No. 94583-7

SUPREME COURT OF THE STATE OF WASHINGTON

BA&C PROPERTY MANAGEMENT, LLC, a Washington Limited Liability Company,

Petitioner,

Vs.

CITY OF LAKEWOOD,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

RAP 13.4(b) outlines those factors which govern this Court's review of the Court of Appeals decision in this matter. Rather than identify how the Court of Appeals allegedly erred and square that alleged error within a RAP 13.4(b) framework, BA&C Property Management ("BA&C") makes clear that none of the lower courts erred. Rather BA&C made errors which it now asks the judiciary to correct.

This Court has been clear in its role in evaluating petitions for review. "In reviewing a decision of the Court of Appeals, we are generally limited to questions presented before and determined by that court and to claims of error directed to that court's resolution of such issues." *Peoples Nat'l Bank v. Peterson,* 82 Wn.2d 822, 830, 514 P.2d 159 (1973)(*citing*, *Wood v. Postelthwaite*, 82 Wn.2d 387, 510 P.2d 1109 (1973)(Emphasis added)).

The Petition does not allege a basis under RAP 13.4(b) nor does it even claim that the Court of Appeals erred. Given these critical defects, we will not ferret out potential claims and arguments which could or should have been made and develop counterarguments to such claims. This Court shouldn't either and it should deny review.

II. POINTS AND AUTHORITIES[1]

There are a myriad of reasons why the Petition for Review should be denied. Given the infirmities with the Petition itself and for brevity, we highlight two. First, BA&C simply fails to cite, much less discuss how the Court of Appeals decision meets any one of the factors, contained in RAP 13.4(b), governing this Court's acceptance of review. Second, there is no showing that the Court of Appeals erred, especially given that that BA&C failed to preserve its instant claims for review.

A. BA&C Fails to Show How This Case Satisfies RAP 13.4(b).

BA&C is entitled to discretionary review of the Court of Appeal's decision only if it satisfies the requirements of RAP 13.4(b). This rule provides:

> *Considerations Governing Acceptance of Review*. A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

[1] BA&C fails to provide a single citation to a single "fact," in the record. Rather than provide a point-by-point rebuttal to each "fact," presented by BA&C in a separate section of this brief, Lakewood simply generally accepts the facts set forth in the Court of Appeals' Unpublished Opinion. Unlike the claims asserted by BA&C, those facts *are* supported by the record. There are a few minor factual errors throughout the Opinion, the most notable of which relate to the identity of the various participants and are mostly addressed in our briefing before that Court. (See e.g., Respondent's Br. at p. 11, fn. 5). The correctness of those facts do not bear on the outcome.

> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Hindering our ability to meaningfully respond is that BA&C fails to identify which subpart(s) of the rule, and directed to what part(s) of the Court of Appeals' decision, it believes warrants review.

It's not clear that any of the RAP 13.4(b) factors are present. The Petition does not raise a significant question of law under the state or federal constitutions; it cites no constitutional provisions. Nor does the Petition raise an issue of substantial public interest; BA&C seeks to avoid the abatement of its property and its property alone. There's not even a conflict of any law from either this Court or another division of the Court of Appeals which it points to. It continues to advance an imaginative alternative theory which it created for the first time on appeal without highlighting why it believes the Court of Appeals was wrong.

This latter point bears some additional emphasis. In its briefing before the Court of Appeals, BA&C failed to provide a single citation to the record and failed to argue the theory which it presented to the trial court. In spite of these defects, which the Court of Appeals recognized, it nonetheless chose to address these "improperly briefed legal or factual issue[s]," as the

basis for the claim was apparent. (Opinion at p. 3, fn. 2). Despite the leniency shown by the Court of Appeals, its Petition to this Court makes the same mistakes. But now, the basis by which BA&C seeks review is not apparent. Without a single citation to the record to back up its claims, BA&C continues to present "improperly briefed legal or factual issue[s,]" without confronting either the standards governing review or why the lower courts ruled the way they did.

Given its inability to articulate a RAP 13.4(b) factor, much less finesse its claims into the framework provided by that rule, this Court should deny review.

B. The Court of Appeals Properly Rejected BA&C's Attempts to Recharacterize its Trial Court Claims.

BA&C's claims before the Superior Court focused exclusively on a statutory writ of review. As the Court of Appeals recognized, "BA & C appears to abandon its argument that it was entitled to a writ of certiorari[.]" (Opinion at p. 4). Its current Petition also appears to abandon those grounds which it advanced in the trial court. What BA&C has done on appeal is to shift its theory, claiming it should have been entitled to either a writ of mandamus or writ of prohibition. The Court of Appeals affirmed, but not because of the appellation of any claims. Instead, it evaluated the theory BA&C presented to the trial court and concluded that BA&C sought the

writ of review based on its briefing, arguments and theories presented to the trial court. It accordingly held that the trial court did not err in entertaining the theory presented by BA&C. It expressly declined to reach BA&C's alternative theories under RAP 2.5 because BA&C presented them for the first time on appeal. (Opinion at p. 4). Notably, BA&C doesn't even cite or analyze the rule to suggest otherwise.

"The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). As this Court stated a half-century ago, "[a] case will be considered in this court only on the same theory upon which it was presented in the trial court." *Browning v. Johnson*, 70 Wn.2d 145, 152, 422 P.2d 314 (1967). The balance of the Court of Appeal's opinion flows from this unchallenged threshold determination.

The issue in this case is not, as BA&C claims, whether the caption of its trial court petition was in error. (*Petition for Rev.* at p. 1, ¶ C). If the appellation of its claims were the true issue, BA&C could have requested that the trial court address it via an appropriate motion (such as a motion to amend) and an adverse determination could have been the appropriate focus of appellate review. Instead, as the Court of Appeals explained, "at no point during the hearing on Lakewood's motion to dismiss, or in any of the briefing to the superior court, did BA&C state that it was seeking a writ of prohibition or a writ of mandamus." (Opinion at p. 4 (Emphasis added)).

That Court went on to explain that *after the case was dismissed*, and on BA&C's motion for reconsideration, it continued to expressly represent that it was seeking a writ of review. (*Id*, citing VRP (10/30/2015) at 7). In context, this makes sense; contrary to their claims before this Court, BA&C also originally challenged the underlying determination authorizing abatement of this property. (CP 5, ¶ 3.1 (second)(asserting that due to an alleged settlement[2] which occurred prior to the expiration of the appeal period, "...the abatement order contained within that decision was voided and rendered moot.")).

The real issue is whether BA&C properly complied with a basic precept of appellate practice: articulating why any court erred. Whether its claims fall within an invited error analysis, failure to preserve rubric or otherwise, a trial court cannot have committed "error," if the alleged "error," was never pointed out to it in the first instance. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Whatever "error," may have been committed is simply not of the judicial variety for which a grant of review will remedy.

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[2] The Court of Appeals expressly recognized that the "overwhelming evidence in the record," does not support BA&C's factual account of a settlement, and even if there were, there still was no basis for the statutory writ of review. (Opinion at p. 5, fn. 5). If there was contrary evidence of a "settlement," that the Court of Appeals overlooked, one might expect it to be cited. And, if the analysis reached by the Court of Appeals was incorrect, one might expect it to be briefed.

CONCLUSION

For the foregoing reasons, the Petition for Review should be denied.

DATED: June 22, 2017.

Heidi Ann Wachter,
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By: _____
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing on:

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By the following indicated method(s):

- VIA ABC Legal Messengers.

The undersigned hereby declares, under penalty of perjury, that the foregoing statements are true and correct.

EXECUTED this 22 day of June, 2017 at Lakewood, Washington.

_____
Michael Fulmer

CITY OF LAKEWOOD

June 29, 2017 - 11:34 AM

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