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Appellate Court No. 64207-3-1

Superior Court No. 08-2-02447-7

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

Tom Westergreen, Richard Whitmore and Nielson Brothers, Inc.,

Appellants/Plaintiffs,

v.

Whatcom County and The Washington State Department Of
Natural Resources,

Respondents/Defendants.

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION.....	1
ASSIGNMENTS OF ERROR	2
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
STATEMENT OF THE CASE.....	3
ARGUMENT.....	8
Standard of Review.....	8
Issue No. 1	8
Issue No. 2.....	9
Issue No. 3.....	11
CONCLUSION	16

TABLE OF AUTHORITIES

Table of Cases

<u>Kitsap County v. Smith</u>	10; 11
143 Wn.App. 893, 180 P.3d 834 rev den 164 Wn.2d 1036 (2008)	
<u>Neighbors & Friends v. Miller</u>	9
87 Wn.App. 361, 940 P.2d 286 (1997) rev den 135 Wn.2d 1009 (1998)	
<u>Nollette v. Christianson</u>	10; 12; 16
115 Wn.2d 594, 800 P.2d 359 (1990)	
<u>South Tacoma Way, LLC v. State</u>	12; 13
146 Wn.App. 639, 191 P.3d 938 (2008) review granted 165 Wn.2d 1036 (2009)	
<u>Stephens v. Seattle</u>	8
62 Wn.App. 140, 813 P.2d 608 rev den 118 Wn.2d 1004 (1991)	

Statutory Authority

RCW 7.24.020	9
RCW 7.24.120	9
RCW 9.73.030	10
RCW 36.01.010	14
RCW 39.34.020	15
RCW 39.34.030	14
RCW 39.34.060	15
RCW 79.22.040	1; 7

RCW 79.22.300..... 1; 7; 12

INTRODUCTION

Whatcom County and the DNR entered into a contract to re-convey some 8,470 acres from the DNR to Whatcom County. The contract authorizes the hiring of staff, the appraisal of lands, the acquisition of easements and the expenditure of public funds necessary to allow the re-conveyance to take place. The contract commits Whatcom County and the DNR to providing the necessary staff to accomplish the re-conveyance in accordance with the contract's timeline.

The re-conveyance is governed by RCW 79.22.300, which authorizes the DNR to convey lands back to a county "that were acquired from such county by the state pursuant to RCW 79.22.040."¹ The contract covers land which was never conveyed to the DNR by Whatcom County originally as required by the statute.

Plaintiffs filed a declaratory judgment action against Whatcom County and the DNR seeking to invalidate the contract. Whatcom County and the DNR moved for summary judgment on

¹ RCW 79.22.040 authorizes counties to convey property acquired as a result of tax foreclosures to the DNR to be administered in trust as forest lands.

the ground that this case is not ripe for review. The trial court granted summary judgment on this ground and denied plaintiffs' motion to reconsider. The plaintiffs now appeal.

ASSIGNMENTS OF ERROR

1. The trial court erred in entering the Order Granting Defendants' Joint Motion for Summary Judgment on July 13, 2009.²

2. The trial court erred in entering the Order Denying Plaintiffs' Motion for Reconsideration dated August 20, 2009.³

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is the validity of a public contract a proper subject for declaratory judgment?⁴

2. Is the validity of the 10/23/08 Contract an issue of major public importance?⁵

3. In the alternative, does this case present a justiciable controversy?⁶

² CP 74-77.

³ CP 78-79.

⁴ Assignment of Error 1 pertains to this issue.

⁵ Assignment of Error 1 pertains to this issue.

⁶ Assignments of Error 1 & 2 pertain to this issue.

STATEMENT OF THE CASE

Contract. On October 23, 2008, the Whatcom County Executive signed a contract (“10/23/08 Contract”) with the Department of Natural Resources (“DNR”) for the re-conveyance of some 8,470 acres from the DNR to Whatcom County.⁷ Much of the property was not owned by Whatcom County originally, but by third parties.⁸ Because the properties conveyed by the county are not contiguous, the 10/23/08 Contract provides for the exchange of various parcels to make a contiguous area.⁹ The property is zoned commercial forestry.¹⁰

The 10/23/08 Contract authorizes the hiring of staff, the appraisal of lands, the acquisition of easements and the expenditure of public funds necessary to allow the re-conveyance to take place.¹¹ The contract commits Whatcom County and the DNR to providing the necessary staff to accomplish the re-conveyance in accordance with the 10/23/08 Contract’s timeline. The timeline calls for: hiring of project staff and title review of

⁷ CP 33-34 and maps at CP 42-43.

⁸ CP 2, ls. 20-23; CP 6, ls. 22-25; CP 12, ls. 22-25.

⁹ CP 34.

¹⁰ CP 54; CP 3, ls. 14-18; CP 8, ls. 1-6; CP 13, l. 26 & CP 14, ls. 1-2.

¹¹ CP 35, 37, 39 & timeline attached to contract at CP 40.

properties to be re-conveyed beginning in late 2008; soliciting appraisals in early 2009; obtaining appraisals beginning April 2009; configuring “inter-grant and re-conveyance” land beginning July 2009; and closing the transaction in mid-2010.¹²

Plaintiffs. Plaintiffs Tom Westergreen, Richard Whitmore and Nielsen Brothers, Inc., are Whatcom County residents who work in the timber industry.¹³ If the DNR lands covered by the 10/23/08 Contract are re-conveyed to Whatcom County, plaintiffs will lose the opportunity to harvest these lands.¹⁴

Plaintiff NBI. One of the plaintiffs, Nielsen Brothers, Inc., (“NBI”) owns two parcels abutting the DNR land involved in this case. One parcel consists of 765 acres located in the Blue Canyon area off south Lake Whatcom. The other parcel consists of 80 acres located on Carpenter Creek off the Y Road. Between the two parcels, NBI has about five miles of common boundaries with the DNR land.¹⁵

NBI has logged parts of both parcels. NBI intends to log the

¹² Ibid.

¹³ CP 1.

¹⁴ CP 56.

¹⁵ CP 53.

rest at some point in the future. NBI is in the business of harvesting timber, and this land was acquired with that purpose in mind (among others).¹⁶

NBI's two parcels abut DNR lands that will be included in the proposed park. The park has to front near south Lake Whatcom in order to have access to North Shore Drive, so the park will necessarily include DNR lands abutting NBI's 765-acre parcel. In addition, there is already a trailhead on Whatcom County property off the Y Road, and the trails continue through DNR lands abutting NBI's 80-acre parcel. This makes it highly probable that the park will include DNR lands abutting NBI's 80-acre parcel.¹⁷

Effect on NBI Property. When the abutting DNR land is converted to a park, NBI's ability to log its property will be adversely affected because of buffers, restricted access and other requirements of local and state law applicable to parks. In addition, Forest Practices Applications will be delayed or denied.¹⁸

Diminished Value. The 10/23/08 Contract and its adverse effect upon property abutting the DNR land covered by that contract is common knowledge in the timber industry. This has

¹⁶ Ibid.

¹⁷ CP 53-54; see also CP 35-36.

¹⁸ CP 54-55.

lowered the value of NBI's two parcels. If the 10/23/08 Contract is declared invalid, the value of these two parcels will go back up towards its pre-10/23/08 level.¹⁹

Lost Cutting. In addition, NBI (along with all the other plaintiffs in this action) is going to lose the opportunity to bid for the cutting rights to the 8,470 acres of DNR lands converted to a park. NBI and some of the other plaintiffs have logged or purchased logs from part of these 8,470 acres pursuant to contracts with DNR in the past and plan on bidding for the right to do so in the future. However, once these lands are put into a park, that opportunity will be lost to the plaintiffs and will have an adverse effect on their businesses.²⁰

Declaratory Judgment Action. Plaintiffs filed a Complaint for Declaratory Judgment Action and Injunctive Relief on December 22, 2008, against Whatcom County and the DNR, seeking to invalidate the 10/23/08 Contract and to prohibit Whatcom County from taking any action in furtherance of the 10/23/08 Contract.²¹

The grounds stated in the complaint are:

1. The 10/23/08 Contract is governed by RCW

¹⁹ CP 55-56.

²⁰ CP 56.

²¹ CP 1-4.

79.22.300, which authorizes the DNR to convey lands back to a county “that were acquired from such county by the state pursuant to RCW 79.22.040.”²² Some of the lands covered by the 10/23/08 Contract were not acquired from Whatcom County in the first place and therefore cannot legally be “re-conveyed” to Whatcom County under the statute.

2. The 10/23/08 Contract was executed without any SEPA review. The conversion of 8,470 acres from forestry to a park has a reasonable probability of more than a moderate effect on the quality of the environment and should receive full SEPA review, including an EIS. Nevertheless, no such review occurred, not even a threshold review.²³

3. The lands re-conveyed under the 10/23/08 Contract by law are required to be used as a park.²⁴ Much of the land covered by the 10/23/08 Contract is zoned “commercial forestry” under the Whatcom County Comprehensive Plan, a zoning which is inconsistent with its use as a park.

Summary Judgment. Defendants Whatcom County and

²² RCW 79.22.040 authorizes counties to convey property acquired as a result of tax foreclosures to the DNR to be administered in trust as forest lands.

²³ CP 3, Is. 8-13; CP 7, Is. 16-17; CP 13, Is. 13-14.

²⁴ RCW 79.22.300 provides that land re-conveyed must be used “for public park use in accordance with the county and state outdoor recreation plans.”

DNR moved for summary judgment on the ground (among others) that this case is not ripe for review. The trial court granted summary judgment on this ground:

Plaintiffs' Complaint is not ripe for review because the Memorandum of Agreement merely establishes options and considerations in the event of future action, and any opinion by the Court at this stage would be advisory and based on speculative future actions that may not occur. An action not ripe for judicial review should be dismissed.²⁵

Reconsideration & Appeal. Plaintiffs' motion for reconsideration was denied,²⁶ and this appeal followed.²⁷

ARGUMENT

Standard of Review. The appellate court decides a summary judgment appeal on a *de novo* basis, engaging in the same analysis as the trial court. The evidence is viewed in the light most favorable to the nonmoving party. *Stephens v. Seattle*, 62 Wn.App. 140, 813 P.2d 608 rev den 118 Wn.2d 1004 (1991).

Issue No. 1. Is the validity of a public contract a proper subject for declaratory judgment?

²⁵ CP 76.

²⁶ CP 78-79.

²⁷ CP 73-79.

Discussion. The Uniform Declaratory Judgments Act (UDJA), Chapter 7.24 RCW, allows parties to challenge the validity of contracts. RCW 7.24.020 reads in part:

A person ... whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Furthermore, the legislature intended for the UDJA to be applied liberally:

7.24.120. Construction of chapter

This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

Issue No. 2. Is the validity of the 10/23/08 Contract an issue of major public importance?

Discussion. The trial court dismissed this action on the ground that this case is not ripe for review. This is another way of saying that no justiciable controversy is presented by this case.

Neighbors & Friends v. Miller, 87 Wn.App. 361, 382-83, 940 P.2d

286 (1997) rev den 135 Wn.2d 1009 (1998) (“Before a court may rule by declaratory judgment, a justiciable controversy must exist...Put another way, a claim is ripe for judicial determination if the issues raised are primarily legal and do not require further factual development and the challenged action is final.”).

However, it is unnecessary to decide if a justiciable controversy is presented if the action involves an issue of major public importance. As this Court said in *Kitsap County v. Smith*, 143 Wn.App. 893, 180 P. 3d 834 rev den 164 Wn 2d 1036 (2008):

In applying the Uniform Declaratory Judgments Act, [Washington courts] have firmly maintained that, absent issues of major public importance, a justiciable controversy must exist before a court's jurisdiction may be invoked under the act.²⁸

In *Kitsap County*, a county employee recorded conversations with other county employees without their knowledge. The county sought a declaratory judgment that this violated the Privacy Act, RCW 9.73.030. The trial court held that the county failed to establish a justiciable controversy and dismissed.

On appeal, this Court reversed without reaching the issue of

²⁸ 143 Wn App at 902-903, citations omitted, emphasis supplied, quoting from *Nollette v. Christianson*, 115 Wn.2d 594, 598-99, 800 P.2d 359 (1990).

whether a justiciable controversy was present. The court reasoned that the county needed to give advice to its employees regarding whether they could record conversations with co-employees and that persons dealing with the county needed to know whether their conversations could be surreptitiously recorded. The court held that clarification of these issues was of great public importance and remanded to the trial court for full consideration of the county's declaratory judgment action.

Here, substantial public funds are being expended and will be expended in the future pursuant to the 10/23/08 Contract. In addition, plaintiffs and other citizens of Whatcom County need to know whether 8,470 acres of DNR timberlands are going to be converted to a county park. This is an issue of major public importance – arguably of more importance than the privacy issues at play in *Kitsap County* – and the trial court should have reached the merits of this declaratory judgment action for this reason.

Issue No. 3. In the alternative, does this case present a justiciable controversy?

Discussion. If it is necessary to reach the issue, the trial court erred in holding that no justiciable controversy is presented by

this case. For purposes of declaratory relief, a justiciable controversy is:

(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Nollette v. Christianson, 115 Wn.2d 594, 599, 800 P 2d 359 (1990).

Here, all four elements are present, as discussed below.

Actual Dispute. First, there is an actual dispute between the plaintiffs and defendants regarding the validity of the 10/23/08 Contract. The contract calls for the re-conveyance of lands that were never owned by Whatcom County in the first place. RCW 79.22.300 requires that lands being re-conveyed “were acquired from such county.” As was said in South Tacoma Way, LLC v. State, 146 Wn App 639, 191 P. 3d 938 (2008) review granted 165 Wn.2d 1036 (2009):

An administrative agency has only those powers expressly granted or necessarily implied by statute. When a state agency enters into a contract that is completely outside of its authority, i.e., ultra vires, or enters into a contract that violates public policy

or a statutory scheme, the contract is void and unenforceable.²⁹

As in South Tacoma Way, the 10/23/08 Contract is void and unenforceable.

Opposing Parties. Second, the plaintiffs have genuine and opposing interests. Defendants want to convert 8,470 acres of DNR property from timberlands to a park. Plaintiffs oppose this since this is harmful to their businesses. The plaintiffs depend upon logging for their livelihood. Some of the plaintiffs have logged part of the 8,470 acres of DNR land in the past and plan to do so in the future. However, once the lands are put into a park, that opportunity would be lost to all the plaintiffs and will have an adverse effect on their businesses.

Direct and Substantial Interests. Third, plaintiffs' interests are direct and substantial, not theoretical. In this regard, the trial court erred in deciding that this case was not ripe for review since any determination would be "based on speculative future actions that may not occur."³⁰ Defendants argued successfully at trial that there is no way of knowing which lands will be included in the proposed park and therefore no way of ascertaining exactly who

²⁹ 146 Wn App at 650, citations omitted, emphasis supplied.

³⁰ CP 76, paragraph 2.

will be harmed. However, plaintiffs produced evidence showing that the proposed park must include DNR land abutting south Lake Whatcom and in all probability will include land abutting the Y Road trailhead. This being so, NBI's two parcels – with more than five miles of common boundaries with the DNR lands in question – will be directly affected. This has already resulted in a loss of value to these two parcels since logging and marketing this property has been made more difficult and expensive because of the 10/23/08 Contract.

Further, the 10/23/08 Contract is authorized by statute. Two separate statutes authorize counties to enter into contracts. RCW 36.01.010 states in part that “The several counties in this state shall have the capacity...to make such contracts...as may be necessary to their corporate or administrative powers and to do all other necessary acts in relation to all the property of the county.” In addition, the Interlocal Cooperation Act, RCW 39.34 *et. seq.*, authorizes counties to enter into agreements with state agencies:

39.34.030. Joint powers – Agreements for joint or cooperative action, requisites, effect on responsibilities of the component agencies – Financing of joint projects

...

(2) Any two or more public agencies³¹ may enter into agreements with one another for joint or cooperative action pursuant to the provisions of this chapter...

39.34.060 Participating agencies may appropriate funds and provide personnel, property, and services

Any public agency entering into an agreement pursuant to this chapter may appropriate funds and may sell, lease, give, or otherwise supply property, personnel, and services to the administrative joint board or other legal or administrative entity created to operate the joint or cooperative undertaking.³²

Thus, the 10/23/08 Contract authorizes the expenditure of public funds under RCW 39.34.060.

In fact, the 10/23/08 Contract calls for the expenditure of public funds. The contract contains a commitment by Whatcom County and the DNR “to [provide] the necessary staff effort to accomplish the transaction declared in this MOA approximately according to the timeline presented below.”³³ The timeline calls for appraisal of the lands covered by the 10/23/08 Contract no later than January 2010,³⁴ with the burden on Whatcom County to “provide funds to DNR to hire a staff person to assist with the

³¹ 39.34.020 defines “public agency” to include municipal corporations and “any agency of the state government.”

³² Emphasis supplied.

³³ CP 39.

³⁴ CP 40.

transaction, so that the timeline can be met.”³⁵

In summary, the 10/23/08 Contract has already caused damage to one of the plaintiffs by lowering the value of NBI's property. In addition, all three plaintiffs will lose potential business if the DNR land is re-conveyed as called for by the contract. Finally, public funds are already being spent to implement the 10/23/08 Contract, and additional funds will be spent while this appeal is pending. These impacts are “direct and substantial, rather than potential, theoretical, abstract or academic,”³⁶ and the trial court erred in holding that this case is not ripe for review.

Final Decision. Fourth, this action will finally and conclusively decide whether or not the 10/23/08 Contract is valid. If the contract is declared invalid, NBI's property will recover the loss of value which has resulted from this illegal attempt to convert timberlands to a park.

CONCLUSION

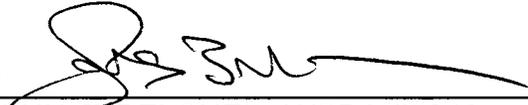
The trial court should be reversed and the case remanded for determination on the merits.

³⁵ CP 39.

³⁶ *Nollette v. Christianson*, supra, 115 Wn.2d at 599. See above at page 12.

Respectfully submitted this 7TH day of December, 2009.

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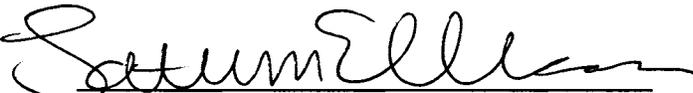
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DECLARATION OF MAILING/DELIVERY

I, Tatum Ellison, under penalty of perjury under the laws of the State of Washington, hereby certify and declare that on the below date, I mailed via U.S. First Class Mail, postage prepaid, a true copy of Appellants' Opening Brief to:

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DATED this 7th day of December, 2009, at Bellingham, Washington.


TATUM ELLISON