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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 35171-4-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

JOHN BICHLER and MARIANNE SOUTHWORTH,

Appellants,

v.

**COWLITZ COUNTY and RYDERWOOD IMPROVEMENT AND
SERVICES ASSOCIATION, INC.,**

Respondents.

**BRIEF OF RESPONDENT COWLITZ
COUNTY**

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I. INTRODUCTION

Pursuant to applicable county regulations, the Appellants Bichler and Southworth ("Bichlers") sought two permits or approvals from Respondent Cowlitz County ("County") required for Bichlers' proposed development and use of property adjacent to the unincorporated town of Ryderwood. Special use approval is required under the applicable zoning regulations of the County Land Use Ordinance, CCC 18.10. Preliminary site plan approval is required under the County Recreational Vehicle Park and Campground Binding Site Plan Code, CCC 18.56. Under each ordinance, authority for issuance or denial of the required permit is vested in the county hearing examiner. After a public hearing, the hearing examiner denied the application of Bichlers for the required permits. Bichlers sought review of that decision in Superior Court under the Land Use Petition Act, Chapter 36.70C RCW. Bichlers failed to serve their land use petition on Gabriel Goro, the person identified in the hearing examiner's decision as the owner of the subject property. Bichlers appeal here from an order dismissing that LUPA petition based on lack of jurisdiction.

II. ANSWER TO ASSIGNMENT OF ERROR

The Superior Court properly dismissed the Bichlers' LUPA petition based on the failure to comply with the procedural requirements for review under RCW 36.70C.040.

III. STATEMENT OF THE CASE

County accepts for purposes of review the Statement of the Case contained in the Appellants' Brief, with the exception that Appellants fail to note that Respondent-Intervenor, Ryderwood Improvement and Services Association, Inc. ("RISA"), was not a party to the LUPA proceeding at the time the superior court entered the Stipulation and Order Pursuant to RCW 36.70C.080(5). CP 38-41.

IV. SUMMARY OF ARGUMENT

Bichlers appeal from the dismissal of a LUPA petition, asserting error based on the trial court's conclusion that it lacked jurisdiction as a result of the petitioners' failure to serve the owner and taxpayer of record with respect to the subject property. Bichlers fail to directly address the clear language of RCW 36.70C.040(2). Moreover, litigants may not waive subject matter jurisdiction.

V. ARGUMENT

A. REVIEW OF THE LAND USE PETITION WAS BARRED UNDER RCW 36.70C.040(2)(B)(II).

Bichlers do not dispute that they failed to serve Gabriel Goro. They simply argue that Gabriel Goro was not an “owner” of the subject property by citing to cases discussing the nature of the interest held by the seller under a real estate contract. None of the cited cases involve petitions under LUPA. None of the cases are controlled by specific legislation similar to RCW chapter 36.70C.

The straightforward, unambiguous language of RCW 36.70C.040(2)(b)(ii) is as follows:

(2) A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition:

.....

(b) Each of the following persons if the person is not the petitioner:

....

(ii) Each person identified by name and address in the local jurisdiction’s written decision as an owner of the property at issue;

The local jurisdiction’s written decision in this case is obviously the Findings, Conclusions and Decision issued by the hearing examiner attached as Exhibit A to the Bichlers’ land use petition. CP 1, pp. 13-37.

In that written decision, the hearing examiner found as follows: “According to Cowlitz County Assessor records, the property owner is Gabriel D. Goro. John Bichler and Marianne Southworth are the contract purchasers.” CP 1, p. 23, line 29. The decision then referenced the real estate contract entered in the administrative proceeding as Exhibit 31 containing the owner’s address of record.

LUPA’s requirements are clear.

The procedural requirements of the Land Use Petition Act have to be strictly met before a trial court's appellate jurisdiction under the Act is properly invoked. Overhulse Neighborhood Assoc. v. Thurston County, 94 Wash.App. 593, 597, 972 P.2d 470 (1999) (petition properly dismissed where service was on county commissioner rather than auditor as required by statute). A trial court may not hear a land use petition if it was not timely served upon certain persons designated by statute as necessary parties to the judicial review.

Citizens to Preserve Pioneer Park LLC v. City of Mercer Island 106 Wash.App. 461, 467, 24 P.3d 1079(2001).

Bichlers simply failed to comply with the procedural requirements established by the legislature for judicial review of their land use petition.

B. SUBJECT MATTER JURISDICTION CANNOT BE CONFERRED ON A COURT BY WAIVER.

Recognizing the failure to comply with the statutory procedural requirements, Bichlers argued in their motion for reconsideration below and argued to this court that the procedural defect of failing to serve

Gabriel Goro, who was identified in the hearing examiner's written decision as an owner of the property at issue, was waived by entry of the Stipulation and Order Pursuant to RCW 36.70C.080(5). CP 6. First, as noted, the assertion of waiver fails to address the fact that Respondent-Intervenor RISA did not sign the Stipulation.

More importantly, Bichlers simply fail to devote any attention to the fact that the procedural defect in question is jurisdictional. It is axiomatic that the parties are unable to confer subject matter jurisdiction on a court. Bichlers fail to offer any authority for the proposition that the County's execution of the stipulation entered pursuant to RCW 36.70C.080(5), an act which occurred 38 days after filing of the land use petition and service on the County, cured the jurisdictional bar resulting from failure to serve Gabriel Goro within 21 days of the issuance of the land use decision as required under RCW 36.70C.040.

Respondent Cowlitz County respectfully submits that the Bichlers' claim of waiver is directly refuted by the Washington Supreme Court decision in *Skagit Surveyors and Engineers, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 958 P.2d 962 (1998). In that case, the surveyors sought judicial review of an order of the growth management hearings board invalidating certain Skagit County zoning regulations. Review was available under the Administrative Procedure Act, RCW 34.05, pursuant

to RCW 36.70A.300(5). *Id.*, at 555. *Surveyors* served its petition for judicial review on the attorneys of record for the county and two cities who were parties to the administrative proceeding, rather than properly serving those parties. *Id.*, at 553. The Supreme Court granted a motion dismissing the petition. *Id.*, at 557.

In so ruling, the Court stated as follows:

Lack of jurisdiction over the subject matter renders the superior court powerless to pass on the merits of the controversy brought before it. *Deaconess Hosp. v. Washington State Highway Comm 'n*, 66 Wash.2d 378, 409, 403 P.2d 54 (1965) (Donworth, J., concurring in part and dissenting in part). Surveyors argue that Friends' motion to dismiss should be denied because only Anacortes or Mt. Vernon has standing to raise the jurisdictional issue, and neither city protests the method of service. While litigants, like the cities involved here, may waive their right to assert a lack of *personal* jurisdiction, litigants may not waive *subject matter* jurisdiction. *Deaconess Hosp.*, 66 Wash.2d at 410, 403 P.2d 54 (Donworth, J., concurring in part and dissenting in part); *Skagit Motel v. Department of Labor & Indus.*, 107 Wash.2d 856, 858-59, 734 P.2d 478 (1987). Any party to an appeal, including one who was properly served, may raise the issue of lack of subject matter jurisdiction at any time. RAP 2.5(a)(1); *In re Saltis*, 94 Wash.2d 889, 893, 621 P.2d 716 (1980).

Skagit Surveyors, supra, 135 Wn.2d at 556.

The same result must follow here. Bichlers failed to timely serve the land use petition on Gabriel Goro, thus depriving the superior court of jurisdiction to grant review of that petition.

VI. CONCLUSION

The decision of the trial court dismissing the Bichlers' land use petition for lack of jurisdiction should be affirmed.

Respectfully submitted this 15th day of December, 2006.

A handwritten signature in black ink, appearing to read 'R. Marshall', written over a horizontal line.

RONALD S. MARSHALL, WSBA #11662
Attorney for Respondent Cowlitz County

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JOHN BICHLER and MARIANNE)	
SOUTHWORTH,)	NO. 35171-4-II
Appellants,)	
)	
)	
COWLITZ COUNTY, et al)	CERTIFICATE OF
)	MAILING
Respondents.)	
)	

I, Audrey J. Gilliam, certify and declare:

That on the 15 day of December, 2006, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent Cowlitz County addressed to the following parties:

Jeffrey P. Helsdon	Frank F. Randolph
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I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 15 day of December, 2006.


Audrey J. Gilliam