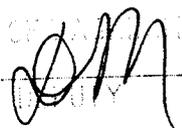


COURT OF APPEALS  
DIVISION II

No. 37769-1-II

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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON  
BY 

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WOODFIELD NEIGHBORHOOD HOMEOWNERS ASSOCIATION,  
D/B/A ENGLISH GARDENS HOMEOWNERS ASSOCIATION

Respondent

v.

RICARDO G. GRAZIANO,

Appellant

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**REPLY BRIEF OF APPELLANT**

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## I. ARGUMENT

### A. The Note on the face of the plat map did not create a covenant restricting the use of Tract A.

At oral argument in the trial court, the Association conceded that the note on the plat map did not create a restrictive covenant. At RP 5, counsel for the Association stated:

Your Honor, if I can interject, the first part of the argument that the plat does not create the easement I'm willing to concede that part of it. I think my argument is going to be on the deed ...

This concession was noted in the trial court's summary judgment. (CP 83)

In its appellate brief, the Association now attempts to "explain" this concession, and focuses its argument on appeal almost solely on the theory that the plat Note created a restriction that survives the tax foreclosure sale. This issue was not argued to the trial court, and should not be considered on appeal.

The appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). With regard to summary judgment specifically, RAP 9.12 provides that on review of an order granting or denying a motion for summary judgment, the appellate court will consider only evidence and issues called to the attention of the trial court. Arguments or theories not presented to the trial court will generally

not be considered on appeal. *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 290, 840 P.2d 860 (1992).

An example of the application of this rule is *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 814 P.2d 243 (1991). In that case, the plaintiff argued to the trial court that the provisions of a town ordinance were not applicable, but argued on appeal that the provisions of the ordinance had not been followed. The Court stated that, “Contentions not made to the trial court in its consideration of a summary judgment motion need not be considered on appeal.” *Id.*, at 413. *See also*, *Wetherbee v. Gary*, 62 Wn.2d 123, 128, 381 P.2d 237, 240 (1963), where the Court refused to consider the sufficiency of a legal description where counsel stipulated at trial that the sufficiency of the legal description was not an issue in the case. *Also see*, *State v. Smith*, 82 Wn. App. 153, 163, 916 P.2d 960, 966 (1996), which held that a party cannot challenge on appeal that which was conceded at trial.

The Association conceded at the summary judgment hearing before the trial court that the Note on the plat did not create a restriction that survives the tax foreclosure sale, and focused its argument solely on the effect of the Treasurer’s Deed. The Association should not be allowed to make the opposite argument on appeal.

Even if the Association is not precluded from making this argument for the first time on appeal, its “explanation” is inconsistent. First the Association asserts that since it is admitted that there was no conveyance of Tract A to the Association, it is also admitted that the Note on the plat did not create a restriction. (Respondent’s brief, pp. 2-3) Then the Association asserts that the Note on the plat did create a restriction binding on the developer. (Respondent’s brief, p. 3) The Association does not explain how, under the same set of facts, the Note first did not create a restriction and then did create a restriction.

The Association cites to the case of *Shertzer v. Hillman Inv. Co.*, 52 Wash. 492, 100 P. 982 (1909), and asserts that in that case the Court held that an easement or restriction was created by the plat on facts similar to the case at bar. That is a misstatement of the holding in that case, which is actually quite different from the case at bar.

In *Shertzer*, the developer prepared a map of its proposed subdivision depicting the lots to be sold and a park fronting on Lake Washington. After the lots were sold, the developer recorded a plat map depicting the former park area as another block of lots to be sold. Persons who had purchased lots in reliance on the first map depicting a park filed suit, and were granted an injunction barring the developer from

subdividing or selling the park property. The Court held that the developer is estopped from asserting the area is not a public park after selling lots based on a representation of the existence of the park. This result was based on the Court's prior decision in *Lueders v. Town of Tenino*, 49 Wash. 521, 523, 95 P. 1089, 1090 (1908), where on similar facts it held that the developer was estopped to say the land is not a public park.

In the case at bar, there is no issue of estoppel. The developer, upon whose actions the purchasers of lots may have relied, is not a party to this case. Mr. Graziano is not the successor in interest to the developer. He is the purchaser at a tax foreclosure sale. Mr. Graziano cannot be estopped by the actions (or inactions) of the developer.

Another difference in the case at bar is that there was no intent to dedicate Tract A as a public park. The Note stated the intent to dedicate the property to the Association, not the public. RCW 58.17.165 sets forth the process for dedication of property in a plat. The statute requires a certificate or separate written instrument containing the dedication, signed and notarized by the owners of the property. No such certificate was made in the case at bar, and in fact the Note on the plat indicates the intent to dedicate the property by subsequent action that never occurred.

Nor was there a common law dedication to the public. There are two essential elements for common law dedication: (1) An intention on the part of the owner to devote his land, or an easement in it, to a public use, followed by some act or acts clearly and unmistakably evidencing such intention; and (2) an acceptance of the offer by the public. *Knudsen v. Patton*, 26 Wn. App. 134, 140, 611 P.2d 1354, 1359 (1980). The use must be for the public generally, not for one person or a limited number of persons, or for the exclusive use of restricted groups of individuals. *Id.*, at 141. Acceptance may arise by express act, by implication from the acts of municipal officers, or by implication from use by the public for the purpose for which the property was dedicated. *Id.*, at 143.

In *Knudsen*, the Court rejected a claim of common law dedication where the developer intended the park for the residents of the development only, there was no evidence of use by the public generally, the developer continued to pay property taxes on the property, and no governmental entity recognized or claimed the land as public property. Those facts are indistinguishable from the case at bar.

The Association correctly notes that pursuant to RCW 36.35.290 and *City of Olympia v. Palzer*, 107 Wn.2d 225, 728 P.2d 135 (1986), an easement or restrictive covenant is not extinguished by a tax foreclosure

sale, if such easement or restrictive covenant is established of record prior to the year for which the taxes were foreclosed. However, the restriction limiting Tract A to park use only was not established of record prior to the foreclosure. The dedication to the Association never occurred. Any rights the lot owners may have had in Tract A, arising from estoppel or otherwise, were not established of record prior to the foreclosure and were thus extinguished.

The Association or individual lot owners may have a claim against the developer, as in *Shertzer*. However, they have no claim to rights in Tract A, which was conveyed to Mr. Graziano without any easement or restriction of record.

**B. The legal description in the Treasurer's Deed cannot create a restriction on the use of Tract A.**

In the trial court, the Association conceded that the Note on the plat did not create a restriction, and focused its entire argument on the Treasurer's Deed issued by Pierce County. On appeal, the Association takes the opposite approach, devoting their entire brief to an argument that the Note created a restriction, and devoting only one paragraph on the last page of its brief to the Treasurer's Deed.

In that one paragraph, the Association argues that the Treasurer's Deed does not use the future tense used in the Note on the face of the plat, and thus "completes what [the developer] failed to do." (Respondent's brief, p. 8) What the Association fails to note is that the Treasurer's Deed actually uses the past tense, indicating that Tract A had already been conveyed to the homeowners association. The Association admits that conveyance has never occurred.

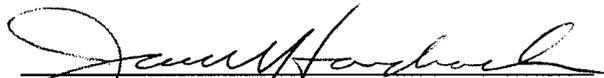
The Association completely ignores all of the arguments in appellant's brief demonstrating that Pierce County had no authority to "complete what [the developer] failed to do." As pointed out in that brief, the County only had the authority to convey the property which owed the delinquent tax to the person who made the highest bid at the sale. It could not, and did not, try to carve out a restrictive covenant for the benefit of the Association. By failing to respond, the Association essentially concedes the merit of those arguments.

## **II. CONCLUSION**

The trial court erred in granting summary judgment to the Association. However, since the material facts are not in dispute, summary judgment should be granted to Graziano, quieting title to the property described in paragraph 2.2 of the complaint in Graziano free and

clear of any interest of the Association, and declaring that such property is not subject to any use restriction arising out of the plat of Woodfield Estates Division I or the Declaration of Covenants, Conditions and Restrictions thereto. This Court should reverse the summary judgment in favor of Association, and enter summary judgment in favor of Graziano.

RESPECTFULLY SUBMITTED this 31<sup>st</sup> day of December, 2008.

  
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Morton McGoldrick, P.S.  
Attorneys for Appellant

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IN THE COURT OF APPEALS OF THE STATE  
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WOODFIELD NEIGHBORHOOD  
HOMEOWNER'S ASSOCIATION, d/b/a  
ENGLISH GARDENS HOMEOWNER'S  
ASSOCIATION, a Washington Non-Profit  
Corporation,

Plaintiff,

v.

RICARDO G. GRAZIANO,  
Defendant.

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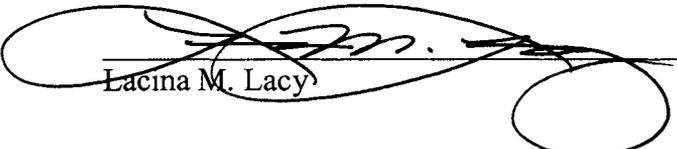
CERTIFICATE OF SERVICE

I, Lacina M. Lacy, under penalty of perjury under the laws of the State of Washington declares as follows:

I am an individual of at least 18 years of age, a resident of Pierce County, Washington, and not a party to this action. On December 31, 2008 I did cause to be served by U.S. Mail a true and correct copy of the Reply Brief of Appellant on:

Werner Boettcher  
14705 Meridian East  
Puyallup, WA 98375

DATED this 31st day of December, 2008 at Tacoma, Washington

  
Lacina M. Lacy