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COURT OF APPEALS
WASHINGTON II
03 DEC -3 PM 2:02
STATE OF WASHINGTON
BY DEPUTY

No. 37769-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Respondent,

v.

RICHARD G. GRAZIANO

Appellant.

REPLY BRIEF OF RESPONDENT

WERNER BOETTCHER, WSBA#2547
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I. APPEAL FROM SUMMARY JUDGMENT

On appeal, the appellate court decides the case on a de novo basis engaging in the same analysis as the trial court. Roger Crane & Associates v. Felice, 74 Wn.App. 769, 875 P.2d 705 (1994). Both the law and the facts will be reconsidered by the appellate court. Brouillett v. Cowles Publishing Co., 114 Wn.2d 788, 791 P.2d 526 (1990).

II. ISSUE ON APPEAL

Whether a restriction on a Treasurer's Deed requiring Tract "A" to be used for "park and recreational uses" is binding upon the purchaser of the property at a County tax foreclosure sale?

III. SUMMARY OF FACTS

Schuur Bros. Inc. developed a 100 lot subdivision then known on Woodfield Estates – Division I by recorded plat on June 15, 1995, under Pierce County Auditor's File No. 9506150106. (CP 2). The Plat map does show the location of Tract "A" and under a heading of "NOTES" the following statement appears: "TRACT 'A' IS TO BE DEDICATED TO HOMEOWNERS ASSOCIATION FOR PARK AND RECREATIONAL USES." (CP 25) It is

conceded that Tract "A" was never conveyed by Deed to the homeowners association, and therefore title to Tract "A" remained with the developer Schuur Bros. Inc. However, the plat was never amended to give Tract "A" a numerical lot designation.

Because of inadvertence or neglect by Schuur Bros. Inc. and the homeowners association, the property taxes for Tract "A" were not paid for the years 2002 through 2005. (CP 3) The property designated as Tract "A" was sold at a tax foreclosure sale and a Treasurer's Deed was executed on December 19, 2005. (CP 3, 37)

The Treasurer's Deed described the property and designated that "Tract A dedicated to homeowners association for park c [sic] and recreational uses." (CP 37)

IV. LEGAL ARGUMENT

A word of explanation may be appropriate on behalf of the Respondent homeowners association regarding what was conceded during the oral argument of the Motion for Judgment on the Pleadings heard April 18, 2008 (Verbatim Transcript of Proceedings, pg. 5). It had to be admitted that no conveyance was ever made by Schuur Bros. Inc. of Tract "A" to the homeowners association. Therefore it was admitted that the Notes on the Plat face did not

create the restriction, because the conveyance to the Association never took place. However, I did not intend to infer that the restriction (or easement) did not apply to the title owner of Tract "A", who was Schuur Bros. Inc.

The Notes on the Plat merely stated that Tract "A" was to be dedicated (i.e. Deeded) to the Association for parks and recreational uses. The "Notes" language could not mean that there was no valid restriction against Schuur Bros. Inc. when it owned Tract "A", but the restriction only became effective upon the Conveyance of Tract "A" to the association. If that were the case, Schuur Bros. Inc. could simply have built a home residence on Tract "A" and sold the developed lot without the restriction.

In fact the property had been conveyed to the homeowners association by deed, and then there was a tax foreclosure sale on Tract "A", the Appellant seems to infer and concede that the restriction (or easement) for "park and recreational uses" would have been valid against Graziano. The inference would be that that the restriction was then valid, after the conveyance to the Association, and would not be extinguished by a tax foreclosure sale like other "easements" of record.

A more basic and fundamental question is whether the developer and restriction for "parks and recreational uses" was previously binding upon the developer and title owner, Schuur Bros. Inc.? And secondly, if it were a binding restriction or easement against the developer and owner of the property, whether this restriction or easement can be extinguished at a tax foreclosure sale, whether or not the restriction or easement is included in the language of the Treasurer's Deed?

A. The Nature of the Restriction:

Pierce County, as part of its oversight and allowing the subdivision to be platted, required a parcel of land to be set aside for parks and recreational uses. This was obviously for the benefit of the lot owners in the development, so that a playground or park could be used by the owners. This restriction had to be binding on the subdivision at the time of the creation and recording of the plat. If not, Schuur Bros. Inc. could have built a residence on Tract "A" and increased his profit. In other words, the restriction or easement was already in place in 1995 and did not come into being only when conveyed to the homeowners association.

The case of Shertzer v. Hillman Investment Company, 52 Wash. 492, 100 P.982 (1909) has a similar fact pattern and concludes

that the "easement" or restriction was created by, or implied, from the plat . The case is summarized in a footnote in Washington Practice, Vol. 17, Real Estate: Property Law, 2nd Edition, "Easements Implied From Plat," at page 97 as follows:

In Schertzer lot owners obtained an injunction against the subdivider, to prevent an area shown on the plat as a public park from being turned into building lots. The Court does not explicitly say the owners had an easement in the park, but they obviously had some kind of rights in it. Their theory of recovery seems to be that, by displaying the plat map showing the park and making other representations about the park, the subdivider was estopped to deny its existence. Estoppel has been the theory used in Washington's later cases involving private Subdivision street easements.

The facts in our case are similar, except the new owner Graziano, and not the developer, wishes to use Tract "A" as building lots.

It is argued that Schuur Bros. Inc. could not use Tract "A" for building lots, as the owners in the development had some "rights" in Tract "A". It is submitted that such a right is an "easement" binding against Schuur Bros. Inc., and this "easement" right did not go away simply because Schuur Bros. Inc. did not convey Tract "A" to the homeowners association. Nor did the "easement" right have to await the deeding of Tract "A" to the association for the right to be created.

If the restriction was an existing restriction or easement in 1995, as it is argued, then the restriction or easement would be part and parcel of the title that passed to Graziano with the Treasurer's Deed. The Treasurer's Deed merely confirmed that the property was limited for "parks and recreational uses." Even had that language not appeared in the Treasurer's Deed, it is clear under case law that the restriction would have survived the tax foreclosure sale.

B. Washington Case Law:

Any objection that can be raised by Graziano that "parks and recreational uses" restriction does not apply to his property has already been answered by the Supreme Court case of City of Olympia v. Palzer, 107 Wash.2d 225, 728 P.2d 135 (Wash. 1986). In that case, the trial court, the Court of Appeals and the Supreme Court (9-0) all held that the restrictive covenants were not extinguished by the tax foreclosure sales of property.

In the Palzer case, the purchaser paid $4,401.09 and obtained a "Treasurer's Deed' for certain tracts of real property. The original developer failed to pay taxes on the property which was to remain a "greenbelt" for the enjoyment and benefit of the owners in the subdivision. (In our case, the homeowners association and the developer had put playground equipment on Tract "A"). The

purchaser at the tax sale in Palzer then sold the tracts to another entity for $135,000.00. In a well reasoned three page opinion, the Supreme Court unanimously ruled that the restrictive covenant survived the tax foreclosure sale.

C. Statutory Law:

RCW 84.64.460, enacted in 1959, now codified as RCW 36.35.290, provides as follows:

> The general property tax assessed on any tract, lot, or parcel of real property includes all easement appurtenant thereto, provided said easements are a matter of public record in the auditor's office of the county in which said real property is situated. Any foreclosure of delinquent taxes on any tract, lot or parcel of real property subject to such easement or easements, and any tax deed issued pursuant thereto shall be subject to such easement or easements, provided such easement or easements were established of record prior to the year for which the tax was foreclosed.

If the restriction for "park and recreational uses" was binding on the developer in 1995, then the restriction or easement was a "matter of public record in the auditor's office." This is so in spite of the inartful language that Tract "A" is to be dedicated to the homeowners association for "parks and recreational uses." It makes no sense that the restriction comes into existence only if conveyed to the homeowners association, but there is no restriction if Tract "A" is not conveyed to the association.

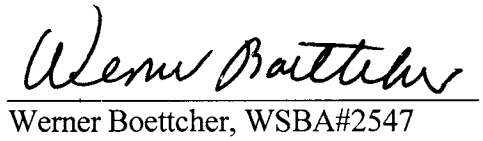
While it is true the Plat Note does use the future tense – "Tract 'A' is to be dedicated," the Treasurer's Deed has no such limitation. The Treasurer's Deed states "Tract A Dedicated to the Homeowners Association for Park and Recreational Uses." The Tax Deed in effect completes what Schuur Bros. Inc. failed to do.

If Graziano wishes to remove the restriction as plat requirement, he has a remedy available. He can initiate a plat amendment or alteration process as authorized in RCW 58.17.215. Because of the length of that section, it is attached as Exhibit A.

V. CONCLUSION

While there was no conveyance to the homeowners association of Tract "A", it is evident that Tract "A" could not be used by the developer for anything other than "parks and recreational uses." The restriction did not need to be created by a conveyance, it was already in existence as an easement. The easement could not be extinguished by a tax foreclosure sale under Washington case law and statutory provisions set forth above.

RESPECTFULLY SUBMITED this 3rd day of December, 2008.



Werner Boettcher, WSBA#2547
Attorney for Respondent

58.17.215 Alteration of subdivision—Procedure. When any person is interested in the alteration of any subdivision or the altering of any portion thereof, except as provided in RCW 58.17.040(6), that person shall submit an application to request the alteration to the legislative authority of the city, town, or county where the subdivision is located. The application shall contain the signatures of the majority of those persons having an ownership interest of lots, tracts, parcels, sites, or divisions in the subject subdivision or portion to be altered. If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for alteration would result in the violation of a covenant, the application shall contain an agreement signed by all parties subject to the covenants providing that the parties agree to terminate or alter the relevant covenants to accomplish the purpose of the alteration of the subdivision or portion thereof.

Upon receipt of an application for alteration, the legislative body shall provide notice of the application to all owners of property within the subdivision, and as provided for in RCW 58.17.080 and 58.17.090. The notice shall either establish a date for a public hearing or provide that a hearing may be requested by a person receiving notice within fourteen days of receipt of the notice.

The legislative body shall determine the public use and interest in the proposed alteration and may deny or approve the application for alteration. If any land within the alteration is part of an assessment district, any outstanding assessments shall be equitably divided and levied against the remaining lots, parcels, or tracts, or be levied equitably on the lots resulting from the alteration. If any land within the alteration contains a dedication to the general use of persons residing within the subdivision, such land may be altered and divided equitably between the adjacent properties.

After approval of the alteration, the legislative body shall order the applicant to produce a revised drawing of the approved alteration of the final plat or short plat, which after signature of the legislative authority, shall be filed with the county auditor to become the lawful plat of the property.

This section shall not be construed as applying to the alteration or replatting of any plat of state-granted tide or shore lands. [1987 c 354 § 4.]

EXHIBIT A

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WOODFIELD NEIGHBORHOOD HOMEOWNERS ASSOCIATION, D/B/A ENGLISH GARDENS HOMEOWNERS ASSOCIATION,	)	Court of Appeals No. 37769-1-II
Appellant	)	PROOF OF SERVICE
vs.	)	RESPONDENT'S REPLY BRIEF
RICHARD G. GRAZIANO,	)	
Respondent..	)	

I, CAROL LUCERO, under penalty of perjury under the laws of the State of Washington, declares as follows:

I am an individual at least 18 years of age, a resident of Pierce County, Washington, and not a party to this action. On December 3, 2008 I did cause to be served by U.S. Mail a true and correct copy of the Respondent's Reply Brief on:

JAMES V. HANDMACHER
P.O. Box 1533
Tacoma, WA 98401

Carol Lucero
CAROL LUCERO