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STATE OF WASHINGTON  
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CLERK

NO. 41691-3-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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GRAYS HARBOR COUNTY,  
Respondent,

v.

JOHN R. WYSS,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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BRIEF OF RESPONDENT

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PM 5/24/11

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## **I. INTRODUCTION**

John Wyss has brought this appeal from the proceedings in the Grays Harbor County Superior Court for foreclosure of liens for delinquent property taxes for the years 2007 through 2010 and some prior years. The underlying action was brought pursuant to RCW 84.64 for the foreclosure of liens that had been delinquent. The actual appeal brought by Mr. Wyss is from a summary motion brought pursuant to RCW 84.64.080 to have the matter heard in a summary manner. The appellant appeals from the court's granting of the judgment of foreclosure of the parcel which is the subject of this action.

Mr. Wyss contends that this appeal is related to his attempt to create an illegal subdivision. This appeal has nothing to do with that action and those issues have been decided in other court cases.

The Grays Harbor County Treasurer also requests that this matter be dismissed for failure to comply with the statutory requirements regarding appeals of this matter.

## **II. MOTION FOR DISMISSAL**

### **1. Statement of relief sought.**

Grays Harbor County asks that this appeal be dismissed because the appellant has not complied with the laws governing appeal of these matters.

2. Facts relevant to motion.

The Declaration of Janice Louthan, Chief Deputy Clerk of the Grays Harbor County Superior Court which was filed earlier in this matter should be considered. The Judgment and Order of Sale is also relevant to this motion. Mr. Wyss has not disputed that he did not pay the amount of the judgment to the court.

3. Grounds for relief sought and argument.

This motion was raised before the Court Commissioner. Court Commissioner Schmidt denied the motion, but stated that it may be raised in Respondent's brief.

Grays Harbor County asks the appeal of this matter be dismissed as the appellant did not comply with the statutory framework regarding appeals in the foreclosure proceeding as set forth in RCW 84.64.10 by paying the amount of the judgment to the court registry within 30 days of its entry.

The Judgment and Order of Sale was entered on December 20, 2010 regarding property owned by John R. Wyss. The amount of the judgment is \$42,849.37. CP 52-54. A Notice of Appeal was filed on January 13, 2010 by Mr. Wyss. The Notice of Appeal was misnamed as an appeal from an order dismissing plaintiff's action, rather than an appeal of the Judgment and Order of Sale. The appellant did not pay the judgment into the registry of the court.

The law governing appellate review of tax foreclosure proceedings is set forth in Chapter 84.64 of the Revised Code of Washington. RCW 84.64.120 provides for appellate review of judgments in foreclosure proceedings. That statute reads in pertinent part:

Appellate review of the judgment of the Superior Court may be sought as in other civil cases. However, review must be sought within thirty days after the entry of the judgment and the party taking such appeal shall deposit a sum equal to all taxes, interest and costs with the clerk of the court, conditioned that the appellant shall prosecute the appeal with effect, and will pay the amount of any taxes, interest and costs which may be finally adjudged against the real property involved in the appeal by any court having jurisdiction of the cause. No appeal shall be allowed from any judgment for the sale of land or lot for taxes unless the party taking such appeal shall before the time of giving notice of such appeal, and within thirty days herein allowed within which to appeal, deposit with the clerk of the court of the county in which the land or lots are situated, an amount of money equal to the amount of the judgment and costs rendered in such cause by the trial court....(emphasis added)

This statute is unambiguous. In interpreting a statute, the purpose is to effectuate the Legislature's intent. *Hubbard v. Dept. of Labor & Industries*, 140 Wn.2d 35, 992 P.2d 1002 (2000). If a statute is not ambiguous, the court relies on the statute's language alone. *State v. Azpitarte*, 140 Wn.2d 138, 995 P.2d 31 (2000). The language of the statute is not permissive. It states that the respondent shall deposit the sum owing. It further states no appeal shall be allowed if no deposit is made. RCW 84.64.120 is a jurisdictional requirement to prosecute an appeal and has not been complied with. Mr. Wyss should not be allowed to ignore the

plain language of the statute and pursue the appellate process without complying with depositing the sum into the court.

### CONCLUSION

In the present case, no deposit was made into the registry of the court for the amount of the judgment. This condition precedent to the appeal has not been made, therefore, the appeal of Mr. Wyss must be dismissed and the judgment to stand.

### III. RESPONSE TO ASSIGNMENTS OF ERROR

- 1. The Superior Court had authority to approve and hear the foreclosure proceeding and foreclose on Mr. Wyss' property.**
- 2. The assessment which was foreclosed on was valid on the parcel of Mr. John Wyss.**

### IV. STATEMENT OF THE CASE

Mr. Wyss sets forth in his brief a section entitled "Statement of facts if the motion to consolidate is granted." The motion to consolidate was previously denied by Commissioner Schmidt. He has not asked for review of that ruling. Therefore, that portion of his brief should be stricken.

On August 19, 1999, the City of Hoquiam condemned an eight unit apartment building that John Wyss owned because it was dangerous and unsafe. This property is located solely within the corporate limits of the city of Hoquiam, Grays Harbor County, Washington. CP 12-27.

On September 21, 1999, Mr. Wyss executed a deed transferring the north 40 feet of his 84 foot lot to his minor son, James Wyss. *Id.* Mr. Wyss retained the portion of real property on which the building stood. *Id.* Mr. Wyss did not comply with any of the city regulations regarding the subdivision of property in the city of Hoquiam. *Id.* Mr. Wyss recorded the Quit Claim Deed with the County Auditor. *Id.* A new tax parcel number, 053800800703 obtained by Mr. Wyss from the County Assessor for the north 40 feet of the property. *Id.* Wyss did not comply with the City's regulations and subdivisions of real property when he quit claimed the property. *Id.* The City subsequently assessed an abatement lien on the property and provided notice of this abatement lien to the County. *Id.*

Wyss filed a petition for review of the City's building code council decision condemning the apartment building in Grays Harbor County Superior Court, but the court dismissed his appeal as untimely. *Id.* Wyss appealed to the Court of Appeals and the Superior Court's dismissal was affirmed in an unpublished opinion. *Id.*

Wyss then filed a complaint in Federal District Court for violation of his civil rights, claiming he was deprived of his home and property without compensation, denied due process and suffered a physical invasion, and total taking of his property for public benefit without compensation. *Id.* On summary judgment for both parties, the Federal District Court ruled that Wyss was accorded due process and Wyss' Fifth Amendment taking claim had no merit because the building was a

nuisance and the City was properly exercising its police power to protect and ensure public safety. *Id.* The Federal District Court decision was affirmed on appeal. *Id.*

The City then filed a complaint in Grays Harbor County Superior Court on July 7, 2004 seeking declaratory judgment that the land transferred to James Wyss was unlawful and invalid. *Id.* Wyss filed a counterclaim for inverse condemnation. *Id.* The City and Wyss both moved for summary judgment. The Grays Harbor County Superior Court denied summary judgment to Wyss and granted summary judgment to the City, voiding the land transfer by Wyss to his son. The Grays Harbor County Superior Court summary judgment order was affirmed by the Court of Appeals in an unpublished opinion. *Id.* The Court of Appeals ruled, among other things, that the short subdivision he had attempted to transfer by Quit Claim, was not created legally and the transfer was illegal and in violation of RCW 58.17.030 and Chapter 9.34 of the Hoquiam Municipal Code. *Id.*

By letter dated March 11, 2009, the City notified the Grays Harbor County Assessor that Grays Harbor County Superior Court invalidated Wyss' purported subdivision by Quit Claim Deed. *Id.* In response, the Assessor cancelled tax parcel number 053800800703 and listed the plaintiff's property as a single lot under the original tax parcel number 053800800702. *Id.* That parcel is the subject of the tax foreclosure proceeding.

Despite the Grays Harbor County Superior Court's judgment, affirmed by the Court of Appeals, declaring Wyss' purported subdivision by the September 21, 1999 Quit Claim Deed to be illegal and invalid, Wyss filed an action in Thurston County Superior Court on February 19, 2010, alleging that the purported two lot "subdivision" remains valid and that Grays Harbor County somehow improperly, "assessed an abatement lien against plaintiff's second lot in 2009." *Id.* The County moved for summary judgment on this matter and summary judgment was granted in favor of Grays Harbor County on September 17, 2010. Mr. Wyss has now appealed that order and it is the subject of another appeal in this court, Cause No. 41298-5-II.

The Grays Harbor County Superior Court heard this matter in a summary manner pursuant to RCW 84.64.080. Judgment was granted on December 20, 2010. CP 57-58. This appeal has followed that ruling.

#### ARGUMENT

A. This case does not involve an administrative appeal.

Mr. Wyss' first argument is that this case somehow involves a question of review of land use decisions. He argues that an action under RCW 36.70C, a LUPA action, should have been filed or some type of writ of mandate or prohibition.

These arguments should be disregarded as not complying with the Rules of Appellate Procedure. Rule of Appellate Procedure 2.5 states that the appellate court may refuse to review any claim or error which was not

raised in the trial court. Therefore, the Court of Appeals should not address that issue. See *Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995). In *Berg v. Ting, supra*, the Tings raised an issue never raised in the trial court and the Court of Appeals stated: "...under well-settled principles we will not address the issue." at 556. A review of Mr. Wyss' response to motion for summary disposition (CP 6-8) reveals that he did not ask the Superior Court to address these issues, nor did he suggest a LUPA action was correct. Therefore, these issues should not be allowed to be raised for the first time on appeal.

Moreover, this is not an appeal from a LUPA proceeding or other action involving land use decisions. This is an appeal brought pursuant to RCW 84.64 which is a proceeding to foreclose on liens which have been outstanding more than three years. Therefore, any argument that LUPA or other action would apply to this is not appropriate. The statutes governing LUPA actions do not contemplate deciding tax proceedings.

B. The County Assessor's action in assigning a parcel number to the north 40 feet of Wyss' property did not create a subdivision.

The facts in this matter are that Wyss filed a Quit Claim Deed in the Auditor's office. The tax assessor assigned a separate tax parcel number to this illegally created lot. This, however, is not a land use decision which would invoke the provisions of LUPA. Land use decision is defined by RCW 36.70C.020(2) to mean:

...a final determination by a local jurisdiction's body or officer with the highest level of authority to make the

determination, including those with authority to hear appeals, on:

- a. an application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used, but excluding applications for permits or approvals to use, vacate or transfer streets, parks, and similar types of public properties; excluding applications for legislative approvals such as area wide re-zones and annexations; and excluding applications for business licenses;
- b. an interpretive or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and
- c. the enforcement by a local jurisdiction of ordinances regulating improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforcement the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

Wyss has cited no authority for the proposition that when a County Assessor assigns real property tax parcel numbers, he or she is making a land use decision and RCW 36.70C.020(2) or for any subdivision purpose under RCW 58.17.

Interestingly, Mr. Wyss admits in his brief that his “subdivision” was illegal. However, even though the courts have found this to be an illegal act, he claims that the “subdivision” is valid. He argues that the unpublished opinion of the court established as a matter of law that the

County Assessor created an illegal subdivision. A review of that opinion clearly shows that is not the case. Nowhere in the opinion is the Assessor even mentioned, much less is it asserted that the illegal subdivision remains in effect.

RCW 84.40.160 mandates assignment of tax parcel numbers by the Assessor only as a means of listing real property, not for land development or subdivision creation which is governed by RCW 58.17 and in this case by the Hoquiam Municipal Code. The County Assessor has no authority to create, validate, or cancel land use actions which take place wholly within the city limits of an incorporated city. Any subdivision would have had to been approved by the City of Hoquiam. The act of accepting the deed presented by Mr. Wyss did not confer authority on the Assessor to “validate” the illegal subdivision. As a result, Grays Harbor County was not required to file a LUPA or any other kind of action declaring the subdivision void or illegal.

C. Wyss argues that the County Assessor did not “arbitrarily” cancel Wyss’ subdivision.

Mr. Wyss claims that the process of correction of Assessor’s record by canceling the new tax parcel number pursuant to the appellate court’s decisions, canceled his subdivision. Again, Grays Harbor County does not have the authority to either create or cancel subdivisions located solely within the confines of a municipal corporation. The Assessor’s action in

correcting the assessment roles and placing the property back as one parcel was not a land use decision nor was it correcting a subdivision.

D. The judgment of the Grays Harbor County Superior Court foreclosing on Mr. Wyss' is valid and should be upheld.

Chapter 84.64 of the Revised Code of Washington governs the foreclosure of liens and assessments on real property. If the assessments or taxes are not paid within a three year period, the County may proceed to foreclosure. Furthermore, RCW 84.64.080 provides for the foreclosure of liens in a summary manner. That statute reads in pertinent part:

The court shall examine each application for a judgment foreclosing a tax lien, and if defense (satisfying in writing in a particular cause of objection) be offered by any person interested in any of the lands or lots to the entry of judgment against the same, the court shall hear and determine the matter in a summary manner, without other pleadings and shall pronounce judgment as the right of the case may be;...in all judicial proceedings of any kind for the collection of taxes, and interest and costs thereon, all amendments which by law can be made in any personal action pending in such court shall be allowed, and no assessments of property or charge for any of the taxes shall be considered illegal on the account of any irregularity in the tax list or assessment rules or on account on the assessment rules or taxes not having been made, completed or returned within the time required by law, or on account of the property having been charged or listed in the assessment or tax list without name, or in any other name than that of the owner, and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collection of the taxes, shall officiate or in any manner affect the tax or the assessment thereof, and any irregularities or informality in the assessment rules or tax list or in any of the proceedings connected with the assessment or levy of such taxes or any omission or defective act of any officer or officers connected with the assessment or levying of such taxes, may be, in a discretion of the court, corrected, supplied and made to conform to the

law by the court. The court shall give judgment for such taxes, interest and costs as shall appear to be due on the several lots or tracts described in the notice or application for judgment or complaint, and such judgment shall be a several judgment against each tract or lot or part of a tract or lot for each kind of tax included therein, including all interest and costs, and the court shall order and direct the clerk to make and enter an order for the sale of such real property against which judgment was made, or vacate and set aside the certificate of delinquency or make such other order or judgment as in the law or equity may be just...

As can be seen by RCW 84.64.080, any irregularities or informalities in the assessment roles or omission or defective act of any officer or officers may be corrected, supplied and made to conform to the law. In this case, the Superior Court for the State of Washington, the Federal District Court and the Court of Appeals all recognize that the attempted transfer of the land by Mr. Wyss to his son was ineffective and null. While the Assessor may have initially added a new tax parcel number to this illegal transfer, the mistake was corrected by the Assessor when brought to the attention by the City of Hoquiam. The assessments undisputedly were applied to the entire parcel and were properly before the court for foreclosure.

#### CONCLUSION

The County asks that the court dismiss this appeal for failure of the appellant to comply with the statutory requirements regarding perfection of appeal. In the alternative, if the court determines to hear this appeal, the

County asks that the judgment of the Superior Court ordering the foreclosure and sale of this property be affirmed.

DATED this \_\_\_\_\_ day of May, 2011.

Respectfully Submitted,

By: \_\_\_\_\_  
JENNIFER L. WIELAND  
Senior Civil Deputy  
WSBA #12141

JLW/jfa

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BY \_\_\_\_\_  
DEPUTY

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No.: 41691-3-II  
  
**DECLARATION OF MAILING**

**DECLARATION**

I, Barbara Chapman hereby declare as follows:

On the 24<sup>th</sup> day of May, 2011, I mailed a copy of the BRIEF OF  
RESPONDENT to SCOTT E. STAFNE; STAFNE LAW FIRM; 239 N. OLYMPIC AVENUE;  
ARLINGTON, WA 98223, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the  
foregoing is true and correct to the best of my knowledge and belief.

Barbara Chapman