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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BA & C PROPERTY MANAGEMENT, LLC, a Washington Limited Liability Company, Appellant, v. CITY OF LAKEWOOD, a Washington Municipal Corporation, Respondent.	No. 48332-7-II UNPUBLISHED OPINION

WORSWICK, J. — BA & C Property Management LLC appeals the superior court's order dismissing its petition for a writ of certiorari for lack of jurisdiction. BA & C contends that its petition sufficiently established jurisdiction because its petition actually sought writs of prohibition and mandamus. Because BA & C petitioned the trial court only for a writ of certiorari, and its petition failed to establish jurisdiction, we affirm.

FACTS

BA & C owns property located in Lakewood. Following inspections of the property, the City of Lakewood's building official made a preliminary determination that the property was unfit for human habitation or other uses and constituted a public nuisance. On May 21, 2014, Lakewood's hearing examiner conducted a hearing regarding the property. At the hearing, William Chung, representing BA & C, acknowledged the poor condition of the property and did not contest that many of the structures thereon violated codes. Lakewood and Chung agreed that

Chung would have until 5:00 p.m. June 4 to submit his plan to correct the violations, clean up the property, and submit a detailed written work plan.

On June 16, having never received any such plan from Chung, Lakewood entered a formal order before the building official in accordance with the chapter 15A.34 Lakewood Municipal Code (LMC) and chapter 35.80 RCW directing abatement of the property. The order directed BA & C to submit complete applications for permits to demolish and/or repair the building no later than July 16 (30 days from the date of the order). The order also directed BA & C to demolish the building on the property no later than August 15, or to complete repairs no later than 60 days after repair permits were issued. The order contained a notice that BA & C could appeal the order within 30 days as allowed by RCW 35.80.

On August 5, having never received any applications for permits to demolish or repair the property, Lakewood sent a letter to BA & C requesting access to the property to proceed with abatement. In response, BA & C arranged a meeting for August 14 to discuss the abatement. According to BA & C, at that meeting, Lakewood granted BA & C additional time to submit an application for a building permit. Lakewood contends that no additional time was granted.

In early December, BA & C attempted to submit a building permit application for repairs to the property. Because the property was in abatement, Lakewood refused to accept the application and indicated its intention to proceed with the abatement procedures.

BA & C then petitioned the superior court for a writ of certiorari under chapter 7.16 RCW. In its petition, BA & C claimed that Lakewood and BA & C had reached a settlement suspending the abatement process and permitting BA & C an unspecified length of additional time to submit a building permit application. The petition sought a writ of certiorari enjoining

and prohibiting Lakewood from proceeding with the abatement and mandating Lakewood to accept and process BA & C's building permit application, and also sought a judgment for attorney fees and costs.

On Lakewood's CR 12(b)(1)[1] motion, the superior court dismissed the petition for lack of jurisdiction.

ANALYSIS

BA & C contends that its petition for a writ was sufficient to establish the superior court's jurisdiction, and therefore the superior court erred by dismissing the claim under CR 12(b)(1).[2] BA & C specifically argues that although its petition was entitled "Petition for Writ of Certiorari," the petition actually sought a writ of prohibition and a writ of mandamus. We disagree.

To resolve BA & C's arguments, we must first determine the type of writ it sought in superior court. For the first time on appeal, BA & C contends that "[a]lthough Appellant's Petition was entitled one 'for a writ of certiorari' the allegations set forth and remedies requested therein clearly establish that the petition was for writs of prohibition and mandamus." Reply Br. of Appellant 2. But the record does not support BA & C's attempt to characterize the petition's title as a simple scrivener's error.

[1] CR12(b)(1) establishes a defense for "lack of jurisdiction over the subject matter." "Without subject matter jurisdiction, a court or administrative tribunal may do nothing other than enter an order of dismissal." *Inland Foundry Co., Inc. v. Spokane Cty. Air Pollution Control Auth.*, 98 Wn. App. 121, 123-34, 989 P.2d 102 (1999).

[2] Lakewood argues that we should not consider the merits of BA & C's claims because it failed to comply with the Rules of Appellate Procedure. We may address an improperly briefed legal or factual issue if the basis for the claim is apparent. *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978). We exercise our discretion to consider this argument.

BA & C's petition refers only to a writ of certiorari. Moreover, at no point during the hearing on Lakewood's motion to dismiss, or in any of the briefing to the superior court, did BA & C state that it was seeking a writ of prohibition or a writ of mandamus. In fact, at a hearing on BA & C's motion for reconsideration of the dismissal order, when the superior court asked BA & C what its original pleading was, BA & C replied, "It was a petition to review."[3] Verbatim Transcript of Proceedings (Oct. 30, 2015) at 7.

A petitioner seeking a statutory writ must satisfy different conditions for each type of writ: certiorari, prohibition, or mandamus. The only type of writ BA & C requested at any point prior to this appeal was a writ of certiorari. The parties argued under a theory of writ of certiorari, thus the superior court made its decision based on the petition for a writ of certiorari. By now changing its theory of relief, BA & C asks us to consider issues raised for the first time on appeal. Under RAP 2.5(a), we decline to consider these issues.

Although BA & C appears to abandon its argument that it was entitled to a writ of certiorari, we nonetheless address whether the superior court properly denied BA & C's petition for a writ of certiorari because it was the only theory of relief considered by the superior court.

RCW 7.16.040 authorizes the superior court to grant a writ of review when an inferior board, exercising judicial functions, has exceeded its jurisdiction or acted illegally, and there is no appeal, nor any plain, speedy and adequate remedy at law. The absence of a right of appeal or plain, speedy, and adequate remedy at law is recognized as an essential element of the superior court's jurisdiction to grant a statutory writ of review. *City of Seattle v. Holifield*, 170 Wn.2d

[3] The statutory writ of certiorari is also known as the statutory writ of review. RCW 7.16.030.

230, 240, 240 P.3d 1162 (2010); *see Bridle Trails Cmty. Club v. City of Bellevue*, 45 Wn. App. 248, 250-51, 724 P.2d 1110 (1986) (it was "apparent" that review under chapter 7.16 RCW was unavailable because direct appeal to superior court was provided for by the city code). "If any of the factors is absent, then there is no jurisdiction for superior court review." *Newman v. Veterinary Bd. of Governors*, 156 Wn. App. 132, 140, 231 P.3d 840 (2010). "Where a party fails to pursue a statutory right to a direct appeal, a petition for writ of review is properly denied on that basis alone." *Coballes v. Spokane Cty.*, 167 Wn. App. 857, 867, 274 P.3d 1102 (2012). We review an order of dismissal of a petition for a writ based on lack of jurisdiction under CR 12(b)(1) de novo. *Int'l Longshore and Warehouse Union, Local 23 v. Port of Tacoma*, 154 Wn. App. 373, 378, 225 P.3d 433 (2010); *Newman*, 156 Wn. App. at 140.

Here, the hearings examiner entered a formal order on June 16, 2014 directing abatement of the property. BA & C failed to show an absence of a right of appeal or plain, speedy, and adequate remedy at law. BA & C merely failed to timely appeal the June 16, 2014, order from the hearings examiner.[4] Because BA & C failed to show an absence of a right to a direct appeal, the superior court did not have jurisdiction to consider the writ, and the superior court properly dismissed BA & C's petition for writ of certiorari.

BA & C also seems to base its petition on Lakewood's refusal to accept its building permit application in December 2014. See Clerk's Papers at 6 ("Defendant's refusal to accept Plaintiff's building permit application is unlawful and violates the terms of its settlement."[5]).

[4] RCW 35.80.030 permits an aggrieved person to appeal the hearing examiner's decision to the superior court within 30 days.

[5] The parties strongly disagree as to whether any such "settlement" was ever reached between BA & C and Lakewood. The overwhelming evidence in the record suggests that no settlement

However, BA & C's claim is no more meritorious on this basis. The city clerk refused to accept BA & C's permit application because the property in question was in abatement due to BA & C's failure to appeal the June 16 order. Moreover, BA & C cannot show that the clerk was exercising any judicial or quasi-judicial functions when she rejected the application. RCW 7.16.040; *see Hood Canal Sand and Gravel, LLC v. Goldmark*, 195 Wn. App. 284, 305, 381 P.3d 95 (2016) (holding that the superior court properly dismissed a request for statutory writ of certiorari where the petitioner failed to show that the Department of Natural Resources exercised any judicial or quasi-judicial functions when it granted an easement over the petitioner's property).

ATTORNEY FEES

Lakewood also argues it is entitled to attorney fees on appeal. Specifically, Lakewood contends that LMC 15A.05.090(M) authorizes an attorney fee award because it permits recovery of the costs of staff time in vacating and closing a nuisance. We disagree.

Reasonable attorney fees are recoverable on appeal if authorized by statute, rule, or contract. RAP 18.1(a); *Pierce County v. State*, 159 Wn.2d 16, 50, 148 P.3d 1002 (2006). To determine whether LMC 15A.05.090(M) authorizes an award of attorney fees, we interpret the ordinance. The rules of statutory interpretation apply equally to ordinances. *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 392, 816 P.2d 18 (1991). Thus, when construing an ordinance, our fundamental objective is to carry out the legislative body's intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

agreement was ever reached. However, even assuming the settlement did occur, BA & C cannot satisfy the conditions for a statutory writ of certiorari.

In determining the legislative body's intent, we first examine the plain language and meaning of the ordinance. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). When an ordinance has a plain meaning, we give the plain meaning effect. *Campbell & Gwinn*, 146 Wn.2d at 11. We do not add words to the plain meaning of an ordinance because it assumes the legislative body intended to use the words it used and intended not to use words it did not use. *See State v. Nelson*, 195 Wn. App. 261, 266, 381 P.3d 84 (2016).

LMC 15A.05.090(M) provides: "[T]he cost of vacating and closing shall include . . . (iii) all other reasonable expenses, including but not limited to, the costs of staff time, materials, incidentals, mailing, publishing, and recording notices." RCW 35.80.030(1)(h) permits municipalities to adopt an ordinance, like LMC 15A.05.090(M), providing for recovery of "the amount of the cost of such repairs, alterations or improvements; or vacating and closing; or removal or demolition [of a nuisance] by the board or officer." RCW 35.80.030(1)(h) does not explicitly permit municipalities to adopt an ordinance providing for attorney fees as the result of vacating and closing a property.

LMC 15A.05.090(M) permits Lakewood to recover costs of staff time in vacating and closing a nuisance. However, the ordinance's inclusion of the costs of materials, mailing, and recording notices in its definition of reasonable expenses incurred in the cost of vacating and closing suggests that reasonable expenses are limited to those expenses actually incurred during nuisance abatement. Because the ordinance makes no mention of attorney fees or the costs of defending nuisance abatement, we presume the legislative body did not intend to include attorney fees in its definition of reasonable expenses. Accordingly, LMC 15A.05.090(M) does

not permit an award of attorney fees for defending the vacating and closing of a nuisance. Therefore, Lakewood is not entitled to an award of reasonable attorney fees under RAP 18.1(a).

In conclusion, we affirm the superior court's order dismissing BA & C's petition for a statutory writ for lack of jurisdiction, and deny Lakewood's request for attorney fees.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Maxa, A.C.J.

Sutton, J.