

FILED
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No. 100827-9
SUPREME COURT
OF THE STATE OF WASHINGTON

OLIVE OSHIRO, *et al.*, Petitioners,
v.
WASHINGTON STATE HOUSING FINANCE
COMMISSION, *et al.*, Respondents.

**PETITIONERS' EMERGENCY MOTION TO MODIFY
THE COMMISSIONER'S APRIL 19, 2022 RULING AND
REQUEST FOR PRELIMINARY INJUNCTIVE RELIEF¹**

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¹ An affidavit pursuant to Rule of Appellate Procedure 17.4(b) accompanies this Motion.

A. IDENTITY OF PETITIONERS

Olive Oshiro, Norma and Eugene Aldredge, Michael Rabang, Michelle and Rubert Roberts, Francisco Rabang Sr., Wilma Rabang, Alex Mills, and Saturnino Javier are a group of mostly elderly individuals facing eviction from their homes beginning today, April 20, 2022 at 1:30 p.m. Petitioners are federal Low-Income Housing Tax Credit (“LIHTC”) program homebuyers who have lived in their homes for as many as 24 years, and who are, or soon will be, due to own their homes. Representing households comprised of 23 individuals who imminently face eviction without good cause, Petitioners ask this Court to accept emergency review of the decision designated in Part B of this Motion.

B. DECISION

Pursuant to Rule of Appellate Procedure 17.7(a), Petitioners object to and seek emergency review of the Supreme Court Commissioner’s Ruling Denying Motion for Injunctive Relief, entered late yesterday, April 19, 2022 (“Ruling”). RAP 17.4(b).

Through that motion, Petitioners sought an order enjoining Respondents Nooksack Housing Limited Partnership #2–4 (the “State Partnership Respondents”) from evicting them from their homes pending this Court’s consideration of Petitioners’ motion for emergency discretionary review of the Thurston County Superior Court’s April 13, 2022, denial of their Motion for Preliminary Injunction.² Because Petitioners’ motion was denied by the Commissioner, Petitioners will be evicted from their homes soon after April 20, 2022 at 1:30 p.m., absent relief from this Court.

C. ISSUES PRESENTED FOR REVIEW

1. Should this Court preserve the status quo by preliminarily enjoining Petitioners’ evictions under Rule of Appellate Procedure 8.3 when, without that relief, “effective and

² Petitioners’ motion for emergency discretionary review will be considered by the Commissioner after May 6, 2022, by which time, as the Commissioner acknowledges, it might be too late to save Petitioners from eviction. *See* Ruling at 5 (recognizing that “denial of the requested relief is likely to lead to harsh results for petitioners”).

equitable review” of the Ruling and the superior court order will be impossible because the evictions will occur?

2. Did the Commissioner err by analyzing subject matter jurisdiction under RCW 37.12.060 and Article IV, § 4 of the Washington Constitution when Petitioners do not rely on either authority as the basis for jurisdiction?

3. Did the Commissioner err by overlooking 26 U.S.C. § 42(h)(6)(B)(ii) as the primary basis for subject-matter jurisdiction?

D. FACTS RELEVANT TO MOTION

This case pertains to the administration of the federal Low-Income Housing Tax Credit (“LIHTC”) program in the State of Washington. *See* A-1007–A-1009. LIHTC, enacted by Congress and codified in the Internal Revenue Code at 26 U.S.C. § 42, prohibits evictions of residents of program homes except where “good cause” exists. 26 U.S.C. § 42(h)(6)(E)(ii)(I). It also gives those residents the right to enforce that prohibition by contesting evictions “in any State court.” *Id.* at § 42(h)(6)(B)(ii). Petitioners

invoked 26 U.S.C. § 42(h)(6)(B)(ii) as the basis for the superior court's subject-matter jurisdiction, *see* A-1006, but the Commissioner overlooked this pivotal assertion. *See generally* Ruling.

All Petitioners live in LIHTC homes owned by the State Partnership Respondents. The State Partnership Respondents are 99.99 percent owned by subsidiaries of Raymond James Financial, Inc., a Florida corporation ("Raymond James"), and .01 percent owned by the Nooksack Indian Tribe ("Tribe"). *See* A-1005–A-1006. Each of the three limited partnerships were formed under the laws of the State of Washington. *See* A-0504.

In 2001, the 106th Congress amended 26 U.S.C. § 42 to give tax-credit allocation preference to LIHTC development projects that included a plan by which low-income housing tenancies would be converted into homeownership at the conclusion of a mandatory compliance period. *See* 26 U.S.C.

§ 42(m)(1)(C)(viii).

In 2005, eager to receive an allocation of tax credits, each State

Partnership Respondent entered into a contract with Respondent Washington State Housing Finance Commission (“WSHFC”), the State agency tasked with administering, monitoring, and enforcing LIHTC. *See* A-0017–A-0239. Congress required that state housing agencies such as WSHFC and recipients of tax credits such as the State Partnership Respondents enter into these contracts, known as regulatory agreements, before the award of tax credits. *See* 26 U.S.C. § 42(h)(6)(A). The Commissioner correctly observed: “With [26 U.S.C. § 42] in mind, the tribe entered into [agreements] subordinating its interests in mortgages on the property to . . . regulatory agreement[s] with [WSHFC] for purposes of supporting the low income housing project at issue here.” Ruling at 2. Those subordination agreements “unconditionally” subjected the land on which Petitioners’ homes sit to state law and regulation. *See* A-0901, A-0910, A-0921.

In the regulatory agreements, the State Partnership Respondents promised WSHFC that they would not evict

residents without good cause and agreed—consistent with the LIHTC statute—that residents can enforce that prohibition on evictions “in any State court.” A-0033, A-0118, A-0180.

The State Partnership Respondents further promised WSHFC that residents like Petitioners would be conveyed deeds to their homes after fifteen years of successful tenancy. *See* A-0033, A-0118, A-0180. Petitioner Oshiro, age 86, has lived in her LIHTC home for 24 years; Petitioners Aldredges, ages 74 and 84, for 17 years; Petitioner Michael Rabang, age 79, for 16 years; Petitioners Francisco and Wilma Rabang, ages 80 and 71, for 15 years; and Petitioners Michelle and Rupert Roberts, each age 57, for 15 years. *See* A-1002–A-1004. Over those many years, Petitioners have made timely monthly “rent-to-own” payments and impeccably maintained and improved their homes. *See id.* As the Commissioner correctly observed, “[t]here are no allegations that petitioners have not paid their rent or have damaged the leased premises.” Ruling at 3. In other words, there is no good cause for Petitioners’ evictions.

According to the architect of State Partnership Respondents’ LIHTC development deal: “WSHFC awarded application points to each of the Limited Partnerships based on that 15-year home ownership concept, and in turn awarded tax credits to each of the Limited Partnerships.” A-0801. State Partnership Respondents—specifically, Raymond James—have since reaped federal income tax benefits of LIHTC participation for fifteen years,³ but now refuse to honor the accompanying burden because, according to WSHFC, doing so would increase its federal tax liability. *See* A-1010 (“Raymond James has since received annual tax credits [but] decided against certain LIHTC tenant homeownership compliance and reporting measures in order to increase its bottom line.”). WSHFC—the steward of the “highly

³ The Tribe, as 00.01 percent owner of the State Partnership Respondents, does not pay federal income taxes. The Raymond James subsidiaries have not yet appeared in this lawsuit. Despite owning 99.99 percent of each of the State Partnership Respondents and having leveraged lucrative federal income tax credits for at least 15 years, they now attempt to hide behind the Tribe’s sovereignty.

competitive” federal tax credit program and of affordable housing opportunity for low-income families in Washington State—demurs in the face of State Partnership Respondents’ bait and switch. *See* A-0800, A-1010, A-1014–1015.

After learning that an eviction proceeding against Petitioner Saturnino Javier was scheduled for April 20, 2022 at 1:30 p.m., *see* A-0825, Petitioners filed a Motion for Preliminary Injunction in Thurston County Superior Court on March 29, 2022. A-0001–A-0011. Under federal law and the regulatory agreements, that court is the proper forum for challenges by LIHTC residents to their eviction. *See* 26 U.S.C. § 42(h)(6)(B)(ii); A-0033, A-0118, A-0180.

The Tribe’s Office of Tribal Attorney filed an opposition to Petitioners’ motion, ostensibly on behalf of the State Partnership Respondents. *See* A-0865–A-0880. The Tribe’s opposition failed to address, and therefore conceded, Petitioners’ central legal arguments: that Congress conferred jurisdiction on state courts to adjudicate LIHTC eviction disputes, and that there is no good

cause to evict Petitioners. *See generally id.* WSHFC filed a joinder in the State Partnership Respondents’ request for dismissal, even though no motion to dismiss has been filed. *See* A-0881–A-0883.

The superior court heard argument on Petitioners’ motion on April 8, 2022, and denied their motion on April 13, 2022. Petitioners sought discretionary review and an emergency preliminary injunction from the Supreme Court that same day, and the Commissioner ordered that any preliminary injunction response be filed by April 18, 2022. The Tribe’s Office of Tribal Attorney filed an opposition to Petitioners’ motion for discretionary review by that deadline but failed to address Petitioners’ request for a preliminary injunction under Rule of Appellate Procedure 8.3.

Yesterday the Commissioner denied Petitioners’ injunction request because Petitioners’ “request to enjoin a party from exercising its right to seek relief in tribal court concerning the

possession of real property⁴ on tribal trust land falls far outside this court's jurisdiction."⁵ Ruling at 5 (citing Wash. Const. art. IV, § 4; RCW 37.12.060). In addition to relying on two state provisions that are inapplicable here, the Commissioner overlooked 26 U.S.C. § 42(h)(6)(E)(ii)(I) as the primary jurisdictional basis Petitioners have invoked for this LIHTC eviction dispute.

E. GROUNDS FOR RELIEF AND ARGUMENT

On a motion to modify under Rule of Appellate Procedure

⁴ Petitioners' homes are improvements and thus personal property, not real property, under applicable state law. *See Chief Seattle Properties, Inc. v. Kitsap County*, 86 Wash. 2d 7, 16 (1975).

⁵ The Commissioner's ruling would prevent, for example, any Washington State court from probating a residential structure owned by non-Indians simply because that personal property sits on federal Indian trust land. That is not and cannot be the law in Washington, where non-Indian homes exist on leased tribal trust lands along the shores of Lake Chelan and throughout the Puget Sound. *See Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 181 Wn.2d 272, 276, 333 P.3d 380 (2014) (en banc) (noting there exist "few limitations on the subject matter jurisdiction of superior courts in Washington.").

17.7(a), the Court applies *de novo* review. *See State v. Rolax*, 104 Wash. 2d 129, 133 (1985).

This Court has the power to grant injunctive relief “to insure effective and equitable review.” RAP 8.3; *see also Washington Federation of State Employees, Council 28, AFL-CIO v. State*, 99 Wash. 2d 878, 883 (1983) (noting the Court enjoined implementation of a payroll plan pending its review of a superior court denial of a motion for preliminary injunction).

1. This Court should preserve the status quo by enjoining evictions pending review of the superior court order.

Eviction proceedings in this case are scheduled for today at 1:30 p.m. *See* A-0825. If any Petitioners are evicted from their homes and their home ownership rights are abrogated before this Court’s review, meaningful review will be impossible as Petitioners will have already suffered irreparable harm through the loss of their homes.

This Court has “authority to issue orders, before or after acceptance of review . . . to insure effective and equitable review, *including authority to grant injunctive or other relief to a party.*”

RAP 8.3 (emphasis added). “The purpose of [RAP 8.3] is to permit appellate courts to grant preliminary relief in aid of their appellate jurisdiction so as to prevent destruction of the fruits of a successful appeal.” *Washington Federation*, 99 Wash. 2d at 883. For instance, in *Washington Federation*, the Chief Justice of this Court preliminarily enjoined implementation of a payroll plan even though the Thurston County Superior Court had denied petitioners’ motion for a preliminary injunction. *Id.* at 882. The new payroll plan would have changed payday for State employees “from the last working day of each month to approximately the 10th day of the following month.” *Id.* at 880. The Court in *Washington Federation* “merely preserved the status quo” by enjoining the implementation of the new plan. *Id.* at 883.

The harm faced by Petitioners here—the loss of homes they should already or will soon own—is far more serious than the ten-day delay in pay faced by the *Washington Federation* petitioners. A preliminary injunction of the evictions pending

review in this case would simply preserve the status quo—
Petitioners residing in their homes as they have for as many as
24 years. *See* A-0851. This Court should enjoin State Partnership
Respondents from evicting Petitioners pending its review.

2. The Commissioner erred by applying RCW 37.12.060 and/or Wash. Const. art. IV, § 4 to find a lack of subject-matter jurisdiction.

The Commissioner relied upon RCW 37.12.060 and Article IV, § 4 of the Washington Constitution to conclude that this dispute “falls far outside this court’s jurisdiction.” Ruling at 5. This was error for at least three reasons. First, RCW 37.12.060 is inapplicable to this case because the limitation found in that statute applies only to cases in which jurisdiction is premised on RCW 37.12. Second, Article IV, § 4 of the Washington Constitution contains no limitation on the Court’s jurisdiction. Finally, the Ruling conflicts with multiple decisions of this Court under which the exercise of state jurisdiction here is proper.

Starting with the state statute relied upon by the Commissioner, RCW 37.12.060 does not divest the Court of

jurisdiction because Petitioners do not rely upon RCW 37.12 as the basis for jurisdiction in this case. *See* A-1006. Pursuant to congressional authority found in Public Law 280, “the Washington legislature enacted RCW 37.12, in which the state bound itself to exercise ‘criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state.’” *Powell v. Farris*, 94 Wash. 2d 782, 784 (1980). While RCW 37.12.060 contains a limitation on the State’s assumption of jurisdiction, that limitation only applies to cases in which jurisdiction is predicated on RCW 37.12. *See Snohomish County v. Seattle Disposal Co.*, 70 Wash. 2d 668, 671 (1967) (noting that the limitation found in RCW 37.12.060 is a limitation on the State’s assumption of jurisdiction through RCW 37.12); *see also* RCW 37.12.021 (recognizing that “jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in RCW 37.12.060) (emphasis added).

Jurisdiction in this case is not predicated on Public Law 280, and the State Partnership Respondents cannot unilaterally

recharacterize Petitioners' claims to gain the benefit of the limitation on state subject-matter jurisdiction found in RCW 37.12.060. Petitioners' claims are based upon the LIHTC statute and the regulatory agreements—both of which give Petitioners a cause of action in a state forum. *See* A-1006, A-1013. The limitation on jurisdiction found in RCW 37.12.060 therefore has no application and it was error for the Commissioner to apply it. *See Outsource Services Management*, 181 Wash. 2d at 277 (analyzing and finding state jurisdiction even though claimants conceded RCW 37.12 had no application).

Next, Article IV, § 4 of the Washington Constitution simply extends this Court's appellate jurisdiction to "all actions and proceedings." Wash. Const. art. IV, § 4. It contains no limitation on the Court's exercise of jurisdiction.

Finally, the Ruling contradicts with this Court's precedent. In *Outsource Services Management*, this Court held that where a tribe consensually enters into a contract whose "plain language" permits suit in state court, the state may exercise jurisdiction over

a dispute under that contract. *See Outsource Services Management*, 181 Wash. 2d at 278–79. In the regulatory agreements governing their LIHTC participation, the Tribe, as the general partner of the State Partnership Respondents, consented to suit in state court for challenges to evictions, such as this. *See* A-0033, A-0118, A-0180. Thus, state courts may exercise jurisdiction over this dispute. *See Outsource Services Management*, 181 Wash. 2d at 278–79.

The Ruling is also at odds with this Court’s decision in *Matter of Adoption of Buehl*. 87 Wash. 2d 649, 661 (1976). That case recognized that acts of Congress can confer state subject-matter jurisdiction. *Id.* Such an act exists here: the LIHTC statute, which directs that proceedings such as this one—a challenge to evictions by state partnerships in receipt of tax credits allocated to them by a state housing agency—should be heard in state court. *See* 26 U.S.C. § 42(h)(6)(B)(ii).

In sum, the Ruling’s conclusion that state subject-matter jurisdiction is improper was error. Neither state statute nor the

Washington Constitution prohibits the exercise of jurisdiction, and this Court's precedent allows it.

F. CONCLUSION

Petitioners are vulnerable individuals who are hours or days away from being evicted from their LIHTC homes and having their home ownership rights extinguished even though the "good cause" required by Congress is lacking.

This Court should modify the Ruling to preliminarily enjoin the State Partnership Respondents under Rule of Appellate Procedure 8.3 from evicting Petitioners pending the Court's review of the superior court order and until further order of the Court.

This document contains 2,715 words, excluding the parts of the document exempted from the word count by RAP 18.17.

April 20, 2022

Respectfully submitted,

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