

No. 72417-7

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

CITY OF WOODINVILLE,

Plaintiff/Respondent,

v.

THE FOWLER PARTNERSHIP,

Defendant/Appellant.

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DIVISION I
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BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
I. Introduction.....	1
<i>II. Assignments of Error</i>	
<i>Assignments of Error</i>	
No. 1. The trial court erred by granting the City of Woodinville’s Motion for Summary Judgment.....	1
No. 2. The trial court erred by denying the Fowler Partnership’s Motion for Summary Judgment.....	1
No. 3. The trial court erred by dismissing the Fowler Partnership’s Counterclaim.....	1
<i>Issues Pertaining to Assignments of Error</i>	
1. Does the City of Woodinville have any rights under the Covenant? (Assignments of Error 1 and 2.)	1
2. Was the Covenant revoked by operation of law? (Assignments of Error 1 and 2.)	1
3. Does the Covenant run with the land? (Assignments of Error 1 and 2.)	1
4. Is the City a beneficiary of the Covenant? (Assignments of Error 1 and 2.).....	2
5. Did the City gain or lose any rights with the passage of time? (Assignments of Error 1 and 2.).....	2
6. Does laches bar the City’s claim under the Covenant? (Assignments of Error 1 and 2.).....	2

TABLE OF CONTENTS

	<u>Page</u>
7. Does the statute of limitations apply to bar the property owner’s rights? (Assignments of Error 1 and 2.).....	2
8. Did the City obtain title to the property by adverse possession? (Assignments of Error 1 and 2.).....	2
9. Was the Covenant an unconstitutional taking? (Assignments of Error 1 and 2.).....	2
10. Does the plain language of the Covenant say or mean that no compensation is due? (Assignments of Error 1 and 2.)....	2
11. Is there a taking before an interest in the property is taken? (Assignments of Error 1 and 2.).....	2
12. Is the fair market value of the property \$592,500? (Assignment of Error 3.)	2
13. Should judgment be entered for Defendant with an award of costs and attorney fees? (Assignment of Error 3.)	2
 III. Statement of the Case	
A. The facts of the case.....	3
1. The parties and property at issue.....	3
2. The Lot Line Adjustment.....	5
3. The use of the south 50 feet of the property.....	7
4. The Woodin Creek Village development.....	10

TABLE OF CONTENTS

	<u>Page</u>
5. A Demand for the deed and appraisal of the fair market value of the property.....	11
B. Procedural history.....	11
IV. Summary of Argument.....	12
V. Argument	
A. The standard of review is <i>de novo</i>	13
B. The City of Woodinville has no rights under the Covenant.....	13
1. The Covenant was revoked by operation of law.....	13
2. The Covenant does not run with the land.....	14
a. The Covenant would not have been enforceable as a matter of contract.....	15
b. King County did not bind its successors.....	20
c. There is no vertical privity of estate between King County and the City of Woodinville.....	20
i. There is no privity of estate under property law.....	20
ii. There is no privity of estate as a matter of fact.....	20
d. There is no horizontal privity of estate.....	22
3. Laches bars the City's claim.....	23
C. The Covenant does not say "for free".....	24
1. The Covenant does not say the dedication will be extracted without compensation.....	24

TABLE OF CONTENTS

	<u>Page</u>
2. There is no taking until an interest in the property is taken.....	26
D. The statute of limitations does not apply.....	27
1. No statute of limitations bars a Constitutional taking claim.....	28
2. Any appeal or protest was not ripe for review.....	29
E. The City did not acquire title to the property by adverse possession.....	31
F. The fair market value of the south 50 feet of defendant's property is \$592,500.....	32
G. Judgment should be entered in favor of Defendant with an award of attorney fees and costs.....	33
VI. Conclusion.....	34
VII. Appendix	

TABLE OF AUTHORITIES

Page

CASES

<i>Arnold v. Melani</i> , 75 Wn.2d 143, 437 P.2d 908(1968).....	24
<i>Aylmore v. Seattle</i> , 100 Wash. 515, 171 P. 659 (1918)	28
<i>City of Spokane v. Security Savings Society</i> , 82 Wash. 91, 143 P. 435 (1914)	13, 14
<i>Deep Water Brewing, LLC v. Fairway Resources Ltd.</i> , 152 Wn.App. 229, 215 P.3d 990 (Div. 3 2009)	15, 22
<i>Feider v. Feider</i> , 40 Wn.App. 589, 699 P.2d 801 (1985)	23
<i>Gazija v. Nicholas Jerns Co.</i> , 86 Wn.2d 215, 543 P.2d 338 (1976)	30
<i>Gorman v. City of Woodinville</i> 175 Wn.2d 68, 283 P.3d 1082 (2012)	31
<i>Guimont v. Clarke</i> , 121 Wn.2d 586, 854 P.2d 1 (1993)	26
<i>Highline School District No. 401 v. Port of Seattle</i> , 87 Wn.2d 6, 548 P.2d 1085 (1976)	30
<i>Lappin v. Lucurell</i> , 13 Wn.App. 277, 534 P.2d 1038 (Div. 1 1975)	25
<i>Mains Farm Homeowners Association vs. Worthington</i> , 121 Wn.2d 810, 854 P.2d 1072 (1993)	24
<i>Michak v. Transnation Title Ins. Co.</i> , 148 Wn.2d 788 64 P.3d 22 (2003)	13
<i>Poltz v. Tyree</i> , 41 Wn.App. 695, 705 P.2d 1229 (Div. 1 1985). .	27
<i>Saddle Mountain Minerals, L.L.C. v. Joshi</i> , 152 Wn.2d 242, 95 P.3d 1236 (2004)	29

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Smith v. King County</i> , 80 Wash. 273, 141 P. 695 (1914)	13
<i>Sparks v. Douglas County</i> , 127 Wn.2d 901, 904 P.2d 738 (1995)	16, 17
<i>The Kahuna Land Co. v. Spokane County</i> , 94 Wn.App. 836, 974 P.2d 1249 (Div. 3 1999)	26
<i>Thompson v. Schlittenhart</i> , 47 Wn.App. 209, 734 P.2d 48 (1987)	31
<i>Tom E. Petersen v. The Port of Seattle</i> , 94 Wn.2d 479, 618 P.2d 67 (1980)	28
<i>Unlimited v. Kitsap County</i> , 50 Wn.App. 723, 750 P.2d 651 (Div. 2 1988)	15, 18, 19
<i>Williamson County Regional Planning Comm'n v. Hamilton Bank</i> , 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985)	29

CONSTITUTIONAL PROVISIONS

Washington Constitution, Article I, § 16	12, 26, 30, 33
U. S. Constitution, Amendment V	12, 33

STATUTES

RCW 35.02.180	22
RCW 36.88.310	25
RCW 8.25.070	33, 34

TABLE OF AUTHORITIES

	<u>Page</u>
RULES	
CR 56(d)	32
ER 803(a)(20)	21
RAP 18.1	33

OTHER AUTHORITIES

Black's Law Dictionary (4th rev. ed. 1968)	27
<i>Real Property Deskbook</i> , WSBA	20
WPI 301.01	16

I. Introduction

In this lawsuit, the City of Woodinville seeks to acquire privately owned real property without compensating the property's owner. The City is claiming rights to the property under a Covenant recorded in 1985. But the City has no rights under the Covenant and the trial court erred by ruling the City can take the property without paying for it.

II. Assignments of Error

Assignments of Error

No. 1. The trial court erred by granting the City of Woodinville's Motion for Summary Judgment.

No. 2. The trial court erred by denying the Fowler Partnership's Motion for Summary Judgment.

No. 3. The trial court erred by dismissing the Fowler Partnership's counterclaim.

Issues Pertaining to Assignments of Error

1. Does the City of Woodinville have any rights under the Covenant? (Assignments of Error 1 and 2.)

2. Was the Covenant revoked by operation of law? (Assignments of Error 1 and 2.)

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6. Does the statute of limitations apply to bar the property owner's rights? (Assignments of Error 1 and 2.)

7. Does laches bar the City's claim under the Covenant? (Assignments of Error 1 and 2.)

8. Did the City obtain title to the property by adverse possession? (Assignments of Error 1 and 2.)

9. Was the Covenant an unconstitutional taking? (Assignments of Error 1 and 2.)

10. Does the plain language of the Covenant say or mean that no compensation is due? (Assignments of Error 1 and 2.)

11. Is there a taking before an interest in the property is taken? (Assignments of Error 1 and 2.)

12. Is the fair market value of the property \$592,500? (Assignment of Error 3.)

13. Should judgment be entered for Defendant with an award of costs and attorney fees? (Assignment of Error 3.)

III. Statement of the Case

A. The facts of the case.

1. The parties and property at issue.

Plaintiff is the City of Woodinville. CP 1. Woodinville was incorporated in 1993 following voter approval of a ballot measure for incorporation on the third attempt. CP 77. Prior to incorporation, the region within the City limits was unincorporated King County. *Id.*

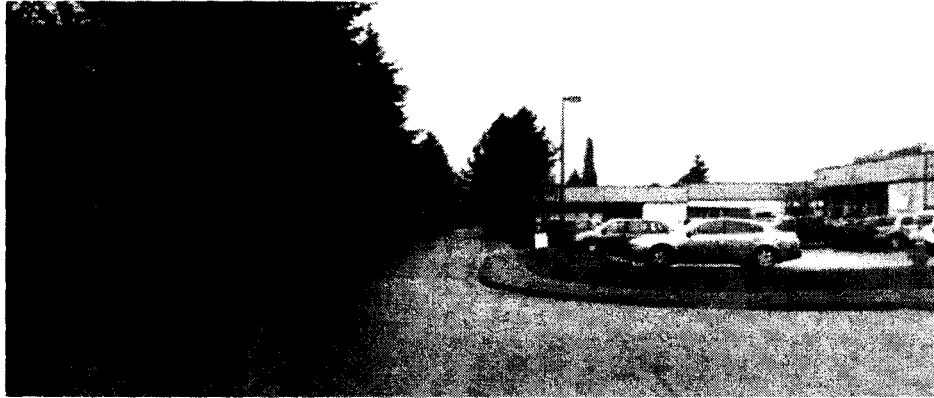
Defendant is a partnership that owns the real property at issue in this suit. CP 112. The property in issue is part of commercial property known as Woodinville City Center and it is located in the City of Woodinville; Defendant purchased the property in 1991. CP 112.

The dispute concerns the south 50 feet of Defendant's property. CP 115. It consists of a paved road called 173rd, with a sidewalk, curb and gutter on the north side of the road, and landscaping on both sides of the roadway, as shown in this Google Earth image:



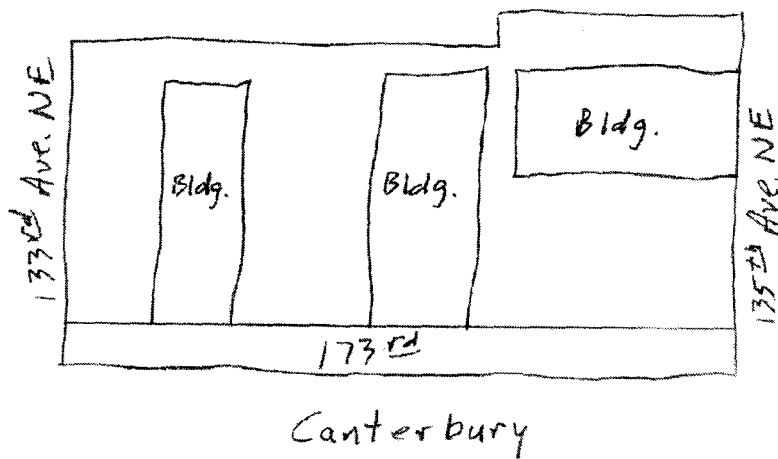
CP 113, 114.

A photo taken by the City's appraiser showing the roadway and property looking west on 173rd from 135th Ave. NE is shown here:



CP 114.

A mobile home park called Canterbury was located immediately south of Defendant's property. CP 114. A sketch of the Defendant's property and its proximity to Canterbury is shown here:



2. The Lot Line Adjustment.

The Defendant's predecessor in title owned the property in 1985 when they redrew the internal boundary lines pursuant to a Lot Line Adjustment application that was submitted and approved in 1985. CP 48, 49.

In connection with the Lot Line Adjustment, the property owners recorded a document entitled "Covenants, Conditions and Restrictions Running with the Land." CP 50-54. The Covenant was recorded on May 21, 1985. CP 50. Under the Covenant, the property owners granted King County a right to acquire a right of way for a possible future road, and King County retained full discretion as to when, if ever, it would ask for a deed to the property to build the road. CP 50. It states that the timing of the dedication "shall be determined by King County." CP 50. The road was never dedicated to the public. CP 42 (Hansen dep., p. 22).

The Covenant was granted in connection with the Lot Line Adjustment, not in the course of any sale or conveyance of an interest in the real property. CP 48, 49. That fact has legal significance that is described below.

The Lot Line Adjustment application as approved and revised shows that at first on March 22, 1985 the County approved the application subject to the land owner dedicating the south 50 feet for purposes of a

public road. CP 49. Then the Approval was revised on May 21, 1985, and the County deleted the requirement for an immediate dedication of the south 50 feet of the property. CP 49. The revised approval states, "reserves south 50 ft for future public road. No dedication required at this time." CP 49. The south 50 feet of the property remained in private ownership, and it was held in private ownership when the City of Woodinville commenced this action to acquire it. CP 116, 117.

The records do not show there was any adverse public impact arising from the change to the property lines, and there was none; it simply revised the lot boundary lines internal to the property. CP 48, 49.

Woodinville's Public Works Director, Tom Hansen, P.E., testified he has reviewed between 10 to 30 lot line adjustments in the course of his career. CP 45 (Hansen dep. p. 43). As to the potential for an adverse impact on the public interest, he said:

Q. Are you aware of any adverse impact on the public interest as a result of this lot line adjustment?

A. A lot line adjustment, you're moving lot lines. I don't see any -- that's all it does.

Q. And by that, are you trying to tell me that it's unlikely that there ever would be an adverse impact on the public interest by merely adjusting lot lines?

A. Usually, there is not an impact from adjusting lot lines.

CP 46. (Hansen dep. pp. 46-47).

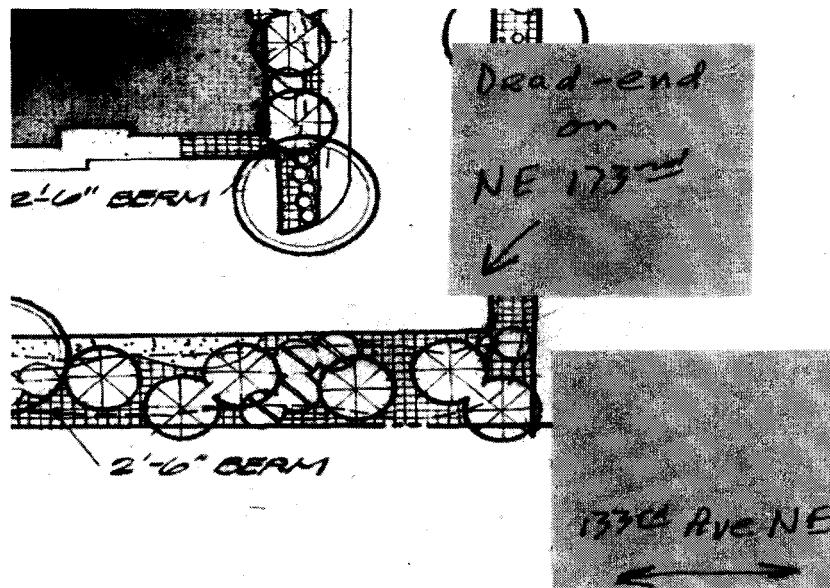
It appears that the County was anticipating there may be a need for a public road someday in the future, and they wanted to be able to acquire the right of way without opposition if the need arose.

What is most significant about the Covenant, and it is the issue in this case, is it does not say that the County may take the property without payment of compensation. CP 50-54.

3. The use of the south 50 feet of the property.

The Defendant's predecessor in title built and paved a roadway in the south 50 feet of the property, known as NE 173rd. CP 114. Since purchasing the property in 1991, the Defendant has paid to maintain the road and landscaping on both sides of the roadway, to purchase general liability insurance, and all real estate taxes. CP 115.

Prior to 2001, NE 173rd was not a through road; the roadway dead ended at the west end of NE 173rd. CP 115. The roadway ended at its western edge at a landscaped berm as shown on the Landscape Plan issued when the Woodinville City Center was developed. CP 525. The lower right hand corner of Landscape Plan is shown on the following page.



The roadway is privately owned and it was used exclusively, with the owner's permission, by the tenants, customers and vendors of the tenants occupying space in the Woodinville City Center until 2001. CP 115.

After Woodinville built its new City Hall on 133rd Ave. NE in about 2001, the City connected NE 173rd to 133rd Ave. NE. CP 115. Before the City connected the roadway to its street grid, the City's Public Works Director, Mick Monkin, asked Chuck Reidt, the defendant's property manager, for permission to open the dead end and connect 133rd Ave. NE to NE 173rd and join the new pavement to the existing paving on NE 173rd. CP 115. The defendant granted permission to the City to connect NE 173rd to 133rd Ave. NE as a neighborly accommodation. CP 115.

Neither King County nor the City of Woodinville behaved at any time as if they were the owners or occupiers of NE 173rd. CP 115. In

2009 or 2010, the City's Public Works Director, Tom Hansen, concluded that a dedication deed had never been executed and NE 173rd continued to be private property. CP 43. He testified, "It looked like private property." CP 43 (Hansen dep. p. 22).

When an issue arose, the City referred all matters concerning the roadway to the Defendant as the owner of the property. CP 115, 116. For example, the property immediately south of Defendant's property was occupied by the Canterbury mobile home park. CP 116. In 2009, the owners of the mobile home park asked the City to trim the trees and vegetation along the south edge of the Defendant's property, which is the southern edge of NE 173rd, and the City instructed them to address their concern to the Defendant. CP 47. In response, the Defendant retained a landscaping company to address the mobile home park owner's complaints. CP 116.

In another instance in 2009, a lady named Ms. Eunice Aho claimed she tripped and fell on the sidewalk on NE 173rd and she filed a claim for personal injuries with the City. CP 116. The City denied they owned the property and referred the matter to the Defendant and its insurer. Mr.

Hansen testified:

Q. How did you first learn of the claim?

A. The claim came down from the city clerk's office to my department to respond to.

Q. And did you personally take care of that or delegate it to somebody?

A. I personally responded to that.

Q. And what was your response?

A. My response to the city clerk was that it appeared that the claim happened not on city property, on city right of way.

Q. Your conclusion at that time was that it happened on private property?

A. It happened on -- not on city property.

Q. And you concluded it happened on the Fowler Partnership property, if at all?

A. Yeah, if at all. CP 94 (Hansen dep. pp. 51-52).

In 2009 or 2010, Mr. Hansen, on behalf of the City, asked Mr. Reidt whether the Fowler Partnership would dedicate a right of way, and Mr. Reidt replied affirmatively as long as the owner was compensated for the taking. CP 43. The City did nothing further about it at that time. *Id.*

4. The Woodin Creek Village development.

The mobile home park south of Defendant's property is being developed into several hundred units of residential housing, retail space and associated amenities by Woodin Creek Village Associates, LLC pursuant to an agreement with the City of Woodinville dated May 7, 2013. CP 45-76, 116. The City admits, "a full street improvement for 173rd Street is needed with development of the Woodin Creek Village property." CP 38.

5. A demand for the deed and appraisal of the fair market value of the property.

In 2010, the City concluded that someday it would need a road on 173rd. CP 44 (Hansen dep. p. 38). That day came when the City entered into the development agreement with Woodin Creek Village Associates, LLC. CP 44. In the Fall of 2013, the City of Woodinville, and not King County, asked the Defendant for a deed to the south 50 feet of the Defendant's property. CP 44 (Hansen dep. pp. 38, 39). The Defendant requested an appraisal of the fair market value of the taking, and the City retained an appraiser, and he concluded the fair market value of the south 50 feet of Defendant's property was \$592,500. CP 117. This fair market value is an admitted fact. CP 158.

But then the City changed its governmental mind and declared its intent to take the property and pay no compensation to the property owner. CP 117.

B. Procedural history.

The City filed this suit on April 22, 2014 asserting rights under the 1985 Covenant and claiming a right to take the Defendant's property and pay nothing for it. CP 1-28. Defendant answered with a counterclaim for compensation for the taking. CP 29-35. The trial court, the Honorable Regina Cahan, heard both parties' motions for summary judgment on

August 1, 2014, and then granted the City's Motion, denied the Defendant's Motion and dismissed the counterclaim. CP 526-528.

A timely notice of appeal was filed on August 29, 2014. CP 539.

IV. Summary of Argument

The City's demand for the Defendant's real property is governed by Washington Constitution, Article I, § 16. It provides in relevant part, "No private property shall be taken for public or private use without just compensation having been first made, or paid into court for the owner."

In summary, the City has no rights under the Covenant because it was revoked by operation of law when the property was conveyed to Defendant before a dedication was completed. In any event, a covenant runs with the land only if five criteria are met – even when it is entitled "run with the land" – and this Covenant meets none of the five requirements under Washington law. The plain language of the Covenant conferred no rights on the City. And the City waited too long to seek to enforce the Covenant, to the Defendant's prejudice.

Finally, the application of Washington Constitution, Article I, § 16 and the Fifth Amendment to the U.S. Constitution to the facts of this case requires the payment of compensation. As there is no dispute about the value of the property or that the City offered nothing, Defendant

should be awarded the value of the property and its attorney fees and costs.

V. Argument

A. The standard of review is *de novo*.

Although the City pled a claim for declaratory relief (CP 1), the trial court made no findings of fact and simply entered summary judgment. CP 526-528. The standard of review of an order granting summary judgment also is *de novo*. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 64 P.3d 22 (2003).

B. The City of Woodinville has no rights under the Covenant.

1. The Covenant was revoked by operation of law.

In *City of Spokane v. Security Savings Society*, 82 Wash. 91 143 P. 435 (1914), the Court held that a dedication of private property to a City, if it is not accepted by the City, is revoked by operation of law upon a conveyance of the property to a third party. In *City of Spokane*, the property owner recorded a dedication of the land to the City but the City never accepted the tender of dedication formally or by public use. Citing *Smith v. King County*, 80 Wash. 273, 141 P. 695 (1914), the Court said, “A statutory dedication of streets to a public use is merely a tender of a servitude or easement to the public, which the public is at liberty to accept or reject.” It may be revoked at any time before it has been

accepted, and “a conveyance of an unaccepted street or highway revokes the dedication.” *Supra, City of Spokane v. Security Savings Society*, 82 Wash. at 93. As the Court said:

..... one who offers to dedicate property to the public may revoke the offer at any time before acceptance by the public, either in a formal way or by actual user, and that **a conveyance of the property by the dedicator to a third party before acceptance operates as a revocation of the offer to dedicate....** *Id.* (emphasis added).

This rule of property law should control the City’s claim here where there was, in fact, no dedication and no evidence shows that King County ever actually used the property before it was conveyed to the Defendant. King County never took the steps necessary to seek or accept the dedication of the south 50 feet of the property, and the intervening conveyance of the property to the Defendant before the City came into existence revoked the offer to execute a dedication. In *City of Spokane*, the revocation as a matter of law occurred where the property owner had recorded a deed to the property in favor of the City. The City of Woodinville has even less right to demand enforcement of the Covenant where no dedication was made.

2. The Covenant does not run with the land.

A covenant “runs with the land” only if the following five criteria are met:

- (1) the covenant must have been enforceable between the original parties, such enforceability being a question of contract law;
- (2) the covenant must "touch and concern" both the land to be benefitted and the land to be burdened;
- (3) the covenanting parties must have intended to bind their successors in interest;
- (4) there must be vertical privity of estate, *i.e.*, between the original parties to the covenant and the present disputants; and
- (5) there must be horizontal privity of estate between the original parties.

Deep Water Brewing, LLC v. Fairway Resources Ltd., 152 Wn.App. 229, 215 P.3d 990 (Div. 3 2009).

a. The Covenant would not have been enforceable as a matter of contract.

The issue is presented only because Woodinville claims it can take the property for free. King County never sought to exercise its alleged rights, and we don't know if the County would have asserted the same high handed unconstitutional taking of property without compensation that Woodinville asserts. If so, that assertion of rights would have been clearly unlawful under *Unlimited v. Kitsap County*, 50 Wn.App. 723, 750 P.2d 651 (Div. 2 1988).

A contract is a legally enforceable promise or set of promises. WPI 301.01. Under the first criteria, the Covenant does not run with the land if it was not enforceable by the original parties to it, *i.e.*, King County and the property owner, as a matter of contract. If the Covenant was not enforceable as between those parties, then the first criterion is not met and the Covenant does not run with the land.

This is not an issue concerning consideration for the Covenant or its adequacy. If King County had attempted to enforce the Covenant without paying compensation, that would have been an illegal and unconstitutional taking.

The government can extract a right of way from a land owner in the process of reviewing and approving a development permit without paying compensation only if there is a “nexus” between the planned development and an adverse impact on the public interest that was the result of the development. In *Sparks v. Douglas County*, 127 Wn.2d 901, 904 P.2d 738 (1995), the Court said, “As a prerequisite for development permission, a regulation may require a landowner to dedicate property rights for public use if the regulatory exaction is reasonably calculated to prevent, or compensate for, adverse public impacts of the proposed development.” If the exaction is not reasonably calculated to prevent or compensate for the adverse impacts of the

proposed development, then the exaction is a “taking” requiring payment of compensation under the Washington Constitution. *Id.*

In *Sparks v. Douglas Co.*, the land owner sought approval to develop home sites on four plats totaling 31 acres of land. During the review process, the county concluded that the adjoining streets were deficient for the anticipated increase in traffic flow from the development, and one of the streets did not meet fire code requirements for safe access. *Sparks v. Douglas Co., Id.* 127 Wn.2d at 904. In order to mitigate these adverse impacts of the development, the Subdivision Review Committee imposed conditions including the dedication of rights of way for new roads. *Id.* at 905. In affirming the Review Committee’s conditions, the Court began its discussion with the following passage that should control the issue presented here.

The federal and Washington state constitutions provide that private property may not be taken for public use without just compensation. Where the government physically appropriates a portion of a person's private property, such as through an easement or right-of-way, a taking has occurred which requires compensation. This rule does not necessarily apply, however, where conveyance of a property right is required as a condition for issuance of a land permit.

"As a prerequisite for development permission, a regulation may require a landowner to dedicate property rights for public use if the regulatory exaction is reasonably calculated to prevent, or compensate for, adverse public impacts of the proposed development." *Id.* at 907, internal citations omitted.

The Court held no compensation was due because, “the proposed developments would likely generate increased traffic on adjacent roads that are inadequate for safe access.” *Id.* at 917. In other words, the development would have adversely impacted the public interest and the exaction without compensation was lawful.

In this case, there was no adverse public impact from the lot line adjustment, nor could there be, it simply revised the lot lines internal to the parcels, converting three smaller parcels into one large parcel. The City was unaware of any evidence, for example, that King County conducted any traffic impact analysis. CP 46 (Hansen dep. p. 46).

In its approval of the lot line adjustment, King County cited no adverse public impact from the lot line adjustment, and the City of Woodinville’s designated spokesperson said that in his experience reviewing as many as 30 applications for lot line adjustment, one would not expect there to be an adverse impact on any public interest. He testified, “Usually, there is not an impact from adjusting lot lines.” CP 46 (Hansen dep. at p. 47).

Under nearly identical facts, in *Unlimited v. Kitsap County, supra*, where the County had no immediate plans and, instead, intended to hold the exacted property until some undefined future time when a road could be extended to connect with other, as yet unbuilt, roads, the court held

the uncompensated exaction was invalid. *Unlimited v. Kitsap County*, *supra*, 50 Wn. App. at 727. And that is precisely what happened here.

There was no adverse impact on any public interest resulting from the lot line adjustment or the building of the Woodinville City Center. Instead, the revised approval shows only that the County was looking ahead to possible future needs for a public roadway. The approval says the 50 feet are reserved for “future public road.” CP 49. According to the City’s designated representative, Public Works Director Thomas Hansen, that future need arose when the Woodin Creek Village Associates, LLC – a private developer – decided to turn the Canterbury Mobile Home Park into a residential/multi-use development. CP 44. The City’s need for a right of way arose nearly 30 years after the Covenant was executed.

Because there was no adverse impact on any public interest from the lot line adjustment or the construction of Woodinville City Center, under the Washington cases, the Covenant can be enforced, if at all, only upon payment of compensation to the land owner.

As long as the City insists that no compensation is due under the Covenant, the Covenant is unenforceable because that promise with those terms would have been unenforceable by King County.

As a matter of contract law, the promise was not enforceable and the first criterion for a covenant to run with the land is not met.

b. King County did not bind its successors.

Although the Covenant expresses an intent by the property owner to bind its successors, the Covenant is silent as to King County's intent. The second criterion is not met.

c. There is no vertical privity of estate between King County and the City of Woodinville.

i. There is no privity of estate under property law.

Privity of estate is a term of art in property law. Under real property law, "privity of estate" means a covenant runs with the land only if it was made in connection with a transfer of some interest in the land between the covenanting parties. *Real Property Deskbook*, §8.2(3)(d) (horizontal privity), 8.2(3)(e) (vertical privity) CP 81-86. As there was no conveyance of any interest in the property when the Covenant was made, as a matter of property law it does not run with the land.

ii. There is no privity of estate as a matter of fact.

The property was located in unincorporated King County when the Covenant was recorded in 1985. The City of Woodinville incorporated in 1993 following its third attempt to convince the voters to incorporate. At the time of incorporation the property at issue was private property

and NE 173rd was a private roadway. CP 115. The resolution adopted by the City upon its incorporation says nothing about land use decisions made by King County (CP 173), and there is no statute, ordinance or resolution by which the City acquired any of King County's legal rights as to private property. There was no transfer of any kind in law or fact from King County to the City relating to this Covenant.

The incorporation history reveals that the voters for incorporation succeeded the third time only because "King County changed some minds when it announced plans to establish an interim jail in the area." CP 77. The City's designee, Mr. Hansen, testified "That was one of the factors of incorporation. That's what I've been told by long-time residents of the city." CP 47 (Hansen dep. p. 66).¹

No statute, ordinance or resolution says that the City of Woodinville adopted or otherwise agreed to submit to the agreements or undertakings made by King County as to private property prior to incorporation. Not only is there no law that says the City is a successor to King County, as a factual matter the City had good reason to refuse to accept the County's land use decisions: the voters did not want a county jail built in their neighborhood.

¹ This evidence is not excluded by the hearsay rule under ER 803(a)(20) *Reputation Concerning Boundaries or General History*.

In any event, King County had no “estate” in the property as they chose not to seek a dedication. If there had been a dedication, then by statute Woodinville would have succeeded to that dedication upon incorporation. RCW 35.02.180. App. 1. But because the County never acquired the dedication, the property remained private property. Absent an estate it is difficult to imagine how the County could be in privity of estate with anyone.

The only legal conclusion from these undisputed facts is that, for purposes of the south 50 feet of Defendant’s property, King County is not in privity of estate with the City of Woodinville. The Covenant does not meet the fourth criteria and, therefore, for another reason it does not run with the land.

d. There is no horizontal privity of estate.

In *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, *supra*, the court defined horizontal privity thusly: “Horizontal privity requires the transfer of some interest in land, other than the covenant itself, between covenantor and covenantee in connection with the making of the covenant.” *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, *supra*, 152 Wn.App. at 260, 261, internal citations omitted.

Here, there was no transfer or conveyance of any interest in the land when the Covenant was recorded; there was a Lot Line Adjustment and

nothing more. Absent a transfer or conveyance of an interest in the land, the Covenant does not run with the land. And that is so even when the agreement between the parties states that it “runs with the land.” *Feider v. Feider*, 40 Wn.App. 589, 699 P.2d 801 (1985).

Because the Covenant does not run with the land, it is at best a personal contract and the City of Woodinville has no right to enforce it. *Feider v. Feider, Id.*

3. Laches bars the City’s claim.

The Covenant does not run with the land because it fails to meet the five criteria set forth above, even though it is entitled “run with the land”, and it is at most a personal contract under *Feider* and enforceable, if at all, only for a reasonable time. In *Feider*, as here, no expiration date was set in the document creating the alleged rights, and the party claiming rights did not exercise them for 29 years. In *Feider*, the Court held 29 years was not a reasonable time and refused to enforce the contract.

Here, nobody sought to enforce any alleged rights under the Covenant for 29 years, *i.e.*, 2014 – 1985 = 29 years. It is too late, the Covenant has expired.

Laches requires diligence on the part of the party in exercising his or her rights. *Arnold v. Melani*, 75 Wn.2d 143, 437 P.2d 908 (1968). In *Arnold*, the Court stated the principle thusly:

Laches, while said to be founded on the principle of equitable estoppel, is an equitable principle that in a general sense relates to neglect for an unreasonable length of time, under circumstances permitting diligence, to do what in law should have been done. It also requires an intervening change of condition, making it inequitable to enforce the claim. The doctrine is also derived from the familiar maxim that equity aids the vigilant, not those who slumber on their rights. (Internal citations omitted).

Here, a delay of 29 years, while the property owner paid real property taxes, the costs of maintenance, and the costs of a personal injury claim, is too long. Laches bars the claim under the Covenant.

C. The Covenant does not say “for free”.

Two issues are presented here. First, what rules govern the court’s interpretation of the language used in a covenant and, second, when has a property owner suffered a compensable taking?

1. The Covenant does not say the dedication will be extracted without compensation.

As to the first issue, the court is required to determine the intent of the parties by applying "ordinary and common use" to the language in the covenant. *Mains Farm Homeowners Association vs. Worthington*, 121 Wn.2d 810, 854 P.2d 1072 (1993).

Under the Covenant if, at some undetermined date in the future, the County chose to proceed with the construction of a public road on NE 173rd, the property owner made three promises: 1) they would participate in and/or not oppose or protest it, 2) they would maintain a 50 foot set back from the southern property line, and 3) if and when asked by King County, they would execute a deed to the south 50 feet to the County for public road purposes. The Covenant recited the County's legal rights to proceed under RCW 36.88 to acquire a right of way and build a public road. That means the Covenant was not completely silent as to whether or not compensation would be paid to the landowner.

RCW 36.88.310 is entitled "Acquisition of property – Eminent domain" and it states in relevant part:

All land, premises or property necessary for right-of-way or other purposes in the construction or improvement of any county road, including bridges, sidewalks, curbs and gutters and the drainage facilities therefore, under this chapter may be acquired by the county acting through its board of county commissioners, either by **gift, purchase or by condemnation**. (Emphasis added, full text at App. 2).

Two out of three of those, *i.e.*, purchase and condemnation, explicitly require payment of compensation. And a gift ordinarily will not be presumed. *Lappin v. Lucurell*, 13 Wn.App. 277, 534 P.2d 1038 (Div. 1 1975). As the Covenant does not promise that the property owner will simply gift the property to the County if and when they ask for it, the

Constitutional presumption that “No private property shall be taken for public or private use without just compensation having been first made, or paid into court for the owner” should be applied to the City of Woodinville’s demand for the property. Washington Constitution, Article I, § 16.

The ordinary meaning of the words used in the Covenant indicate that if the County asked for the deed, then when that happened the value of the property would be established and compensation would be paid.

2. There is no taking until an interest in the property is taken.

The Defendant’s right to compensation arose when the City of Woodinville demanded the property and not before then, because there was no loss of property rights or interests before somebody asked for the dedication deed. The cases refer to such interests as a loss of a “fundamental attribute of property ownership”. *The Kahuna Land Co. v. Spokane County*, 94 Wn.App. 836, 974 P.2d 1249 (Div. 3 1999).

The fundamental attributes of property ownership include the rights a) to possess the property, b) to exclude others from the property, c) to dispose of the property or, d) to make some economically viable use of the property. *Guimont v. Clarke*, 121 Wn.2d 586, 601-02, 854 P.2d 1 (1993). The Covenant did not interfere in the owner’s right to possess

the property, or to exclude others from it, or to dispose of it, or to make some economically viable use of it. Until somebody demanded a deed conveying an interest in the property, the Covenant disturbed none of the fundamental attributes of the property owner's ownership.

The Covenant was nothing more than a contingent promise to do something in the future and it created at most an inchoate interest. An "inchoate interest" is "[a]n interest in real estate which is not a present interest, but which may ripen into a vested estate, if not barred, extinguished, or divested." *Poltz v. Tyree*, 41 Wn.App. 695, 705 P.2d 1229 (Div. 1 1985) fn 3 *citing* Black's Law Dictionary 904 (4th rev. ed. 1968).

Simply put, there is and can be no taking of an interest in property until an interest in the property is, in fact, taken. Here there was no taking until Judge Cahan entered the Order granting the City summary judgment and denying the Fowler Partnership's claim for payment.

D. The statute of limitations does not apply.

The City's Complaint asserts, "The applicable statute of limitations has run on any takings claim associated with the dedication requirement." CP 4. The City is wrong for two reasons; they are wrong on the law, and they are wrong because no right of appeal or protest was ripe in any event.

1. No statute of limitations bars a Constitutional taking

claim.

The applicable law is stated succinctly in the following passage from the Court's decision in *Tom E. Petersen v. The Port of Seattle*, 94 Wn.2d 479, 618 P.2d 67 (1980).

As early as *Aylmore v. Seattle*, 100 Wash. 515, 171 P. 659 (1918), this court recognized that a landowner's right to just compensation for a taking of his land is bottomed on Const. art. 1, § 16 (amendment 9), and may not be barred merely by the passage of time. In *Aylmore*, at 519, 171 P. at 660, we quoted with approval:

"Where the constitution either expressly, or as interpreted by the courts, requires compensation to be first made for property taken for public use, a law which casts the initiative upon the owner and requires him to prosecute his claim for compensation within a time limited or be barred, is invalid. When under such a constitution property is appropriated to public use without complying therewith, the owner's right to compensation is not barred, except by adverse possession for the prescriptive period." Lewis, *Eminent Domain* (3d ed.), § 966. The court reasoned that until title is lost by adverse possession, the owner "should have the right to maintain an action to recover that which represents the property itself." 94 Wn.2d at 484.

No statute of limitations bars the property owner's demand for compensation and, for the reasons set forth below, the City did not acquire title to the property by adverse possession.

2. Any appeal or protest was not ripe for review.

In addition, no statute of limitations began to run because King County retained complete discretion as to when, if ever, it would demand the deed and under what terms. That means no objection to the Covenant was ripe for review. *Saddle Mountain Minerals, L.L.C. v. Joshi*, 152 Wn.2d 242, 95 P.3d 1236 (2004). In *Saddle Mountain Minerals*, the Court held: “Before a property owner can raise a taking claim, the government entity charged with implementing the regulation must reach a final decision regarding the application of the regulations to the property at issue.” The Court relied, *inter alia*, on U.S. Supreme Court jurisprudence where the Court said:

a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

Citing, Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186, 105 S.Ct. 3108, 3116, 87 L.Ed.2d 126 (1985).

Here, King County retained discretion as to when, if ever, it would ask for the dedication. The Covenant states that the timing of the dedication “shall be determined by the King County.” CP 50. The City admits it retained the same discretion. CP 44 (Hansen dep. p. 39). The language of *Saddle Mountain Minerals* that an unconstitutional taking is

ripe for judicial review only **after there has been a final local decision** squarely supports Defendant's argument on this issue. King County never did make a final decision, which would include a demand for the deed and a decision as to how much compensation was due. Consequently, any objection to the Covenant was not ripe for judicial review.

This application of the principle stated in *Saddle Mountain Minerals* is consistent with the general rule that a cause of action accrues and the statute of limitations on that cause of action begins to run on the occurrence of the last element essential to the action. *Highline School District No. 401 v. Port of Seattle*, 87 Wn.2d 6, 548 P.2d 1085 (1976) – a “takings” case – citing, *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 543 P.2d 338 (1976). The last element essential to a claim in this case was the demand for the property with no offer of compensation, and that did not happen until the City of Woodinville made such a demand.

No statute of limitations bars the Defendant from demanding its right to compensation under Washington Constitution, Article I, § 16.

E. The City did not acquire title to the property by adverse possession.

In a decision the City of Woodinville should know well, the Court said,

The doctrine of adverse possession permits a party to acquire legal title to another's land by possessing the property for at least 10 years in a manner that is (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile.

Gorman v. City of Woodinville 175 Wn.2d 68, 72, 283 P.3d 1082

(2012). None of those facts exist in this case. The City never possessed or acted as if it possessed NE 173rd, let alone doing so openly and notoriously, without interruption, exclusively, or hostilely.

First, the City did not exist prior to 1993. Before 2001, which includes the period when the property was within unincorporated King County, NE 173rd dead ended at a landscaped berm at its west end. In that time, the roadway was used exclusively by the Woodinville City Center owners, tenants and vendors. CP 115. In 2001 the City asked the owner if they could connect 133rd NE to the Defendant's private roadway. The Defendant's property manager, Chuck Reidt, gave permission to the City as a neighborly accommodation. At best the use of NE 173rd was a shared use, but a shared use is not an exclusive use.

Thompson v. Schlittenhart, 47 Wn.App. 209, 734 P.2d 48 (1987).

Second, whatever public use was made was interrupted in 2009, when the City's Public Works Director concluded that NE 173rd had not been dedicated and it was, therefore, private property. And in 2009 when the City was faced with two demands for action arising from the condition of NE 173rd, the City declined to act and, instead, referred the complaints to the Fowler Partnership because they and not the City of Woodinville owned the property.

The City's assertion of adverse possession fails because it did not possess the property for at least 10 years in a manner that was (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile. Its claim is so devoid of any merit as to be frivolous.²

F. The fair market value of the south 50 feet of defendant's property is \$592,500.

It is undisputed that but for the City's unconstitutional application of the Covenant, the fair market value of the south 50 feet of Defendant's property is \$592,500. CP 158. Absent an issue of fact, the Court should have made a finding of fact as to the value of the property. CR 56(d).

² The City's effort to create an issue of fact as to adverse possession with the Declarations of Al and Donna Young (CP 354-362) and Mick Monkin (CP to be supplied) fails as immaterial in view of the undisputed evidence showing the City's use of the road was not uninterrupted, exclusive, or hostile for ten years.

G. Judgment should be entered in favor of Defendant with an award of costs and attorney fees.

The City seeks to acquire the Defendant's property, and the plain language of Washington Constitution Article I, § 16 and U. S. Constitution, Amendment V requires payment of compensation when the government takes private property for a public use. The City's demand is a condemnation of the property under RCW 8.12, *et seq.* As the value of the property is undisputed and the City offered nothing in compensation, Defendant seeks a judgment for \$592,500, and an award of attorney fees and costs pursuant to RCW 8.25.070. App. 3.

In addition, Appellant seeks an award of attorney fees and costs pursuant to RAP 18.1.

VI. Conclusion

In this country the government cannot take private property without paying compensation to the property owner. It is as basic a proposition as there is. The City of Woodinville has no right and it can recite no authority to avoid that basic proposition.

The trial court's Order Granting Summary Judgment to the City of Woodinville, Denying Summary Judgment to the Fowler Partnership, and Dismissing the Counterclaim should be reversed, and the court should remand this matter to the trial court for entry of judgment in favor

of the Fowler Partnership for the sum of \$592,500 and attorney fees and costs pursuant to RCW 8.25.070.

Respectfully submitted this 13th day of November, 2014.

SCHEDLER BOND, PLLC

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RCW 35.02.180

Ownership of county roads to revert to city or town — Territory within city or town to be removed from fire protection, road, and library districts.

The ownership of all county roads located within the boundaries of a newly incorporated city or town shall revert to the city or town and become streets as of the official date of incorporation. However, any special assessments attributable to these county roads shall continue to exist and be collected as if the incorporation had not occurred. Property within the newly incorporated city or town shall continue to be subject to any indebtedness attributable to these roads and any related property tax levies.

The territory included within the newly incorporated city or town shall be removed from the road district as of the official date of incorporation. The territory included within the newly incorporated city or town shall be removed from a fire protection district or districts or library district or districts in which it was located, as of the official date of incorporation, unless the fire protection district or districts have annexed the city or town during the interim period as provided in *RCW 52.04.160 through 52.04.200, or the library district or districts have annexed the city or town during the interim period as provided in **RCW 27.12.260 through 27.12.290.
[1986 c 234 § 17.]

RCW 36.88.310

Acquisition of property — Eminent domain.

All land, premises or property necessary for right-of-way or other purposes in the construction or improvement of any county road, including bridges, sidewalks, curbs and gutters and the drainage facilities therefor, under this chapter may be acquired by the county acting through its board of county commissioners, either by gift, purchase or by condemnation. In the event of any exercise of the power of eminent domain, the procedure shall be the same as is provided by law for the securing of right-of-way for county roads. The title to all property acquired for any construction or improvement under this chapter shall be taken in the name of the county. The county commissioners in any eminent domain action brought to secure any property for construction or improvement under this chapter may pay any final judgment entered in such action with county road funds and take possession of the particular property condemned. In the event of any such payment the county commissioners may require that the county road fund be reimbursed out of the particular county road improvement fund of the district for which the property was acquired.

[1963 c 4 § 36.88.310. Prior: 1951 c 192 § 31.]

RCW 8.25.070

Award of attorney's fees and witness fees to condemnee — Conditions to award.

(1) Except as otherwise provided in subsection (3) of this section, if a trial is held for the fixing of the amount of compensation to be awarded to the owner or party having an interest in the property being condemned, the court shall award the condemnee reasonable attorney's fees and reasonable expert witness fees in the event of any of the following:

(a) If condemnor fails to make any written offer in settlement to condemnee at least thirty days prior to commencement of said trial; or

(b) If the judgment awarded as a result of the trial exceeds by ten percent or more the highest written offer in settlement submitted to those condemnees appearing in the action by condemnor in effect thirty days before the trial.

(2) The attorney general or other attorney representing a condemnor in effecting a settlement of an eminent domain proceeding may allow to the condemnee reasonable attorney fees.

(3) Reasonable attorney fees and reasonable expert witness fees authorized by this section shall be awarded only if the condemnee stipulates, if requested to do so in writing by the condemnor, to an order of immediate possession and use of the property being condemned within thirty days after receipt of the written request, or within fifteen days after the entry of an order adjudicating public use whichever is later and thereafter delivers possession of the property to the condemnor upon the deposit in court of a warrant sufficient to pay the amount offered as provided by law. In the event, however, the condemnor does not request the condemnee to stipulate to an order of immediate possession and use prior to trial, the condemnee shall be entitled to an award of reasonable attorney fees and reasonable expert witness fees as authorized by subsections (1) and (2) of this section.

(4) Reasonable attorney fees as authorized in this section shall not exceed the general trial rate, per day customarily charged for general trial work by the condemnee's attorney for actual trial time and his or her hourly rate for preparation. Reasonable expert witness fees as authorized

in this section shall not exceed the customary rates obtaining in the county by the hour for investigation and research and by the day or half day for trial attendance.

(5) In no event may any offer in settlement be referred to or used during the trial for any purpose in determining the amount of compensation to be paid for the property.
[1984 c 129 § 1; 1971 ex.s. c 39 § 3; 1967 ex.s. c 137 § 3.]

No. 72417-7

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

CITY OF WOODINVILLE,

Plaintiff/Respondent,


v.

THE FOWLER PARTNERSHIP,

Defendant/Appellant.

**CERTIFICATE OF SERVICE OF
APPELLANT'S BRIEF**

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I certify that I mailed a true and correct copy of the Appellant's Brief and this Certificate of Service to be served on Greg Rubstello, attorney for Plaintiff/Respondent, at Ogden Murphy Wallace, PLLC 901 Fifth Avenue, Suite 3500, Seattle, WA 98164-2008, postage prepaid, on November 13, 2014.

DATED this 13th day of November, 2014.

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