No. 100546-6

SUPREME COURT,
OF THE STATE OF WASHINGTON

(Court of Appeals No. 82073-7-I)
(Consolidated with No. 82074-5-I)

Paul Michel, et al.,

Petitioners,

v.

The City of Seattle,

Respondent.

CITY OF SEATTLE'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioners disagree with the Court of Appeals' decision in this case, but their petition fails to show that any of the RAP 13.4 criteria are met that would justify review by this Court. The Court of Appeals' decision is sound, well-reasoned, and creates no conflict with any decision by the Supreme Court or the Court of Appeals. The decision does not involve an issue of substantial public interest that should be determined by the Supreme Court. Respondent City of Seattle (the "City") respectfully requests that the Court deny the petition.

Petitioners Paul and Ann Michel, John Merriam and Brenda Kaye Walker, (homeowners), are attempting to convert public land used for the distribution of electricity, and a recreational trail, to their own private use. In Washington, adverse possession does not extend "to lands held for any public purpose." RCW 7.28.090. Since the legislature enacted that prohibition in in 1893, this Court and the Court of Appeals have rejected adverse possession claims against lands held by

municipalities for any public purpose. The Court of Appeals' decision correctly applied this longstanding principle of adverse possession law.

II. IDENTITY OF RESPONDENT

The City of Seattle is the Respondent in this case. Throughout their petition, the homeowners inaccurately state that the Respondent in this case is "respondent Seattle City Light." Pet. at 1, 3, *passim*. The Respondent in this case, and the owner of the land at issue, is the City of Seattle. Seattle City Light owns no real property in its name, and all real property rights at issue are held by the City of Seattle. The homeowners continue this practice even though this distinction was noted numerous times below.

III. COUNTERSTATEMENT OF THE ISSUES

1. Should discretionary review be denied where the Court of Appeals' decision is consistent, rather than in conflict, with Supreme Court and Court of Appeals' decisions that hold that

land held for any public purpose is immune to adverse possession under RCW 7.28.090.

2. Should discretionary review be denied where the Court of Appeals' decision is consistent, rather than in conflict, with Supreme Court and Court of Appeals' decisions that hold that the actual and exclusive elements of adverse possession need only be of the character that a true owner would assert in view of the land's nature and location.

3. Should discretionary review be denied where the Court of Appeals' decision does not raise an issue of substantial public interest that should be determined by the Supreme Court, but instead applies existing precedent and protects the public interest in having municipal lands remain in public hands for public purposes.

IV. COUNTERSTATMENT OF THE CASE

The Court of Appeals' opinion does an excellent job of setting forth the complex facts and procedural history of this case. Op. at 2-5. The City concurs in Division I's statement of

facts. The homeowners seek to re-argue the facts, often mischaracterizing them. Only a few factual points bear emphasis as they are relevant to the homeowners' argument that the Court of Appeals erred in holding that the City took possession of all the disputed areas by adverse possession.

The homeowners argue, with no citation to the record, that the City "claimed title by adverse possession—even while conceding that it had never physically possessed the Merriam and Michel front yards . . . ." Pet. at 2. This statement is incorrect, and the City did not make this concession. In fact, the City provided photographic evidence that demonstrated its physical possession of the homeowners' fenced yards. The City's and the homeowners' pictures show that the City's poles and power transmission lines are located in and directly over the disputed areas that the homeowners claim as their yards. CP 6, 59, 147, 492, 523, 998, 1023, 1268.

The homeowners also incorrectly claim that the City's "transmission wires or poles," are "located east of petitioners'

fences lines." Pet. at 6-7. This statement is contradicted by the homeowners' own photograph, shown below, which clearly shows that the poles and transmission wires are located west of the homeowners' fence lines and within the disputed areas.


(CP1268)

This statement is also contradicted by the numerous photographs in the record that show the City's transmission lines directly over the homeowners' fenced yards. CP 6, 59, 147, 492, 523, 998, 1023.

The homeowners also inaccurately describe the basis of the City's adverse possession claim. Pet. at 9-10. The City's adverse possession claim was based on its poles and

transmission lines, permits, drawings, surveys, appraisals, and removal of encroachments that all reflected how a property owner would possess Tract 44 given its nature and circumstances. CP 707-708; 730-737; 743-747; 758; 773-774; 812-822; 848-849; 856-860; 889-913; 974; 1069-1070. The homeowners incorrectly state that they had exclusively occupied the disputed area. Pet. at 9-10. As noted above, the City's poles and transmission wires are located on the disputed area. CP 6, 59, 147, 492, 523, 998, 1023, 1268.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

Although the homeowners provide little analysis for how they have met the grounds for review, they cite RAP 13.4(b)(1), (2) and (4). Pet. 14-16, 24-25. An examination of the decisions cited by the homeowners demonstrates that there are no decisions in conflict with the Court of Appeals' decision.

While the Court of Appeals' decision involved an issue of substantial public interest, the Court of Appeals resolved the

issue by correctly applying existing Supreme Court precedent, so the petition does not involve "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). Review is unwarranted on any of these grounds.

A. The Court of Appeals' decision that RCW 7.28.090 prohibits adverse possession against land held for a public purpose follows Supreme Court and Court of Appeals' precedent and creates no conflict warranting review.

In 2012, this Court held that: "A party may not claim adverse possession of property held or controlled by a municipality for public use." *Kiely v. Graves*, 173 Wn.2d 926, 935–36, 271 P.3d 226 (2012) (citing RCW 7.28.090; *Gustaveson v. Dwyer*, 83 Wn. 303, 304–05, 145 P. 458 (1915)). The Court noted the statute's important role in safeguarding lands held for a public purpose, explaining that: "To decide otherwise would encourage encroachments upon public easements and hinder public use." Id. at 940. The Court of Appeals' decision follows this Court's precedent.

1. No Washington appellate court has ever held that RCW 7.28.090 does not apply to adverse possession claims brought under RCW 4.16.020.

The bulk of the petition's legal argument is devoted to claiming that RCW 7.28.090's immunization of lands held for a public purpose only applies to adverse possession claims brought under RCW 7.28.070 (the payment of taxes statute) or RCW 7.28.080 (the vacant land statute). Pet. at 16-24. The homeowners cite no decisions in support of this restrictive application of RCW 7.28.090. The Court of Appeals' holding that: "RCW 7.28.090 can apply to adverse possession claims brought against a government entity under RCW 7.28.070, .080, or RCW 4.16.020" does not conflict with any Supreme Court of Court of Appeals decision. Op. at 13.

The homeowners accuse the Court of Appeals of rewriting the statute and disregarding its plain language. Pet. at 17. If that was the case, then the homeowners must accuse the Supreme

Court and every Court of Appeals' panel of doing the same to the statute. Every Washington court that has considered RCW 7.28.090, has interpreted the statute in the same manner as the Court of Appeals did in its decision.

As the Court of Appeals' decision notes, Washington Courts have always held that RCW 7.28.090 applies to adverse possession claims "even when a plaintiff does not rely on either RCW 7.28.070 or .080." Op. at 11-14 (citing *Skinner v. McCrackan* 93 Wash. 43, 45-46, 159 P. 977 (1916); *Kiely v. Graves*, 173 Wn.2d 926, 271 P.3d 226 (2012)); *Pioneer National Title Insurance Company v. State*, 39 Wn. App. 758, 695 P.2d 996 (1985)*; Williams Place, LLC v. State ex rel. Dep't of Transp.*, 187 Wn. App. 67, 98, 348 P.3d 797 (2015); *See also Neighbors v. King Cty.*, 15 Wn. App. 2d 71, 83, 479 P.3d 724 (2020).[1]

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[1] The Court of Appeals' decision persuasively points out that the homeowners' suggested interpretation would allow an adverse possession plaintiff that would be blocked under RCW 7.28.090

Unlike the Court of Appeals' decision, the homeonwers' argument is in direct conflict with the Supreme Court's decision in *Kiely v. Graves*, 173 Wn.2d 926, 271 P.3d 226 (2012). In *Kiely*, this Court held that "RCW 7.28.090 prohibited the Kielys from obtaining title to the alley through adverse possession." *Id.* at 940. Neither RCW 7.28.070 nor .080 were the basis for adverse possession claims at issue in *Kiely*. In fact, although not mentioned in this Court's decision, the Kielys claimed title based on RCW 4.16.020, the same statute as the homeowners in this case. *See Kiely* v. *Graves*, Brief of Appellants., 2010 WL 6893553 ("The Kielys conceded that to meet their burden, they had to tack their predecessors' adverse use onto their time of possession to establish the necessary time under RCW 4.16.020.").

The homeowners' only argument against the numerous cases applying RCW 7.28.090 to all adverse possession claims

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to simply wait an additional 3 years and proceed under RCW 4.16.020 instead. Op. at 13. That would be an absurd outcome.

is to state in a footnote that *Kiely* involved a public alley. Pet. at 24 n.2. This distinction has nothing to do with whether RCW 7.28.090 applies to adverse possession claims brought under RCW 4.16.020. Nothing in this Court's *Kiely* decision indicates that its legal principle is confined to public alleys. This Court held that: "A party may not claim adverse possession of **property held** or controlled by a municipality for public use." *Kiely* 173 Wn.2d at 935–36 (citing RCW 7.28.090) (emphasis added). This Court's holding applies to all municipal property, not just public alleys. *Id.*

Moreover, other decisions applying RCW 7.28.090 did not involve public alleys. In *Neighbors v. King Cty.*, the court applied RCW 7.28.090 to a 10-year adverse possession claim when the property at issue was a former railroad corridor, the exact type of property at issue in this case. 15 Wn. App. 2d 71, 74, 479 P.3d 724 (2020).

This Court did not err in applying RCW 7.28.090 to the adverse possession claim brought under RCW 4.16.020 in

Kiely. In this case, the Court of Appeals did not err, or create a conflict with any decisions in applying it to homeowners' adverse possession claim.

2. No Washington Court has ever held that RCW 4.16.160 supersedes or conflicts with RCW 7.28.090.

The homeowners claim that the "Court of Appeals inexplicably failed to discuss or even cite the controlling statute, RCW 4.16.160 . . . ." Pet. at 20. The homeowners' confusion is unwarranted.

Pioneer National Title Insurance Company, is the only decision that has ever discussed both RCW 7.28.090 and RCW 4.16.160. 39 Wn. App. 758, 761, 695 P.2d 996 (1985). In that decision, the court merely cited both provisions as barring adverse possession against the state. It did nothing to indicate that RCW 4.16.160 was the "controlling statute" or superseded RCW 7.28.090.

There is nothing in the text of RCW 4.16.160's prohibition that "no claim of right predicated upon the lapse of time shall

ever be asserted against the state" that would limit the separate and additional protection provided by RCW 7.28.090 to "lands held for any public purpose".

Every other case cited above that applied RCW 7.28.090 did not discuss or cite RCW 4.16.160. There is no need to cite or discuss RCW 4.16.160 because RCW 7.28.090 provides immunity from adverse possession for "lands held for any public purpose." If the land is held for a public purpose, no further analysis is necessary.[2]

3. The Court of Appeals' decision creates no conflict with decisions that had applied a governmental vs. proprietary test to adverse possession claims.

The homeowners next argue that the Court should have decided whether the City held the land at issue in a governmental or proprietary capacity. Pet. at 22 (citing *Com. Waterway Dist.*

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[2] The homeowners only challenged whether RCW 7.28.090 applied before the Court of Appeals, and therefore waived any challenge to whether the property in this case was held for a public purpose.

No. 1 of King Cty. v. Permanente Cement Co., 61 Wn.2d 509, 512–13, 379 P.2d 178 (1963); *Gorman v. City of Woodinville*, 175 Wn. 2d 68, ¶ 6, 72, 283 P.3d 1082 (2012); *City of Edmonds v. Williams*, 54 Wn. App. 632, 634, 774 P.2d 1241(1989). Importantly, none of those decisions involved a defense by the municipal landowner that it was immune from adverse possession under RCW 7.28.090.

The Court of Appeals correctly determined that RCW 7.28.090 does not require it "to label land uses as 'proprietary' or 'governmental' to decide whether RCW 7.28.090 shields municipal lands from claims of adverse possession." Op. at 16. This determination follows this Court's decision in *Kiely*, which made no mention of "governmental" or "proprietary." 173 Wn.2d 926, 271 P.3d 226 (2012).

Further, even if the governmental vs. proprietary test was relevant, the Court of Appeals decision does not conflict with how that test has been applied in any adverse possession case. The homeowners' argument to the Court of Appeals was that the

governmental vs. proprietary test from *Okeson v. City of Seattle,* 150 Wn.2d 540, 78 P.3d 1279 (2003) could be applied to adverse possession cases. This argument directly conflicts with this Court's decision in *Lakehaven Water & Sewer Dist. v. City of Fed. Way*, which held that in evaluating whether a function is governmental or proprietary, the "applicable rules in any given case will depend on the relevant area of the law under consideration." 195 Wn.2d 742, 765, 466 P.3d 213 (2020) (and noting that there appear to be at least six different tests for evaluating whether a function is governmental or proprietary).

The test in *Okeson* addresses whether there has been a violation of the local government accounting act, RCW 43.09.210, and has no relevance in adverse possession cases. In decisions that did apply a "governmental" vs. "proprietary" test, the only decisions to ever find that municipal land was held in a proprietary capacity did so because the municipality "had abandoned and forgotten about and had done nothing to sustain any title, or ownership, or control, of the land in question." *Sisson*

v. Koelle, 10 Wn. App. 746, 751, 520 P.2d 1380 (1974); *See also Kesinger v. Logan*, 51 Wn. App. 914, 919, 756 P.2d 752 (1988). In this case, the City did not forget or abandon its land. The provided substantial evidence of its active use, ownership and control.

The Court of Appeals' decision harmonizes, rather than conflicts with those adverse possession cases by noting that: "abandoned or forgotten lands put to no actual or planned use at all do not provide public benefits." Op. at 18 (citing *Sisson*, 10 Wn App. at 751).

B. The Court of Appeals' straightforward application of RCW 7.28.090 is not an issue of substantial public interest that should be determined by the Supreme Court.

The homeowners argue that: "This decision presents an issue of substantial public interest justifying this Court's review, RAP 13.4(b)(4), ..." Pet. at 25. The homeowners misread RAP 13.4(b)(4). The fact that this case contained an issue of substantial public interest is not sufficient to meet this ground for

review. The criterion is whether the decision "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4).

The issue of substantial public interest was to prevent private landowners from arguing that they could adversely possess land held for a public purpose. Accepting these arguments would have put public land, and affordable, reliable electricity, at risk. The Court of Appeals' decision has resolved this issue of substantial public interest according to Supreme Court precedent and is binding on all trial courts.

As the Court of Appeals' decision follows Supreme Court precedent and the legislature's intent to protect public lands, there is no need for this issue to be determined by the Supreme Court.

C. The Court of Appeals' decision on the actual and exclusive elements of adverse possession follows Supreme Court and Court of Appeals precedent and creates no conflict warranting review.

Although the homeowners cite RAP 13.4(b)(1) and (2), they do not provide a single case that conflicts with the Court of Appeals' decision. Pet. at 27-32. Instead, the homeowners mischaracterize the decision as "eliminating the requirement that an adverse possessor actually and exclusively possess the claimed land." Pet. at 31. The Court of Appeals' decision did not eliminate any requirement for adverse possession claims. It simply applied the requirement that in deciding the actual and exclusive possession elements, "[t]he ultimate test is the exercise of dominion over the land in a manner consistent with actions a true owner would take." Op. at 7 (citing *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 759, 774 P.2d 6 (1989).

The homeowners are not citing the correct test for "actual possession" in Washington. Washington law does not require actual physical occupation of every square foot of land to obtain adverse possession of a parcel. However, even if the

homeowners' concept of "physical possession" were required for the disputed areas, the City demonstrated that it has physical possession of the disputed areas.

As noted above, homeowners' claim that the City did not possess the disputed areas "at all" is inaccurate. Pet. at 27. It is undisputed that the photographic evidence shows that the City's poles and transmission wires located in and over the disputed areas that the homeowners claim as their yards. CP 6, 59, 147, 492, 523, 998, 1023, 1268. It is also undisputed that the power lines were in place prior to 1951, and through current day. CP 1325-1326, 1347; 523. This evidence demonstrates that the Court of Appeals' decision correctly found that the City had met the requirement that it actually possess the disputed areas. Op. at 7-8.

The homeowners, unable to find a decision in conflict with the Court of Appeals' decision, suggest that it conflicts with a legal treatise. Pet. at 27 (citing WILLIAM B. STOEBUCK AND JOHN W. WEAVER, WASHINGTON PRACTICE: REAL

ESTATE: PROPERTY LAW § 8.9 (2d ed. 2004)). Leaving aside the fact that RAP 13.4(b)(1) and (2) require a conflict with a decision, there is no conflict with this legal treatise.

The Court of Appeals' decision followed existing decisions regarding adverse possession, which hold that: "The necessary use and occupancy need only be of the character that a true owner would assert in view of its nature and location." *Chaplin v. Sanders*, 100 Wn.2d 853, 863, 676 P.2d 431 (1984) (citing *Krona v. Brett*, 72 Wn.2d 535, 539, 433 P.2d 858 (1967)). The Court of Appeals correctly noted that the homeowners cited "no authority requiring physical occupation of the entirety of a disputed property to prove 'actual' and 'exclusive' use." Op. at 7.

The homeowners selectively cite 17 Wash. Prac., § 8.9 in an attempt to create a requirement that an adverse possessor be in physical occupation of every square foot of land. Pet. at 27, 30. The homeowners do not cite the part of the treatise on this issue that explains that: "**The best general test of actual**

possession, subscribed to by a number of Washington decisions **is this: Considering the nature of the land and the area where it is situated, were the claimant's acts on the ground the kind of use a true owner would make of such land**?" Stoebuck & Weaver, 17 Wash. Prac., Real Estate § 8.19 (2d ed 2004) (emphasis added) (citing *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984)).

The homeowners' argument regarding exclusivity fares no better. The Court of Appeals' decision explained that: "Although possession of tract 44 was not literally exclusive, as the homeowners would require, the record shows the City managed the land as a true owner would under the circumstances." Op. at 8. The Court applied the correct exclusivity test, holding that "Adverse possession must be as exclusive as one would expect of a titled property owner under the circumstances." Op. at 7 (Citing *Harris v. Urell*, 133 Wn. App. 130, 138, 135 P.3d 530 (2006).

The homeowners do not provide any explanation for how this is conflict with a Supreme Court or Court of Appeals decision. The homeowners simply disagree with the Court of Appeals' decision that the City had exclusive control of the disputed areas. This disagreement is based on the homeowners' factual inaccuracies, and it is not a valid ground for review under RAP 13.4(b)(1), (2), or (4).

D. The Court of Appeals' decision on the actual and exclusive elements of adverse possession is not an issue of substantial public interest that should be determined by the Supreme Court.

The homeowners claim that the Court of Appeals' decision to eliminate "the requirement that an adverse possessor actually and exclusively possess the claimed land" is an issue of substantial public interest. Pet. at 31-32. As explained above, the Court of Appeals' decision made no changes to the requirements of adverse possession law. Therefore, there is no issue of substantial public interest that needs to be determined by the Supreme Court.

VI. CONCLUSION

RCW 7.28.090 prohibits adverse possession of lands held for any public purpose. Adverse possession only requires actual and exclusive possession be of the character a true owner would assert in view of the land's nature and location. The Court of Appeals' decision is not in conflict with any Supreme Court or other Court of Appeals decision, nor does it raise an issue of substantial public interest that should be decided by this Court. The City respectfully asks this Court to deny the petition.

I certify that this document is in 14-point Times New Roman and contains 3,553 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

RESPECTFULLY SUBMITTED this 4th day of February 2022.

Ann Davison
Seattle City Attorney

By: */s/ Andrew C. Eberle*
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Assistant City Attorney
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I filed this document via the Clerk's electronic portal filing system, which should cause it to be served by the Clerk on all parties, and I emailed a courtesy copy of this document to:

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DATED this 4th day of February, 2022, at Seattle, Washington.

s/ Andrew C. Eberle
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SEATTLE CITY ATTORNEY'S OFFICE - CONTRACTS AND UTILITIES

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