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No. 70500-8

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

KEITH L. HOLMQUIST and KAY BURDINE HOLMQUIST, f/k/a KAY BURDINE, husband and wife; and FREDERICK A. KASEBURG, a single man,

Respondents,

v.

KING COUNTY, a political subdivision of the State of Washington; and CITY OF SEATTLE, a municipal corporation,

Appellants.

AMICUS CURIAE BRIEF OF FRIENDS OF CEDAR PARK NEIGHBORHOOD AND SEATTLE SEA KAYAK CLUB

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I. INTRODUCTION

Friends of Cedar Park Neighborhood and the Seattle Sea Kayak Club (together, the "Community Groups") write in support of King County and the City of Seattle's ("appellants") appeal of the trial court's ruling quieting title to a tiny, public, Lake Washington waterfront park, called here the "N.E. 130th street end park," in favor of three individuals ("respondents") who own adjacent waterfront properties.

This case is not simply a technical property ownership dispute between King County or the City of Seattle and three individuals. It is first and foremost a case of three neighboring owners of already very valuable waterfront properties seeking windfall profits by taking away a vital community resource that has been understood by King County, the City of Seattle, the Community Groups, the respondents' predecessors in interest, and the real estate agents who sold respondents their properties, to belong to the public since 1926. Indeed, before respondent Kaseburg made his recent purchase of one adjacent property, not even the Holmquist respondents – residents for 15 years -- had ever given any indication that they believed they had a claim to the public N.E. 130th street end park.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Community Groups represent the "public" for whose benefit this street end was dedicated in 1926, when Puget Mill Company first transferred the N.E. 130th street end to King County. The Dedication read:

> [Puget Mill Company] dedicate[s] to the use of the public forever all the streets shown hereon and the use thereof for all public purposes . . . [CP340][1]

The Friends of Cedar Park Neighborhood ("FCPN") is a grassroots, nonprofit, 501(c)(3) organization dedicated to protecting and preserving the community values of the neighborhood in which the street end park subject to this litigation is located. Members live in the neighborhood. For many decades they and their predecessors have made use of the N.E. 130th street end park, for swimming, launching inner tubes or other small craft, or just sitting on the shore enjoying the lake. FCPN regularly addresses a variety of land use issues of broad applicability in Seattle and nearby areas, including building on unstable slopes and other issues of local concern.

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[1] The City of Seattle and King County filed a Designation of Clerk's Papers under two separate appellate numbers before the appeals were consolidated. As such, the trial court provided two sets of Clerk's Papers to the Court of Appeals. All references to Clerk's Papers ("CP") in this brief refer to the Clerk's Papers requested by the City, under original appellate number 70500-8.

The Seattle Sea Kayak Club ("SSKC") is an association of kayaking enthusiasts who live in or around Seattle and kayak the area's lakes and saltwater. Members range from whole families of kayakers, including children, to competitive athletes. For decades, SSKC members have made use of Seattle street end waterfront access points -- including the N.E. 130th street end park -- to launch their kayaks. These little parks are important to kayakers because there is very limited water access in Seattle for launching small, hand powered boats.

The interest of the entire Seattle community in the outcome of this suit and preservation of water access points at Seattle street ends can be also be seen in stories broadcast by local network affiliates: http://mynorthwest.com/11/2339568/Land-Grab (KIRO radio); http://www.komonews.com/news/local/POCKET-PARK-LEGAL-BATTLE-LAKE-CITY-PRIVATE-PUBLIC.html?tab=video&c=y (KOMO TV).

III. STATEMENT OF THE CASE

The Community Groups' identity and interests are stated above. In addition, the Community Groups believe that most of the case is

accurately depicted in appellants' opening briefs and will not restate it here.[2]

The Community Groups add to the appellants' statements of the case the following: All parties have raised equitable concerns, and the Community Groups agree that these will be significant if the appeal is not decided solely on the law. In fact, they are so significant that respondents attempted to keep those with an equitable interest in ownership of the park from participating in the lawsuit. Moreover, respondents have obtained substantial economic benefit by waiting over 77 years to make their claim for the first time, in 2012.[3]

Respondents kept first the City of Seattle, and then the public, from knowing of this suit until it was well underway or, in the case of the Community Groups, until after it reached summary judgment. This allowed, for example, respondents' false claim that the Holmquists performed "the only known maintenance in the last 15 years" to go

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[2] Puget Mill Company's initial and subsequent actions to preserve the Street End park for the public, as well as similar attempts by respondents' predecessors in interest, Miller and Shotwell, are described in detail in the briefs filed by the City of Seattle and King.

[3] Respondents assert that the last relevant event was a deed recorded in 1935. Respondents' brief, Introduction, p. 1. This was 77 years before this suit was filed. The City of Seattle annexed the relevant area in 1954, or 58 years before this suit was filed.

unchallenged by other individuals who also voluntarily performed maintenance.

Members of the Community Groups have maintained this property starting long before any of the respondents purchased their property and continuing until the present. Neighbors (other than respondents) and kayakers, as well as the City of Seattle, have long cleared trash from the area, and kayakers have cleared floating logs and other objects that could pose a danger to boaters or swimmers entering at the park.

IV. CONCISE STATEMENT OF ISSUES ADDRESSED BY THEAMICUS CURIAE

The principal issue addressed by the Community Groups is stated by King County simply as "The Trial Court's Ruling is Inequitable." Respondents argue the opposite position.[4]

V. ARGUMENT

A. Respondents Attempted to Keep Facts Bearing on the Equities from the Trial Court by Failing to Give Notice of the Suit to the City of Seattle or Neighbors, and by Attempting to Prevent Park Users from Learning of the Lawsuit.

The history of this case is unusual in that it was initiated without notice to the parties most affected by the relief sought, *i.e.*, the City of

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[4] Appellant King County Opening Brief Sec. IV.B, p. 11. Respondents make this an issue in their Reply Brief, Sec. IV.C, p. 28: "There is nothing inequitable in quieting title in favor of Kaseburg and Holmquist."

Seattle and the people who had been and were openly using the N.E. 130th street end park for decades. First, the City of Seattle was given no notice of the lawsuit. The City did not even learn of the suit until January 2013, after it had been underway for six months and discovery complete. Seattle's motion to intervene was then vigorously opposed by respondents.[5] Even then, there was no notice to the neighbors, as further described below.

For 58 years, King County, Seattle, and the general public believed that Seattle was the park's owner. That no notice was given to the city should be deemed an attempt to prevent those with, at the very least, an equitable interest in the park from participating in the lawsuit. The city learned of the suit only after erecting a sign on the property stating its intent to make improvements to the park. CP505.

Even after filing suit, respondents never told any neighbor using the N.E. 130th street end park that they had made a claim to ownership and, in fact, went to court to prevent notice to the public. The first indication the Community Groups had of the dispute – but not that a suit had been filed – was when the City of Seattle put up a second sign in

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[5] City of Seattle Motion to Intervene (3/21/2013), CP98, attached Declaration of Kelly N. Stone, CP107; Reply by City of Seattle (3/28/13), CP190, attached Declaration of Kelly N. Stone, CP196.

January 2013, stating that there was a possible problem with regard to the intended improvements.[6] This did not, however, inform the Community Groups that a lawsuit was already well underway.

After seeing the second sign, neighbors began asking the City what the problem was. It was not until mid-June that the Community Groups learned about the suit and that summary judgment had already been granted two months earlier. They also learned that respondents had sought a court order to force the city to remove even the ambiguous sign described above. The trial court denied this motion on July 9, 2012.[7]

Nonetheless, the damage was done. Summary judgment had been entered without the possibility of any participation of the people most affected by the outcome, the longtime users of the N.E. 130th street end park. As a result, respondents were able to make unfounded and untruthful claims about their supposed exclusive maintenance of the N.E. 130th street end park without fear of contradiction by the Community Groups. It is only because the second sign alerted park users that something was amiss that the Community Groups are able to be heard even at this late date.

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[6] The sign posted in January 2013 read: "The City of Seattle was informed that possible street vacation of this site occurred several decades ago and needs time to thoroughly understand what actions may have occurred, and the impact on city jurisdiction of this site." CP486.

[7] Order Denying Motion re: Supersedeas Bond (July 19, 2013), CP517.

B. Giving Respondents Title to the N.E. 130th Street End Park Would be Inequitable.

While arguing that the case can be decided on purely legal grounds, both appellants and respondents have made equitable concerns an issue on appeal. The Community Groups have an important interest in adding to the discussion of equitable concerns, in this court or on remand to the trial court.

1. It would be inequitable to allow respondents, without any good cause shown, to reap the windfall profits and other benefits of waiting 77 years to make their claim of ownership

It is undisputed that the original intent of the land grant was to give the N.E. 130th street end to the public. As noted above, when Puget Mill Company transferred the N.E. 130th street end to King County in 1926, the Dedication read:

> [Puget Mill Company] dedicate[s] to the use of the public forever all the streets shown hereon and the use thereof for all public purposes . . . [CP340]

Respondents admit that all parties to the original transactions, including Miller and Shotwell in 1932, intended a public use of the N.E. 130th street end.[8] It is also undisputed that for 58 years and continuing

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[8] Respondents' brief p. 6, Restatement of the Case, Sec. III.A.3, p. 6.

until this lawsuit was started in 2012, no one questioned Seattle's ownership of the N.E. 130th street end park.[9]

Respondents (as successors in interest to all previous owners of the adjacent properties) have benefited for decades of not claiming otherwise. They avoided paying any property taxes. They denied the city any opportunity to consider negotiating a settlement to quiet title to the N.E. 130th street end park when property values were low. They avoided any risk of the city instituting condemnation proceedings while the value of the N.E. 130th street end park may have been low. Finally, the current respondents benefited from paying a purchase price for their properties that did not include any market expectation that an interest in the N.E. 130th street end park was included.

Respondents have not claimed that they purchased their properties with any expectation that an extremely valuable share in the N.E. 130th street end park was included in the purchase price. Had the Community Groups been able to participate in the trial court proceeding, they could have introduced evidence and testimony from real estate brokers that the property listings and sales made no mention that the property included the N.E. 130th street end park. This court could also reasonably infer that this

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[9] Seattle opening appeal brief, p. 8 and record citations indicated there.

was the case, since respondents would have had a very strong interest in providing any contrary evidence to the trial court, and they did not.

Nor have respondents introduced any evidence that any predecessor in interest made a claim for the park to Seattle in the past 58 years. No facts have changed nor has new evidence been found. This case could have been brought against King County in 1935, or against Seattle in 1954, as easily as today. Respondents do not claim otherwise. They do not, and could not, offer any good cause or equitable justification for upsetting a long-standing assertion of ownership and pattern of public usage based on the intent of the original parties to the transaction. The original parties' uncontradicted expectation was that the public would continue its use of the N.E. 130th street end park.

Finally, the Community Groups note that respondents conclude their equitable argument with an out of context quotation from the intermediate, appellate court decision in *Tomlinson v. Clarke.*[10] Respondents imply from the quotation that the court there decided that the referenced recording statute was to be applied retroactively and therefore other changes in the law should be applied retroactively as well.

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[10] Respondents' brief p. 31, citing 60 Wn. App. 344, 352, 803 P.2d 828 (1991).

Seattle and King County have admirably contested respondents' legal claims to retroactive application of changes in the law. The Community Groups would only add that the Washington Supreme Court affirmation in *Tomlinson* gave a different statement of equitable reasoning than the respondents imply.

The Supreme Court described a purposeful avoidance of recording: "In essence the Whitsells took a calculated risk by not recording their real estate contract [for less than four years]. By so doing, . . . they failed to give notice to subsequent purchasers."[11]

Unlike in *Tomlinson*, there is no credible allegation here of bad faith or devious motives on the part of King County or Seattle at any time. It is also clear, and again unlike *Tomlinson*, that all parties to the original transactions tried their best, perhaps with mistakes in paperwork, to insure that the N.E. 130th street end park would be public forever. Thus, *Tomlinson* adds nothing at all to respondents' equitable claim for a retroactive application of a change in the law occurring many decades after the original property transfers.

In addition, one might see the respondents here in an analogous equitable position closer to that of the Whitsells in *Tomlinson.*

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[11] 118 Wn.2d 498, 625 P.2d 706 (1991).

Respondents (and their predecessors in interest) took a risk in waiting 77 years to make their claim and should not be rewarded in equity for that delay.

2. No weight should be given to respondents' claims that they maintained the N.E. 130th street end park

It is hard to see (and respondents do not explain) how this argument is even relevant. Good citizens everywhere volunteer their time and energy to help maintain public property. Before now, the Community Groups' members who volunteered their own time to maintain the N.E. 130th street end park had never heard anyone claim that this could give them some ownership interest in the Street End park.

Respondents claim that the Holmquists performed "the only known maintenance in the last 15 years."[12] This is simply false. In addition to the City of Seattle, members of the Community Groups have maintained this property starting long before the Holmquists purchased their property and continuing during the time the Holmquists claim to have done the "only" maintenance.[13]

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[12] Respondents' brief, "Restatement of Facts," Sec. III.A.5, p. 7.

[13] It is clear from the city's briefs and supporting documents that the city did not ignore the maintenance or potential for improvement of the N.E. 130th street end park. *See, e.g.*, appellant City of Seattle's reply brief, pp. 12-13 and record citations given there.

As noted above, the Community Groups were unaware of this suit until entry of summary judgment. Had they been notified of the suit, and had they thought the trial court would even consider respondents' irrelevant "equitable" claim, they would have offered to provide the City of Seattle and King County evidence of decades of citizen maintenance efforts from numerous witnesses. They can provide this evidence if the suit is remanded to the trial court.

VI. CONCLUSION

The Community Groups respectfully request that this court reverse the trial court's order of summary judgment in favor of respondents and direct the trial court to enter an order quieting title in favor of the City of Seattle, as requested by the appellants. Alternatively, if this court remands the case to the trial court for further proceedings, the Community Groups request that the court direct the trial court to take into account equitable concerns, including evidence regarding the historical, unchallenged public use of the N.E. 130th street end park, the failure of respondents to make their claim for 77 years without cause, the benefits reaped by respondents from their delay, the windfall profits that respondents would receive if they obtained the relief they seek, and, if the court considers it relevant, evidence of maintenance of the N.E. 130th street end park.

Dated this 3rd day of January, 2014.

Respectfully submitted,

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