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No. 70500-8

DIVISION I OF THE COURT OF APPEALS FOR 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,

vs.

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

Appellants.

OPENING BRIEF OF APPELLANT CITY OF SEATTLE

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I. INTRODUCTION

For many years, the residents of the Cedar Park community, and residents of the City of Seattle at large (the "City") have used the street end at NE 130th Street as a park area and to access the beach. Since the annexation of the King County Lake district in 1954, which includes the street end, the City has maintained that street end and permitted the community members to use the right-of-way for beach access, all without any protest or comment from any of the residents that have owned the abutting parcels of land over the years. In light of the trial court's grant of summary judgment in favor of Respondents Keith L. Holmquist, Kay Burdine Holmquist and Fredrick Kaseburg ("Respondents"), the City has been forced to postpone its planned improvements for the street end, and the community now faces the prospect of losing access to the shoreline at NE 130th Street.

At the time that NE 130th Street was vacated, Puget Mill Company, not Respondents' predecessor property owners, was the owner of the two adjacent parcels of land. Under the law of street vacation, Puget Mill Company became the owner of the vacated street end. Additionally, Puget Mill Company conveyed the vacated street end to King County in 1932, well before it conveyed the two adjacent parcels of land to Respondents' predecessors. Thus, Respondents' predecessor property owners have

owners have never had any claim to the vacated street end. Without an underlying claim to the street end by their predecessor property owners, Respondents' claims to the street end fail. Accordingly, Appellants City of Seattle and King County request that this Court reverse the trial court's ruling quieting title to the street end in Respondents, and further request that this Court remand the matter to the trial court for entry of an order quieting title in the Appellants.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred by ruling that title to the north one-half of the street end located at NE 130th Street is vested in Keith L. Holmquist and Kay Burdine Holmquist, as successors-in-interest to Mona Miller, free and clear of any interest of King County, the City of Seattle and any street right of way easement.

2. The trial court erred by ruling that title to the south one-half of the street end located at NE 130th Street is vested in Frederick A. Kaseburg, as successor-in-interest to J.I. Shotwell free and clear of any interest of King County, the City of Seattle and any street right of way easement.

B. Issues Pertaining to Assignments of Error

1. When the street end was vacated in 1932, was Puget Mill Company the owner of the adjacent parcels of land?

2. As the owner of the adjacent parcels of land at the time of the street vacation, could Puget Mill

Company separately convey the street end to King County, prior to the issuance of the fulfillment deeds to the buyers of the adjacent parcels?

III. STATEMENT OF THE CASE

On October 26, 1926, the Puget Mill Company successfully platted the Cedar Park Lake Front Community. CP 340[1]. Included in this community was Northeast 130th Street. *Id.* The plat dedicated a right-of-way in all of the streets in the community, including NE 130th Street. *Id.* Additionally, two parcels were platted adjacent to the NE 130th Street right of way – Tract 12 of Block 1 to the north of the right-of-way and Tract 1 of Block 2 to the south of the right-of-way. *Id.* These plats were under King County's jurisdiction. *Id.*

A. The Street Vacation

Nearly six years after NE 130th Street was platted, the Cedar Park Lake Front Community collectively filed a petition with King County to vacate the street end. CP 342. After investigating the petition for vacation, on May 23, 1932, the King County Engineer sent a letter to the Board of Commissioners, in which he recommended denial of the petition

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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. Please note that all references to Clerk's Papers in this brief refer to the Clerk's Papers requested by the City, under original appellate number 70500-8.

in accordance with "the policy adopted by the Board of County Commissioners against vacating any street leading to the water's edge." CP 345. The letter also notes that it was the "intention of the two adjacent property owners who would be benefited by the vacation to turn over to the community the vacated street for a swimming beach, supervised by the community." *Id.* On June 25, 1932, two of the street vacation petitioners, Mona Seschser Miller ("Miller") and J. I. Shotwell ("Shotwell"), attempted to do as the Office of the Engineer's letter suggested – they executed a quit claim deed for the shoreline street end to Cedar Park Community Club, Inc. CP 347.

Two days after the execution of the quit claim deed by Miller and Shotwell, on June 27, 1932, King County granted the petition for vacation of the shoreline street end. CP 350-353. However, contrary to the County Engineer's suggestion and Miller's and Shotwell's apparent belief that they had each become one half owners of the street end upon the order of vacation, on July 5, 1932, the King County Prosecuting Attorney's Office ("KCPAO"), in a letter to the County Board of Commissioners, stated that the vacated street had become the property of Puget Mill Company, not Miller and Shotwell. CP 355-356. In a letter to the King County Board of Commissioners, the KCPAO concluded that, at the time of the vacation, Puget Mill Company (not Shotwell and Miller) held title to the lots

abutting the street end, and thus, nothing could be conveyed to the community club by Miller and Shotwell. *Id.* The KCPAO further noted that the Board of County Commissioners had requested that the KCPAO prepare an "instrument" that would convey the vacated street to the community (not to individual property owners) to hold title to the land under the name of the Cedar Park Community Club. *Id.* The KCPAO stated that such a conveyance would not be possible, since Puget Mill Company was, at that time, the owner of record. *Id.* The KCPAO concluded, "It may be that someone has a contract interest in these lots but this deed gives them no equitable interest in the lot. Section 9303 Rem. Comp. Stat. states as follows:

'The part so vacated, if it be a lot or lots, shall vest, in the rightful owner, who may have the title thereof according to law…'

It therefore follows that the Puget Mill Company becomes the owner of the vacated street in the same manner as if that street had never been dedicated…" *Id.* The KCPAO also noted that since King County had never had more than a right-of-way interest in the street end, it could not "pass any title to the Cedar Park Community Club by reason of vacating" the street end. *Id.*

On August 10, 1932, with this clarification from King County and as the owner of the vacated street end, Puget Mill Company executed a

quit claim deed for the shoreline street end to King County, which effectively returned the right-of-way interest in the street end back to the County. CP 358-359.[2]

B. The Sale of the Lots Adjacent to NE 130th Street

In 1926, Shotwell and Miller entered into real estate sale contracts with Puget Mill Company to purchase the parcels of land abutting the NE 130th St. street end to the north and south. CP 259-261.[3] Shotwell's contract states that upon fulfillment of the payment terms of the contract, Puget Mill Company "will execute and deliver to the Buyer a good and sufficient warranty deed of said real property." CP 260. The payment terms required that Shotwell make monthly payments of fifteen dollars until the entire purchase price of one thousand seven hundred twenty five dollars was paid in full. *Id.* Only then would title be transferred from Puget Mill Company to Shotwell. *Id.* The parcel Shotwell contracted to purchase is described as "Tract One (1) Block Four (4) in Cedar Park No.

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[2] The quit claim deed is dated August 10, 1932, was recorded on March 30, 1935, and notes: "This Deed is issued in lieu of one, bearing the same date, which has been lost, and is so accepted, one of which being accomplished, the other to stand void." CP 358-359.

[3] The record does not contain a copy of the real estate sale contract between Miller and Puget Mill Company, but the existence of the contract is implied in the 1935 deed conveying the parcel to Miller. CP 270-271. It seems likely that the terms of the contract between Miller and Puget Mill Company were similar to those in the contract between Shotwell and Puget Mill Company.

3 King County, Washington, and tract one (1), block two (2) Cedar Park Lake Front, King County, Washington." *Id.*

Upon completion of Shotwell's monthly installments of the purchase price, in 1935, Puget Mill Company executed a warranty deed conveying title to Shotwell to the exact same parcel that the parties had contracted to sell and buy in 1926: "Tract One (1), Block Four (4), Cedar Park No. Three (3), and Tract One (1), Block Two (2), Cedar Park Lakefront." CP 273. Under the terms of the real estate sale contract and the warranty deed, Shotwell became the title holder and owner of the parcel of land in 1935. *Id.*; CP 260.

Similarly, in 1933, Puget Mill executed a warranty deed conveying the northern adjacent parcel to Miller. CP 270-271. That deed describes the parcel sold to Ms. Miller as "Tract twelve (12) block three (3), Cedar Park No. 3, … and tract twelve (12) block one (1) Cedar Park Lake Front." *Id.* Again, the deed (and presumably the terms of the real estate sale contract), show that Miller became the title holder and owner of the parcel in 1933. *Id.* Additionally, neither the deed conveying title to Miller, nor the deed conveying title to Shotwell changed the description of the parcel to include the northern and southern halves of the NE 130th St. street end. *Id.*; CP 273.

C. The City of Seattle Annexed the King County Lake District in 1954

When the City of Seattle annexed the King County Lake District on January 4, 1954, the annexation area covered the NE 130th Street shoreline street end, including the right-of-way. CP 361-368.

In the nearly 60 years since the annexation, none of the owners of the parcels adjacent to the street end have ever indicated to the City that the City or the County did not hold a right-of-way in the street end at NE 130th Street. CP 336. For many years, the street end has been used by the general public in an informal manner as a trail to access the shoreline. *Id.* The trail can be clearly seen from the Burke Gilman Trail and Riviera Place, extending east to the shoreline, accessible through the street end. CP 336-337, 368.

Additionally, the City's treatment of NE 130th Street further demonstrates the long term establishment of the City's right-of-way in the street end and the lack of any objection by Respondents or their predecessor property owners. CP 337-338. In February 2009, the Seattle Department of Transportation published the February 2009 Seattle Shoreline Street Ends Work Plan ("Work Plan"). CP 337, 370-390. This document outlines the City's policies for shoreline street ends, and includes several maps depicting the City's plans for work on its shoreline street ends. *Id.* Figure F.2 shows NE 130th Street as "Not Currently

Signed / Improved for Public Access" rather than "Vacated," and Figure F.10 shows the street ends that the City prioritized for improvement, placing NE 130th Street in the "Earliest" category. CP 389-390. This Work Plan and the accompanying maps were published and available to the public, and the City included public outreach efforts when it was developing this plan. CP 337. The City did not receive any claim or complaint from Respondents disputing the City's claim to the NE 130th Street right-of-way. *Id.*

Additionally, City Resolution No. 29370, which is discussed in the Maps and Tables section of the Work Plan, was adopted in 1996. CP 386-88. That resolution adopted polices to "guide the development of public access improvements to shoreline street ends," which included NE 130th Street. *Id.* As part of the process of drafting and adopting this resolution, the draft shoreline street end policies were sent to property owners in those communities affected by the Resolution, which would necessarily have included Respondents Kaseburg and the Holmquists. CP 337-38. Those property owners were invited to review and comment on the draft resolution in the summer of 1995 and January 1996. *Id.* Respondents did not file any comments or objections to the draft resolution. *Id.*

In 2008, the City passed a property tax levy, which was intended to fund a variety of Parks and Recreation projects, including the restoration

and development of certain trails and shoreline areas. CP 392-409. Specifically, the levy allocates funds to "[d]evelop existing City–owned street-ends to provide publicly accessible shoreline. Potential project locations include: … NE 130th Street." CP 409. In 2012, the City started a project to make the informal street end trail a more formalized trail and park area, and posted a sign at the street end informing the neighborhood that the City would be moving forward with this project. CP 338. After learning of this lawsuit, however, the City was forced to put the project on hold. *Id.*

IV. ARGUMENT

A. Standard of Review

The standard of review by the Court of Appeals on an appeal of a summary judgment is *de novo*. *Green v. A.P.C. (American Pharmaceutical Co.)*, 136 Wash.2d 87, 94, 960 P.2d 912, 915 (1998). The appellate court engages in the same review as the trial court, treating "all facts and inferences therefrom in a light most favorable to the nonmoving party." *Id.*, citing *Fell v. Spokane Transit Authority*, 128 Wash.2d 618, 625, 911 P.2d 1319 (1996); *see also Michak v. Transnation Title Insurance Co.*, 148 Wash.2d 788, 64 P.3d 22 (2003).

B. At the Time of the Street Vacation, Puget Mill Company Was the Legal and Equitable Owner of the Parcels Adjacent to NE 130th Street and the Right-of-Way.

Under Washington law in 1932, at the time of the street vacation in 1932, Puget Mill Company, not Respondents' predecessors, was the owner of the two parcels adjacent to the NE 130th Street shoreline street end and the right-of-way. Thus, the trial court erred in granting judgment in favor of Respondents on the basis that their predecessor property owners each acquired half of the street end and right-of-way as a result of the 1932 street vacation.

The law on real estate sale contracts was different in 1932 than it is today, and the trial court erred inasmuch as it applied today's legal constructs to the events that occurred between 1926 and 1935. The prevailing case law of the time, *Ashford v. Reese* demonstrates that the real estate sale contracts that Miller and Shotwell entered into in 1926 did not give them any legal interest or title in the abutting parcels. *Ashford v. Reese* 132 Wash. 649, 233 P. 29 (1925). In *Ashford*, the parties had entered into an executory real estate contract for the sale of land and a building on the land. *Id.* at 649. The agreed purchase price was $800, payable in monthly installments. *Id.* Once all of the payments were made, the seller would give the buyer "a deed conveying said premises in fee simple with full covenants of warranty." *Id.* at 650, quoting the contract.

A little over one year after entering into the contract, and with only approximately half of the purchase price paid, the building was destroyed by a fire. *Id.* When the seller refused to replace the building, the buyer sued to recover the amount already paid under the contract; the seller counterclaimed for the balance still owing. *Id.* In deciding which party should bear the loss, the court addressed which party was the owner of the property under an executory real estate sale contract when the purchase price had not yet been paid in full. The court held that, in Washington, "we have consistently held in numerous cases that an executory contract of sale in this state conveys no title or interest, either legal or equitable, to the vendee, and, the loss following the title, it must be borne by the vendor." *Id.* The rule of *Ashford* was the relevant and applicable rule of law in 1926 (when Miller and Shotwell entered into their executory real estate contracts) and in 1932 (when the vacation occurred), and for many years thereafter. *See Tomlinson v. Clarke*, 118 Wash.2d 498, 505-509, 825 P.2d 706, 710-712 (1992) (noting that the rule created by the *Ashford* court was that "an executory contract of sale in this state *conveys no title or interest, either legal or equitable*, to the vendee...," and that until *Ashford* was eventually overruled in 1977, the prevailing law was that a buyer's interest under a real estate sales contract was nothing more than a contract right. (internal citations omitted).) Even under current case law, a buyer that enters into a real estate sale contract

does not become the fee simple owner of the property until the purchase price is paid in full and a fulfillment deed is executed. *Bank of New York v. Hooper*, 164 Wash.App. 295, 302, 263 P.3d 1263, 1266 (2011).

Thus, under *Ashford*, when Puget Mill Company entered into executory real estate sale contracts with Miller and Shotwell in 1926, the mere act of entering into the contract did not transfer title from Puget Mill Company to Miller and Shotwell. Rather, Puget Mill Company remained the owner of the two parcels until the contract payment terms were fulfilled in 1933 and 1935. Accordingly, Puget Mill Company was still the legal and equitable owner of the two parcels of land adjacent to the NE 130th Street right-of-way when the street vacation occurred in 1932, and, at that time, Miller and Shotwell held nothing more than a contract interest in the properties.

C. As the Legal and Equitable Owner of the Adjacent Parcels, Puget Mill Company Became the Owner of the Street End and Right-of-Way When the Street Vacation Occurred, and Was Free to Convey the Vacated Street End to King County.

As the legal and equitable owner of the two abutting properties, when NE 130th Street was vacated in 1932, Puget Mill Company, not Respondents' predecessor owners, became the owner of the street end and its right-of-way. Since Puget Mill Company owned both parcels adjacent to the street end, the law dictates that the street end and right-of-way became one

separate parcel, rather than being divided equally between the two adjacent parcels, and Puget Mill Company was free to convey the street end in any form it chose. *Hagen v. Bolcom Mills, Inc.*, 74 Wash. 462, 133 P. 1000 (1913). Puget Mill Company did precisely that – while the real estate sale contracts with Miller and Shotwell were still pending, Puget Mill Company executed a quit claim deed in 1932, conveying to King County "[a]ll that portion of Sixty (60) feet of land lying East of the Northern Pacific Right-of-Way between Lot Twelve (12), Block One (1), and Lot One (1), Block Two (2), Cedar Park Lake Front." CP 358. Thus, Puget Mill Company returned the previously vacated 60 foot wide right-of-way to King County well before either fulfillment deed was executed in favor of Miller and Shotwell.

In *Hagen*, Seattle Iron & Steel Manufacturing Co. owned blocks 162 and 165, which were divided by E Street, a public street. *Hagen*, 74 Wash. at 463, 133 P. at 1001. After Seattle Iron purchased the blocks, it successfully petitioned King County to have E Street vacated, together with a nearby alley. *Id.* Over the next 23 years, the blocks and certain individual lots on block 162 were bought and sold to various parties. The owner of individual lots 2 and 3 in block 162, Hagen, brought suit to quiet title to half of the vacated public street. *Id.* The trial court held in favor of Hagen, and defendants appealed.

The Supreme Court disagreed with the trial court's ruling, and in reversing the decision, explained the operation of the law of street vacation when, at the time of the vacation, one party owns both adjacent parcels of land. *Id.*

> "At the time the street was vacated the steel company was the sole owner of blocks 162 and 165 and became the owner of the intervening vacated space called E street. Unquestionably, the common owner could have conveyed the space without reference to the adjoining lots just as an abutting owner could convey the reverted one-half of the street apart from the lot. To hold otherwise would be to hold that a reverted street could never be conveyed except as a part of an abutting lot."

Id. at 467. The Court further explained that when "the street has been vacated while the original proprietor owns the lots in question, … he owns [the adjacent lots] and the space between in fee simple. He can transfer the whole tract, or any part of it," or the owner can transfer one lot to an individual, the second lot to another person, and the vacated street to a third person. *Id.* at 469 (internal citations omitted).

Thus, Puget Mill Company exercised its rights as the owner of the vacated street in accordance with the principles enumerated in *Hagen* – Puget Mill conveyed to King County, by the 1932 quit claim deed, the right-of-way located between the lots under contract to Shotwell and Miller. Moreover, the deeds demonstrate that Puget Mill Company intended to convey all three parcels (the northern lot, the vacated street end, and the

southern lot) to three different, distinct entities (Miller, Shotwell and King County), again just as the *Hagen* court suggested it could do. CP 270-71, 273, 358-59; *see also McGoniga v. Riches*, 40 Wash.App. 532, 538-39, 700 P.2d 331, 336-37 (1985) (following *Hagen*, noting that where a landowner holds the fee in the street and an abutting lot, upon vacation of the street, the owner may "treat these two estates as separate and distinct parcels of land," and where the vacated street is conveyed separately from the abutting lots, a conveyance of the abutting lot "did not include the fee to the middle of the former street.")

The 1933 Warranty Deed conveying the parcel to Mona Muller describes the land conveyed as "Tract twelve (12) block three (3), Cedar Park No. 3," and makes no mention of including the previously vacated street end that had already been conveyed to King County over a year earlier. CP 270-71. Similarly, the 1935 Warranty Deed conveying the other abutting parcel of land to J.I. Shotwell describes the land as "Tract One (1), Block Four (4), Cedar Park No. Three (3), and Tract One (1), Block Two (2), Cedar Park Lakefront." CP 273. Puget Mill made no effort to revise the descriptions of the property it conveyed to Miller and Shotwell because by operation of law, it could not convey the two halves of the vacated street end to Miller and Shotwell. Puget Mill had already separately conveyed NE 130th Street lying between the two parcels to King County in 1932, and thus,

the conveyances of the abutting parcels necessarily did not include the fee to the center of the vacated street. *See Raleigh-Hayward Co. v. Hull*, 167 Wash. 39, 43-46, 8 P.2d 988, 990-991 (1932) (holding that after the disputed street "was vacated it became a *distinct* parcel of land, and did *not pass as an incident or appurtenance* to the lots by the [subsequent] conveyances." Thus, "respondents by their respective deeds received no more than the particular lots conveyed. They acquired no interest whatever in what was formerly [a dedicated street]."; citing *Hagen*, 74 Wash. 462, 133 P. 1000 (1913).)

Accordingly, when Puget Mill executed the fulfillment deeds conveying the parcels to Muller and Shotwell, the Respondents' predecessors got precisely what they bargained for when they entered into the real estate contracts in 1926 – no more and no less land than described in the contracts and the deeds. Over the course of the many years that followed, all parties, including each successive landowner of the adjacent parcels, abided by the clear terms of these transactions.

D. The Award of Summary Judgment in Favor of Respondents' is Inequitable, Against Public Policy and Contrary to the Intentions of Respondents' Predecessors.

Since the time that Puget Mill Company deeded the right-of-way back to King County in 1932, the County and more recently, the City have

always operated under the premise supported by the case law – that there is a right-of-way owned by the City or the County in the street end at NE 130th Street. In the 80 years since Puget Mill Company conveyed the street end to King County, both the County and the City have maintained the street end and allowed the public to access the shoreline using the right-of-way. RP 35. During the course of this time, each of Respondents' predecessor landowners had multiple opportunities over the years to make a claim to the street end. CP 337-38. The City has adopted a resolution, held public proceedings on that resolution, contacted community members and affected landowners regarding these proceedings and done community outreach regarding the City's plans for the shoreline street end. *Id.* Not once have Respondents or their predecessors responded to the City's actions with complaints or claims that they owned this street end, or that the City does not hold a right-of-way in the street end. *Id.* Respondents' complaint to quiet title in their favor goes against decades of use of the right-of-way by the public, and has resulted in an inequitable ruling by the trial court.

Additionally, the award of summary judgment in Respondents' favor goes against both public policy and the intentions of Respondents' predecessors, Miller and Shotwell. All of the documents related to the street vacation demonstrate that Miller and Shotwell never intended to acquire the street end for private use and/or to merge the parcel with their adjacent

properties. First, the street vacation petition was signed by the entire community, not just Miller and Shotwell. CP 342. Second, the County Engineer's office noted that "it is the intention of the two adjacent property owners who would be benefited by the vacation to turn over to the community the vacated street for a swimming beach, supervised by the community." CP 345. Third, it appears that Miller and Shotwell attempted (but failed) to do just as the County Engineer's office suggested – on June 25, 1932, Miller and Shotwell executed a quit claim deed, which conveyed the street end to the Cedar Park Community Club, Inc. CP 347. Finally, following the entry of the order of vacation, King County attempted to have "some sort of an instrument" prepared that would convey the NE 130th St. street end to the community. CP 355. Although all of these efforts to convey the property to the Cedar Park Community Club ultimately failed because Puget Mill Company, not Miller and Shotwell, was the owner of the two adjacent parcels at the time of the vacation, the intention of all parties is indisputable – the community, Miller, Shotwell and King County envisioned that the street end would be an area open to the general public to use to access the beach. CP 345, 355.

Moreover, the County Engineer's office noted that, in 1932, King County had a policy "against vacating any street leading to the water's edge," and based on that policy, the Engineer's office advised against

granting the petition for vacation. CP 345. Although the order granting the petition does not state the reasons for doing so, one might surmise that the County Commissioners granted the petition since the intention was to keep the street end open to the public and available for use as a community beach. *Id.* Today, this "policy" is formalized in Seattle Municipal Code section 15.62.080. RP at 35. That section provides that "[t]he City is not authorized to vacate a street, alley or public place if any portion thereof abuts a body of salt or fresh water unless" very specific conditions are met, including where the vacation will permit the City to acquire the property for a public purpose (such as beach access), the City Council has declared that the street is not being used as a street and is not suitable for public purposes such as beach access, and where the vacation will enable the City to implement a plan to provide shoreline access to the public. Seattle Municipal Code § 15.62.080; RP at 35. None of these conditions are met in this case.

Thus, public policy in both 1932 and the law today supports the good intentions that the Cedar Park Community had when it petitioned King County for the street vacation in 1932 – a right-of-way that abuts the shoreline should be kept open to the public to allow for beach access by the community.

V. CONCLUSION

The weight of the case law and facts of this case demonstrate that the trial court's order of summary judgment in favor of Respondents Holmquist and Kaseburg should be reversed, and the case remanded to the trial court for entry of an order quieting title in favor of the City of Seattle and King County.

RESPECTFULLY SUBMITTED this 18 day of October, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October 2013, I filed the foregoing document with the Court of Appeals, Division I, and served on counsel listed below via legal messenger.

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