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Court of Appeals No. 72417-7-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF WOODINVILLE,

Respondent,

v.

THE FOWLER PARTNERSHIP,

Petitioner.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

RESPONSE TO PETITION FOR REVIEW

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A. INTRODUCTION

Petitioner Fowler ("Fowler") petitions this Court to review an unpublished Court of Appeals opinion ("Opinion") that meets none of the considerations governing acceptance of review under RAP 13.4(b). Fowler's argument that the Opinion conflicts with prior decisions of this court and of the court of appeals is illusory, ignoring uncontested facts demonstrating that if there was a taking, the taking occurred in 1985 when the property was first damaged.[1] As noted by the Appeals Court, there is no evidence demonstrating that the demand for the deed by the City further damaged the property.[2] The covenant was a condition to an unchallenged final land use decision that was made in 1985.[3]

Fowler completely ignores the Appeals Court's recognition of Fowler's lack of standing to make a takings challenge, based upon the subsequent purchaser rule.[4] Fowler also ignores in his Petition the determination of the Appeals Court that Fowler's current challenge to the enforceability of the covenant is time barred under *Brutsche v. Kent*, 78 Wn.2d 391, 398, 423 P.2d 634 (1967) and prior pre-LUPA decisions of

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[1] Opinion at fn 3. The uncontested opinion of the City's expert appraiser is that the contested 50 foot wide portion of Fowler's property lost all marketable value at the time the covenant was recorded in 1986.

[2] Opinion at fn 3.

[3] Opinion at 9.

[4] Opinion at 8.

this court and the court of appeals.[5] The issuance of the revised lot line adjustment by King County with the recording of the covenant was a final land use decision requiring a timely appeal.[6]

Instead Fowler continues to argue that Woodinville's demand that Fowler fulfill the voluntary promise made by the property owner in the recorded covenant and deliver to the City a dedication deed for a public road, is the first and only opportunity for the property owner to challenge the promise as unconstitutional. As determined by the Appeals Court, this argument has no merit and the Petition for Review should be denied.

B. STATEMENT OF THE CASE

The following facts are uncontested:[7]

In January 1985, WOOD ASSOCIATES, the former owner of the subject real property (the subject property is referred to herein by its

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[5] Opinion at 10.

[6] Opinion at 9.

[7] FOWLER'S statement of case at pp. 2-5 of the Petition for Review contains many disputed factual allegations contested in the Declarations submitted to the Trial Court in support of the City's motion for summary judgment and in response to Fowler's Counterclaim. The disputed factual allegations include but are not limited to Fowler's statements that: 1) prior to 2001, the road was not a through road; it dead-ended at its western edge; 2) in 2001, after Woodinville built a new City Hall, its Public Works Director asked Fowler for permission to connect 133rd AVE NE to the roadway on Fowler's property, and Fowler granted permission as a neighborly accommodation; 3) neither King County nor Woodinville, after incorporation, behaved as if they were the owners or occupiers of NE 173rd; 4) to fulfill its obligations to this new developer, Woodinville asked Fowler to execute a dedication deed to the south 50 feet of his property; and 5) Fowler offered to sell the property, and Woodinville hired an appraiser who opined the value of the property as of January 6, 2014 was $592,500, then Woodinville decided it had rights under the 1985 Covenant to take Fowler's property without compensation.

common name "the Woodinville City Center") made application with KING COUNTY for the development of the property with commercial buildings. CP 247-304. KING COUNTY staff in review of the initial building site plans, among other things, noted that the KING COUNTY zoning code required the dedication of a 50 foot wide strip of the most southern portion of the property ("the Strip") for a public road. CP 284-85. WOOD ASSOCIATES responded to the initial plans review made by KING COUNTY staff, by making application for a Lot Line Adjustment (LLA).[8] FOWLER admits in its Answer (CP 29-35) that Exhibit B to the Complaint is a true copy. In March 1985, KING COUNTY approved the LLA with the express condition that the property owner, immediately dedicate the Strip for public roadway purposes. *See* Exhibit B to the Complaint. CP-13 and 257. Two months later, WOOD ASSOCIATES in apparent compromise and agreement with KING COUNTY[9] in May 1985, recorded a document titled "Covenants, Conditions and Restrictions Running With The Land" ("the Covenant") and binding "*Wood*

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[8] The reasonable inference from the facts is that the LLA was needed to obtain the necessary parcel dimensions for the owner's desired site plan to meet King County zoning code requirements.

[9] King County on the same day as the recording of the Covenant revised the approved LLA to strike the requirement for immediate dedication and incorporated the Covenant by reference. It is a reasonable inference from these facts that an agreed compromise had been reached between King County and Wood Associates as to the conditions attached to the approval of the Boundary Line Adjustment to accommodate the desired site plan for the Woodinville Towne Center development.

Associates, for itself, its grantees, successors and assigns." *See* Exhibit C to the Complaint (CP 14-19 and 259-263), which FOWLER admits in its Answer (CP 29-35) is a true copy of the Complaint. The Covenant among other things gave permission to KING COUNTY to "*develop and/or construct a roadway to be denominated NE 173rd Street*" along the Strip and in addition:

1. Obligated the property owner to maintain a 50-foot setback along the Strip "*in accordance with King County's zoning and setback regulations, except that the owner may develop the Strip for street, landscape and drainage improvements in accordance with approved county plan.*"

2. Obligated the property owner to deed the Strip to King County for "*Public Road purposes when sanctioned by King County.*" Timing of the *dedication* of the Strip "*shall be determined by King County*".

Contemporaneously with the recording of the Covenant, KING COUNTY revised the approved LLA by striking the requirement for immediate dedication and incorporating the recorded Covenant. *See* Exhibit B to the Complaint. CP 13 and 257.

The construction of public road improvements for NE 173rd Street by WOOD ASSOCIATES occurred in 1986, concurrent with the construction of the Woodinville City Center and prior to WOODINVILLE'S incorporation. CP 247-304. The improvements of a sidewalk, curb, gutter and a paved roadway constructed by WOOD ASSOCIATES, were expressly allowed by the recorded Covenant. CP 15 and 259. After its incorporation in 1993, WOODINVILLE placed street signage, traffic control devices, a stop sign and painted stop bar on the roadway. CP 247-304.

The Woodinville City Center is within WOODINVILLE'S corporate boundaries. CP 237-246. WOODINVILLE officially designated 173rd NE as a City Street in Ordinance No. 31, approved on March 15, 1993[10]. CP 237-246.

In 2010, while the WOODINVILLE Director of Public Works was preparing a current street map, he was unable to find a deed evidencing WOODINVILLE'S property interest in the Strip. At the time he was unaware of the Covenant (attached to the Complaint as Exhibit A) recorded in 1985, and the approved revised LLA. After initial discussions with FOWLER'S onsite manager were unproductive in resolving the

[10] Ordinance 33 referred to 173rd NE as 172nd Place, a street name used by King County in King County Ordinance No. 8114 approved June 15, 1987.

paper title issue, additional research of title records was performed by WOODINVILLE staff. The Covenant was discovered by the City in the fall of 2013. After additional efforts at resolving the issue with FOWLER failed, the City demanded FOWLER sign the Dedication Deed attached to the Complaint as Exhibit A. CP 237-246. This lawsuit was commenced after FOWLER refused to execute the Dedication Deed. FOWLER insisted that if WOODINVILLE wanted the Dedication Deed signed, WOODINVILLE would have to pay a market value for the Strip, as if the covenant were not enforceable. CP 247-304.

According to FOWLER in its counterclaim, enforcement of the Covenant without compensation would constitute a taking. WOODINVILLE disagreed and brought this lawsuit for declaratory and injunctive relief to enforce the covenant, obtain the Dedication Deed and quiet title to the Strip in WOODINVILLE. CP 1-28.

The trial court granted WOODINVILLE'S motion for summary judgment and granted WOODINVILLE the relief it requested in the Complaint, on August 1 2014. CP 526-528. The trial court also dismissed FOWLER'S counter claim for just compensation and attorney fees and denied FOWLER'S counter-motion for summary judgment. CP 526-528.

WOODINVILLE in response to FLOWER'S counterclaim and counter-motion for summary judgment submitted multiple declarations to the trial court giving a detailed factual history of the public use of 173rd NE Street, and its improvement and maintenance by WOODINVILLE, disputing FLOWER'S factual assertions of an absence of public use and maintenance, and permissive public use. WOODINVILLE'S declarations from the DeYoungs (CP 354-362)-, Monken (CP 544-574), Hansen (CP 368-510), and Rubstello (CP 363-367) provided the facts in support of WOODINVILLE'S defenses to the counterclaim and counter-motion for summary judgment, which defenses included claims of adverse possession and common law dedication. CP 36-40.

Since the trial court determined the covenant was enforceable based upon the undisputed facts, the trial court did not need to determine if Woodinville's alternative defenses of common law dedication and adverse possession precluded the granting of FOWLER'S counter-motion for summary judgment. The facts supporting those defenses will not be repeated here, but the declarations submitted with WOODINVILLE'S Response to FOWLER'S Counter-Motion for Summary Judgment are incorporated herein by this reference. CP 354-362, 544-574, 363-367, and 368-510.

FOWLER appeals the trial court's order (CP 539-543), the Court of Appeals affirmed the Trial Court in its August 24, 2015, unpublished opinion.

C. RESPONSE TO SPECIFIC ARGUMENTS

1. There is no conflict with *Guimont v. Clarke*.

The Opinion is not in conflict with *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993), a regulatory takings case concerning a statutory land use regulation, as argued by Fowler. The January 31, 2014, revised Appraisal (CP 118-225 and CP 368-510) unequivocally states that if the covenant is enforceable the 50 - foot wide strip has no value. The unchallenged appraisal states the following:

> *The owner has no control over the land awaiting dedication, which therefore has no value*. (Revised Appraisal at p. 18, second paragraph).
>
> *We are assuming the City of Woodinville's position that he owner must dedicate, without compensation, the land with the developed road on the southern border of his property is correct*. (Revised Appraisal at p. 19, second paragraph of the "Extraordinary Assumptions").

The Appeals Court Opinion correctly determined that the damage to the property owner's interest in the 50 foot wide strip of property occurred at the time of the 1985 land use decision and recording. A final governmental land use decision was made when the amended lot line

adjustment was granted. "The Covenant was a condition to a final land use decision that was made in 1985. Therefore, Fowler's argument that Wood associates could not challenge the condition until the deed was demanded lacks merit." Opinion at 9.

2. The Opinion does not conflict with *Sparks v. Douglas County.*

Unlike the instant case, *Sparks v. Douglas County*, 127 Wn.2d 901, 904 P.2d 738 (1995) arose from a timely filed application for a writ of review (pre-LUPA case). The applicant for the writ of review was also not precluded by the subsequent purchaser rule from challenging the condition of the land use approval requiring a dedication as an unconstitutional taking lacking the required nexus.

3. The Opinion does not conflict with *Saddle Mountain Minerals, LLC v. Joshi* and *Highline School District No. 401 v. Port of Seattle.*

Fowler is mistaken in arguing that the Opinion conflicts with the two regulatory takings cases, *Saddle Mountain Minerals, LLC v. Joshi*, 152 Wn.2d 242, 95 P.3d 1236 (2004), and *Highline School District No. 401 v. Port of Seattle*, 87 Wn.2d 6, 548 P.3d 1085 (1976). Here, the Appeals Court correctly determined that King County's approval of the revised lot line adjustment with the condition requiring the recording of

the covenant was a final local land use decision subject to a timely application for judicial review. Opinion at 9.

4. The Opinion does not conflict with Wilkinson v. Chiwana Comm. Ass'n.

Contrary to the argument of Fowler, the Appeals Court did not read out or fail to apply the provision of the covenant referencing RCW 36.88. The provision was determined by the court to be an "alternative method of proceeding with the road project". Opinion at 7-8. "The Covenant provided explicitly for the deed. The Appeals Court took into account all the language of the covenant. There is no conflict with *Wilkinson v. Chiwawa Comm. Ass'n*, 180 Wn.2d 241, 327 P.3d. 614 (2014). The Appeals Court correctly applied the provision referencing RCW 36.88 within the context of the covenant.

5. The Covenant was not revoked by operation of law upon conveyance of the Woodinville City Center Property to Fowler and does not conflict with *City of Spokane v. Security Savings Society*.

City of Spokane v Security Savings Society, 82 Wash. 91, 143 P.435 (1914) citing *Smith v. King County*, 80 Wash. 273, 141 P. 695 (1914) does not support FOWLER'S argument that the Covenant was revoked by operation of law. Both cases are distinguishable on their facts. In both cases prior to the conveyance of the property by the dedicator to a

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third party, a dedication deed had been offered but not accepted by the local government entity. Here, the recorded Covenant was the consideration for the revised LLA approval by King County. The Covenant is explicitly referenced on the face of the revised LLA approval. The Covenant was accepted by King County with the approval of the revised LLA. The revised LLA substituted the Covenant for the prior requirement of immediate dedication of the south 50 feet of the Woodinville City Center Property as a condition of approval of the LLA.

The Covenant and the promise made therein to dedicate the south 50 feet for a public road remained enforceable following conveyance of the Woodinville City Center property by WOOD ASSOCIATES to FOWLER. As specifically set forth in the Covenant, the promise to dedicate upon request was binding upon all successors to the property interest of WOOD ASSOCIATES.

6. The Opinion does not conflict with *State ex rel.Campbell v. State*.

If *State ex rel. Campbell v. Case*, 182 Wash. 334, 47 P.2d 24 (1935) recognizes a presumption that government is presumed to act within the limits of power under the state and federal constitutions, the Opinion of the Appeals Court in no way conflicts with this presumption. The determinations of the Appeals Court that King County made a "final"

land use decision in 1985 and no compensation was due under the language of the covenant are not inconsistent with the presumption. King County agreed with the property owner to accept the recorded covenant in lieu of immediate dedication in issuing the revised lot line adjustment. If King County agreed to compensate the property owner at the time of actual dedication, it would have said so in the covenant, it did not.

7. There is no conflict with summary judgment rules.

Fowler's first argues that in the absence of evidence that Fowler's predecessor drafted the Covenant, Fowler was entitled to the reasonable inference that King County drafted the operative terms of the Covenant. Therefore, according to Fowler, any ambiguities in the Covenant should be construed against King County. This argument fails because as the Decision notes at p. 8: "*Nothing in the record suggests that King County drafted the Covenant.*" Fowler points to no evidence to the contrary. Absent any evidence suggesting that King County drafted the Covenant, no reasonable inference can be drawn that the Covenant was drafted by King County. Moreover, it was Fowler's predecessor who desired to have the condition requiring a deed dedicating the 50 feet of property immediately, removed from the April 1985 lot line adjustment. It is just as reasonable to infer that Fowler's predecessor drafted the Covenant to

persuade King county to revise the lot line adjustment as to infer that King County drafted the Covenant , "in order to get what it wanted" as argued by Fowler.

Fowler's argument that the "Covenant took no property when it was recorded" and therefore there could not be any loss of attribute of ownership has already been addressed in subsection C. 1, above. The Appeals Court's determination that a final land use decision was made when the amended land use decision was issued does not "fly in the face of the evidence" and does not disregard a rule requiring that all reasonable inferences be granted in Fowler's favor, as the non-moving party.

8. There is no conflict with appeals court cases..

At p. 18 of his Petition, Fowler cites to additional court of appeals cases while arguing once again that if there was a lack of evidence in the record of a nexus between the development and the county's need for a roadway a compensatory taking. Again, Fowler has no standing to make the challenge under the subsequent purchaser rule and even if he had the standing, the failure of a timely appeal to the 1985 final land use decision bars his current challenge. Opinion at 10-11.

9. No significant constitutional questions.

This case raises no significant questions of State or Federal constitutional law. This case was reviewed by the Court of Appeals under existing case law. No new questions of constitutional law are presented. The outcome of this case is dependent upon the uncontested facts peculiar to this case and not unanswered questions of constitutional law.

10. No substantial question of public interest.

The decision of the Appeals Court is based upon the particular facts of the case. The decision has no impact on the public at large or the growth management act as argued by Fowler. This is why the Opinion is unpublished and the motion of Fowler to publish was denied.

D. CONCLUSION

This Court should deny the Petition for Review.

RESPECTFULLY SUBMITTED this 4th day of December, 2015.

Respectfully submitted,

OGDEN MURPHY WALLACE, P.L.L.C.

By

Greg A. Rubstello, WSBA #6271
Attorneys for Plaintiff-Respondent

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DECLARATION OF SERVICE

I, Charolette Mace, an employee of Ogden Murphy Wallace, PLLC, make the following true statement:

On the date below, I provided a copy of the foregoing document to the attorney for Appellant/Defendant via email:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington this 4th day of December, 2015.

Charolette Mace
Legal Assistant