72417-7

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No. 72417-7

COURT OF APPEALS,
DIVISION I,
OF THE STATE OF WASHINGTON

CITY OF WOODINVILLE,

Respondent,

v.

THE FOWLER PARTNERSHIP,

Appellant.

RESPONSE BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

A. ASSIGNMENTS OF ERROR

Assignments of Error

Appellant, the Fowler Partnership ("FOWLER") has designated three assignments of error to the trial court's Order Granting Defendant City of Woodinville's ("WOODINVILLE") Motion for Summary Judgment:

No. 1: Grant of WOODINVILLE'S motion for summary judgment.

No. 2: Denial of FOWLER'S motion for summary judgment.

No. 3: Dismissal of FOWLER'S counterclaim.

Issues Pertaining to Assignments of Error

The central issue before the Court is whether the covenant recorded by FOWLER'S predecessor in title[1] promising to dedicate upon request the south 50 feet of FOWLER'S real property to the public for a public road is enforceable by WOODINVILLE.

WOODINVILLE argues that this issue be answered in the affirmative, and that the Order of the trial court be affirmed.

[1] Wood Associates

B. STATEMENT OF THE CASE

The following facts are uncontested:[2]

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

[2] FOWLER'S statement of facts at pp. 3-12 of the Opening Brief of Appellant contains many disputed factual allegations. The disputed factual allegations include but are not limited to : (1) at p. 8: "The roadway is privately owned and it was used exclusively, with the owner's permission, by tenants, customers and vendors of the tenants occupying space in the Woodinville City Center until 2001"; (2) at p. 8: "Before the City connected the roadway to its street grid, the City's Public Works Director, Mick Monkin, asked Chuck Reidt, the defendant's property manager, for permission to open the dead end and connect 133rd Ave. NE to NE 173rd and join the new pavement to the existing paving on NE 173rd. CP 115. The defendant granted permission to the city to connect NE 173rd to 133rd Ave. NE as a neighborly accommodation. CP 115", (3) at p. 8, "Neither King County nor the City of Woodinville behaved at any time as if they were the owners or occupiers of NE 173rd. CP 115, (4) at p. 11, "the Defendant requested an appraisal of the fair market value of the taking, and the City retained an appraiser, and he concluded the fair market value of the south 50 feet of Defendant's property was $592,500. CP117. This fair market value is an admitted fact. CP 158", at p. 11: "The City filed this suit on April 22, 2014, asserting rights under the 1985 Covenant and claiming a right to take the Defendant's property and pay nothing for it. CP 1-28". WOODINVILLE disputes that enforcement of the covenant is a taking under the Washington Constitution, Article I, § 16 or under the Fifth Amendment to the U.S. Constitution. CP 332.

(LLA).[3] 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 257-257)). Two months later, WOOD ASSOCIATES in apparent compromise and agreement with KING COUNTY[4] in May 1985, recorded a document titled "Covenants, Conditions and Restrictions Running With The Land" ("the Covenant") and binding "*Wood Associates, for itself, its grantees, successors and assigns.*" *See* Exhibit C to the Complaint (CP 14-19 aand 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*

[3] 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.

[4] 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.

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[5]. 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 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.

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[5] 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.

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 August1 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.

C. SUMMARY OF ARGUMENT

FOWLER'S argument that WOODINVILLE'S demand for a dedication deed is governed by Washington constitution, Article I, §16, is not well taken. WOODINVILLE'S demand for a dedication deed is governed by the provisions of the bargained for and recorded Covenant. The Covenant promises the public a dedication deed for a public road when requested. WOODINVILLE'S demand for a dedication deed based upon the promise in the Covenant is not a constitutional taking.

Additional arguments made by FOWLER, and summarized under the general assertion that WOODINVILLE has no rights under the Covenant because the Covenant was revoked by operation of law when the Woodinville City Center Property was conveyed by WOOD ASSOCIATES to FOWLER, are not supported by the cited case law or by the uncontested facts. Each of the arguments made by FOWLER in support of its claim that the WOODINVILLE has no rights under the Covenant is individually addressed below.

D. ARGUMENT

1. The Covenant was not revoked by operation of law upon conveyance of the Woodinville City Center Property to Fowler.

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 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 unenforceable 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.

2. Woodinville has the right to enforce the Covenant as the representative of the public.

FOWLER'S argument beginning at the bottom of p. 14 of the Opening Brief is that the Covenant does not run from King County to Woodinville because the elements necessary to establish a running covenant set forth in *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn.App. 229, 215 P.3d 990 (2009), citing *Leighton v. Leonard*, 22 Wn.App. 136, 139, 589 P.2d 279 (1978), cannot be met. What FOWLER fails to recognize is that the beneficiary of the Covenant is the public. KING COUNTY and WOODINVILLE are governmental entities representing the public interest. The public is entitled to enforcement of

the covenant regardless of their governmental representative acting on the public's behalf. The principle that land dedicated for a public purpose is dedicated to the public and not to a particular entity, was early recognized by the Washington Supreme Court in *Meeker v. City of Puyallup*, 5 Wash. 759 (1893). The facts in *Meeker* were that a dedication of land was made for a public park to the Town of Puyallup. The incorporation of the Town of Puyallup was discovered to be invalid. The City of Puyallup was then incorporated and after taking control of the park property the City was sued by the grantors of the dedication to cancel their deed and enjoin the City from using the land. The court however held that the deed was a dedication to the public and that the public was now represented by the City, and as the representative of the public the City could enforce the dedication. The court recognized that such rule exists for not only streets and highways but for other public uses, such as parks, as well. *Meeker v. Puyallup*, at 761.

WOODINVILLE by enforcing the Covenant's promise of a dedication deed, like KING COUNTY in accepting the Covenant and revising the Lot Line Adjustment, is acting as a representative of the public. FOWLER'S argument that the Covenant does not run with the land

from the KING COUNTY to WOODINVILLE is misplaced.[6] There is no succession in title of land from the KING COUNTY to WOODINVILLE by conveyance as there is in the succession of title from WOOD ASSOCIATES to FOWLER, only a change in the representative of the public. The *privity*[7] or connection between KING COUNTY and WOODINVILLE is that both entities are representatives of the public.

WOODINVILLE as the successor governmental entity to KING COUNTY with land use jurisdiction over the Property has the right to enforce the covenant for dedication of public right of way made on behalf of the public. The fact that the covenant names KING COUNTY and not the later incorporated WOODINVILLE as the public representative is of no consequence. WOODINVILLE is the successor in interest to KING COUNTY to the covenant. FOWLER is the successor in interest to WOOD ASSOCIATES and as expressly intended by WOOD ASSOCIATES, bound to the servitudes set out in the Covenant. See

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[6] Fowler does not dispute that the Covenant runs with the land from Wood Associates to Fowler.

[7] Privity is defined in Black's Law Dictionary, Eighth Edition, at p. 1237 as "1. The connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property..."

Washington Real Property Deskbook (2009), §3.8 at pp. 3-15[8] where it is stated:

> A specific grantee need not be named to effect a valid dedication. *Meeker v. City of Puyallup*, 5 Wash. 759, 32 P. 727 (1893). A deed to the general public, which is not a legal entity, may operate as dedication of the property to public use. *Loose v. Locke*, 25 Wn.2d 599, 604, 171 P.2d 849 (1946).
>
> If a specific grantee is named but does not exist, the court will determine whether the grant was intended to be private or public in nature. For example, a grant to the "Town of Puyallup," which was invalidly organized at the time of the grant, was a valid dedication. The deed served as evidence of the intent of the owner to make a dedication to the public, and the actions of the city of Puyallup, once organized, served as evidence of acceptance by the representative of the public, *Meeker*, 5 Wash. 759.

The promise of a dedication deed for public road purposes is enforceable by WOODINVILLE.

3. <u>FOWLER lacks standing to make a collateral attack on the Covenant as an unconstitutional taking of property</u>.

The Covenant when recorded immediately reduced the fair market value of City Center Property due to restrictive covenant. he subsequent purchaser rule prevents FOWLER from making a claim that that the

[88] A complete copy of Ch. 3 of the Washington Real Property Deskbook is attached to this Response as Attachment B.

Covenant is an unconstitutional taking without nexus to adverse impacts from the development of the Woodinville City Center Property. *Wolfe v. Wash. State Dept. of Transportation*, 173 Wash.App. 302, 293 P.3rd 1244 (2013); and *Hoover v. Pierce County*, 79 Wash.App. 427 (1995), Review denied at 129 Wn.2d 1007 (1996).

The exception allowing a damages claim for loss in property value after acquisition is not applicable based upon uncontested facts. The January 31, 2014, revised Appraisal from the Appraisal Group of the Northwest, LLP ("revised Appraisal"), attached to the Declaration of Michael J. Bond (CP 118-255 and Declaration of Hansen CP 368-510), unequivocally states that if the covenant is enforceable the 50 - foot wide strip has no value. The fair market value of the City Center property is no less after enforcement because the Covenant deprived the owner of control of the property at the time it was recorded. The appraisal states:

> *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").

A taking, if in fact there was one, occurred before FOWLER acquired title. The Covenant was of record when Fowler acquired title. Enforcement of the Covenant for a dedication deed does not give rise to any measurable or provable decline in the market value of the property.

The subsequent purchase rule prohibits FOWLER from maintaining any claim for damages based upon a taking arising from the Covenant.

4. FOWLER'S collateral attack on the enforceability of the Covenant due to an "inadequate nexus" is barred by time.

There are no facts before the Court to suggest that the Covenant was not freely offered and recorded by WOOD ASSOCIATES as consideration for a revised Lot Line Adjustment. It is a reasonable inference to make from the words of the Covenant itself and the other uncontested facts, that it was the intent of WOOD ASSOCIATES to dedicate the property for a needed street. The construction of the street by WOOD ASSOCIATES with development of the Woodinville City Center property further demonstrates the immediate need for street improvements on the Strip, arising from the development and the nexus between the Covenant and the development of the Woodinville City Center property.

KING COUNTY accepted the Covenant on behalf of the public when it deleted the condition from the approved lot line adjustment making dedication a condition of approval, substituting a reference to the recorded Covenant in the revised approval.

There is no evidence in the record indicating that WOOD ASSOCIATES sought timely administrative or judicial review to invalidate the Covenant on the basis that there was inadequate "nexus" between the lot line adjustment and an adverse impact on the public interest that was the result of the lot line adjustment. *Unlimited v. Kitsap County,* 50 Wn.App. 723, 750 P.2d 651 (1988), and *Sparks v. Douglas County*, 127 Wn.2d 901, 904 P.2d 738 (1995) cited by FOWLER both arose from timely filed applications for writ of review (pre-LUPA cases). The time period for filing a writ of review is limited to 30 days from the date of the final local decision and exhaustion of administrative remedies. *Brutsche v. Kent*, 78 Wn. App. 370, 380 898 P.2d 319 (1995). Here no writ was timely sought by the property owner.

Thus, even if FOWLER had standing to make the claim, FOWLER is time barred from collaterally challenging the covenant and condition of

Lot Line Adjustment approval made on May 21, 1985.[9] If the act of the county employee signing the LLA could have been administratively appealed, the property owner failed to exhaust administrative remedies. If there was no administrative appeal the act was a final administrative decision. Fowler's argument at p. 29 of the Opening Brief claiming that any appeal or protest was not ripe for review "because King County retained complete discretion as to when, if ever, it could demand the deed and under what terms" is taken out of context to the record facts. The valid and enforceable promise in the Covenant for the property owner to provide a dedication deed does not as explained below in §7, does not give rise to a constitutional takings claim. FOWLER'S argument at p. 28 of the Opening Brief that "no statute of limitations bars a constitutional taking" is also made out of context to the record facts, because no constitutional taking arises out of enforcement of a valid covenant.

5. Laches does not bar the enforcement of the Covenant.

Laches is not available to FOWLER as shield to enforcement of the Covenant by Woodinville. *Laches* requires an intervening change of conditions making it inequitable to enforce the covenant. *Arnold v. Melani*, 75 Wn.2d 143, 148, 437 P.2d 908 (1968). More than just the

[9] Also see *Chelan County v Nykreim*, 146 Wash.2d 904, 52 P.3d 1 (2002), a post LUPA case.

passage of time must be demonstrated for laches to be applied. *Arnold v. Melani*, at 148. Nothing has happened here since the recording of the Covenant and the making of the public road improvements by WOOD ASSOCIATES to require the doctrine of laches to be applied to deny WOODINVILLE the right to enforce the covenant for the public benefit.

In addition, WOODINVILLE did not know of the Covenant until late 2013. When WOODINVILLE became aware of the Covenant it did not delay in exercising its rights under the covenant. In order for the doctrine of laches to be applied, a party must know of its rights and then sit on them when the rights should equitably have been exercised. *Amende v. Pierce Co.*, 70 Wn.2d 391, 398, 423 P.2d 634 (1967), citing *Morris v. Hillman Inv. Co.*, 99 Wash. 276, 169 Pac. 837 (1918).

Feider v. Feider, 40 Wash.App. 589, 699 P.2d 801 (1985) cited by FOWLER is wholly distinguishable on it facts. The case involved an unrecorded right of first refusal that a family member sought to enforce against another after 29 years even though aware of the right of first refusal for years and failing to enforce it at prior opportunities. *Feider v Feide*r does not support the application of laches to the facts before the Court in the instant case.

Application of the doctrine of laches is also in opposite to the words of the Covenant which FOWLER in its briefing acknowledges gave KING COUNTY...discretion as to when, if ever, it would ask for dedication. The Covenant states that the timing of the dedication "shall be determined by King County. CP 50." Opening Brief, at 29.

6. The absence of any language in the Covenant indicating, suggesting or even implying a payment of any kind or nature, as a condition of delivery of the promised dedication deed demonstrates the intent of Wood Associates and King County, that delivery of the dedication deed was to be without compensation.

FOWLER mistakenly argues that the absence of the words "for free" or "without compensation" demonstrates there was no intent on part of Woods Associates, the drafter, signor and recorder of the Covenant, to dedicate the street without compensation. FOWLER wants the Court to rewrite the covenant with language requiring compensation be paid when none exists. This result is contrary to well established case law. In *Wilkinson v. Chiwawa Cmtys. Ass'n*, 180 Wn.2d 141, 250-251, __P.3d__ (April, 2014), the Court stated that:

> "While interpretation of a covenant is a question of law, the drafter's intent is a question of fact." (citations omitted) ...In determining the drafter's intent, we give covenant language "its ordinary and common use: and will not construe a term in such a way "so as to defeat its plain and

> obvious meaning." (citations omitted) ... "Extrinsic evidence is ...used to illuminate what was written, not what was intended to be written." (citations omitted) ... We, however, do not consider extrinsic "[e]vidence that would vary, contradict or modify the written word" or show an intention independent of the instrument." (citation omitted)

None of the promises in the Covenant (CP 15) speak to any compensation to be paid for construction of a public road along the southern boundary, or for the dedication or deeding of the south 50 feet of the City Center Property by the property owner for a public road. FOWLER misinterprets the language of the Covenant. The references to the formation of a County Road Improvement District (CRIB) pursuant to RCW 36.88 are for the stated purpose of obtaining the property owner's waiver of objection to the formation of a CRIB for a road improvement project, should the county choose to form such a district. There is no language calling out RCW 36.88.310 or suggesting that the south 50 feet required to be dedicated would need to be acquired by gift, purchase or by condemnation by the county acting through its board of county commissioners, as implied by FOWLER at p. 25 of the Opening Brief. The Strip was specifically required to be dedicated under paragraph 3 of the Covenant.

The ordinary meaning of the words used in the Covenant indicate that if KING COUNTY, and now WOODINVILLE, asked for a deed, then when that happened a dedication deed would be delivered and recorded without compensation being paid to the owner of the Woodinville City Center.

7. There is no constitutional or compensatory taking of property by enforcement of a valid covenant promising a dedication deed.

A party claiming that private land has been taken by the government in violation of the takings clause has the burden of demonstrating conduct that would constitute a taking. *Burton v. Clark County*, 91 Wn.App. 505, 958 P.2d 343 (1998), review denied at 137 Wn.2d 1015 (1999). This means there must be either: (1) a physical act such as invading and occupying land; (2) a legislative act such as enacting a statute, ordinance; or (3) a regulation by a local governmental entity, or a quasi-judicial act such as denying or conditioning a development permit by a local governmental entity. *Burton v Clark County*, at 515-516. WOODINVILLE has demanded that FOWLER fulfill the promise of the Covenant recorded by the property owner in conjunction with an administrative land use permitting act by KING COUNTY employees in 1985. No administrative appeal was taken. No timely judicial review was

sought. Contrary to FOWLER'S argument at p. 26 of its Opening Brief, fundamental attributes of property ownership were affected by the recording of the Covenant as noted in the revised Appraisal Report referenced at p. 14 of this Response Brief. The resale value of the Strip was reduced to zero with the recording of the enforceable covenant.

The covenant was voluntarily offered by the property owner to obtain the lot line adjustment it needed to development its property under King County zoning regulations. No taking of private property by WOODINVILLE under the state or federal constitution has occurred by WOODINVILLE'S demand for a dedication deed, or by the enforcement of the promise to provide a dedication deed under paragraph 3 of the Covenant.

8. Woodinville has acquired title to the property by common law dedication.

Contrary to the arguments of FOWLER, the south 50 foot wide strip of the Woodinville City Center property has already been dedicated by common law dedication. There was: (1) an intentional offer by the owner to appropriate an interest in the property; (2) the interest was for a public use; and (3) there has been acceptance of the offer by the public through acceptance of the Covenant by King County and use of the street by the general public. No particular form or ceremony is required for a

common law dedication. *Washington Real Property Deskbook* (2009), §3.2 at p. 3, §3.4 at pp. 3-8 and 9, and §3.6 at pp. 2-11 through 3-12. If the dedication occurred prior to the incorporation of Woodinville, title to the county road reverted to WOODINVILLE upon incorporation. RCW 35.02.180. The dedication deed will clear WOODINVILLE'S title to the public right-of-way.

As noted by the authors of Chapter 3 Dedication and Vacation in the *Washington Real Property Deskbook* (CP 334-353) at 3-10 and 3-12), public use need not continue for the 10 years required for adverse possession to establish a common law dedication by public use. It is the intent of the dedicator to dedicate rather than the time period that adverse use continues in determination of a dedication.

9. <u>There are material facts in dispute as to whether Woodinville has, in absence of a common law dedication, acquired the property by adverse possession</u>.

FOWLER relies upon an inaccurate factual scenario at pp. 31 and 32 of the Opening Brief in an attempt to demonstrate a lack of merit to WOODINVILLE'S adverse possession defense to FOWLER'S takings counter claim. The facts as stated by FOWLER are disputed in the declarations of the DeYoungs, Monken, Hansen and Rubstello submitted

with WOODINVILLE'S Response to FOWLER'S Counter-Motion for Summary Judgment.

The Declarations of the DeYoungs (long time area property owners) and of former Director of Public Works Monken, recite facts demonstrating that since construction of the street by Wood Associates, it has been available for public use and used by the general public without restriction by the owner of the City Center Property. When constructed it connected with existing 135th Ave NE and with the Zante Farm Rd. In 1996 with the construction of the Brittany Park Apartments and a half street improvement of 133rd Ave NE (replacing the Zante Farm Rd) greater public access to NE 173rd Street was now available and in demand. With the full street improvement by the City to 133 Ave NE in 2000, the construction of the Woodinville City Hall in 2001 and the Phase II construction of 133rd Ave NE in 2002, the general public need and use of the road again increased. The condition of NE 173rd Street caused the City to overlay the pavement in 2001, an action inconsistent with private ownership. Maintenance being performed by the City over the years until it was stopped by Public Works Director Hansen in 2010 while ownership was in dispute between Woodinville and Fowler. Hansen's action to halt maintenance activities came well after the necessary ten years for adverse

possession expired. Since Woodinville continued to assert to Fowler that adverse possession was already established and the street remained open to general public use Hansen's action is not determinative. The hostility requirement to demonstrate adverse possession is met if the claimant shows it treated the land as its own against the world throughout the statutory ten year period. *Chapin v. Sanders*, 100 Wn.2d 853, 860-861, 676 P.2d 431 (1984).

In all that time between 1986, and continuing even today, the general public has been the adverse user. The Covenant itself demonstrates adverse use of the constructed street since public use was required and as stated by the DeYoungs in their Declaration, the street has always been open to general public use. The tacking of time between adverse public use of NE 173rd Street when in unincorporated King County and then after incorporation by Woodinville in 1993 is recognized by case law to establish the required ten years for adverse possession. *Miller v. Anderson*, 91 Wn. App. 822, 827, 964 P.2d 365 (1998), review denied, 137 Wn.2d 1028 (1999).

10. Fowler's claim that if the Covenant is unenforceable, a fair market value for the Strip of property at $592,500 is undisputed, is misleading and irrelevant.

At p. 32 of the Opening Brief, FOWLER argues that the trial court should have made a finding of fact as to the value of the property in the undisputed amount of $592,500, citing CR 56(d) which states as follows:

> **(d) Case Not Fully Adjudicated on Motion.** If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed establish, and the trial shall be conducted accordingly. (emphasis added)

Since judgment was rendered by the trial court upon the whole case, CR 56(d) has no application. CP 526-528. The trial court correctly did not make a finding of fact as to the value of the property.

Furthermore, since there is no compensable taking by WOODINVILLE if it acquires the property by enforcement of the dedication deed, by common law dedication, or by adverse possession, the value of the property is not an issue in the case, except for purposes of the

subsequent purchaser rule previously discussed in § 3 above. Woodinville has made no argument as to what the value of the property might be if the Covenant is unenforceable and the property has not otherwise been acquired by common law dedication or adverse possession. Woodinville as stated in the Declaration of Hansen (CP 368-510) did not accept the appraisal relied upon by FOWLER. It contained a number of factual errors upon which the appraisal amount was based.

11. No legal basis exists for an award of attorney fees.

Even should this court reverse the trial court and hold that the Covenant is unenforceable there is no legal basis for an award of attorney fees to FOWLER. The record is completely absent of any condemnation proceeding under RCW 8.12, *et seq*, referenced by FOWLER at p. 33. WOODINVILLE'S demand for a dedication deed is based upon enforcement of the Covenant and not an involuntary taking of property under RCW 8.12, *et seq*. WOODINVILLE has made no claim for acquiring the property by eminent domain and the required statutory procedures for such a proceeding have not be commenced by Woodinville.

FOWLER'S claim for an award of attorney fees and costs pursuant to RAP 18.1 is absolutely without merit.

E. CONCLUSION

This Court should affirm the summary judgment of the trial court.

RESPECTFULLY SUBMITTED this 8th day of December, 2014.

Respectfully submitted,

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

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

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:

Michael J. Bond, Esq.
SHEDLER BOND, PLLC
2448 76th AVE SE, Suite 202
Mercer Island, WA 98040
email: michael@bondschambers.com

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 8th day of December, 2014.

Charolette Mace
Legal Assistant

APPENDIX

Attachment A: Recorded Covenant

Attachment B: Ch. 3 of the Washington Real Property Deskbook

ATTACHMENT A

A

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COVENANTS, CONDITIONS AND RESTRICTIONS
RUNNING WITH THE LAND

Wood Associates, a Washington general partnership composed of Baldwin & Associates, Inc., the Gossard partnership, Bruce Tuesley and Russell F. Rogers, owns and is developing the following legally described real estate:

See attached Exhibit A.

8505210708

The county may develop and/or construct a roadway to be denominated NE 173rd Street, adjacent to and running along the southerly boundary of Lots A, B, and C. Said road development may be initiated by the formation of a County Road Improvement District (CRID), pursuant to RCW 36.88.

Wood Associates, for itself, its grantees, successors and assigns, (hereinafter "Owner") hereby agrees and covenants as follows:

1. Owner will participate in, and/or not oppose or protest the formation of a County Road Improvement District (CRID) pursuant to RCW 36.88 or any road improvement project sanctioned by King County which is designed to develop and improve NE 173rd Street.

2. Owner will Maintain a 50 - foot setback along the southerly border of said Lots A, B and C in accordance with King County's zoning and setback regulations, except that owner may develop said 50 - foot strip for street, landscape and drainage improvements in accordance with approved county plan.

3. Owner will deed the south 50 - feet of Lots A, B and C to King County for Public Road purposes when sanctioned by King County.

Timing of the formation of any such CRID or other road improvement project and the dedication of the south 50 - feet of Lots A, B and C shall be determined by King County. The street improvement authorized by the CRID or other road improvement project shall call for improvement of NE 173rd Street and its immediate street system to, at least. the minimum King County road standards applicable to said street (s) and the immediate street system at the time the CRID or other road project is formed; provided that, if there is multiple ownership of properties participating in the formation of the CRID or other road improvement project, if a majority of the property owners want a higher standard, ie, curbs, gutters, underground drainage, etc., that standard shall apply.

In Witness Whereof, we have set our hands and seals this 15TH day of Nov., 1985.

WOOD ASSOCIATES, a Washington partnership

BY: BALDWIN & ASSOCIATES, Inc., PARTNER

By: B Baldwin
Brian J. Baldwin, President

RECORDED AT THE REQUEST OF
MAY 21 2 19
KING CO. WASH.

Filed for Record at Request of
Name Vester Development
Address 8060 165TH Ave NE
Redmond WA. 98052

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ATTACHMENT B

B

CHAPTER 3

DEDICATION AND VACATION

Judith A. Shulman

John T. Cooke

Summary

Judith A. Shulman is a senior vice president and the national director of real estate services for HDR Engineering, Inc., overseeing a nationwide group specializing in the acquisition and disposition of land for government, railroad, and energy purposes, and in related regulatory and permitting matters. Previously, she was a partner in the law firm of Davis Wright Tremaine. She received her law degree from Yale Law School and was an editor of the YALE LAW JOURNAL.

John T. (J.T.) Cooke is an associate at Perkins Coie, LLP, in the firm's environment & natural resources practice. He focuses on land use, real estate, and environmental law and has represented clients before administrative bodies and Washington courts. Mr. Cooke received his law degree from Vermont Law School magna cum laude and was an editor of the VERMONT LAW REVIEW.

B

§3.1 INTRODUCTION

This chapter deals with public acquisition of private property rights through dedication, and the loss or termination of public rights in dedicated property by reason of abandonment or vacation. The chapter details procedures for accomplishing a statutory dedication, the elements necessary to establish a valid dedication under the common law, the processes to extinguish the interest of the public in dedicated property, and the public and private property interests affected by dedication, abandonment, and vacation.

This chapter does not cover the subjects of federal or state public lands, which are discussed in Volume 5, Chapter 20 (Federal Public Lands), and Volume 6, Chapter 12 (State-Owned Public Lands), of this deskbook. It also does not cover the sale or other conveyance of property to the public or a public entity for value, or the acquisition of property or property rights through or under the threat of eminent domain, which is covered generally in Volume 5, Chapter 19 (Regulatory Taking and Inverse Condemnation), of this deskbook. The process by which a public entity may divest itself of or lose its rights in surplus and other property that is not dedicated property is discussed in Volume 6, Chapter 12 (State-Owned Public Lands), of this deskbook.

§3.2 REQUISITES OF A VALID DEDICATION

"Dedication" is the deliberate appropriation of land by an owner for any general and public uses, reserving to themselves no rights beyond those that are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted. RCW 58.17.020(3).

(1) Essential elements

The requisites of a valid dedication are (1) an intentional offer, express or implied, by the owner of real property, to appropriate the property or an easement or interest therein; (2) a public use; and (3) acceptance of the offer, express or implied, by the public. 11A Eugene McQuillin, THE LAW OF MUNICIPAL CORPORATIONS §33.2 (3d ed. 2009); *see* 23 AM. JUR. 2D *Dedication* §1 (2002 & Supp. 2010). No particular form or ceremony is required. *Roundtree v. Hutchinson*, 57 Wash. 414, 415, 107 P. 345 (1910).

(2) Presumptions and burdens

A party that asserts a public right bears the burden of establishing a dedication's essential elements. *Karb v. City of Bellingham*, 61 Wn.2d 214, 218-19, 377 P.2d 984 (1963). The most important of the elements, intention of the owner to dedicate, will not be presumed. It must be proven by the party asserting it and must be unmistakable. *See Cummins v. King Cnty.*, 72 Wn.2d 624, 627, 434 P.2d 588 (1967); *Lopeman v. Hansen*, 34 Wn.2d 291, 295, 208 P.2d 130 (1949). A presumption of the intention to dedicate may arise in special cases in which it is determined that the owner should have intended to dedicate certain property even if that party did not so intend. AGO 1962 No. 182 (Dec. 12, 1962). For example, if a road extends to shorelands, there is a presumption that public access extends to the shorelands. *Albee v. Town of Yarrow Point*, 74 Wn.2d 453, 457, 445 P.2d 340 (1968). There is no presumption of public access to shorelands, however, if the road does not extend to the shorelands. *Clippinger v. Birge*, 14 Wn. App. 976, 987-88, 547 P.2d 871 (1976).

§3.3 OFFER TO DEDICATE—STATUTORY DEDICATION

A statutory dedication is an express dedication that is made pursuant to the provisions of a statute. 11A Eugene McQuillin, THE LAW OF MUNICIPAL CORPORATIONS §§33.3-33.4 (3d ed. 2009). In a statutory dedication, the intention of the owner to dedicate is typically evidenced by presenting a local government with a final or short plat showing the dedication on the plat. Acceptance by the public is evidenced by governmental approval of the plat or short plat for filing. RCW 58.17.020(3). An executed and recorded instrument establishing a dedication may also be evidence of an owner's intent. *See, e.g.*, RCW 79.70.090.

Specific statutory requirements are discussed below.

(1) Subdivisions and short subdivisions

A dedication in connection with a subdivision or short plat is the most common type of dedication. Local government may require a dedication of land as a condition of subdivision approval, as long as it does not result in an unconstitutional taking of private property. RCW 58.17.110(2). See Volume 6, Chapter 2 (Subdivision of Land), of this deskbook for procedures for accomplishing a subdivision or short subdivision of real property.

A plat subject to a dedication must contain a certificate or separate written instrument as part of the final plat that shows all of the street and other areas dedicated to the public (and other benefited parties, if any), and a waiver of all claims against any government for damages to adjacent property caused by the private developer during the construction, the drainage from, and the maintenance of the dedicated property. RCW 58.17.165; *see also Howe v. Douglas Cnty.*, 146 Wn.2d 183, 190, 43 P.3d 1240 (2002) (limiting a government's ability to waive its liability for dedicated improvement to harms *caused* by the private developer that constructed the improvements). If roads are to be maintained as private roads, the final plat must also show on its face those roads that will remain private. A notary public must acknowledge the signature on the certificate or instrument of dedication for all parties having any ownership interest in the subdivided property, and a title report must accompany the plat or short plat confirming the ownership of the persons signing the instrument. RCW 58.17.165.

(2) Cities and towns—recording of plats

When a city or town files a plat with the office of the county auditor in which the city or town is located, the plat is the official plat of the city or town and the roads, streets, and alleys shown on the plat are public highways. RCW 58.08.050. The streets, lanes, and alleys on the plat must be laid off and recorded in accordance with RCW 58.08.010-.030. Any person who does not comply with these requirements may be liable for as much as $100 for each month of delay. RCW 58.08.035.

Before any lots within a town may be sold, a town plat, or plat of an addition to the original plat of a town, must be recorded showing any public grounds, streets, lanes, and alleys, with their respective widths properly marked, the lots regularly numbered, and the size of the lots stated. RCW 58.08.010, .020. When presenting a plat for recording, all persons with an interest in the property covered by the plat must sign and acknowledge the plat. RCW 58.08.030. A certificate must also accompany the plat stating that all taxes levied and charged and special assessments charged against the subject property have been paid, satisfied, and discharged, and all delinquent and special assessments charged against the property to be dedicated have been paid. *Id.* In addition, any person recording a plat after May 31 in any calendar year, and before taxes in that year have been collected, must deposit with the county treasurer a sum equal to the product of the county assessor's latest valuation on the unimproved property in the plat (less improvements), multiplied by the current year's dollar rate increased by 25 percent. After the exact amount of taxes owing is

determined, the county treasurer applies the amount deposited to the unpaid taxes and assessments and returns any excess to the person who made the deposit. RCW 58.08.040.

Comment:	Chapter 58.17 RCW contains specific subdivision dedication provisions. Chapter 58.08 RCW was enacted in 1881 but has since been amended. One should probably read Chapter 58.08 as a supplement to Chapter 58.17 RCW, applicable to dedications in cities and towns.

(3) County land in cities and towns

A board of county commissioners has the authority to determine if it is in the best interest of the public to dedicate any county land in a city or town for the public use as a street or alley. The board accomplishes a dedication by an order entered upon the board's records, designating the land dedicated. A certified copy of the order must be recorded in the auditor's office of the county where the land is situated. From and after the entry of such order and the recording, the land is dedicated. RCW 36.34.300.

(4) Natural areas

A registered natural area is a public or private area of land or water that has retained its natural character (although not necessarily completely natural and undisturbed) or that is important in preserving rare or vanishing flora, fauna, geological, natural, historical, or similar features of educational or scientific value. RCW 79.70.020(2), (10). A natural area is registered by a dedication of an owner, an acquisition, or a voluntary registration with Washington's register of natural preserves. Any private party that owns a registered natural area, or any public agency owning or managing a registered natural area, may voluntarily dedicate the area by signing an instrument of dedication with the state in a form approved by the Natural Heritage Advisory Council. RCW 79.70.090; WAC 332-60-090. The instrument of dedication must be in the form required by law for any other land conveyance. WAC 332-60-100. The dedication becomes effective upon recording of the instrument of dedication in the real property records of the county or counties within which the natural area is located. RCW 79.70.090; WAC 332-60-120. Such dedication, once made, cannot be terminated except as provided in the instrument of dedication. RCW 79.70.090(3)(d); WAC 332-60-130.

(5) State tidelands and shorelands

When the Department of Natural Resources (DNR) establishes harbor lines and harbor areas in front of any city or town, it must survey and plat all unplatted tidelands and shorelands of the first class and lay out streets on them as soon as practical. Such streets dedicated to public use are subject to the control of the cities and towns in which they lie. RCW 79.120.010; RCW 79.125.020. All alleys, streets, avenues, boulevards, waterways, and other public places and highways located and platted on tidelands and shorelands of the first class, or harbor areas, not vacated as of July 1, 1982, are public highways and dedicated to public use. RCW 79.120.020. DNR also has authority, but is not directed, to survey and plat any tidelands and shorelands of the second class. RCW 79.125.030.

(6) Defective plats

A statutory dedication of a plat fails if it contains a defect. Plat defects may be cured by a subsequent deed of dedication, properly executed (and, presumably, filed of record). *Meachem v. City of Seattle*, 45 Wash. 380, 386, 88 P. 628 (1907).

Failure to record a plat renders the dedication contained in the plat a common-law dedication rather than a statutory dedication. *Sweeten v. Kauzlarich*, 38 Wn. App. 163, 167, 684 P.2d 789 (1984). Unless the plat is recorded, a subsequent purchaser who is innocent and has no notice of a dedication will not be bound by the dedication. *City of Spokane v. Catholic Bishop of Spokane*, 33 Wn.2d 496, 505, 206 P.2d 277 (1949); *Lind v. City of Bellingham*, 139 Wash. 143, 245 P. 925 (1926); *Sweeten*, 38 Wn. App. at 168-69. Under the recording statutes, an unrecorded plat is not constructive notice, and reference to an unrecorded plat is not legal notice. The question of actual notice depends upon the proof in a specific case. *Napier v. Runkel*, 9 Wn.2d 246, 253-54, 114 P.2d 534 (1941).

If a statutory dedication fails by reason of a defect, a common-law dedication may exist if the required elements are present. *City of Seattle v. Hill*, 23 Wash. 92, 96-97, 62 P. 446 (1900).

(7) Rules of construction—plats

In an express dedication, whether a particular street, alley, or other strip has been dedicated to the public is a question of law. *Tilzie v. Haye*, 8 Wash. 187, 189, 35 P. 583 (1894). In determining whether a plat complies with the statute, the intention of the dedicator controls.

This intention need not be expressed in words. *Mueller v. City of Seattle*, 167 Wash. 67, 73, 8 P.2d 994 (1932).

If the plat is unambiguous, the court will establish the intention of the dedicator from the plat. *Nelson v. Pac. Cnty.*, 36 Wn. App. 17, 20, 671 P.2d 785 (1983), *review denied*, 100 Wn.2d 1037 (1984); *Rainier Ave. Corp. v. City of Seattle*, 80 Wn.2d 362, 366, 494 P.2d 996, *cert. denied*, 409 U.S. 983 (1972); *Frye v. King Cnty.*, 151 Wash. 179, 182, 275 P. 547 (1929). Plats are construed as a whole and every part of the instruments is given effect. No part of the plat is rejected as meaningless if such a result can be avoided. *Cummins*, 72 Wn.2d at 626-27; *Ditty v. Freeman*, 55 Wn.2d 306, 309, 347 P.2d 870 (1959). Lines and designations on the plat are considered, as well as the words. *Rainier Ave. Corp.*, 80 Wn.2d at 366; *Cummins v. King Cnty.*, 72 Wn.2d 624, 627, 434 P.2d 588 (1967); *Wilson v. Howard*, 5 Wn. App. 169, 176, 486 P.2d 1172 (1971), *review denied*, 79 Wn.2d 1011 (1971). The court will look to all marks and lines on the face of the plat to deduce the intent of the dedicator. *Neighbors & Friends of Viretta Park v. Miller*, 87 Wn. App. 361, 376, 940 P.2d 286 (1997), *review denied*, 135 Wn.2d 1009 (1998). In some cases, intent of the dedicator will be presumed. *Id.* at 375-76 (noting that in Washington it is presumed that a person recording a plat intends to provide convenient access to all of the lots).

When a plat is ambiguous, extrinsic evidence to establish the intention of the dedicator is admissible. *Tilzie*, 8 Wash. 187. Extrinsic evidence cannot be used to contradict an unambiguous plat or to create an ambiguity. *Neighbors*, 87 Wn. App. at 376-77.

§3.4 OFFER TO DEDICATE—COMMON-LAW DEDICATION

A common-law dedication may be either express or implied. *Richardson v. Cox*, 108 Wn. App. 881, 890-91, 26 P.3d 970 (2001), *review denied*, 146 Wn.2d 1020 (2002); 11A Eugene McQuillin, THE LAW OF MUNICIPAL CORPORATIONS §33.3 (3d ed. 2009).

(1) Express dedications

An express common-law dedication is an appropriation formally declared and with the intent being manifested orally or through written words. 11A McQuillin, §33.03. One example of an express common-law dedication is a common-law dedication resulting from a defective statutory dedication. See §3.3(6), above.

A conveyance by deed also may result in a common-law dedication. A deed containing an express grant operates as evidence of the owner's intent to dedicate property to public use. Because the deed in this context is evidence of intent rather than evidence of a legal conveyance, a deed dedicating land to the public need not have all of the formal requisites of a deed of conveyance of real property between private persons. *See, e.g., Horton v. Okanogan Cnty.*, 98 Wash. 626, 631, 168 P. 479 (1917).

(2) Implied dedications

An implied common-law dedication operates by way of an estoppel in pais, as distinguished from a statutory dedication that proceeds from a grant. *Roundtree v. Hutchinson*, 57 Wash. 414, 416, 107 P. 345 (1910) (which did not distinguish between express and implied common-law dedications).

In an estoppel case, the owner of the underlying fee is precluded from challenging a right of use because of some act or deed inconsistent with that denial. *See* 23 AM. JUR. 2D *Dedication* §20 (2002 & Supp. 2010).

Two elements must be present to establish an implied, common-law dedication: (1) an unequivocal act by the fee owner establishing an intention to dedicate and (2) reliance on the act by the public, indicating public acceptance. *Karb v. City of Bellingham*, 61 Wn.2d 214, 218-19, 377 P.2d 984 (1963); *Stevens Cnty. v. Burrus*, 180 Wash. 420, 424, 40 P.2d 125 (1935); *City of Seattle v. Hill*, 23 Wash. 92, 96-97, 62 P. 446 (1900).

These elements have been found present where an entire neighborhood used the owner's property as a burial ground for 30 years with the owner's consent, *Roundtree*, 57 Wash. 414; and where owners sold land with representations that adjoining property was a public park and the property would be used as a public park for several years. *Lueders v. Town of Tenino*, 49 Wash. 521, 95 P. 1089 (1908). In contrast, occasional use of a strip by neighbors, with the consent of the owners, is insufficient to establish an intention to dedicate and acceptance of the strip as a public street. *Forrester v. Fisher*, 16 Wn.2d 325, 335, 133 P.2d 516 (1943). Likewise, a developer may permit lot owners to use property without establishing an intention to dedicate the property. In *Knudsen v. Patton*, 26 Wn. App. 134, 611 P.2d 1354 (1980), *review denied*, 94 Wn.2d 1008 (1980), the developer was allowed to sell his land even though lot owners regularly used it, because the developer did not intend for the property to be used by the general public.

§3.5 PRESCRIPTIVE EASEMENTS AND IMPLIED COMMON-LAW DEDICATIONS DISTINGUISHED

Washington cases do not clearly distinguish between public easement by prescription and implied dedication to the public by the owner. Public easements by prescription have a basis in implied dedications to the public. *Van Sant v. City of Seattle*, 47 Wn.2d 196, 201, 287 P.2d 130 (1955). There are, however, some important distinctions.

To establish an implied dedication there must be a showing that the owner intended to dedicate the property, but it is not necessary to show an owner's intent to establish a prescriptive easement. One must only show that the public used the easement openly, notoriously, continuously, without interruption, and adversely to the owner with the owner's knowledge. *Mood v. Banchero*, 67 Wn.2d 835, 410 P.2d 776 (1966); *see, e.g., Primark, Inc. v. Burien Gardens Assocs.*, 63 Wn. App. 900, 823 P.2d 1116 (1992). See also Volume 1, Chapter 7 (Easements and Licenses), of this deskbook for a discussion of prescriptive easements generally. Although these elements may seem different, intent to dedicate often turns on evidence showing the owner's acquiescence in continuous public use of the property that is adverse to the owner's assertion of private ownership. *See, e.g., Columbia & Puget Sound Realty. Co. v. City of Seattle*, 33 Wash. 513, 74 P. 670 (1903).

A more important distinction is the amount of time the adverse use must continue. For a prescriptive easement, the adverse use must continue without interruption for the statute of limitations period applicable to real property. *See, e.g., State ex rel. Shorett v. Blue Ridge Club*, 22 Wn.2d 487, 156 P.2d 667 (1945). In Washington, this period is 10 years. RCW 7.28.010.

Washington courts have not addressed the specific amount of time the use must continue to establish an implied dedication, but courts have held that the statute of limitations applicable to prescriptive easements does not apply for the purpose of establishing acceptance of a dedication by the public. *Okanogan Cnty. v. Cheetham*, 37 Wash. 682, 80 P. 262 (1905), *overruled on other grounds by McAllister v. Okanogan Cnty.*, 51 Wash. 647, 100 P. 146 (1909). The time period required to establish an implied dedication therefore can be much shorter than that required to establish title by prescription.

Many states focus on the intent of the dedicator to dedicate rather than the time period that the adverse use continues. 23 AM. JUR. 2D *Dedication* §32 (2002 & Supp. 2010). The amount of time may be used, however, as evidence of the owner's knowledge and acquiescence. *See,*

e.g., *Bess v. Cnty. of Humboldt*, 3 Cal. App. 4th 1544, 5 Cal. Rptr. 2d 399 (1992).

Practice Tip:	Intent of the dedicator is critical to establishing a public right-of-way by implied dedication. The length of time of public use is less important. To establish a public right-of-way by prescription, the dedicator's knowledge and acquiescence is less important. The length of time of public use, however, is critical. In litigation to establish a public right-of-way, courts have not always made clear distinctions. It is best to allege a public right-of-way both by implied dedication and by prescription whenever possible.

§3.6 ACCEPTANCE OF DEDICATION

Because a valid dedication may impose duties and liabilities incident to ownership upon governmental authorities and exempt the property from taxation, an offer to dedicate may be accepted or rejected; and some form of acceptance is required to complete the dedication. *Smith v. King Cnty.*, 80 Wash. 273, 276, 141 P. 695 (1914). Acceptance may be implied; no express act by public authorities is required. *Loose v. Locke*, 25 Wn.2d 599, 604, 171 P.2d 849 (1946); *City of Seattle v. Hinckley*, 67 Wash. 273, 121 P. 444 (1912); *Okanogan Cnty. v. Cheetham*, 37 Wash. 682, 80 P. 262 (1905), *overruled on other grounds by McAllister v. Okanogan Cnty.*, 51 Wash. 647, 100 P. 146 (1909). Acceptance may be shown by (1) express acts of the governmental authority, (2) implication from acts of the governmental authority, or (3) implication from use by the public for the purpose for which the property is dedicated. *City of Spokane v. Catholic Bishop of Spokane*, 33 Wn.2d 496, 206 P.2d 277 (1949); *Knudsen v. Patton*, 26 Wn. App. 134, 143, 611 P.2d 1354 (1980), *review denied*, 94 Wn.2d 1008 (1980). Each of these forms of acceptance is discussed below.

(1) Express acceptance

Approval of a final or short plat by the appropriate governmental unit is evidence of acceptance of the dedication. RCW 58.17.020(3). A city, town, or county legislative body has the authority to approve a subdivision and dedication if it finds (1) that the proposed plat makes appropriate provisions for the public health, safety, and general welfare, and for open spaces, drainage ways, streets, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks, playgrounds, schools and school grounds, and all other relevant

features, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (2) that the public use and interest will be served by the subdivision and dedication. RCW 58.17.110(2).

For final plat approval, the legislative body also must find that the subdivision meets all of the requirements of Chapter 58.17 RCW, as well as applicable state and local ordinances. RCW 58.17.170. Written approval must be inscribed on the face of the plat, RCW 58.17.170, and the county auditor must refuse to accept any plat that is not approved by the appropriate legislative body. RCW 58.17.190.

(2) Implication of acceptance from acts

Any purposeful act of acknowledgment can constitute implied acceptance. The order of county commissioners to open platted streets constitutes acceptance. *Thonney v. Rice*, 43 Wash. 708, 86 P. 713 (1906). The order of county commissioners to file a recorded plat in the plat book constitutes acceptance. *Meachem v. City of Seattle*, 45 Wash. 380, 388, 88 P. 628 (1907). Passage of an ordinance establishing street grade for platted streets constitutes acceptance. *Catholic Bishop*, 33 Wn.2d at 503-04. Any repair or improvement, directly or indirectly, to platted streets constitutes acceptance. *Kanall v. Wright*, 137 Wash. 661, 665, 244 P. 245 (1926); *Spencer v. Town of Arlington*, 49 Wash. 121, 123-24, 94 P. 904 (1908). Acceptance can occur without the use of public funds for improvement and maintenance. *Loose*, 25 Wn.2d at 604; *Hinckley*, 67 Wash. 273.

(3) Implication of acceptance from use

Implied acceptance occurs when the public uses the property in the manner for which it is dedicated. *Catholic Bishop*, 33 Wn.2d at 504; *Corning v. Aldo*, 185 Wash. 570, 55 P.2d 1093 (1936); *Hinckley*, 67 Wash. 273; *Spencer*, 49 Wash. 121; *Cheetham*, 37 Wash. 682. The use need not continue for the prescriptive period, but must be actual and continuous. To establish use by the public, use by those who would naturally be expected to enjoy the land is important, rather than the number of users. *Catholic Bishop*, 33 Wn.2d at 504. If the land is used by only a portion of the public, it must at least be available for use by all of the public. *Knudsen*, 26 Wn. App. at 141-42. Only that portion of the property actually used by the public will be deemed accepted and therefore dedicated. *Sweeten v. Kauzlarich*, 38 Wn. App. 163, 168, 684 P.2d 789 (1984).

§3.7 CHARACTERISTICS OF THE DEDICATOR

Only the titleholder of property can make a valid dedication. *Frye v. King Cnty.*, 151 Wash. 179, 183, 275 P. 547 (1929); *Cook v. Hensler*, 57 Wash. 392, 400, 107 P. 178 (1910). If the dedicator does not have legal title at the time of the dedication, equitable title in some cases may be sufficient. *Meachem v. City of Seattle*, 45 Wash. 380, 88 P. 628 (1907). All parties with an ownership interest in the property must join in a dedication. RCW 58.17.165. When there is separate title to the surface and mineral rights, the consent of the mineral rights owner may not be required. *See Harrison v. Stevens Cnty.*, 115 Wn. App. 126, 131-34, 61 P.3d 1202 (2003), *review denied*, 149 Wn.2d 1031 (2003) (concluding that the owner of mineral rights is not affected by a subdivision of land).

Practice Tip:	Be sure to check local code requirements for a valid dedication. In *Harrison*, 115 Wn. App. 126, the Stevens County Code initially required the signature of all parties having "any interest" in the land. The plat was denied because the owner of the mineral rights had not agreed to sign the plat. The county later amended its code to parallel RCW 58.17.165, which requires the signatures of all parties that have "any ownership interest" in the lands subdivided. This change, although slight, allowed the owners of the surface estate to reapply and subdivide their property without the consent of owners of the mineral rights.

Title need not be a matter of public record. *Halverson v. City of Bellevue*, 41 Wn. App. 457, 704 P.2d 1232 (1985). In the absence of ratification and estoppel, a dedication will not be valid as to after-acquired property of the dedicator. *Frye*, 151 Wash. at 183-84. If at the time of dedication the dedicator has neither legal nor equitable title but later acquires title, an ineffective dedication may serve as evidence of intent of an implied dedication. *Frye*, 151 Wash. 179.

(1) Possessory interest in the property

Mere possession of the dedicated property may be sufficient to establish an equitable property interest to validate a dedication, provided the dedicator later acquires legal title. *Meachem*, 45 Wash. 380. A tenant in possession, however, may not dedicate the property of the landlord to public use. *Lopeman v. Hansen*, 34 Wn.2d 291, 295, 208 P.2d 130 (1949). A party who acquires an interest in property by adverse possession has an ownership interest and must participate in a plat dedication, provided that the governmental unit is aware of

the adverse possession claim prior to acceptance. Upon passage of the statutory period, title passes automatically by operation of law to the adverse possessor. *Halverson*, 41 Wn. App. 457.

Comment:	The court in *Halverson*, 41 Wn. App. 457, decided in favor of the adverse possessor because she had notified the city of Bellevue of her claim prior to acceptance of the plat by the city. However, the case makes it clear that an adverse possessor acquires an ownership interest automatically after the passage of the statutory period, and RCW 58.17.165 requires that all parties with an ownership interest join in a dedication. Unless the statute is changed to limit ownership interests to those of record, an argument could be made that a dedication is invalid if, at the time of the dedication, there was an adverse possessor that did not join in the claim, regardless whether the claim of adverse possession has been asserted or the governmental authority has been notified.

(2) Easement interests

A fee owner of land subject to a right of way may dedicate what the dedicator owns, provided the dedication does not adversely affect the right of the owner of the dominant tenement. *See generally Armiger v. Lewin*, 216 Md. 470, 141 A.2d 151, 69 A.L.R.2D 1235 (1958). A railroad may dedicate a portion of its right-of-way to public use, even if the railroad holds only an easement rather than fee simple title to the property, provided the public use does not affect the reserved rights of the original grantor. *N. Pac. R.R. Co. v. City of Spokane*, 56 F. 915 (C.C.D. Wash. 1893), *aff'd*, 64 F. 506 (9th Cir. 1894), *appeal dismissed*, 17 S. Ct. 997 (1896).

Comment:	Although *Northern Pacific Railroad Co.* contains language that might be construed to permit the holder of an easement the right to grant public easements to the extent of the estate possessed, 64 F. at 509, the analysis turns on the rights of railroad corporations; and the facts of the case are unusual because the railroad filed the original plat.

(3) Interests of mortgagor and mortgagee

A mortgagor cannot, without the express or implied consent of the mortgagee, dedicate property so as to adversely affect the interest of the mortgagee. A foreclosure sale or sale under a deed of trust revokes and nullifies an attempted dedication by the mortgagor, and the purchaser

at such a sale takes the property free of the dedication. Annotation, *Power of Mortgagor to Dedicate Land or Interest Therein*, 63 A.L.R. 2D 1160 §4 (1959).

Caveat:	Several jurisdictions have held that a mortgagee gives its implied consent to a mortgagor's dedication by releasing lots from the mortgage with reference to a plat or map showing the dedicated strips. *See, e.g., Weills v. City of Vero Beach*, 119 So. 330 (Fla. 1928); *Pry v. Mankedick*, 34 A. 46 (Pa. 1896); *Boone v. Clark*, 21 N.E. 850 (Ill. 1889). The interest of a mortgagee is an ownership interest and must be in the title report submitted to the jurisdiction when a dedication accompanies a plat. The mortgagee should always join in the dedication.

§3.8 CHARACTERISTICS OF THE DEDICATEE

A specific grantee need not be named to effect a valid dedication. *Meeker v. City of Puyallup*, 5 Wash. 759, 32 P. 727 (1893). A deed to the general public, which is not a legal entity, may operate as a dedication of the property to public use. *Loose v. Locke*, 25 Wn.2d 599, 604, 171 P.2d 849 (1946).

If a specific grantee is named but does not exist, the court will determine whether the grant was intended to be private or public in nature. For example, a grant to the "Town of Puyallup," which was invalidly organized at the time of the grant, was a valid dedication. The deed served as evidence of the intent of the owner to make a dedication to the public, and the actions of the city of Puyallup, once organized, served as evidence of acceptance by the representative of the public. *Meeker*, 5 Wash. 759.

§3.9 ESTATE ACQUIRED

The title or right acquired by the public following common-law or statutory dedication is discussed below.

(1) Common-law dedication

A common-law dedication conveys an easement only, unless the intention of the owner is to convey a fee. *Rainier Ave. Corp. v. City of Seattle*, 80 Wn.2d 362, 365-66, 494 P.2d 996, *cert. denied*, 409 U.S. 983 (1972); *Finch v. Matthews*, 74 Wn.2d 161, 167, 443 P.2d 833 (1968). Words in a dedication reserving the fee to the dedicators is a redundancy.

Bradley v. Spokane & Inland Empire Realty. Co., 79 Wash. 455, 458-59, 140 P. 688 (1914), *error dismissed*, 241 U.S. 639 (1916).

Comment:	It is uncertain how specific a dedication must be to convey a fee simple to the public. In *King County v. Hanson Inv. Co.*, 34 Wn.2d 112, 208 P.2d 113 (1949), for example, a quitclaim deed conveying, releasing, and quitclaiming to King County, for public use as a public highway, all interest in a strip of land conveyed the highest estate that a municipal corporation is empowered to hold. The court decided that the deed did not create a determinable, defeasible, or qualified fee. But the court failed to define the estate conveyed by the deed and left unanswered the question of ownership upon abandonment or vacation.

Practice Tip:	Any deed to a local government specifically for highway, right-of-way, or any public purposes could be interpreted as a dedication conveying only an easement. If the intent is to grant a fee interest, that intent should be clearly stated, and the use should be unrestricted or, if the use is a condition, the condition should be clearly stated with a specific right of reversion.

(2) Statutory dedication

The title or right acquired by the public in a statutory dedication depends upon the language of the statute. 23 AM. JUR. 2D *Dedication* §55 (2002 & Supp. 2010). According to relevant statutes, a dedication shown on a plat is a quitclaim deed to the donee or donees, or grantee or grantees, for their use for the purposes intended by the donors or grantors. RCW 58.08.015; RCW 58.17.165. In interpreting this language, the Washington Supreme Court has stated that the statutory dedication conveys only an easement unless there is evidence of intent to convey the fee. *Rainier Ave. Corp.*, 80 Wn.2d at 365-66. *But cf. Miller v. King Cnty.*, 59 Wn.2d 601, 369 P.2d 304 (1962) (concluding that use of the phrase "donate, grant, and dedicate" in a dedication of streets and alleys to public use on a plat indicated that the dedicator intended to divest itself of all interest in the property if the county put the roads to public use).

Comment:	If the public does not own the fee interest, the owners of the fee, in many cases the adjoining property owners, may be able to make use of the property in a manner not inconsistent with the use for which the property was dedicated, such as for subterranean parking.

§3.10 RIGHTS ACQUIRED BY THE PUBLIC

Upon dedication, a public easement permits not only a right of passage, but also all implied rights and privileges necessary to use the easement. *Finch v. Matthews*, 74 Wn.2d 161, 167-68, 443 P.2d 833 (1968); *Hagen v. City of Seattle*, 54 Wn.2d 218, 221, 339 P.2d 79 (1959) (right to make an original grade is implied in the dedication of a street).

(1) Permissible uses

Absent specific conditional language in the dedication, the property dedicated may be used for any purpose not inconsistent with the use for which the property was dedicated. *See Hanson Inv. Co.*, 34 Wn.2d 112. For example, land dedicated as a street is deemed to be held in trust for the public and for the benefit of public travel. Public improvements that do not interfere with public ingress and egress rights are permissible. *Albee v. Town of Yarrow Point*, 74 Wn.2d 453, 457, 458-59, 445 P.2d 340 (1968) (concluding that construction of a bench on property dedicated for a public street was permissible because it could be used by pedestrians); *City of Seattle v. P.B. Inv. Co.*, 11 Wn. App. 653, 658, 524 P.2d 419 (1974) (water mains, gas pipes, telephone and telegraph lines). Public authorities may change the intensity of the use over time. *Albee*, 74 Wn.2d at 458-59 (adapting a right-of-way to accommodate vehicle use deemed permissible even though it had only been used exclusively by pedestrians); *Ferry v. City of Seattle*, 116 Wash. 648, 203 P. 40 (1922), *rev'g* 200 P. 336 (1921) (concluding the city could change the use of property dedicated to the city because the dedication did not contain any restrictions on its use).

(2) Power to convey

One key difference between an easement and a dedication to the public is that the public has the right to convey interests in the dedicated property, and the interests so conveyed will survive a vacation of the property. Specifically, cities may convey easements for utilities and other public services. RCW 35.79.030. The power to convey easements

is not limited to conveyances to public entities. *Amerada Hess Corp. v. Adee*, 744 P.2d 550 (N.M.), *cert. denied*, 744 P.2d 180 (1987). For public streets, the primary purpose of travel is paramount. A private use is acceptable, if such use does not unreasonably limit or encroach on the public's right to travel. *P.B. Inv. Co.*, 11 Wn. App. at 660.

(3) Compensation for conveyances

Municipalities and other public entities may receive compensation for utilities and other easements granted on dedicated property. Washington cases recognize a city's right to charge market-based fees for secondary uses of their streets. *Baxter-Wyckoff Co. v. City of Seattle*, 67 Wn.2d 555, 561-62, 408 P.2d 1012 (1965); *Kimmel v. City of Spokane*, 7 Wn.2d 372, 109 P.2d 1069 (1941) (approving a city's right to assess a fee for permission to park along a street); *see also Bd. of Regents of Univ. of Wash. v. City of Seattle*, 108 Wn.2d 545, 741 P.2d 11 (1987) (approving a city's right to charge a sky bridge permit fee for use of the space over the street).

(4) Prohibited uses

Public authorities may not take any action that interferes with the use for which the property was dedicated. *Gillis v. King Cnty.*, 42 Wn.2d 373, 380, 255 P.2d 546 (1953); *State ex rel. York v. Board of Comm'rs*, 28 Wn.2d 891, 898, 903, 184 P.2d 577 (1947).

(5) Restrictions and conditions

A dedicator may impose reasonable conditions or restrictions on the property offered for dedication, and acceptance of the offer by the proper governmental authority is an agreement to be bound by such conditions and restrictions. A condition or restriction is reasonable unless it interferes with the primary use and purpose of the dedication or with the rights and duties of the donee. *N. Spokane Irrig. Dist. No. 8 v. Spokane Cnty.*, 86 Wn.2d 599, 601-02, 547 P.2d 859 (1976). Restrictions on the use of property dedicated must be clearly expressed and will not be inferred. *See Neighbors & Friends of Viretta Park v. Miller*, 87 Wn. App. 361, 374-75, 940 P.2d 286 (1997), *review denied*, 135 Wn.2d 1009 (1998).

When the dedicator attaches a condition to the dedication that limits the freedom of action of authorities to devote the property to the needs of the public, the condition is void as against public policy, but the grant stands. *N. Spokane Irrig. Dist. No. 8*, 86 Wn.2d at 601-02; *Neagle*

v. City of Tacoma, 127 Wash. 528, 531, 221 P. 588 (1923); *State ex rel. Grinsfelder v. Spokane St. Ry. Co.*, 19 Wash. 518, 53 P. 719 (1898).

Comment:	The cases cited above all deal with conditions tied to the dedication of streets, and the courts emphasized that public authorities must have full power and control of the streets. It is probable that the same reasoning would be applied to other types of dedications as well.

A restriction as to use will not be regarded as a condition unless appropriate conditional language is used. Without such conditional language, however, the restriction may give rise to an implied covenant that the grantee will use the property for the specified purpose. *King Cnty. v. Hanson Inv. Co.*, 34 Wn.2d 112, 118, 208 P.2d 113 (1949) (citing 19 AM. JUR. 536 *Estates* §71). If a restriction as to use is regarded as a condition and the public authority relinquishes its rights to use the property for that purpose (see §3.12(1)(a), below, relating to abandonment), the property may revert to the dedicator. *Johnston v. Medina Improv. Club*, 10 Wn.2d 44, 56-59, 116 P.2d 272 (1941).

§3.11 REVOCATION OF DEDICATION

A dedication of property to public use, whether express or implied, is in the nature of an offer and may be revoked at any time prior to acceptance by the public. *City of Spokane v. Sec. Sav. Soc'y*, 82 Wash. 91, 93, 143 P. 435 (1914); *Smith v. King Cnty.*, 80 Wash. 273, 278, 141 P. 695 (1914). Conveyance of the land as private property before public acceptance may constitute a revocation. *Hanford v. City of Seattle*, 92 Wash. 257, 261, 158 P. 987 (1916); *Sec. Sav. Soc'y*, 82 Wash. at 93; *Smith*, 80 Wash. 273. However, a dedication of land to public use cannot be revoked after acceptance by the public. *See Roundtree v. Hutchinson*, 57 Wash. 414, 416, 107 P. 345 (1910); *La Bounty v. City of Seattle*, 46 Wash. 141, 144, 89 P. 480 (1907); *City of Seattle v. Hill*, 23 Wash. 92, 99, 62 P. 446 (1900).

§3.12 ABANDONMENT AND VACATION

In most jurisdictions, abandonment or vacation may terminate the rights of the public in a dedicated property. 39 AM. JUR. 2D *Highways, Streets, and Bridges* §153 (2008 & Supp. 2010).