73309-5

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Court of Appeals
Division I
State of Washington

73309-5

NO. 73309-5

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

LAKE FOREST PARK WATER DISTRICT,

Appellant,

v.

THE CITY OF LAKE FOREST PARK,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

In 1988, the Lake Forest Park City Council ("City Council") determined to preserve an undeveloped area of the City of Lake Forest Park ("City"). In order to achieve that goal, the City Council adopted an ordinance purporting to vacate the right-of-way running through the middle of the undeveloped area and retain title to the "vacated" right-of-way in the name of the City. The vacation ordinance and its legislative history evidence the City Council's clear and unambiguous intent that the vacation of the right-of-way would only be effective if the City could retain title to the underlying land. Under the plain terms of state law, however, title in such circumstances passes to the abutting private property owners.

The result of the City Council's action was the adoption of an invalid ordinance. In short, the street vacation never occurred. As such, none of the owners along the "vacated" right-of-way, including Appellant Lake Forest Park Water District ("District"), could permissibly quiet title to the underlying real property because the City had always retained the right-of-way. The trial court properly granted the City's motion for summary judgment and properly denied the District's motion.

II. RE-STATEMENT OF THE ISSUES

Whether the trial court properly dismissed on summary judgment the District's claims that it is the fee owner of certain rights-of-way within the City where:

1. Ordinance No. 398, the Street Vacation Ordinance ("Ordinance"), was invalid and, therefore, of no effect?
2. The invalid provisions of the Ordinance cannot be severed to validate the remainder of the Ordinance?
3. No property rights vested in the District due to the invalidity of the Ordinance from the day of its adoption?

III. RE-STATEMENT OF THE CASE

The facts in this matter are simple and undisputed. In early 1988, the City Council began investigating options to preserve the undeveloped nature of the City's Canyon Creek Watershed area (the "Watershed Area"), to preserve the Watershed Area as a "natural park," and to "legally deny access through the City right-of-way." CP 50-54.

At its meeting on April 20, 1988, the City Council authorized City staff to prepare a resolution that would designate the right-of-way ("ROW") to be used "exclusively for public recreation" and further instructed then-City Attorney Thomas Evans ("Evans") to research alternative proposals by which this goal could be obtained. CP 50-54.

As instructed, Evans prepared a memo outlining the City's options for preserving the Watershed Area.[1] CP 55-56. Evans "strongly" recommended the City vacate the ROW and advised:

> (1) The City has the legal right to vacate the roadway, regardless of opposition, and this would prevent the dedicated area from ever being used as access; [and]
>
> (2) Vacation is much safer, legally, and does not expose the City to risks of lawsuit for damages for the loss of use.

Evans pointed to a Washington Supreme Court decision invalidating, as a taking without just compensation, a City of Seattle ordinance designating certain properties as "green belt" areas. Evans implied that a street vacation was "safer" than an ordinance limiting use of the Watershed Area to its "natural", undeveloped state. Id.

On May 4, 1988, the City Council again discussed the options "to accomplish the City Council's goal of prohibiting development in [the Watershed Area]." Individual City Councilmembers expressed concern that property owners adjacent to the Watershed Area "seem to favor preserving the creek area," but the property owners "do not seem interested in acquiring this land through a vacation." CP 64. In response,

---

[1] The District produced the Evans Memo in response to the City's discovery requests. CP 47-48. The Evans Memo appears to have been shared with the District at the time Ordinance No. 398 was being considered, as evidenced by the name "Ken" handwritten on the top of the memo. Kenneth "Ken" Chalmers was the District superintendent at the time of the purported street vacation, and City Attorney Evans and his law partner served as the legal counsel for both the City and the District at that time. CP 55-56; CP 64; CP 80-81; and CP 88.

and seemingly contrary to state statute, Evans "advised that the vacation statute does provide for the City to retain title of the vacated right-of-way property." The City Council subsequently passed a motion directing a resolution be prepared for the vacation "with title retained by the City." Id.

On May 18, 1988, the City Council passed Resolution No. 391, "[p]roposing vacation of [the ROW and] providing for retention of title to said property in the City of Lake Forest Park." CP 66-69. The Resolution's recitals noted the City Council's finding that "ownership, use, maintenance, and control of the said property, after vacation, should remain with the City." The Resolution further directed that after the required public hearing, the Council:

> [M]ay consider an ordinance effecting the vacation as proposed by this resolution, provided that such ordinance *shall specifically* establish that title to the property vacated shall be retained in the City of Lake Forest Park.

CP 66 (emphases added).

On July 20, 1988, the City Council held a public hearing on the proposed vacation of the ROW. CP 70-71. Several citizens testified in support of and in opposition to the vacation, with one citizen explicitly expressing concern over the City's ability to retain title to the ROW with a street vacation. CP 70. At the conclusion of the public hearing, the City

Council held its regular meeting, and in response to a question regarding the City's ability to retain title, Evans again advised the City Council that "the City has legal right to retain title to the vacated property." CP 74. The City Council then adopted Ordinance No. 398 "in conjunction with Resolution Number 391," purporting to vacate the ROW upon the express condition that "the title to said vacated property be retained in the City of Lake Forest Park." CP 77-79.

Following the purported street vacation in 1988, the parties carried on as if the City had in fact retained title to the ROW, and the City undertook efforts, as the assumed owner of the ROW, to develop a pedestrian trail through the Watershed Area in accordance with historic pedestrian usage. CP 80-87.

Even the District believed that the City was the rightful owner of the ROW. In correspondence with the City in March of 1997 and again in March of 1998, the District asked the City to "relinquish" its ownership or allow the District to use the property by entering into an interlocal agreement. CP 80 and 82. It was not until 2009 that the District first broached with the City the issue of whether the City had the right in 1988 to retain title to the ROW, and it was not until 2014 that the District filed the instant action. CP 90-94.

The current City Council, upon examining the title dispute issue, determined that Ordinance No. 398 was invalid because the City did not have the legal right to retain title to the ROW in 1988. Furthermore, based on the legislative history of Ordinance No. 398 and Resolution No. 391, the current City Council found that the 1988 City Council would not have attempted to vacate the ROW if the City could not have retained title to the property. Accordingly, on October 23, 2014, the current City Council adopted Ordinance No. 1085 repealing Ordinance No. 398 in its entirety. CP 95-97.

IV. ARGUMENT

A. Standard of Review on Appeal.

Appellate review of a trial court's decision to grant summary judgment is de novo. An appellate court engages in the same inquiry as the trial court, which is to determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 278, 937 P.2d 1082 (1997) (*quoting* CR 56(c)). A material fact is one on which the outcome of the case depends. Atherton Condo. Ass'n. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

B. Ordinance No. 398 Was Contrary to State Law and Invalid. The Street Vacation Did Not Occur.

"Cities are vested with only such powers over streets as are conferred by the Legislature." Yarrow First Assoc. v. Clyde Hill, 66 Wn.2d 371, 403 P.2d 49 (1965). Following the statutory procedures for street vacations outlined in Chapter 35.79 RCW, a city's legislative authority may vacate a public street within its territory by ordinance. The statutory procedure for street vacations must be strictly followed. Thayer v. King County, 46 Wn. App. 734, 737, 731 P.2d 1167 (Div. I 1987).

RCW 35.79.040 explicitly provides:

> If any street or alley in any city or town is vacated by the city or town council, the property within the limits so vacated shall belong to the abutting property owners, one-half to each. [Emphases added.]

Thus, absent a situation where a city or town is the abutting property owner, nothing in Chapter 35.79 RCW permits a city or town to retain legal title to a vacated right-of-way.

Here, Ordinance No. 398 purported to vacate the ROW, but expressly retained title to the "vacated" property in the City's name. The City was not the abutting property owner and was not authorized to retain title by law.

The District agrees, noting that "the City's Ordinance [was] contrary to RCW 35.79.040," and that the City's attempt to retain title to

the ROW "did not, and could not, supersede statutory or other law." Appellant's Opening Brief ("Appellant's Brief") at 4. The dispute between the City and the District arises over the effect the title retention provision has on the remainder of Ordinance No. 398.

The District's position is that although Ordinance No. 398 is "contrary" to law and could not supersede the procedures in Chapter 35.79 RCW, the Ordinance was still effective and the street vacation occurred. The District argues, however, that contrary to the intent of the vacating authority, title to the ROW passed to all of the abutting owners instead of being retained by the City. The District's position completely ignores the legislative history of and express condition within Ordinance No. 398's adoption. *See* Appellant's Brief.

The City's position – and the only position that can be sustained based on Ordinance No. 398's express language and unambiguous legislative history, as explained in more detail below – is that because Ordinance No. 398 did not strictly follow the procedures of Chapter 35.79 RCW and cannot be enforced in accordance with the City Council's intent, the entire Ordinance was unenforceable and the street vacation never occurred. In other words, the "if" in RCW 35.79.040 did not happen ("<u>If</u> any street or alley in any city or town is vacated by the city or town Council . . . .") (emphasis added).

"Strict" compliance with Chapter 35.79 RCW also requires that "the ordinance must be enacted for a 'public use.'" Hoskins v. City of Kirkland, 7 Wn. App. 957, 959-960, 503 P.2d 1117 (Div. I 1972) (internal citations omitted). "If the easement for public travel has any value to the city, the street may not be legally vacated." Puget Sound Alumni of Kappa Sigma v. City of Seattle, 70 Wn.2d 222, 226, 422 P.2d. 799 (1967).

In this case, the easement for public travel on the ROW still has value to the City. The legislative history shows the 1988 City Council intended to continue public use of the ROW. See CP 53, 64, 66, 74. The City has since undertaken efforts to maintain use of and enhance with improvements this ROW as a public pedestrian trail. CP 80-87. Thus, value in the public use of this ROW remains. If the ROW is vacated and the property given to the abutting landowners, the City and the public will no longer have the right to continue using the ROW for public travel. Because the easement for public travel still has value to the City, "the street may not be legally vacated." Puget Sound Alumni of Kappa Sigma, 70 Wn.2d at 226.

Ordinance No. 398 was explicitly conditioned upon the City retaining title to the ROW, and the 1988 City Council specifically intended continued public use of the ROW. This condition and intention invalidates the Ordinance, the vacation did not occur, and the property did

not transfer to the abutting property owners. Summary judgment was proper.

C. The "Title Retention" Provision in Ordinance No. 398 Cannot Be Severed so as to Validate the Ordinance.

Where an invalid or unconstitutional provision *can* be removed from a legislative act without affecting the intent of the act, the provision may be severed. State v. Anderson, 81 Wn.2d 234, 236, 501 P.2d 184 (1972). In contrast:

> An act of the legislature is not unconstitutional in its entirety because one or more of is [sic] provisions is unconstitutional unless the invalid provisions are unseverable and it cannot reasonably be believed that the legislature would have passed the one without the other, or unless the elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purposes.

Id. at 236 (emphasis added). A severability clause *may* provide assurance that the legislature would have adopted the valid portion of an ordinance even if it had been advised of the invalidity of the affected provision. McGowan v. State, 148 Wn.2d 278, 294-5, 60 P.3d 67 (2002); see also Anderson, 81 Wn.2d at 236-37. The courts, however, may also look to the legislative intent behind the enactment to determine if this is in fact the case.

> A legislative declaration of the basis and necessity for enactment is deemed conclusive as to the circumstances asserted and must be given effect unless, by the facts of

> which a court can take judicial notice, it can be said that the legislative declaration on its face is obviously false.

Id. at 239-40 (emphases added) (internal citations omitted).

Here, while Ordinance No. 398 contained a severability clause, its legislative history and that of Resolution No. 391 clearly evidence the City Council's firm intent: the City Council sought to protect the Watershed Area from development and believed its goal could only be accomplished if the City retained title to the vacated ROW. If the abutting property owners retained title to the vacated property, the City would not be able to prevent development because the property owners – including the District – could develop their property as they wished. Yet, if the City retained title, the City would have absolute control over the Watershed Area and could prevent its development.

The District mischaracterizes Ordinance No. 398's improper passage as merely a "misunderstanding on poor legal advice."[2] Appellant's Brief at 6. The District also focuses only on the existence of a severability clause, using the Ordinance's short length as proof that the provision retaining title in the City should be severed. The District's analysis, however, fails to appreciate the Ordinance's legislative history.

[2] While the District chastises the City for relying on "poor legal advice," it fails to note that it used the same legal counsel at the time of the Ordinance's adoption. The District's own records evidence its mistaken belief regarding the title retention issue in favor of the City's ownership. CP 55-56; CP 64; CP 80-82; and CP 88.

On multiple occasions prior to the adoption of Ordinance No. 398, the City Council declared its intention to vacate the property only if its goal of preventing development in the Watershed Area could be accomplished through title retention. The legislative history compellingly establishes that the City Council would not have adopted Ordinance No. 398 if the City could not or did not retain title. The City Council's meeting minutes, Resolution No. 391, and Ordinance No. 398 thoroughly document that the reason for the street vacation was to retain title in the City specifically and directly as a means to preserve a natural area.

The City Council's intent, declared on numerous occasions as outlined below, must be given effect:

> Council Minutes April 1988:
>
> At the request of the Mayor, [City Attorney] . . . will identify some appropriate steps to accomplish **the desire of the Council to retain the undeveloped status of the canyon/watershed area.** Mr. Loschen . . . wants to know, at this time, what needs to be done to **establish intent**. . . . **Mr. Loschen stated that he wants to get something on the record and moved that a resolution be prepared proposing that the canyon right-of-way, N.E. 184th Street, be used exclusively for public recreation and the City Attorney be instructed to prepare alternative proposals for designation for that property**. . . . the motion passed with six aye votes and one nay vote by Mr. Baldwin. [CP 53 (emphases added).]

Council Minutes May 1988:

The City Attorney has recommended vacation of the street right-of-way . . . to accomplish the **Council's goal of prohibiting development in that area**. . . . Mr. Loschen said he feels eager to get this land designated in some way and that property owners do not seem interested in acquiring this land through a vacation but do seem in favor [of] preserving the creek area pretty much as it is now. . . . motion that a resolution be prepared for the vacation of the undeveloped right-of-way along N.E. 184th St. **with title retained by the City**. The motion passed unanimously. [CP 64 (emphases added).]

Resolution No. 391 May 1988:

WHEREAS, the City Council has determined it is in the public interest to vacate that certain property . . . **with title to be retained in the City**; and WHEREAS, **the Council does find that ownership, use, maintenance, and control of the said property, after vacation, should remain with the City**. . . . the Council may consider an ordinance effecting the vacation proposed by this resolution, **provided that such ordinance shall specifically establish that title to the property vacated shall be retained in the City of Lake Forest Park**. [CP 66 (emphases added).]

Council Minutes July 1988:

[Motion] to adopt Ordinance No. 398, Vacating Public Right-of-way (Canyon Area) and **Providing For Retention of Title to Said Property by the City of Lake Forest Park.** The motion carried unanimously. [CP 74 (emphasis added).]

Ordinance No. 398 July 1988:

And **the title to said vacated property to be retained in the City of Lake Forest Park upon the effective date of this Ordinance**. . . . This Ordinance is enacted **in conjunction with** Resolution Number 391 . . . . [CP 78.]

The City Council was emphatic as to the intent and purpose of Ordinance No. 398. The District failed to come forward with *any* facts that challenge the City Council's declaration of its intent. Thus, the City Council's declaration of its intent should be deemed conclusive and given effect, rendering the entirety of the Ordinance unenforceable as of the day of its passage. No facts support a finding that the City Council's declaration was "on its face obviously false." Anderson, 81 Wn.2d at 239-40.

As additional support regarding the City Council's intent, the City Council's discussions and the text of Ordinance No. 398 are also devoid of any consideration or discussion by the City Council of two important street vacation issues: payment for the real estate by abutting property owners and easements for public utilities. RCW 35.79.030 provides as follows in regard to compensation and utilities:

> [S]uch city or town shall be authorized and have authority by ordinance to vacate such street, or alley, or any part thereof, and the ordinance may provide that it shall not become effective until the owners of property abutting upon the street or alley, or part thereof so vacated, shall compensate such city . . . . The ordinance may provide that the city retain an easement or the right to exercise and grant easements in respect to the vacated land for the construction, repair, and maintenance of public utilities and services. . . .

Emphases added.

There is no discussion by the City Council of compensation or reservation of utility easements either prior to the adoption of Ordinance No. 398 or within the Ordinance itself. And in this case, an easement was required to be retained for the City's sewer main located within the area covered by Ordinance No. 398. CP 98-99. While these are not mandatory provisions in a street vacation ordinance, the complete lack of discussion and analysis evidences that the 1988 City Council never intended for the street to be vacated unless the City retained title; title transfer to the abutting owners was never contemplated by the Council so no need for even a discussion of compensation or utilities ever existed.

The District claims that the City's objective to preserve the Watershed Area has been achieved through *the District's* efforts. See Appellant's Brief at 8, n. 6. In making this statement, the District ignores not only the fact that it, too, believed the City rightfully owned the ROW and therefore *could not* do anything to disturb the ROW area (See CP 80-82), but also that it is not the only property owner affected by the purported vacation. CP 79 and 118. Rendering Ordinance No. 398 valid and vacating the ROW, therefore, *cannot* ensure the City's objective is achieved.

The City's retention of title condition in Ordinance No. 398 was inextricably intertwined with the vacation and could not be severed from

the remainder of the Ordinance without completely contradicting the City Council's purpose. It "cannot reasonably be believed that the legislature would have passed the one without the other." Anderson, 81 Wn.2d at 236. Therefore, because Ordinance No. 398 cannot be enforced in accord with the City Council's intent, the entire Ordinance was unenforceable and a lawful street vacation never occurred.

D. No Property Rights Vested Upon Passage of Ordinance No. 398 Because the Vacation Never Occurred.

As explained above, the street vacation did not occur. As a result, the ROW is, and has always remained, public right-of-way. The District's arguments regarding vested rights are accordingly misplaced.

The cases set forth by the District are inapplicable. The District argues that its rights in the ROW vested upon adoption of Ordinance No. 398 in 1988, and that later invalidation of the Ordinance by the City's adoption of Ordinance No. 1085 and the trial court's ruling on summary judgment deprived it of vested property rights without due process of law. Appellant's Brief at 4-7. The District's argument misses the point – Ordinance No. 398 was invalid on the date of its passage.

> It is the rule in [Washington] that an invalidly enacted statute[3] is a nullity. It is as inoperative as if it had never been passed. The natural effect of this rule ... is that once

[3] The same rules of statutory construction apply to ordinances as to statutes. Palermo, 147 Wn. App. at 85 (citing Ford Motor Co. v. City of Seattle, 160 Wn.2d 32, 59, 156 P.3d 185 (2007), *cert. denied*, 552 U.S. 1180, 128 S.Ct. 1224, 170 L.Ed.2d 61 (2008)).

> the invalidly enacted statute has been declared a nullity, it leaves the law as it stood prior to the enactment.

Palermo at Lakeland, LLC v. City of Bonney Lake, 147 Wn. App. 64, 85, 193 P.3d 168 (Div. II 2008).

Here, it is as if Ordinance No. 398 never passed, the result of which is that the ROW was never vacated. *See* Yarrow First Associates, 66 Wn.2d 371 (1965) (enjoining the vacation of rights-of-way where the town attempted to vacate the street for an improper purpose); *see also* City of Federal Way v. King County, 62 Wn. App. 530, 533, 815 P.2d 790 (Div. I 1991), superseded by statute on other grounds (stating that the effect of an invalid emergency clause in a street vacation ordinance rendered the entire ordinance ineffective). Therefore, because the property was right-of-way prior to the adoption of Ordinance No. 398, the law stands as it did prior to the Ordinance's adoption. The vacation did not occur and no rights vested.

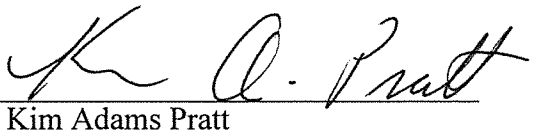
V. CONCLUSION

Ordinance No. 398 and its legislative history evidence the City Council's clear and unambiguous intent to vacate the right-of way only if the City could retain title to the underlying land. The Ordinance was invalid from the moment of its inception and the street vacation never occurred. The trial court properly granted summary judgment in favor of

the City finding that the "ordinance cannot and did not stand."[4]

DATED this 21st day of August, 2015.

KENYON DISEND, PLLC

By 

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[4] RP 15, ll. 23-24.

DECLARATION OF SERVICE

I, Kathy I. Swoyer, declare and state:

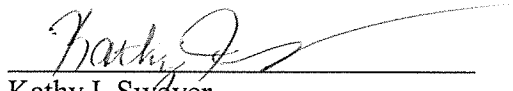
1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 24th day of August, 2015, I arranged for service a true copy of the foregoing *Respondent's Statement of Arrangements* on the following counsel of record using the method of service indicated below:

Daryl A. Deutsch Rodgers Deutsch & Turner, P.L.L.C. Three Lake Bellevue Drive, Suite 100 Bellevue, WA 98005-2440	☐ First Class, U.S. Mail, Postage Prepaid ☒ Legal Messenger, by 8/25/15 ☐ Overnight Delivery ☐ Facsimile ☒ E-Mail, by agreement: daryl@rdtlaw.com

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

DATED this 24 August 2015, at Issaquah, Washington.



Kathy I. Swoyer