

Court of Appeals No. 74423-2-I
King County Superior Court No. 14-2-18430-1 SEA

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

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2016 APR 25 PM 4:19

BRYAN KELLEY; and DORRE DON LLC,

APPELLANTS,

v.

BEVERLY L. TONDA and MICHAEL E. TONDA;
KENNAN T. SOUTHWORTH and PATRICIA C. SOUTHWORTH;
KING COUNTY, WASHINGTON;
CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY
OF WASHINGTON,

RESPONDENTS.

BRIEF OF RESPONDENTS KENNAN T. SOUTHWORTH
AND PATRICIA C. SOUTHWORTH

KENNAN T. SOUTHWORTH
PATRICIA C. SOUTHWORTH
Pro Se

21670 227th Place SE
Maple Valley, WA 98038
Telephone (425) 413-8271
E-mail: southhouse@comcast.net

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTRODUCTION AND OVERVIEW.....	1
RELIEF REQUESTED.....	3
ISSUE PRESENTED FOR APPELLATE REVIEW.....	3
COUNTER STATEMENT OF THE CASE.....	4
PREFACE.....	4
A. BACKGROUND STATEMENT OF FACTS.....	4
1. 1907 Real Estate Contract.....	5
2. 1907 Agreement.....	6
3. 1908 CMSPCW Deed.....	7
4. Establishment of the W ^m Goldtrip Road in 1903.....	9
5. Establishment of the George J. Drummer Road in 1930.....	9
6. 1930 Tax Foreclosure by King County and Acquisition of Lots 12 and 13, Block 7, Plat of Maple Valley.....	10
7. 1951 Order of Vacation of West Part of Martin Ave (at the Beginning of Goldtrip Road #667).....	10
8. 1979 Ordinance Closing and Blocking the Eastern Part of Martin Ave (Extended by the Goldtrip Road #667).....	11
9. 1983 Update to King County Engineer’s Office Map of Plats and County Road System Located in Section 9, Township 22N, Range 6E, W.M.....	12
10. 1989 Letter from King County Road Engineer.....	12
11. 2007 King County Road Standards.....	13

B. BACKGROUND STATEMENT OF PROCEDURES.....	13
STANDARD OF REVIEW.....	14
ARGUMENT AND DISCUSSION.....	16
A. King County Long Ago Abandoned The Subject Strip Of Land As A Public Road Or Highway.....	18
B. King County Was Granted Only A Defeasible Fee In The Subject Strip Of Land, And Upon Cessation Of That Strip As A Public Road Or Highway The Fee Title In That Land Reverted To Appellants' Predecessors Free Of Any King County Right, Title, Or Interest Therein.	23
C. The 1930 Tax Foreclosure And Subsequent 1995 Tax Deed Regarding The Subject Strip Of Land Is Further Clear And Competent Evidence That King County Has Been Legally Divested Of Any Claim To Right, Title, And Interest In The Subject Strip Of Land.....	24
CONCLUSIONS.....	26

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Court Cases

Baldwin v. Sisters of Providence in Washington, Inc., 112 Wn.2d 127, 769 P.2d 298 (1989). 15

Barnhart v. Gold Run, Inc., 68 Wn. App. 417, 843 P.2d 545 (1993). 21

Brazell v. City of Seattle, 55 Wash. 180, 104 Pac. 155 (1909). 19

Brown v. Olmsted, 49 Wn.2d 210, 299 P.2d 564 (1956). 25

Burrows v. Kinsley, 27 Wash. 694, 68 Pac. 332 (1902). 20

Cameron v. Downs, 32 Wn. App. 875, 650 P.2d 260 (1982). 14

Citizens for Clean Air v. Spokane, 114 Wn.2d 20, 785 P.2d 447 (1990). 15

City of Seattle v. Hill, 23 Wash. 92, 62 Pac. 446 (1900). 15

Cunningham v. Weedin, 81 Wash. 96, 142 Pac. 453 (1914). 18, 19

Denaxas v. Sandstone Court of Bellevue, L.L.C., 148 Wn.2d 654, 63 P.3d 125 (2003). 14

Donald v. City of Vancouver, 43 Wn. App. 880, 719 P.2d 966 (1986). 15

Foster v. Bullock, 184 Wash. 254, 50 P.2d 892 (1935). 19

Gillis v. King County, 42 Wn.2d 373, 255 P.2d 546 (1953). 18

Hampton v. Gilleland, 61 Wn.2d 537, 379 P.2d 194 (1963). 16

Hanson v. Carr, 66 Wash. 81, 118 Pac. 927 (1911). 25

Harmon v. Gould, 1 Wn.2d 1, 94 P.2d 749 (1939). 25

<i>Hartley v. State</i> , 103 Wn.2d 768, 698 P.2d 77 (1985).....	14
<i>Heg v. Alldredge</i> , 124 Wn. App. 297, 99 P. 3d 914 (2004).....	22
<i>In re Estate of Tyler</i> , 140 Wash. 679, 250 Pac. 456 (1926).....	18
<i>Johnston v. Medina Improvement Club, Inc.</i> , 10 Wn.2d 44, 116 P.2d 272 (1941).	18
<i>Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Association</i> , 156 Wn.2d 253, 126 P.3d 16 (2006).	15
<i>King County v. Hanson Investment Company</i> , 34 Wn.2d 112, 208 P.2d 113 (1949).	23, 24, 27
<i>Miller v. King County</i> , 59 Wn.2d 601, 369 P.2d 304 (1962).....	15
<i>Morris v. McNicol</i> , 83 Wn.2d 491, 494, 519 P.2d 7 (1974).	14
<i>N. Pac. Ry. v. Tacoma Junk</i> , 138 Wash. 1, 244 Pac. 117 (1926).....	22
<i>N. Spokane Irrigation District No. 8 v. County of Spokane</i> , 86 Wn. 2d 599, 547 P.2d 859 (1976).	16
<i>Rubenser v. Felice</i> , 58 Wn.2d 862, 365 P.2d 320 (1961).	15
<i>Sweeten v. Kauzlarich</i> , 38 Wn. App. 163, 684 P.2d 789 (1984).....	16

Other Jurisdictions

<i>Okemo Mountain, Inc. v. Town of Ludlow Zoning Board of Adjustment</i> , 671 A.2d 1263 (Vt. 1995).....	17
--	----

State Statutes

RCW 4.04.010.....	18
RCW 5.44.040.....	4
RCW 58.17.020.....	16
RCW 64.04.010.....	16
RCW 64.04.030.....	16

RCW 84.64.460. 25

Court Rules

CR 56. 3, 14
ER 803. 4

Other Authorities

4 L. Orland, *Washington Practice, Rules Practice* § 5656
(3d ed. 1983). 15
17 William B. Stoebuck & John W. Weaver, *Washington Practice:
Real Estate: Property Law* (2d ed. 2004). 18
37 *Cyclopedia of Law and Procedure* (1911). 17, 19, 20, 21-22
39 Am. Jur. 2d, *Highways, Streets, and Bridges* (1999). 26
Black’s Law Dictionary (5th ed. 1979). 7, 17
King County, *2007 Road Design And Construction Standards*
(King County Department of Transportation, Road Services
Division), adopted by Ordinance No. 15753 (approved
by the King County Executive on May 14, 2007). 13, 17
Laws of 1889-90, Chapter 19. 18, 19
Webster’s College Dictionary (Random House 1995). 7

I. INTRODUCTION AND OVERVIEW

Respondents Kennan T. Southworth and Patricia C. Southworth, husband and wife and pro se (“Southworth”), respectfully submit their Brief in support of Appellants Kelley and Dorre Don LLC and their underlying Complaint seeking a Declaratory Judgment and an Order to Quiet Title to the subject strip of land. The Southworths oppose and object to the King County Superior Court’s grant of summary judgment in favor of Respondents King County and Tonda. As shown by a preponderance of competent and persuasive evidence, King County was long ago divested of any claim of right, title and interest in the subject strip of land. Fee title reverted to private ownership, now vested in Appellants Kelley and Dorre Don LLC.

The Southworths were named as party Defendants in the underlying lawsuit because the subject strip of land runs adjacent to their home, and over which there is an express private access easement serving their lot.¹ King County has named this strip of land 227th Place SE and further has for many years identified this easement as a Private Road.² Based on a number of historical documents the Southworths have obtained over the years from King County Archives and the Road Department, the 1907 agreements between Chicago Milwaukee St Paul Company of Washington and King

¹ “Grant of Easement” recorded in King County under Recording Number 199505030980.

² And this is precisely what this strip of land is – private property on which there is simply a private access easement. It is by no stretch of the imagination -- or fact -- a public road or highway.

County did nothing more than for these parties to merely agree that at some time in the future this strip of land would be dedicated to the County for public road and highway purposes – as there has been found no independent proof that the railroad company in fact owned this strip in 1907 – and one cannot deed or dedicate real property in which it does not have a fee interest. However, the Deed in 1908 issued by the railroad company is a warranty deed by which the railroad company affirms that it does indeed own the strip and has the present right to convey the land to the County – with the one very big condition that if this strip of land should in the future not be used for public road or highway purposes, title to this strip automatically reverts to the railroad and then on to its successors – presently the Appellants.³

Not only is there ample, competent and clear evidence in the record that King County has long ago abandoned this strip of land for public road or highway purposes, there is ample, competent and clear evidence that King County, through a tax foreclosure and tax deed conveyed the subject strip of

³ There are many factual indicia that over the years King County by various acts abandoned this strip of land as a viable and continuing public way to travel from a point (let's call it Point A) on what is now 216th Way SE in a southeasterly direction to what is now a point (let's call it Point B) on Dorre Don Way SE. In 1951 the County vacated the western part of Martin Ave where it meets 216th Way SE and in 1979 the County ordered the east end of Martin Ave extended (by the Goldtrip Road #667) closed and barricaded where it meets the Dorre Don Way SE – declaring it a misdemeanor for anyone to breach the barricade. The public could no longer travel from Point A to Point B even by using the strip of land. Public travel was thereafter solely on Dorre Don Way SE to get from Point A to Point B and beyond. This was acknowledged in 1989 in a letter from the County Road Engineer, Louis Haff. Essentially, ever since Dorre Don Way SE was established in 1930, the subject strip of land has been abandoned as any kind or part of a public road or highway. As a result and according to the 1908 Deed, ownership of this strip automatically went back to the railroad company, and over the years has found its way to now being owned by Appellants with no public rights in or to this land.

land to Appellants' predecessor in interest free and clear of any and all public encumbrances, including any public road.⁴

Based on all of this information, the County and Tondas were not entitled to summary judgment as it is very clear that Appellants have title to the strip of land free and clear from any County claims related to a public road or highway. Summary judgment was erroneously granted by the superior court and should be reversed by this Court as requested hereinbelow.

II. RELIEF REQUESTED

Although Appellants should be entitled to a *sua sponte* grant of summary judgment as a matter of law and fact pursuant to CR 56, should this Court determine that genuine issues of material fact exist and the trial court erred in granting summary judgment to Respondents King County and Tonda, the Southworths respectfully ask this Court to remand this matter to the superior court for trial.

III. ISSUE PRESENTED FOR APPELLATE REVIEW

Whether the trial court erred by granting summary judgment to Respondents King County and Tonda because either (1) Appellants are entitled as a matter of law and fact to be granted summary judgment *sua sponte* because they are the successors in interest to the fee title in the subject strip of

⁴ The 1930 tax foreclosure of Lots 12 and 13 of Block 7 of the Plat of Maple Valley would have by operation of law in effect at that time extinguished any and all public and private rights and interests in this strip of land. When King County sold those Lots to a private citizen at an auction in 1994, the County conveyed title by Tax Deed that was free and clear of any public claim to the strip of land traversing Lots 12 and 13.

land; or (2) there exist genuine issues of material fact for trial as to which of the parties has fee title in the subject strip of land?

IV. COUNTER STATEMENT OF THE CASE

PREFACE

As in the trial court, the Southworths do not object to the authenticity of certain Exhibits in the Record that are appended to Appellants' Complaint and to certain of those attached to Respondent King County's and Tonda's respective Motions for Summary Judgment that are specifically referenced hereinafter. What the Southworths do object to is the interpretation of these referenced Exhibits and the distorted application of them by Respondents King County and Tonda as purported support for their respective Motions and the summary judgment granted them by the trial court. The referenced written Exhibits are unambiguous and must be allowed to reasonably speak to the intent of the parties thereto and the scope of coverage therein.⁵

A. BACKGROUND STATEMENT OF FACTS

The strip of land that is the focus of Appellants' Complaint is known as 227 Place SE (designated and identified by King County as a **PRIVATE ROAD** – *see* CP at 1031 (a fair and accurate depiction of the sign currently posted by King County at the entrance to the subject strip of land from Dorre Don Way SE) and, as a matter of fact and law, is and has been for some time owned in fee by Appellants under a chain of title that, at least as to its

⁵ ER 803(14-16); RCW 5.44.040.

southern extremity, stems from an acquisition by King County as a tax foreclosure occurring in 1930 and then sold by the County at public sale in 1994 to Appellants' predecessor in interest.⁶

This strip of land has in fact been the subject and object of several written agreements, deeds, and County legislative and administrative actions over the years. Each relevant writing is set forth and discussed hereinbelow.

1. 1907 Real Estate Contract

In the early stages of the construction of a new railroad in the State of Washington, King County ("County") and the Chicago Milwaukee and St. Paul Railway Company of Washington ("CMSPCW") entered into an Agreement titled Real Estate Contract on June 18, 1907, in which the County conditionally agreed to grant CMSPCW the right, privilege and authority to appropriate, use and occupy for railroad purposes portions of an existing County road lying within the proposed route in exchange for the CMSPCW's agreement to acquire and then *in futuro* cause to be dedicated to King County that property for highway purposes. CP at 1045-49 (a true copy of the 1907

⁶ CP at 1033-35 (a true copy of an online King County iMap that depicts the subject property (Tax Parcel ID#s 5105400085 and 5105400130), and a true copy from the online King County Recorders Office of two deeds in Appellants' chain of title for the subject strip of land). For reference purposes, CP at 1037 (a true copy from the online King County Recorders Office of the original Plat of Maple Valley (1890)); and CP at 1039-1043 (a true copy from the King County Department of Assessments of the Assessor's Map of a portion of the SE 1/4 of Section 9, Township 22N, Range 6E, W.M., revised August 3, 2000, and a portion of the SW 1/4 of Section 10, Township 22N, Range 6E, W.M., revised December 10, 1998, that depicts the area encompassed by the subject strip of land which, as is very obvious, is NOT depicted or otherwise identified on these official Assessor's Maps as a King County Road or public way).

Real Estate Contract). From what can be discerned from the general descriptions of the property involved in the 1907 Real Estate Contract, the subject strip of land is not included as part of this document.⁷

2. 1907 Agreement

On July 29, 1907, King County and the CMSPCW entered into an “Agreement” directed to the railroad’s “desire [of] the right to appropriate, use and occupy” certain County roads as part of the right of way for its new railway, “upon the terms and conditions hereinafter set forth.”⁸ King County recited in the 1st Condition that it “hereby grants to the [CMSPCW] upon the performance of the conditions hereinafter mentioned, the right, privilege and authority to appropriate, use and occupy for railroad purposes a portion of that certain County road” as described in the Agreement. With that conditional promise, the CMSPCW then recited in the 3rd Condition that it “hereby agrees to, and does hereby dedicate, to [King County], for highway purposes” the subject strip of land, “and in consideration of such dedication, [King County] agrees to vacate and discontinue the use of that portion of” a certain County road, “it being the intention hereof to discontinue and avoid

⁷ The real property generally described in the 1907 Real Estate Contract appears to be located well south of the subject strip of land, and then extending farther south into Section 16 (adjoining Section 9 along its south line), and presently known as Witte Road SE. Nevertheless, the 1907 Real Estate Contract sets the general context for the next agreement and the fact that King County agreed to grant CMSPCW certain rights “upon the terms and conditions hereinafter set forth” and CMSPCW agreed to acquire additional property and then cause such to be dedicated to the County for highway purposes – all such actions to occur in the future with no presently intended grants and dedications.

⁸ CP at 1051-54 (true copy of the 1907 Agreement between King County and CMSPCW).

a grade crossing of the railway” of that County road. To further evince the intention and mindset of the CMSPCW in this Agreement, in the 4th Condition the CMSPCW recited that it “agrees that it will grade and place in a suitable condition for public travel, the strips of land hereinbefore agreed *to be* dedicated for the purposes of County roads as aforesaid.” Emphasis added. And in the 5th Condition, the parties to the Agreement identified a plat map attached to the Agreement showing “the strips of land *to be* dedicated to [King County] for the purposes of County roads.” Emphasis added. Note that the words “to be” is commonly defined and generally understood to mean “future; soon to be as specified (used in combination).” Webster’s College Dictionary, at p. 1401 (Random House 1995).

3. 1908 CMSPCW Deed

On August 3, 1908, the CMSPCW executed a deed to King County, “in consideration of one dollar . . . to it in hand paid, and other considerations” stating that it “does hereby grant, convey and dedicate to the County of King, in the State of Washington, the following described tracts of land situated in King County, Washington, to wit,” as Tract No. 1 the subject strip of land.⁹ The Habendum clause¹⁰ of the 1908 CMSPCW Deed clearly states and

⁹ CP at 1056-59 (true copy of the 1908 CMSPCW Deed).

¹⁰ “The office of the ‘habendum’ is properly to determine what estate or interest is granted by the deed, though office may be performed by the premises, in which case the habendum may lessen, enlarge, explain or qualify, but not totally contradict or be repugnant to, estate granted in the premises.” Black’s Law Dictionary, at p. 639 (5th ed. 1979).

provides that the estate granted by CMSPCW to King County in the subject strip of land is a defeasible fee, subject to a right of reverter.

TO HAVE AND TO HOLD unto the County of King and its successors, so long as the said strips of land shall be used for the purposes of public roads or highways, and in case such use of said strips, or either of them, shall cease, all the right, title and interest hereby granted and conveyed shall, as to the strip or strips so ceased to be used as aforesaid, revert to the [CMSPCW], its successors or assigns.

CP at 1057 (1908 CMSPCW Deed, at p. 2). Finally, the CMSPCW acknowledged that neither the 1907 Real Estate Contract nor the 1907 Agreement were self-executing, as it expressly states that “this instrument of dedication is executed in pursuance of two certain agreements between said railway company and the County of King, one dated July 29th, 1907, and recorded April 21st, 1908, in Volume 572 of Deeds, Page 355, covering tracts Numbers 1 and 2, above described” and as to which the subject strip of land is described as Tract Number 1.

That King County also recognized and acknowledged as fact that the 1908 CMSPCW Deed was the one and only true instrument that conveyed the subject strip of land to, and was accepted by, the County as a public road or highway is not subject to good faith dispute, as in the Commissioner’s Road Files the only document that was recorded therein is the 1908 CMSPCW Deed. CP at 1061-67 (true copy of the Commissioner’s Road File Folder contents covering the period from 1907 through 1914 obtained from King County Archives). No mention is made therein of the 1907 Agreement.

4. Establishment of the W^m Goldtrip Road in 1903

In 1903 and prior to the agreements with the CMSPCW, the King County Commissioners established the Wm Goldtrip Road (County Road #667) on and over a portion of Martin Ave as laid out in the Plat of Maple Valley (*see* CP at 1037) beginning at what was then known as R R Ave and then following Martin Ave and the extension thereof in a southeasterly direction (intersecting with and then generally following the current route of Dorre Don Way SE). CP at 1069-72 (true copy of documents and maps relating to the establishment of the Goldtrip Road #667). Note that no part of Road #667 included the subject strip of land as subsequently deeded to King County by the 1908 CMSPCW Deed. Nevertheless, what can be identified for present purposes of Appellants' Quiet Title action is the general public road established by the Goldtrip Road #667 to travel from **Point A** (on R R Ave and Maple Street in the Plat of Maple Valley, or currently SE 216th Way/ Street) in a southeasterly direction along a portion of Martin Ave and continuing until intersecting at **Point B** with and then generally following what is now Dorre Don Way SE to its terminus.

5. Establishment of the George J. Drummer Road in 1930

In March 1930, the King County Commissioners established the George J. Drummer Road Revision (now known as Dorre Don Way SE) that traversed the route from R R Ave / Maple Street in the Plat of Maple Valley (now known as SE 216th Way/Street) in the immediate vicinity of the

intersection with the subject strip of land (now known as 227 Place SE) then in a southeasterly direction to its terminus (thereby replacing the Goldtrip Road #667 as the intended County Road and highway for public travel from Point A to Point B and beyond). CP at 1074-78 (true copy of documents and maps relating to the establishment of the George J. Drummer Road Revision (now known as Dorre Don Way SE)).

6. 1930 Tax Foreclosure by King County and Acquisition of Lots 12 and 13, Block 7, Plat of Maple Valley

On October 11, 1930, Lots 12 and 13, Block 7, Plat of Maple Valley, were acquired by King County in a tax foreclosure sale. *See* CP at 1033-35. The subject strip of land traverses much of these two lots according to the legal description of that strip in the 1908 CMSPCW Deed. *See* CP at 1056-59 (Tract No. 1). These lots were acquired by King County in their entirety, expressly excepting from the legal description only that portion within the existing 100-foot wide CMSPCW right of way. Absolutely no mention of, reference to, or exception made for the subject strip of land's existence as any kind or type of a public road or highway. For all intents and purposes, there was no public road or highway traversing Lots 12 and 13 included in the 1994 sale of those Lots at a public sale held by King County or in the County's 1995 Tax Deed.

7. 1951 Order of Vacation of West Part of Martin Ave (at the Beginning of Goldtrip Road #667)

On September 10, 1951, the King County Commissioners issued an

Order of Vacation as to the west part of Martin Ave (at the beginning of Goldtrip Road #667) based on the finding and conclusion that “the road sought to be vacated will not be useful as a part of the general road system.” CP at 1080-81 (true copy of the 1951 Order of Vacation and a map depicting in solid shading that part of Martin Ave (Goldtrip Road #667) vacated and closed by Order of the King County Commissioners). There was still no mention of the subject strip of land constituting any kind of alternative public road or highway in traveling from Point A to Point B, especially in light of the establishment of the Drummer Road (Dorre Don Way SE) as the official public thoroughfare for travel in that vicinity.

8. 1979 Ordinance Closing and Blocking the Eastern Part of Martin Ave (Extended by the Goldtrip Road #667)

On May 11, 1979, the King County Executive approved Ordinance No. 4243 that formally and officially “closed to all vehicular traffic the south end, adjacent to the Dorre Don Road, of 227th Pl S.E., also known as Martin Avenue . . . [and] the Department of Public Works is authorized to erect a barricade and post the necessary traffic control signs and notice of closure[, and further that] after the effective date of closure, the operation of a vehicle through the [foregoing] described location shall constitute a misdemeanor.” CP at 1083-84 (true copy of the 1979 Ordinance of Closure and a map depicting both the western vacated portion of Martin Ave and the eastern intersection of the ‘Old County Road’ (*i.e.*, the Goldtrip Road #667) with Dorre Don Way SE that was Ordered closed and barricaded by King

County). Clearly, the public road or highway system formally, officially, and solely recognized by King County for the public to travel from Point A to Point B and beyond is Dorre Don Way SE.

9. 1983 Update to King County Engineer's Office Map of Plats and County Road System Located in Section 9, Township 22N, Range 6E, W.M.

CP at 1086 is a true copy of the September 3, 1983 Revised King County Engineer's Office map of Plats and the existing County Road System in Sec 9, Twn 22N, R 6E, W.M., including the vicinity surrounding the subject strip of land in both Sections 9 and 10. Note that the subject strip of land otherwise known as 227 Place S.E. appears nowhere on this official King County map (the only reference to such is the remnants of Martin Ave).

10. 1989 Letter from King County Road Engineer

By letter dated November 16, 1989, King County Road Engineer Louis J. Haff, P.E., wrote a letter regarding a complaint alleging lack of County response to dumping of trash in the vicinity of 228th Ave SE (the dog-leg south roadway at the east terminus of Martin Ave as laid out in the Plat of Maple Valley) and the Cedar River. CP at 1088-89 (a true copy of County Road Engineer Haff's 1989 letter). In his letter, County Road Engineer Haff states that the combination of the 1951 Order of Vacation and the 1979 Ordinance of Closure "appears to cut off the portion of 228th Avenue Southeast near the Ahlquist property from any direct access to the County road system. . . . Based on the above findings, maintenance staff have been advised to

decline any further responsibility for cleanup or prevention of access to the area.” Very clearly and as official policy, King County neither recognizes nor includes the subject strip of land and even the remnants of Martin Ave as a public road or highway. Any aspects of use by the public as a road or highway to get from Point A to Point B has long ago been formally and officially abandoned by King County.

11. 2007 King County Road Standards

As previously observed by official King County signage posted at the intersection of the subject strip of land (227 Pl SE) with Dorre Don Way SE, the County identifies the subject strip of land as a PRIVATE ROAD. See CP at 1031. CP at 1091-93 is a true copy of excerpts from the 2007 Road Design And Construction Standards published by the King County Department of Transportation Road Services Division and officially adopted by Ordinance No. 15753 (approved by the King County Executive on May 14, 2007). Section 2.06 sets forth the requirements for Private Streets, that are permitted to exist “when they are . . . (4) not obstructing, or part of, the present or future public neighborhood circulation plan . . . ; and (6) not needed as public roads to meet the minimum road spacing requirements of these Standards.” CP at 1092-93 (p. 2-15, § 2.06(B)). It cannot be any more clear or definitive that the subject strip of land is NOT a County public road or highway.

B. BACKGROUND STATEMENT OF PROCEDURES

The superior court granted Respondent King County’s and Tonda’s

Motions for Summary Judgment finding that “the 1907 Agreement conveyed unconditional right of way to the County and the right of way still exists.” Clerk’s Minutes, Summary Judgment Hearing (July 17, 2015).¹¹ Appellants Kelley and Dorre Don LLC timely filed their Notice of Appeal seeking this Court’s review and reversal of the superior court’s final order granting summary judgment to Respondents King County and Tonda.

V. STANDARD OF REVIEW

This Court engages in the same inquiry as the superior court when reviewing an order for summary judgment. *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 662, 63 P.3d 125 (2003). Summary judgment is appropriate if there is no genuine issue of material fact and Respondents King County and Tonda, as the moving parties, are entitled to a judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends, in whole or in part.¹² The burden is on the moving party to demonstrate that there is no genuine issue as to a material fact and that, as a matter of law, summary judgment is proper.¹³ If

¹¹ The foregoing finding was made notwithstanding the clear, competent and convincing evidence directly to the contrary; evidence that was required to be considered in the light most favorable to the nonmoving parties and very clearly showing the abject disregard and abandonment of the subject strip of land as a public road or highway by King County over more than 85 years at least since the establishment of Dorre Don Road in 1930. At a minimum as a matter of law, a genuine issue of material fact exists necessitating a trial. CR 56.

¹² *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974); *Cameron v. Downs*, 32 Wn. App. 875, 877, 650 P.2d 260 (1982).

¹³ *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985).

the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts are in dispute.¹⁴ All facts and reasonable inferences therefrom must be considered in the light most favorable to the nonmoving party.¹⁵ Even though the nonmoving party did not move for summary judgment to quiet title, the Court is entitled as a matter of law to grant Appellants summary judgment for the relief requested. *Rubenser v. Felice*, 58 Wn.2d 862, 365 P.2d 320 (1961); 4 L. Orland, *Washington Practice, Rules Practice* § 5656, at 422 (3d ed. 1983).

In construing a grant of land whether by common law dedication or by written deed, the intent of the donor/grantor (here, CMSPCW as to the subject strip of land) is of paramount importance.¹⁶ The court is not concerned with the individual meaning of the words used, but rather with the overall intent of the party using them. *Miller v. King County*, 59 Wn.2d 601, 605, 369 P.2d 304 (1962). The intent to convey an interest in real property is ascertained by examining the circumstances surrounding a conveyance, even absent ambiguity. *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Association*, 156 Wn.2d 253, 271-72, 126 P.3d 16 (2006).

¹⁴ *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

¹⁵ *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 38, 785 P.2d 447 (1990).

¹⁶ In order for a common law dedication to be valid, there must be (a) an intentional offer by the owner of real property, to appropriate the property, or an easement or interest in the land (b) to a public use and (c) acceptance of the offer, express or implied, by the public or public body. *City of Seattle v. Hill*, 23 Wash. 92, 97, 62 Pac. 446 (1900); *Donald v. City of Vancouver*, 43 Wn. App. 880, 885, 719 P.2d 966 (1986).

Dedication is a mixed question of law and fact; an owner's intent to dedicate is a factual question, but whether a common law dedication has occurred is a legal issue. *Sweeten v. Kauzlarich*, 38 Wn. App. 163, 166, 684 P.2d 789 (1984). The recording of a deed creates a strong presumption of delivery of the property and interest therein to the grantee. *Hampton v. Gilleland*, 61 Wn.2d 537, 545, 379 P.2d 194 (1963). Acceptance by the public body of a conveyance subject to conditions or restrictions is an agreement to be bound by such limitations. *N. Spokane Irrigation District No. 8 v. County of Spokane*, 86 Wn. 2d 599, 602, 547 P.2d 859 (1976). Furthermore, in Washington "every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed." RCW 64.04.010. And whether by dedication or conveyance, the party making such transfer must have an ownership interest in the subject real property. RCW 58.17.020(3) (dedication by plat); RCW 64.04.030 (warranty deed).¹⁷

VI. ARGUMENT AND DISCUSSION

As commonly understood at the time contemporaneous with the 1907 Real Estate Contract, the 1907 Agreement, and the 1908 CMSPCW Deed,

¹⁷ There is no indication in either the 1907 Real Estate Contract or in the 1907 Agreement that CMSPCW in fact has a present fee ownership interest in the subject strips of land "to be dedicated" to King County. Compare these agreements with the 1908 CMSPCW Deed that in fact, form and law is a Warranty Deed that affirms CMSPCW "at the time of the making and delivery of such deed [it] was lawfully seized of an indefeasible estate in fee simple, in and to the premises therein described, and had good right and full power to convey the same." RCW 64.04.030(1).

the term “public road or highway”, without further qualification, meant “nothing but an easement comprehending merely the right of all the individuals in the community to pass and repass, with the incidental right in the public to do all the acts necessary to keep it in repair.” Vol. 37, *Cyclopedia of Law and Procedure*, at p. 200 n.48 (1911, cited hereinafter as “37 Cyc.”). This is “consistent with the plain meaning of ‘public road or highway,’ [as] a road over which the public has a right to pass and which the government has the obligation to maintain.” *Okemo Mountain, Inc. v. Town of Ludlow Zoning Board of Adjustment*, 671 A.2d 1263, 1269 (Vt. 1995).¹⁸

Contrast this commonly understood meaning of public road or highway with King County’s definition of Private Streets in its 2007 Road Standards. See CP at 1091-93 (§2.06(B) at pp. 2-15 -- 2-16).

It is very clear that between the two choices, the subject strip of land, with its now express private easement as created by the previously referenced 1995 Grant of Easement on, over and across it to serve the Southworth’s lot with reasonable ingress and egress, is a *Private Street*.¹⁹

¹⁸ Citing Black’s Law Dictionary (5th ed. 1979), at p. 1193 (“public road” is defined as a “highway” which is “a strip of land appropriated and used for purposes of travel and communication between different places”), at p. 656 (a “highway” is defined as “a free and public roadway, or street; one which every person has the right to use” and “its prime essentials are the right of common enjoyment on the one hand and the duty of public maintenance on the other”). “The proper test in determining whether road is a ‘public’ or ‘private road’ is use to which such roadway is put”. *Id.* at p. 1193.

¹⁹ As has clearly happened with respect to the subject strip of land, public roads or highways are subject to termination of such public rights and interests by abandonment based on several doctrines applicable under the facts and circumstances of our case. And upon such abandonment and termination of public use as a road or highway, pursuant to the Habendum (continued...)

A. King County Long Ago Abandoned The Subject Strip Of Land As A Public Road Or Highway

It is fundamental that Washington courts apply a "common law²⁰ rule of presumption of abandonment" to public roads, and consistent with this legal premise the purpose of the 1889-90 nonuser statute "was to specify a certain number of years after which . . . abandonment would be given effect."²¹ *Gillis v. King County*, 42 Wn.2d 373, 377, 255 P.2d 546 (1953).²²

The earliest case found that specifically addressed the means for extinguishing public rights in county roads is *Cunningham v. Weedon*, 81 Wash. 96, 142 Pac. 453 (1914). The Supreme Court defined the public right held and the means of terminating such right as follows:

¹⁹(...continued)
clause in the 1908 CMSPCW Deed, all right, title and interest in and to the subject strip of land by operation of law automatically reverts back to CMSPCW and to its successors in interest; here, the Appellants. *Johnston v. Medina Improvement Club, Inc.*, 10 Wn.2d 44, 57, 116 P2d 272 (1941) (if a restriction as to use is regarded as a condition and the public authority relinquishes its right to use the property for that purpose by abandonment, the property reverts to the grantor). As in the 1908 CMSPCW Deed, the specific use of the words "so long as" creates a defeasible fee subject to the possibility of reverter. 17 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Property Law* §§ 1.7, 1.8 at pp. 10-12 (2d ed. 2004).

²⁰ "The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state." RCW 4.04.010.

²¹ The Laws of 1889-90, Chapter 19, did not repeal the common law rule of abandonment; quite to the contrary, such statutes served only to provide for an administrative procedure by which public roads could be discontinued (*i.e.*, vacated by governmental body) after such roadways became useless or went unused for a period of 5 years. *See* Sections 25 and 32.

²² Repeal of the common law is not to be freely presumed and accordingly, statutes in derogation of the common law are strictly construed, and a legislative intent to change the common law must appear with clarity. *In re Estate of Tyler*, 140 Wash. 679, 684, 250 Pac. 456 (1926).

A county holds an easement in its highways in trust for the public. . . . An easement, once asserted by the public, will not be lost unless in virtue of some statute, or nonuser for a time, and under such circumstances as will create an estoppel. 37 Cyc. 195.

Cunningham, 81 Wash. at 98-99. In general parlance, the statutory nonuser process describes the method by which a governmental body may discontinue all rights in a public road by voluntary relinquishment (e.g., vacation).²³ The "nonuser for a time" describes abandonment of public rights which is determined by judicial process. Thus it was in *Foster v. Bullock*, 184 Wash. 254, 50 P.2d 892 (1935), that the courts were called upon to determine whether the facts supported the abandonment of a public road, or at least a portion thereof. The *Foster* Court let stand without question the following application of the nonuser statute's prescribed time period as the basis for determining whether an abandonment had occurred.

To establish an abandonment of a public road it is necessary to show nonuser by the public for a period of at least five years.

Foster, 184 Wash. at 257.²⁴

As evidenced by the citation of persuasive and controlling legal authority in the foregoing opinions, the principal body of jurisprudence

²³ Although not the only means of terminating public rights in a roadway, it is axiomatic that where the Commissioners determine to vacate a county road by statutory procedure, the requirements of such statute must be strictly followed. *Brazell v. City of Seattle*, 55 Wash. 180, 185, 104 Pac. 155 (1909). It is also noteworthy that the *Cunningham* decision postdates *Brazell* by 5 years, and expressly distinguishes the procedure under "statute" (i.e., vacation) from "nonuser for a time" (i.e., abandonment). Here, King County clearly abandoned the subject strip of land as a public road or highway long ago.

²⁴ Laws of 1889-90, Chapter 19, Section 25.

drawn upon by the Washington Supreme Court in its discussion and application of the common law rule of abandonment during the time period contemporaneous with the 1907 Real Estate Contract, the 1907 Agreement, the 1908 CMSPCW Deed, and the subsequent establishment of the Goldtrip Road #667 and Drummer Road Revision, is that found in Vol. 37, *Cyclopedia of Law and Procedure*, at pp. 194-200 (1911). In relevant part:

A public highway may be extinguished and lost by abandonment. . . .[It] is said that the law will raise a presumption of an extinguishment of the right when the road has been abandoned for a long period.

37 Cyc. at 194-95.

Abandonment may also be found where a former public road has been revised by a new highway, especially where the new road takes the traveling public between the same termini of the old roadway.

The mere building of a new highway is ineffectual to work an abandonment of an old road, where the former is a new and separate highway. But the public will lose their right to a highway where they have abandoned it and accepted another in its stead for such a length of time, and under such circumstances, as to give them a title to the substituted road.

37 Cyc. at 199. This is the theory of abandonment considered in *Burrows v. Kinsley*, 27 Wash. 694, 700-01, 68 Pac. 332 (1902), where the Court acknowledged that under circumstances where a new road begins and ends at the same points as did an old roadway, and the public interest is served by

the new road, such alteration may by law effect the vacation of the old road.²⁵ And in *Barnhart v. Gold Run, Inc.*, 68 Wn. App. 417, 422, 843 P.2d 545 (1993), the Court held that the location of a platted road right of way had shifted to a new roadway used for years as a substitute thereby evincing the "intent to abandon the right to use a roadway in the [original] platted location." In our case, the establishment of the Geo. J. Drummer Road Revision in 1930 (*see* CP at 1074-78) in fact connected the termini of the former public roadway comprised of the Goldtrip Road #667 (1903),²⁶ the CMSPCW deeded strip (1908), and Martin Avenue as dedicated in the 1890 Plat of Maple Valley. Abandonment may also be evidenced where obstructions or encroachments to or upon a roadway bar the public's usage of the way for substantial period of time.

[An encroachment or obstruction] may . . . be submitted to for such a period of time as to raise a fair presumption of abandonment; and the public may be estopped to claim any easement in a road where it has for years been in disuse and closed to travel by permanent structures built across the entire width.

²⁵ In our case, the Geo. J. Drummer Road Revision (as it was expressly called by the Commissioners) encompassed the termini of the old county road system comprised of the 1908 CMSPCW deeded strip (the subject strip of land), Goldtrip Road #667 (and Martin Avenue as originally dedicated by the 1890 Plat), County Road 305 (King County Records note that this original route of the George J. Drummer Road was "knocked out" by the Supreme Court), and County Road 165 (referred to as the W^m Johnston Road). Accordingly, the establishment of the Geo. J. Drummer Road Revision in 1930 in legal and factual effect vacated all of these former public roads. Each of the foregoing roads was legally and factually abandoned by King County as any part of the accepted, formally approved, and official route for the public to travel from Point A to Point B and beyond.

²⁶ Based on the ever-changing course of the Cedar River, the Goldtrip Road was itself a revision of the Johnston Road #165 (established 1885) and the former Geo. J. Drummer Road #305 (established 1891).

37 Cyc. at p. 199. Effecting an abandonment by obstruction was recognized by the court in *Heg v. Alldredge*, 124 Wn. App. 297, 99 P. 3d 914 (2004).²⁷

Placement by the grantee of a barrier rendering use of a right of way impossible or impractical will support a finding of abandonment.

Heg, 124 Wn. App. at 307. In our case there were two specific occurrences that effectively created a barrier to public travel at each end of Goldtrip Road #667 (comprised in part of Martin Ave). First, in 1951 the King County Council formally vacated the western-most part of Martin Ave by the passage of Resolution No. 12818,²⁸ as such segment was found and concluded to be "useless as a part of the general road system of King County". This was followed in 1979 with the King County Council adopting Ordinance No. 4243 that officially closed to all vehicular traffic "the south end, adjacent to the Dorre Don Road, of 227th Pl. S.E., also known as Martin Avenue."²⁹ The Council authorized the placement of "a barricade"³⁰ and declared that "after the effective date of closure, the operation of a vehicle

²⁷ The *Heg* court referenced the case of *N. Pac. Ry. v. Tacoma Junk*, 138 Wash. 1, 244 Pac. 117 (1926), wherein nonuse coupled with taking up a portion of a railroad track was found to constitute an abandonment.

²⁸ Or actually that part of Goldtrip Road (as it may be argued that Martin Avenue as identified by the Plat of Maple Valley had not in fact been opened and had been vacated by operation of law under the nonuser statute).

²⁹ Ordinance No. 4243, Section 1 (Dorre Don Way SE is the Geo. J. Drummer Road).

³⁰ Ordinance No. 4243, Section 2.

through the above-described location shall constitute a misdemeanor."³¹

B. King County Was Granted Only A Defeasible Fee In The Subject Strip Of Land, And Upon Cessation Of That Strip As A Public Road Or Highway The Fee Title In That Land Reverted To Appellants' Predecessors Free Of Any King County Right, Title, Or Interest Therein

One additional means by which the public may be divested of its rights in a public road is by defeasance under a deed. *See generally King County v. Hanson Investment Company*, 34 Wn.2d 112, 208 P.2d 113 (1949).

A determinable, qualified, or defeasible fee is an estate which is limited to a person and his heirs, with a qualification annexed or subjoined thereto, by which it is provided that the fee must determine whenever that qualification is at an end. . . . [A] determinable or qualified fee has all the attributes of a fee simple, except that it is subject to be defeated by the happening of the condition which is to terminate the estate.

Hanson, 34 Wn.2d at 118-19. In our case, the 1908 CMSPCW Deed³² clearly conveyed to King County a defeasible fee in the subject strip of land.

The express qualification was set forth as follows:

To have and to hold unto the County of King and its successors, so long as the said strips of land shall be used for the purposes of public roads or highways, and in case such use of said strips, or either of them, shall cease, all the right, title and interest hereby granted and conveyed shall, as to the strip or strips so ceased to be used as aforesaid, revert to the party of the first part, its successors or assigns.

³¹ Ordinance No. 4243, Section 3.

³² Recorded in King County in Vol 593 of Deeds, Page 481 (September 14, 1908).

1908 CMSPCW Deed, at p. 2.³³ Upon cessation of use for public road or highway purposes of the Goldtrip Road #667 and Martin Ave resulting from the establishment of the Geo. J. Drummer Road Revision in 1930, coupled with the County's vacation of the west end of Martin Ave in 1951 and the ordered closure and barricading of the east end of Goldtrip Road #667 in 1979, because the public now traveled officially and at all times on the Dorre Don Way SE to get from Point A to Point B, there was, automatically by operation of law, a defeasance and reversion of the fee interest in the subject strip of land to Appellants as successors in interest to the CMSPCW, and the loss of all public rights and interests therein.

C. The 1930 Tax Foreclosure And Subsequent 1995 Tax Deed Regarding The Subject Strip Of Land Is Further Clear And Competent Evidence That King County Has Been Legally Divested Of Any Claim To Right, Title, And Interest In The Subject Strip Of Land

In addition to the foregoing clear evidence of abandonment in and reversion of all property rights and interests in the subject strip of land to Appellants, there is the matter of the 1930 tax foreclosure and acquisition by King County of a substantial portion of the subject strip of land located in Lots 12 and 13, Block 7, Plat of Maple Valley. *See* CP at 1033-35. Absolutely no mention of any public road or highway held by King County on, over and across Lots 12 and 13 under the 1908 CMSPCW Deed was made

³³ The Habendum clause in the 1908 CMSPCW Deed meets all the requirements imposed by the Supreme Court in *Hanson*, 34 Wn.2d at 119.

in King County's Tax Deed by which the County conveyed this property by public sale to Appellants' predecessor in interest in the subject strip of land. The legal description of the property conveyed by King County in its Tax Title Property Deed was "Lots 12 & 13, Block 7, Maple Valley Add., Less 100 Ft R/W."³⁴ This is absolutely correct, as the law of Washington prior to the enactment of RCW 84.64.460 in 1959 was that the sale of real property previously acquired by a county through a tax foreclosure created a new title superior to any possessory right, divesting the owner and all claiming under him of all right to the land, and any rights of way, public or private, over the portions of any former streets thus acquired by the county were extinguished. See *Brown v. Olmsted*, 49 Wn.2d 210, 214, 299 P.2d 564 (1956); *Harmon v. Gould*, 1 Wn.2d 1, 10, 94 P.2d 749 (1939); *Hanson v. Carr*, 66 Wash. 81, 83, 118 Pac. 927 (1911). Accordingly, the tax foreclosure of Lots 12 and 13 by King County in 1930 by operation of law extinguished any and all right, title and interest that King County might have had in the subject strip of land traversing on, over and across Lots 12 and 13 for public road or highway purposes however such may have been initially obtained by the County. Upon sale and issuance of the Tax Deed in 1995, the Appellants' predecessor in interest in the subject strip of land acquired that real property free and clear of any and all encumbrances and possessory interests, including and not

³⁴ The referenced 100 foot right of way was solely the CMSPCW railroad right of way -- not in any way including the subject strip of land lying outside the railroad right of way.

limited to the dedication of portions of Lots 12 and 13 for public road or highway purposes regardless of whether obtained under the 1907 Agreement (as contended by King County and the Tondas) or the 1908 CMSPCW Deed (as is the true source of the grant under the clear and convincing, competent evidence). As a result of the 1930 tax foreclosure, Appellants have a firm claim of fee simple title to the subject strip of land, and are therefore entitled as a matter of law to being granted judgment *sua sponte* on their Complaint for Declaratory Judgment and Quiet Title.

VII. CONCLUSIONS

In closing, the following general summary aptly describes the rise and fall of public roads under American, and Washington State, jurisprudence:

The ancient maxim, "once a highway, always a highway," which has frequently been quoted by the courts, is subject to the qualification that a highway once established continues until it ceases to be such by the action of the general public in no longer traveling upon it, or by action of the public authorities in formally closing it. . . . Accordingly, a highway once in existence is presumed to continue until it ceases to be such, owing to abandonment or some other lawful cause.

39 Am. Jur. 2d, *Highways, Streets, and Bridges* § 158 (1999).

In our case the public has lost all rights and interests they may once have held in the subject strip of land for road or highway purposes. All of King County's rights and interests in the subject strip of land for public road or highway purposes have been extinguished by operation of law either by abandonment or by its tax foreclosure of Lots 12 and 13, Block 7, Plat of

Maple Valley, in 1930.³⁵ Any private rights of access recently created by express easement on, over and across the subject strip of land continue as an individual right rather than a public right.

Respectfully, the Southworths ask the Court to rule in favor of Appellants and reverse the superior court's grant of summary judgment to Respondents King County and Tonda and remand this matter to the superior court for trial. However and if deemed appropriate under the circumstances, the Southworths request the Court *sua sponte* to grant summary judgment to Appellants Kelley and Dorre Don LLC and award them the relief they requested in their Complaint, including quieting title in them to the subject strip of land.

DATED this 22nd day of April, 2016.

Respectfully submitted,


KENNAN T. SOUTHWORTH, Pro Se


PATRICIA C. SOUTHWORTH, Pro Se

³⁵ Upon abandonment the fee simple with all its attributes reverts by operation of law to the original grantor and its successors in interest. "By the weight of authority, where property dedicated to the public is abandoned or relinquished, the public's rights are terminated and the land by operation of law reverts to the dedicator." *Hanson*, 34 Wn.2d at 120.