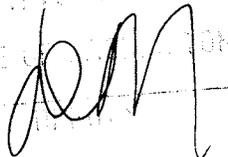


No. 37439-1-II

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

**JOY JOHNSON, EARL JOHNSON,
and PEDER JOHNSON, Respondents.**

vs.

**WAHKIAKUM COUNTY, a political subdivision of
the State of Washington, Appellant.**

**APPEAL FROM THE ORDER OF THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR**

WAHKIAKUM COUNTY

The Honorable Michael J. Sullivan, Judge

COUNTY'S REPLY BRIEF

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I. FACTS

The facts in this case are agreed and set out in the clerk's papers, report of proceedings, and exhibits herein.

II. ARGUMENT

1. Court of Appeals Jurisdiction

The trial court herein adjudicated title to the real property in question. The Johnsons apparently argue that an adjudication of title is not subject to appeal. This is a novel claim. The Court of Appeals has heard appeals to quiet title actions. E.g., Bavarian Properties, Ltd. v. Ross, 104 Wash.2d 73, 700 P.2d 1161 (1985), Miebach v. Colasurdo, 35 Wash.App. 803, 670 P.2d 276 (1983).

Johnsons argue that the Superior Court's decision herein did not "affect a substantive right" or "determine the action" for the purposes of RAP 2.2. From the point of view of the Johnsons, nothing may have changed as a result of this decision – because they prevailed. Had the decision favored the County, the County could argue that nothing has changed and therefore no one's rights had been affected. But in either case the truth would be the same: the difference between having plenary authority over a piece of property one owns outright, and having limited power to do only certain things on a piece of property, is a substantial difference.

The County asserts fee simple ownership over property and the trial court has ruled that the County's ownership has limits. If the trial court's decision is not reviewed, the best case scenario is that the County labors under the limits imposed by the trial court forever. But the County does not wish to be confined in its use of the property. The Johnsons apparently believe that until the County violates one of the conditions the trial court found to exist, the County's rights have not been violated. But it is the imposition of the conditions that is at issue. It is the imposition of the conditions that the County appeals. Since the conditions have been imposed, the appeal herein is ripe.

2. Existence of Common Law Dedication

Johnsons argue at 8 et seq of their brief that "a common law dedication proceeds not from a grant of title." They further note, as the County has previously done, that "normally, the fee of the dedicated property remains in the dedicator." Johnson brief at 9, citing Donald v. City of Vancouver, 43 Wn.App. 880, 885, 719 P.2d 966 (1986). And, of course, they concede that the intention of the party to dedicate must be "unmistakably" shown. Johnson brief at 8, citing Sweeten v. Kazularich, 38 Wn.2d 163, 165, 684 P.2d 789 (1984).

But if a grant of title is unnecessary to create a dedication and it is uncommon for a dedicator to transfer title to the public entity to which the dedication is made, surely the fact that this unnecessary and uncommon step was taken is proof of the grantor's intentions.

As the Johnsons pointed out, their predecessors in title did not have to deed the property to the County to achieve a public dedication. Yet deed it they did.

As the Johnsons pointed out, their predecessors could have kept title to the property in the family. Yet they did not. They gave the County not just an “easement” to use the property (Johnson brief at 8), but title to the property. This is the exact opposite of an “unmistakable” indication of intent to dedicate. But an “unmistakable” intent to dedicate is required by Sweeten, supra. The Johnsons’ own analysis does not support their conclusion.

3. “Park Purposes”

Johnsons’ citation to Ranier Ave. Corp. v. Seattle, 80 Wn.2d 362, 494 P.2d 966 (1972), standing for the proposition that “the intention of the dedicator controls” the scope of a dedication, is not the end of the inquiry, merely the start. After all, the intent of the drafters controls the meaning of the United States Constitution, and yet no one says that telephone, broadcast, and Internet communication are not included in the First Amendment merely because they had not been invented in 1787.

Flexibility for legal documents to move with the times has long been anticipated and approved. One relevant example is this: in the absence of a specific provision to the contrary in the granting document, the grantee of an easement is entitled to vary the mode of enjoyment and use of the easement by availing himself of modern inventions if by so doing he

can more freely exercise the purpose for which the grant was made. 28 C.J.S. Easements, Section 95 (1941).

This principle has been followed in Illinois: “Illinois courts have long recognized that a ‘right of way is one including the right of improving, from time to time, according to the improvements of the age.’ Heuer v. Webster (1st Dist. 1914), 187 Ill.App. 273, 278; Diller v. St. L., S. & P.R.R. (1922), 304 Ill. 373, 136 N.E. 703; See also Annot., 3 ALR3d 1256, s 9(a).” Talty v. Commonwealth Edison Co., 38 Ill.App.3d 273, 347 N.E.2d 74 (1976).

Insofar as the Johnsons claim to have received a dedication and that a dedication is a form of easement, they cannot deny the application of this reasoning to the tract of land in question. Furthermore, as previously argued, grants are to be construed in favor of the grantee. National Bank of Commerce of Seattle v. Dunn, 194 Wash. 472, 78 P.2d (1938). Thus, there is no legal impediment to accepting the common sense proposition that written documents can move with the times.

4. Argument re: Cross-Appeal

The Johnsons requested, in their Complaint at paragraph 18 (page 6), that the superior court “declare that the fee simple interest in the Property reverts to [Johnsons]... if Wahkiakum County continues its violation of the dedicated purposes or uses in the property in the future in contravention of the dedicated purposes.” CP 1.

On January 28, 2008, the trial court stated its belief that “there was a clear understanding that [Johnsons] were seeking relief from this point forward and not ... go back and attack it ... retrospectively.” RP 1. The court stated its order had the effect of “just closing the door to any challenge prior to the date this Order is signed... and I thought that was the intent of [Johnsons] at the last hearing.” RP 6. “It was,” Johnsons’ trial counsel represented to the court, “and I represented to the Court that that was precisely what they were looking for.” Id.

In other words, the trial court awarded no more than what the Johnsons asked for. Any fair reading of the entire Report of Proceedings supports this. The Johnsons now appeal the award of a remedy they requested. The doctrine of invited error applies to just such a situation as this. City of Seattle v. Patu, 147 Wash.2d 717, 58 P.3d 273 (2002). The Johnsons cannot now complain the court gave them what they asked for.

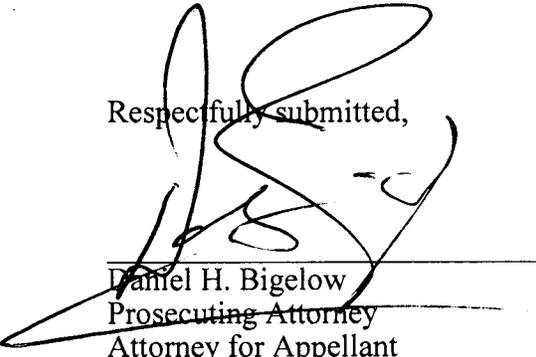
III. CONCLUSION

Since the trial court quieted title, the county has a right to appeal this matter. The Johnsons’ own arguments indicate that if the transfer in question herein were a dedication, it would be a highly unusual one, for a common law dedication “proceeds not from a grant of title;” and given the presumptions herein as argued in the County’s opening brief, it is for the courts to come down on the side of this being a usual fee-simple grant rather than an unusual dedication. Even if there was a dedication, there is

no reason to think that “park purposes” is a phrase that fossilizes the potential uses for the park, especially in view of the presumptions and policies in favor of unrestricted use that the County set out in its opening brief. Finally, the Johnsons are pre-empted from arguing against a remedy they requested from the court. For these reasons and those set out in the County’s original brief, this court should reverse the trial court and quiet title to Johnson Park in the County of Wahkiakum in fee simple and without restriction.

DATED this 12th day of January, 2009.

Respectfully submitted,



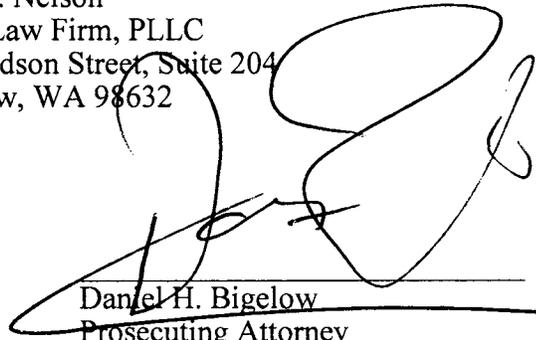
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CERTIFICATE

I certify that I mailed a copy of the foregoing Appellant's Brief to the following addresses, postage prepaid, on 1/13, 2009.

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