

73309-5-1

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION I

LAKE FOREST PARK WATER DISTRICT, a municipal corporation

Appellant,

and

CITY OF LAKE FOREST PARK, a municipal corporation

Respondent.

APPELLANT'S REPLY BRIEF

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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INDEX

	Page
A. Reply to City's Issues	1
1. The City's intent was to preserve the watershed use of the unopened streets, and that objective has been accomplished.	1
2. The Street Vacation Ordinance was enacted for a public use.	4
3. The Water District cannot be divested of its Property Rights.	6
B. Conclusion	8

TABLE OF AUTHORITIES

	Page
TABLE OF CASES	
<i>Bay Industry, Inc. v. Jefferson County, Bd. of Com'rs of Jefferson County</i> , 33 Wn.App. 239, 653 P.2d 1355 (1982) ..	5
<i>City of Federal Way v. King County</i> , 62 Wn. App. 530, 815 P.2d 790 (1991)	5,7
<i>City of Tacoma v. Vance</i> , 6 Wn.App. 785, 496 P.2d 534 (1972)	1
<i>Gillis v. King County</i> , 42 Wn.2d 373, 255 P.2d 546 (1953)	6
<i>Henry v. Town of Oakville</i> , 30 Wn.App. 240, 246-247, 633 P.2d 892 (1981)	1
<i>Holmquist v. King County</i> , 182 Wn. App. 200, 328 P.3d 1000 (2014)	4
<i>Hoskins v. Kirkland</i> , 7 Wn.App. 957, 503 P.2d 1117 (1972)	5
<i>Kiely v. Graves</i> , 173 Wn.2d 926, 271 P.3d 226 (2012)	6
<i>Lawson v. State</i> , 107 Wn.2d 444, 730 P.2d 1308 (1986)	6
<i>Palermo at Lakeland, LLC v. City of Bonney Lake, LLC</i> , 147 Wn. App. 64, 193 P. 3d 168 (2008)	7
<i>Puget Sound Alumni of Kappa Sigma, Inc. v. City of Seattle</i> , 70 Wn.2d 222, 240, 422 P.2d 799 (1967)	4, 5
<i>State v. Anderson</i> , 81 Wn.2d 234, 501 P.2d 184 (1972)	2
<i>Teter v. Clark County</i> , 104 Wash.2d 227, 704 P.2d 1171 (1985)	1

Page

Yarrow First Associates v. Town of Clyde Hill, 66 Wn.2d
371, 403 P.2d 49 (1965) 7

OTHER AUTHORITY

RCW 35.79.040 8

A. REPLY TO CITY'S ISSUES. The City's ordinance vacating the streets is valid, and the unenforceable provision therein can be severed.

1. The City's intent was to preserve the watershed use of the unopened streets, and that objective has been accomplished.

Ordinances are presumed valid. *Henry v. Town of Oakville*, 30 Wn.App. 240, 246-247, 633 P.2d 892 (1981). The party challenging the validity of an ordinance has the heavy burden of establishing its invalidity. *City of Tacoma v. Vance*, 6 Wn.App. 785, 496 P.2d 534 (1972). "A legislative determination will be sustained if the court can reasonably conceive of any state of facts to justify that determination." *Teter v. Clark County*, 104 Wash.2d 227, 704 P.2d 1171 (1985), at 234 - 235.

The City is challenging the validity of its own Ordinance. Specifically, the City asserts that it would not have enacted the Street Vacation Ordinance had it understood that it was unable to retain title to the vacated streets. Since doing so was not possible under State law, the City maintains that the entire Ordinance should be deemed invalid from the inception. However, retaining title was not the City's ultimate objective. Instead, it was simply a means to accomplish the "legislative purpose", i.e., the preservation of the watershed area. This legislative purpose is well documented:

(i) Minutes of April 20, 1988 council meeting.

At the request of the Mayor, Mr. Evans will identify some appropriate steps to accomplish the desire of the Council to retain the undeveloped status of the canyon/watershed area.

(CP 53)

(ii) Memo dated April 27, 1988 from City attorney to City Council.

You have asked my opinion with respect to actions the City may take to preclude development of the "Water Shed" area.

. . . .

Since vacation would seem to accomplish the purpose precluding development and is permitted, vacation is recommended (sic) as the procedure we should follow.

(CP 55 - 56)

(iii) Minutes of May 4, 1988 City Council meeting.

The City Attorney has recommended vacation of the street right-of-way on N.E. 184th St. running through the watershed area, to accomplish the Council's goal of prohibiting development in that area.

(CP 64)

As set forth in *State v. Anderson*, 81 Wn.2d 234, 236, 501 P.2d 184 (1972), at 236, if the legislative purpose can be accomplished despite the

severance of the unlawful provision, then the remaining provisions survive:

An act of the legislature is not unconstitutional in its entirety because one or more of its 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.** Boeing Co. v. State, 74 Wash.2d 82, 442 P.2d 970 (1968).

The presence of a severability clause, in light of these cases, offers to the courts the necessary assurance that the remaining provisions would have been enacted without the portions which are contrary to the constitution. **(Emphasis Added)**

The City's desire to preserve the watershed use of the vacated streets in question has been accomplished. In fact, no party is better situated than the Water District to perpetuate such a use since unlike the City, which may over time succumb to various interest groups promoting different uses of the watershed, the District is a laser focused governmental entity with an independent legal obligation to comply with the high standards set for the delivery of water to the public. Preserving the watershed is an essential component of doing so. As noted by the Water District manager:

the never opened vacated streets claimed by the Water District have for many decades been exclusively used by the District for watershed and related purposes. **The District is vigilant in maintaining the natural and mostly undisturbed condition of the land since doing so is an essential part of ensuring compliance with state and other health standards related to the delivery of potable water to the public. (Emphasis added)**

(CP 101 – 102)¹

2. The Street Vacation Ordinance was enacted for a public use.

The City for the first time raises the argument that the streets could not be legally vacated since the Street Vacation Ordinance was not enacted for a "public use", and since they still had the potential for use by the public. See City's brief at p. 9. There is a presumption that the ordinance was

¹ The City also argues that its failure to discuss compensation for the vacated streets and/or a reservation of utilities is further evidence of its intent. Initially, as the City admits at page 15 of its brief, charging for the property vacated or reserving easements therein is not mandatory. Further, the City only held an easement for street purposes, since the fee was held by the Water District as the abutting owner. See *Holmquist v. King County*, 182 Wn.App. 200, 1328 P.3d 1000 (2014). Therefore, the City never had the right to charge compensation for the vacation in the first place:

A municipality is not entitled to compensation for loss of a public easement in streets in which it does not own the fee. It thus follows, where a street is vacated by a court on the application of abutting landowners, the municipality has no such proprietary interest therein as to entitle it to compensation.

Puget Sound Alumni of Kappa Sigma, Inc. v. City of Seattle, 70 Wn.2d 222, 240, 422 P.2d 799 (1967), at 227.

enacted for a public purpose. *Hoskins v. Kirkland*, 7 Wn.App. 957, 503 P.2d 1117 (1972), at 963. Further,

The statutory test is not whether the road is of use to anyone, but whether it is useful as part of the county system. The public to be benefited included all taxpayers of the county, who deserve to be relieved of the burden of maintaining a road of such limited utility.

Bay Industry, Inc. v. Jefferson County, Bd. of Com'rs of Jefferson County, 33 Wn.App. 239, 653 P.2d 1355 (1982). Other public benefits that might accrue from a street vacation could include the return of the property to public tax rolls (*City of Federal Way v. King County*, 62 Wn. App. 530, 815 P.2d 790 (1991)), and the elimination of repair obligations and the potential of liability for injuries (*Puget Sound Alumni of Kappa Sigma*, supra at 240).

At bar, the streets were never opened and used for street purposes despite having been dedicated for such use in 1912. (CP 21-22, & 25-29) The City has made assertions that the public on occasion wanders through the area. However, the property claimed by the Water District has been subject to the District's exclusive use for many decades. (CP 22, para. 3) If the unopened streets were deemed by the City to be a useful part of the City's road system, those streets would have been opened years ago – instead of vacated by the City so that the watershed use could be

preserved. In that regard, the City has recognized the ultimate public benefit in the street vacation since its objective of preserving the watershed (and as a result the integrity of the water system serving many of its citizens) has been accomplished. Other public benefits resulting from the street vacation include, but are not necessarily limited to, relief from potential liability from those who might get injured while wandering throughout the ravines that form part of the watershed.

3. The Water District cannot be divested of its Property Rights.

The Street vacation Ordinance was passed in 1988.² Upon its enactment title to the subject property vested in the Water District, as a matter of both statutory and common law, free of the City's street easement. See RCW 35.79.040. Also see *Kiely v. Graves*, 173 Wn.2d 926, 271 P.3d 226 (2012), at 930. Those rights, once vested, cannot be divested except upon due process of law. See *Gillis v. King County*, 42 Wn.2d 373, 255 P.2d 546 (1953), at 376, and *Lawson v. State*, 107 Wn.2d 444, 730 P.2d 1308 (1986). Therefore, the City's 2014 repeal of the Ordinance did not divest the Water District of the rights that vested when the Street Vacation Ordinance was enacted.

² The Street Vacation Ordinance was also filed of record with the King County Recorder in 1988. (CP 22, para.4)

The City has not denied in its brief that the 2014 repeal of the Street Vacation Ordinance could not divest the Water District of the rights that vested at the time the Ordinance was passed in 1988. Instead, the City attempts to avoid the vested rights argument altogether by stating that if the Street Vacation Ordinance is held to be invalid it is as if it was never enacted; and, if never enacted, the property rights in question never vested. In support of that contention the City cites *Palermo at Lakeland, LLC v. City of Bonney Lake, LLC*, 147 Wn. App. 64, 193 P. 3d 168 (2008), *Yarrow First Associates v. Town of Clyde Hill*, 66 Wn.2d 371, 403 P.2d 49 (1965), and *City of Federal Way v. King County*, supra.

Initially, *Yarrow First Associates* and *City of Federal Way* are inapplicable. In *Yarrow*, although the City had passed a resolution supporting the passage of a street vacation ordinance, it was enjoined from proceeding with an actual vacation. See *Yarrow First Associates*, at 377. In *City of Federal Way* the street vacation ordinance was not held invalid, and the City's challenge thereto was dismissed as being untimely.

In *Palermo at Lakeland, LLC*, the court did state that if an ordinance is held invalid it should be treated as if it was never enacted. However, the court also stated that this rule does not apply to "matters and transactions past and closed". *Palermo*, at 85 - 86. The Water District maintains that (i) the transfer to the Water District, pursuant to RCW

35.79.040, that was triggered by the Street Vacation Ordinance³, (ii) the recording of the Ordinance with the King County Recorder in 1988, (iii) the over one-quarter century passage of time, (iv) the continuous use and occupancy of the vacated streets by the Water District during that period of time, and (v) the prejudice and damage that would occur to the District and its operations, which operations are conducted for the benefit of the public and in accordance with strict health regulations, individually and certainly collectively, qualify as a matter "past and closed" which should prevent the District from being divested of the rights that vested when the Street Vacation Ordinance was passed in 1988 – even if the Ordinance is otherwise held to be invalid.

B. CONCLUSION

The City never intended to use the vacated property for street purposes since had that been the intent it would not have initiated the 1988 vacation, nor stated that the purpose for doing so was to preserve the "watershed area". The watershed area preservation intent of the City has not only been accomplished, but in essence guaranteed, given that the

³ RCW 35.79.040 provides as follows:

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.

vacated streets in question have at all times applicable been in the exclusive possession of Water District. Holding the Street Vacation Ordinance to be invalid, 25 years after it was passed, because the current City Council may have a different idea, however slight, as to how the property should be used, is not supported by the applicable facts or law.

For these reasons, and for the reasons further discussed in this brief and the Water District's opening brief, the District maintains that trial court erred when it entered the Order (i) denying the District's motion for Summary Judgment, and (ii) partially granting the City's motion for Summary Judgment. The Water District respectfully requests that said Order be reversed.

DATED this 29th day of September, 2015.

RODGERS DEUTSCH & TURNER, P.L.L.C.

A handwritten signature in black ink, appearing to read 'Daryl A. Deutsch', written over a horizontal line.

Daryl A. Deutsch, #11003
Attorney for Appellants

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

LAKE FOREST PARK WATER DISTRICT, a municipal corporation)	Appeal No. 73309-5-I DECLARATION OF SERVICE
Appellant,)	
and)	
CITY OF LAKE FOREST PARK, a municipal corporation)	
Respondent.)	
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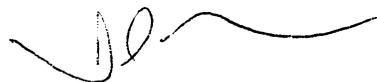
The undersigned declares under penalty of perjury as follows:

On September 29, 2015, I caused to be served a true and correct copy of the appellant's Reply Brief on counsel for the respondent listed below pursuant to an agreement between counsel to permit electronic service:

Ann Marie Soto: AnnMarie@kenyondisend.com

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Dated this 29th day of September, 2015 at Bellevue, Washington.



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