No. 90612-2

SUPREME COURT
OF THE STATE OF WASHINGTON

KEITH L. HOLMQUIST and KAY BURDINE HOLMQUIST, f/k/a KAY BURDINE, husband and wife; and FREDERICK A. KASEBURG, a single man,

Respondents,

v.

KING COUNTY, a political subdivision of the State of Washington; and CITY OF SEATTLE, a municipal corporation,

Petitioners.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MONICA BENTON

ANSWER TO PETITION FOR REVIEW

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A. Introduction.

Respondents' predecessors purchased the lots adjoining a platted street right-of-way in 1926 shortly after the plat was established. King County vacated the street right-of-way in 1932. Since Territorial times, first by common law and then by statute, the owners of the adjacent lots own a street once it has been vacated. *See Burmeister v. Howard*, 1 Wash. Terr. 207, 211-12 (1867); Rem. Rev. Stat. § 9303. Because the original contract purchasers had the right to, and did in fact acquire legal title by purchase, respondents' right to the vacated street end is not diminished because their predecessors purchased under real estate contracts or because the original contract vendor subsequently purported to quit claim the vacated street end to King County.

The Court of Appeals decision comports with two centuries of precedent. Moreover, the public has no interest, let alone a substantial public interest, in taking private property for public use without just compensation. Since neither the County, the City, nor any community organization ever established the "community beach park" that petitioners now seek to carve out of respondents' property, the Court of Appeals decision presents no issue of substantial public interest. This Court should deny review.

B. Restatement of issues presented for review.

1. Are the purchasers under a real estate contract entitled to legal title to all the property bargained for, including title to a street adjacent to their platted lots that was subsequently vacated?

2. Does a quit claim deed given by the contract vendor to the County for nominal consideration, with notice of the respondents' predecessors' real estate contracts, years after the purchasers took possession under those contracts, defeat the presumption that a sale of platted lots conveys the seller's interest in an adjacent street?

C. Restatement of the case.

The Court of Appeals accurately recited the material undisputed facts underlying the 1926 real estate purchases of platted lots by respondents' predecessors and the County's subsequent vacation in 1932 of the adjoining Cedar Park plat street right-of way easement. In violation of RAP 9.12, the County and the City now rely on "facts" that were not presented to the trial court when it entered summary judgment, but were first put forth by amicus when this case was on appeal in Division One. (Pet. 9) As did the Court of Appeals, this restatement of the case properly relies

on the "documents and other evidence called to the attention of the trial court before the order on summary judgment was entered." RAP 9.12. (*See* CP 429-30)

1. Puget Mill platted Cedar Park and sold the lots adjoining a street right-of-way to respondents' predecessors in 1926.

Respondents Holmquist and Kaseburg are, respectively, successors-in-interest to Mona Muller and J.I. Shotwell – the original 1926 purchasers from developer Puget Mill Company of platted lots on the shores of Lake Washington. The 1926 "Cedar Park" plat included lands lying between a railroad right-of-way and the shoreline of Lake Washington. (Op. 3; CP 257, 263)[1] Muller and Shotwell purchased the shoreline lots adjacent to the NE 130th (then "E. 130th St.") street end established in the Cedar Park plat that provided access to the public highways to adjoining landowners.

On August 17, 1926, Muller and Puget Mill entered into a contract for the sale of tract 12, blocks 1 and 3 of Cedar Lake Front addition, immediately north of NE 130th St. (CP 270) This contract

[1] Both King County and the City of Seattle designated clerk's papers, which were numbered separately. Unless otherwise noted, the citations here refer to the City's designation indexed on July 17, 2013 and numbered 1-518.

was not recorded, but the contract date is expressly referenced in the subsequent 1933 warranty deed from Puget Mill Co. to Muller in fulfillment of the real estate contract. (Op. 3; CP 270)

On November 1, 1926, Shotwell and Puget Mill entered into a contract of sale for tract 1, blocks 2 and 4, Cedar Park Lake Front Addition, immediately south of NE 130th St. The Shotwell contract was recorded September 29, 1927 (Op. 3-4; CP 259-61), shortly after the Legislature amended Washington's recording act to authorize the recording of real estate installment contracts. Laws 1927, ch. 278, § 2.

2. King County vacated the Cedar Park street right-of-way easement in 1932.

The Territorial Legislature codified the common law rule that upon vacation of streets in plats, ownership of the vacated street vests in the persons owning the adjoining lots. Code 1881, § 2333, codified at *Remington's Compiled Statutes of Washington*, § 9303; *see Burmeister*, 1 Wash. Terr. at 211-12 (1867). Shotwell, Muller, and others filed a petition for vacation of NE 130th street with King County on April 26, 1932. (Op. 4; CP 265) The King County Board of Commissioners granted the Shotwell/Muller petition for vacation of the NE 130th street right-of-way on June 7,

1932. (CP 268) The County conceded below that Shotwell and Muller "believed they would receive ½ of the vacated [right of way]." (King County App. Br. 11 n.6)

The County's files contained a 1932 quit claim deed to a "Cedar Park Community Club" signed by Muller and Shotwell. (CP 114-15) It is undisputed that the deed was never delivered or recorded, and there is no evidence that the Cedar Park Community Club was ever incorporated or otherwise established as a legal entity. *See* 4 Tiffany, *Real Prop.* § 1053 (3d ed.) ("a conveyance to a nonexistent corporation is ordinarily invalid"). The County conceded that the "Cedar Park Community Club beach proposal came to naught," and that there was never a "community beach" on the vacated street right of way. (King County App. Br. 11)

3. Puget Mill executed fulfillment deeds to Muller and Shotwell before executing a backdated quit claim deed of the vacated right-of-way to King County.

Muller and Shotwell fulfilled the terms of their respective contracts. On September 20, 1933, Puget Mill executed a deed to Muller in fulfillment of her 1926 real estate contract. (CP 270-71) The fulfillment deed was recorded on September 27, 1933. (CP 271) On March 8, 1935, Puget Mill executed a deed to Shotwell in

fulfillment of the recorded November 30, 1926, real estate contract. (CP 273) The deed shows a recording number but does not bear a recording date. (Op. 4-5)

On March 30, 1935, *after* execution of both fulfillment deeds to Muller and Shotwell, Puget Mill executed a quit claim deed to King County, back-dated to 1932, for any interest it had had in the vacated NE 130th street right-of-way. (CP 295) The 1935 quit claim deed purported to "replace" a "lost," and therefore "void" August 10, 1932 quit claim deed from Puget Mill. (CP 295) But there is no evidence, save for the recital in the backdated 1935 deed, that the 1932 deed was ever executed or delivered to the County. The March 30, 1935 Puget Mill quit claim deed was recorded on April 10, 1935. (CP 295)

4. The Holmquists performed the only known maintenance in the last 15 years.

There is no evidence that the County, the City (which annexed the Cedar Park neighborhood in 1954), or anyone other than the adjacent property owners ever exercised any control over the vacated street end. By 1997, when the Holmquists purchased the property, the vacated NE 130th street right-of-way was heavily overgrown with blackberries, bamboo, brush and cane. Respondent

Holmquist cleared and maintained the vacated street right-of-way, removed the heavy overgrowth, and prevented occasional late night parties and underage drinking. (CP 90-91) Holmquist has since continuously maintained the vacated street right-of-way, cutting brush and grass, raking leaves, and picking up trash and generally policing the property. (CP 91)

No public agency performed any clearing or maintenance activity since the Holmquist purchased the property in 1997. (CP 91-92) The City did not perform any activity on the vacated NE 130th street right-of-way until November 2012, approximately five months after the litigation was commenced, when a City crew erected a sign indicating its intent to establish a park on the vacated right-of-way. (CP 338)

5. The Court of Appeals affirmed the trial court's summary judgment quieting title to Holmquist and Kaseburg.

On June 20, 2012, Holmquist and Kaseburg filed this action against King County to quiet title to the vacated street right-of-way. (KC CP 1) King County did not request any affirmative relief in its answer. (KC CP 12-14) The trial court granted the City of Seattle's motion to intervene as the County's successor in interest. (CP 98,

203)[2] The trial court granted Holmquist's and Kaseburg's motion for summary judgment quieting title to the vacated NE 130th St. street end. (CP 427-39)[3] The Court of Appeals affirmed.

D. Argument why review should be denied.

1. The Court of Appeals' holding that respondents' predecessors purchased the NE 130th street end in 1926 comports with a century of settled precedent.

The Court of Appeals followed an unbroken line of authority in holding that respondents' predecessors purchased not just platted lots, but also their vendor's interest in the adjoining platted NE 130th street end. Petitioners do not challenge any portion of that decision, arguing instead that because respondents' predecessors financed their purchase by real estate contracts, the Court of Appeals erred in holding that Puget Mill could not quit claim to King County anything more than its seller's interest in vacated NE 130th St. That argument is meritless. While Puget Mill

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[2] The Court of Appeals' decision incorrectly states that the respondents "assume that the City has a "colorable claim of interest in the property." (Op. 5, n.5) Holmquist and Kaseburg opposed the City's intervention on the ground that the City failed to establish a colorable claim of title to the vacated street end. (CP 168) Respondents have never conceded that the City has any colorable claim to the property.

[3] The Court of Appeals opinion states that respondents recovered attorney fees against the County, but fails to note that the trial court awarded only statutory attorney fees. (Op. 5; CP 433)

retained "basic legal title," Muller's and Shotwell's purchase of their platted properties in 1926 gave them a right "enforceable against the land which is the subject of the contract; a right which cannot be taken away by either the grantor in the contract or by any one, with notice of the contract. . . ." *Culmback v. Stevens*, 158 Wash. 675, 680, 291 P. 705 (1930) (*citing Ashford v. Reese*, 132 Wash. 649, 233 P. 29 (1925), *overruled by Cascade Sec. Bank v. Butler*, 88 Wn.2d 777, 567 P.2d 631 (1977)). That right included the right to fee title to the vacated street end on adjacent NE 130th St.

The County's assertion that the Court of Appeals decision conflicts with *Ashford* because Muller and Shotwell, as real estate installment contract purchasers, had "at most a contract interest in the street end," (Pet. 7) is wrong now and it was wrong in 1932, long before *Ashford* was overruled. By the 1920s, this Court had held that the purchaser's "bundle of sticks" under a real estate contract included most of the attributes of ownership, and that a contract purchaser's interest, though not "legal title," gave the purchaser enforceable ownership rights in the land being purchased. *See Pratt v. Rhodes*, 142 Wash. 411, 416, 253 P. 640, 256 P. 503 (1927) (contract vendee entitled to proceeds of crops grown on land); *Oliver v. McEachran*, 149 Wash. 433, 438, 271 P. 93 (1928)

(contract purchaser has "substantial rights" in land being purchased, including right to benefit from easement and can enforce right against a subsequent grantee with notice); *State ex rel Oatey Orchard Co. v. Superior Court*, 154 Wash. 10, 12, 280 P. 350 (1929) (purchaser's interest constitutes real property for purposes of attachment and execution).

The City's and the County's argument that the Court of Appeals decision conflicts with *Ashford* ignores that case's limited holding that where buildings on the property under contract were destroyed by fire, the purchaser would be permitted to rescind the contract and recover the purchase price and the contract seller, who held formal legal title, would bear the risk of loss. 132 Wash. at 651. The Court never held that the contract purchaser obtained nothing more than the right to enforce a contract claim, as petitioners argue. (Pet. 8) *Ashford* and its progeny from the early 20th century reflect only that the "attributes of ownership that *have* been transferred to the buyer *may* be lost if the seller exercises the contractual right to terminate them under the forfeiture clause." Hume, *Real Estate Contracts and the Doctrine of Equitable Conversion in Washington: Dispelling the Ashford Cloud*, 7 U.P.S. L. Rev. 233, 238 (1984) (emphasis in original).

Petitioners' argument that the Court of Appeals decision retroactively "enforces Muller's and Shotwell's contract rights over 80 years after Puget Mill conveyed the street end to the County," in conflict with *Cascade Sec. Bank v. Butler*, 88 Wn.2d 777, 784, 567 P.2d 631 (1977) (Pet. 8), is similarly without merit. In expressly overruling *Ashford,* the *Cascade Sec. Bank* Court held that "judgments are liens upon the interest of a real estate contract purchaser within the meaning" of the judgment lien statutes, RCW 4.56.190-.200. 88 Wn.2d at 780. The *Cascade Sec. Bank* Court applied its holding prospectively only because "many attorneys, title companies, vendors, vendees, assignees, judgment debtors and judgment creditors have relied in one fashion or another" on the notion that the purchaser's interest did not constitute real property under the judgment lien statutes. 88 Wn.2d at 786. Neither the County nor the City could show such detrimental reliance here, where they first asserted an interest in the vacated street end over 80 years after respondents' predecessors purchased the property.

In any event, nothing in *Ashford* or *Cascade Sec. Bank* supports the petitioners' assertion that in 1932 contract purchasers could be stripped of their rights to the land being purchased by their vendor's subsequent quit claim deed to a third party with

notice of the purchaser's interests. *See* Hume, 7 U.P.S. L. Rev. at 241 (broad interpretation of *Ashford* to deprive purchasers of rights in property purchased by contract "was never applied in the decisions"). The Court of Appeals properly held that any transferee of Puget Mill by a quit claim deed could acquire no more than Puget Mill's contract vendor's interest that was subject to its obligation to convey to its purchasers title to the vacated street. (Op. 13-15, citing *Culmback v. Stevens*, 158 Wash. 675, 291 P. 705 (1930))

When petitioners' sweeping mischaracterizations of *Ashford* and *Cascade Sec. Bank* are set aside, the Court of Appeals decision turns on four established propositions, none of which is challenged in the petition for review:

First, the County and the City do not contest the longstanding rule that a sale of real property described according to a plat is presumed to include one half of the underlying street:

> [T]he general rule is that a conveyance of land abutting upon a public highway carries with it the fee to the center of the highway as part and parcel of the grant. No language is required to express such an intent on the part of a grantor in whom the title to the lot and highway vests. It follows as an inference or presumption of law that, in selling the land abutting upon the highway, he intended to sell to the center line of the adjoining highway.

Bradley v. Spokane & I.E.R. Co., 79 Wash. 455, 459-60, 140 P. 688 (1914), *error dismissed by* 241 U.S. 639 (1916). The Court of Appeals thus correctly held that Puget Mill's sale of the platted lots adjoining NE 130th St. carried with it Puget Mill's interest in the street itself, subject to the public easement for access. (Op. 7-9)

Second, when the County vacated NE 130th St. in 1932, the public's right to use NE 130th St. terminated, and those rights vested in the persons owning the lots on either side. In 1932, by statute and by common law, the vacated portion of "a street or alley, . . . shall be attached to the lots or ground bordering on such street or alley; and all right or title thereto shall vest in the person or persons owning the property on each side thereof, in equal proportions." Rem. Rev. Stat. § 9303. *See Burmeister*, 1 Wash. Terr. at 211-12 (1867).

Third, where, as here, a purchaser buys platted lots *before* the adjoining street is vacated, the law presumes the purchaser has paid a premium for the use of the adjoining street. Accordingly, the vendor (Puget Mill) and any subsequent grantee (the County) are barred from asserting any superior claim to the vacated street end (NE 130th St.):

> The proprietor of premises platted as a town site, by reason of dedicating a part for use as streets, enhances the value of the lots to which access may be had by means of such streets. His grantees pay this enhanced value, and the proprietor thus receives a consideration, not only for the precise amount of land described in each lot, but, also, that embraced in the streets upon which the lots abut; and he who has already been once paid for his land cannot, in equity, be heard to assert title thereto as against one who has paid him the consideration therefor.

Hagen v. Bolcom Mills, 74 Wash. 462, 466-67, 133 P. 1000, *reh'g denied*, 134 P. 1051 (1913).

Fourth, the County could not receive by quit claim deed (whether in 1932, as it asserts, or in 1935 under the recorded, back-dated deed that is in the record at CP 295) any greater rights than were held by Puget Mill. This is particularly true because, as the Court of Appeals held, the County was not a bona fide purchaser for value and without notice of the rights of the contract purchasers Muller and Shotwell. (Op. 14)

The petitioners concede that the County had actual notice, through its prosecuting attorney, that "someone has a contract interest in these lots," (CP 355; Pet. 4), and it is undisputed that the Shotwell contract was recorded on Sept. 29, 1927, almost five years

before the alleged 1932 deed. (Op. 16; CP 273)[4] Under *Culmback*, the only interest that the County could obtain from Puget Mill by its quit claim deed was the vendor's right "to receive the payments as they fell due on the contract." (Op. 14, *quoting Culmback*, 158 Wash. at 681).

The City and the County do not take issue with any one of these four dispositive principles and do not argue that the Court of Appeals decision conflicts with any of this Court's cases establishing these principles, all of which were well established *before* the County's claim arose by virtue of a quit claim deed, whether that deed was given in 1932 or 1935. *See* RAP 13.4(b)(1). This Court should deny review.

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[4] Respondents do not concede that the County received a deed in 1932, as the petitioners allege and the Court of Appeals assumed in its decision. There is no evidence that the allegedly lost deed was ever executed or delivered. *See Anderson v. Ruberg*, 20 Wn.2d 103, 107, 145 P.2d 890 (1944) (deed must be executed and delivered by the grantor to the grantee in order to be effective to pass title).

The March 30, 1935 deed from Puget Mill to the County, which *is* in the record (CP 205) post-dates not only the two real estate contracts, but also the two fulfillment deeds to Muller and Shotwell, dated respectively, September 27, 1933, and March 8, 1935. (CP 270-71, 273) Pursuant to RAP 13.7(b), respondents preserve their argument that only the 1935 quit claim deed is relevant. RAP 13.7(b).

2. The City may not create a public park on private property that has never been dedicated to public or community use.

There is no substantial public interest in usurping for public use privately owned property that has never been used by the public as a "community beach park." (Pet. 10) *See* RAP 13.4(b)(4). The Washington Constitution is clear: "No private property shall be taken or damaged for public or private use without just compensation having been first made . . ." Wash. Const., Art. I, § 16. The constitution reflects the public interest in paying just compensation when taking private property under the power of eminent domain, rather than evading that obligation as the County and City have attempted here.

Petitioners have conceded that the Cedar Park Community Association (if it existed at all in 1932) never established a community beach on the vacated NE 130th street end. (County App. Br. 11) It is also undisputed that the City, after annexing the neighborhood in 1954, considered the NE 130th street end a vacated street, referring specifically to the June 27, 1932 County Commissioner's order. (CP 283-84 (Seattle Public Utilities map),

292-93 (zoning map)).[5] The City did not purport to exercise any control over the vacated street end until 2009, when it listed the street end as slated for improvement in a published "Work Plan." (CP 370, 389) Holmquist, not the City, has performed the only maintenance and upkeep on the vacated street end. (CP 91)

These were the only facts before the trial court on summary judgment, RAP 9.12, and they are undisputed. There is no evidentiary support for petitioners' assertion, based solely on their amicus' supporting brief in the Court of Appeals, that the "public has used the NE 130th street end" as a park area. (Pet. 9) "The purpose of an amicus brief is to help the courts with points of law," and not to evade the requirements of appellate review on the factual record established in the trial court. *Ochoa Ag Unlimited, LLC v. Delanoy,* 128 Wn. App. 165, 172, 114 P.3d 692 (2005) (striking appendices to amicus brief, citing RAP 10.3(e)), *rev. denied*, 156 Wn.2d 1021 (2006).

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[5] Respondents preserve their argument that the City, which annexed the area 22 years *after* the County vacated NE 130th St., lacks a colorable claim to title by virtue of its annexation. RAP 13.7(b). The County, having vacated the NE 130th street end in 1932, had no interest in the subject property for the City to obtain by virtue of annexation, and the City points to no other conveyance that would put it in the chain of title.

Petitioners' attempt to raise an issue of fact – that they rebutted the presumption that Puget Mill's sale of the Muller and Shotwell lots in 1926 included Puget Mill's interest in the adjacent platted street – fails for another reason: it was never raised below. Neither the County nor the City argued in the trial court or in the Court of Appeals that they rebutted the presumption that Puget Mill sold the NE 130th street end to Muller and Shotwell in 1926. The Court of Appeals addressed the only legal argument that was raised by the County and the City: that under *Ashford,* Muller and Shotwell "had no interest in the abutting properties until they received their deeds." (Op. 9) This Court will not "consider issues raised for the first time in a petition for review." *Fisher v. Allstate Ins. Co.,* 136 Wn.2d 240, 252, 961 P.2d 350 (1998).

Even were the Court to consider petitioners' factual argument for the first time now, it fails because none of the facts alleged bear on Puget Mill's intent in 1926, when Muller and Shotwell purchased their properties by reference to the platted lots adjacent to a street end. Petitioners speculate on Muller's and Shotwell's subsequent abortive intent to establish a "community beach for the entire neighborhood." (Pet. 10) But that was in 1932, six years after they purchased their properties. The County

concedes that effort, for whatever reason, "came to naught." (County App. Br. 11) Moreover, the City is not now attempting to establish a private community beach for a Cedar Park Neighborhood Association, but a public park. If the City wants to take private property to create a park, it must pay just compensation under Art. I, § 16 of the Washington Constitution.

E. Conclusion.

The Court of Appeals followed established law that predates the conveyances at issue here. The Court of Appeals decision presents no conflict with this Court's cases, whether from 1926 or from 2014, RAP 13.4(b)(1), and presents no issue of substantial public interest. RAP 13.4(b)(4). This Court should deny the petition for review.

Dated this 29th day of August, 2014.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 29, 2014, I arranged for service of the foregoing Answer to Petition for Review, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 29th day of August, 2014.

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Attached for filing in .pdf format is the Answer to Petition for Review, in *City of Seattle, et al. vs. Holmquist and Kaseburg,* Cause No. 90612-2. The attorney filing this document is Howard M. Goodfriend, WSBA No. 14355, e-mail address: howard@washingtonappeals.com.

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