No. 92539-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF WOODINVILLE,

Plaintiff/Respondent

v.

THE FOWLER PARTNERSHIP,

Defendant/Appellant.

PETITION FOR REVIEW

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A. Identity of Petitioner

The Petitioner is the Fowler Partnership, hereinafter "Fowler".

B. Court of Appeals Decision

The Court of Appeals' unpublished decision was filed on August 24, 2015. Timely motions for reconsideration and to publish were denied on October 8, 2015.

Copies of the decision, and the rulings denying the motions for reconsideration and to publish are in the Appendices at A, B, and C.

C. Issues Presented for Review

1. Is the City of Woodinville's 2014 demand for a dedication deed of the south fifty (50) feet of Fowler's property a taking that requires payment of compensation to Fowler under Washington Constitution, Article I, § 16 and the U.S. Constitution, Amendment V?

2. Is it reasonable to conclude that King County imposed an uncompensated exaction in 1985 when it approved a lot line adjustment that caused no adverse impact on the public interest?

3. Is an unaccepted offer of dedication revoked upon conveyance of the property to a third party?

4. Are there any genuine issues of material fact?

D. Statement of the Case.

1. The parties and the facts.

This suit arose from Woodinville's 2014 demand that the owner of real property dedicate a right of way on the south fifty (50) feet of his property with no compensation. CP 21. Fowler owns the property at issue. CP 112.

In 1985, Fowler's predecessor developed the property into an office complex then located in unincorporated King County. CP 77. In connection with his project, the developer submitted an application for a lot line adjustment to revise internal property lines, and King County approved the application. CP 12, 13. At first, the County insisted on an immediate dedication of the south 50 feet of the developer's property "for public road purposes." CP 13. Two months later, the County decided an immediate dedication was not required and, instead, the developer recorded a Covenant. The approved application says "no dedication required at this time." CP 13.

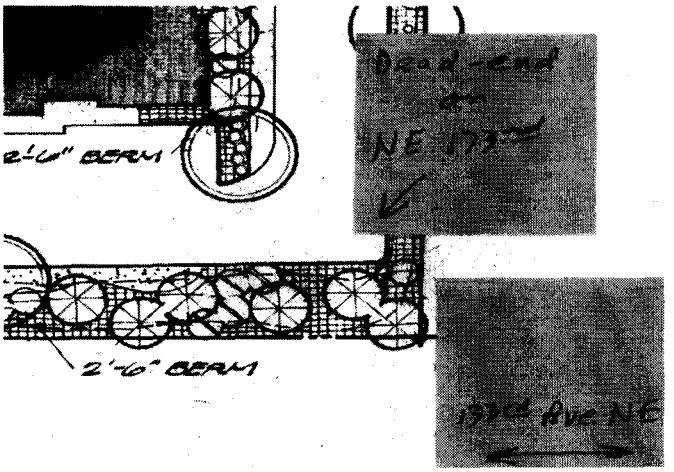
The Covenant (CP 15, App. D) granted King County the right to demand the dedication of the south 50 feet of the owner's property for a roadway to be known as NE 173rd Street at a future date to be determined at the County's discretion. App. D. The Covenant provides King County may initiate a road improvement by formation of a County Road

Improvement District pursuant to RCW 36.88. *Id.* Those proceedings include eminent domain and condemnation. RCW 36.88.310.

The developer built an office complex and, as allowed by the Covenant, he built a roadway in the south 50 feet of the property. CP 114. King County never asked for a dedication deed. CP 43.

The lot line adjustment in 1985 caused no adverse impact on the public interest. CP 45-47. There was no adverse impact on the public interest from any aspect of the development. Op. at 7, App. A.

Fowler bought the property in 1991, and at all times since then paid King County the real property taxes on it and the costs to maintain the roadway and insure it. CP 112, 115. Woodinville incorporated in 1993. CP 77. Prior to 2001, the roadway was not a through road; it dead-ended at its western edge at a landscaped berm as shown here:



CP 115, 525. In 2001, after Woodinville built a new City Hall, its Public Works Director asked Fowler for permission to connect 133rd Ave. NE to the roadway on Fowler's property, and Fowler granted permission as a neighborly accommodation. CP 115.

Neither King County nor Woodinville, after incorporation, behaved as if they were the owners or occupiers of NE 173rd. CP 115. Indeed, Woodinville specifically denied any responsibility for the roadway because "it looked like private property". CP 43, 47, 115, 116. Fowler continues to be the fee simple owner of the south 50 feet of his property.

On May 7, 2013 Woodinville entered into a development agreement with Woodin Creek Village Associates, LLC to develop several hundred units of residential housing, retail space and associated amenities at a former mobile home park located immediately south of Fowler's property. CP 45-76, 116. According to Woodinville, "a full street improvement for 173rd Street is needed with development of the Woodin Creek Village property." CP 38. To fulfill its obligations to this new developer, Woodinville asked Fowler to execute a dedication deed to the south 50 feet of his property. CP 116, 117.

Fowler offered to sell the property, and Woodinville hired an appraiser who opined the value of the property as of January 6, 2014 was $592,500.

CP 117. Then Woodinville decided it had rights under the 1985 Covenant to take Fowler's property without compensation.

2. Procedural history.

Woodinville filed a Complaint for Declaratory and Injunctive Relief on April 22, 2014. CP 1. Fowler Answered with a counterclaim seeking payment for the taking of his property. CP 29-35.

Fowler and Woodinville sought summary judgment, which were considered together, and on August 1, 2014 the trial court, The Honorable Regina Cahan, granted summary judgment to Woodinville and dismissed Fowler's counterclaim. CP 526-528.

The Court of Appeals, Division One, affirmed the trial court on August 24, 2015, and it denied Fowler's Motions for Reconsideration and to Publish the decision on October 8, 2015.

E. Argument Why Review Should Be Accepted

Review should be accepted because all four considerations governing acceptance of review under RAP 13.4(b) are satisfied.

1. The decision of the Court of Appeals conflicts with no less than seven Supreme Court decisions. RAP 13.4(b)(1).

a. The decision conflicts with *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993).

The Washington Constitution, Article I, § 16, and the U. S. Constitution, Amendment V, require the government to pay compensation when it takes a landowner's property. This Court ruled a taking does not occur unless, as a result of the government's action, the property owner loses one of the fundamental attributes of property ownership; these are the rights a) to possess the property, b) to exclude others from the property, c) to dispose of the property or, d) to make some economically viable use of the property. *Guimont v. Clarke.* In *Guimont*, mobile home park owners alleged the Mobile Home Relocation Assistance Act, RCW 59.21, was unconstitutional under several theories. While striking down the statute on due process grounds, the Court concluded the Act was not a taking because there was no "physical invasion" of their property, and it did "not unconstitutionally infringe any other fundamental attribute of property ownership, such as the right to possess, exclude others, or dispose of the property." *Guimont*, 121 Wn.2d at 608.

Here, recording the Covenant caused no loss of any fundamental attribute of ownership. The Covenant did not physically invade the property, nor did it caused a loss of the right to possess, exclude others or dispose of the property. The evidence shows only that the owner built, possessed, and maintained a roadway on the property for the exclusive use

of his tenants and their vendors, and he sold the property in 1991. When Woodinville wanted to connect its City street to the roadway on Fowler's property, it asked for Fowler's permission. That request can only mean Fowler retained the right to possess the roadway and the right to exclude others from using it. And when Woodinville was confronted twice with complaints about the condition of the sidewalk and the roadway landscaping, it denied ownership and referred all questions to Fowler as its owner. (CP 94, sidewalk personal injury claim, CP 47, landscaping).

The Court of Appeals' ruling that the taking occurred in 1985 when the Covenant was recorded conflicts with this Court's holding in *Guimont* because recording the Covenant, in fact, caused no loss of any attribute of ownership.

b. The decision conflicts with *Sparks v. Douglas County*, 127 Wn.2d 901, 904 P.2d 738 (1995).

This Court held compensation is not required when a dedication of a right of way for public roads, for example, is imposed as a condition for approval of a development permit and there is a "nexus" between the development and an adverse impact on the public interest. In *Sparks*, the Court held no compensation was due to the developer for a required right

of way where a traffic impact study showed the development would increase traffic on otherwise inadequate county roads.

Fifth Amendment jurisprudence is the same. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). In that case, when a land owner asked the California Coastal Commission for a permit to build a beach house, the Commission imposed an easement across his property for public access to the beach. The Court held that requiring an easement across the land owner's property was a taking because there was no "nexus" between the owner's construction of the beach house and any adverse impact on the public interest.

Here, the Court of Appeals ruled, "We conclude that the Covenant language did not require King County to compensate Wood Associates for the dedication of the 50 foot right of way for NE 173rd Street." Op. at 8. That conclusion followed hard on the heels of the Court's rejection of Woodinville's argument that the 1985 development caused some adverse impact on the public interest. ("The record is insufficient to sustain Woodinville's position." *Id.* at 7). By ruling the Covenant did not require compensation if the County asked for the dedication, the Court of Appeals expressly approved the uncompensated taking of a right of way.

That conflicts with *Sparks v. Douglas Co.* The lot line adjustment under consideration when the covenant was recorded caused no adverse impact on the public interest and, consequently, the Constitutionally required nexus was absent.

c. The decision conflicts with *Saddle Mountain Minerals, LLC. v. Joshi*, 152 Wn.2d 242, 95 P.3d 1236 (2004), and *Highline School District No. 401 v. Port of Seattle*, 87 Wn.2d 6, 548 P.2d 1085 (1976).

The Court of Appeals' conclusion that the developer was required to contest the exaction in 1985 or lose his right to object to the taking conflicts with *Saddle Mountain Minerals, LLC* and *Highline School District No. 401*.

In *Saddle Mountain Minerals*, the Court held: "Before a property owner can raise a taking claim, the government entity charged with implementing the regulation must reach a final decision regarding the application of the regulations to the property at issue." The Court relied, *inter alia*, on U.S. Supreme Court jurisprudence where the Court said:

> a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

Citing, Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186, 105 S.Ct. 3108, 3116, 87 L.Ed.2d 126 (1985).

Here, King County retained discretion as to when, *if ever*, it would ask for the dedication. The Covenant states the timing of the dedication "shall be determined by King County." App. D. Woodinville retained the same discretion. CP 44. The *Saddle Mountain Minerals* holding that an unconstitutional taking is ripe for judicial review only **after there has been a final local decision** should have been applied here. King County never made a final decision, which would include a demand for the deed and a decision as to how much compensation, if any, was due. Therefore, any objection to the Covenant was not ripe for judicial review.

The *Saddle Mountain Minerals* ruling is consistent with the general rule that a cause of action accrues and the statute of limitations begins to run on the occurrence of the last element essential to the action. *Highline School District No. 401 v. Port of Seattle* – a "takings" case – citing, *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 543 P.2d 338 (1976). The last element essential to a claim in this case was the demand for the dedication with no offer of compensation, and that did not happen until Woodinville made such a demand.

d. The decision conflicts with *Wilkinson v. Chiwawa Comm. Ass'n.*, 180 Wn.2d 241, 327 P.3d. 614 (2014).

Reading RCW 36.88 out of the Covenant conflicts with *Wilkinson v. Chiwawa Comm. Ass'n.* When construing the legal effect of the Covenant, the law requires the court to apply all the words in the Covenant, to construe it in its entirety. *Id.* In determining the drafter's intent, the court must give covenant language its ordinary and common use and the court cannot construe any term in such a way so as to defeat its plain and obvious meaning. The Court of Appeals read RCW 36.88 right out of the Covenant when it ruled: "King County did not need to invoke chapter 36.88 RCW to acquire the property." Op. at 8. That misses the point: all the language of the Covenant must be taken into account in determining the intent of the parties as to whether compensation would be due if King County asked for the dedication.

The court's assertion that King County did not need to invoke RCW 36.88 to acquire the property deprives the reference to RCW 36.88 of any meaning or application. Covenants are to be interpreted as contracts. *Roats v. Blakely Island Maint. Comm'n, Inc.*, 169 Wn.App. 263, 273-75, 279 P.3d 943 (2012) (interpreting homeowners' association articles of incorporation, bylaws and covenants); *Jensen v. Lake Jane Estates*, 165

Wn.App. 100, 105, 267 P.3d 435 (2011) (interpreting restrictive covenant). An interpretation of a contract that gives effect to all provisions is favored over an interpretation that renders a provision ineffective. *Snohomish County Pub. Transp. Benefit Area Corp. v. First Grp. Am., Inc.*, 173 Wn.2d 829, 840, 271 P.3d 850 (2012).

The Court of Appeals' decision conflicts with these basic principles.

e. The decision conflicts with *City of Spokane v. Security Savings Society*, 82 Wash. 91, 143 P. 435 (1914).

Enforcing the Covenant notwithstanding the conveyance of the property to Fowler in 1991 before King County asked for the deed conflicts with *City of Spokane v. Security Savings Society*. There, the Court held a dedication of private property to a City, if it is not accepted by the City, is revoked by operation of law upon a conveyance of the property to a third party. In *City of Spokane*, the property owner recorded a dedication of the land to the City but the City never accepted the tender of dedication formally or by public use. The Court said, "A statutory dedication of streets to a public use is merely a tender of a servitude or easement to the public, which the public is at liberty to accept or reject." *City of Spokane,* 82 Wash. at 93, *citing Smith v. King County*, 141 P. 695. It may be revoked at any time before it has been accepted, and "a

conveyance of an unaccepted street or highway revokes the dedication." *City of Spokane*, 82 Wash. at 93.

This rule of property law should control Woodinville's claim here where there was, in fact, no dedication and no evidence showed King County ever actually used the property before it was conveyed to Fowler.

King County never took any steps to seek or accept the dedication of the south 50 feet of the property, and the intervening conveyance of the property to Fowler before Woodinville came into existence revoked the offer to execute a dedication. In *City of Spokane*, the revocation as a matter of law occurred where the property owner had recorded a deed to the property in favor of the City. Woodinville has even less right to demand enforcement of the Covenant where there was no dedication.

In *Hanford v. City of Seattle*, 92 Wash. 257, 158 P. 987 (1916) the Court ruled, "Where there has been no acceptance by the city or the public, either formal or otherwise, the levy and collection of taxes and special assessments shows an intention not to accept the dedication." Those are the facts here: King County never asked for the dedication deed and, instead, continued to levy and collect real estate taxes on this property. CP 112, 115.

These decisions are the property law of this state. The Covenant was at best an offer to dedicate the south 50 feet of the property, and the offer was revoked by operation of law when the owner sold the property to Fowler.

f. The decision conflicts with *State ex rel. Campbell v. Case*, 182 Wash. 334, 47 P.2d 24 (1935).

Construing the Covenant to not require compensation for taking the right of way conflicts with the principle stated in *State ex rel. Campbell v. Case.* It is settled law that the government is presumed to act within the limits of power under the state and federal constitutions. *Id.* The Court of Appeals' conclusions that King County made a "final" decision in 1985 and no compensation was due even though there was no nexus between the lot line adjustment and the demand for the Covenant can only mean King County intentionally violated its Constitutional obligations to compensate property owners when it takes their property. That is not a reasonable construction of the Covenant.

Where one construction would make a contract unreasonable, and another, equally consistent with its language, would make it reasonable, the latter more rational construction must prevail. *Better Fin. Solutions, Inc. v. Transtech Elec, Inc.*, 112 Wn.App. 697, 712 n. 40, 51 P.3d 108

(2002). It is more reasonable to conclude King County would have met its state and federal Constitutional obligations to pay for the property it takes.

We are a nation of laws, not men, and this Court should uphold that fundamental principle here. It is not reasonable to conclude King County acted unlawfully and demanded the right to take the property at some unknown date in the future with no expectation of compensating the landowner. Because there was no "nexus", the only reasonable construction is King County would have compensated the property owner in accordance with its Constitutional obligations if it wanted the roadway.

g. The decision conflicts with the rules governing summary judgement.

Under CR 56 the court may grant a motion for summary judgment only if there are no genuine issues of material fact after the non-moving party gets the benefit of all reasonable inferences from the evidence presented. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990). These rules are well established, yet they were disregarded in three respects.

i. There was no evidence of who drafted the Covenant.

After citing the rule that any ambiguities in the drafting would be construed against the party drafting the Covenant, the court declared

"nothing in the record suggests that King County drafted the Covenant." Op. at 8. But there is likewise no evidence Fowler's predecessor drafted the Covenant; the record is silent as to the drafter's identity. In the absence of such evidence, as the party resisting Woodinville's motion for summary judgment, Fowler was entitled to the reasonable inference that King County drafted the operative terms of the Covenant in order to get what it wanted.

ii. The Covenant took no property when it was recorded.

As argued above, the cases are clear; there has been no taking where there was no loss of a "fundamental attribute of property ownership". *Supra* at 6-7. *See also, The Kahuna Land Co. v. Spokane County*, 94 Wn.App. 836, 974 P.2d 1249 (Div. 3 1999). To re-iterate, the evidence is Fowler and its predecessor exercised all four attributes of ownership. Fowler maintained the property for its exclusive use, paid all taxes on it, granted Woodinville permission when it wanted to connect its street to the roadway, and Woodinville denied a claim made for an injury caused by a condition of the property, asserting that Fowler and not Woodinville owned the property. As this was a motion for summary judgment, Fowler was entitled to the reasonable inference that the Covenant caused no loss

of any of the fundamental attributes of ownership under the record in this case.

In ruling there "is no question that a final decision was made when the amended lot line adjustment was granted" the court must be concluding a taking occurred at that time. But that flies in the face of the evidence in this record showing there was no loss of any attribute of ownership, and it disregards the rule requiring that all reasonable inferences be granted in Fowler's favor.

iii. The Covenant required compensation only when the deed was demanded.

The decision asserts "King County did not need to invoke chapter 36.88 RCW to acquire the property" because it "provided explicitly for the deed." Op. at 8. But that may be only one possible conclusion from the terms of the Covenant. Another, reasonable, inference would be that the reference to RCW 36.88 meant King County knew if it wanted the property at some future date it would acquire the property by gift, purchase, or condemnation as set forth in RCW 36.88.310. The court erroneously gave Woodinville the benefit of the inferences.

2. The decision is in conflict with other decisions of the court of appeals. RAP 13.4(b)(2).

Division 1 held for the property owner in *The Luxembourg Group, Inc. v. Snohomish Co.*, 76 Wn.App. 502, 887 P.2d 446 (Div. 1 1995), ruling the absence of a nexus between the development and the county's demand for a road right of way made the county's demand a taking that must be compensated.

Division 2 held for the property owner that the county's exaction of a right of way for a future undetermined road was a taking that must be compensated in *Unlimited v. Kitsap County*, 50 Wn. App. 723, 750 P.2d 651 (1988). Indeed, the court's decision in *Unlimited* is squarely on point. Kitsap County sought to do exactly what King County tried to do here, that is, take a right of way for some undetermined future need, completely unrelated to the impacts of the development under review.

The Court of Appeals' decision conflicts with those two decisions.

3. The decision involves significant questions of law under the Washington State and U.S. Constitutions. RAP 13.4(b)(3).

As stated at the outset, the Washington Constitution, Article I, § 16, and the U. S. Constitution, Amendment V, require the government to pay compensation to a landowner when the government takes her or his

property. The Court of Appeals' decision cannot be reconciled with these basic principles.

4. This petition involves an issue of substantial public interest that should be determine by the Supreme Court. RAP 13.4(b)(4).

It is a matter of substantial public interest anytime the government takes private property from one owner in order to meet the government's obligation to another property owner. That is what is happening here. Woodinville had no significant need for Fowler's property before entering into a development agreement with the land owner immediately south of his property. CP 38, 44-76, 116. Woodinville intends to take Fowler's property to satisfy its obligations to that developer.

The adoption of the Growth Management Act in 1990 lead to planning goals that include, encourage urban growth, reduce sprawl, and protect private property rights. RCW 36.70A.020. Consequently, vast regions of unincorporated county land throughout Washington are becoming part of cities and towns due to the growth of our population.[1] Almost half of the

[1] According to the Puget Sound Regional Council, about 2,709,660 people, or 70.6%, live within the incorporated area of the central Puget Sound region alone. This area comprises 82 cities and towns and has grown by 182,770 people (7.2%) since 2010. Annexations from unincorporated areas account for about 48% of that growth. http://www.psrc.org/assets/2782/trend-d3.pdf?processed=true.

growth of our cities and towns comes from annexations of previously unincorporated lands. *Id.* What happens to the counties' land use decisions – the one here is 30 years old – when the jurisdiction governing future development shifts from the county to the city or town is a matter of substantial public interest.

Landowners, developers, cities, and counties all over Washington need the Court's guidance when old conditions of development are implicated in new developments.

F. Conclusion

The government can take private property only upon payment of compensation.

Fowler asks the Court to grant this Petition for Review, and reverse and remand this matter to the trial court to determine the fair market value of the property that Woodinville wants to take.

Respectfully submitted this 4th day of November, 2015.

Michael J. Bond

Michael J. Bond, WSBA # 9154
Attorney for The Fowler Partnership

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF WOODINVILLE, a municipal corporation of the State of Washington, Respondent, v. THE FOWLER PARTNERSHIP, a Washington general partnership, Appellant.	)	No. 72417-7-I DIVISION ONE UNPUBLISHED OPINION FILED: August 24, 2015

APPELWICK, J. — Fowler appeals the trial court's order granting Woodinville's motion for summary judgment. The order entitled Woodinville to a deed for 50 feet of property without compensation. Fowler argues that its predecessor's Covenant to deed the property on demand is not enforceable and that Woodinville has not already acquired the property through a valid permit condition, common law dedication, or adverse possession. We affirm.

FACTS

Early in 1985, Wood Associates submitted an application to King County for a permit to develop its property into commercial buildings. Wood Associates also filed a lot line adjustment application with King County in order to revise the property's internal lot boundary lines. On March 22, 1985 King County approved the lot line adjustment subject

to Wood Associates dedicating the south 50 feet of the property to King County for public road purposes. The approval required Wood Associates to provide a copy of a recorded deed to satisfy the condition.

In April 1985, King County reviewed a site plan for the property. The site plan included a handwritten notation stating, "50 [feet] to be dedicated upon demand by King Co. per zoning requirement."

On May 21, 1985, a document executed by Wood Associates, entitled "Covenants, Conditions and Restrictions Running with the Land," (Covenant) was recorded in King County. Later the same day, King County revised the lot line adjustment approval by striking through the condition requiring a deed dedicating the property immediately. Interlineated was a notation that read, "Covenant recorded under AF #850521 0708 which reserves south 50 ft[.] for future public road, no dedication required at this time." The lot line adjustment application approval with the revision was recorded on August 12, 1985.

In 1986, Woodinville City Center was built on the property. Fowler acquired title to the property at issue via statutory warranty deed in 1991. In 1993, the City of Woodinville incorporated. The property, previously located within unincorporated King County, then fell within Woodinville city limits. King County did not request a dedication deed of the property prior to Woodinville's incorporation.

Years later, on May 7, 2013, Woodinville entered into a development agreement with Woodin Creek Village Associates to build several hundred units of residential housing, retail space, and amenities on the property immediately to the south of Woodinville City Center. A full street improvement was needed with the development of

the Woodin Creek Village property. Consequently, in early 2014, Woodinville contacted Fowler and informed it that it now required a dedication of the property for a public road.

On March 25, 2014 Woodinville sent Fowler a letter with a dedication deed for signature. Fowler refused to deed the property without compensation. After Fowler refused to sign the deed, Woodinville filed an action for declaratory and injunctive relief on April 22, 2014. Woodinville argued it was entitled to a declaration that the dedication required under the Covenant is not a taking. Fowler responded and counterclaimed arguing that requiring dedication of the deed without compensation is a taking, because there was no adverse public impact of the lot line adjustment necessitating the dedication of the property to King County as required by the Covenant.

On June 30, 2014, Fowler moved for summary judgment. It requested relief in the form of dismissal of Woodinville's claim that it is entitled to the property without compensation and a declaration that the demand for the deed without compensation is an unconstitutional taking. Fowler argued that the Covenant does not run with the land, that the Covenant does not say that the deed would be extracted without compensation, and that its takings argument is not barred by the statute of limitations.

On July 3, 2014, Woodinville also filed a motion for summary judgment requesting the relief it sought in its initial complaint. Specifically, it argued that as a matter of law, the recorded Covenant requiring the dedication was enforceable, that Fowler was time-barred from challenging the validity of the conditional approval of the lot line adjustment imposed by King County, and that its enforcement of the Covenant given in consideration for the lot line adjustment is not a compensable taking.

The trial court granted Woodinville's motion for summary judgment and denied Fowler's motion for summary judgment. Fowler appeals the trial court's order granting Woodinville's motion for summary judgment.

STANDARD OF REVIEW

This court reviews summary judgment orders de novo. Hadley v. Maxwell, 144 Wn.2d 306, 310-11, 27 P.3d 600 (2001). Summary judgment is appropriate only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Peterson v. Groves, 111 Wn. App. 306, 310, 44 P.3d 894 (2002). When considering the evidence, the court draws reasonable inferences in the light most favorable to the nonmoving party. Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995).

DISCUSSION

Whether Woodinville must compensate Fowler for a deed to the 50 feet of property turns on the legal effect of the Covenant.[1] The Covenant was executed and acknowledged weeks before Wood Associates applied for permits for its development. King County placed an explicit condition on the approval of the lot line adjustment: delivery of an acceptable deed dedicating the south 50 feet of the property to the county. Two months later, Wood Associates recorded the Covenant. The same day, King County removed the condition of delivery of a deed immediately dedicating the property and interlineated on the amended lot line adjustment approval a notation that read "covenant recorded under AF #850521 0708 which reserves south 50 ft[.] for future public road, no

[1] Fowler appears to concede that Woodinville is entitled to the deed to the property as long as it is compensated.

dedication required at this time." We conclude that King County accepted the Covenant, in lieu of an immediate deed, as a condition of the amended lot line adjustment approval.

The opening text of the Covenant identifies the owners and the property it was developing, and then provides that the county may develop and/or construct a roadway to be denominated NE 173rd Street, adjacent to and running along the southerly boundary of lots A, B, and C. It also provides that the development may be initiated by the formation of a County Road Improvement District (CRID). The first numbered paragraph of the Covenant requires the property owner to participate in and not oppose or protest the formation of a CRID or any road improvement project sanctioned by King County. The second paragraph states that the property owner will maintain a 50 foot setback along the southern border of its property in accordance with King County's zoning and setback regulations. That same provision granted the property owner permission to develop the 50 foot strip for a street or make landscape and drainage improvements. The third paragraph states in part, "Owner will deed the south 50 - feet of Lots A, B and C to King County for Public Road purposes when sanctioned by King County." The concluding paragraph notes that the "[t]iming of the formation of any such CRID or other road improvement project and the dedication of the south 50 - feet of Lots A, B, and C shall be determined by King County." It also specifies the minimum standard for any improvements and an option for property owners to require a higher standard.

The provisions for the formation of a CRID and the references to construction standards are of little interest here. Stripped of them, the Covenant states the following: (1) Owner will deed the south 50 feet of Lots A, B, and C to King County; (2) King County may construct NE 173rd Street over the south 50 feet; (3) timing of the construction and

delivery of the deed shall be determined by King County; and (4) in the meantime, the owner will maintain a 50 foot setback, but may develop that 50 foot strip for street, landscape, and drainage improvement in accordance with an approved county plan. These provisions became conditions of the amended lot line adjustment approval.

Fowler contends there was an insufficient nexus between the Wood Associates' lot line adjustment request and King County's extraction of the right of way in the Covenant. It contends that the required dedication in the Covenant was an improper condition placed upon the property, because there was no evidence that the lot line adjustment would have adverse public impacts. Fowler argues that the required dedication of the property under the Covenant would have constituted an unconstitutional taking if King County had attempted to enforce the Covenant without paying compensation.

The federal and Washington state constitutions provide that private property may not be taken for public use without just compensation. Sparks v. Douglas County, 127 Wn.2d 901, 907, 904 P.2d 738 (1995). Where the government physically appropriates a portion of a person's private property, such as through an easement or right of way, a taking has occurred which requires compensation. Id. This rule does not necessarily apply, however, where conveyance of a property right is required as a condition for issuance of a land permit. Id. As a prerequisite for development permission, a regulation may require a landowner to dedicate property rights for public use if the regulatory exaction is reasonably calculated to prevent, or compensate for, adverse public impacts of the proposed development. Id.

Woodinville argues that the conditions on the amended lot line adjustment approval were reasonably related to the impacts of development, were authorized under the King County zoning code, and did not amount to a taking. The lot line adjustment approval required the dedication, but makes no reference to the zoning code. The site plan for the development contained a notation that the dedication was required per the zoning code. The applicable code provisions however are not in the trial court record. Nor does the record document the impacts of the lot line adjustment (or other aspects of the development) which would justify such conditions under the zoning code. The record is insufficient to sustain Woodinville's position.

If the nexus was insufficient between Wood Associates' lot line adjustment request and the required dedication in the Covenant, Fowler argues that imposing the Covenant conditions without compensation is an unconstitutional taking.[2] See id. Even if the nexus is sufficient, Fowler also argues that the Covenant does not say that Wood Associates would deed the property to King County without compensation. It notes that the Covenant referenced chapter 36.88 RCW which authorizes the formation of a CRID. That statute authorizes the county to acquire a necessary right of way by gift, purchase, or by condemnation. RCW 36.88.310. Fowler argues that two out of three alternatives, i.e., purchase and condemnation, explicitly require payment of compensation. And, Fowler cites to Lappin v. Lucurell, 13 Wn. App. 277, 534 P.2d 1038 (1975), for the assertion that a gift ordinarily will not be presumed.

[2] If the dedication of the property required by the Covenant was reasonably calculated to prevent, or compensate for, adverse public impacts of the lot line adjustment approval, then the requirement for the dedication in the Covenant without compensation would not have been an unconstitutional taking. And, King County would have been entitled to the property upon demand.

This argument lacks merit. King County did not need to invoke chapter 36.88 RCW to acquire the property. The Covenant provided explicitly for the deed. The Covenant was not short on details and provided for contingencies—alternative methods of proceeding with the project and alternative development standards. Notably, the Covenant does not mention eminent domain. It is silent about either a value for the property, a method to determine the value for the property, or conditioning the deed on tender of payment. Any ambiguities in the drafting would be construed against the party drafting it. Riss v. Angel, 80 Wn. App. 553, 557, 912 P.2d 1028 (1996), aff'd, 131 Wn.2d 612, 934 P.2d 669 (1997). Nothing in the record suggests that King County drafted the Covenant. We conclude that the Covenant language did not require King County to compensate Wood Associates for the dedication of the 50 foot right of way for NE 173rd Street.

Because we conclude the Covenant does not provide for compensation, we now address Fowler's claim of an unconstitutional taking. Fowler contends an unconstitutional taking is ripe for judicial review only "after there has been a final local decision" and that King County never made a "final decision," because it did not demand the deed. Therefore, it contends that Wood Associates could not have challenged the conditioning of the lot line approval on the Covenant. Fowler argues the challenge became ripe only when Woodinville demanded that it provide the deed.[3] Fowler relies on Saddle Mountain

[3] Even if the taking challenge was not ripe until Woodinville demanded the deed, Fowler nonetheless lacks standing to challenge the taking now, because of the subsequent purchaser rule. Where property is taken under the exercise of the power of eminent domain, the owner at the time of the taking or injury is the proper person to initiate the proceeding or sue. Hoover v. Pierce County, 79 Wn. App. 427, 433, 903 P.2d 464 (1995). Because the right to damages for an injury to property is a personal right

Minerals v. Joshi, 152 Wn.2d 242, 252, 95 P.3d 1236 (2004) for this assertion. But, its reliance is misplaced. In Saddle Mountain the court considered a regulatory taking and opined that before a property owner can raise a takings claim, the government entity charged with implementing the regulation must reach a final decision regarding the application of the regulations to the property at issue. Id.

Here, there is no question that a final decision was made when the amended lot line adjustment was granted. The uncompensated conditions were imposed at that time. It was recorded as notice in the land title records. If the conditions were not reasonably related to the impacts under zoning regulations, the "taking"—the obligation to provide the dedication deed on demand—occurred when the amended lot line adjustment became final. At that point the county had only to provide notice to receive the deed. The question was only when the deed would be officially "sanctioned" as provided in the Covenant. The Covenant was a condition to a final land use decision that was made in 1985. Therefore, Fowler's argument that Wood Associates could not challenge the condition until the deed was demanded lacks merit.

The time period for filing a writ of review to challenge a land use decision is limited to 30 days from the time a final local governmental land use decision is issued. Brutsche v. City of Kent, 78 Wn. App. 370, 380, 898 P.2d 319 (1995). Wood Associates did not challenge the Covenant as an unconstitutional condition placed upon the lot line adjustment approval within 30 days of it becoming a final decision.[4] Brutsche compels

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belonging to the property owner, the right does not pass to a subsequent purchaser unless expressly conveyed. Id. at 433-34.

[4] It is worth noting that although Brutsche was decided in 1995—well after the lot line adjustment was approved—the law at the time of the amended lot line adjustment approval was similar. Cathcart-Maltby-Clearview Cmty. Council v. Snohomish County,

the conclusion that Fowler's challenge to the enforceability of the Covenant as between King County and Wood Associates is time barred.

Fowler further argues that laches bars the city's claim because no party sought to enforce any alleged rights under the Covenant for 29 years and that the Covenant has expired. Laches is an equitable principle that relates to neglect for an unreasonable length of time, under circumstances permitting diligence, to do what in law should have been done. Arnold v. Melani, 75 Wn.2d 143, 147, 449 P.2d 800 (1968). More than a lapse of time must be demonstrated in order for a laches defense to succeed. Id. at 148. The Covenant clearly contemplated a delay in construction of the street. It specifically authorized King County to dictate timing. Fowler and its predecessors had the benefit of the permits issued with the Covenant conditions. They developed and used the 50 feet that were subject to the dedication, as provided in the Covenant. The conditions were filed in the public records, not hidden from the parties. Whether Woodinville was unaware of its legal interest for years, is not a basis to apply laches here. Whether Fowler paid too much for the property because it did not understand the dedication is not a basis to apply laches. Whether Fowler paid property taxes on the 50 feet when it should not have had to do so, is not a basis to apply laches here. The record does not demonstrate that the delay in requesting the delivery of the deed caused a change of position that would make enforcement of the Covenant inequitable.

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96 Wn.2d 201, 205-06, 634 P.2d 853 (1981). Absent a controlling statute or ordinance, a writ of review had to be filed "within a reasonable period after the rezone decision." Id. In Cathcart, the court held that because a writ was filed within 30 days of the county's decision, it was timely. Id. at 206.

Because Fowler's challenge is barred as untimely, we need not consider whether the Covenant as a contract is enforceable[5] or whether Woodinville acquired the property via common law dedication or adverse possession. King County's interest in NE 173rd Street reverted to Woodinville by virtue of RCW 35.02.180 upon incorporation. Woodinville is entitled to the transfer of the deed as a mere formality. Because we conclude that Woodinville's request now for the dedication deed does not constitute a taking, Fowler is not entitled to a judgment for the market value of the property nor is it entitled to attorney fees for a condemnation pursuant to RCW 8.25.070.

We affirm.

WE CONCUR:

[5] Fowler emphasizes that Woodinville had no rights to the property under the Covenant, because the Covenant was revoked by law when King County failed to accept the dedication. But, acceptance was not dependent upon demanding or receiving the deed. Acceptance was completed when King County struck the original condition on the lot line adjustment approval and substituted the Covenant conditions in the amended lot line adjustment approval.

APPENDIX B

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

CITY OF WOODINVILLE, a municipal corporation of the State of Washington, Respondent, v. THE FOWLER PARTNERSHIP, a Washington general partnership, Appellant.	)	No. 72417-7-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, The Fowler Partnership, has filed a motion for reconsideration. The respondent, City of Woodinville, has filed an answer. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 8th day of October, 2015.

Appelwick, J.
Judge

APPENDIX C

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

CITY OF WOODINVILLE, a municipal corporation of the State of Washington, Respondent, v. THE FOWLER PARTNERSHIP, a Washington general partnership, Appellant.	)	No. 72417-7-I ORDER DENYING MOTION TO PUBLISH

The appellant, The Fowler Partnership, has filed a motion to publish. The respondent, City of Woodinville has filed an answer. Nonparty property owners and developers have joined in Fowler's motion to publish. A panel of the court has considered its prior determination and finding that the opinion will not be of precedential value has determined that the motion should be denied. Now, therefore it is hereby

ORDERED, that the unpublished opinion filed August 24, 2015 shall remain unpublished.

DATED this 8th day of October, 2015.

Appelwick J
Judge

APPENDIX D

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COVENANTS, CONDITIONS AND RESTRICTIONS
RUNNING WITH THE LAND

Wood Associates, a Washington general partnership composed of Baldwin & Associates, Inc., the Gossard partnership, Bruce Tuesley and Russell F. Rogers, owns and is developing the following legally described real estate:

See attached Exhibit A.

The county may develop and/or construct a roadway to be denominated NE 173rd Street, adjacent to and running along the southerly boundary of Lots A, B, and C. Said road development may be initiated by the formation of a County Road Improvement District (CRID), pursuant to RCW 36.88.

Wood Associates, for itself, its grantees, successors and assigns, (hereinafter "Owner") hereby agrees and covenants as follows:

1. Owner will participate in, and/or not oppose or protest the formation of a County Road Improvement District (CRID) pursuant to RCW 36.88 or any road improvement project sanctioned by King County which is designed to develop and improve NE 173rd Street.

2. Owner will Maintain a 50 - foot setback along the southerly border of said Lots A, B and C in accordance with King County's zoning and setback regulations, except that owner may develop said 50 - foot strip for street, landscape and drainage improvements in accordance with approved county plan.

3. Owner will deed the south 50 - feet of Lots A, B and C to King County for Public Road purposes when sanctioned by King County.

Timing of the formation of any such CRID or other road improvement project and the dedication of the south 50 - feet of Lots A, B and C shall be determined by King County. The street improvement authorized by the CRID or other road improvement project shall call for improvement of NE 173rd Street and its immediate street system to, at least. the minimum King County road standards applicable to said street (s) and the immediate street system at the time the CRID or other road project is formed; provided that, if there is multiple ownership of properties participating in the formation of the CRID or other road improvement project, if a majority of the property owners want a higher standard, ie. curbs, gutters, underground drainage, etc., that standard shall apply.

In Witness Whereof, we have set our hands and seals this 15th day of Nov., 1985.

WOOD ASSOCIATES, a Washington partnership

BY: BALDWIN & ASSOCIATES, Inc., PARTNER

By: B Baldwin
Brian J. Baldwin, President

FILED for Record at Request of
Name Vester Development
Address 8060 165th Ave NE
Redmond WA. 98052

May 21 2 13 PM
RECEIVED

APPENDIX E

RCW 36.88.310

Acquisition of property — Eminent domain.

All land, premises or property necessary for right-of-way or other purposes in the construction or improvement of any county road, including bridges, sidewalks, curbs and gutters and the drainage facilities therefor, under this chapter may be acquired by the county acting through its board of county commissioners, either by gift, purchase or by condemnation. In the event of any exercise of the power of eminent domain, the procedure shall be the same as is provided by law for the securing of right-of-way for county roads. The title to all property acquired for any construction or improvement under this chapter shall be taken in the name of the county. The county commissioners in any eminent domain action brought to secure any property for construction or improvement under this chapter may pay any final judgment entered in such action with county road funds and take possession of the particular property condemned. In the event of any such payment the county commissioners may require that the county road fund be reimbursed out of the particular county road improvement fund of the district for which the property was acquired.
[1963 c 4 § 36.88.310. Prior: 1951 c 192 § 31.]

RCW 36.70a.020

Planning goals.

The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:

(1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.

(2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

(3) Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.

(4) Housing. Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock.

(5) Economic development. Encourage economic development throughout the state that is consistent with adopted comprehensive plans, promote economic opportunity for all citizens of this state, especially for unemployed and for disadvantaged persons, promote the retention and expansion of existing businesses and recruitment of new businesses, recognize regional differences impacting economic

development opportunities, and encourage growth in areas experiencing insufficient economic growth, all within the capacities of the state's natural resources, public services, and public facilities.

(6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

(7) Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.

(8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

(9) Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities.

(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

(11) Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

(12) Public facilities and services. Ensure that those public

facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

(13) Historic preservation. Identify and encourage the preservation of lands, sites, and structures, that have historical or archaeological significance.
[2002 c 154 § 1; 1990 1st ex.s. c 17 § 2.]

APPENDIX F

Washington Constitution Article I Section 16

SECTION 16 EMINENT DOMAIN.

Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: Provided, That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.
[AMENDMENT 9, 1919 p 385 Section 1. Approved November, 1920.]

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United States Constitution Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.