

No. 37439-1-II

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

---

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

vs.

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

---

APPEAL FROM THE ORDER OF THE SUPERIOR COURT  
OF THE STATE OF WASHINGTON FOR  
WAHKIAKUM COUNTY

The Honorable Michael J. Sullivan, Judge

---

BRIEF OF APPELLANT

---

Daniel H. Bigelow  
WSBA No. 21227  
Prosecuting Attorney  
P.O. Box 397  
Wahkiakum County Courthouse  
Cathlamet, Washington 98612  
(360) 795-3652

STATE OF WASHINGTON  
BY   
03 SEP 22 AM 9:47

FILED  
COURT OF APPEALS  
DIVISION II

P.M. 9-18-2008

**TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
<b>Assignments of Error</b> .....	1
<b>Issues Pertaining to Assignments of Error</b> .....	1
<b>Statement of the Case</b> .....	1
<b>Argument</b> .....	3
<b>Conclusion</b> .....	13

**TABLE OF AUTHORITIES**

TABLE OF CASES

**PAGE**

Washington Cases

<u>Burton v. Douglas County</u> , 65 Wn.2d 619, 399 P.2d 68 (1965) . . . . .	4
<u>Central Christian Church v. Lennon</u> , 59 Wn. 425, 427-8, 109 P. 1027 (1910) . . . . .	10
<u>City of Spokane v. Merriam</u> , 80 Wash. 222, 141 P. 358 (1914) . . . . .	11
<u>Donald v. City of Vancouver</u> , 43 Wn.App. 880, 885, 719 P.2d 966 (1986) . . . . .	6
<u>King County v. Hanson Investment Co.</u> , 34 Wn.2d 112, 208 P.2d 113 (1949) . . . . .	7,8
<u>Nelson v. Pacific County</u> , 36 Wn.App. 17, 671 P.2d 785, <u>review denied</u> , 100 Wn.2d 1037 (1984) . . . . .	4
<u>Rainier Ave. Corp. v. Seattle</u> , 80 Wn.2d 362, 494 P.2d 996, <u>cert. denied</u> , 409 US 983, 93 S.Ct. 321, 34 L.Ed.2d 247 (1972) . . . . .	5,6,10
<u>Sandy Point Improvement Co. v. Huber</u> , 26 Wn. App. 317, 320, 613 P.2d 160 (1980) . . . . .	4
<u>Sheikh v. Choe</u> , 156 Wash.2d 441, 128 P.3d 574, (2006) . . . . .	3
<u>Shell v. Poulson</u> , 23 Wash. 535, 537, 63 P. 204 (1900) . . . . .	4

<u>Shertzer v. Hillman Inv. Co.</u> , 52 Wash. 492, 100 P. 982 (1909) .....	5
<u>Sinclair v. Fleischman</u> , 54 Wash. App. 204, 773 P.2d 101, <u>review denied</u> , 113 Wash.2d 1032, 784 P.2d 531 (1989) .....	4
<u>Sweeten v. Kazularich</u> , 38 Wn.app. 163, 166, 684 P.2d 789 (1984) .....	4,5
<u>Weld v. Bjork</u> , 75 Wn.2d 410, 411, 451 P.2d 675 (1969).....	10

Other State Cases

<u>City of Marysville v. Boyd</u> , 181 Cal.App.2d 755, 756, 5 Cal.Rprtr. 598 (1960)(citations omitted) .....	6
<u>In re: Annexation of 118.7 Acres in Miami Tp. to City of Moraine</u> , 52 Ohio St.3d 124, 130, 556 NE2d 1140 (1990).....	11
<u>Ravettino v. City of San Diego</u> , 70 Cal.App.2d 37, 160 P.2d 52 (1945) .....	11

Statutes

RCW 58.17.020(3).....	5
-----------------------	---

Other Authorities

19 Am.Jur. 536, <i>Estates</i> , §71 .....	8
15 McQuillin, <i>Municipal Corporations</i> 33.26 (3d ed. rev. 1964 . . .	10, 11
<i>Webster's Dictionary</i> 1913, retrieved on the World Wide Web at < <a href="http://machaut.uchicago.edu/cgi-bin/WEBSTER.sh?WORD=park">http://machaut.uchicago.edu/cgi-bin/WEBSTER.sh?WORD=park</a> >... ..	12
17 William B. Stoebuck, <i>Washington Practice, Real Estate: Property Law</i> , sec 1.8, at 11-12 (2003) .....	4

## **ASSIGNMENTS OF ERROR**

1. The trial court erred in finding that Johnson Park was the subject of a public dedication rather than a quitclaim deed without reversion.

2. The trial court erred in holding that the purpose of a dedication is to be so strictly construed that a dedication for "park purposes" only includes what constituted "park purposes" at the time of dedication, and would be violated by a use that would constitute "park purposes" today.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the facts on record establish as a matter of law that Johnson Park labors under a public dedication and thus a conditional right of reentry on the part of the grantors' heirs.

2. Whether, if there is a public dedication and thus a conditional right of reentry, the trial court was correct in its ruling that any "park purpose" that has come into being since 1936 violates the "park purposes" for which the Johnson Park property was dedicated.

## **STATEMENT OF THE CASE**

This case was disposed of through judgment on the pleadings, with little additional information added, all through the pleading process. The dispute centers on the transfer of a parcel of land henceforth referred to as Johnson Park by John and Helen Johnson in 1936. See Exhibit A of

Complaint, CP 25. John and Helen Johnson, hereafter "grantors," recorded a deed transferring the Johnson Park property to Wahkiakum County, hereafter "county," the defendant and appellant herein. The deed provided that county should receive the property "TO HAVE AND TO HOLD the same... for the purposes of a public park forever; PROVIDED HOWEVER, that School District No. 66, or its successors, shall have the right in the event that it shall deem it necessary and proper to construct and maintain a public school building or buildings and playgrounds on so much of said... premises as shall be considered necessary and proper for the purposes of said district."

Upon receipt of the property, the county passed a resolution "that the Board of County Commissioners of Wahkiakum County, Washington, in regular session at Cathlamet on the 7<sup>th</sup> day of December, 1936, do hereby accept the gift of this tract of land on behalf of the people of Wahkiakum County to be hereafter known and referred to as JOHNSON PARK in honor of the unselfish contribution of the donors to the common well-being of the people of Wahkiakum County." CP 27-28. This document also appears in Appendix A of the complaint, and it, with the deed, constitutes the bulk of plaintiffs' case.

Based upon these facts, in this lawsuit between the heirs of the grantors and the county, the superior court held that Johnson Park was the subject of a public dedication of land rather than a gift from grantors to county, entering an order to that effect. This order has the effect of limiting

the use of the property to "park purposes." CP 113-114. See page 3 of the final order herein, filed 1/28/07. Furthermore, the court found that since "the intent of the parties controls the extent of the dedication... the meaning of the dedication for 'park purpose' is limited to 'park purpose' as the phrase would have been understood on the date of the dedication."

## **ARGUMENT**

### **A. Standard of Review**

Since this case was decided on the pleadings, this court's review is de novo. E.g., *Sheikh v. Choe*, 156 Wash.2d 441, 128 P.3d 574, (2006).

### **B. Public Dedication or Gift to the County?**

It is undisputed that the grantors herein intended to give, and did give, a fee simple ownership interest in Johnson Park to the County of Wahkiakum. See, e.g., CP 10 (arguing that the estate granted is irrelevant, thus ceding the point).

Plaintiffs therefore rested their case on the theory of public dedication, arguing that the deed and resolution above stated, in combination, constitute offer and acceptance of a public dedication.

In deciding the case, this court proceeds from the following starting point:

The law strongly favors the free use of property and is just as strongly against restrictions on property use. Burton v. Douglas County, 65 Wn.2d 619, 399 P.2d 68 (1965). "Words in a deed of conveyance... restricting the use of real property by the grantee are to be construed strictly against the grantor and those claiming the benefit of the restriction." Sandy Point Improvement Co. v. Huber, 26 Wn. App. 317, 320, 613 P.2d 160 (1980). The law favors the unfettered use of one's own property. Sinclair v. Fleischman, 54 Wash. App. 204, 773 P.2d 101, review denied, 113 Wash.2d 1032, 784 P.2d 531 (1989). "In line with American courts generally, Washington does not favor estates upon condition. If the creating language is unclear that a conditional estate was intended, the estate created will be a fee simple absolute." 17 William B. Stoebuck, *Washington Practice, Real Estate: Property Law*, sec 1.8, at 11-12 (2003).

Public dedications are included in the category of disfavored restrictions. Nelson v. Pacific County, 36 Wn.App. 17, 671 P.2d 785, review denied, 100 Wn.2d 1037 (1984). Therefore, the courts construe against finding such a dedication and will not find that one exists unless the evidence in favor of one is clear and unequivocal. Nelson, supra; accord, Shell v. Poulson, 23 Wash. 535, 537, 63 P. 204 (1900).

The party asserting a dedication has the burden of establishing it. Sweeten v. Kazularich, 38 Wn.app. 163, 166, 684 P.2d 789 (1984). The elements are: (1) an intention on the part of the owner to devote his land, or

an easement in it, to a public use, followed by some act or acts clearly and unmistakably evidencing such intention; and (2) an acceptance of the offer by the public." Id., 38 Wn.App. at 166.

The question therefore becomes what evidence exists to shoulder the burden, against the presumptions above stated, that the grantors clearly and unequivocally intended a conditional grant rather than a gift. We know of several things the grantors did not do.

RCW 58.17.020(3), the statutory dedication process, provides that a "dedication" is defined as follows: it "is the deliberate appropriation of land by an owner for any general and public uses, reserving to himself or herself no other rights than such as are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted. The intention to dedicate shall be evidenced by the owner by the presentment for filing of a final plat or short plat showing the dedication thereon; and, the acceptance by the public shall be evidenced by the approval of such plat for filing by the appropriate governmental unit." Dedication is (and was, at the time of the dedication herein) considered most unequivocally expressed when platted. E.g., Shertzer v. Hillman Inv. Co., 52 Wash. 492, 100 P. 982 (1909). It is undisputed that the grantors herein did not use the statutory method.

Another usual condition of dedication is that "the fee of dedicated property remains in the dedicator, and even when a park is so dedicated, the public gains only an easement." Rainier Ave. Corp. v. Seattle, 80 Wn.2d 362,

494 P.2d 996, cert. denied, 409 US 983, 93 S.Ct. 321, 34 L.Ed.2d 247 (1972); cited in Donald v. City of Vancouver, 43 Wn.App. 880, 885, 719 P.2d 966 (1986). Some decisions suggest that this phenomenon is the entire basis for the plaintiffs' claim that the property reverted to them if used inconsistently with the purpose for which it was dedicated. "Generally, where property has been dedicated for use as a public park, it cannot be devoted to an inconsistent use... the main reason for this rule is that in such a case the title remains in the original owner subject to the specified public use... However, where a municipality has acquired title in fee, a contrary rule applies." City of Marysville v. Boyd, 181 Cal.App.2d 755, 756, 5 Cal.Rptr. 598 (1960)(citations omitted).

Here, not only did the grantors deed Johnson Park to the county without either of these traditional indicators that they were dedicating the land rather than transferring it entirely to the county, but those same grantors took clear steps to specify the kind of estate they were granting. The grantors knew exactly the conditions under which the property was to labor and they took pains to make their wishes a reality. See the deed, which grants the property to the county to have and to hold forever, "PROVIDED" that the school district be allowed to build and maintain a school there. CP 25. This language proves that the grantors knew how to unequivocally limit the county's estate in the land, and that, consistent with legal tradition, any limitations in the county's estate would come after the general grant in the

form of a proviso.

Note further that the deed does not limit the school district's right to construct and maintain a school on the Johnson Park property. If the grantors intended the property to revert to the private ownership of their heirs in the event the county used the property inconsistently with a grant for the purpose of park use only, what then are we to make of the school provision? Certainly it is easier for a governmental entity to deal with a piece of real property on which a school has an ongoing right to build and maintain a school than does a private entity. If the grantors had not intended for the property to remain in the hands of the government, they would have dealt differently with the grant of authority to the school district - perhaps causing it to terminate if a school, once built, is abandoned. Instead, the grantors' gift of a perpetual right to the school to use the property for educational purposes strongly implies that the grantors did not contemplate that the county's rights would terminate and deliver such an oddly burdened parcel of property to their heirs.

Furthermore, the resolution containing a putative acceptance of a public dedication in fact accepted a "gift," thus rejecting the concept of public dedication by its own terms. Complaint, Appendix 1. CP 27-28.

Against the weight of this evidence and the legal presumptions above stated, the plaintiffs interposed a single phrase in the deed: "for the purposes of a public park." But this is an argument that has proved unsuccessful in

other, analogous contexts. In King County v. Hanson Investment Co., 34 Wn.2d 112, 208 P.2d 113 (1949), a company deeded land to King County "for the use of the public forever, as a public road and highway." Id. at 115-116. The county subsequently decided to vacate the road and use the property for the purpose of a public park; the original grantor claimed the right to reenter. Id. Our Supreme Court ruled as follows:

It is also the settled rule in this state, as elsewhere, that a deed which by its terms conveys the land to a grantee operates as the grant of the fee, although it may also contain a recital designating, or even restricting, the use to which the land may be put... the effect of such recitals in a deed of conveyance is well stated in 19 Am.Jur. 536, *Estates*, §71, as follows:

"A condition will not be raised by implication from a mere declaration in the deed that the grant is made for a special and particular purpose without being coupled with words appropriate to make such a condition. Such recitals are usually construed as giving rise, at most, to an implied covenant that the grantee will use the property only for the specified purpose. They are merely to restrain the generality of the preceding clauses; and in the case of sales to municipal and other corporations, they are considered as having been inserted merely for the purpose of showing the grantee's authority to take, even though the authorization under which the land is taken itself limits its use to the purpose specified."

Id., 34 Wn.2d at 119-20.

The court in that case did not extend this reasoning to the question of public dedication because the issue was not before it, but the logic holds, and the policies behind it are equally well served, in the case before us. A statement of purpose, without more, is insufficient evidence that a dedication is not meant to be irrevocable, and gift of the entire property without

reservation is still the presumed result. The phrase in the deed designating the purpose for which the grantors donated the property to the county does not sustain the extraordinary weight of the significance the respondents placed upon it.

### C. "Park Purposes"

As an afterthought and without authority, the trial court ruled that "the intent of the parties controls the extent of the dedication. Therefore, the meaning of the dedication for 'park purposes' is limited to 'park purpose' as the phrase would have been understood on the date of the dedication." CP 113-114. This would be a troubling enough ruling if it had been based on information gained through thorough briefing and lengthy litigation. Obviously, from a policy standpoint, it opens a tremendous new field of litigation as the heirs of dedicated property test the limits of such a rule. As the trial court intended to apply it here, for instance, we find a park dedicated in 1936, long before the invention of the Internet. Should Johnson Park today offer an Internet connection, or a wi-fi hotspot, there can be no question that such a thing could never have been conceived of by the grantors over seven decades ago. But the only authority cited for this counterintuitive proposition was a 1933 law dictionary definition of "park." PTF Supplementary Pleading re: Cross-Motion at 3; CP 19. Deciding that "park" must always have the 1933 definition based on the 1933 definition of "park" is circular reasoning at best.

The line of reasoning the court should have taken starts with the fundamental principle that, in cases of doubt as to the parties' intentions, deeds and grants are to be construed against the grantor and those who claim under the grantor. E.g., Weld v. Bjork, 75 Wn.2d 410, 411, 451 P.2d 675 (1969). This accords with the policies listed in section A, supra, regarding the favor in which all courts hold the free use of land and property. This is specifically the case in fact patterns like this. "The forfeiture clause in a deed must always be strictly construed against the grantor, and nothing will be held to cause a forfeiture, unless it plainly appears to be such." Central Christian Church v. Lennon, 59 Wn. 425, 427-8, 109 P. 1027 (1910). More specifically, "It is also a salutary rule to resolve doubts against the dedicator, and within reasonable limits, to construe dedications so as to benefit the public rather than the dedicator. 15 McQuillin, *Municipal Corporations* 33.26 (3d ed. rev. 1964)." Rainier Ave. Corp., supra, 80 Wn.2d at 366.

Beginning from this point, the trial court should have regarded a grant for "park purposes" as either unambiguously giving the grantee the power to do anything on it that a park can do, or else that the question of the meaning of "park purpose" should be resolved in favor of the grantee. Again, public policy militates in favor of such an outcome. Many roads may have been dedicated before there was any expectation that automobiles would be using them. Many sites for government buildings may have been dedicated before there was any expectation that the scope of government would one day

include departments of health, information services, income tax, or education. Heirs and possessors of other potential residuary interests may test the meaning of various "purposes" if this court opens that door.

The county's proposed solution accords with the "modern trend of decision" (actually in existence at least as far back as 1945 -- see Ravettino v. City of San Diego, 70 Cal.App.2d 37, 160 P.2d 52 (1945)) -- " to expand and liberally construe the term "public use" in considering state and municipal activities sought to be brought within its meaning." In re: Annexation of 118.7 Acres in Miami Tp. to City of Moraine, 52 Ohio St.3d 124, 130, 556 NE2d 1140 (1990), citing 15 McQuillin, *Municipal Corporations* (3<sup>rd</sup> Ed.) at 36. For the same reasons McQuillin observes an advantage in keeping the definitions of public use fluid to keep current with modern needs, "park use" should similarly be able to keep up with the times. After all, "park purposes" is considered a "public use." E.g., City of Spokane v. Merriam, 80 Wash. 222, 141 P. 358 (1914).

Nor is it completely out of the question that the grantors understood this, despite what was apparently assumed by both petitioners and the trial court. A certain amount of fluidity is built into the deed itself, granting as it does the right of another entity to use as much or as little of the property it desires as a school. Clearly the ability of the property to be used for various park purposes would be either enabled or foreclosed depending on the school's use of the land. For instance, in its complaint the present petitioners

deplore the possibility the county might cut trees on the property, claiming that this would defeat the park purpose. But the school could cut every tree on the property in order to erect what buildings and playing fields it decides are necessary, without limitation. If it had done so, there would be no trees on the property. So a treeless property cannot be inconsistent with "park purposes" as the grantors originally intended the phrase. Further, the grantors may well have been aware that the word "park" had no permanent meaning, in that within their lifetime -- in 1913, to be precise -- Webster's definitions of "park" were:

1. (Eng. Law) A piece of ground inclosed, and stored with beasts of the chase, which a man may have by prescription, or the king's grant. Mozley & W.

2. A tract of ground kept in its natural state, about or adjacent to a residence, as for the preservation of game, for walking, riding, or the like. Chaucer.

While in the park I sing, the listening deer Attend my passion, and forget to fear. Waller.

3. A piece of ground, in or near a city or town, inclosed and kept for ornament and recreation; as, Hyde Park in London; Central Park in New York.

4. (Mil.) A space occupied by the animals, wagons, pontoons, and materials of all kinds, as ammunition, ordnance stores, hospital stores, provisions, etc., when brought together; also, the objects themselves; as, a park of wagons; a park of artillery.

5. A partially inclosed basin in which oysters are grown.

*Webster's Dictionary* 1913, retrieved on the World Wide Web at <<http://machaut.uchicago.edu/cgi-bin/WEBSTER.sh?WORD=park>>

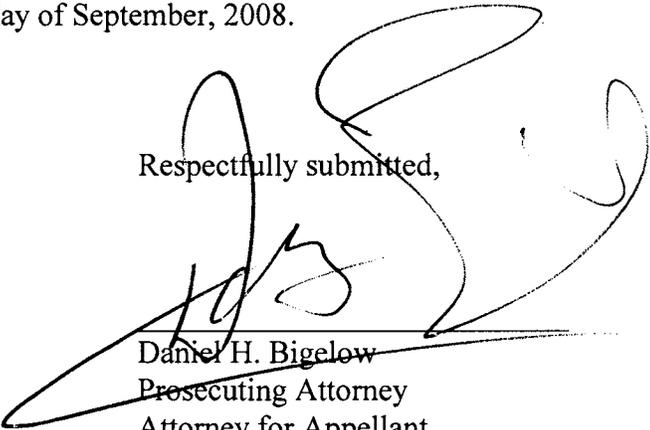
Thus, the concept of "park use," especially in this case, is inherently flexible. There was no basis for the trial court's ruling that the parties would not expect it to keep flexing as parks found more ways to serve the public, especially given the presumptions involved. The court's ruling to the contrary, without even the benefit of briefing from either side, was erroneous as a matter of law.

### CONCLUSION

The County of Wahkiakum owns Johnson Park free and clear by virtue of the deed from the original grantors. In any event, the trial court erroneously ruled that any conditions on the grant that do exist would prohibit "park uses" as they are understood today.

**DATED** this 18<sup>th</sup> day of September, 2008.

Respectfully submitted,



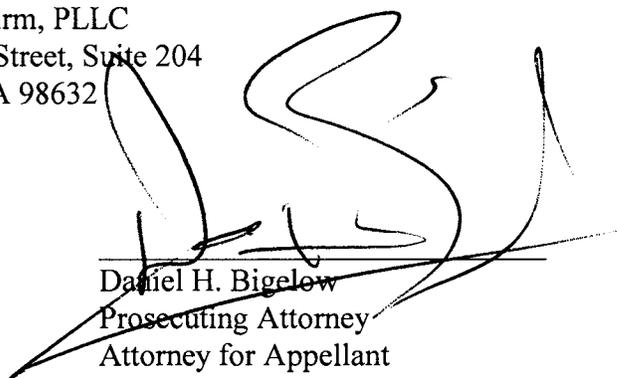
Daniel H. Bigelow  
Prosecuting Attorney  
Attorney for Appellant  
WSBA No. 21227

**CERTIFICATE**

I certify that I mailed a copy of the foregoing Appellant's Brief to the following addresses, postage prepaid, on September 18, 2008.

David C. Ponzoha,  
Washington State Court of Appeals-Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

David A. Nelson  
Nelson Law Firm, PLLC  
1516 Hudson Street, Suite 204  
Longview, WA 98632



Daniel H. Bigelow  
Prosecuting Attorney  
Attorney for Appellant  
WSBA No. 21227

08 SEP 22 AM 9:47  
STATE OF WASHINGTON  
BY 

COURT OF APPEALS  
DIVISION II