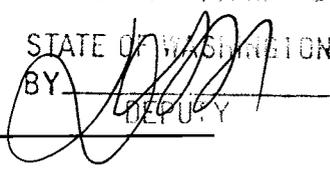


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 37439-1-II

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.

Respondents' Opening Brief

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I. **INTRODUCTION**

In 1936, Respondents' predecessors, John Johnson and Helen Johnson, donated approximately 18 acres of property to Wahkiakum County for a "public park forever." In recent years, the county has violated the restriction on the donation by renting the property to private parties and using it for governmental offices and general storage. The Respondents brought this action to enforce the restriction through an injunction and for an order that the property reverts to them if the county is found to have violated the restriction.

Both parties brought motions for judgment on the pleadings. The trial court granted Respondents' cross-motion for judgment on the pleadings holding that the conveyance to the county was a common law dedication and that the property would revert to the Respondents if the "county is ever from this day forward found to have used the property to any use other than use as a public park or public school." A subsequent order made clear that "public park" was to be given its meaning in 1936, the time of the dedication. The county appealed from the orders arguing the county acquired the property in fee with no restrictions.

The Respondents argue, first, that the Appellate Court has no jurisdiction because there is no final order or dispositive action. Accordingly, this appeal should be dismissed.

Second, Respondents argue that the trial court was correct in determining a common law dedication occurred and that the intent of the donors in 1936 should control the meaning of “public park”.

Finally, Respondents’ cross-appeal that the court’s order “from this day forward” is not supported by law, and that the property should revert to the Respondents if the county violated the “public park” restriction in the past.

II. RESPONSE TO ASSIGNMENT OF ERROR

The trial court did not err when it determined that Respondents’ predecessors’ grant to Wahkiakum County was a common law dedication.

The trial court did not err when it determined the intent of the donors controls the dedication and that the term “public park” should be given its meaning in 1936.

1936, the Appellant accepted the dedicated property for those stated purposes on behalf of the people of Wahkiakum County.

In response to Appellant's motion for judgment on the pleadings, Respondents brought their cross-motion for judgment on the pleadings, alleging that the pleadings established a common law dedication and requesting an injunction prohibiting Appellant from using the property for any use other than park purposes. The Respondents relied on the following admitted facts:

1. The Dedicators deeded the real property at issue to the County by deed dated December 1, 1936, the deed language quoted in the complaint is accurate, and the deed is attached to the complaint as Exhibit A.²

2. By resolution dated December 7, 1936, the County expressly recognized and formally accepted the Dedicators' donation of the property for park and school purposes on behalf of the people of Wahkiakum County, and a copy of the resolution is attached as Exhibit B to the complaint.

After oral argument, the trial court:³

1. Granted Respondents' cross-motion for judgment on the pleadings;

² CP 1; CP 4.

³ CP 1; CP 4.

2. Found that the conveyance of the property deeded to the county, and the county's acceptance, constitutes a common law dedication; and

3. Held that the property shall revert to the Respondents if the county is ever from this day forward found to have used the property to any use other than use as a public park or public school.⁴

Subsequent motions sought clarification of the meaning of "public park." On February 25, 2008, the court added the following Conclusion of Law:

The intent of the parties controls the extent of the dedication. Therefore, the meaning of the dedication for "park purpose" as the phrase would have been understood on the date of the dedication.⁵

Following the entry of the amended order on February 25, 2008, Appellants timely filed this appeal. Respondents cross appealed, challenging the inclusion of the language "from this day forward" in the original order.

The Respondents set forth the following arguments:

1. The Court of Appeals has no jurisdiction because the Orders entered on January 23, 2008, and February 25, 2008, do not constitute a final judgment or dispositive action.

⁴ CP 19.

⁵ CP 28.

Specifically, the factual issue of what activities are included in "park purposes" in 1936 has not been litigated nor determined, or whether the park purposes restriction has been violated. Accordingly, this appeal must be dismissed.

2. If the Court of Appeals determines that it does have jurisdiction, Respondents argue the trial court was correct in finding a common law dedication with the possibility of a reverter.

3. The trial court was correct in determining that the intent of the dedicating parties' controls and that "park purposes" must be given its common meaning in 1936.

4. Finally, the Respondents argue in their cross appeal that the court had no basis to apply the restriction prospectively "from this day forward" but that the restriction must apply from the date the dedication was accepted, December 7, 1936.

VI. LEGAL STANDARD

The issue of an owner's intent to dedicate is a question of fact. Whether a common-law dedication has occurred, however, is a legal issue. Where, as here, a mixed question of law and fact exists, it is within the province of the trier of fact to determine from

the conflicting evidence, the existence of facts necessary to constitute dedication and such factual findings will not be disturbed on appeal when they are amply sustained in the record.⁶

VII. THE COURT OF APPEALS DOES NOT HAVE JURISDICTION IN THIS MATTER

The Appellants' appeal of the trial court's orders is premature, as there is no final judgment or dispositive order. Under RAP 2.2(a)(1) and (3), a party may only appeal from a final judgment or "Any written decision affecting a substantive right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action." The two orders appealed from are neither a final judgment nor affect the substantive rights of the Appellants. That is because two significant factual determinations must be made before a final judgment is rendered.

First, there is a factual question as to what activities constitute "park purposes" in 1936. Without an understanding of the activities allowed or excluded by Respondents' predecessors' dedication, it is impossible to determine if the Appellant is, or has been in violation of the restriction.

Second, there is a factual question as to whether past, current, or contemplated uses of the property violate the "park

⁶ *Sweeten v. Kauzlarich*, 38 Wash. App. 163, 166, 684 P.2d 789 (1984).

purposes” restriction. Without a factual hearing, the Court of Appeals will be issuing an advisory opinion as to whether the restriction has been or will be violated, without the benefit of a fully developed record. The Respondents urge the Court of Appeals to dismiss this appeal to allow further evidentiary hearings that address the allowed uses and possible violation issues.

VIII. ARGUMENT

A. The Facts Admitted by Appellant Amply Support the Trial Court’s Decision that Respondents’ Predecessors Made A Common Law Dedication, Subject to the Possibility of A Reverter.

A common-law dedication exists if there is “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.”⁷ A common law dedication proceeds not from a grant of title, but “by way of estoppel *in pais*.”⁸ A common law dedication creates an easement for the use of the public.

A common law dedication is the designation of land, or an easement on such land, by the owner, for the use of the public, which has been accepted for use by or on behalf of the public.⁹

⁷ *Sweeten v. Kauzlarich*, 38 Wash. App. at 165.

⁸ *Sweeten v. Kauzlarich*, 38 Wash. App. at 168.

⁹ *Richardson v. Cox*, 108 Wash. App. 881, 890, 26 P.3d 970 (2001).

Normally, the fee of the dedicated property remains in the dedicator, and even when a park is so dedicated, the public gains only an easement.¹⁰

If the specific use of the dedicated property is discontinued, the property reverts to the dedicator.

By the weight of authority, where property dedicated to the public is abandoned or relinquished, the public's rights are terminated and the land by operation of law reverts to the dedicator.¹¹

Quoting Campbell v. City of Kansas,¹² the Johnston court observed:

When land is donated for a mere public use, such as highways, streets, wharves, parks and landing places, the use of the land reverts to the donor upon discontinuance or abandonment of the particular use for which it was donated.¹³

Substantial evidence supports the trial court's conclusion that a common law dedication occurred with respect to the Johnson property in 1936. The deed to the county demonstrates the Respondents' predecessors' clear intent to devote their property to a public use as a park, or for school purposes. The deed states that the conveyance is "for purposes of a public park forever." The express

¹⁰ Donald v. City of Vancouver, 43 Wash. App. 880, 885, 719 P.2d 966 (1986).

¹¹ Johnston v. Medina Improvement Club, Inc., 10 Wash. 2d 44, 56, 116 P.2d 272 (1941).

¹² 102 Mo. 326, 13 S.W. 897 (1890).

¹³ Johnston v. Medina Improvement Club, 10 Wash. 2d at 58-59.

statement standing alone sufficiently demonstrates the requisite intent to devote property to a specified public use.

Moreover, the admitted conduct of the county further evidences the Respondents' predecessors' intent to dedicate their property for use as a public park or a public school. In 1936, concurrent with the conveyance of the property to the county, the county passed a resolution that expressly identified and recognized the Dedicators' intent to dedicate the property to a public use. The resolution stated, in part:

“JOHN JOHNSON and HELEN K. JOHNSON of Rosburg, Wahkiakum County, Washington, have donated an 18-acre tract of land near Rosburg to Wahkiakum County to be utilized for park and school purpose; and ... this gift represents a considerable monetary contribution in the interest of the recreational and educational functions of Wahkiakum County; ... [and the County Commissioners] 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[.]”¹⁴

As the county itself recognized and stated at the time of the dedication, the Dedicators' intent was to dedicate their property for the public's use in connection with the “recreational and educational functions of Wahkiakum

¹⁴ CP 1.

County.” Based on the admitted facts set forth in the pleadings, the Dedicators’ intent is clear and unmistakable: they dedicated their property to the county “to be utilized for park and school purposes.”

Further, the admitted facts also demonstrate that the county accepted the Dedicators’ dedication of the property for the stated use as a public park or public school. “[A]cceptance of a common-law dedication may arise (1) by express act; (2) by implication from the acts of municipal officers; and (3) by implication from user by the public for the purposes for which the property was dedicated.”¹⁵ As discussed above, the county, by formal resolution, expressly “accept[ed] the gift of this tract of land on behalf of the people of Wahkiakum county.”¹⁶ Indeed, the county admits, as it must, that it “expressly recognized the Dedicators’ donation of the property... and formally accepted” the property on behalf of the people of Wahkiakum County.¹⁷ The county further admits that the public used the property for one of its dedicated purposes – a public school – for approximately 60 years following the dedication. There can

¹⁵ *Sweeten v. Kauzlarich*, 38 Wash. App. at 168.

¹⁶ CP 1.

¹⁷ CP 1; CP 4.

be no question that the county accepted the dedication both by express act and by implication based on its subsequent conduct. In finding a common law dedication, the court recognized Appellants' admitted facts establishing both the intent to dedicate the property to public use and acceptance by the county.

B. Substantial Evidence Supports the Trial Court's Conclusion that "Park Purposes" Must be Given the Meaning Intended in 1936.

By supplemental order dated February 25, 2008, the trial court made the following conclusion of law:

The intent of the parties controls the extent of the dedication. Therefore, the meaning of the dedication for "park purposes" is limited to "park purposes" as the phrase would have been understood on the date of the dedication.¹⁸

In Rainier Avenue Corporation v. City of Seattle,¹⁹ the court set forth the rule governing the dedication of a plat.

In construing a plat, the intention of the dedicator controls. This intention is to be deduced from the plat itself, where possible, as that furnishes the best evidence thereof.²⁰

There is no question but that the intent of the Respondents' predecessors controls the scope of the

¹⁸ CP 28.

¹⁹ 80 Wash. 2d 362, 494 P.2d 996 (1972).

²⁰ 80 Wash. 2d at 366.

dedication. The trial court was correct in limiting the scope to park purposes as that term was understood in 1936, the date of the grant. There is no language in the grant suggesting that the concept of “park purposes” was to grow and change with the times. Rather, the term is fixed and certain as of the date of the grant. The meaning of “park purposes” as of 1936 must control.

C. The Trial Court Improperly Made Its Order Prospective, or “From This Day Forward”, Rather Than Consider Past Violations of the Limitation to Park Purposes.

Respondents cross appeals that the trial court made its order prospective.

The property shall revert to Plaintiffs, or their successors, as the heirs of John Johnson and Helen Johnson if the county is ever from this day forward found to have used the property to any use other than use as a public park or public school.²¹

Respondents have found no case that supports the trial court’s prospective application of a restriction in a dedication. Rather, if a court finds that the current use is inconsistent with the dedication, the property may revert back to the Respondents.

“When land is donated for a mere public use, such as highways, streets, wharves, parks and

²¹ CP 19.

landing places, the use of the land reverts to the donor upon discontinuance or abandonment of the particular use for which it was donated.”²²

Because of this premature appeal, the trial court did not determine what activities are included in “park purposes” in 1936, and never determined whether there was a violation or discontinuation of the “park purposes” restriction so as to find the property reverts to the Respondents. The pleadings suggest there are violations in that in recent years the county has rented a portion of the premises for private use, housed governmental operation, and used the property for general storage. When this case is sent back for further proceedings, the Court of Appeals should direct that a past and present violation of the “park purposes” restriction can form the basis of a reverter to the Respondents.

IX. CONCLUSION

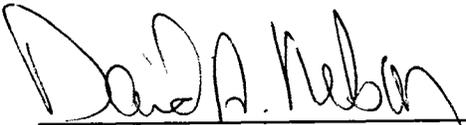
Because factual issues remain, this Appeal should be dismissed. If the Court of Appeals has jurisdiction, however, then the trial court’s decision that ~~the~~^o common law dedication occurred is correct. The trial court was also correct in determining that the meaning of “public park” in 1936 should control. Finally, the trial court erred in holding that only

²² Johnston v. Medina Improvement Club, Inc., 10 Wash. 2d at 58-59.

future violations would form the basis for a reverted. Past violation of the "public park" restriction must also be a basis of a reverter.

DATED this 18th day of December, 2008.

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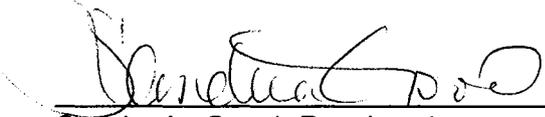
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CERTIFICATE OF SERVICE

I hereby certify that under penalty of perjury of laws of the State of Washington that I served the document to which this certificate is attached on the attorney for Appellant, Daniel Bigelow, by first class mail, postage prepaid on the date signed below.

DATED this 18th day of December, 2008, at Longview, Washington.



Sandra L. Good, Paralegal