

70467-2

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No. 70467-2

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

THE CITY OF SEATTLE, a municipal corporation

Respondent,

vs.

145th AND LINDEN AVE., LLC, a Washington Limited Liability Co.,

Appellant.

THE CITY OF SEATTLE'S RESPONSE BRIEF

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I. INTRODUCTION

This case arises out of Appellant 145th and Linden Ave, LLC's ("Appellant") breach of its obligation to pay for its use of City of Seattle-owned real property for the benefit of its adjacent 102-unit apartment complex, the Woodland Point Apartments. Despite having executed a permit in 2010 with the City of Seattle ("City") for license to use Seattle City Light's electric power transmission corridor for access, parking and landscaping purposes (the "Permit"), and after numerous requests by the City for payment, Appellant simply refused to meet its obligation under the Permit to pay for such use. The City had no choice but to terminate the Permit in May 2012, and demand that Appellant stop illegally using the City's property. Appellant refused to do so, resulting in an illegal continuing trespass and damages.

The City then brought an action for breach of contract and trespass in King County Superior Court. After reviewing the evidence and law, the court ruled in favor of the City on its Motion for Summary Judgment ("MSJ"). The Court entered an order of judgment against Appellant on July 2, 2013, awarding damages to the City in the amount of \$24,238, with post judgment interest to accrue at 12% annually until fully paid.

Since purchasing the Woodland Point Apartment complex in 2007, Appellant has gained a significant economic benefit from illegally using the City's property without paying for it. The superior court correctly determined that there are no genuine issues of material fact as to Appellant's breach of its contractual obligations under the Permit executed by its former Vice President of Real Estate Management to pay for its use of the City's property, or its subsequent trespass.

The issue raised by Appellant in its appeal brief of purported easements is irrelevant since quiet title has not been asserted in this case by either party. If one or both of the purported easements was a genuine issue of fact in this matter, Appellant could simply have counterclaimed to quiet title to assert its supposed easement rights, which it did not. Appellant has no legal right to use the City's property for free. Thus, the superior court's order and entry of judgment in favor of the City on its Motion for Summary Judgment on the breach of contract and trespass causes of action against Appellant should be affirmed by the Court of Appeals.

II. QUESTION PRESENTED

Did the superior court correctly rule in favor of the City on its Motion for Summary Judgment that Appellant breached its contractual obligations and illegally trespassed on City property when: 1) Appellant failed to pay for its use of the City's electric transmission corridor property for access, landscaping and parking

for its adjacent apartment complex as it was required to do under its permit for use of the City's property; and 2) Appellant continued to use and occupy the City's property following termination of the permit for non-payment?

III. STATEMENT OF THE CASE

Because Appellants' Statement of the Case omitted important facts regarding the history of the City's transmission corridor property, its use by Appellant and its predecessor, and the transactional record between Appellant and the City, the City is compelled to provide the following counterstatement to the case.

1. The City owns an electric power transmission line corridor that runs north-south along the west side of Linden Ave. N. between North 145th Street and North 143rd Street in North Seattle (the "Transmission Corridor"). The City purchased this portion of its Transmission Corridor in fee simple from Puget Sound Power & Light Company in 1951 by Special Warranty Deed. ("City Property") (CP 203-233; CP 57-59)

2. Seattle City Light, the department of the City having jurisdiction over the Transmission Corridor, issues temporary permits for use of its Transmission Corridor and charges rent for such use. (CP 248-302)

3. Appellant owns and operates a 102-unit apartment complex known as the Woodland Pointe Apartments, adjacent to and west of the City Property. Appellant purchased the apartment complex property in 2007. (CP 35-43; CP 122-138; CP 164-171)

4. Appellant's predecessor in interest, the Linden Tree Apartments, executed a temporary permit in 1987 for use of a portion of the City Property for access and parking. The permit remained in effect with the Linden Tree Apartments paying the City the required rent until it sold the apartment complex to Appellant in 2007. (CP 234-238)

5. In 2007, Mr. Craig Dwyer, Appellant's Vice President for Residential Property Management executed for Appellant as grantor a permanent easement to Comcast to use, occupy, and access the Woodland Pointe Apartments property for communication facilities and equipment. (CP 239-247)

6. In 2008, Mr. Dwyer applied for a permit from Seattle City Light, to use the adjacent City Property for access, parking, and landscaping. (CP 239-247)

7. On April 29, 2010 Mr. Dwyer executed Temporary Permit P.M. #260419-2-407 (the "Permit") with the City. The Permit was a license to use

a portion of the City Property for access, parking and landscaping for the benefit of the Woodland Pointe Apartments. (CP 1-34; CP 81-84)

8. The Permit required Appellant to pay \$561.94 per month for use of the City Property (\$498.00 rental fee and \$63.94 leasehold tax). (CP 81-84) Despite having executed the Permit and agreeing to pay rent for its use of the City Property, Appellant failed to make any payments to the City. (CP 95-99)

9. On April 3, 2012 the City sent a letter to Appellant via certified mail informing it that the Permit would be terminated if the outstanding rent balance was not paid in full by May 1, 2012. (CP 95-99)

10. On June 5, 2012, the City sent a letter to Appellant by certified mail informing it that the Permit was terminated on May 1, 2012 because it had not paid the outstanding rent balance owed, and that it was illegally trespassing and occupying the City Property. (CP 100-101)

11. The City served on Appellant and filed a summons and complaint in King County Superior Court on June 8, 2012. (CP 1-34) The court granted the City an Order Granting Summary Judgment on May 31, 2013, and entered a Judgment on Order Granting Summary Judgment on July 2, 2013 for \$24,772.09. (CP 303-305; CP 311-313)

12. Appellant claims to hold two easements for access over the City Property—a 20' and a 40' easement for access. (CP 123; CP 133.)

13. The City has never granted, executed or recorded a permanent easement for access on the City Property over the 44' wide existing driveway from Linden Ave. N. where Appellant's primary street access for its apartment complex is located. (CP 172-179)

14. The 20' wide easement for access is located on the City Property to the north of the existing 44' wide driveway in an area used by Appellant for landscaping and has never been used for access during Appellant's or its predecessor's ownership of the apartment complex property. (CP 123; CP 133)

IV. ARGUMENT

A. Standard of Review.

The court reviews an order granting summary judgment de novo, engaging in the same inquiry as the trial court. *Bankston v. Pierce County* 174 Wash.App. 932, 301 P.3d 495 (2013), citing *Schmitt v. Langenour*, 162 Wash.App. 397, 404, 256 P.3d 1235 (2011). The court considers all facts in the record and reasonable inferences from those facts in the light most favorable to the nonmoving party. *Clements v. Travelers Indem. Co.*, 121 Wash.2d 243, 249, 850 P.2d 1298 (1993). Summary judgment is appropriate if there is no genuine issue of material fact and the moving

party is entitled to judgment as a matter of law. CR 56(c) A fact is material if it affects the outcome of the litigation. *Owen v. Burlington N. Santa Fe R.R. Co.*, 153 Wash.2d 780, 789, 108 P.3d 1220 (2005).

B. No Genuine Issue of Material Fact Exists Regarding Two Purported Easements.

Appellant's claim that two purported easements are genuine issues of material fact is without merit. First, since neither the City nor Appellant raised quiet title as a claim or counterclaim, these alleged facts are irrelevant to the Court's task before it: whether or not to affirm the lower court's summary judgment order in favor of the City on its claims of breach of contract and trespass. Second, the alleged 20' and 40' easements are simply not genuine issues of material fact.

The scope of an easement defined for a specific use (e.g., ingress and egress) means that the easement is limited to that specific use and the easement can never be used for a wholly different purpose than its original purpose. "For instance, an easement that began as an easement for utility lines could never become a roadway easement, nor probably could a walkway easement become a motor vehicle easement." 17 William B. Stoebuck and John W. Weaver, *Washington Practice Real Estate: Property Law* § 2.9, p. 111 (2nd ed. 2011). Neither Appellant nor its predecessor-in-interest (Linden Tree Apartments) have ever used the 20' easement for

access. There is no driveway or road through this easement area; Appellant and its predecessor have only used the area for *landscaping* purposes—which is clearly not within the scope of the 1949 easement grant from Puget Power and Light. (CP 54-110, 122-138)

Appellant’s claim that it holds a 40’ wide easement over the existing 44’-wide driveway by virtue of a notation on a 1977 short plat approval for the apartment complex development is also not genuine issue of material fact. In Washington, easements are created by the same kinds of instruments that are used to create and transfer estates in land. Since they are considered “interests” in land, this means that an easement is created by an instrument having the essentials of a deed—that is, the three elements required by RCW 64.04.020: It must be in writing, be signed by the grantor, and grantor’s signature must be acknowledged. (RCW 64.04.010); 17 William B. Stoebuck and John W. Weaver, *Washington Practice Real Estate: Property Law* § 2.1, p. 80 (2nd ed. 2011); *Kesinger v. Logan*, 113 Wash.2d 320, 325-326, 779 P.2d 263 (1989).

To satisfy the requirements the requirements of RCW 64.04.010, a document must demonstrate an intent to grant or reserve an easement, it must be signed by the granting party, and it must be acknowledged. *Zunino v. Rajewski*, 140 Wash.App. 215, 222-23, 165 P.3d 57 (2007). In

Zunino, the court found that documents designating road and utility easements that were recorded for a county platting process did not create valid easements, as the documents did not show an intent to grant easements and were not deeds because they did not convey an interest in property as required by RCW 64.04.010 and 64.04.020. *Zunino v. Rajewski*, 140 Wash.App. at 222-23.

Similarly, citing persuasive authority, a New York court found that a notation on a map submitted by a builder of a residential development was insufficient, as a matter of law, to convey any property interest to the future residents of the subdivision. The court found that the right of residents to use the road should be deemed a license, revocable at will by the grantor, rather than an easement. *Devine v. Village of Port Jefferson*, 849 F.Supp.185, E.D.N.Y., (1994)

In this case, the City has never granted, executed or recorded an easement for access purposes to Appellant or its predecessors. The City does not and cannot grant easements on City property by virtue of a notation on a survey that is submitted by an applicant for approval of a short plat to develop a certain piece of private property. (CP 172-179) The 1977 short plat Appellant points to as creating an easement fails to meet the statutory requirements laid out in RCW 64.04.010 & .020—it is not a grant in the form of a deed that is signed by a grantor, it is not

properly acknowledged, nor does it show any intent to convey an easement.

C. No Genuine Issue of Material Fact Exists Regarding Authority of Appellant's Vice President for Residential Property Management to Execute the Permit.

Appellant's assertion that Craig Dwyer, its Vice President for Residential Property Management did not have authority to sign the Permit is simply without merit. A principal is bound by the act of his agent when he has placed the agent in such a position that persons of ordinary prudence are led to believe and assume that the agent is possessed of certain authority. *Hoglund v. Meeks*, 139 Wash.App. 854, 869, 170 P.3d 37 (2007) citing *Mohr v. Sun Life Assur. Co. of Canada*, 198 Wash. 602, 603-04, 89 P.2d 504 (1939).

A principal may also be estopped to deny that an agent has the authority he assumes to exercise, where the principal permits him to act as to justify a third person of ordinarily careful and prudent business habits to believe that he possesses the authority exercised, and the principal avails itself of the benefit of agent's acts. *Walker v. Pacific Mobile Homes, Inc.*, 68 Wash.2d at 351-52 citing *Lamb v. General Associates, Inc.*, 60 Wash.2d 623, 374 P.2d 677 (1962). Also, a principal ratifies an agent's agreement if the principal receives, accepts, and retains benefits from the

contract. *Barnes v. Treece*, 15 Wash.App. 437, 443, 549 P.2d 1152 (1976).

The actions of Mr. Dwyer clearly establish his authority to execute the Permit. By acting in his capacity as an employee of Appellant in the position of Vice President of Residential Property Management, and applying for and then executing the Permit with the City for Appellant's use of a portion of the City Property, City staff were led to reasonably believe and assume that Mr. Dwyer had the authority to execute the Permit and bind the Appellant to the permit requirements, including the payment of rent for the use of the City Property. Moreover, Appellant clearly availed itself of the benefits brought to it by Mr. Dwyer applying for and executing the Permit with the City, which included rights to use a portion of the City Property for ingress and egress, parking and landscaping solely for the benefit of operating its Woodland Pointe Apartment complex.

Additionally, by appointing a person to a position which carries with it generally recognized duties apparent authority can be created to do the things ordinarily entrusted to one having such a position, regardless of the unknown limitations that may be imposed upon the agent. *Smith v. Hansen, Hansen & Johnson, Inc.*, 63 Wash.App. 355, 365, 818 P.2d 1127 (1991). Similarly, "[a]uthority to perform particular services for a principal carries with it the implied authority to perform the usual and

necessary acts essential to carry out the authorized services.” *Walker v. Pacific Mobile Homes, Inc.*, 68 Wash.2d 347, 351, 413 P.2d 3 (1966) citing *Larson v. Bear*, 38 Wash.2d 485, 230 P.2d 610 (1951).

In this case, even if Appellant did not grant actual authority to Mr. Dwyer to execute the Permit, since that limitation was unknown to the City, apparent authority existed in this context, as signing such a permit for access, parking and landscaping would be a generally recognized duty for a Vice President of Residential Property Management for an apartment complex such as the Woodland Pointe Apartments.

Allowing Appellant to avoid paying for its continued use of the City Property for its own economic benefit simply by claiming lack of authority for its Vice President of Residential Property Management to both request permission to use the City Property--and then actually sign a Permit for such use--would be unjust. It also would reward Appellant for its illegal behavior by allowing it to hide behind the shell of its LLC status simply because Mr. Dwyer as a high-level employee was not a designated member of Appellant’s LLC it created to own and operate the apartment complex property.

D. No Genuine Issue of Material Fact Exists as to Whether The City Owns the City Property in Fee Simple under its 1951 Warranty Deed from Puget Sound Power and Light Company.

Appellant's statement in its opening "Brief of Appellant" dated August 26, 2013 ("Appellant's Brief") that the City does not own the City Property in fee simple is without merit. Puget Sound Power and Light Company ("Puget Power") purchased the City Property from K.M. and Lynn O'Beirn in 1943 ("1943 Deed"). (CP 192-194) Concurrent with the 1943 Deed, Puget Power obtained an "Owner's Policy" for its "Fee Simple estate" purchase of the City Property (CP 195-202).

In 1951, Puget Power and the City executed a "Deed and Bill of Sale" that included a "Special Warranty Deed," ("1951 Deed") through which Puget Power conveyed to "the City, its successors and assigns, the following *lots, tracts or parcels of land*," including the City Property (emphasis added). (CP 203-211) In addition, two recent title report documents show the City as fee simple owner of the City Property. (CP 212-233)

Appellant cites *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Association*, 156 Wn.2d 253, 126 P.3d 16 (2006) to support its assertion that "for purposes of Summary Judgment, City Light did not show that it owns the ROW in fee simple." (Appellant's Brief, p. 17) However, *Kershaw* stands for the tenet that in the context of a *railroad right-of-way*, "when the granting clause of a deed declares the purpose of the grant to be a right of way for a railroad the deed passes an

easement only, and not a fee with a restricted use . . .” (emphasis added) *Kershaw*), 156 Wash.2d at 263 (citing *Swan v. O’Leary*, 37 Wash.2d 533, 536, 225 P.2d 199 (1950) and *Morsbach v. Thurston County*, 152 Wash. 562, 278 P. 686 (1929)).

Conversely, where there is no language in a deed granting clause relating to the purpose of the grant or limiting the estate conveyed, and it conveys a definite strip of land, it will be construed to convey fee simple title. *Brown v. State of Washington*, 130 Wash.2d 430, 438, 924 P.2d 908 (1996) (citing *Swan v. O’Leary*, 37 Wash.2d at 536, 225 P.2d 199)^{1 2} Additionally, Appellant has the burden of showing that the original parties intended to adapt a statutory deed form to grant an easement instead of fee simple.

In this case, the “granting clause” of the 1951 Deed is in the form of a “Special Warranty Deed” with no express limit on the use of the real property for railroad or any other purpose. The 1951 Deed clearly conveys to the City in the granting clause “lots, tracts or parcels of land,” and the habendum clause provides: “To have and to hold unto the City of

¹ See *King County v. Hanson Inv. Co.*, 34 Wash.2d 112, 208 P.2d 113 (1949) (words in deed must clearly indicate intent to make estate conditional); *Wright v. Olsen*, 42 Wash.2d 702, 257 P.2d 782 (1953) (absent limiting language, State acquired fee title to land acquired for highway purposes under statutory bargain and sale deed)

² See also *Ray v. King County*, 120 Wash.App. 564, 86 P.3d 183 (2004) (railroad deed conveyed fee title, rather than only an easement, where: (1) granting clause described interest conveyed as a “right of way”; (2) a subsequent clause referred to the interest conveyed as a “right of way strip”; and (3) the habendum clause began with the words, “To have and to hold the said premises . . .”

Seattle, its successors and assigns forever, the said property hereinabove described and conveyed.” Further, title reports show that the City has fee simple ownership interest in the City Property, as did its predecessor, Puget Power.

In *Brown*, the court ruled that a fee simple interest was conveyed when the term “right of way” merely described a strip of land for rail lines and did not qualify or limit the interest expressly conveyed. Similarly, the use of the term “transmission line right of way” in the 1951 Deed outside of the granting clause merely refers to the “lots, tracts or parcels of land” conveyed in fee simple to the City in the granting clause of the deed.

Moreover, if the City merely holds an easement from the 1951 Deed as Appellant attempts to assert, then Appellant’s claimed easements across the City Property for access to its apartment complex property are not valid, because neither Puget Power nor the City could have granted the access easements Appellant now claims to hold across the City Property if the interest held by Puget Power, or subsequently the City, was just an easement and not fee simple title.

V. CONCLUSION

Appellant has failed in its attempt to establish the existence of genuine issues of material fact to support overturning the trial court’s

ruling in favor of the City on its Motion for Summary Judgment. For the foregoing reasons, the City requests that this Court affirm that ruling.

DATED this 31st day of October, 2013.

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CERTIFICATE OF SERVICE

I certify that on this date I caused a copy of City of Seattle's Response Brief to be filed with the court by legal messenger and served by U.S. Mail and email to each of the following parties:

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Signed at Seattle, Washington this 31st day of October, 2013.


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