

73309-5

73309-5

73309-5-1

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION I

LAKE FOREST PARK WATER DISTRICT, a municipal corporation

Appellant,

and

CITY OF LAKE FOREST PARK, a municipal corporation

Respondent.

APPELLANT'S OPENING BRIEF

Rodgers Deutsch & Turner, P.L.L.C.
By: Daryl A. Deutsch
Attorney for Appellants

Three Lake Bellevue Drive
Suite 100
Bellevue, WA 98005
(425) 455-1110

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 JUN 11 PM 3:10

INDEX

	Page
A. Assignments of Error	1
B. Issues Pertaining to Assignments of Error	1
C. Statement of the Case	1
D. Argument	2
Issue No. 1. Title to a vacated street vests in the abutting owner.	2
Issue No. 2. An ordinance vacating a street cannot be repealed or declared invalid if doing so would divest a vested property right.	4
Issue No. 3 A severability clause in an ordinance preserves its lawful provisions.	7
E. Conclusion	9
Appendix	11

TABLE OF AUTHORITIES

	Page
TABLE OF CASES	
<i>Gillis v. King County</i> , 42 Wn.2d 373, 255 P.2d 546 (1953)	5, 7
<i>Hagen v. Bolcom Mills</i> , 74 Wash. 462, 133 P. 1000 (1913)	4
<i>Holmquist v. King County</i> , 182 Wn. App. 200, 328 P.3d 1000 (2014)	4
<i>Lawson v. State</i> , 107 Wn.2d 444, 730 P.2d 1308 (1986)	5, 7
<i>State v. Anderson</i> , 81 Wn.2d 234, 501 P.2d 184 (1972)	7, 9
OTHER AUTHORITIES	
Wash. State Const., art. I, § 16. (amend.9)	4, 7, 8
RCW 35.79	3
RCW 35.79.040	2, 3
RCW 58.17.212	3, Appendix

A. ASSIGNMENTS OF ERROR

1. The court erred in denying the plaintiff's Motion for Partial Summary Judgment.
2. The court erred in granting the City's Motion for Summary Judgment.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. **If a city street within a subdivision is vacated do the owners of the abutting property become the fee owners to the centerline thereof?**
2. **Can a property right that vested upon passage of an ordinance vacating a street be divested by (i) a later repeal of the ordinance, or (ii) a court declaring the ordinance retroactively invalid since it was passed with a misunderstanding of the legal consequences of doing so?**
3. **If an ordinance contains an unlawful provision does a severability clause preserve its remaining provisions even though the legislative body asserts that it would not have been enacted without the unlawful provision?**

C. STATEMENT OF THE CASE

1. The plat of Lake Forest Park, and the adjoining First Addition thereto, were established in 1912 (the "Plats"). (CP 21, para. 2) The streets depicted on the Plats were dedicated for use by the public. (CP 21, Exs. 2 & 3) Several of the dedicated streets were never opened. (CP 21, para. 4)
2. In July 1988 the City passed Ordinance 398 (the "Ordinance"). (CP 21, Ex. 6) The Ordinance vacated streets in the Plats that had never been opened (the "Vacated Streets"). (CP 21, para. 4)

3. The Water District has been the owner of several parcels on each side of the Vacated Streets for many decades. (CP 21, para. 1-4).¹

4. In February 2014 the Water District filed a lawsuit against the City to quiet title to the Vacated Streets. (CP 1) On October 24, 2014 the parties filed cross-motions for summary judgment (i.e. the Water District requesting that title to the Vacated Streets be quieted in its favor, and the City requesting that the District's complaint be dismissed). (CP 18; CP 35) On November 21, 2014 the court entered an Order denying the Water District's motion, and partially granting the City's motion.² (CP 103)

5. On October 23, 2014, one day before the parties filed their cross motions for summary judgment, and over 25 years after its passage, the City repealed the street vacation Ordinance. (CP 47, Ex. O)

D. ARGUMENT

Issue No. 1. If a city street within a subdivision is vacated do the owners of the abutting property become the fee owners to the centerline thereof?

Summary Answer to Issue. Yes. See RCW 35.79.040.

¹ The Water District parcels, and the Vacated Streets adjacent thereto, have for years been exclusively used by the Water District as a watershed, for shallow and deep public drinking water wells, and for pumps, mains, tanks, and related structures. (CP 21, para. 3)

² The Court did not dismiss the Water District's alternative claims for relief based upon adverse possession and/or prescriptive rights. However, those claims were later voluntarily dismissed, without prejudice, in an agreed order. (CP 106)

The procedure for the vacation of a subdivision is set forth in RCW 58.17.212.³ It provides that RCW 35.79 shall apply when a city street is to be vacated. RCW 35.79.040 unequivocally states that a street vacated by a city belongs to the abutting property owners:

If any street or alley in any city or town is vacated by the city or town council, the property within the limits so vacated shall belong to the abutting property owners, one-half to each.

The City's Ordinance, contrary to RCW 35.79.040, provided that title to the vacated streets was "to be retained" by the City. (CP 21, Ex. 6) The City's self-serving statement did not, and could not, supersede statutory and other law.⁴ Instead, as a matter of law, title to the Vacated Streets vested in the Water District at the time of the vacation to the extent the District was the owner of the abutting property. RCW 35.79.040

In addition to the statutory mandate, a long history of case law supports the conclusion that fee title to the Vacated Streets vested in the Water District upon vacation of the streets.

The actual effect of street vacations was articulated by the Supreme Court in Hagen: "[T]he general rule [is] that, upon the vacation of a street or alley, the land thus

³ See Appendix for the text of the applicable portion of RCW 58.17.212.

⁴ The City concedes this point. See CP 35, p. 4, lns 23 -24, where it stated: "Upon reexamining the 'title issue', the current City Council determined that in 1988 the City did not have the legal right to retain title to the ROW [right of way]. . . ."

relieved of the public easement therein becomes attached to, and passed by deed under a description of the abutting property.

Holmquist v. King County, 182 Wn. App. 200, 328 P.3d 1000 (2014), at 212 (citing *Hagen v. Bolcom Mills*, 74 Wash. 462, 133 P. 1000 (1913), at 465).

In summary, statutory and case law unequivocally establish that title to the Vacated Streets vested in the Water District as the abutting owner at the time of the vacation.

Issue No. 2. Can a property right that vested upon passage of an ordinance vacating a street be divested by (i) a later repeal of the ordinance, or (ii) a court declaring the ordinance retroactively invalid since it was passed with a misunderstanding of the legal consequences of doing so?

Summary Answer to Issue. No. One cannot legislatively or judicially be deprived of a vested property right without due process of law, i.e., compliance with constitutional requirements including the payment of just compensation. See Wash. State Const., art. I, § 16 (amend. 9)

(i) Repeal of Ordinance Cannot Divest a Vested Property Right. The City repealed the street vacation Ordinance while the Water District's quiet title lawsuit was pending. (CP 47, Ex. O) The City then argued that the repeal made the Water District's action moot, and that it

should therefore be dismissed. (CP 35, p.6, para. B) The City's argument is without merit.

A statute may not be applied retroactively if the effect of doing so would be to "deprive one of his property without due process of law". *Gillis v. King County*, 42 Wn.2d 373, 255 P.2d 546 (1953), at 376. In *Gillis* the court examined an 1890 statute which provided that certain streets would vest in the abutting owner if not opened within five years, and a 1909 amendment which attempted to carve out exceptions thereto. The court concluded that the amendment could not deprive an abutting owner of rights that had already vested. The court stated at 377:

In recognition of this principle, we have held that, where a street lying outside any city or town has been dedicated and unopened for a period of five years prior to the 1909 amendment, the right of abutting property owners to the vacated street, pursuant to the provisions of the 1890 statute, **has vested and is not affected by the 1909 amendment.** (citations omitted) (emphasis added)

More recently, the court in *Lawson v. State*, 107 Wn.2d 444, 730 P.2d 1308 (1986) held that a state statute which would have indefinitely postponed the vesting of an adjacent owner's interest in an abandoned railroad right-of-way violated the takings provision of the constitution. The court stated at 454 - 455:

As set forth in *Gillis*, a statute may not be given retroactive effect where the effect would be to interfere with vested rights. *Gillis v. King Cy.*, supra at 376. See also *In re Marriage of MacDonald*, 104 Wash.2d 745, 750, 709 P.2d 1196 (1985); *Lynch v. United States*, 292 U.S. 571, 576-80, 54 S.Ct. 840, 842-844, 78 L.Ed. 1434, (1934). Thus, for example, a statute may not be applied retroactively where the result would be to impair the obligation of contract, or to deprive one of property without due process of law. . . .
(**Emphasis Added**)

The court continued 455:

Most importantly, as we discuss below, we conclude these are valuable property interests entitled to protection under our constitution's prohibition against takings without payment of just compensation. For these reasons, we hold the Legislature cannot defeat by statute the existing interests alleged here.

(ii) Ordinance Cannot be Retroactively Declared Invalid. The City argued in the alternative that the Ordinance is invalid since it would not have been passed had the City understood that it could not retain title to the Vacated Streets. The City blames its misunderstanding on poor legal advice. (CP 35, p. 1, lns. 18-19; CP 35, p. 3, lns 14-15) Perhaps this circumstance would have provided the City with a claim against its attorney. However, it does not provide a lawful basis for the court to

declare the Ordinance retroactively invalid since doing so would deprive the Water District of a vested property right. See *Gillis v. King County*, supra, and *Lawson v. State*, supra.

In summary, the Water District has been the fee owner of the Vacated Streets since enactment of the Ordinance in 1988. The District's interest in that property, as a matter of constitutional law, cannot be divested as a result of a later legislative enactment or judicial declaration. If the City desires to acquire the property or an interest therein for a public use, it must do so in a voluntary transaction, or by exercising its power of eminent domain in conjunction with the payment of just compensation. Wash. State Const., art. I, § 16. (amend. 9).⁵

Issue No. 3. If an ordinance contains an unlawful provision does a severability clause preserve its remaining provisions even though the legislative body asserts that it would not have been enacted without the unlawful provision?

Summary Answer to Issue. Yes. See *State v. Anderson*, 81 Wn.2d 234, 501 P.2d 184 (1972), at 236.

In seeking invalidation of the Ordinance the City also argued that the severability clause therein should be disregarded since enforcing it

⁵ Art. I, § 16. (amend. 9) of the Washington State constitution reads in part as follows:

. . . . No private property shall be taken or damaged for public or private use without just compensation having been first made

would undermine the purpose of the Ordinance, i.e, to retain title to the vacated streets.⁶ This argument, as with the others made by the City, cannot withstand the constitutional prohibition against giving effect to the Ordinance in a manner that would divest a vested property right. Even in the absence of the constitutional argument, the City's severability argument lacks merit.

The Ordinance is clear, concise and unambiguous. It is less than 1-1/2 pages in length (most of which is the legal description of the streets being vacated), and contains only two sections. The severability clause in Section 2 reads as follows:

If any part or portion of this Ordinance is declared invalid for any reason, such declaration of invalidity shall not effect any remaining portions.

(CP 21, Ex. 6) If the City did not want to vacate the streets absent retaining title thereto, it certainly could have stated that intent in the

⁶ The City maintains that its objective in 1988 when it vacated the unopened streets was to ". . . preserve the undeveloped nature of the Watershed Area . . . ". CP 35, p. 2, lns 3 – 6. The City has certainly achieved that objective. See CP 101, para. 3, lns. 22 - 25, where the Water District's manager stated:

. . . the never opened vacated streets claimed by the Water District have for many decades been exclusively used by the District for watershed and related purposes. The District is vigilant in maintaining the natural and mostly undisturbed condition of the land since doing so is an essential part of ensuring compliance with state and other health standards related to the delivery of potable water to the public.

Ordinance. To the contrary, and as a matter of law, the inclusion of the severability clause established the opposite intent. Such a clause

. . . offers to the courts the necessary assurance that the remaining provisions would have been enacted without the portions which are contrary to the constitution.

State v. Anderson, 81 Wn.2d 234, 501 P.2d 184 (1972), at 236.

E. **CONCLUSION**

The operative and ultimate fact in this case is the City's enactment of the street vacation Ordinance in 1988. At that moment title to the Vacated Streets, as a matter of law, vested in the Water District. One cannot "unring the bell" by repealing the Ordinance or declaring it invalid since doing so would unconstitutionally divest the District of a vested property right.

For these reasons, and for the reasons further discussed in this brief, the Water District maintains that trial court erred when it entered the Order (i) denying the District's motion for Summary Judgment, and (ii) partially granting the City's motion. The Water District respectfully requests that said Order be reversed.

DATED this 11th day of June, 2015.

RODGERS DEUTSCH & TURNER, P.L.L.C.



Daryl A. Deutsch, #11003
Attorney for Appellants

APPENDIX

RCW 58.17.212. Vacation of subdivision - Procedure

. . . .

When the vacation application is specifically for a county road or city or town street, the procedures for road vacation or street vacation in chapter 36.87 or 35.79 RCW shall be utilized for the road or street vacation. When the application is for the vacation of the plat together with the roads and/or streets, the procedure for vacation in this section shall be used, but vacations of streets may not be made that are prohibited under RCW 35.79.030, and vacations of roads may not be made that are prohibited under RCW 36.87.130. **(Emphasis Added)**

. . . .

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

LAKE FOREST PARK WATER DISTRICT, a municipal corporation)	Appeal No. 73309-5-I DECLARATION OF SERVICE
Appellant,)	
and)	
CITY OF LAKE FOREST PARK, a municipal corporation)	
Respondent.)	
)	
)	
)	
)	
)	

The undersigned declares under penalty of perjury as follows:

On June 11, 2015, I caused to be served a true and correct copy of the appellant's opening brief on counsel for the respondent listed below pursuant to an agreement between counsel to permit electronic service:

Ann Marie Soto: AnnMarie@kenyondisend.com

Kim Adams Pratt: kim@kenyondisend.com

Dated this 11 day of June, 2015 at Bellevue, Washington.



Daryl A. Deutsch, WSBA #11003
Attorney for Appellant

2015 JUN 11 PM 3:10
COURT OF APPEALS DIV 1
STATE OF WASHINGTON