



DATE: January 13, 2022

TO: Debbie Tarry, City Manager **CONFIDENTIAL ATTY-CLIENT
COMMUNICATION**

FROM: Margaret King, City Attorney
Julie Ainsworth-Taylor, Assistant City Attorney

RE: 27th Avenue NW (Apple Tree Lane)

I. ISSUES

1. Did 27th Avenue NW, also referred to as Cottage Drive and Apple Tree Lane, become a private street by operation of law prior to the 1909 Non-Use Statute Amendment?

Short answer: Yes, as it is unlikely that documentation can be found that would support a claim that King County opened this road to public use within the five (5) year period after it was dedicated.

2. If yes, did King County and/or the City of Shoreline's construction and maintenance of a bridge to access the street, maintenance of the street itself, if any, the property owner's course of conduct regarding the street, and/or public use of the street establish a public street in all or a portion of the street under equitable principles such as implied common law dedication, prescriptive public right-of-way easement, mutual recognition and acquiescence, and laches?

Short answer: The primary block to any of these equitable principles is that there are no records showing the City repaired/maintained 27th Avenue NW itself. And, for any of these equitable principles, the loss to the public of 27th Avenue NW would need to be shown. Given the City's actions in attempting to restrict public use, the quiet title actions, along with the non-function this street has within the City's transportation network, it is unlikely that the City would prevail on an equitable claim. The most viable claim would be a prescriptive public easement, at least for pedestrian traffic.

B. Issue No. 1 – Non-User Statute

1. Applicable Law

The law relevant to this issue dates back to statehood. Section 32 of chapter XIX of the Laws of 1889-90, p. 603, provided:

Any county road, or part thereof, which has heretofore been or may hereafter be authorized, which remains unopened for public use for the space of five years after the order is made or authority granted for opening the same, shall be and the same is hereby vacated, and the authority for building the same barred by lapse of time.

In 1909, the Legislature amended the statute with Laws of 1909, chap. 90, § 1, p. 189, re-enacting the above language with the following proviso added:

* * * Provided, however, That the provisions of this section shall not apply to any highway, street, alley, or other public place dedicated as such in any plat, whether the land included in said plat be within or without the limits of any incorporated city or town, nor to any land conveyed by deed to the state or to any town, city or county for roads, streets, alleys, or other public places.

The combined language of these two early legislative acts is now found in RCW 36.87.090 and is referred to as the “Non-User” statute.¹ In *Wells v. Miller*, 42 Wn. App. 94 (1985) the Court stated:

By this enactment, the Legislature fixed a statutory time limit within which the county was required to perform the condition of the grant. If the purpose of the grant was not accomplished within 5 years, “a reversion of the authority to construct a road would result.” When the street has not been opened within that 5-year period, the right of abutting property owners to the vacated street vests by operation of law ... The burden of demonstrating a street has remained unopened for the statutory period rests on the proponent of the claim. [internal citations omitted].

Real Progress Inc v. City of Seattle, 91 Wash.App. 833 (1998), was a street that was part of an 1884 plat in an area that was subsequently annexed to the City of Seattle. To defend its rights in the street, Seattle argued that the street was part of a plat, it had subsequently been annexed to the City, and that the 1909 amendment should be applied retroactively. The Washington State Supreme Court did not agree. The Court 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. In other words, the

¹ See, **1963 c 4 § 36.87.090**. Prior: **1937 c 187 § 52**

1909 amendment did not have retroactive effect so as to nullify any rights granted by the 1890 statute's language.

Recently, in the 2021 case of *San Juan County v. Burns*, 16 Wn. App. 2d 1044, the Court addressed what it meant to “open a road to public use.” Citing to several older cases, the Court agree that to “open” is not based on the intermittent use of old pathways or winding forth paths; when there are no public improvements; or there are impassible physical characteristics. However, the Court also noted that a winding wagon track could be “open” and the fact that a street is limited to foot traffic is still a street used by the public. In the end, the Court concluded that “it is not enough for a road to be established by the governmental authority. Rather, it must be physically opened in some manner.” ... the lack of evidence of improvement by “clearing and grading,” “graveling,” and “ditching” is [not] dispositive ...”

2. Analysis

In 1890, the Plat of Richmond Beach was filed with King County. This Plat did not show 27th Avenue NW and also did not show the Great Northern Railroad Right-of-Way. In 1901, the Re-Plat of Richmond Beach was filed with King County. According to language on the face of the Re-Plat, it involved those portions of the blocks and streets of the Plat of Richmond Beach which were “duly vacated by the board of County Commissioners of King County” on November 5, 1891, and February 1, 1892. The Map of the Re-Plat shows the Great Northern Railroad right-of-way and Cottage Drive (now 27th Avenue NW).

Based on the 1890 statute, as applied by the Courts, Cottage Drive was required to be open by 1906, five (5) years after its recording that dedicated it to the public. If Cottage Drive was open, then it is a public street; otherwise, in 1906 it automatically became a private street.

In 1990 and in 1995, property owners at the northern end of 27th Avenue NW filed Quiet Title actions: *Davis v. King County*, King County Superior Court Case No. 90-2-14189-6, and *Madden, et al v. King County and City of Shoreline*, King County Superior Court Case No. 95-2-23189-6. For *Davis*, this case was filed prior to the incorporation of the City and was a Complaint for Quiet Title based on the Non-Use statute for property abutting Lots 43 and 44 of the Replat of Richmond Beach. For *Madden*, this case was filed at the point of incorporation and was also a Complaint for Quiet Title based on the Non-Use statute for property abutting Lots 39, 40, 41, and 42. Both filings denote that 27th Ave NW was not opened for public use within 5 years of the filing of the Replat and that there is no other real property dependent on this portion of 27th Ave NW for access. Both of these cases were disposed of by stipulated motions and the results were a portion of 27th Avenue NW becoming a private street. Each case had conditions, namely granting utility easements.

Drury v. City of Shoreline (2011). In 2011, the City was involved with another Quiet Title action involving 27th Avenue NW – *Drury v. City of Shoreline*, King County Superior Court Case No. 11-2-40407-2 SEA, involved the end of Market Street (now 195th NW) which is on the western side of the Railroad ROW. In a 2011 memorandum to the City Manager from former City Attorney Ian Sievers, it was explained that, based on the Non-Use Statute, if the road was not opened before 1906 it was automatically returned to the adjacent properties and may not be used for public right of way. The 2011 memorandum continued to state that there was no history of paving this portion of Market Street in King County records but, there was an overflow sewer line used by King County Sewerage and Drainage Improvement District #3 within the road end and extending into Puget Sound.²

The question at that time was whether the City could prove that the sewer line was constructed before 1906. Based on the evidence available, it was concluded that this portion of Market Street had reverted to the adjacent owners. According to the 2011 memorandum, the King County maps only showed an easement for the sewer line and, therefore, if a public right-of-way existed, only the sewer line would be shown, not an easement to create rights of access for repair and maintenance. Thus, the City Attorney concluded that the evidence established King County had acquiesced in the loss of this segment of its right-of-way and its merger with the adjacent parcels. To settle the matter, the City secured an easement for the infrastructure and released any interest the City had in this portion of former Market Street. While the easement was recorded, it was recently discovered during research for this 2021 memorandum that the court order quieting title to this portion of Market Street was never recorded. In 2019, based on the City's belief that this portion of Market Street was still a public right-of-way, an application to vacate it was filed with the City – PLN19-0132. The applicant subsequently determined not to pursue the vacation and withdrew the application, partially because another portion of Market Street was on adjacent property, and it would be unlikely that the City would approve a partial vacation. There has been no refund of fees, which were approximately \$15,000.

3. Conclusion – Non-Use Statute

Based on the Non-User Statute and court cases interpreting and applying that statute, along with the 1990, 1995, and 2011 court cases involving King County and the City of Shoreline, 27th Avenue NW has probably reverted to the adjacent properties after the statutory five (5) year period. Evidence would need to be secured that King County opened the street to public use prior to the expiration of the required time period. Without this evidence, since 1906, this street should have been considered a private street for which the property owners on 27th Avenue NW had the responsibility to maintain and the ability to restrict access.

² This overflow sewer line would have become the property of the Ronald Wastewater District in 1985 as King County transferred its system, then referred to as Richmond Beach Sewer System, to the District.

C. Issue No. 2 – Equitable Principles

1. Applicable Law

There are several equitable principles that could be applicable to analyzing the question of whether 27th Avenue NW is a public right-of-way regardless of the Non-Use Statute: Common Law Dedication, Prescriptive Easement, Mutual Recognition and Acquiescence, or Laches.

a) Implied Common Law Dedication³

Dedication may be accomplished under statute or at common law. A dedication is generally defined as the devotion of property to a public use by an unequivocal act of the owner, manifesting an intention that it shall be accepted and used presently or in the future. The two necessary elements of a complete dedication are (1) intention of the owner to dedicate and (2) acceptance by the public. Dedication is a mixed question of law and fact. Although an owner's intent to dedicate is a factual question, whether a common law dedication has occurred is a legal issue. The party asserting that the public has acquired a right to use an area as a public street bears the burden of establishing these essential elements.

As to the first element, owner's intention, an “implied” common law dedication arises from some act or course of conduct from which the law will imply an intention on the part of the owner of the property to dedicate it to the public use. The second element, acceptance by the public, may be proved by (1) an express act; (2) implication from the acts of municipal officers; or (3) implication when the public uses the property for the purposes for which it was dedicated. It is unnecessary to show that the dedicated property has been used by any certain number of persons for any set period of time; rather, it requires merely showing that those persons who might naturally be expected to enjoy it have used it to their pleasure or advantage.

b) Prescriptive Easement⁴

The public can acquire the right to use a road through a prescriptive easement. A prescriptive easement requires (1) use adverse to the owner of the servient land; (2) use that is open, notorious, continuous, and uninterrupted for 10 years; and (3) knowledge of such use by the owner at a time when they were able to assert and enforce his rights. Prescriptive easements are not favored under Washington law.

Whether the elements of a prescriptive easement have been satisfied presents a mixed question of law and fact. The entity benefitted by the easement has the burden of proving the existence of a prescriptive right.

³ *Donald v. City of Vancouver*, 43 Wn. App. 880, 885, 719 P.2d 966 (1986); *Sweeten v. Kauzlarich*, 38 Wn.App. 163, 165–66, 684 P.2d 789 (1984). *Roundtree v. Hutchinson*, 57 Wash. 414, 415–16, 107 P. 345 (1910); *City of Spokane v. Catholic Bishop of Spokane*, 33 Wn.2d 496, 503, 206 P.2d 277 (1949)

⁴ *King County v. Hagen*, 30 Wn.2d 847 (1948); *810 Props. v. Jump*, 141 Wn.App. 688, (2007).

c) Mutual Recognition and Acquiescence⁵

Under the Doctrine of Mutual Recognition and Acquiescence, a party must show (1) that the boundary line between two properties was certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc.; (2) that the adjoining landowners or their predecessors in interest, in the absence of an express boundary line agreement, manifested in good faith a mutual recognition of the designated boundary line as the true line by their acts, occupancy, and improvements with respect to their respective properties; and (3) that mutual recognition and acquiescence of the boundary line continued for the period of time necessary to establish adverse possession (10 years). The party asserting the doctrine applies must show by clear, cogent, and convincing evidence that both parties acquiesced in the line.

d) Laches⁶

Laches is an equitable doctrine that may be asserted as a defense. Laches consists of two elements: (1) inexcusable delay and (2) prejudice to the other party from such delay. In determining whether the delay was inexcusable, a court may look to a variety of factors including similar statutory and rule limitation periods. But the main component of the doctrine is not so much the period of delay in bringing the action, but the resulting prejudice and damage to others. A court will not presume prejudice merely from the fact of a delay. The burden is on the defendant to show whether and to what extent he or she has been prejudiced by the delay.

2. Analysis

a) Common Law Dedication

The original plattor, the Richmond Beach Improvement Co., expressly dedicated Cottage Drive to the public when recording the 1901 Re-plat of Richmond Beach, and King County expressly accepted the dedication when the Board of County Commissioners approved the Re-plat in August 1901. However, as was explained above, King County's failure to open Cottage Drive within five (5) years of this dedication caused it to automatically revert to the adjacent property owners in 1906 despite the plattor's intent.

The question then becomes – could there be an “implied” common law dedication that subsequently occurred? For an “implied” common law dedication there must be (1) some act or course of conduct from which the law will imply an intention on the part of the owner of the property to dedicate it to the public use and (2) acceptance by the public proved by (a) an express act; (b) implication from the

⁵ *Merriman v. Cokeley*, 168 Wn.2d 627 (2010); *City of Bainbridge Island v. Brennan*, 128 Wn. App. 1046 (2005).

⁶ *Clark Cty. Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840 (2000); *Pierce v. King County* 62 Wash.2d 324 (1963); *Vance v. City of Seattle*, 18 Wash.App. 418 (1977) (noting that laches is an equitable doctrine, and its application does not depend solely upon the passage of time alone, but also upon the effects of delay upon the relative positions of the parties).

acts of municipal officers; or (c) implication when the public uses the property for the purposes for which it was dedicated.

(1) Intent of Property Owners

Based on a 1936 aerial image from King County Records, while there is a street (paved or unpaved) with a few structures, most of Cottage Drive was not developed at this time. Property records generally show houses with construction dates starting in the 1940s. The 1936 aerial image shows a crossing of the Railroad right-of-way which is likely the wooden bridge that was constructed in/about 1922 by the Great Northern Railroad under an agreement with King County; refurbished by King County in/about 1955; and then replaced by the City of Shoreline in 2011 under a new agreement with Burlington Northern.

With the exception of the Quiet Title actions in 1990, 1995, and 2011 that were based on the Non-Use statute, 27th Ave NW has largely been considered a public street. The property owners' "course of conduct" may demonstrate this as they have (1) called upon the City to enforce parking and beach access,⁷ (2) no recorded road maintenance agreement setting forth the responsibilities of each property owner pertaining to the cost of maintaining and repairing the private street,⁸ (3) did not require the City to secure temporary or permanent easements for the area of the street that was necessary when replacing the bridge in 2011, (4) investigated vacation of street in/about 2013-2014, and (5) although none has occur, would probably have accepted the City's maintenance and/or repair of the street. However, the property owners have also sought to restrict the public use of 27th Ave NW, treating it similar to a private street.

(2) Acceptance by King County and/or City of Shoreline

If there way implied intent to dedicate by property owners, then as noted above, King County and the City of Shoreline could have implied acceptance by investing public resources into the construction and maintenance of the Richmond Beach Overcrossing, the sole vehicular point of access to 27th Ave NW, as well as into the maintenance of 27th Ave NW itself. Acceptance is weakened by the fact that the City has not done any actual maintenance or repair of the street itself. However, in could be argued that the City has implied acceptance by addressing property owner's inquiries about street vacation and parking issues along with public signage.⁹

⁷ However, the property owners' demands to restrict public use are also in juxtaposition to such an intent for public dedication.

⁸ Generally, this is seen when a street is being used by multiple properties. Available King County records do not show a road maintenance agreement for any of the parcels on 27th Ave NW, even the properties involved in the 1990 and 1995 Quiet Title actions which resulted in a joint driveway.

⁹ Similar to property owner's intent being countered by their desire to restrict public use, the City's involvement in restricting public use is in juxtaposition to acceptance of 27th Ave NW as a public street.

Conclusion – Implied Dedication

Evidence for and against an intent to dedicate would need to be reviewed along with the expenditure of public resources to maintain 27th Ave NW. The more evidence that the property owners considered 27th Ave NW as a public road and wanting the City to take care it would favor Implied Dedication. Unfortunately, given the lack of any maintenance and the position of the property owner's that is similar to the position of an owner on a private street, Implied Dedication would be a difficult case.

b) Prescriptive Easement

A prescriptive easement requires (1) use adverse to the owner of the servient land; (2) use that is open, notorious, continuous, and uninterrupted for 10 years; and (3) knowledge of such use by the owner at a time when they were able to assert and enforce their rights. All elements must be satisfied to establish a prescriptive easement. Washington State recognizes a "public" prescriptive easement. *Gray v. McDonald*, 46 Wn. 2d 574 (1955) (1st appeal) and 52 Wn. 2d 822 (1958) (2nd appeal).¹⁰

Prong 1 is likely satisfied in that the public's use of land that is in private ownership, whether it is other property owners use for ingress/egress or the general public's use for beach access, is adverse to the owner's property rights, namely the rights to possess, control, and exclude. Under the law, permission and even neighborly acquiescence will defeat a claim of adverse possession and the 27th Ave NW property owners would probably assert such permission or acquiescence. But knowledge of their ownership rights would probably have to be shown before permission/acquiescence would be applicable. Prong 2 is satisfied in that it is undebatable that the public has been using portions of 27th Ave NW for more than 10 years. Prong 3 is somewhat problematic because most of these property owners (with the exception of those involved in the Quiet Title actions) did not know they had rights to assert and enforce given their belief 27th Ave NW was a public street. But, the 10-year period for adverse possession is a type of statute of limitations – one must defend their right to the property before the 10-year period expires or it will be lost. In *Doyle v. Hicks*, 78 Wn. App. 538 (1995), the court stated that the essence of adverse possession is just that—possession which is adverse. Therefore, it is not possession which must be within the knowledge of the record owner; it is possession which is adverse and contrary to the claims of the record owner.

Other states have decisions regarding knowledge of rights. *Lawrence v. Town of Concord*, 439 Mass. 416 (2003, Massachusetts) the Court found that the owner's lack of knowledge of ownership is not a defense to adverse possession. In *Morris v. Texas Elks Crippled Children's Hosp.*, 525 S.W.2d 874, 882 (Tex. Civ. App. 1975), the Court held that the statutes limitations, barring an action for the

¹⁰ The analysis would be applicable not only to the general public but, also the property owner's that pass in front of their neighbor's property to access their own with easement rights.

recovery of land, run against those who inherit an interest in property whether they are aware of such inheritance or not. See also, *Wilcox v. Sams*, 213 Ky 696 (1926, Kentucky) (Ordinarily lack of knowledge of one's rights is insufficient to prevent operation of statutes of limitation).

Conclusion – Prescriptive Easement

As noted above, while the prongs for a prescriptive easement, sounding in adverse possession, could possibly be satisfied, the property owners would undoubtedly assert lack of knowledge or permission. While there is case law, none truly on point (based on my current research), aligning with statute of limitations cases that dismiss lack of knowledge as a basis for adverse possession claims would be the argument. But, remember that Court's do not prefer "stealing" land based on this doctrine and, it is for this reason that the Court may not be so liberal in labeling the street a public street.

c) Mutual recognition and acquiescence¹¹

This doctrine could be used as an offensive claim or a defensive response. Many property owners do not realize or understand that the edge of the pavement may not be the edge of the public right-of-way and therefore treat non-paved/graveled areas adjacent to the paved street as their own property. For Prong 1, it could be argued that the pavement is the physical delineation of the line between public right-of-way and private property and residents have been treating it as such for many years. In this regard, the importance of a strong pavement edge for the delineation is important.

For Prong 2, based on the conduct of the residents and the City, there was a mutual recognition that the pavement delineated a public right-of-way. Recognition of and acquiescence in the established line consists of the two neighbors' occupying or improving their lands with reference to the line. *Washington Practice, Real Estate: Property Law, Sec. 8.25*. The construction of residences and outbuildings based on setbacks from the right-of-way line shows mutual acquiescence. Many of the houses along 27th Avenue NW have been reconstructed in the past few decades with surveys done and setbacks established based on 27th Avenue NW being a public street. Prong 3 is easily satisfied in that 27 Ave NW has been at this location for decades.

Conclusion – Mutual Recognition and Acquiescence

It appears that a good case could be made that the City, the property owners' and the public all believed the pavement edge is the boundary between public and private property. In addition, permits were issued for homes that set the setback on surveys locating 27th Ave NW at its historic locations. Lot coverage requirements were similarly based on this. Structures/improvements have been

¹¹ Frequently cited for this principle is *Lamm v. McTighe*, 72 Wn.2d 587 (1967)

done within the last few years, all respecting the City's regulations as if 27th Ave NW is a public street.

d) Laches

This equitable principle is generally used in a defensive manner. In *Real Progress v. City of Seattle*, cited above, in addition to the Non-User statute the Court also addressed the equitable defense of Laches. The Court had no problem with finding the first two elements were met - knowledge by plaintiff of facts constituting a cause of action or a reasonable opportunity to discover such fact [see the discussion on knowledge in prescriptive easement above]; (2) unreasonable delay by plaintiff in commencing an action (it has been over 100 years since the Non-Use statute triggered reversion). But, as to the third element, the Court found that Seattle could not show that it would suffer damage because the street was never opened, and Seattle had done nothing to the street.

Similar to *Real Progress*, it could be shown that 27th Avenue NW satisfies the first two elements of knowledge [based on prior quiet title actions and/or lack of knowledge not a defense] and delay. However, it does not appear possible for the City to show damage based on the road itself since there has been no maintenance. The only damage would be public access to beach which, we know is actually from BNSF property and not the public right-of-way.

Conclusion: Laches

Since use of this principle is defensive, it could be included in any action the City utilizes for 27th Avenue NW to be a public street. Since the first two (2) prongs would, most likely, be easily established, a positive result rests on the amount of damage the City would suffer with the loss of 27th Ave NW as a public road.