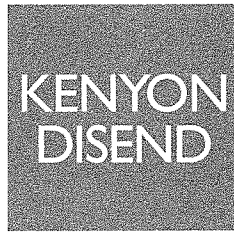


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1967 - 2014

## MEMORANDUM

TO: Jeff Thomas, Director, Community Development Department

CC: Lyman Howard, City Manager  
Jessi Bon, Deputy City Manager

FROM: Mike Kenyon, City Attorney  
Kim Adams Pratt, Deputy City Attorney *KAP*

DATE: December 14, 2016

RE: Real Property Interests - East Lake Sammamish Trail Segment 2B, King County  
SSDP Application No. 2016-00415

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On October 19, 2016, King County filed an application for a Shoreline Substantial Development Permit, application no. 2016-00415, for the East Lake Sammamish Trail Segment 2B (“Trail Application”), which proposes work on King County Tax Parcel 292506-9007 (the “Corridor Parcel”). The Trail Application was deemed incomplete by the City on November 15, 2016, in part due to the inadequacy of the title information submitted. On November 30, 2016, King County submitted additional documentation to verify its real property interests in the Parking Lot Parcels and the Corridor Parcel (the “November Submittal”). On December 13, 2016, the City deemed the Trail Application complete.

Our office has been asked to review the November Submittal in light of the review criteria in SMC 20.05.040, *Application requirements*, regarding the real property interest necessary to develop the project proposed in the Trail Application. The code provides in relevant part as follows:

**20.05.040 Application requirements.**

(1) . . . Except as provided in subsection (2) of this section, all land use permit applications described in SMC 20.05.020, Exhibit A, shall include the following:

...

(r) Verification that the property affected by the application is in the exclusive ownership of the applicant, or that the applicant has a right to develop the site and that the application has been submitted with the consent of all owners of the affected property; provided, that compliance with subsection (2)(d) of this section shall satisfy the requirements of this subsection (1)(r); and

...

(2) Additional complete application requirements apply for the following land use permits:

...

(d) For all applications for land use permits requiring Type 2, 3, or 4 decisions, a title report from a reputable title company indicating that the applicant has either sole marketable title to the development site or has a publicly recorded right to develop the site (such as an easement); if the title report does not clearly indicate that the applicant has such rights, then the applicant shall include the written consent of the record holder(s) of the development site.

(3) The director may specify the requirements of the site plan required to be submitted for various permits and may waive any of the specific submittal requirements listed herein that are determined to be unnecessary for review of an application. (emphasis added)

Given that King County did not submit a title report for the Corridor Parcel our analysis focused on whether King County provided information that would warrant a waiver of the title report provision as provided for in SMC 20.05.040(3) when it is “unnecessary for review of an application.” In support of its assertion that it has the necessary property rights to pursue the Trail Application project within the Corridor Parcel, the November Submittal included correspondence dated November 30, 2016, from Kevin Brown, King County Director, Parks and Recreation Division; a declaration from Robert Nunnenkamp, a Property Agent with the King County Parks and Recreation Division; and Exhibits 1 – 27, which are listed in the Index of Exhibits attached as **Exhibit A** hereto.

King County’s Exhibits 1 through 4 were the most informative to our analysis. Exhibit 1 is a 1997 deed from Burlington Northern Santa Fe Railway Company to the Land Conservancy of Seattle and King County (“1997 Deed”). The legal description attached to the 1997 Deed includes the Corridor Parcel. Exhibit 2 is a 1998 deed from the Land Conservancy of Seattle and King County to King County (“1998 Deed”). The legal description attached to the 1998 Deed also includes the Corridor Parcel. The 1998 Deed is also attached to Exhibit 4, which is the Judgment Quieting Title to King County dated May 13, 2016 (“Judgment”). This Judgment was entered by the Hon. Marsha Pechman, a judge of the U.S. District Court for the Western District of Washington at Seattle, in cause no. 2:15-cv-00284-MJP.

According to its plain terms, the Judgment quieted title in the Corridor Parcel to King County “free and clear of all claims by the Plaintiffs and/or successors in interest” to any portion of the land conveyed by the 1998 Deed. King County and Plaintiffs were ordered to “recognize in perpetuity the boundary lines” described in the 1998 Deed. For the purposes of the Trail Application, this portion of the Judgment tells the City that the real property included within the legal description for the Corridor Parcel is under King County control and use, “free and clear of all claims by the Plaintiffs.” The Judgment also confirms that King County has fee simple title to a portion of the Corridor Parcel and a prescriptive easement in other portions of the Corridor Parcel. For the Trail Application, both the fee simple and prescriptive rights are acceptable property interests for the proposed use.

Exhibit 3 in the November Submittal is the Order on Cross-Motions for Summary Judgment entered by Judge Pechman in the same cause of action as the Judgment (the “Order”). The Order explains in detail the rationale supporting entry of the Judgment. The fee simple ownership issue was decided by the language used in the particular deed that originally conveyed the fee simple portion of the Corridor Parcel in 1887. Order at 4-5. For the remainder of the Corridor Parcel, the Court explained that rail-banking provided for under Federal law does not extinguish railroad easements, and that King County has “acquired all of BNSF’s property interest in the Corridor.” Order at 5-6. The Court held that King County “is entitled to the exclusive use and possession of the area on, above, and below the surface of the Corridor for railroad purposes and incidental uses permitted by Washington law, including use as a recreational trail.” Order at 8. The Order provides that the width of the Corridor Parcel is, by necessity, 100 feet except in three cases where specific transactions have narrowed the Corridor Parcel to 50 and 75 feet (Morels, 50 feet; Menezes, 75 feet; Vanderwendes, 75 feet).

Lastly, the Court held that even if King County had not acquired the 100-foot Corridor Parcel from BNSF, “it acquired the same through operation of law of RCW 7.28.070.”

RCW 7.28.070, Adverse possession under claim and color of title—Payment of taxes.

Every person in actual, open and notorious possession of lands or tenements under claim and color of title, made in good faith, and who shall for seven successive years continue in possession, and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section.

The Court determined that King County had paid all fees and taxes for the Corridor Parcel since 1998 and had been in open and notorious possession by “recording the deed, appearing as trail sponsor in public proceedings . . . , removing the old railroad tracks, installing a soft-surface trail and requiring all adjacent landowners to apply for permits for crossing or other encroachments on the Corridor.” Order at 12.

In our opinion, the November Submittal, and particularly the plain terms of the Judgment and the Order, provide a sufficient basis under SMC 20.05.040(3) for the Director to waive the otherwise applicable requirement for a title report in order to be satisfied that King County has the necessary real property interests in the Corridor Parcel to pursue the project proposed in the Trail Application. Arguably, the Judgment and Order are actually better evidence of King County’s real property interests than would be a title report. On the one hand, a title report is an insurance policy from a private title company, but a title company has no legal authority to resolve real property disputes and determine the extent of real property interests between competing parties. Rather, a title company merely insures what it has determined to be those interests. On the other hand, Judge Pechman has full legal authority to determine the extent of real property interests between competing parties, and has actually done so in this case.

Our review of additional court records not included in the November Submittal further indicates that the Judgment and Order have been appealed to the United States Court of Appeals for the Ninth Circuit, but no stay of enforcement of the Judgment or Order has been sought by the Plaintiffs or issued by the court. The Judgment and Order are final orders. In the absence of a court order staying enforcement of the Judgment and Order pending the outcome of the appeal, there would be a high probability of liability for delay damages should the City withhold permit decisions based on the speculative possibility that the Court of Appeals will overturn the Judgment and Order. The City would of course abide by any stay order that may be issued by the Court of Appeals.

The delay caused by waiting for the Court of Appeals' decision would be considerable. The Court of Appeals' website explains that oral argument will be heard approximately 9-12 months after completion of briefing, which in this case would set oral argument between September 2017 and December of 2017. After oral argument, most cases are decided within three months to one year, or in this case, between December 2017 and December 2018.

## INDEX OF EXHIBITS

1. Quit Claim from BNSF to TLC
2. Quit Claim from TLC to King County
3. 04-20-2016 Order on Cross Motion for Summary Judgment, Hornish v. King County, No. 2:15-cv-00284-MJP
4. 05-13-2016 Judgment Quieting Title to King County, Hornish v. King County, No. 2:15-cv-00284-MJP
5. King County v. Rasmussen, 299 F.3d 1077 (9th Cir. 2002)
6. Ray v. King County, 120 Wn.App. 564 (2004)
7. Friends of the E. Lake Sammamish Trail v. City of Sammamish, 361 F. Supp. 2d 1260, 1274 (W.D. Wash. 2005)
8. Table with parcel numbers and relevant information
9. Hutchinson Deed
10. Reeves Deed
11. Davis Deed
12. Yonderpump Deed
13. Sbedzuse Deed
14. Tahalthkut Deed
15. Hilchkanum Deed
16. Land Grants
17. Tibbett's Deed
18. Fuller Deed 2861110
19. Fuller Deed 2861109
20. Easement - Reinhardsen
21. Easement – Rogalski
22. Easement – Ivanoff
23. Easement – Pickering
24. Easement – Buck
25. Map to illustrate King County's ownership and control of the Corridor in Segment B
26. Bark-Jensen Deed
27. Map of the Corridor provided to the City on 7/31/14 as part of the SSPD 2014-00171
28. Inglewood Title Reports
29. Updated Inglewood Title Reports