Attorney General Slade Gorton

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October 20, 1970

Ernest Geissler, P.E.
Administrative Engineer
County Road Administration Board
106 Maple Park
Olympia, Washington 98501

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No. 137

Dear Mr. Geissler:

This is written in response to your request for our opinion on three questions pertaining to county right-of-way acquisitions. We paraphrase your questions as follows:

(1) Does a dedication deed of right-of-way by a land owner to a county convey fee simple title to the right-of-way property to the county?

(2) What is the effect of a dedication of a plat to a county which contains the following statement:

". . . The undersigned hereby dedicate to the public use the streets shown thereon. There is reserved to any public utility or municipality the right to lay water mains, sewer lines, gas mains, or to erect transmission lines within the above described subdivision in the streets thereon."?

(3) Does a county, by acceptance of a dedicated road by either the right-of-way deed considered in question (1), or a plat dedication such as that considered in question (2), acquire any rights to gravel under the roadway?

We answer questions (1) and (3) in the negative, and question (2) in the manner set forth in the body of the opinion.

ANALYSIS

Question (1):

The Washington Supreme Court has on numerous occasions had the question of dedication of public rights-of-way under [[Orig. Op. Page 2]] advisement and has stated the general rule as follows:

"It is true that land dedicated as a highway is thereby devoted to a general, or public, use.

. . .

"Normally, the interest acquired by the public is but an easement. . . . "But whatever the nature of the interest may be, it is held in trust for the public, and the primary purpose for which highways and streets are established and maintained is 'for the convenience of public travel.'" (State ex rel. York v. B. of C. Com'rs., 28 Wn.2d 891, 184 P.2d 577 (1947) and cited cases.)

and, similarly,

". . . The rule is well settled that the ownership in fee to land over which a street is constructed is presumed, in the absence of evidence to the contrary, to be in the owner of the abutting property . . . It is further the rule that the owner of the abutting property or the owner of the fee has the right to use the subsurface of the street for all lawful purposes that are consistent with the full enjoyment of the easement acquired by the public for travel and transportation." (Lanham v. Forney, 196 Wash. 62, 81 P.2d 777 (1938).

Both of the above cases extensively cite earlier Washington cases substantiating the above rule.

The court further stated in Finch v. Mathews, 74 Wn.2d 161, 443 P.2d 833 (1968), as follows:

"Since Burmeister v. Howard, 1 Wash. Terr. 207 (1867), this court has not departed from the rule established in that case, that the fee in a public street or highway remains in the owner of the abutting land, and the public acquires only the right of passage, with powers and privileges necessarily implied in the grant of the easement. This rule was applied specifically to a street dedicated to the public through the recording of a plat in Schwede v. Hemrich Bros. [[Orig. Op. Page 3]] Brewing Co., 29 Wash. 21, 69 Pac. 362 (1902). Therefore, the only property right which either the city of Seattle, or King County ever acquired in the tract of land in controversy, was an easement for passage and use for street purposes."

It must be noted here that the court in its rulings concerning the "public easement" doctrine leaves an obvious exception; i.e., when the public body does acquire the fee. In the case of Puget Sd. Alumni Kappa Sig. v. Seattle, 70 Wn.2d 222, 422 P.2d 799 (1967),

the city of Seattle attempted to impose a monetary condition for the vacation of a city street and the Supreme Court upheld the dismissal of the claim of the city, citing Burmeister v. Howard, supra, and then citing McQuillin on municipal corporations to the effect that as long as the city did not own the fee, it could not sell same; the court stated as follows:

"The city has nothing to sell in such case. 11 McQuillin, Municipal Corporations, Sec. 30.189, at 134 (3d rev. ed.), states:

'A municipality is not entitled to compensation for loss of a public easement in streets in which it does not own a fee. It thus follows, where a street is vacated by a court on the application of abutting land owners, the municipality has no such proprietary interest therein as to entitle it to compensation.'"

The first line of the quote from McQuillin draws the attention to the statement as follows:

". . . in which it does not own the fee."

The rule is that if the county or a municipal corporation obtains the right-of-way in fee by either eminent domain or by purchasing the property and obtaining a fee title deed or obtaining a deed which indicates that the public body paid valuable consideration and obtained the fee in the property, then the county or the city would own the land including the rights underneath to gravel and to air space above, and the abutting property owners would not then own the fee to the center of the road, subject to a public easement. See Wright v. Olsen, 42 Wn.2d 702, 257 P.2d 782 (1953), wherein the Washington court held the state to own the property in fee simple and not subject to the public easement category.

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In a case directly dealing with the exception, Horn v. King Co., 52 Wn.2d 839, 329 P.2d 661 (1958), King County received from two parties a deed for road purposes which stated that the county for valuable consideration received from the parties the conveyance of certain real property; here, the deed included this statement:

". . . to the same extent and purpose as if the rights herein granted had been acquired by condemnation proceedings under Eminent Domain statutes of the State of Washington, . . ."

Here, the court held that the county received by the deed the same interests as it would have received under eminent domain, and thus it granted to the county the right to change the established grade without paying any further damages or compensation to the abutting property owners.

If the county obtains the fee, the county would own the right-of-way in the same ownership of other county property.

Related to the foregoing is the further question of the extent of the public's right to use a public right-of-way.

In State ex rel. York v. B. of C. Com'rs., 28 Wn.2d 891, 184 P.2d 577 (1947), the Supreme Court set forth the following rules which govern what rights the counties obtain in a right-of-way:

"Normally, the interest acquired by the public is but an easement . . . But whatever the nature of the interest may be, it is held in trust for the public, and the primary purpose for which highways and streets are established and maintained is 'for the convenience of public travel.'"

and

"In addition to this primary purpose, however, there are numerous other purposes for which the public ways may be used, such as for water mains, gas pipes, telephone and telegraph lines, etc. These are termed secondary uses and are subordinate to, and permissible only when not inconsistent with, the primary object of the highways . . ."

The court then held in this case that Walla Walla County had the legal right and authority to franchise a portion of the right-of-way as long as the right did not restrict the general primary purpose of the public easement for highway travel.

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In summary as to this question, it is apparent that in obtaining a right-of-way by the customary right-of-way deed, dedication deed or quitclaim deed for road purposes, without compensation and for road purposes only, and wherein the county does not condemn or receive the title in fee, the county only obtains a public easement to utilize the property for road purposes, subject to the abutting property owners owning the fee in the land.

Question (2):

The second question that you raise in your inquiry concerns the effect of the following statement that is being utilized in a dedication of streets within a plat:

". . . The undersigned hereby dedicate to public use the streets shown thereon. There is reserved to any public utility or municipality the right to lay water mains, sewer lines, gas mains, or to erect transmission lines within the above described subdivision in the streets therein."

In the case of Coleman v. Hammond Lumber Co., 160 Wash. 170, 294 Pac. 968 (1931), the Washington court held that such a restriction or reservation in a dedication of streets was improper, saying:

"The law is well settled that, when an owner dedicates his land for street purposes, he cannot make any reservation affecting its use or occupation in the future. In Giles v. Olympia, 115 Wash. 428, 197 Pac. 631, 16 A.L.R. 493, we said:

'No dedication is good, under all the authorities, which attempts to take from the public authorities their full power and control over streets.'"

However, this rule as above expressed by the court in Giles v. Olympia, supra, was thereafter qualified by the court in that case by the following statement:

"As a general rule, the dedicator may impose reasonable conditions and restrictions in making a dedication of his property."

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The Supreme Court in Neagle v. Tacoma, 127 Wash. 528, 221 Pac. 588 (1923) further explained the rule in Giles v. Olympia, supra, by quoting from Bradley v. Spokane & Inland Empire R. Co., 79 Wash. 455, 140 Pac. 688 as follows:

"The reservation in the dedication to general municipal purposes, such as the laying of 'water and gas pipes and electric wires, and to erect poles for such purpose, and to construct and operate in such streets and alleys cable and motor railways,' would be so repugnant to the character of these streets and alleys as public ways by seeking to take away from the city the power to exercise control over these streets, as to contravene a sound public policy, and for this reason we think it must be held absolutely void."

and from 9 A & E Ency. Law p. 75 as follows:

"The right of the dedicator to annex conditions to that dedication is limited, however, by the rule that the conditions must not be such as would prevent a reasonable enjoyment of the dedication, or be in any way inconsistent with the enjoyment. No condition can be annexed which will take the property from the control of the duly authorized public officers, or which will in any way impair the usual exercise of the public power by the proper authorities. Should an attempt be made to add such conditions, the dedication will be upheld and the conditions be held void." (Emphasis supplied.)

The dedication language noted in this inquiry would remove the power of the county commissioners to determine whether or not to grant franchises and permits as to the location of water mains, sewer lines, gas mains, transmissions and the like. It would appear that such a reservation would impose a restriction to the reasonable enjoyment of the dedication by creating a higher right to the utilities to proceed to install facilities without any permit from the county.

It is customary amongst the municipalities and counties in the development of subdivisions to allow utilities to be installed prior to the dedication of the lands; however, this is done on the basis of the developer granting an easement to the utilities while making the utilities subject to the franchise rights of the county as to maintenance, upkeep and repair. It would be our opinion that the language used in the dedication [[Orig. Op. Page 7]] which is the subject of your question, would render the reservation void, and if the matter were presented to court, the Neagle case, supra, would constitute authority for this result.

Question (3):

Your third and last question is whether or not a county, by its acceptance of a dedicated road by either a plat dedication or by a right-of-way deed such as that which you enclosed with your request, would acquire the rights to the material under the roadway. The discussions above make it evident that the county, by either the right-of-way deed or the plat dedication, only would obtain a public easement and not the fee to the property; therefore, the county would not have any legal right to the gravel under the

road.

We hope that this will be of assistance to you.

Very truly yours,

FOR THE ATTORNEY GENERAL

Keith D. McGoffin
Special Assistant Attorney General