

OFFICE OF THE PROSECUTING ATTORNEY
KING COUNTY, WASHINGTON
CIVIL DIVISION

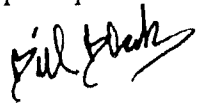
Norm Maleng
Prosecuting Attorney

E550 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015
FAX (206) 296-0191

17 September 1997

MEMORANDUM

TO: Faith Holste, Office of Open Space

FROM: Bill Blakney, Sr. Deputy 

SUBJECT: "Right of Way" deeds, Redmond & Issaquah, former BNSF rail line.

You have requested our opinion whether the above-referenced right of way deeds conveyed fee simple title, or merely an easement, to the railroad.

In the past, "right of way" deeds were frequently construed to convey only an easement. I believe the Washington Supreme Court's October 1996 decision in Brown v. State, 130 Wn. 2d 430, has clarified the law in this area. Brown clearly establishes the rule that a deed to a railroad, even though it may convey a right of way, will convey fee simple title unless the deed contains language expressly and clearly limiting the estate conveyed. Brown at page 443. A copy of the Brown decision is enclosed.

According to Brown, the fact that deeds, such as the ones referred herein, are characterized as right of way deeds, and/or convey rights of way is not dispositive. The term "right of way" is not an express and clear limitation on the estate conveyed to the railroad for the simple reason that a railroad can own a right of way in fee simple as well as an easement. Brown at page 440. "To describe the property as a "right of way" simply begs the question of what interest [the railroad] acquired, because a railroad can own rights of way in fee simple if that is what the deed conveys." Brown at 442.

The single most important facts in interpreting the deeds referenced herein is the lack of limiting conditions attached to the conveyances. An easement will be found where there is an express condition on the conveyance. For example, a grant for "so long as said land is used as a right of way by said railway Company" will create an easement. King County v. Squire Investment Co., 59 Wn.App 888, 801 P.2d 1022 (1990). Other language in railroad deeds that will create an easement include: "for all railroad and other right of way purposes," Roeder Co. V. Burlington N., Inc., 105 Wash.2d 567, 716 P.2d 855(1986), "for the purpose of the Railroad right-of-way..." Swan v. O'Leary, 37 Wash.2d 533,535,225 P.2d 199 (1950), or "so long as the same shall be used for the operation of the railroad," Reichenback v. Washington Short Line Ry. Co., 10

Faith Holste
9/17/97
Page 2

Wash. 357,358, 38 P.1126 (1894). These cases follow the "almost universal rule that in order to make an estate conditional, the words used in the deed must clearly indicate such an intent, either by express terms or by necessary implication from the language used." King County v. Hanson Inv. Co., 34 Wn.2d 112, 119, 208 P.2d 113 (1949). Or more specifically:

A condition will not be raised by implication from a mere declaration in the deed that the grant is made for a special and particular purpose without being coupled with words appropriate to make such a condition.

19 Am.Jur. 536, *Estates*, sec. 71, cited in Hanson Inv. Co., at 119.

In the opposite situation, where "there is no language in the deed relating to the purpose of the grant or limiting the estate conveyed, and it conveys a definite strip of land, the deed will be construed to convey fee simple title." Brown, at 439-440. The language in the deeds referenced herein lack any conditions, and clearly convey specific strips of land. The deeds convey title unambiguously: "to have and to hold the said premises with the appurtenances unto the said party of the second part and to its successors and assigns forever." Thus, the term "right of way," in and of itself, does not qualify or limit any interest in the property, but merely describes the parcel in question.

Another significant point is that, at least in some of the referenced deeds, the railroad agreed to build a crossing across its right of way. The court in Brown found obligations to construct or maintain farm crossings or other facilities in connection with the right of way as consistent with a fee simple transfer. Brown, footnote 9 at 442. They give the grantors an easement across land conveyed to the railroad. If the grantors had retained ownership, and granted only an easement to the railroad, there would be no reason to specifically include such obligations; the grantors would still have use of all the land.

In summary, the Washington Supreme Court has laid down a bright line rule for determining whether a railroad deed conveyance describes an easement or a fee simple transfer, and the "right of way" deeds listed in the attachment fit squarely within that rule. Where there is no language expressly and clearly burdening the estate conveyed, and it conveys a specified strip of land, it will be construed to convey fee simple title. Brown, at 443. The "right of way" deeds clearly meet all requirements of deeds transferring fee simple title. The unambiguous language of the deeds conveys the precisely measured strips of land to the railroad and its successors forever, without any restrictions of the use of such land. Therefore, fee simple title was transferred.

Any appraisal for the County as purchaser or prospective purchaser with respect to the Redmond and Issaquah rail corridor may properly treat the "right of way" deeds as fee, consistent with the Brown decision.