Hon. Marsha J. Pechman
Hearing Date: _____
Hearing Time: _____
Oral Argument Requested

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THOMAS E. HORNISH AND SUZANNE J. HORNISH JOINT LIVING TRUST, TRACY AND BARBARA NEIGHBORS, ARUL MENEZES AND LUCRETIA VANDERWENDE, LAKE SAMMAMISH 4257 LLC, HERBERT MOORE AND ELYNNE MOORE, AND EUGENE MOREL AND ELIZABETH MOREL, Plaintiffs, vs. KING COUNTY, a home rule charter county, Defendant.	No: 2:15-cv-00284-MJP PLAINTIFFS' MOTION TO STAY ENFORCEMENT OF ORDER FOR SUMMARY JUDGMENT PENDING RESOLUTION OF APPEAL ***Oral Argument Requested*** NOTE ON MOTION CALENDAR: December 22, 2017

I. INTRODUCTION

Several things have come to pass since the Court issued its order granting Summary Judgment in favor of Defendant King County (the "Judgment")—and Plaintiffs' subsequent pending appeal—that now justify Plaintiffs' request for an order from this Court staying enforcement until the appeal is decided. First, substantial additional evidence has come to light that demonstrates the actual existence of genuine issues of material fact with respect to the claim on which the County prevailed in the Judgment—this evidence has been accepted by the 9th Circuit as part of the record for its review of the Judgment. And second, the County has been using the Judgment, which was issued against the six Plaintiffs in this case, as a

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weapon that will irreparably damage Plaintiffs, along with hundreds of City of Sammamish citizen property owners residing along Lake Sammamish, whose property rights were not before this Court and are not bound by the Order. In fact, the County has demanded that the City of Sammamish ignore the City Code requirements and rely solely on the Judgment in approving its plans to make drastic changes to the trail and the property it crosses that is at the heart of the case—a demand that would result in the disenfranchisement of hundreds of Sammamish citizens living along the shores of the lake and whose rights were not before the Court in any form when the Order was issued.

If the County's plans are approved by the City of Sammamish in the manner demanded by the County—with the City waiving code requirements that mandate the County establish ownership by providing title insurance from a reputable insurer—and the Plaintiffs subsequently prevail on the appeal, the damage to Plaintiffs and the public will be irreparable because of the planned construction and demolition the County is eager to commence. There will be no practicable way to undo the trail improvements once begun in a way that will give meaning to a victory on appeal. In effect, the County is seeking to use the Judgment obtained against a few, to steamroll the City and its citizens because it cannot follow the letter of the City Code. The potential damage is too great to allow while there is a significant chance that the Judgment itself could be reversed and the case remanded for trial.

II. RELIEF REQUESTED

Plaintiffs request that this Court stay enforcement of the Judgment until the appeal pending before the 9th Circuit is resolved.

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III. STATEMENT OF FACTS

On April 20, 2016, this Court issued the Judgment, which includes a few key findings and rulings that are subject of the appeal pending before the 9th Circuit. First, the Court determined that the width of the right of way obtained by the County from the Railroad was 100-feet across Plaintiffs' properties, except where the County or its predecessor had agreed to a narrower width. This was done despite indications by the Court that it would not decide the width of the right of way because such width was subject to state law. Second, the Court determined that the County had converted its easement rights into fee simple rights by operation of a state statute, RCW 7.28, that outlines the process for a statutory adverse possession, when the adverse possessor pays taxes on the whole of the parcel being claimed for a certain period of time—even though the County explicitly admitted in its moving paperwork that it did not actually pay taxes on the claimed corridor. The statute in question, RCW 7.28.070, states:

> 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.

(emphasis added). The County's evidence on this matter was in the form of a declaration by Ms. Susan Sweany, Budget and Finance Officer of King County's Division of Parks and Recreation, testifying that no other landowners paid taxes on the claimed corridor. On this basis, the Court determined that the County had obtained, through adverse possession, fee simple over the claimed corridor that cuts across Plaintiffs' properties.

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In addition to this case, another group of landowners filed a separate lawsuit against the County in the Washington State Superior Court for King County, *Neighbors et al. v. King County*, No. 15-2-20483-1 SEA (the "State Court Case"). The State Court Case plaintiff homeowners allege fee ownership over much of the claimed corridor.[1] In that case, all those plaintiffs, including those who are Plaintiffs in the instant case, have alleged that they were assessed property taxes, and paid property taxes, on the land being claimed as the 100-foot corridor by the County, with most of them (and/or predecessors in title) paying those taxes for decades! The State Court Case plaintiffs supported their allegations with county tax records, deeds, and other documentary evidence in fourteen (14) declarations filed in opposition to the County's motion for summary judgment in that case—a motion that was nearly identical in substance, tone, and theory as the one brought in this case that resulted in the Judgment. The evidence demonstrates that the plaintiffs were paying taxes on their properties in a manner that suggests a 20-foot railroad corridor was in effect while the railroad was in operation. Upon receiving those plaintiffs' summary judgment opposition, the County withdrew its motion within 48 hours. Recently, on August 25, 2017, the 9th Circuit made several of those declarations and supporting evidence (submitted herewith), specifically those by Plaintiffs Morel, Menezes, Neighbors, Lake Sammamish 4527 LLC and Moore, part of the record available to the panel as it considers reversing the Judgment.

The evidence brought to light by the State Court plaintiffs establishes the existence of a material question about the taxes allegedly paid by the County on the claimed corridor, and the applicability of RCW 7.28, when the County admits that it in fact did not pay taxes at all

[1] The Morel, Menezes, Neighbors, Moore, and LLC Plaintiffs are also plaintiffs in the *Neighbors* case, but the case involves twelve other plaintiffs not part of the instant case.

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on the property. As explained in Exhibits A, B, and C, the declarations of Tracy Neighbors, Eugene Morel, and Arul Menezes, respectively, these plaintiffs and their predecessors were assessed taxes since the 1930s onward (including the time period beginning in 1998 when King County alleged payment of all taxes in its summary judgment briefing that resulted in the Judgment) for portions of 072406-9004-06 in a manner inconsistent with the 100-foot wide corridor claimed by the County. Similarly, as explained in Exhibits D and E in the declarations of Lake Sammamish 4257 LLC and Herbert Moore, respectively, these plaintiffs were assessed taxes from 1998 and onward for portions of 172406-9007-01 in a manner also inconsistent with the 100-foot wide corridor claimed by the County. In fact, the evidence and testimony of all the State Court Case plaintiffs demonstrate that the homeowners in this area have been assessed, and have paid, taxes on land purportedly "covered" by the proposed 100-foot corridor.

The newly supplemented evidence significantly changes the prospects of the Judgment's potential to survive the appeal as it relates to the width of the right of way across Plaintiffs' properties and the nature of the County's interest in the right of way as something other than an easement.

Outside of litigation, the County is seeking to use the Judgment to strong arm the City of Sammamish into eschewing its own City Code requiring construction project applicants, like the County, to demonstrate ownership of the applicant proposes to "improve" with title insurance from a reputable insurer. Sammamish Municipal Code 20.05.040 provides in part:

> (1) The department shall not commence review of any application set forth in this chapter until the applicant has submitted the materials and fees specified for complete applications. Applications for land use permits requiring Type 1, 2, 3, or 4 decisions shall be considered complete as of the date of submittal upon determination by the department that the materials submitted meet the

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> requirements of this section. 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.

(emphasis added).

The County has consistently refused to comply with SMC 20.05.020, insisting that the Judgment alone is sufficient to prove ownership in fee simple over the entire right of way, not just the right of way in relation to Plaintiffs against whom the Judgment was obtained. *See* Hornish Decl., Exhibit F. This theory and course of conduct is contrary to the County's years long publicly-stated policy with respect to ownership and width of the right of way:

> There are about 27 properties in Section 7 and the county has settled with about 9 of them or they have been settled prior to the county gaining ownership to the Corridor. Section 7 is an area where there is clouded title. That means that you can't go to records and find titles that says whether [the Right of Way] belongs to the railroad or it belongs to someone else so its adverse or can happen either way. So, the County says rather than getting into legal battle about it, let's settle with these people. And let's take what we need for the trail and then they can have what they need for their properties. So, 9 properties out of 27 that have been happened and settled and I have asked the Prosecuting Attorney that it will make my job a lot easier to pursue all the rest of the properties now addressing this so that we get them settled so that when we start building the trail there won't be these questions.

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See Morel Decl., B. Interestingly, these statements were made on the record by the County during the time period that it now must claim, for purposes of completing all elements of adverse possession, that it was in open and notorious use of the land in question. So, the County led the City and homeowners to believe it did not seek to "own" the land, yet all the while it appears to have been scheming to do so.

The County has commenced construction of the "improved" trail and if it can strong-arm the City of Sammamish into relying on the Judgment instead of the title insurance required by City Code (insurance that the County likely could not obtain), then the construction would work to irreparably damage the properties of not only Plaintiffs, but many homeowners along the shore of Lake Sammamish. The claimed corridor impacts residences and improvements over a multi-mile stretch that the County is seeking to "improve" based solely on the Judgment, which is under serious attack in the appeal, and which was obtained against a small number of homeowners, not against all people residing on properties bisected by the claimed corridor. If allowed to, the County would use the Judgment to widen the existing trail, significantly alter topography, remove decks, and possibly even bulldoze residences that have existed in some cases for close to 100 years. And if the Judgment is then reversed, the damage will be done. The public has a strong interest in having the County held in check at least until the appeal is decided by the 9th Circuit.

IV. STATEMENT OF ISSUES

Should the Court grant an order to stay the enforcement of the Judgment until such time as the 9th Circuit issues an opinion on the pending appeal?

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V. EVIDENCE RELIED UPON

This motion relies upon the Declarations of Tom Hornish, Gene Morel, Arul Menezes, Herbert Moore, and Tracy Neighbors that are submitted herewith, and the files and records of the Court.

VI. ARGUMENT

Under a Rule 62(c) motion for a stay of enforcement, the Court's analysis asks four questions: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012).

In the case at hand we have such a circumstance where all four elements favor the imposition of a stay.

1. The County's Theories and Factual Assertions Have Been Called into Question in the Appeal.

The arguments raised in the briefing and the evidence that has come forward through the State Court Case establish a strong likelihood that Plaintiffs will succeed on appeal. The evidence that the 9th Circuit is considering establishes the existence of a question of fact regarding the payment of property taxes by Plaintiffs on the land covered by the claimed corridor, as well as on the width of the right of way, regardless of its nature as an easement or fee simple. Tax records and deeds maintained by the County Assessor's office but not disclosed to this Court or to the Plaintiffs (which were subsequently located by the Plaintiffs and presented in the State Court Case) establish a width of the right of way inconsistent with

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the County's claimed 100-foot width across Plaintiffs' properties. It is clear from the County's own records that the County taxed these owners and/or their predecessors on the land when BNSF held the right of way and has now taken an expansive view of the right of way since taking it over. Additionally, the inconsistencies in the County's legal theory regarding the application of RCW 7.28—that it has complied with the statute without actually paying the taxes on the properties—make the Judgment likely to be reversed on appeal. What is most interesting is that most of this evidence was under the control of the County when it sought the Judgment, and yet it was not proffered to the Court, obviously because the County needed the Court to accept its strategically-worded declarations in order to have a chance at success.

2. The Potential Injury to Plaintiffs in the Absence of a Stay is Likely, Severe, and Irreparable.

Regardless of the Court's position as to the relative strength of the case for success on appeal, even though the evidence that has been uncovered since the Court issued the Judgment is strong and has given even the County pause in subsequent proceedings, the potential damage to Plaintiffs is unquestionable. If construction is allowed to move forward before the litigation has run its course, there is nothing reparable about the injury Plaintiffs will suffer. The County's plans call for the removal of long-standing trees, changing topography, drastically widening the trail and changing it to an impervious surface that will significantly increase the volume of stormwater runoff in the environmentally sensitive Lake Sammamish area, and potentially taking out families' homes and improvements. Given the chance that the appeal could be successful, it makes no sense to allow the County to put these homeowners in such a position where even a win on appeal will be rendered meaningless by real world events. Plaintiffs are fighting to maintain their homes and ways of life, which will be unquestionably

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and irreparably altered in the absence of a stay of enforcement pending the appeal. The proverbial toothpaste that is the County's construction project cannot be put back in the tube once begun.

3. The County Will Face No Harm Through Imposition of a Stay.

In contrast to Plaintiffs' imminent harm if a stay is not granted, the third factor-potential harm to the non-movant is minimal, at best. By being required to wait until the appeal runs its course, the County is not being denied anything. In fact, it is being saved the cost and expense of starting a construction project prematurely and suffering the additional expense of probable corrective construction costs.[2]

4. The Public Interest Lies in Ensuring that the County is Not Allowed to Prematurely Enforce the Judgment, Especially in a Way That Impacts Non-Parties to the Instant Case.

The public interest lies in ensuring that the appeal is resolved prior to the County being allowed to use the Judgment as a weapon to preempt the rights of people who are not party to the instant case and whose rights have not been adjudicated. That is essentially what the County is trying to do with its use of the Judgment in its application for City approval of the trail construction project for the whole length of the corridor. The same type of irreparable damage facing Plaintiffs is hanging over hundreds of other people like an unseen Sword of Damocles. Once that sword drops, there is no way to repair that damage, and the County cannot be allowed to wield the Judgment as it has been, especially since there is such a strong argument for Plaintiffs' success on appeal.

[2] The trail design and development process has been going on for about 20 years, so there is no potential damage to the County in waiting for the appeal to be resolved.

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The four elements are met by Plaintiffs in this case. Given what has transpired and come to light since the issuance of the Judgment, summary judgment was not appropriate as ruled by the Court, and the 9th Circuit is likely to reverse at least a portion of the Judgment. In that event, undoing the construction planned by the County is not really possible. Homes, neighborhoods, and ways of life really do hang in the balance and must be protected until at least the appeal is decided, especially given its chance of success due to the factual questions raised by the evidence discovered after the Judgment was issued. If a stay is not enforced, the Court will not be able to avoid the miscarriage of justice that will befall this community of Plaintiffs and non-party homeowners in the event Plaintiffs succeed on appeal after construction begins.

VII. CONCLUSION

The evidence and theories that were not before the Court when the Judgment was issued, but have emerged since the issuance of the Judgment, give the appeal the added strength needed for reversal of at least a portion of the Judgment. Plaintiffs simply ask for the Court's assistance is not allowing the County to broaden the scope of the Judgment and cause irreparable damage to themselves and their fellow homeowners along the lake trail, at least until the appeal is decided.

DATED this 7th day of December, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of December, 2017, the foregoing was filed electronically with the Clerk of the Court to be served by the operation of the Court's electronic filing system upon all parties of record.

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