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No. 389065

THE SUPREME COURT OF WASHINGTON

Court of Appeals Division III No. 38906-5-III

Spokane Superior Court No. 21-2-03396-32

HAROLD T. MESSERSMITH and LISA R. BRYANT, Husband and Wife,

Petitioner,

v.

TOWN OF ROCKFORD

Respondent.

PETITION TO SUPREME COURT FOR REVIEW OF A DECISION BY THE COURT OF APPEALS

Allen T. Miller
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Spokane, WA 99201
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A. IDENTITY OF PETITIONERS

Harold T. Messersmith and Lisa R. Bryant ("the Messersmiths") were the Plaintiffs in the Superior Court, the Respondents in the Court of Appeals, and are the Petitioners before the Supreme Court.

B. COURT OF APPEALS DECISION

Messersmith v. Town of Rockford, No. 38906-5-III. A copy of the decision, filed May 18, 2023, is in the Appendix at pages A-1 through 9. A copy of the order denying petitioner's motion for reconsideration, filed June 29, 2023, is in the Appendix at pages A-10.

C. ISSUES PRESENTED FOR REVIEW

I. Whether the Court of Appeals reversing the Superior Court's grant of summary judgment results in genuine issues of material fact that need to be resolved on remand at the Superior Court.

II. Whether the Court of Appeals properly analyzed the LAWS OF 1889-90, ch. 19, § 32, now codified as RCW 36.87.090.

III. Whether the Court of Appeals properly analyzed the LAWS OF 1889-1890, ch. 7, § 15, which should invalidate the alleged establishment of the alley and streets by the Town of Rockford on Petitioner's property.

D. STATEMENT OF THE CASE

I. Facts

On August 12, 2019, Respondents, Harold Messersmith and Lisa Bryant, acquired legal title to the property commonly referred to as 442 E. Lee Street, Rockford, WA 99030 ("Petitioners' Property"). CP 33. Petitioners' Property borders and/or abuts undeveloped portions of Emma Street and Center Avenue, which contains an undeveloped alley running through the property ("Subject Properties"). CP 49-59.

The Subject Properties are in Waltman's Addition to the Town of Rockford. Both were initially filed on June 5, 1889, with Spokane County and subsequently recorded on June 12, 1889, in Volume B of Plats, Page 20 with the Spokane County Auditor. CP 4, 20. A year later, the Town of Rockford Incorporated, and Waltman's Addition was annexed into the Town of Rockford. CP 5, 28. Since its filing, however, no effort has been made to develop or open the Subject Properties to the public. CP 33-35, 49-50, 62-63.

Over the 130 years of nonuse by the Town of Rockford, the owners of Petitioners' Property (including the predecessors of the property) developed the Subject Properties to include exclusive features such as a corral, garden, shed, and fences. CP 33-35, 96-97. For example, Walter and Ruby Faire have resided in Rockford, Washington since 1955. In 1960, the couple purchased eighteen acres on 115 N. Center Street across from 442 E. Lee Street, Rockford, WA 99030, which ultimately became the Petitioners' property. A-12. In 1968, Bud Storm

purchased the Petitioners' property. *Id.* Mr. Storm subsequently built a house and put up an electric fence around the perimeter. *Id.* Mr. Storm had two horses and Mr. Faire would stretch a hose across the street to water the Storms' horses in the 1970's. *Id.*

Mr. Faire and Mr. Storm served as elected officials together on the Rockford Town Council. *Id.* As a Town Council member, Mr. Storm petitioned to have Center Avenue vacated. *Id.* After three years of residing on the property, Storm sold the land to Terry and Marylin Frost who built the current corral and fences on the Petitioners' property. *Id.* The Frost deed, dated November 25, 1975, described the Petitioners' Property as follows:

> Lots 1 to 16, inclusive, Block 14 Waltman's Addition to the Town of Rockford, according to plat recorded in Volume "B" of Plats, page 20, in Spokane County, Washington, **together with that part of the vacated alley in said Block 14.**

CP 100 (emphasis added); A-15.

At no point during the construction of Rockford has the Town of Rockford or the County of Spokane ever attempted to

use or open the Subject Properties to the public. CP 33-35, 49-50, 62-63. Faire attests that during the sixty-eight years living in the area, he "never observed any member of the public accessing the alley that supposedly goes through the center of the Messersmith property."

II. Procedural History

Petitioners filed a Complaint against the Town of Rockford seeking to quiet title to the Subject Properties on November 29, 2021. CP 3-25. In the underlying lawsuit, both parties sought cross motions for Summary Judgment. CP 67-76, 80-87. Petitioners asserted that pursuant to the Nonuser Statue of 1890, now codified in RCW 36.87.090, the Subject Properties were vacated as they were unused for a period of five years. *Id.* Respondents contended that the Nonuser Statute did not apply as the Town of Rockford incorporated the Subject Properties during the five-year period. *Id.* The trial court found that no effort was made to develop or open the Subject Properties. As a result, the court found that the Subject Properties were vacated under the

Nonuser Statute and granted summary judgment for the Petitioners. CP 134-36.

On May 18, 2023, the Washington Court of Appeals for Division III reversed and remanded the case with instructions to enter judgment in favor of the town of Rockford. Opinion, at p. 9. This was based upon the court's determination that the application of the nonuser statute, *see* LAWS OF 1889-90, ch. 19, § 32, was limited to county roads, not those of a town or city. *Id.* at 8. The Court of Appeals subsequently denied Petitioner's motion for reconsideration on June 29, 2023.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. Standard of Review

Petitioners seek review pursuant to RAP 13.4(b). The rule provides, in pertinent part:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant

> question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

II. This Court should grant review on the grounds that the Court of Appeals' decision conflicts with existing precedent.

Courts in Washington have consistently held that summary judgment is inappropriate when there are "genuine issue[s] of material fact…." *Slack v. Luke*, 192 Wash. App. 909, 915, 370 P.3d 49 (2016) (citing *Lybbert v. Grant County*, 141 Wash.2d 29, 34, 1 P.3d 1124 (2000)). Here, the Court of Appeals reversed and remanded the case with instructions to enter judgment in favor of the defendants. Opinion, at p. 9. This is improper as there are competing declarations that demonstrate there is a genuine issue of material fact. *See* Opinion, at p. 3; A-12. This Court should grant review to resolve the

discrepancy between existing precedent and the Court of Appeals decision.

III. Alternatively, this Court should grant review as this matter is an issue of substantial public concern.

To no fault of their own, Petitioners face losing portions of their property that had been in the control of previous owners for over a century. Notably, the deed to the property never indicated issues of ownership because it stated the alley was vacated. CP 100; A-15. Consequently, this matter is of substantial public concern because the Court of Appeals' decision establishes a precedent that will impact rural property owners across the state of Washington as demand for available land increases. The ambiguity surrounding the application of RCW 36.87.090 demands this Court provide clarity on the matter.

i. This Court should recognize the distinction between towns and cities under the Nonuser statute.

The Court of Appeals held that the distinction between a city and town is irrelevant when considering the application of the Nonuser Statute. Opinion, at p. 8-9. This is based upon its interpretation of *Northwestern Indus., Inc. v. City of Seattle*, 33 Wash. App. 757, 658 P.2d 24 (1983), which held that the annexation of a parcel by a city tolled the operation of the Nonuser Statute. *Id.* at 759-60. Further, the court relied on *Brokaw v. Town of Stanwood*, 79 Wash. 322, 140 P. 358 (1914), to illustrate that the Nonuser statute is inapplicable to plats annexed by towns. Opinion, at p. 8; 79 Wash. 322, 327. Ultimately, the Court of Appeals concluded that the nonuser statute is only applicable to county roads, which is reflected in the plain language of the nonuser statute. Opinion, at p. 8.

Both the Court of Appeals and the court in *Northwestern* acknowledged the possibility of the holding

in *Brokaw* pertaining to incorporation being dicta. Opinion, at p. 8; 33 Wash. App. at 761. Nonetheless, both courts explained that *Brokaw*, 79 Wash. at 327, made a correct statement of law regarding the incorporation of a plat into the town of Stanwood. Opinion, at p. 8; 33 Wash. App. at 761. Petitioners maintain that the distinction between cities and towns is of relevance, and respectfully request this Court to expressly address this matter.

ii. The Laws of 1889-1890, Chapter 7, § 15 should be applied to invalidate the Appellant Town of Rockford's position that Center Avenue and the Alley are not property of the Respondents.

In the event this Court declines to recognize the distinction between towns and cities under the Nonuser statute, this distinction is still of significance under another theory. At the time the Petitioners' property was annexed and incorporated, towns (i.e., municipal corporations that were not at least third-class) were limited to being one-

square mile in size at the time. *See* Laws of 1889-90, Ch. 7, § 15.

Prior to the Washington State Legislature amending relevant portions of the laws in 1961, there was a longstanding problem of town-annexations exceeding the one-square mile limitation. *See* Laws of 1889-90, Ch. 7, § 15 ("Provided, That not more than one square mile shall be included within the corporate limits of municipal corporations of the fourth class…"). On March 31, 1961, the Legislature eliminated the threat of future challenges by enacting the following law:

> Any incorporation of a municipal corporation of the fourth class and any annexation of territory to a municipal of the fourth class prior to the effective date of this act, which is otherwise valid except for compliance with the limitation to the area of one square mile as prescribed by section 15, page 141, Laws of 1889-90, is hereby validated and declared to be a valid incorporation or annexation in all respects.

1961 Wash. Laws Ex. Sess., Ch. 16, § 1.

This was not the Legislature's first attempt to resolve this conundrum. Prior attempts made by the Legislature had been ruled unconstitutional. *See Parosa v. Tacoma*, 57 Wash.2d 409, 357 P.2d 873 (1960). This prompted the legislature to enact 1961 Session Law, Chapter 277. The Governor, however, vetoed three sections of the law. The Legislature responded by enacting the aforementioned section. *See* 1961 Wash. Laws Ex. Sess., Ch. 16, § 1.

Governor Rosellini's veto-message on the second attempted fix makes plain the problem of invalid annexations and illustrates this is a matter of substantial public interest. *See id.* at 2256. During this period, municipalities were starting to expand, which brought the issue of invalid annexations to a breaking point. Despite compelling arguments supporting the validation of such incorporations, the Governor proceeded to veto relevant sections of Chapter 16. 1961 Wash. Laws Sess. In explaining their decision, the

Governor stated:

> I cannot help but feel that it is unjust and violative of the most fundamental principles of our form of government to permit a small group of people, such as 300 inhabitants, to incorporate and to include within such incorporation or annexation, without the consent of the owners of such areas, unlimited tracts of land.

1961 Wash. Laws Ex. Sess., Ch. 16, 2255. The *Parosa* decision also sheds light on this background, emphasizing how it had always been accepted that annexations were invalid for exceeding the one square-mile limit, but that it had been thought original incorporations remained beyond challenge. 57 Wash.2d 409, 411. That is the reason for the "emergency" declaration. *See* 1961 Wash. Laws Ex. Sess., Ch. 16, § 3.

Petitioners face a similar issue to property owners prior to the enactment of Chapter 16 in 1961. As explained by Governor Rosellini, it is problematic to "permit a small minority to tax owners of large areas of land without their consent…." 1961 Wash. Ex. Sess., Ch. 16, § 3, 2256. Even

if the Petitioners' property does not fall within the scope of the Nonuser statute, the incorporation was invalid from the start. This is clear upon evaluating the legislative history of relevant statutory provisions. *See* Laws of 1889-90, Ch. 7, § 15, 141. This Court should grant review to provide clarity on this issue stemming from years of statutory ambiguity.

F. CONCLUSION

Based on the foregoing, Petitioners respectfully request that the Court grant the Petition for Discretionary review.

I certify that the brief contains 2,126 words, excluding the parts of the brief exempted under RAP 18.17.

RESPECTFULLY SUBMITTED this 28th day of July 2023.

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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the foregoing electronically through the Washington Supreme Court's online Portal to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED this day 28th of July, 2023, at Spokane, Washington.

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APPENDIX

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FILED
MAY 18, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

HAROLD MESSERSMITH, and LISA R. BRYANT, husband and wife,	)	No. 38906-5-III
Respondents,	)	
v.	)	PUBLISHED OPINION
TOWN OF ROCKFORD,	)	
Appellant.	)	

SIDDOWAY, J. — The town of Rockford appeals a summary judgment entered in favor of Harold Messersmith and Lisa Bryant, which quieted title to allegedly undeveloped roads and an alleyway dedicated by a plat for Waltman's Addition recorded in 1889. Mr. Messersmith and Ms. Bryant relied on the terms of Washington's nonuser statute as it existed between 1890 and 1909 to argue that the roads, having gone unopened for public use for more than five years, had reverted to their predecessor in interest.

The nonuser statute imposes a time limit for opening only county roads. The roads and alleyway in Waltman's Addition ceased to be subject to the nonuser statute in 1890 when the town of Rockford was incorporated and Waltman's Addition was annexed

and became part of the town. We reverse the judgment in the plaintiffs' favor and remand with directions to enter judgment in favor of the town of Rockford.

FACTS AND PROCEDURAL BACKGROUND

In August 2019, Harold Messersmith and his wife Lisa Bryant acquired title to the property commonly referred to as 442 East Lee Street in the town of Rockford. They later discovered that portions of their property, which included the 16 lots in block 14 of Waltman's Addition, had been dedicated as part of Emma Street, Center Avenue, and an alleyway by the original plat for the addition. It had been recorded with the Spokane County auditor in June 1889. Emma Street, Center Avenue, and the alleyway had never been developed as roads and, according to Mr. Messersmith, the couple's predecessors had developed the land on which the roads were to have been located, installing permanent fixtures, including fences, corrals, gardens, and sheds. Mr. Messersmith and Ms. Bryant brought the action below to quiet title to the strips of land that fell within the platted roads and alleyway.

It is undisputed that when the plat of Waltman's Addition was recorded in June 1889, the platted property was located in unincorporated Spokane County. One year later, in June 1890, the town of Rockford incorporated, and Waltman's Addition was annexed into Rockford. That same year, the state legislature passed the nonuser statute, now codified at RCW 36.87.090. It 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.

LAWS OF 1889-90, ch. 19, § 32.

Mr. Messersmith and Ms. Bryant moved for summary judgment, relying on declarations from a former owner of the property, Mr. Messersmith, the couple's lawyer, and a land surveyor, attesting that to their knowledge the roads and alleyway had never been opened for public use. Anticipating that the town of Rockford would contend that the automatic vacation feature of the 1890 statute was eliminated by legislative amendment in 1909,[1] the plaintiffs argued in their summary judgment briefing that the change was irrelevant, since the roadways and alley would have automatically been vacated and reverted to their predecessor before the 1909 amendment.

The town responded with different arguments, however. In its own motion for summary judgment, it argued that when Waltman's Addition was annexed in 1890, its platted roads were removed from the operation of the nonuser statute. It also submitted a declaration from Heidi Johnson, the town clerk and treasurer, asserting that the roads and alleyway *had* been open for public use, creating a disputed issue of fact requiring trial.

---

[1] The 1909 amendment provided that the statute did not apply to "any highway, street, alley or public place dedicated as such in any plat, whether the land . . . 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." LAWS OF 1909, ch. 90, § 1, *recodified as* RCW 36.87.090.

The trial court granted summary judgment to Mr. Messersmith and Ms. Bryant, resting its decision on the fact that the subject properties "were not opened for public use within the statutorily required five (5) year period to avoid automatic vacation." Clerk's Papers (CP) at 135. The town of Rockford appeals.

ANALYSIS

The town of Rockford continues to advance both arguments presented to the trial court. It is supported in its argument that the nonuser statute applies to only "county" roads by amicus curiae, the Washington State Association of Municipal Attorneys. The legal argument that the nonuser statute does not apply proves dispositive.

Summary judgment orders are reviewed de novo, with this court engaging in the same inquiry as the trial court. *Lee v. State*, 185 Wn.2d 608, 614, 374 P.3d 157 (2016). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Construction of a statute is a question of law that we review de novo. *Lee*, 185 Wn.2d at 614.

The issue of whether the nonuser statute operates to automatically vacate unopened roads that fall within a city or town has been touched on in several Washington decisions. In a controlling decision by our Supreme Court, *Brokaw v. Town of Stanwood*, 79 Wash. 322, 140 P. 358 (1914), the Brokaws sought to enjoin the town of Stanwood from taking possession of, and improving for street use, a 16.5 by 280 foot strip of land along the south border of their property. The strip fell within the boundary of "Rainier

Street" as platted and dedicated on a plat recorded with the Snohomish County auditor in July 1891. *Id.* at 323. The Brokaws contended that the nonuser statute adopted in 1890 supported their claim to the land because up until the time they acquired the property in 1902, and thereafter, the town of Stanwood had never used it as a public street. *Id.* at 324. Alternatively, they claimed to have acquired title by adverse possession. *Id.* at 326-27.

In ruling in favor of the town, the Supreme Court first reasoned that for the period from the 1891 recording of the plat until the Brokaws acquired the property in 1902, no evidence was presented that Rainier Street *was not* opened for public use:

> For aught that appears in this record, . . . Rainier street, along in front of respondents' lots, may have, during this entire period, been actually physically open for public use, unobstructed, unenclosed and, by nature, well suited for ordinary travel by such means as are in common use upon public highways.

Id. at 325. The court also set a low bar for proving a road opened, holding that "[t]he public is not, under all circumstances, obliged to take physical possession of public highways whether they have been acquired by dedication or otherwise, in order to preserve its rights therein." *Id.* at 326.

Turning to the issue relevant to the present case, the court held it "manifest" that once the town of Stanwood was incorporated in 1903, the Brokaws had no argument:

> That incorporation brought the street within the corporate limits of the town, thereby exempting it from the further operation of the law of 1890 above quoted. It was, thereafter, no longer subject to vacation or to being lost to the public by the operation of that statute, since that statute had no application to streets within cities and towns.

Id. at 327.

Mr. Messersmith and Ms. Bryant seek to avoid the plain import of this passage by arguing that it was dictum. We disagree. "'[D]icta' is 'language not necessary to the decision in a particular case.'" *ADCI Corp. v. Nguyen*, 16 Wn. App. 2d 77, 86, 479 P.3d 1175 (2021) (quoting *In re Marriage of Roth*, 72 Wn. App. 566, 570, 865 P.2d 43 (1994)). The passage in *Brokaw* was not unnecessary; it supplied a second reason why the Brokaws' claim could not succeed. "'[W]here a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*.'" *State v. White*, 135 Wn.2d 761, 767 n.3, 958 P.2d 982 (1998) (alterations in original) (quoting *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537, 69 S. Ct. 1235, 93 L. Ed. 1524 (1949)).

In any event, *Brokaw* is supported by other reported Washington cases. In holding that the nonuser statute ceased to operate once Rainier Street fell within the town of Stanwood's corporate limits, *Brokaw* cited as support the court's 1907 decision in *Murphy v. King County*, 45 Wash. 587, 88 P. 1115. *Brokaw*, 79 Wash. at 324-25. That opinion held that the nonuser statute *had* operated to automatically vacate unopened roads dedicated by a plat of land located in unincorporated King County, observing that the nonuser statute applied only to county roads:

> There may be strong and controlling reasons why a street in a city or town should not be deemed vacated after the lapse of five years, unless open to public travel within that time, but on the other hand we see no plausible reason why the right of a board of county commissioners to open a public highway should continue forever . . . .
>
> We will add, in conclusion that [the nonuser statute] applies only to roads and highways under the control and supervision of the boards of county commissioners of the respective counties, and this decision in no manner conflicts with the decision in [*Town of*] *West Seattle v. West Seattle* [*Land &*] *Imp*[*rovement*] *Co.*, 38 Wash. 359, 80 P[.] 549 [1905], and other cases in this court where streets and alleys in incorporated cities and towns were involved.

Murphy, 45 Wash. at 593.

Finally, this court held that *Brokaw* correctly stated the law on this score in *Northwestern Industries, Inc. v. City of Seattle*, 33 Wn. App. 757, 761, 658 P.2d 24 (1983). Northwestern had filed suit to quiet title to a strip of land running between two parcels of its property; the strip had been dedicated as an avenue by a plat filed in King County in 1890. *Id.* at 758. In 1891, the area was annexed to the city of Seattle. *Id.* In seeking to quiet title, Northwestern evidently argued, as Mr. Messersmith and Ms. Bryant do, that the Supreme Court's discussion in *Brokaw* about the nonuser statute not applying to streets within cities and towns was dictum. *Id.* at 761.

This court disagreed. It pointed out that the nonuser statute was enacted as part of an act "Relating to County Roads." *Id.* at 759. Absent a "clear and unambiguous" legislative directive, it refused to read the state law as interfering with the rules and ordinances of a city. *Id.* at 759-60. It likewise refused to construe the nonuser statute as

creating a vested right of reversion in the landowner, should a public road not be opened in five years. *Id.* at 760.

Mr. Messersmith and Ms. Bryant argue that *Northwestern* held only that the court would not construe the nonuser statute "'to interfere with the power of a first-class city such as Seattle over its own streets.'" Resp'ts' Br. at 7 (alteration in original) (quoting *Northwestern*, 33 Wn. App. at 759-60). While Seattle is a first-class city and the quoted language appears in the opinion, the court's holding was unrelated to Seattle's status as a first-class city. The basis for reversal was the fact that within one year of the plat being recorded, the property "pass[ed] . . . out of county control and therefore out of the reach of the statute's operation." *Id.* at 760. Elsewhere, addressing Northwestern's argument that the court should disregard *Brokaw*'s statement "that incorporation of the Town of Stanwood tolled the operation of the nonuser statute," the court held that even if the statement could be characterized as dictum, "our analysis of the statute shows that the court there made a correct statement of the law," and "[t]he trial court did not err in following it." *Id.* at 761.

The plain language of the nonuser statute as it existed at relevant times limits its application to "county" roads. LAWS OF 1889-90, ch. 19, § 32. It ceased to apply to the roads in Waltman's Addition in June 1890, when the town of Rockford incorporated and Waltman's Addition was annexed into and became part of the town. We reverse the

summary judgment in favor of the plaintiffs and remand with directions to enter judgment in favor of the town of Rockford.

Siddoway, J.

WE CONCUR:

Fearing, C.J.

Lawrence-Berrey, J.

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

HAROLD MESSERSMITH, and LISA R. BRYANT, husband and wife, Respondents, v. TOWN OF ROCKFORD, Appellant.	)	No. 38906-5-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered Respondents' motion for reconsideration, and record and file herein, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of May 18, 2023, is hereby denied.

PANEL: Judges Siddoway, Fearing, Lawrence-Berrey

FOR THE COURT:

George Fearing

GEORGE B. FEARING
Chief Judge

No. 389065

COURT OF APPEALS,

DIVISION III

OF THE STATE OF WASHINGTON

HAROLD T. MESSERSMITH and LISA R. BRYANT, Husband and Wife,

Respondents,

v.

TOWN OF ROCKFORD

Appellant.

DECLARATION OF WALTER WAYNE FAIRE IN SUPPORT OF MOTION FOR RECONSIDERATION

Allen T. Miller
Pierce J. Jordan
Paine Hamblen, LLP
717 W. Sprague Avenue
Spokane, WA 99201
(509) 455-6000

1. I, Walter Wayne Faire, and my wife Ruby have lived in Rockford since 1955.

2. In 1960 we originally bought 18 acres at 115 N. Center St. which is across the street from the Messersmith property at 442 E. Lee Street.

3. I served on the Rockford town council for approximately four years in the 1970's.

4. Bud Storm served with me on the town council and petitioned to have Center Avenue vacated during the time he owned the property at 442 E. Lee Street.

5. Bud Storm bought the property at 442 E. Lee Street in November of 1968. Before he built the house the Messersmiths live in now, he built an electric fence around the perimeter of the property. Bud had two horses.

6. I would stretch a garden hose from my house across Lee Street to fill the water trough for Bud Storms horses.

7. In November of 1975 Bud sold the property at 442 E. Lee Street to Terry and Marylin Frost.

8. Shortly after Terry Frost moved in He took down the electric fence and built the wood fence currently around the Messersmith property.

9. In the 63 years I have lived across the street from 442 E. Lee St., I have never observed any member of the public

accessing the alley that supposedly goes through the center of the Messersmith property.

I DECLARE UNDER PENALTY OF PERJURY PURSANT TO THE LAW OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 30th day of May, 2023, at Rockford, Washington.

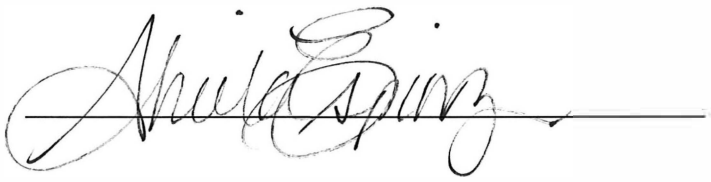
Walter Wayne Faire

WALTER WAYNE FAIRE

CERTIFICATE OF TRANSMITTAL

On this date, the undersigned sent to counsel of record a copy of this document via submitting the document to the Court of Appeals filing portal. I hereby certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED at Spokane, WA this 7th day of June, 2023.



8809020007

PIONEER NATIONAL TITLE INSURANCE
A TICOR COMPANY

Filed for Record at Request of

THIS SPACE RESERVED FOR RECORDER'S USE

[illegible] TICOR TITLE

REQUEST OF

SEP 2 8 32 AM '88

WILLIAM E. DONAHUE
AUDITOR
SPOKANE COUNTY, WASH.
DEPUTY
SAMPSON

$5.00

REVENUE STAMPS

OFF. VOL. 991 PAGE 454

TO RICHARD E. DULLANTY
ATTORNEY AT LAW
216-217 PAULSEN BLDG.
SPOKANE, WASH.

Rocks + Rocks Inc.
N. 103 Locust Rd.
Spokane, WA 99206

FORM LSB

Statutory Warranty Deed

THE GRANTORS, MILTON P. STORM and EILEEN M. STORM, his wife,

for and in consideration of ten dollars and other valuable consideration,

in hand paid, conveys and warrants to TERRY FROST and MARILYN FROST, his wife,

the following described real estate, situated in the County of Spokane, State of Washington:

Lots 1 to 16, inclusive, Block 14, Waltman's Addition to the Town of Rockford, according to plat recorded in Volume "B" of Plats, page 20, in Spokane County, Washington, together with that part of the vacated alley contained in said Block 14.

1% Excise Tax on Real Estate
Sale, Amt. Pd $ 500.00
Date 10/4/88 No. 142702
DON W. BROWN, Co. Treas.
By [illegible]

Dated this 25 day of November, 1975.

Milton P. Storm (SEAL)
Milton P. Storm

Eileen M. Storm (SEAL)
Eileen M. Storm

STATE OF WASHINGTON,
County of Spokane. } ss.

On this day personally appeared before me MILTON P. STORM and EILEEN M. STORM, to me known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 25 day of [illegible] 19[illegible]

Notary Public in and for the State of Washington, residing at Spokane.

SESSION LAWS

OF THE

STATE OF WASHINGTON,

ENACTED BY THE

FIRST STATE LEGISLATURE,

SESSION OF 1889-90.

[COMPILED IN CHAPTERS, WITH MARGINAL NOTES AND INDEX, BY ALLEN WEIR, SECRETARY OF STATE.]

PUBLISHED BY AUTHORITY.

OLYMPIA, WASH.:
O. C. WHITE, STATE PRINTER.
1890.

the same way, more than fifteen hundred and less than ten thousand inhabitants, shall constitute the third class.

SEC. 13. All corporations organized under this act and containing not more than fifteen hundred nor less than three hundred inhabitants on the first day of the month of January last, shall be known as towns, and shall remain such until they become cities of the third class.

How advanced as to class.

SEC. 14. A city of the second class shall not be advanced to the first class until it attains a population of twenty thousand inhabitants. A city of the third class shall not be advanced to the second class until it attains a population of ten thousand. A town shall not be advanced to a city of the third class until it attains a population of fifteen hundred inhabitants.

SEC. 15. Municipal corporations now or hereafter organized are bodies politic and corporate under the name of the city of ———, or the town of ———, as the case may be, and as such may sue and be sued, contract or be contracted with, acquire, hold, possess and dispose of property, subject to the restrictions contained in other chapters of this act, having a common seal, and change or alter the same at pleasure, and exercise such other powers, and have such other privileges as are conferred by this act: *Provided*, That not more than one square mile in area shall be included within the corporate limits of municipal corporations of the fourth class, nor shall more than twenty acres of unplatted land belonging to any one person be taken within the corporate limits of municipal corporations of the fourth class without the consent of the owner of such unplatted land.

Limit of area.

CITIES AND TOWNS; HOW ADVANCED.

SEC. 16. When a petition signed by one hundred freeholders of a town, or two hundred freeholders of a city of the third class, is presented to the council of the corporation in which the signers reside, setting forth that they desire such town to be advanced to a city of the third class, or such city of the third class to a city of the second class, and that they have the population requisite for such advancement, the council shall cause notice to be given

CHAPTER 16.

[S. B. 43.]

TOWNS—VALIDATION OF INCORPORATION, ANNEXATION.

AN ACT Relating to municipal corporations of the fourth class commonly known as towns, validating certain incorporations thereof and annexations of territory thereto; repealing section 5, chapter 277, Laws of 1961; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Incorporations, annexations, validated.

SECTION 1. Any incorporation of a municipal corporation of the fourth class and any annexation of territory to a municipal corporation of the fourth class prior to the effective date of this act, which is otherwise valid except for compliance with the limitation to the area of one square mile as prescribed by section 15, page 141, Laws of 1889-90, is hereby validated and declared to be a valid incorporation or annexation in all respects.

Repeal.

SEC. 2. Section 5, chapter 277, Laws of 1961 is hereby repealed.

Emergency.

SEC. 3. This act is necessary for the immediate preservation of the public peace, health and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the Senate March 25, 1961.

Passed the House March 26, 1961.

Approved by the Governor March 31, 1961.

in some bank to the credit of the district in lieu of the bond, securities approved by the board of a market value in an amount not less than the amount of the maximum deposit. All depositaries which have qualified for insured deposits under any federal deposit insurance act need not furnish bonds or securities, except for so much of the deposit as is not so insured.

Passed the Senate February 18, 1961

Passed the House March 6, 1961.

Approved by the Governor March 20, 1961.

CHAPTER 277.

[H. B. 455.]

CITIES AND TOWNS—JURISDICTION OVER ADJACENT WATERS. VALIDATION OF CERTAIN ANNEXATIONS.

AN ACT relating to cities and towns; amending section 15, page 141, Laws of 1890 and RCW 35.21.010 and 35.27.020; amending section 1, chapter 111, Laws of 1909 and RCW 35.21.160; and repealing section 1, chapter 109, Laws of 1951.

Be it enacted by the Legislature of the State of Washington:

Section 1. Section 15, page 141, Laws of 1890 (heretofore divided and codified as RCW 35.21.010 and 35.27.020) is divided and amended as set forth in sections 2 and 3 of this act, and the provisions as contained in this act shall apply to all incorporation and annexation proceedings now pending or hereinafter initiated.

Vetoed.

Sec. 2. (RCW 35.21.010) Municipal corporations now or hereafter organized are bodies politic and corporate under the name of the city of .....,
or the town of ....., *as the case may be, and as such may sue and be sued, contract or be contracted with, acquire, hold, possess, and dispose of property, subject to the restrictions contained in*

this title, have a common seal, and change or alter the same at pleasure, and exercise such other powers, and have such other privileges as are conferred by this title.

SEC. 3. (RCW 35.27.020) No more than twenty acres of unplatted land belonging to any one person shall be taken into the limits of municipal corporations of the fourth class without the consent of the owner thereof, except that this limitation shall not be applicable to original incorporation proceedings. Vetoed.

SEC. 4. Section 1, chapter 111, Laws of 1909 and RCW 35.21.160 are each amended to read as follows: RCW 35.21.160 amended.

The powers and jurisdiction of all incorporated cities and towns of the state having their boundaries or any part thereof adjacent to or fronting on any bay or bays, lake or lakes, sound or sounds, river or rivers, or other navigable waters are hereby extended into and over such waters and over any tidelands intervening between any such boundary and any such waters to the middle of such bays, sounds, lakes, rivers, or other waters in every manner and for every purpose that such powers and jurisdiction could be exercised if the waters were within the city or town limits. Cities and towns. Jurisdiction over adjacent waters.

SEC. 5. Any annexation made to any city or town of the fourth class prior to the effective date of this 1961 amendatory act which is otherwise valid except for compliance with the limitation to the area of one square mile is hereby declared to be a valid annexation in all respects. Prior annexations validated.

SEC. 6. Section 1, chapter 109, Laws of 1951 is hereby repealed. Repeal.

Passed the House March 6, 1961.

Passed the Senate March 5, 1961.

Approved by the Governor March 20, 1961, with the exception of Sections 1, 2, and 3, which are vetoed.

NOTE: Excerpt of Governor's veto message reads as follows:

Veto message, excerpt.

"This Bill as amended would permit, on original incorporation proceedings, cities of the 4th class to include within the area of proposed incorporation, practically unlimited territories within a county. The law dealing with the powers of 4th class cities, was originally passed during the 1889-1890 Legislative session (Chapter 7, section 15, page 141). It provides that cities of the 4th class upon original incorporation, or in annexation proceedings, cannot include more than one square mile of territory. This law likewise prohibits 4th class cities from including more than 20 acres of unplatted lands belonging to any one owner without the consent of such owner.

"I am fully aware of the fact that the proponents of sections 1, 2, and 3 of this bill have many excellent arguments in favor why these sections should not be vetoed. Thus I sympathize with the view of the Fife School District which takes the position that if the City of Tacoma were to annex the area belonging to the Port of Tacoma, the tax base of the school district would be jeopardized. I also realize that there is some doubt as to whether or not by vetoing sections 1, 2, and 3 of this bill, section 5 thereof, validating previous annexations, can stand.

"On the other hand, the Association of Washington Cities has recommended that I veto sections 1, 2, and 3. This Association to my mind is the most authoritative source of information available to me with reference to problems related to cities and towns.

"I cannot help but feel that it is unjust and violative of the most fundamental priniciples of our form of government to permit a small group of people, such as 300 inhabitants, to incorporate and to include within such incorporation or annexation, without the consent of the owners of such areas, unlimited tracts of lands. To permit such action, to my mind, would permit a small minority to tax owners of large areas of land without their consent, and without representation in the city to be incorporated. I am also impressed by the fact that any action other than the action I am about to take, might seriously hamper the future development of the largest tract available to the Port of Tacoma for industrial development.

"The majority of the Council of the City of Tacoma have asked me to veto sections 1, 2, and 3 of this bill. The Tacoma Labor Council, the Pierce County Commissioners, the Tacoma Real Estate Board, and the Chamber of Commerce of the City of Tacoma have unanimously recommended that I veto sections 1, 2, and 3. Let me stress again, that I recognize the problem involved in the consideration of this bill is by no means a one-sided one, and it is exactly for these considerations that I have urged the Legislature to pass Senate Bill No. 95 which creates a Joint Legislative Committee on urban area development. This Committee, I am sure, will give full consideration to the problem presented to us by the instant Act. For this reason I feel that pending a full and complete study by this Joint Legislative Committee, the interests of the State will be best served by leaving the law as it now stands, and by vetoing sections 1, 2, and 3.

"Section 4 of this bill, as amended, merely restricts the jurisdiction of 4th class cities and towns bordering on lakes, sounds, or navigable waters, to the one square mile area.

"Section 5 purports to validate annexations made during the past ten years by 4th class cities and towns which annexed areas exceeding one square mile. This validation is necessary because the Supreme Court sitting *En banc* in the case of PAROSA vs. THE CITY OF TACOMA, and the PORT OF TACOMA vs. HARRY SPRINKER, *et al* (157 Washington Decisions, 307) declared a 1951 statute purporting to repeal the 1,000 acre limitation unconstitutional.

"Section 6 merely follows the result reached by the Supreme Court with reference to its construction of section 1, chapter 109, Laws of 1951, in the above captioned cases.

"For the reasons indicated, sections 1, 2, and 3 of House Bill No. 455 are vetoed; the remainder of the bill is approved."

ALBERT D. ROSELLINI,
Governor.

[2256]

PAINE HAMBLEN LLP

July 28, 2023 - 7:34 AM

Filing Petition for Review

Transmittal Information

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Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Harold Messersmith, et al v. Town of Rockford (389065)

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