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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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CASE NO. 303519

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

(S)

PAT McINTYRE, a single man; DAVID THOMPSON, a single
man; and GARY PETERS, a single man,

Appellants,

v.

SPOKANE VALLEY HERITAGE MUSEUM, d/b/a SPOKANE
VALLEY LEGACY FOUNDATION, a non-profit corporation,

Respondent.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

	Page
I. SUMMARY OF REPLY	1
A. <u>ISSUES</u>	1
<u>Issue No. 1:</u> The Trial Court’s Findings of Fact that the ...1, 2 property “was not vacant after 1990” is supported by substantial evidence; Respondent’s Brief, p. 11	
<u>Issue No. 2:</u> The Trial Court’s Findings of Fact that1, 3 Spokane County held the property in its governmental capacity was supported by substantial evidence; Respondent’s Brief, p. 12	
<u>Issue No. 3:</u> Prescriptive use must be exclusive as a1, 7 matter of law.	
<u>Issue No. 4:</u> The use by the businesses’ customers was ..2, 11 presumed permissive based on <i>Imrie v. Steve Kelly, et al.</i> 160 Wn.App. 1, 7, 250 P.3d 1045(2010); Respondent’s Brief, p. 16	
<u>Issue No. 5:</u> The use by the customers of the three2, 14 adjoining businesses was not hostile; Respondent’s Brief, p. 16	
<u>Issue No. 6:</u> While Spokane County was in fee simple ...2, 18 title as a matter of law, the County held the property in its governmental capacity, Respondent’s Brief, p. 31	
II. <u>CONCLUSIONS</u>	20

TABLE OF AUTHORITIES

Cases	Page
<i>810 Properties v. Jump</i> , 141 Wn.App. 688, 170 P.3d 120910, 13 (Wash.App. Div. 3 2007)	
<i>Brown v. Voss</i> , 105 Wn.2d 366, 715 P.2d 514 (Wash. 1986).....9	
<i>Burnett v. Knight</i> , 428 S.W.2d, 470 (Tex.Civ.App. Dallas 1968)8	
<i>Chaplin v. Sanders</i> , 100 Wn.2d 853, 676 P.2d 431 (Wash. 1984)8	
<i>Commercial Waterway Dist. No. 1 of King County v. Permanente</i>4 <i>Cement Co.</i> , 61 Wn.2d 509, 379 P.2d 178 (Wash. 1963)	
<i>Drake v. Smersh</i> , 122 Wn.App. 147, 89 P.3d 726 (Wash.....11, 12, 13, 15 App.Div. 1 2004)	
<i>Hagerman v. Seattle</i> , 189 Wash. 694, 66 P.2d 1152 (Wash. 1937).....19	
<i>Kunkel v. Fischer</i> , 106 Wn.App. 599, 23 P.3d 1128 (Wash.App.12, 13 Div. 1 2001)	
<i>Imrie v. Kelly</i> , 160 Wn.App., 250 P.3d 1045 (Wash.App. Div. 3 ...2, 11, 12 2010)	
<i>Mahon v. Haas</i> , 2 Wn.App. 566, 468 P.2d 713 (Wash.App. Div 315, 17 1970)	
<i>Martin v. Rondono</i> , 175 Mont. 321, 573 P.2d (Mont. 1978).....9	
<i>Miller v. Anderson</i> , 91 Wn.App. 822, 964 P.2d 365 (Wash. App.6, 14 Div. 1 1998)	
<i>NW Cities Gas Co. v. Western Fuel Co., Inc.</i> , 13 Wn.2d 75,7, 8 123 P.2d 771 (Wash. 1942)	
<i>Okeson v. City of Seattle</i> , 150 Wn.2d 540, 78 P.3d 1279 (Wash.....14 2003)	
<i>Paul v. Mead</i> , 234 Iowa 1, 11 N.W. 2d 706 (Iowa 1943).....8	
<i>Primark Inc. v. Burien Gardens Associates</i> , 63 Wn.App. 900,.....16, 17 823 P.2d 1116, (Wash.App. Div. 1 1992)	
<i>Rick v. Grubbs</i> , 147 Tex. 267, 214 S.W.2d 925 (Tex. 1948).....8	
<i>Russell v. Gullett</i> , 285 Or. 63, 589 P.2d 729 (Or. 1979).....8	
<i>Schulenbarger v. Johnstone</i> , 64 Wash. 202, 116 P. 843 (Wash.8 1911)	
<i>Standing Rock Homeowners Ass'n v. Misich</i> , , 106 Wash. App.16 231, 240 23 P.3d 520 (Wash.App. Div. 3 2001)	
<i>The Mountaineers v. Wymer</i> , 56 Wn.2d 721, 355 P.2d 341 (Wash.7 1960)	
<i>Young v. Lacy</i> , 221 Neb. 511, 378 N.W.2d, 192 (Neb. 1985).....8	

Statutes:
RCW 8.24.0107

Journals:
3 Am. Jur. 2d 75 at 1718

I. SUMMARY OF REPLY

Three adjoining business on Sprague Avenue, Spokane, Washington, appealed a bench trial decision denying their claim for prescriptive roadway and parking spaces over the adjoining Valley Museum's driveway and parking spaces. The Response Brief conceded, as did the Court and the Museum at trial, that the three prescriptive elements obtained but Respondent argued for affirmance on bases that:

Issue No. 1: The Trial Court's Findings of Fact that the property "was not vacant after 1990" is supported by substantial evidence; *Respondent's Brief, p. 11.*

Issue No. 2: The Trial Court's Findings of Fact that Spokane County held the property in its governmental capacity was supported by substantial evidence; *Respondent's Brief, p. 12.*

Issue No. 3: Prescriptive use must be exclusive as a matter of law;

Issue No. 4: The use by the businesses' customers was presumed permissive based on *Imrie v. Steve Kelly, et al.*, 160 Wn.App. 1, 7, 250 P.3d 1045 (2010); *Respondent's Brief*, p. 16.

Issue No. 5: The use by the customers of the three adjoining businesses was not hostile; *Respondent's Brief*, p. 16.

Issue No. 6: While Spokane County was in fee simple title, as a matter of law, the County held the property in its governmental capacity; *Respondent's Brief*, p. 31.

McIntyre, Thompson and Peters reply that these arguments rely on outmoded or out of state case law and ignore the undisputed transcript testimony.

A. ISSUES.

Issue No. 1: The Trial Court's Findings of Fact that the property "was not vacant after 1990" is supported by substantial evidence; *Respondent's Brief*, p. 11.

Use and occupancy of the County's two lots and small building, after 1990, is an integral element of issues of: The County's proprietary vs. governmental capacity; the County's "implied permissive use" or "neighborly acquiescence"; and, hostility in prescriptive use by the public.

The entire drive area and parking area property is paved. The balance (15%) of the property is occupied by the Museum building. *Exhibit P-1*. To that extent, it is not vacant and undeveloped in the context of the permissive use cases.

In 1990, the property was leased for about a year, under written lease between Spokane County and a retail picture framing business. RP p. 14, ll 23-25; RP p. 60, ll 13-14. During this lease, Pat McIntyre, the owner of adjoining Ichabod's Tavern, had an "aggressive" discussion with the frame shop owner over their demand to stop tavern customers from driving and parking on the frame shop's leased land. RP p. 12, ll 13-16. Mr. Secor of Spokane County Parks testified that neither Spokane County nor anyone else occupied the property from 1990 until 2004. RP p. 86, ll 10-11. It is undisputed that tavern, hardware store and restaurant customers and vendors used the roadway and parking areas continuously from 1990 to 2004. Mr. Thompson testified that no one else physically used the property in fifty years. RP p. 2, ll -24.

Issue No. 2: The Trial Court's Findings of Fact that Spokane County held the property in its governmental capacity was supported by substantial evidence; *Respondent's Brief*, p. 12.

Spokane County never “used” the property for any purpose except to post its “For Rent or Sale” sign and occasional one-day, event rental, such as a private special wedding reception. RP p. 14, ll 1-20; RP p. 13, ll 21 – RP p. 15, ll 1-8; RP p. 98, ll 17-25. Mr. Secor pointedly testified that the building was never used for government offices of any kind. RP p. 86, ll 1-9.

The *Duwamish Slough* cases specify that holding property in a governmental vs. proprietary capacity is determined by use not intent: by legislated trust not with right of sale. *Commercial Waterway Dist. No. 1, etc., v. Permanente Cement Co.*, 61 Wn.2d, 509. Judge Eitzen erred when she concluded that the County’s governmental capacity was demonstrated by its intent to historically preserve the old building. RP p. 63. The only County work on the building was two instances of repair, and Mr. Secor could not even recall what his crew did. RP p. 86, ll 10-11.

The successor City of Spokane Valley imposed a reversionary condition in the ordinance approving its grant to the Museum, that the Museum be open to the public. CP 61, para. 3. But, this is after

the period of County ownership. The County's Quitclaim Deed to the City of Spokane Valley had no historic preservation or any other restrictions. *Exhibit P-2.*

The County continuously advertised the property "For Sale or Rent," for decades. RP p. 14, ll 1-20.

The County's demonstrated plan was to divest itself of the property, to the tavern owner or any private buyer. After over twenty years, the County gave it away with no strings attached. The County's deed to the City of Spokane Valley demonstrates the County's intent that there be no historic preservation restrictions on the property. *Exhibit P-2.*

There is no other evidence than the intent was other than divestment with or without payment of consideration and free and clear of any historic preservation restriction during or after ownership.

Tavern, restaurant and hardware store customers and vendors driving back and forth across the roadway and parking cars in the striped stalls was hostile to the frame shop, County and Museum, by any definition.

The customers' vehicles demonstrated their disdain for the County's barriers by driving vehicles over them and breaking them up. RP p. 17, ll 1-3.

The initial burden of proof is on the Museum to prove use was permissive. The burden then shifts to the claimant to prove that permissive use was terminated. *Miller v. Anderson*, 91 Wn.App. 822, 824, 964 P.2d 365.

Applying inapposite and outdated rules of law, Museum argues that the Judge reasonably inferred that there was permissive use by the County's "neighborly sufferance." The record circumstance from which the Court drew this inference was, solitarily, the parking area was in fact used as a parking area (*Respondent's Brief*, p. 20) and because the road "was a convenient cutoff" which "seemed" to be intended for the public (*Respondent's Brief*, p. 20). Without citation to the evidence or law, Respondents simply conclude that the business owners failed to rebut it. The Court made an inference not a rebuttable presumption.

The Court and Museum cite no evidence but rely on the Court's conjecture merely that the County owns "a considerable

amount of property,” therefore, too much property to police it. CP 59, para. 3.

Issue No. 3: Prescriptive use must be exclusive as a matter of law:

To establish a prescriptive right of way over the land of another person, the claimant of such right must prove that his use of the other’s land has been open, notorious, continuous, uninterrupted, over a uniform route, adverse to the owner of the land sought to be subjected, and with the knowledge of such owner at a time when he was able in law to assert and enforce his rights. *The Mountaineers v. Wymer*, 56 Wn.2d 721, 722, 355 P.2d 341, 342 (1960) (citing *NW Cities Gas Co.*, 13 Wn.2d 75, 123 P.2d 771 (1942)).

Neither *Wymer* nor *NW Cities Gas Co.* contain the word “exclusive.” *NW Cities Gas Co.*, recites sixteen enumerated “principles” of prescriptive rights and does not include exclusivity. *NW Cities Gas Co.*, 13 Wn.2d at 83-88.

The word “private,” as used in RCW 8.24.010, does not mean “exclusive,” but rather, is used in contract to “public.”

In order to be “exclusive” for purposes of adverse possession, the claimant’s possession need not be absolutely exclusive. Rather, the possession must be of a type that would be expected of an owner under the circumstances. *Russell v. Gullett*, 285 Or. 63, 589 P.2d 729, 730-31 (1979); 3 Am. Jur. 2d 75, at 171. Important again is the consideration of what use an owner would make are the nature and location of the land. *Chaplin v. Sanders*, at 863.

Exclusivity is a characteristic of them: Use. See *Rick v. Grubbs*, 147 Tex. 267, 214 S.W.2d 925 (1948) (owner conveyed right of way to pipeline company, sold a part of the land, moved the adverse possessor’s fence, erected large advertising sign, and permitted army to maneuver on the property); *Paul v. Mead*, 234 Iowa 1, 11 N.W.2d 706 (1943) (owner and adverse claimant made similar use of disputed strip for pasture and access); *Young v. Lacy*, 221 Neb. 511, 378 N.W.2d 192 (1985) (adverse claimant’s possession of land suitable only for parking and access to lake not exclusive when nearby residents used land for same purpose); *Burnett v. Knight*, 428 S.W.2d 470 (Tex. Civ. App. 1968) (adverse claimant’s use of disputed strip not exclusive when same use

benefitted title owner as much as adverse claimant); *Martin v. Randon*, 175 Mont. 321, 573 P.2d 1156 (1978) (adverse claimant's possession not exclusive when title owner used property frequently without objection from claimant). An easement appurtenant to one parcel of land may not be extended by the owner of the dominant estate to other parcels owned by him or her to which the easement is not appurtenant. *Brown v. Voss*, 105 Wn. 2d 366, 371, 715 P.2d 514 (1986).

Prescriptive use has been found over roadways which are used by: Members of the public, customers of the claimants, and the owners of the burdened land. In *NW Cities Gas Co.*, the gas company encouraged its customers and the public to use the roadway over the neighbor's property. *Id.* at 91. The road was used by "various persons" using the property as a dumping ground for rocks and dirt excavated elsewhere. *Id.* at 80.

Contrarily, in *Schulenbarger v. Johnstone*, 64 Wash. 202, 207, 116 P. 843 (1911), the court held that "the right [may] be asserted by the public." In *NW Cities Gas Co.*, the plaintiff gas company "encouraged the public to use that method of ingress and

egress to and from its premises ...[making] the same use of [the servient estate] ... as it would have made if the land had been its own.” *NW Cities Gas Co.*, 13 Wn.2d at 91.

The Appellants, the Museum’s neighboring property owners, did just the same as the Plaintiff in *NW Cities Gas Co.*: The Appellants encouraged their patrons to use the road and parking. Employees of Peter’s Hardware used the road “just about everyday since 1946 on.” RP p. 94, ll. 11-14. For example, hardware store customers seeking directions were instructed that, “If they were coming [from] downtown, we would instruct them to come in this way” RP p. 96, ll. 1-5. The hardware store customers were also directed to park on the property. RP p. 101, ll. 16-20.

In the *810 Properties v. Jump*, 141 Wn.App. 688, 701, 170 P.3d 1209 (2007) case, the adjoining landowner acquired a prescriptive easement to use a roadway, even though the roadway had been used by third parties for a variety of purposes, “including repairing fences, trucking cattle, Kittitas Reclamation District (KRD) maintenance work, and hunting” *Id* at 700-701. “... [T]he roadway was used by property owners to the south, the KRD, and

sportsmen” *Id.*, at 701. This concurrent use by the public did not obviate against exclusivity; the prescriptive easement was awarded to the claimant property owners. *Id.* at 703.

Issue No. 4: The use by the businesses’ customers was presumed permissive based on *Imrie v. Steve Kelly, et al.*, 160 Wn.App. 1, 7, 250 P.3d 1045 (2010); *Respondent’s Brief*, p. 16.

The Respondent asserts that “under the facts of this case, “The business customers’ use of the property may be considered a neighborly accommodation,” and as such, “[a] neighborly permissive use.” Respondent makes such assertion without pointing to any “facts in this case” to support its claim that there was permission.

A court may not presume that use of another’s property was permissive unless the facts of the case support permissive use. *Drake v. Smersh*, 122 Wn.App 147, 153, 89 P.3d 726. Respondent cites *Imrie v. Kelley*, 160 Wn.App. 1, 8 (2010) at p. 17 of its Response Brief, stating that:

Use without express permission is insufficient to establish adverse or hostile use.

This is not what the court states in *Imrie*. The court stated that “mere use without permission may not be sufficient to establish adverse use.” *Id.* It did not require express permission. Further, it stated that a court must make findings of permissive use. *Id.* The *Imrie* court also made reference to the idea of permissive use developed in *Kunkel v. Fisher*, 106 Wn.App. 599, 23 P.3d 1128 (2001), a position which has been disavowed by that court.

Initially, *Kunkel* stated that a court must presume that use of another’s land is permissive, unless the facts of the case support otherwise. However, *Kunkel* was clarified by the same court of appeals three years later in *Drake* to explain that permissive use should *not* be presumed, and that a court should instead analyze the facts of the case. *Drake v. Smersh*, 122 Wn.App. at 147. The *Drake* court stated with regard to *Kunkel*:

[w]e recognize on reflection that our analysis in *Kunkel* extended the implication of permissive use by neighborly accommodation too far when we applied a presumption of permissive use. At least one legal scholar criticizes *Kunkel* for applying a presumption of permissive use akin to the “vacant lands doctrine” in a case where both pieces of land were developed and in the face of Washington cases establishing that another’s use of improved land is presumed hostile or adverse.

Because *Kunkel* has been interpreted to apply a presumption of permissive use in prescriptive easement cases involving developed land, we take this opportunity to clarify the rule. In developed land cases, when the facts in a case support an inference that use was permitted by neighborly sufferance or accommodation, a court may imply that use was permissive and accordingly conclude the claimant has not established the adverse element of prescriptive easements. In contrast, courts should only apply the "vacant lands doctrine" and its presumption of permissive use in cases involving undeveloped land because, in those cases, owners are not in the same position to protect their title from adverse use as are owners of developed property.
- *Drake*, 122 Wn. App. at 153-154.

Although Division Three of the Court of Appeals has cited *Kunkel* in *810 Properties*, the law should be that the facts of a case must evidence permissive use, and if the claimant presents facts supporting adverse use, then the owner must present contrary *evidence* of permissive use. *810 Properties v. Jump*, 141 Wn.App. at 706.

The land here is not vacant and unimproved; various improvements have been made over the years. (CP 60). Further, the Museum cannot and does not point to any facts in the record that imply use was permissive. Rather the Court may only presume use was permissive *if* the evidence in the case support recognition and

neighborly accommodation by the County. To the contrary, the County erected barriers “because they didn’t want people to go through there.” RP p. 89, ll 16-25. Further, the fact that a lease existed between the County and the dance studio and the County and the frame shop implies that contractual permission was given to private parties not the public or the Plaintiff’s customers.

Issue No. 5: The use by the customers of the three adjoining businesses was not hostile; *Respondent’s Brief*, p. 16.

It should be noted again, here, that the Court conceded that the business Plaintiff’s proved all the elements of prescriptive use except exclusivity and hostility. CP 56, para. 6. Appellants’ Opening Brief argued that exclusivity was not an element of prescriptive use. Amended Appellants’ Opening Brief, Section I.A., pgs. 15-18. See also *Miller v. Anderson, supra*. And, again, just as the Museum ignore the issue of the “ten year rule,” the Museum also ignore the issue that exclusivity is not an element of prescriptive use.

As to the only other element, hostility, one of the Ichabod’s patrons testified that they thought the tavern owned the drive lane

and parking space property. RP p. 39, ll 2-7. The beer delivery truck drivers for all time, parked in these spaces when delivering to the tavern, particularly because there was a ramp on the back of the tavern, used to run up the hand trucks, that faced the Museum (County) property and began just at the property line. The ramp was replaced by steps beginning at the property line. *Exhibit P-7*. RP p. 9, ll 6 through RP p. 10, l 4. This would demonstrate openly and in a hostile manner that the parking area was to be used by the tavern suppliers; that disputed area necessarily had to be used to start up the ramp, as part of the tavern owner's physical operation. Use such as only the true owner would make. *Drake v. Smersh*, 122 Wn.App. 147, 152.

This was use as the true owner would make, as was parking along the east side of the County lot abutting the tavern, under claim of right, disregarding the claims of others by smashing the County's drive-through barriers, and forever ignoring the complaints of the frame shop and Museum.

A private citizen can claim a prescriptive easement which can be used by the public. *Mahon v. Haas*, 2 Wn.App. 560, 468 P.2d 713.

Division I and III of the Washington Courts of Appeals have held that a party will be found to have standing to institute an action to establish a road benefiting the public upon the theory of common law prescriptive easement, if the party has a real present and substantial interest and will benefit by the relief granted. *Primark Inc. v. Burien Gardens Associates*, 63 Wash.App. at 907-08, 823 P.2d 1116; *Standing Rock Homeowners Ass'n v. Misich*, 106 Wash. App. at 240, 23 P.3d 520.

In the case *Primark* case, the Court was asked to declare the existence of a county road by a prospective purchaser of property. The landowner argued that *Primark* did not have standing to bring a claim, and that the claim should have been brought by the county government. The Court rejected this argument claiming that *Primark* had standing as it had paid earnest money on a contract to purchase the adjoining property. It would benefit from the road

being declared a public road by being able to obtain a building permit.

In the case of, *Standing Rock Homeowners Ass'n v. Misich*, 106 Wash.App. 231, 23 P.3d 520, the Court confirmed the rule in *Primark*. In that case, the plaintiff sought to enjoin the defendant from removing gates across a roadway upon the plaintiff's property even though the defendant had an express easement to cross the property. The defendant in that action counterclaimed for a judgment declaring the road a county road by prescription. The Court cited to *Primark*, noting that "to establish standing, a party must show it will benefit from relief granted."

Furthermore, other Washington case law has implicitly demonstrated that a private citizen may assert claims for the recognition of prescriptive easement which would benefit the public. *Mahon v. Haas*, 2 Wn.App. 560, 468 P.2d 713. In *Mahon*, the Court did not specifically address the issue of standing when it found a prescriptive easement in favor of the general public which required the landowner to remove a greenhouse constructed on the road easement area. Here again the prescriptive easement was

determined by the use of the property and not by the character of the user.

Issue No. 6: While Spokane County was in fee simple title, as a matter of law, the County held the property in its governmental capacity; *Respondent's Brief*, p. 31.

The property devolved by default to the County of Spokane when the Opportunity Township dissolved. There was no bond issue to acquire the property in trust for a public use. The property did not generate general County taxes. There was no public dedication to or for the public good by ordinance or sovereign decree. There was not historic landmark or historic preservation status adopted by the County Commissioners.

The principal test for determining whether a municipal act involves a governmental function or a proprietary function is whether "the act" is for the common good of all or whether it is for profit of the specific corporate entity. *Okeson v. City of Seattle*, 150 Wn.2d 540, 548, 78 P.3d 1279 (2003), citing *Okeson*, 150 Wn.2d at 550, 78 P.3d 1279.

Here, posting the "For Rent or Sale" signs were aimed at a specific monetary profit. The only other "act" was the occasional

rental to private groups, again for monetary profit while in fact excluding the public from use. In *Okeson*, the “act” of “providing street lighting has been recognized as a governmental function ... of the City.” *Id at 55*. Operating an electric utility on the other hand was deemed a proprietary function because the utility operates for the benefit of its customers and the consumer pays for the commodity which is furnished for the consumer’s use. *Id at 550*. Acting as a Landlord is an analogous function, benefitting the Tenant not the public.

In the Museum’s other cited case, *Hagerman v. Seattle*, 189 Wn. 694, 66 P.2d 1152, a city employee driving a city health department vehicle on his way to a hospital maintained by the City of Seattle suffered a vehicle collision. The court held that the city was acting in the interest of the public good, not the special benefit of the municipality and thus was engaged in a governmental function. Proceeding with analysis based on settled doctrine and public policy, the courts have declared the difficulty to be in the application of the governing principles of law to particular facts. In this case, the application is not so difficult. For decades, the

property did no more than generate a few dollars rent and burden the County with an albatross. There was no public service afforded or pursued. There was no benefit to the general public health and welfare.

Ultimately, the property served no “sovereign ... function.”

II. CONCLUSION

The Museum concedes that the trial court erred as a matter of law in its conclusion that the Museum must have owned the property for ten years in order to be susceptible of prescriptive rights. The Museum concedes that exclusivity is not an element of prescription in the context of this case.

This error becomes a material issue when the Response Brief argues that the property was held for many decades in a sovereign or governmental capacity for the public good. Because no governmental capacity was shown, but rather “For Sale or Rent” for corporate profit, without any legislated trust or public purpose, the years immediately prior to the deed to the City of Spokane Valley and then to the Museum may be determinative of proven prescriptive use. It is not argued by the Respondent that the City of Spokane

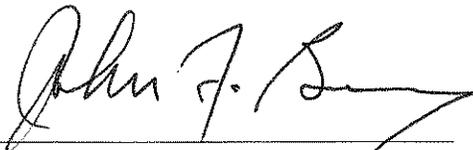
Valley held the property, ever so briefly, in its governmental capacity, as it could not.

The sole pieces of evidence to support the inference of benefit for the public as a whole was the restriction on the Museum's future use after both the City and County gave it away. This speaks nothing of the governmental capacity but only the private Museum's operation.

The Decision of the trial court should be reversed and the business customers restored to their lifelong use of the drive lane and parking areas, without excluding the Museum from the same use.

Respectfully Submitted this 11th day of June, 2012.

MURPHY, BANTZ & BURY, PLLC

A handwritten signature in black ink, appearing to read "John F. Bury", written over a horizontal line.

John F. Bury, WSBA No. 4949
Attorney for Appellants