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COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

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FRIENDS OF NORTH SPOKANE COUNTY PARKS,

MAR 3 2014

Appellant,

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

vs.

SPOKANE COUNTY; FRED MEYER STORES, INC; and,  
STAR SAYLOR INVESTMENTS LLC,

Respondents.

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

This brief is in reply to the Response Brief of Star Saylor Investments, LLC<sup>1</sup> and the Response Brief of Spokane County and Fred Meyer Stores, Inc. Each issue raised by the Respondents will be dealt with in sequence.

## II. ARGUMENT

### A. Assignments of Error.

Star Saylor asserts that Friends did not properly assign error to the trial court's findings of fact and conclusions of law. Star Saylor Response 6 -7. The County and Fred Meyer joined in Star Saylor's assertion. Spokane County Fred Meyer Response 4.

The Respondents are wrong. Findings of fact and conclusions of law are unnecessary for the decision of the court on a motion to dismiss for failure to state a claim. CR 12(b)(6).

By court rule, findings of fact and conclusions of law, are specifically not required by court rule. CR 52(a)(5)(B).

Furthermore, Friends properly assigned error to the findings of fact and conclusions of law. Brief of Appellant 1 - 2.

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<sup>1</sup> Hereinafter, Star Saylor.

1. **Findings of Fact and Conclusions of Law Are Not Required under CR 52(a)(5)(B).**

Findings of fact and conclusions of law are unnecessary under CR 52(a)(5)(B) which specifically provides that [f]indings of fact and conclusions of law are not necessary . . .[o]n decisions of motions under rules 12 or 56 or any other motion, except as provided in rules 41(b)(3) [defendants motion to dismiss after plaintiff rests] and 55(b)(2) [default judgment where amount uncertain].”

2. **Findings of Fact and Conclusions of Law are Unnecessary and Superfluous.**

"However, because these findings were entered in the course of a summary judgment, they carry no weight on appeal. Findings of fact are superfluous in summary judgment<sup>[2]</sup> proceedings. A failure to assign error to them has no effect on the case." *County Deputy Sheriffs' Ass'n v. Chelan County*, 294 n.6, 745 P.2d 1 (1987). *See also, Duckworth v. Bonney Lk.*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978); *Washington Optometric Ass'n v. County of Pierce*, 73 Wn.2d 445, 448, 438 P.2d 861 (1968).

Furthermore, because the matter was decided on a motion to dismiss under CR 12(b)(6), the court must review the record de novo

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<sup>2</sup> For purposes of the rule stated there is no difference between a motion for summary judgment and a motion under CR 12(b)(6).

according to CR 12(b)(6). “[The] court applies the de novo standard of review to a trial court's decision to dismiss pursuant to CR 12(b)(6).”

*Futureselect v. Tremont Holdings*, 175 Wn. App. 840, 865, 309 P.3d 555 (2013); *see also*, *Gaspar v. Peshastin Hill Growers*, 131 Wn. App. 630, 634, 128 P.3d 627 (2006).

Although the trial court entered findings, they are superfluous on appeal. They are superfluous because the appeal in the case under CR 12(b)(6) is de novo. *Hubbard v. Spokane County*, 146 Wn.2d 699, 706 n.14, 50 P.3d 602 (2002); *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978).

**3. Proper Assignment of Error to the Findings of Fact and Conclusions of Law.**

Friends assigned error to the trial court’s dismissal of Friends’ Amended Complaint with prejudice on October 25, 2013. Order of Dismissal (Order), CP 212. Brief of Appellant 1- 2.

The error also extends to the orders (1) denying Friends’ motion to disqualify attorney, (2) granting Star Saylor’s motion to dismiss under CR 12(b)(6), and (3) the dismissal of Friends’ Amended Complaint with prejudice. Order CP 214.

Further, Friends properly and effectively assigned error to the trial court’s findings of fact and conclusions of law. Friends assigned error “to

the trial court's "Findings of Fact and Conclusions of Law in the Order (1) pertaining to Friends' motion to disqualify the Spokane County Prosecuting Attorney from representing Fred Meyer Stores, Inc., and (2) pertaining to Star Saylor Investments, LLC's<sup>3</sup> motion to dismiss under CR 12(b)(6). CP 213-14." Brief of Appellant 1 - 2.

These assignments were made as to all of the findings of fact and conclusions of law. Under the circumstances it was not necessary to specifically list each finding of fact and conclusion of law. None were left out. There was a "separate assignment of error as to each finding of fact" Friends contends was "improperly made." No specific reference to a number was necessary because all numbers were included. RAP 10.3(g).

The decision before this court is de novo. The appeal does not address facts which may or may not have been found because the review is not fact based.

**B. The Standing Issue.**

The Respondents claim that Friends does not have standing because it has not claimed "that it pays the type of taxes implicated." Star Saylor Response at 8.

The Court of Appeals, and specifically Division III, has stated what

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<sup>3</sup> Sometimes referred to herein as Star Saylor.

the requirements are as to taxpayer standing. These requirements were specifically set forth in Friends' Response to Respondent's motion to dismiss. In their Response (CP 127 - 28), Friends stated the law as to taxpayer standing in Washington and particularly in Division Three of the Court of Appeals. Appellants cite *Eugster v. Spokane*, 139 Wn. App. 21, 28, 156 P.3d 912 (2007) (Division III). There, this Court said:

Ordinarily, an individual taxpayer must show special injury in order to sue a municipality. *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7-8, 802 P.2d 784 (1991). But every taxpayer is presumed injured if the city acts illegally. *Kightlinger v. Pub. Util. Dist. No. 1 of Clark County*, 119 Wn. App. 501, 506, 81 P.3d 876 (2003). However, taxpayers must first request the appropriate government entity — here, the attorney general — take action on their behalf. *Id.* at 508 (citing *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 269, 534 P.2d 114 (1975)). Alternatively, the taxpayer may show that a request for government action would be useless. *Wash. Pub. Trust Advocates ex rel. City of Spokane v. City of Spokane*, 117 Wn. App. 178, 182, 69 P.3d 351 (2003).

This court made no mention of *Dick Enterprises, Inc. v. King County*, 83 Wn. App. 566, 922 P.2d 184 (1996) in the decision. The reason was clear, *Dick Enterprises* was and is not the law. In fact, the Court of Appeals Division before which *Dick Enterprises* was decided did not follow *Dick Enterprises* in a subsequent case dealing with the issue of taxpayer standing. About four years after the decision, Division I addressed the standing issue differently in *Robinson v. City of Seattle*, 102

Wn. App. 795, 804 – 05, 10 P.3d 452 (2000):

Washington recognizes ‘litigant standing to challenge governmental acts on the basis of status as a taxpayer.’ Under the doctrine of taxpayer standing, ‘a taxpayer need not allege a personal stake in the matter, but may bring a claim on behalf of all taxpayers.’ Taxpayers need not allege a direct, special, or pecuniary interest in the outcome of the suit, but must demonstrate that their demand to the Attorney General to institute the action was refused, unless such a request would have been useless. [Footnotes omitted.] [Emphasis added.]

This language is directly contrary to the language of *Dick Enterprises*. See Friends’ Brief of Appellant at page 14.

**C. First Time On Appeal Issue.**

Star Saylor tells the court that Friends cannot raise the argument that *Dick Enterprises* is not good law because Friends raises the argument for the first time on appeal. This is not true and if it were, Friends would not be prevented from raising it on appeal because RAP 2.5 (a) does not apply to legal argument about the law.

The issue before the trial court and the issue before this Court is whether Friends has taxpayer standing to bring the action. Friends showed that it did, that it paid taxes, its members paid taxes, it asked the Attorney General to take action, and that the Attorney General refused. It showed that it had met the requirements for taxpayer standing. *Eugster v. Spokane, supra*.

In its Reply to Friends Responsive brief at the time of the hearing on the Motion to dismiss for failure to bring a claim under CR 12(b)(6), Star Saylor asserted that taxpayer standing required that the taxpayer paid the taxes which actually went to the project in question. It cited *Dick Enterprises*.

Friends did not have a right to file a response to the reply, the rules do not permit it to do so. Friends did address the issue of what was necessary for taxpayer standing in its Responsive Brief at trial. See discussion above. In addition, Friends addressed the *Dick Enterprises* argument by restating the standards required for taxpayer standing; those set forth in *Eugster v. Spokane, supra*.

Friends objection to Star Saylor's argument about taxpayer standing requiring the payment of specific taxes regarding a project was enough to raise the issue on appeal. *State v. Osborne*, 140 Wn. App. 38, 41, 163 P.3d 799 (2007). In *Osborne*, the court went on to say it had discretion to consider the issue under RAP 2.5 (a) and that in any case "[t] question here is one of law and review is, then, de novo. *State v. Johnson*, 96 Wn. App. 813, 815-16, 981 P.2d 25 (1999)." *State v. Osborne, supra*.

One last observation about the matter: Respondents are asking this Court to overrule its decision in *Eugster v. Spokane, supra*. The basis for overruling the case and adopting the *Dick Enterprises* decision on the

point is a technical, unsupported, argument that since Friends did not specifically say that *Dick Enterprises* was superceded by *Eugster v. Spokane*.

What Respondents are saying is this: That this Court must overrule one of its decisions on the basis of technicality, *Eugster v. Spokane, supra*, the alleged failure to address the specific issue of the *Dick* case by name at the time of oral argument in the trial court.

This approach to overruling of precedent is not correct nor even remotely reasonable.

**D. Article VII, Section 7.**

Friends asserts in these proceedings that what Spokane County intends to do to support Star Saylor's land development is in violation of Wash. Const. Art. VIII, Section 7.

SECTION 7 CREDIT NOT TO BE LOANED. No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

**1. Court Has not Adopted the Plausibility Rule of FRCP 12(b)(6).**

The court dismissed Count 6 of Plaintiff's Complaint on the basis

of its “finding of fact and conclusions of law” as follows:

Further, Friends has not alleged and can not allege facts sufficient to pursue a claim under Article VIII, section 7 of the Washington State Constitution (Count 6 of the Amended Complaint), because there has been no transfer of public property and there is no donative intent.

Order, CP at 214.

The court is making conclusions about the facts – it concludes there has been no transfer of public property and there is “no donative intent.” The court is saying that the road, whatever sort of road, is not a gift. It is saying a road cannot be a gift because it is a benefit to the public.

The court is stepping beyond the boundaries of CR 12(b)(6) motion and is making factual decisions.

Respondents seek the application of the federal rule pertaining to Fed. R. Civ. P. 12(b)(6) – the “plausibility rule” found in *Ashcroft v. Iqbal*, 556 US 662, 129 S. Ct. 1937 (2009). This application has been denied by the courts of Washington.

The federal rule, Fed. R. Civ. P. 12(b)(6) permits dismissal “unless the claim is plausibly based upon the factual allegations in the complaint — a more difficult standard to satisfy.” *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 101, 233 P.3d 861 (2010).

In *McCurry*, the Supreme Court declined to adopt the federal standard for dismissal. “We thus have no [ ] basis to fundamentally alter

our interpretation of CR 12(b)(6) that has been in effect for nearly 50 years.” *McCurry*, 169 Wn.2d 96 at 103.

**2. Other Reasons Why a “Road” in this Case Violates Wash. Const. Art. VIII, Section 7.**

The road if it is given will include other gifts of public assets. One gift is the gift of land which is park land. The county, before it transfers land for a road or rights for a road, has to get the land or rights from land which is park land.

The land must come from property impressed with a trust for a particular purpose, a park. Even if it is concluded that the park land can be used for a road under the so-called amended deed, it cannot transfer it for use by a private developer. Only the county could in this case make use of the road.

**E. Conflict of Interest, Spokane County Prosecuting Attorney.**

**1. Facts Relevant to Representation of Fred Meyer Stores by Spokane County Prosecuting Attorney.**

The Spokane County Prosecuting Attorney realizes that Friends’ claim that the use the county can make of Freddy Park is constrained by the deed of the park to the county. A deed, which by its very terms was not signed by Fred Meyer Stores and constituted a complete transfer of all interest in the property including the reversionary rights if any. Fred Meyer Stores was not a grantor of the deed. Declaration of Stephen K

Eugster, CP 53.

The Spokane County Prosecuting Attorney approached Fred Meyer Stores to get them to amend the deed of Wilmington Trust to Spokane County which when accepted by the county created a certain kind of Spokane County park.

Fred Meyer Stores had nothing to amend, no right to amend. There was no right of reversion or continued interest in the park deed which remained in Wilmington Trust or was provided by Wilmington Trust in the park deed.

Nevertheless, the county got Fred Meyer Stores to “amend” the park deed. In addition, the county agreed to indemnify Fred Meyer Stores concerning any attorney’s fees.

In so indemnifying Fred Meyer Stores, the county prosecuting attorney agreed to provide its legal services for the purposes of the indemnification.

**2. Spokane County Prosecuting Attorney and Attorney Ron Arkills Cannot Represent Fred Meyer Stores, Inc.**

Friends has explained in detail why the Spokane County Prosecuting Attorney and Attorney Ron Arkills cannot represent Fred Meyer Stores, Inc. Brief of Appellants pages 19 – 25.

No further response is necessary. However, Friends would like to

add to its argument that the prosecuting attorneys office is exceeding its authority under Wash. Const. Art. VIII, Section 7.

Wash. Const. Art. VIII, Section 7 is violated because the county prosecuting attorney is making a gift of public resources to Fred Meyer Stores. The prosecuting attorney says this is not true because “the county’s promise to represent Fred Meyer was given in return for Fred Meyer’s signature of the amended covenants . . .” Response of Spokane County and Fred Meyer Stores at 18. That is to say, if services are given by the prosecuting attorney to a person to cause the person to do what the county wants is not a gift.

By providing services to get Fred Meyer to amend the deed is not proper and it is certainly improper to claim that the gift of such services is not a violation of Wash. Const. Art. VIII, Section 7. The gifting of attorney services and attorney fees is not, by any stretch of the imagination, a public function. Nor is it a public function that the prosecuting attorney would make its services available for free to gain an amendment to a deed, especially a deed that the person to whom the gift was made did not have any right or legal interest to amend a deed. As shown in their Opening Brief at 19 - 20 the grantor of the deed, Wilmington Trust, also transferred to Spokane County all of its “tenements, hereditaments and appurtenances belonging thereto, and the

reversion, and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right and title to the property whether in law or in equity, and subject to the Restrictions on Use and Development of Property as stated in Exhibit B, and the encumbrances shown on Exhibit C.” Complaint, CP 15, Declaration of Stephen K. Eugster, CP 53.

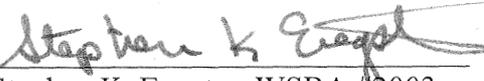
Fred Meyer had no authority to change the deed, thus the gift of the services of the prosecuting attorney could not be claimed to be a public or governmental function. Causing a person to do an illegal act is not a governmental function. It is a violation of the gifting prohibition contained in Wash. Const. Art. VIII, Section 7.

### III. CONCLUSION

The dismissal of the case by the trial court should be reversed.

Respectfully submitted this 2nd day of March, 2014

EUGSTER LAW OFFICE PSC

By   
Stephen K. Eugster, WSBA #2003  
Attorney for Appellants

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury that on or before March 3, 2014 I served Appellants Reply Brief by personal service on the attorneys for Spokane County and Fred Meyer Stores Inc. and the attorneys for Star Saylor Investments, LLC at the addresses and to the e-mail addresses as follows:

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Signed at Spokane, Washington on March 3, 2014.

  
Stephen K. Eugster, WSBA 2003