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DIVISION III
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COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

FRIENDS OF NORTH SPOKANE COUNTY PARKS,

Appellant,

vs.

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

Respondents.

SPOKANE COUNTY'S AND FRED MEYER STORES, INC.'S
RESPONDENTS' BRIEF

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I. INTRODUCTION

The Appellant Friends of North Spokane County Parks (“Friends”) filed this action to prevent the construction of a public road through property owned by the Respondent Spokane County (“County”). This property is commonly known as “Freddy Park.”

In 2001, the County acquired Freddy Park by a Deed with Covenant and Joint Warranties of Title to Real Property from the predecessors in interest of Respondent Fred Meyer Stores, Inc., an Ohio Corporation (“Fred Meyer”). Friends claims that restrictive covenants recorded with that conveyance prohibit construction of a road through Freddy Park.

In 2007, testimony from the County’s own traffic engineers, the Washington State Department of Transportation, and a local fire district determined that a road running through Freddy Park and a subdivision to the south, would be beneficial to area traffic circulation.

Concerned that Friends might challenge the construction of such a road, the County, acting through its Board of County Commissioners, entered into an agreement with Fred Meyer to amend the original restrictive covenants to expressly permit a road to run through the western portion of Freddy Park. As part of the consideration for that agreement, the County agreed to represent Fred Meyer in any litigation arising from a

challenge to the amended covenants.

Relying on this agreement, Fred Meyer tendered its defense of this action to the County. The Spokane County Prosecutor (“Prosecutor”), acting through his Deputy Prosecuting Attorney, accepted the tender on behalf of the County. As a result, the Prosecutor in his role of County attorney represents both the County and Fred Meyer in this litigation.

Star Saylor Investments, LLC (“SSI”), the developer of the subdivision to the south of Freddy Park, was joined in the action. Pursuant to CR 12(b)(6), SSI successfully moved to dismiss Friends’ causes of action as failing to state a claim upon which relief may be granted. Friends appeals that dismissal.

The County and Fred Meyer joined SSI’s successful motion to dismiss; and also joins SSI’s Response Brief herein in support of affirming the dismissal.

Additionally, Friends moved to disqualify the Prosecutor because: (1) the Prosecutor’s joint representation of both the County and Fred Meyer constitute a concurrent conflict of interest under RPC 1.7; and (2) the Prosecutor lacks authority to represent Fred Meyer. Friends appeals from the trial court’s denial of that motion.

The trial court’s decision on a motion to disqualify counsel is reviewed for abuse of discretion.

Disqualification of counsel is a drastic remedy that should only be granted when absolutely necessary.

Friends, for the first time on appeal, claims the Prosecutor lacks authority to represent Fred Meyer under RCW 36.27.020. Because Friends failed to raise this issue to the trial court, this argument should not be considered on appeal.

In the event this court decides to consider this issue, RCW 36.27.020 does not limit the Prosecutor's authority as County attorney to represent the County's interests in litigation.

In this case, the Prosecutor served as both legal advisor to the County, and as its representative in litigation. He provided legal services to his client by fulfilling the County's obligation to represent Fred Meyer in this case. The Board of County Commissioners determined that it is in the County's best interests to allow a road to cross Freddy Park.

No concurrent conflict of interest exists here because the County and Fred Meyer share common litigation objectives; and Friends has not demonstrated that the Prosecutor's representation of Fred Meyer materially limits his representation of the County. This is witnessed by the fact that the Prosecutor's representation resulted in a dismissal of this action for both his clients.

Friends also argues, without the support of legal authority, that the Prosecutor's representation of Fred Meyer constitutes an unconstitutional gifting of public property prohibited by Wash. Const. art. VIII, §7. This unsupported assertion should not be considered here.

If this issue is decided, no unconstitutional gifting has occurred because the Prosecutor's representation of Fred Meyer induced Fred Meyer to sign the amended restrictive covenants. Fred Meyer's execution of the amended covenants was valuable consideration for these legal services. Additionally, by enabling the construction of beneficial public transportation, the representation helped achieve a fundamental purpose of County government.

Based on the foregoing, the trial court did not abuse its discretion in denying Friends' motion to disqualify the Prosecutor.

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Response to Assignments of Error.

1. The County and Fred Meyer join in SSI's response to Friend's assignments of error relating to the trial court's dismissal under CR 12 (b)(6); and agree that the trial court did not err in granting the motion.

2. The trial court did not err in denying Friends' motion to disqualify the Prosecutor because Friends failed to demonstrate either that: (1) a concurrent conflict of interest arises from the Prosecutor's representation of the County and Fred Meyer; or (2) the Prosecutor lacks authority to represent Fred Meyer under the facts of this case.

B. Issues Pertaining to Assignments of Error Concerning Motion to Disqualify the Prosecutor.

1. What is the standard of review on a motion to disqualify an attorney based on a conflict of interest?
2. Is disqualification of an attorney a drastic remedy which should only be imposed when absolutely necessary?
3. Should this Court consider Friends' argument regarding the Prosecutor's authority to represent Fred Meyer under RCW 36.27.020 where it is raised for the first time on appeal?
4. In the event the court considers the issue, does RCW 36.27.020 bar the Prosecutor from representing Fred Meyer?
5. Does a conflict of interest exist under RPC 1.7(a) where the County and Fred Meyer share common litigation objectives, and Friends has not demonstrated that the Prosecutor's representation of the County will be materially limited by his representation of Fred Meyer?

6. Should this court consider Friend's assertion that the Prosecutor's representation of Fred Meyer constitutes an unconstitutional gifting under Wash. Const. art. VIII, §7 where this claim is not supported by legal argument?
7. Does the Prosecutor's representation of Fred Meyer constitute an unconstitutional gifting where it furthers a fundamental purpose of local government and is supported by consideration?

III. STATEMENT OF THE CASE

The County and Fred Meyer incorporate by reference the Statement of Case found on pages 2-4 of the Respondent Star Saylor Investments, LLC's Response Brief.

Additionally, they add the following:

On August 13, 2001, Wilmington Trust Company, a Delaware corporation, not in its individual capacity, but solely as Owner Trustee under FMS Trust 1997-1, a Delaware business trust, held fee simple interest to certain real property located in Spokane County, which was designated as BSP-58-97. CR 151.

Wilmington Trust's estate was held as part of a synthetic lease financing vehicle. CR 155.¹

¹ A synthetic lease is a financing arrangement that is treated as a lease for financial accounting purposes and a loan for federal income tax purposes. If the synthetic lease is

Under this financing arrangement: (1) Roundup Company("Roundup"), was the Prime Lessee of BSP-58-97, under a Prime Lease with Fred Meyer Stores, Inc., a Delaware Corporation("FMS") as Prime Lessee; (2) FMS had a Prime Lease with Fred Meyer, Inc.("FMI") for the property; and FMI had a Prime Lease with Wilmington Trust Company. CP 155. Collectively, Roundup, FMS, and FMI are referred to as "the Fred Meyer Parties."

On August 13, 2001, the Fred Meyer Parties and the Wilmington Trust Company conveyed a portion of BSP-58-97 to the County by documents titled "Deed with Covenant"² and "Joinder With Warranties of Title to Real Property." CR 151-162, 169. The property conveyed to the County is commonly referred to as "Freddy Park."

Freddy Park is located immediately to the east of property occupied by a Fred Meyer store (BSP-58-97, Lots A and G). CP 161, 186.

The conveyance of Freddy Park was subject to the following restrictive covenants included in the Deed:

properly structured, the lessee/borrower is treated as a lessee under the applicable accounting rules and does not reflect either the debt or the property on its balance sheet other than in footnotes. However, for federal income tax purposes, the lessee is considered the owner of the property and a borrower under a debt arrangement. Additionally, the lessee retains operational control of the property. Nancy R. Little, What Do You Need to Know about Financing With Synthetic Leases, *available at <http://corporate.findlaw.com/business-operations/what-you-need-to-know-about-financing-with-synthetic-leases.html>*.

² FMI executed the deed as Wilmington Trust's attorney-in-fact pursuant to a power of attorney. CP 154.

The herein described real property shall be held, conveyed, sold, and improved only as a natural, community, or regional park. This condition and restriction shall constitute a covenant and encumbrance which shall run with the land and shall be perpetually binding upon Grantee, its successors-in-interest and assigns, and all parties having or acquiring the right, title, or interest in, or to, any part of the subject property.

There shall be no vehicular ingress or egress from the property to the adjacent property owned by Grantor, Parcels A and G of BSP-58-97. Vehicular access to the property shall be only from Standard Avenue....CP 161.

On October 1, 2007, the County, through its Hearing Examiner, entered Findings of Fact, Conclusions of Law, and Decision approving a preliminary plat under File No. PN-1981-06, subject to various conditions including:

15. Prior to the final platting of the 34th lot of the preliminary plat, the applicant shall secure and construct a second ingress/egress roadway to serve the proposed development. The proposed second access must be dedicated *through the parkland owned by Spokane County* north of the site. The dedication of the 38 feet of right-of-way to the County, and the construction of a 24 foot wide off-site pavement section from the north boundary of the plat to the termination of the Standard Drive shall also be required within such time period. (Emphasis supplied.) CP 170.

The referenced “parkland owned by Spokane County” is Freddy Park. CP 170.

In conjunction with imposing Condition No. 15, the County, in consultation with its own traffic engineers, the Washington State Department of Transportation, and local Fire District 9 determined that a north-south road connection between Hastings Road and Regina Road along the Standard Road alignment would be beneficial to area traffic circulation, and relieve pressure on the Regina Road/State Highway intersection. CP 170. This proposed alignment runs along the western boundary of Freddy Park. CP 170, 186.

On November 19, 2012, the County, acting through its Board of County Commissioners, and Fred Meyer (which is the successor in interest of the Fred Meyer Parties) ³entered into a document entitled “Amendment to Restrictions on Use and Development of Property.” CP 169-186.

Through the amendment of the original restrictive covenants on Freddy Park, the agreement sought to: (1) avoid any issues regarding interpretation of the 2001 restrictive covenants; and (2) allow a public road to cross Freddy Park along the proposed Standard Road alignment. CP 170-171.

As part of the consideration for the agreement, the parties agreed that:

³ The FMS Trust 1997-1 was canceled on July 25, 2012. CP 169.

PROVIDED FURTHER, in the event a third party initiates litigation to challenge or contest this Amendment to Restrictions on Use and Development of Property document or to challenge or contest the construction and establishment of a public road through the Subject Real Property, Grantee [County] agrees to defend the Grantor [Fred Meyer] and Wilmington Trust in any such litigation and further agrees to indemnify and hold harmless the Grantor and Wilmington Trust from any fees, costs, or judgments in such litigation. CP 170.

On February 19, 2013, Friends brought this action, naming the County as defendant. CP 1-13.

On April 2, 2013, the Amendment to Restrictions on Use and Development of Property was recorded with the Spokane County Auditor. CP 167.

On May 2, 2013, Friends filed an Amended Summons and Complaint, which amended its original action to challenge the amended restrictive covenants. CP 16-32. Fred Meyer Stores, Inc. and Star Saylor Investments, LLC were named as additional defendants. Id.

On May 3, 2013, Fred Meyer Stores, Inc. was served with a copy of the Amended Summons and Complaint. CP 188.

Relying on the indemnity provision in the Amended Covenants, counsel for Fred Meyer tendered defense of this action to the Prosecutor on May 21, 2013. CP 188-189. The Prosecutor, acting through his Deputy Prosecuting Attorney, Ronald P. Arkills, unconditionally accepted this

tender on behalf of the County. CP 205-206.

Mr. Arkills, acting in his capacity as a Deputy Prosecuting Attorney, filed a Notice of Appearance on behalf of Fred Meyer on May 22, 2013. 249-250.

On October 7, 2013, Friends filed a motion to disqualify the Prosecutor from representing Fred Meyer. According to Friends, such representation was: (1) a concurrent conflict of interest under RPC 1.7; and (2) an unconstitutional gifting of public property prohibited by Wash. Const. art. VIII, § 7. CP 38-40, 267-268.

Friends appeals from the denial of this motion.

IV. ARGUMENT

A. The County and Fred Meyer join in SSI's arguments supporting the trial court's dismissal of this action under CR 12(b)(6).

The County and Fred Meyer joined in SSI's successful motion to dismiss in the trial court, CP 36-37; and now support SSI's efforts to affirm that decision on appeal. Therefore, they incorporate by reference SSI's arguments as set forth on pages 4-20 of the Respondent Star Saylor Investments, LLC's Response Brief.

B. Standard of Review on Motion to Disqualify Prosecutor.

The trial court's decision not to disqualify the Prosecutor is reviewed for an abuse of discretion. *Doyle v. Lee*, 166 Wn.App. 397, 403,

272 P.3d 256(2012). Discretion is abused if it is exercised for untenable grounds or reasons. *Id.*

C. Disqualification of counsel is a drastic remedy that should be used only when absolutely necessary.

Disqualification of counsel is a drastic remedy that exacts a harsh penalty from the parties, as well as punishing counsel; therefore, it should be imposed only when absolutely necessary. *In re Firestorm 1991*, 129 Wn.2d 130, 140, 916 P.2d 411 (1996). *See also, State v. Schmitt*, 124 Wn.App. 662,666, 102 P.3d 856(2004)(“Generally, a court should not disqualify an attorney absent compelling circumstances.”); and *Tessier v. Plastic Surgery Specialist*, 731 F.Supp. 724 (E.D.Va.1990) (“The disqualification of a party's chosen counsel is a serious matter which cannot be based on imagined scenarios of conflict.”)

D. This court should not consider Friend’s argument regarding the Prosecutor’s authority under RCW 36.27.020 to represent Fred Meyer, which is raised for the first time on appeal.

Friends argues, for the first time on appeal, that the Prosecutor lacks authority to represent Fred Meyer under RCW 36.27.020. *Appellant’s Brief*, at 20-21.

Generally, appellate courts will not entertain issues raised for the first time on appeal. RAP 2.5(a); *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008).

E. In the event the court considers the issue, RCW 36.27.020 does not bar the Prosecutor from representing Fred Meyer in this action.

Friends claims the Prosecutor has the authority to represent a party only in those circumstances specifically enumerated in RCW 36.27.020. *Appellant's Brief*, at 20-21.

RCW 36.27.020 merely lists the Prosecutor's mandatory *duties*. *Hoppe v. King County*, 95 Wn.2d 332, 339-40, 622 P.2d 845(1980).

However, it does not a limit the Prosecutor's *authority* to appear in litigation.

A prosecuting attorney's authority to appear in actions which present issues concerning county officials and their operation of county departments has been broadly construed by Washington courts. *Fuqua v. Fuqua*, 88 Wn.2d 100, 102, 588 P.2d 801 (1977).

In this state the prosecuting attorney is also the county attorney, and the relations of that officer to the county may be such as possibly require him to appear in behalf of the county in some instances, even if the specific duty may not be particularly and expressly prescribed by statute. If so, the duty arises out of the obligations he has assumed as an officer of the county to discharge the general functions of an attorney in [its] behalf.

In re Lewis, 51 Wn.2d 193, 201-02, 316 P.2d 907 (1957) (quoting *Bates v. School Dist. No. 10*, 45 Wash. 498, 501-02, 88 P. 944 (1907).

Thus, in *Fuqua*, the prosecutor could represent the county clerk in a dispute over distribution of child support; and, in *Lewis*, the prosecutor was permitted to represent a juvenile probation officer in a juvenile delinquency case—even though not mandated by RCW 36.27.020.

In other cases, a prosecutor has exercised his discretion to bring actions on behalf of county officers, while being under no affirmative duty to do so. See, *Clark County Sheriff v. Department of Social & Health Services*, 95 Wn.2d 445, 626 P.2d 6(1981); and *Pierce County Sheriff v. Civil Serv. Comm'n.*, 98 Wn.2d 690, 658 P.2d 648(1983).

In this case, the Prosecutor fulfilled the dual roles of the County legal adviser and the County's representative in this lawsuit. See, RCW 36.27.020(1) and (4).

Osborne v. Grant County, 130 Wn.2d 615, 626-27, 926 P.2d 911(1996) describes these roles as follows:

Amongst other enumerated duties, prosecutors are authorized to represent the county, RCW 36.27.005; they are required to advise the county board of commissioners or legislative authority on any matter concerning county affairs, RCW 36.27.020(1); and they are required to represent the county in all criminal and civil proceedings in which the county may be a party, RCW 36.27.020(3), (4). These statutes essentially require the prosecutor to maintain a certain degree of allegiance to the county commissioners, insofar as the county commissioners are the body that exercises county "powers," RCW 36.01.030, and adopts the official county position on legal issues, RCW 36.32.120(6).

In his role as the county attorney, the Prosecutor provided legal services at the direction of his client, the Board of Commissioners. These services fulfilled the County's contractual obligation to represent Fred Meyer in this action. At the same time, the Prosecutor was able to effectively represent both the County's and Fred Meyer's legal position in this matter.

F. No conflict of interest exists under RPC 1.7(a) because the County and Fred Meyer share common litigation objectives; and Friends has not demonstrated that the Prosecutor's representation of the County will be materially limited by his concurrent representation of Fred Meyer.

Friends also erroneously concludes that the Prosecutor's concurrent representation of the County and Fred Meyer constitutes an inherent conflict of interest under RPC 1.7.

A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, former client or third person or by a personal interest of the lawyer. RPC 1.7(a).

Friends incorrectly concludes that the Prosecutor's defense of the amended restrictive covenants is adverse to the County's interests – apparently because of its belief that it is in the County's interests to adopt Friends' interpretation of the restrictive covenants. *Appellant's Brief*, at

23.

However, the Board of County Commissioners determines what the County's objectives are in this litigation. *Osborne*, 130 Wn.2d at 627. The Board has found that it is in the County's best interests to support and defend the amended restrictive covenants in order to allow a road to run through Freddy Park. CP 164-186.

Friends has also not demonstrated that concurrent representation of Fred Meyer materially limited the Prosecutor's representation of County. This is because Fred Meyer's objectives in this litigation do not differ from the County's.⁴

There is clearly no conflict of interest where the Prosecutor's legal strategy resulted in obtaining a dismissal of this action for both the County and Fred Meyer. *See, Patterson v. Balsamico*, 440 F.3d 104(2^d Cir. 2006); *Kreamer v. Oxford*, 96 A.D.3d 1130, 946 N.Y.S.2d 284(2012).

⁴ Friends also incorrectly claims that Fred Meyer has no interest in Freddy Park. *Appellant's Brief*, at 19-20, and 23-25. Fred Meyer is a successor in interest to the 2001 grantors of Freddy Park. *Ante*, at 9. The restrictive covenants on Freddy Park clearly benefit the Fred Meyer store property, and run with the land. CP 161. As the successor in interest to the Fred Meyer store property, Fred Meyer is a proper signatory of the amended covenants.

G. This court should not consider Friends' bare assertion that the Prosecutor's representation of Fred Meyers constitutes an unconstitutional gifting, where this claim is not supported by legal argument.

Friends simply concludes that the Prosecutor's representation of Fred Meyer constitutes an illegal gifting under Wash. Const. Art. VIII, without providing any supporting legal authority. *Appellant's Brief*, at 25.

This court will not consider such bald legal conclusions without supporting legal analysis and argument. *Graves v. Employment Security Department*, 144 Wn.App. 302, 311-12, 182 P.3d 1004(2008). If a party raises an issue but fails to provide argument relating to the issue in his or her brief, the party waives any challenge. *Yakima County v. Growth Management Hearings Bd.*, 146 Wn.App. 679, 698, 192 P.3d 12(2008).

H. In the event this court considers the issue, the Prosecutor's representation of Fred Meyer does not constitute an unconstitutional gifting because it furthers a fundamental purpose of government, and is supported by consideration.

Clearly, no violation of Wash. Const. art. VIII, §7 has occurred.

"The manifest purpose of [Wash.Const. art. VIII, §7]... is to prevent state funds from being used to benefit private interests where the public interest is not primarily served." *CLEAN v. State*, 130 Wn.2d 782, 797, 928 P.2d 1054 (1996). An otherwise incidental benefit to a private individual or organization does not invalidate an otherwise valid public

transaction. *City of Tacoma v. Taxpayers*, 108 Wn.2d 679, 705, 743 P.2d 793 (1987).

A two-pronged analysis is applied to determine whether or not there is an unconstitutional gifting. *CLEAN*, 130 Wn.2d at 797.

Initially, the court asks if the funds are being spent to carry out a fundamental purpose of government. If that question has been answered affirmatively, then there is no gifting of public funds. *Id.*

If the expenditure does not further a fundamental governmental purpose, then the second prong comes into play. The court then examines the consideration received by the government, as well as the government's donative intent, to determine whether or not a gift has occurred. *CLEAN*, 130 Wn.2d at 798. Courts do not inquire into the adequacy of consideration unless there is proof of donative intent or a grossly inadequate return. *In Re Limited Tax General Obligation Bonds of City of Edmonds*, 162 Wn.App. 513, 530, 256 P.3d 1242(2011).

The County's promise to represent Fred Meyer was given in return for Fred Meyer's signature of the amended restrictive covenants. Fred Meyer's signature of the amended covenants provides adequate consideration for the County's legal services.

The amended covenants remove any doubt that a valuable road may be constructed across Freddy Park. In this sense, it may also be said

that the County's representation of Fred Meyer furthered a fundamental governmental purpose. *See, Embry v. City of Calumet City, Ill.*, 701 F.3d 231, 236 n. 11 (7th Cir. 2012) (provision of transportation services is a primary function of local government).

V. CONCLUSION

Based on the foregoing, the trial court did not abuse its discretion in denying Friend's motion to disqualify the Prosecutor from representing Fred Meyer.

Therefore, the Respondents Spokane County and Fred Meyer respectfully request that this court affirm the trial court's decisions to dismiss this action, and to deny Friends' motion to disqualify the Prosecutor.

RESPECTFULLY SUBMITTED this 31st day of January, 2014.

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CERTIFICATE OF SERVICE

I certify that on January 31, 2014, a copy of Respondent Spokane County's and Fred Meyer Stores, Inc.'s Respondents' Brief, was personally served via hand delivery and via email on:

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