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

No. 320561

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

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FRIENDS OF NORTH SPOKANE COUNTY PARKS,

Appellant,

v.

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

Respondents.

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RESPONDENT STAR SAYLOR INVESTMENTS, LLC'S RESPONSE  
BRIEF

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**TABLE OF CONTENTS**

|  | <u>Page</u> |
|--|-------------|
| I. INTRODUCTION .....  | 1           |
| II. ASSIGNMENTS OF ERROR .....   | 2           |
| III. STATEMENT OF THE CASE.....  | 2           |
| IV. ARGUMENT .....   | 4           |
| A. STANDARD OF REVIEW FOR MOTION TO<br>DISMISS .....   | 4           |
| B. THE TRIAL COURT’S DECISION MUST BE<br>AFFIRMED BECAUSE FRIENDS FAILED TO<br>ASSIGN ERROR TO ANY OF THE FINDINGS OF<br>FACT OR CONCLUSIONS OF LAW.....   | 5           |
| C. IN ANY CASE, THE TRIAL COURT CORRECTLY<br>FOUND THAT FRIENDS DID NOT HAVE STANDING<br>TO PURSUE THIS ACTION.....  | 7           |
| 1. Friends Does Not Have Taxpayer Standing to<br>Bring a Claim Related to a Third-Party Deed<br>Because it Cannot Allege a Taxpayer Cause of<br>Action That it Pays Taxes Funding the<br>Construction of the Road. ....  | 8           |
| 2. For the First Time on Appeal, Friends<br>Erroneously Argues That <i>Dick Enterprises</i> is Not<br>Good Law.....  | 11          |
| 3. <i>Dick Enterprises</i> Remains Good Law.....   | 12          |
| D. THE TRIAL COURT DID NOT ERR IN FINDING THAT<br>FRIENDS COULD NOT ALLEGE FACTS SUFFICIENT<br>TO PURSUE A CLAIM UNDER ARTICLE VIII, § 7, OF<br>THE WASHINGTON STATE CONSTITUTION.....                                   | 15          |
| 1. Friends Could not Allege Facts Sufficient to Show<br>that Spokane County’s Approval of the Road<br>Construction Constituted a Gift for Purposes of<br>Article VIII, § 7, of the Washington State<br>Constitution..... | 17          |

|                     |   |    |
|---------------------|---|----|
| 2.                  | Even if the Approval of the Road Construction was a Gift for Purposes of Article VIII, § 7, Friends could not Allege Facts Sufficient to Show a Constitutional Violation..... | 18 |
| V. CONCLUSION ..... |   | 20 |

## TABLE OF AUTHORITIES

|   | <u>Page</u>               |
|---|---------------------------|
| <br><b>Cases</b>  |                           |
| <i>Adams v. Univ. of Wash.</i> , 106 Wn.2d 312, 327, 722 P.2d 74 (1986) .....   | 19                        |
| <i>Citizens for Clean Air v. City of Spokane</i> , 114 Wn.2d 20, 39, 785 P.2d 447 (1990).....                             | 19                        |
| <i>Citizens Protecting Resources v. Yakima County</i> , 152 Wn. App. 914, 920, 219 P.3d 730 (2009).....                   | 19                        |
| <i>City of Seattle v. McKenna</i> , 172 Wn.2d 551, 564, 259 P.2d 1087 (2011).....   | 7, 9, 12                  |
| <i>City of Tacoma v. O'Brien</i> , 85 Wn.2d 266, 269, 534 P.2d 114 (1975).....  | 9, 12                     |
| <i>City of Tacoma v. Taxpayers of City</i> , 108 Wn.2d 679, 701-02, 743 P.2d 793 (1987).....                              | 17, 18                    |
| <i>CLEAN v. State</i> , 130 Wn.2d 782, 792-793, 928 P.2d 1054 (1996) ...  | 16, 18, 19                |
| <i>Cowiche Canyon Conservancy</i> , 118 Wn.2d at 808; <i>State v. Hill</i> , 123 Wn.2d 641, 644, 870 P.2d 313 (1994)..... | 5, 11                     |
| <i>Dick Enterprises, Inc. v. King Cy.</i> , 83 Wn. App. 566, 572-73, 922 P.2d 184 (1996).....                             | 9, 10, 11, 12, 13, 14, 15 |
| <i>Embry v. City of Calumet City, Ill.</i> , 701 F.3d 231, 236 n.11 (7th Cir. 2012) .....                                 | 20                        |
| <i>Eugster v. City of Spokane</i> , 139 Wn. App. 21, 156 P.3d 912 (2007).....   | 11, 14                    |
| <i>Federal Way School Dist. No. 210 v. State</i> , 167 Wn.2d 514, 219 P.3d 941 (2009).....                                | 10                        |
| <i>Foss v. Dept. of Corrections</i> , 82 Wn. App. 355, 918 P.2d 521 (1996).....   | 5                         |
| <i>Gen. Tel. Co. of the NW., Inc. v. City of Bothell</i> , 105 Wn.2d 579, 588, 716 P.2d 879 (1986).....                   | 16, 17                    |
| <i>Great Harbor 2000 v. City of Seattle</i> , 132 Wn.2d 267, 937 P.2d 1088 (1997).....                                    | 10, 13                    |

|   |           |
|---|-----------|
| <i>Gustafson v. Gustafson</i> , 47 Wn. App. 272, 276, 734 P.2d 949 (1987).....  | 7         |
| <i>Haberman v. Wash. Pub. Power Supply Sys.</i> , 109 Wn.2d 107, 120, 744<br>P.2d 1032, 750 P.2d 254 (1987) .....   | 16        |
| <i>Hollis v. Garwall, Inc.</i> , 137 Wn.2d 683, 691, 974 P.2d 836 (1999).....   | 7         |
| <i>Hudson v. City of Wenatchee</i> , 94 Wn. App. 990, 995, 974 P.2d 342<br>(1999).....  | 19        |
| <i>In re Limited Tax General Obligation Bonds of City of Edmonds</i> , 162 Wn.<br>App. 513, 530, 256 P.3d 1242 (2011).....                                    | 16, 19    |
| <i>King Aircraft Sales, Inc. v. Lane</i> , 68 Wn. App. 706, 716, 846 P.2d 550<br>(1993).....  | 5, 6      |
| <i>King Cy. v. Taxpayers of King Cy.</i> , 133 Wn.2d 584, 949 P.2d 1260<br>(1997).....  | 18        |
| <i>Lawson v. State</i> , 107 Wn.2d 444, 448, 730 P.2d 1308 (1986).....  | 4         |
| <i>Millican of Wash., Inc. v. Wienker Carpet Serv., Inc.</i> , 44 Wn. App. 409,<br>413, 722 P.2d 861 (1986).....  | 5         |
| <i>Nickum v. City of Bainbridge Island</i> , 153 Wn. App. 366, 223 P.3d 1172<br>(2009).....   | 5         |
| <i>Northwest Properties Brokers Network, Inc., v. Early Dawn Estates<br/>Homeowner’s Association</i> , 173 Wn. App. 778, 800–801, 295 P.3d 314<br>(2013)..... | 7         |
| <i>Robinson v. City of Seattle</i> , 102 Wn. App. 795, 805, 10 P.3d 452<br>(2000).....  | 9, 11, 14 |
| <i>San Juan County v. No New Gas Tax</i> , 160 Wn.2d 141, 164, 157 P.3d 831<br>(2007).....  | 4         |
| <i>Scott Paper Co. v. City of Anacortes</i> , 90 Wn.2d 19, 33, 578 P.2d 1292<br>(1978).....   | 19        |
| <i>State ex re. Boyles v. Whatcom Cy. Superior Court</i> , 103 Wn.2d 610, 694<br>P.2d 27 (1985).....  | 12, 14    |
| <i>State ex rel. Gephardt v. Superior Court for King Cy.</i> , 15 Wn.2d 673, 680,<br>131 P.2d 943 (1942).....   | 10        |
| <i>State v. O’Neill</i> , 148 Wn.2d 564, 571, 62 P.3d 489 (2003) .....  | 5, 6      |
| <i>Tabor v. Moore</i> , 81 Wn.2d 613, 616-17, 503 P.2d 73 (1972) .....  | 9, 10     |

*Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104  
(1998)..... 5  
*Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994)..... 10

**Rules**

CR 12(b)(6)..... 4, 5, 15

**Constitutional Provisions**

Washington State Constitution,  
art. VIII, § 7 ..... 1, 2, 4, 6, 7, 15, 16, 17, 18, 19, 20

## **I. INTRODUCTION**

Appellant Friends of North Spokane Parks (“Friends”) filed this action in an attempt to prevent Star Saylor Investments, LLC (“SSI”) from constructing a public road for ingress and egress through Spokane County property, commonly referred to as “Freddy Park.”

Friends asserted a number of erroneous legal theories in advancing its position, based on alleged deed restrictions and the allegation that the construction of a public road is somehow a “gift” of public property to SSI in violation of the Washington State Constitution.<sup>1</sup> Friends lacks standing and/or legal authority for each of its claims.

First, Friends does not have standing to assert claims related to the original deed granting Freddy Park to the County because Friends is not a party to the deed or a successor in interest. Second, Friends’ argument that the construction of a road through Freddy Park violates the Washington State Constitution, art. VIII, § 7, fails as a matter of law because that provision is simply inapplicable to the construction of a road for the benefit of the public.

SSI respectfully submits that the trial court did not err in granting Defendant’s Motion to Dismiss Plaintiff’s claims under Civil Rule 12(b)(6) for failure to state a claim for relief and requests that the trial court’s decision be upheld.

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<sup>1</sup>Friends’ Amended Complaint also contained a claim that the property in question was held in “trust” for the public, *i.e.*, a charitable trust. The claim and related arguments appear to have been abandoned and are not argued on appeal.

## **II. ASSIGNMENTS OF ERROR**

Friends erroneously asserts that the trial court erred by granting SSI's Civil Rule 12(b)(6) motion to dismiss, arguing that:

- (1) The trial court erred in holding that a taxpayer must show his taxes fund the project in question to have taxpayer standing;
- (2) The trial court erred by making findings of fact of matters outside the record that Spokane County will not violate article VIII, § 7 of the Washington State Constitution; and
- (3) The trial court erred by finding that Friends' Amended Complaint did not sufficiently plead a claim for violation of article VIII, § 7, of the Washington State Constitution.<sup>2</sup>

To the contrary, the trial court correctly concluded that Friends did not allege and could not allege any claims upon which relief could be granted. Accordingly, the trial court did not err by granting SSI's 12(b)(6) motion to dismiss.

## **III. STATEMENT OF THE CASE**

In July 2001, Fred Meyer, Inc., Fred Meyer Stores, Inc., and Roundup Co. (collectively, "Fred Meyer") deeded a 3.99 acre parcel of property to Spokane County. CP 20. The property became known as "Freddy Park." *Id.* The deed contained certain use restrictions, including

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<sup>2</sup> Friends also challenges the trial court's denial of its motion to disqualify Spokane County Prosecuting Attorney Ronald Arkills. However, SSI did not present any arguments on that issue below because it had no bearing on SSI's motion to dismiss. SSI similarly declines to address that argument on appeal.

that the parcel be used as a “natural, community, or regional park.” *Id.* Friends of North Spokane Parks (“Friends”) was not a party to the deed.

Star Saylor Investments, LLC (“SSI”) owns a separate parcel of property which borders Freddy Park to the south. CP 21. In 2007, SSI applied to Spokane County for a preliminary plat on the SSI parcel, which the County approved. *Id.* One of the conditions of the approval of the preliminary plat was the private construction of a public road for ingress and egress to the SSI parcel through the Freddy Park property. *Id.*

In 2012, SSI applied for and was granted a rezone, which required the construction of a road through the Freddy Park property. CP 21-22. In connection with the rezone, Spokane County passed the “Amendment to Restrictions on Use and Development of Property,” thus giving final approval to the zone classification. CP 22. No property was transferred to SSI through the rezone.

Friends subsequently filed an action for a declaratory relief, pursuant to Chapter 7.24 RCW, seeking to prohibit the construction of the public road through Freddy Park as an alleged violation of the 2001 deed and the Washington State Constitution. CP 1, 18. Specifically, Friends alleged that: (A) the County’s actions in approving the road through Freddy Park were prohibited, based on deed restrictions; (B) any amendments to the deed to remedy those restrictions allowing a road were “void”; (C) the County’s actions in approving the road through Freddy Park were prohibited because the property was held in “trust” as park property; and (3) the County’s actions in approving the road through

Freddy Park were prohibited by article VIII, § 7, of the Washington State Constitution. CP 18-30.

SSI moved for dismissal pursuant to CR 12(b)(6). CP 33, 255. After a hearing on the motion, the trial court granted SSI's motion for dismissal, holding that Friends did not have standing to enforce the 2001 deed restrictions or to challenge the 2012 deed amendments, either as a party or successor to the 2001 deed, or as a taxpayer. CP 212-214. The trial court found that Friends had not alleged a taxpayer cause of action and could not demonstrate that it paid the type of taxes funding the project in question. The trial court also held that Friends had not and could not allege facts sufficient to pursue a claim under article VIII, § 7, of the Washington State Constitution because there had been no transfer of public property, and there was no donative intent. *Id.*

#### **IV. ARGUMENT**

##### **A. Standard of Review for Motion to Dismiss**

Whether dismissal was appropriate under CR 12(b)(6) is a question of law that the appellate court reviews *de novo*. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007). Dismissal under CR 12(b)(6) is proper where “it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.” *Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986). A 12(b)(6) motion may be granted where the “plaintiff includes allegations that show on the face of the complaint that

there is some insuperable bar to relief.” *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998). Dismissal under CR 12(b)(6) is appropriate where the plaintiff lacks standing. *See, e.g., Foss v. Dept. of Corrections*, 82 Wn. App. 355, 918 P.2d 521 (1996); *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 223 P.3d 1172 (2009).

**B. The Trial Court’s Decision Must be Affirmed Because Friends Failed to Assign Error To Any of the Findings of Fact or Conclusions of Law.**

RAP 10.3(g) provides that:

A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

If the appellant does not assign error to the trial court’s findings of fact, they are verities on appeal. *State v. O’Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003); *see also Cowiche Canyon Conservancy*, 118 Wn.2d at 808; *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Similarly, unchallenged conclusions of law become the law of the case. *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 716, 846 P.2d 550 (1993) (citing *Millican of Wash., Inc. v. Wienker Carpet Serv., Inc.*, 44 Wn. App. 409, 413, 722 P.2d 861 (1986)).

Friends alleges on appeal solely that the trial court’s error “extends to the Findings of Fact and Conclusions of Law” in the Order granting

SSI's 12(b)(6) motion." Br. of Appellant at 1. However, Friends does not assign error to any of the court's findings or conclusions and does not reference any finding or conclusion by number. Since Friends does not assign error to any of the findings or conclusions, the findings are verities on appeal, and the conclusions are the law of the case. *See O'Neill*, 148 Wn.2d at 571; *King Aircraft Sales, Inc.*, 68 Wn. App. at 716.

Accordingly, the following findings and conclusions should not be disturbed on appeal:

1. Friends has not alleged and cannot allege that it is: (a) a grantee or grantor; or (b) a successor to a grantee or grantor with respect to the 2001 deed between Wilmington Trust Company and Spokane County.

2. Friends has not alleged and cannot allege facts sufficient to confer taxpayer standing because it has not alleged and cannot allege a taxpayer cause of action, nor that Friends pays the type of taxes "funding" the project that is the subject matter of this action.

3. Accordingly, Friends does not have standing to pursue Counts 1 – 5, as alleged in the Amended Complaint.

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

Given the trial court's conclusions, which form the law of the case, and the unchallenged findings that support those legal conclusions, the Court must affirm the trial court's order dismissing Friends' claims for lack of standing and failure to allege facts sufficient to pursue a claim under article VIII, § 7.

C. **In Any Case, the Trial Court Correctly Found that Friends Did Not Have Standing to Pursue This Action.**

The trial court properly found that Friends did not have standing to enforce alleged deed restrictions or challenge the validity of the 2012 amendments to the deed.

The standing doctrine requires that a plaintiff must have a personal stake in the outcome of a case in order to bring suit. *Gustafson v. Gustafson*, 47 Wn. App. 272, 276, 734 P.2d 949 (1987). Generally, standing must be traditional, taxpayer, representative, or liberalized. *City of Seattle v. McKenna*, 172 Wn.2d 551, 564, 259 P.2d 1087 (2011) (J. Alexander, concurring).

Friends does not attempt to argue that it has traditional standing. Friends concedes that it was not a party to the deed, and that it is not a successor to a party to the deed. Thus, Friends lacks traditional standing to make claims related to the deed.<sup>3</sup>

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<sup>3</sup> See *Northwest Properties Brokers Network, Inc., v. Early Dawn Estates Homeowner's Association*, 173 Wn. App. 778, 800–801, 295 P.3d 314 (2013) (citing *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 691, 974 P.2d 836 (1999)) (standing to enforce a deed limited to parties to the deed and successors in interest).

Instead of alleging traditional standing to enforce the terms and conditions of the deed (for which Friends undisputedly does not qualify), Friends relies on an erroneous definition and application of alleged taxpayer standing to claim a right to bring the current objections to a third-party deed, for which no taxpayers are impacted. Friends cannot establish taxpayer standing because it has not alleged and cannot allege a taxpayer cause of action or that it pays the type of taxes implicated, which are necessary prerequisites to taxpayer standing.

1. **Friends Does Not Have Taxpayer Standing to Bring a Claim Related to a Third-Party Deed Because it Cannot Allege a Taxpayer Cause of Action That it Pays Taxes Funding the Construction of the Road.**

In addition to finding that Friends does not have traditional standing, the trial court held that Friends did not have taxpayer standing to pursue the current action, finding that “Friends has not alleged and cannot allege facts sufficient to confer taxpayer standing because it has not alleged and cannot allege a taxpayer cause of action, nor that Friends pays the type of taxes ‘funding’ the project that is the subject matter of this action.” CP 213.

To qualify for taxpayer standing, a plaintiff’s complaint must allege: (1) a taxpayer’s cause of action and facts supporting the taxpayer’s status; (2) that the plaintiff pays the type of taxes funding the project in question; and (3) the plaintiff asked the Attorney General’s office to take action before bringing suit. *Dick Enterprises, Inc. v. King Cy.*, 83 Wn.

App. 566, 572-73, 922 P.2d 184 (1996); *City of Seattle*, 172 Wn.2d at 564 (J. Alexander, concurring). Taxpayers need not allege a direct, special, or pecuniary interest in the outcome of the lawsuit, but they must demonstrate that their demand to the Attorney General's office to initiate the action was refused, unless such a request would have been futile. *Robinson v. City of Seattle*, 102 Wn. App. 795, 805, 10 P.3d 452 (2000) (citing *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 269, 534 P.2d 114 (1975)).

Thus, a taxpayer seeking standing based on that status must first allege a taxpayer cause of action. A taxpayer cause of action is a cause of action in which there is an alleged burden on taxpayers associated with the government action. *See Dick Enters.*, 83 Wn. App. at 572-73.; *see also Tabor v. Moore*, 81 Wn.2d 613, 616-17, 503 P.2d 73 (1972). The trial court correctly held that Friends had not alleged and could not allege a taxpayer cause of action. Friends did not allege below, and does not assert on appeal, that the challenged action (a privately financed road) will impose any burden on taxpayers.

Rather, Friends' apparent assertion is that status as a taxpayer gives it automatic standing to assert any type of claim against the government – regardless of whether the claim itself involves the use of taxpayer funds. To the contrary, in order to have taxpayer standing, Friends must bring a taxpayer cause of action, *i.e.*, a cause of action that alleges that taxpayers are burdened by the government action in question. *See e.g., State ex rel. Gephardt v. Superior Court for King Cy.*, 15 Wn.2d

673, 680, 131 P.2d 943 (1942) (“[A] taxpayer may seek relief in equity against a public wrong which results in imposing an additional burden on the taxpayers.”); *Great Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 937 P.2d 1088 (1997) (J. Sanders, dissenting) (recognizing requirement of a taxpayer cause of action); *Dick Enters.*, 83 Wn. App. at 572-73.; *see also Tabor*, 81 Wn.2d at 616-17.

If Friends’ theory were true, it would essentially mean that every taxpayer has standing to challenge any government action simply on the basis that it pays taxes, which is clearly not the case. *See, e.g., Federal Way School Dist. No. 210 v. State*, 167 Wn.2d 514, 219 P.3d 941 (2009) (holding respondents lacked taxpayer standing to bring challenge to school funding formulas under the Basic Education Act); *see also Walker v. Munro*, 124 Wn.2d 402, 879 P.2d 920 (1994) (noting it was questionable that petitioners would have taxpayer standing to protest legislation which would limit state expenditures, make it more difficult to raise taxes, and would not impose any burden on taxpayers).

Furthermore, the trial court did not err by finding that Friends did not have taxpayer standing because it cannot show that it pays the type of taxes funding the project that is the subject matter of the action. In addition to alleging a taxpayer cause of action, a plaintiff must show that he or she pays the type of taxes funding the project in question in order to have taxpayer standing. *Dick Enters.*, 83 Wn. App. at 572-73.

As discussed, Friends did not assign error to the factual finding that it does not pay the type of taxes funding the project in question. Thus,

this factual assertion is a verity on appeal. Friends did not, and cannot, allege that it pays the type of taxes “funding” the project that is the subject matter of the action because, *there is no government funding involved in the construction of the road*. Thus, the trial court properly held that Friends did not have taxpayer standing on the additional basis that Friends could not show it pays the type of taxes funding the challenged project.

2. **For the First Time on Appeal, Friends Erroneously Argues That *Dick Enterprises* is Not Good Law.**

Friends argues for the first time on appeal that *Dick Enterprises* is not good law because subsequent cases, including *Robinson v. City of Seattle*, 102 Wn. App. 795, 10 P.3d 452 (2000), and *Eugster v. City of Spokane*, 139 Wn. App. 21, 156 P.3d 912 (2007), have recognized that taxpayers are not required to demonstrate a direct, special, or pecuniary interest in the outcome of the suit. Courts, including the Washington Supreme Court continue to require a taxpayer cause of action to confer taxpayer standing.

a. **There is No Evidence in the Record That Friends Made This Argument Before the Trial Court.**

Absent manifest constitutional error, the Court of Appeals does not consider arguments raised for the first time on appeal. RAP 2.5(a); *Cowiche Canyon Conservancy*, 118 Wn.2d at 809. RAP 2.5(a) does not

allow a party to present a ground for reversing a trial court decision which was not presented to the trial court.

Friends asserts for the first time on appeal that a plaintiff does not have to show that it pays the type of taxes funding the challenged project in order to have taxpayer standing. Friends did not raise this argument in the briefing below, and this is not an argument concerning manifest constitutional error. RAP 2.5(a) does not allow a party to present a ground for reversing a trial court decision which was not presented to the trial court. Therefore, Friends has waived the argument, and this Court should decline to consider it, pursuant to RAP 2.5(a).

**3. Dick Enterprises Remains Good Law.**

The requirement of a “special” or “unique” taxpayer injury has arguably been abandoned in favor of allowing plaintiffs to obtain the right to pursue a cause of action on behalf of all taxpayers by first seeking the involvement of the Attorney General’s office. *See e.g., City of Tacoma v. O’Brien*, 85 Wn.2d 266, 269, 534 P.2d 114 (1995); *State ex re. Boyles v. Whatcom Cy. Superior Court*, 103 Wn.2d 610, 694 P.2d 27 (1985). Friends argues that this somehow negates the requirement of alleging a taxpayer cause of action.

However, the relevant holding in *Dick Enterprises* is still good law. In fact, *Dick Enterprises* was cited by the Washington Supreme Court for this proposition as recently as 2011. *See City of Seattle*, 172 Wn.2d at 564 (J. Alexander, concurring) (holding that in order to confer

taxpayer standing, a taxpayer must allege a “taxpayer cause of action”); *see also Great Harbor 2000*, 132 Wn.2d at 299 (J. Sanders, dissenting) (rejecting the lead opinion’s holding that a plaintiff must allege a unique injury or special interest to assert taxpayer standing, and citing to *Dick Enterprises* for the proposition that the plaintiff must allege a taxpayer’s cause of action).

The two relevant requirements for taxpayer standing (taxpayer cause of action and payment of taxes) are not the same as requiring a taxpayer to demonstrate a unique or special injury above affected taxpayer status; taxpayer standing simply requires a demonstration of *affected taxpayer status*.

A plaintiff could easily demonstrate that a certain government action burdens taxpayers, and that the plaintiff pays taxes impacted by the government action, without also being required to demonstrate a unique or special taxpayer injury. For example, a Spokane County property taxpayer would presumably have taxpayer standing to allege that Spokane County is somehow misusing funds collected through property taxes without having to demonstrate an additional unique or special injury beyond those suffered by all property taxpayers. In that case, the taxpayers paying those types of taxes are being burdened (taxpayer cause of action), but no “unique” or “special” taxpayer injury has been demonstrated by the plaintiff.

The cases cited by Friends do not prove otherwise.<sup>4</sup>

Friends first relies on *Robinson*, 102 Wn. App. 795, 804-05. In that case, the plaintiffs challenged the constitutionality of the City of Seattle's preemployment urinalysis drug test requirement, which was required for about half of the employment positions with the City. The plaintiff group who brought the challenge consisted of eight residents of the City of Seattle and the American Civil Liberties Union of Washington, all who paid local sales and use taxes. *Id.* at 804. Noting that the City did not challenge the plaintiffs' taxpayer standing, the Court summarily recognized standing without analysis. *Id.* at 805. There was no discussion of the requirements for taxpayer standing.

In *Eugster*, 139 Wn. App. 21, a city council member (notably, counsel for Friends) brought an action against the City, challenging a settlement between the City and a parking garage developer. Noting that taxpayers must first request the appropriate government entity to take action on their behalf before they can bring a lawsuit as taxpayers, the Court summarily held the plaintiff did not have standing because he failed to file a complaint with the Attorney General's office before filing suit. *Id.* 28-29. The Court did not discuss and did not need to discuss whether the plaintiff actually paid taxes, or whether the plaintiff paid taxes that funded the challenged project.

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<sup>4</sup> Friends also cites to *State ex rel. Boyles v. Whatcom County Superior Court*, 103 Wn.2d 610, 614, 694 P.2d 27 (1985). However, *Dick Enterprises* was decided 11 years after *State ex rel. Boyles*.

Neither *Robinson* nor *Eugster* overruled *Dick Enterprises* or otherwise overruled the requirement that a plaintiff asserting taxpayer standing must allege a taxpayer cause of action and payment of implicated taxes because it was not at issue in either case.

*Dick Enterprises* and its requirements for taxpayer standing remain good law.<sup>5</sup> The trial court did not err by holding that Friends could not establish taxpayer standing, where Friends did not allege and could not allege a taxpayer cause of action, nor that it paid the type of taxes that fund the challenged project. Dismissal of Friends' claims to enforce the 2001 deed restrictions and challenge the 2012 deed amendments was appropriate and required under CR 12(b)(6).

**D. The Trial Court did not Err in Finding that Friends Could Not Allege Facts Sufficient to Pursue a Claim Under Article VIII, § 7, of the Washington State Constitution.**

Article VIII, § 7 of the Washington State Constitution provides:

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.

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<sup>5</sup> In fact, multiple recent unpublished decisions out of all three divisions of this Court, including an opinion filed by Division Two as recently as October 24, 2013, continue to cite to *Dick Enterprises* for the proposition that a plaintiff is not required to show a unique injury or special interest beyond being a taxpayer, but must allege that he or she pays the type of taxes funding the project in question.

WA Const., art. VIII, § 7. The primary purpose of article VIII, § 7, is to prevent state funds from being used to benefit private interests where the public interest is not primarily served. *In re Limited Tax General Obligation Bonds of City of Edmonds*, 162 Wn. App. 513, 530, 256 P.3d 1242 (2011) (quoting *CLEAN v. State*, 130 Wn.2d 782, 792-793, 928 P.2d 1054 (1996)). “In determining whether an expenditure of public funds violates article VIII, § 7, we look at consideration and donative intent.” *In re Limited Tax*, 162 Wn. App. at 530 (citing *Gen. Tel. Co. of the NW., Inc. v. City of Bothell*, 105 Wn.2d 579, 588, 716 P.2d 879 (1986)).

Friends’ argument on appeal is that the trial court erred by finding Friends did not and could not allege a violation of article VIII, § 7, because the court had to take Friends’ complaint allegations as if they were true under Civil Rule 12(b)(6). However, Friends’ argument erroneously assumes the trial court was bound to accept Friends’ alleged legal conclusion that the County’s approval of construction of the road constituted a gift in violation of article VIII, § 7. Although the court must resolve any factual discrepancies in the plaintiff’s favor when deciding a 12(b)(6) motion to dismiss, it is not required to accept the plaintiff’s legal conclusions. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987), appeal dismissed, 488 U.S. 805, 109 S.Ct. 35, 102 L.Ed.2d 15 (1988).<sup>6</sup>

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<sup>6</sup> Although Friends claims the trial court erred by not accepting its asserted legal conclusion that allowing construction of the road constituted a gift to SSI in violation of Article VIII, Section 7, Friends did not assign error to the trial court’s findings that there was no transfer of public property nor any donative intent, and therefore those findings are verities on appeal, which should not be disturbed.

The trial court did not err by holding that Friends did not and could not allege facts sufficient to prove a violation of article VIII, § 7, because Friends could not show that there was any gift for purposes of article VIII, § 7, and the construction of the road serves a fundamental purpose of the government.

1. **Friends Could not Allege Facts Sufficient to Show that Spokane County’s Approval of the Road Construction Constituted a Gift for Purposes of Article VIII, § 7, of the Washington State Constitution.**

In order to prove a violation of the constitutional prohibition against gifts in the public property context, a plaintiff must show that the challenged action constitutes “**a transfer of property** without consideration and with donative intent.” *See City of Tacoma v. Taxpayers of City*, 108 Wn.2d 679, 701-02, 743 P.2d 793 (1987) (emphasis added); *General Tel. Co. v. City of Bothell*, 105 Wn.2d 579, 588, 716 P.2d 879 (1986). Here, there has not been and will not be any “gift” of public property because there will be no transfer of the County property. At most there will be a change in the character of the County property. No property will change hands in the construction of the public road. Nor will any public funds be utilized in the construction of the road. The County’s action of approving construction of the road on Spokane County property simply does not come within the scope of article VIII, § 7.

Friends’ argument below and on appeal is that the alleged benefit to SSI from the public road somehow qualifies as a gift for purposes of

article VIII, § 7. CP 30, Br. of Appellant at 18-19. However, it is well-established that an incidental benefit to a private individual or organization does not invalidate an otherwise valid public transaction. *City of Tacoma*, 108 Wn.2d at 705 (holding that incidental benefit of higher property values and lower utility bills to individual homeowners did not invalidate an otherwise valid utility conservation ordinance); *see also King Cy. v. Taxpayers of King Cy.*, 133 Wn.2d 584, 949 P.2d 1260 (1997). If this were not the case, every time the government built a road, which no doubt provides an incidental benefit to certain individuals and business owners, it would constitute a violation of article VIII, § 7. That is clearly not the intent of article VIII, § 7. Instead, a gratuitous transfer from the government to an individual – not a tangential benefit – must be present to implicate article VIII, § 7. No such transfer was alleged or is present here, and the trial court correctly found that Friends’ claim for violation of article VIII, § 7, must be dismissed.

2. **Even if the Approval of the Road Construction was a Gift for Purposes of Article VIII, § 7, Friends could not Allege Facts Sufficient to Show a Constitutional Violation.**

To determine whether a gift constitutes a violation of article VIII, § 7, the courts apply a two-pronged analysis. *CLEAN*, 130 Wn.2d at 797. First the court will consider whether the funds are being expended (or the public property is being allocated) to carry out a fundamental purpose of

the government. *Id.* If the answer is yes, then there has been no gift of public funds or public property and the analysis is concluded. *Id.*

If the expenditures are not found to serve a fundamental purpose of the government, then the court “focuses on the consideration received by the public for the expenditure of public funds and the donative intent of the appropriating body in order to determine whether or not a gift has occurred. *Id.* (citing *Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20, 39, 785 P.2d 447 (1990)). Furthermore, “[c]ourts do not inquire into the adequacy of consideration unless there is proof of donative intent or a grossly inadequate return.” *In re Limited Tax*, 162 Wn. App. at 530 (citing *Adams v. Univ. of Wash.*, 106 Wn.2d 312, 327, 722 P.2d 74 (1986)). Intent to give a gift must be present, because if intent to give a gift is lacking then the elements of a gift are not present and article VIII, § 7, does not apply. *CLEAN*, 130 Wn.2d at 798 (quoting *Scott Paper Co. v. City of Anacortes*, 90 Wn.2d 19, 33, 578 P.2d 1292 (1978)).

Generally, what constitutes a fundamental purpose of the government is quite broad. *See, e.g., CLEAN*, 130 Wn.2d at 799-800 (holding that the use of public funds to construct a Seattle Mariners stadium did not violate article VIII, § 7, as the ownership of the stadium was to remain in public hands and the Seattle Mariners would be required to pay reasonable rent to use the facility); *Citizens Protecting Resources v. Yakima County*, 152 Wn. App. 914, 920, 219 P.3d 730 (2009) (finding that flood prevention is considered to be a fundamental purpose of government); *Hudson v. City of Wenatchee*, 94 Wn. App. 990, 995, 974

P.2d 342 (1999) (noting that the state's police power is considered to be a fundamental purpose of government).

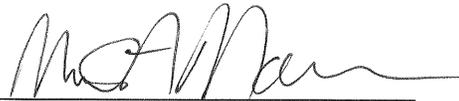
The development of transportation infrastructure has specifically been designated a primary function of the government. *See, e.g., Embry v. City of Calumet City, Ill.*, 701 F.3d 231, 236 n.11 (7th Cir. 2012) (noting that the primary function of any local government entity is the provision of services such as transportation). The construction of a public road confers a benefit to a significant portion of the public and is clearly a fundamental purpose of the government, and therefore the County's approval of the road construction did not violate article VIII, § 7.

#### **V. CONCLUSION**

For the foregoing reasons, Respondent SSI respectfully requests that the Court deny the appeal and affirm the trial court's order of dismissal under Civil Rule 12(b)(6).

RESPECTFULLY SUBMITTED this 16th day of January, 2014.

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**CERTIFICATE OF SERVICE**

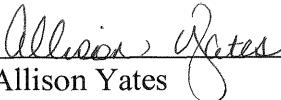
I hereby certify that I caused to be served a true and correct copy of the foregoing document on the 16<sup>th</sup> day of January, 2014 addressed to the following:

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