

FILED

No. 339823-III

MAY 16 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

FRIENDS OF NORTH SPOKANE COUNTY PARKS,

Appellant,

v.

STAR SAYLOR INVESTMENTS, LLC; SPOKANE COUNTY; FRED
MEYER STORES, INC.; ROUNDUP CO. D/B/A FRED MEYER,

Respondents.

BRIEF OF RESPONDENT STAR SAYLOR INVESTMENTS, INC.

MICHAEL A. MAURER, WSBA#20230
LAURA J. BLACK, WSBA #35672
Attorneys for Respondent
Star Saylor Investments, Inc.

LUKINS & ANNIS, P.S.
1600 Washington Trust Financial Center
717 W Sprague Ave.
Spokane, WA 99201-0466
Telephone: (509) 455-9555
Facsimile: (509) 747-232

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. STATEMENT OF THE CASE.....	3
III. PROCEDURAL HISTORY.....	6
IV. ARGUMENT	10
A. THE TRIAL COURT CORRECTLY DETERMINED THAT THE STATUTE OF LIMITATIONS IN RCW 36.32.330 BARRED FRIENDS’ LAWSUIT	10
B. THE COURT SHOULD AFFIRM THE DENIAL OF FRIENDS’ MOTION FOR RECONSIDERATION AS FRIENDS FAILS TO CHALLENGE ANY OF THE TRIAL COURT’S FINDINGS OF FACT AND, IN ANY CASE, NO WAIVER OF STATUTE OF LIMITATIONS DEFENSE HAS OCCURRED	17
C. ALTERNATIVELY, THE COURT SHOULD GRANT SSI’S MOTION FOR SUMMARY JUDGMENT AND DISMISS THIS CASE AS NEITHER THE ORIGINAL OR AMENDED DEDICATION LIMIT THE COUNTY’S ABILITY TO EXTEND STANDARD DRIVE FOR ROAD ACCESS THROUGH FREDDY PARK.....	22
1. The County’s Proposed Extension of Standard Drive is Expressly Permitted by Plain Language of the 2001 Deed and Original Park Providing for “Vehicular Access” to Freddy Park “from Standard Drive”	23
2. The County Had the Authority to and Has Properly Amended the 2001 Deed Restrictions via the 2013 Amendment Thereby Specifically Allowing a Public Road Through Freddy Park.	27
V. CONCLUSION.....	29

TABLE OF AUTHORITIES

Cases

<i>224 Westlake, LLC, v. Engstrom Properties, LLC</i> , 169 Wn. App. 700, 705, 281 P.3d 693 (2012).....	19
<i>Atherton Condo Apt.-Owners Ass 'n Bd. of Dirs. v. Blume Dev. Co.</i> , 115 Wn.2d 506, 516, 799 P.2d 250 (1990).....	10
<i>Bercier v. Kiga</i> , 127 Wn. App. 809, 824 (2004).....	22
<i>Berg v. Hudesman</i> , 115 Wn.2d 657 (1990)	23
<i>Blue Diamond Grp., Inc. v. KB Seattle 1, Inc.</i> , 163 Wn. App. 449, 453 (2011).....	22
<i>Burton v. Lehman</i> , 153 Wn.2d 416, 423 (2005)	14
<i>Butler v. Joy</i> , 116 Wn. App. 291, 296 (Div. III, 2003).....	18
<i>Clymer v. Empl. Sec. Dep't</i> , 82 Wn. App. 25, 27 (1996).....	18
<i>Donald v. City of Vancouver</i> , 43 Wn. App. 880, 883 (1986) (citing <i>Thomas v. Nelson</i> , 35 Wn. App. 868, 871 (1983)).....	23
<i>Friends of North Spokane Co. Parks v. Spokane Co.</i> , 184 Wn. App. 105, 336 P.3d 632 (2014).....	8, 28
<i>Hearst Comm., Inc. v. Seattle Times, Co.</i> , 154 Wn.2d 493, 503 (2005).....	24, 25
<i>Holiday v. Merceri</i> , 49 Wn. App. 321, 324 (1987).....	19
<i>Hollis v. Garwall, Inc.</i> , 137 Wash.2d 683, 695–96 (1999).....	23
<i>Imperato v. Wenatchee Valley College</i> , 160 Wn. App. 353, 358 (2011).....	11
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997).....	19
<i>King v. City of Dallas</i> , 374 S.W.2d 707 (1964).....	26
<i>Kleyer v. Harborview Med. Ctr.</i> , 76 Wn. App. 542, 545 (1995).....	18
<i>Lewark v. Davis Door Servs., Inc.</i> , 180 Wn. App. 239, 242, 321 P.3d 274, review denied, 180 Wn.2d 1026, 328 P.3d 902 (2014)	22
<i>Lewis v. City of Seattle</i> , 174 Wn. 219, 225 (1933)	28
<i>Lyons v. US. Bank NA</i> , 181 Wn.2d 775, 783 (2014).....	10
<i>Miller v. Am. Unitarian Ass'n</i> , 100 Wn. 555, 557 (1918)	23
<i>Neighbors & Friends of Viretta Park v. Miller</i> , 87 Wn. App. 361 (1997).....	25, 26
<i>Oltman v. Holland Am. Line USA, Inc.</i> , 163 Wn.2d 236, 243-47 (2008).....	18

<i>Rettkowski v. Dept. of Ecology</i> , 1238 Wn.2d 508, 516 (1996).....	15
<i>Robertson v. Wash. State Parks and Recreation Com'n</i> , 135 Wn. App. 1, 7 (Div. I 2005)	15
<i>Ronken v. Board of County Comm. of Snohomish Co.</i> , 89 Wn. 2d 304 (1997).....	15, 16, 17
<i>Rucker v. NovaStar Mortg., Inc.</i> , 177 Wn. App. 1, 10, 311 P.3d 31 (2013).....	11
<i>State v. Stannard</i> , 109 Wn.2d 29, 36 (1987).....	14
<i>Sterling v. Spokane County</i> , 31 Wn. App. 467, 469 (1982).....	12, 18
<i>Strong v. Clark</i> , 56 Wn.2d 230, 232 (1960).....	16
<i>Tingey v. Haisch</i> , 159 Wn.2d 652, 657 (2007)	13
<i>Vance v. Dept. of Retirement Sys.</i> , 114 Wn. App. 572, 577 (Div. III 2002)	13
<i>White v. Kent Med. Center, Inc., P.S.</i> , 61 Wn. App. 163, 170 (1991).....	11
<i>White v. State</i> , 131 Wn.2d 1, 9 (1997).....	27
<i>Young v. Key Pharm., Inc.</i> , 112 Wn.2d 216, 226 (1989).....	11

Statutes

RCW 36.32.120	17
RCW 36.32.120(6).....	12
RCW 36.32.330	1, 2, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21
RCW 64.08.050	28

Other Authorities

11A McQuillin Mun. Corp. §33:81 (3d. ed., West 2015).....	28
Black's Law Dictionary (10 th Ed., West 2014).....	13, 14
Black's Law Dictionary 1310 (6 th Ed. 1990).....	13
Merriam-Webster.com, 2016.....	14

Rules

CR 12	2, 18
CR 12(b).....	9, 20, 21
CR 12(b)(6).....	6, 19, 21
CR 12(g).....	20, 21
CR 12(h).....	18, 21
CR 56(c).....	10
RAP 10.3(a)(5).....	22
RAP 10.3(a)(6).....	22

I. INTRODUCTION

This appeal involves Friends of North Spokane County Parks' ("Friends") untimely appeal of an act of the Spokane County Commissioners. The underlying suit filed by Friends challenged a proposed road through "Freddy Park," alleging the road would violate conditions of the original Freddy Park dedication and, alternatively, asserting those conditions are incapable of amendment. All Defendants joined in a motion for summary judgment seeking to dismiss the lawsuit. The Trial Court dismissed Friends' case, determining that it had failed to comply with the 20-day appeal deadline in RCW 36.32.330 in which to challenge the County's amendment permitting a public road along on the park's outskirts.

On appeal, Friends makes three assignments of error and two issues pertaining thereto, all of which are less than a model of clarity. However, in essence Friends' challenges two interrelated statute of limitations issues, both of which were resolved in SSI and its co-Defendants' favor by the Trial Court below.¹

First, Friends argues that the Trial Court's conclusion that the 20-day statute of limitation contained in RCW 36.32.330 barred this lawsuit was in error. Second, Friends claims that the Trial Court's denial of its motion for reconsideration, which argued that SSI and co-Defendants

¹ Friends' also moved for cross summary judgment below, but does not appeal the trial court's order denying its summary judgment.

Spokane County and Fred Meyer had waived the statute of limitations defense, was improper.

Friends' challenges lack merit. Without any citation or support, Friends claims that the discrete act of Spokane County in managing its property and removing any road access restrictions to Freddy Park was somehow a legislative act subject to challenge at any time. To the contrary, the County's decision to do so was within its usual and ordinary duties and was a "decision or order" of the County falling squarely within the purview of RCW 36.32.330's limitation period. Because the statute applies to Friends' lawsuit, its claims are time barred.

Additionally, Friends fails to assign error to the Trial Court's discretionary findings and order denying its motion for reconsideration, requiring its ruling to be affirmed. Even if it had properly challenged the this order, Friends nevertheless misapplies a CR 12 and common law waiver claim to Defendants statute of limitations defense. As SSI and co-Defendants Spokane County and Fred Meyer preserved and properly asserted the statute of limitations issue below, Friends motion for reconsideration on this point was correctly denied. Last, because the appellate jurisdiction of the trial court can only be invoked if Friends had posted a bond and appealed the County's decision within 20 days, there can be no waiver. Friends simply failed to pursue this action in accordance with the requirements of RCW 36.32.330.

Even if this were not the case, Friends simply misreads the plain language of the original dedication and, in any event, cites no authority

which would preclude the County and Fred Meyer from amending any limitation on roadway access in Freddy Park. These theories were fully briefed and argued by SSI below, are unaddressed by Friends on appeal, and serve as an independent or alternative basis for the Court to affirm summary judgment dismissal.

As was the case before the Trial Court, Friends' appeal fails to advance evidence or argument in support of its claims or which would preclude summary judgment in Defendants favor. This Court must affirm the Trial Court's dismissal. Alternatively, the Court should grant summary judgment as both the original Freddy Park dedication and later amendment specifically allow the road access with which Friends takes issue, foreclosing any of the relief it seeks.

II. STATEMENT OF THE CASE

Sometime prior to July 24, 2001, Roundup Company, doing business as Fred Meyer Stores, Inc., approached Spokane County to donate a 3.99-acre parcel of land to the County to use as a park. (CP 451).

On July 24, 2001, by Resolution No. 01-0660, the Spokane County Board of County Commissioners accepted the donation to what became known as "Freddy Park." (CP 451-52). In doing so, the County agreed to the following restriction on the future use Freddie Park:

There shall be no vehicular access from the park property to the abutting property on which the Fred Meyer Store is located as well as another parcel denominated as Parcel "A," depicted in Attachment "B," attached hereto and incorporated herein by reference, which is being marked for sale and development.

CP 451).² Parcel A, lying directly to the North of Freddie Park, did not include the road commonly known as Standard Drive. (CP 455).

On August 13, 2001, Fred Meyer, Inc., Fred Meyer Stores, Inc., and Roundup Co. (collectively, “Fred Meyer”) deeded the park property to Spokane County. (CP 457). The transfer was effectuated by a “Deed with Covenant and Joinder with Warranties of Title to Real Property,” filed under Spokane County Auditor No. 4624178, and signed by Robert Currey-Wilson as Vice President of Fred Meyer. (CP 457-60) (the “2001 Deed”). Exhibit “B” to the 2001 Deed contained “Restrictions on Use and Development” of Freddie Park, and stipulated that the property was to be used “only as a natural, community, or regional park.” (CP 467). The restrictions also contained one narrow limitation on use of the parcel, providing: “Vehicular access to the property shall be only from Standard Drive.” *Id.* (emphasis added).

SSI owns a separate parcel of property which borders Freddy Park to the south. In 2007, SSI applied to Spokane County for a preliminary plat of its parcel, which was approved. (CP 6, 7). One of the conditions of approval of the preliminary plat was the construction of a road for ingress and egress to SSI’s parcel through the Freddy Park property. (*Id.*); (CP 471). In 2012, SSI applied for and was granted a rezone, which (among other things) would permit the construction of a road through Freddy Park.

² The “property on which the Fred Meyer Store is located” is depicted in “Attachment ‘B’” to the County’s resolution as Parcel G. (CP 455).

(CP 6, 7); (CP 118-149). No appeal was taken from these land use decisions.

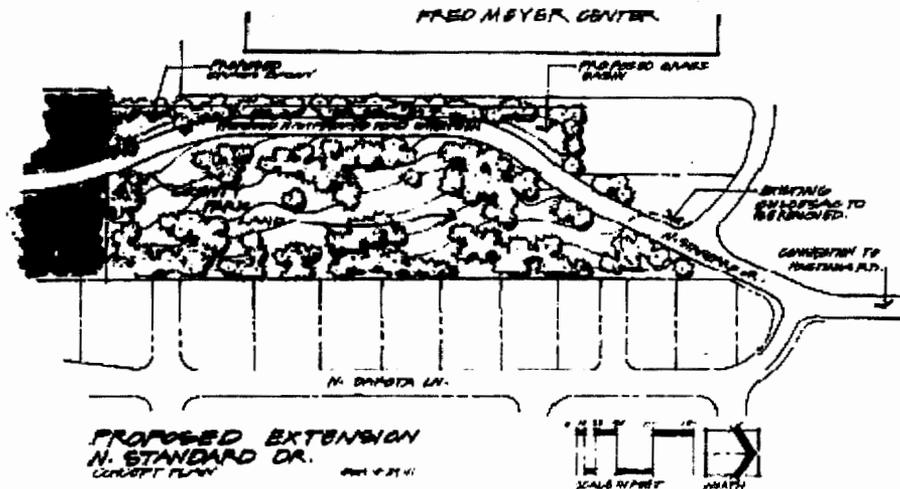
In order to provide for the road access authorized under SSI's plat approval, on November 7, 2012, "pursuant to the provisions of RCW 36.32.120(6)," the County Commissioners passed Resolution No. 12-0910 amending Exhibit "B" to the 2001 Deed – the Restrictions on Use and Development – which states:

The herein described real property described shall be held, conveyed, sold, and improved as a natural, community, or regional park and for the establishment of a public road.

(CP 470-72) (emphasis added). The modification contemplated by Resolution No. 12-0910 was recorded March 28, 2013, under Spokane County Auditor's Recording No. 6191976, and titled "Amendment to Restrictions on Use and Development of Property." (CP 475) (the "2013 Amendment"). This document reiterated the intent behind the County's acceptance of the Freddie Park dedication:

A question has arising when the existing restrictive covenant language in Recital B above [i.e., the 2001 Deed "Restrictions on Use and Development of Property"] would permit the establishment and construction of a public road across [Freddie Park]... To avoid any issues regarding interpretation of the restrictive covenant, the FRED MEYER PARTIES and SPOKANE COUNTY wish to amend the restrictive covenant to allow for the establishment and construction of a public road across [Freddie Park].

(CP 476-77). Fred Meyer and the County then agreed to “amend, supersede and replace” any restriction in the 2001 Deed to provide for the “establishment of a public road as depicted in the attached Exhibit ‘C’” as:



(CP 477, 493). “The proposed alignment for the Standard Drive between Hastings Road and Regina Road,” was diagramed in Exhibit C as follows: (CP 493). Like the 2001 Deed, Robert Currey-Wilson signed this document for the “Grantor.” (CP 478).

III. PROCEDURAL HISTORY

Friends filed this lawsuit on February 19, 2013. On April 24, 2013, Friends moved to amend its complaint to include an allegation that the County’s 2013 Amendment was void. SSI then intervened, and on April 25, 2013 filed a Motion to dismiss Friends’ complaint under CR 12(b)(6) for failure to state a claim upon which relief can be granted. (CP 158-60); (CP 171-72).

SSI argued dismissal was warranted because Friends failed to timely appeal the December 20, 2012 Decision of the Spokane County hearing examiner which granted SSI a rezone of its property and “allowed for the construction of a road to SSI’s [property] through [Freddie] park.” (CP 163). SSI also noted:

Even if Friends’ current objection to the re-zoning decision were not (for some reason) subject to LUPA [the Land Use Petition Act, Chapter 36.70C RCW], Friends further failed to appeal the Spokane County Commissioners’ [s]eparate November 7 Amendment, which allowed a road through the [Freddie] Park Parcel within 20 days, as required to appeal all such decisions under **RCW 36.32.330**. Friends’ claims are separately subject to dismissal on that basis.

(CP 163 fn. 10) (emphasis added).

On May 2, 2013, Friends amended its Complaint to include SSI as a party. (CP 1-17). Co-Defendants Spokane County and Fred Meyer Stores, Inc. submitted answers to Friends’ Amended Complaint on May 13 and June 5, 2013, respectively. (CP 20-22); (CP 24-26). Both Spokane County and Fred Meyer’s answers contained affirmative defenses alleging that Friends failed to exhaust administrative remedies, failed to timely appeal the County’s action under the LUPA, and that Friends was collaterally estopped from challenging the County’s authority to allow a road through Freddie Park. (CP 21-22); (CP 25-26).

SSI filed a second Motion to Dismiss on September 18, 2013 (CP 174-75), which was granted on October 25, 2013. (Ct. Rec. No. 36) (CP 363-65). In doing so, the Trial Court ruled Friends did not have standing

under the 2001 Deed or as taxpayers to challenge the County's amendments to the restrictive covenant, that no cause of action existed under the Washington Constitution for a gift of public funds, that no "actual trust" of public land was created by the 2001 Deed. Friends appealed the Court's dismissal. (CP 366-67). In a published decision, Division III of the Court of Appeals affirmed in part and reversed in part. *Friends of North Spokane Co. Parks v. Spokane Co.*, 184 Wn. App. 105, 336 P.3d 632 (2014). The Court held that Friends had taxpayer standing to question the County's land use action and that the Amended Complaint met minimum pleading requirements to state a challenge to the County's actions based on the 2001 Deed restrictions. *Friends of North Spokane*, 184 Wn. App. 105, 336 P.3d at 640, 644. The Court otherwise affirmed the dismissal. *Id.*

After the case was remanded in December 2014 (CP 373), the parties filed their respective witness disclosures between March 26, 2015, and July 22, 2015. *See* (CP 410); (CP 412-427). Other than the witness disclosures required by the Trial Court's Scheduling Order, there was no other pleadings, discovery, or case activity of any kind.

On August 21, 2015, SSI Moved for Summary Judgment seeking dismissal of the Amended Complaint based in part on Friends' failure to comply with the statute of limitations and bond requirements imposed by RCW 36.32.330. (CP 428-29). Friends filed a Cross-Motion for Summary Judgment on September 8, 2015. (CP 31). Co-Defendants Spokane County and Fred Meyer Stores, Inc. joined in SSI's Motion for Summary

Judgment on September 9, 2015. (CP 628-29). The Court heard oral argument on the parties' motions on October 9, 2015, and issued a letter ruling granting Defendants' summary judgment motion on October 16, 2015. (CP 32-34). Friends' cross motion for summary judgment was denied. (CP 34). A written order dismissing Friends' Complaint with prejudice was entered on October 27, 2015. (CP 47-52).

Friends moved for reconsideration of the Trial Court's summary judgment in Defendants favor, arguing that SSI had waived the statute of limitations defense by not including it in its CR 12(b) motion to dismiss. (CP 35). In denying Friends' motion for reconsideration, the Trial Court Order made the following unchallenged findings of fact:

2. SSI... filed a CR 12(b)(6) Motion to Dismiss on April 25, 2013, arguing in part that the statute of limitations under RCW 36.32.322 (sic) barred Friends' lawsuit...

.....

4. Defendants Spokane County and Friend Meyer Store, Inc. answered Friends' Amended Complaint on May 13, 2013 and June 5, 2013, respectively, and both Defendants raised an affirmative defense that the Amended Complaint was barred as untimely...

.....

6. Friends was on notice that Defendants intended to assert the statute of limitations as a defense.

7. On August 21, 2015, SSI filed a Motion for Summary Judgment asserting, in part, that dismissal of Friends' Amended Complaint was appropriate based on the expiration of the statute of limitations under RCW 36.32.322. [sic]

8. Both Spokane County and Fred Meyer Joined in SSI's motion for summary judgment.

(CP 69-70). Based on these findings, the Trial Court concluded:

F. Because the parties properly raised the affirmative defense of the statute of limitations in their answer to Friends' Amended Complaint, and Spokane County and Fred Meyer joined in SSI's motion for summary judgment, the Court concludes that the affirmative defense was properly pled and was not waived by the parties under CR 12.

(CP 71).

Friends' filed a Notice of Appeal on December 24, 2015. (CP 74).

IV. ARGUMENT

A. The Trial Court Correctly Determined that the Statute of Limitations in RCW 36.32.330 Barred Friends' Lawsuit

This court reviews an order granting summary judgment de novo, engaging in the same inquiry as the trial court. *Lyons v. US. Bank NA*, 181 Wn.2d 775, 783 (2014).

Summary judgment is appropriate if the moving party can show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). "A material fact is one upon which the outcome of the litigation depends in whole or in part." *Atherton Condo Apt.-Owners Ass 'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

Although "[a]ll reasonable inferences are to be made in favor of the nonmoving party," *Imperato v. Wenatchee Valley College*, 160 Wn. App.

353, 358 (2011), a defendant moving for summary judgment may meet its “initial burden of showing the absence of an issue of material fact... by showing that there is an absence of evidence supporting the nonmoving party’s case.” *White v. Kent Med. Center, Inc., P.S.*, 61 Wn. App. 163, 170 (1991) (citations omitted). Doing so shifts the burden to the plaintiff to “set forth specific facts showing that there is a genuine issue for trial.” *Id.* at 171; *see also Rucker v. NovaStar Mortg., Inc.*, 177 Wn. App. 1, 10, 311 P.3d 31 (2013) (“Mere allegations or conclusory statements of facts unsupported by evidence are not sufficient to establish a genuine issue.”).

If a plaintiff fails to meet its burden, summary judgment is required because “there can be ‘no genuine issues as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226 (1989) (quotation omitted).

Because Friends concedes that it did not file its appeal of the County’s decision within the 20-day limitation period in RCW 36.32.330,³ the only issue the Court needs to decide is whether statute of limitations in RCW 36.32.330 applies to the act of the Spokane County Commissioners in dealing with County property through the 2013 Amendment.

RCW 36.32.330 provides in pertinent part:

³ (Friends’ Opening Brief at 1) (“...it is apparent from the Amended and Restated Complaint that the case was not filed within the statute of limitations.”).

Any person may appeal to the superior court from any decision or order of the board of county commissioners. Such appeal shall be taken within twenty days after the decision or order, and the appellant shall within that time serve notice of appeal on the county commissioners. The notice shall be in writing and shall be delivered to at least one of the county commissioners personally, or left with the county auditor. The appellant shall, within ten days after service of the notice of appeal give a bond to the county with one or more sureties, to be approved by the county auditor, conditioned for the payment of all costs which shall be adjudged against him or her on such appeal in the superior court.

RCW 36.32.330 (emphasis added).⁴

Friends acknowledges that the County's Resolution and 2013 Amendment amount to "an action by the county to deal with county property under RCW 36.32.120(6). (Friends' Opening Brief at 12); *see also* (CP 470) (stating the 2013 Amendment was being promulgated "pursuant to the provisions of RCW 36.32.120(6)"). Because "RCW 36.32.330 applies in situations where the Board [of County Commissioners] is acting on its ordinary and usual duties," such as the present case, any challenge to Resolution 12-0910 and the 2013 Amendment should have been brought within 20-days under RCW 36.32.330. *Sterling v. Spokane County*, 31 Wn. App. 467, 469 (1982)). Friends' lawsuit is untimely.

⁴ The Trial Court correctly noted that, regardless of whether Friends was challenging the County's actions under the statutory appeal process in RCW 36.32.330 or via a declaratory judgment action, the same 20-day limitation applies. (CP 33).

Straining to avoid the inevitable, Friends' contends that the 2013 Amendment and decision of the County to change the scope of the Freddy Park dedication was void "legislation" that may be attacked at any time. (Friends' Opening Brief at 10, 12). While the decision of the County to amend the Freddy Park dedication was accomplished through a "resolution" of the County Commissioners, Friends' argument that this action was "legislative" is contrary to the plain, unambiguous language of RCW 36.32.330 and would lead to absurd results.⁵

Because the terms "decision or order" are undefined in RCW 36.32.330, the Court may use a dictionary to give these terms "their common and ordinary meaning." *Vance v. Dept. of Retirement Sys.*, 114 Wn. App. 572, 577 (Div. III 2002). The Court may also look at "the context of the statute in which these terms are found, related provisions, and the statutory scheme as a whole." *Tingey v. Haisch*, 159 Wn.2d 652, 657 (2007). "In undertaking this plain language analysis, the court must remain careful to avoid 'unlikely, absurd or strained' results." *Burton v.*

⁵ Friends cite to an outdated version of Blacks Law Dictionary for the definition of a "resolution" and concludes that this type of action must be legislative. (Friends' Opening Brief at 10) (citing Black's Law Dictionary 1310 (6th Ed. 1990). Disregarding the entirely unsupported nature of Friends' leap, the current version of "resolution" published by Blacks defines it as "a highly formal kind of main motion" or "Formal action by... [a] corporate body authorizing particular act, transaction, or appointment." *Resolution*, Black's Law Dictionary (10th Ed., West 2014). This definition clearly supports the application of RCW 36.32.330 to the County's authorization of the 2013 Amendment, and Friends reliance on an old version of Black's is misplaced.

Lehman, 153 Wn.2d 416, 423 (2005) (quoting *State v. Stannard*, 109 Wn.2d 29, 36 (1987)).

The dictionary defines a “decision” as “a choice you make about something after thinking about it: the result of deciding.” *Decision*, Merriam-Webster.com, 2016 (last accessed May 11, 2016)⁶; *see also Decision*, Black’s Law Dictionary (10th Ed., West 2014) (“A judicial or agency determination after consideration of the facts and the law.”). In a related vein, an “order” is “A command, direction, or instruction.” *Order*, Black’s Law Dictionary (10th Ed., West 2014).

The County’s Resolution noted that they had consulted with traffic engineers, the State Department of Transportation, and local fire departments and determined that a Freddy Park roadway “would be beneficial to area traffic circulation.” (CP 471). Seeking to “avoid any issues” regarding whether the 2001 Deed actually prohibited such a road, the County Commissioners then authorized the execution of the 2013 Amendment providing for “the establishment of a public road” along the boundary of the park. (CP 471-72). The County’s consideration of the facts and ultimate choice to utilize County property in this manner was a “decision or order” that falls under the scope of RCW 36.32.330’s 20-day appeal requirement.

Furthermore, by using the expansive modifier “any decision or order,” the Legislature clearly illustrated its intent to make the application

⁶ Available at www.merriam-webster.com/dictionary/decision

of the statute as broad as possible. See *Robertson v. Wash. State Parks and Recreation Com'n*, 135 Wn. App. 1, 7 (Div. I 2005) (Legislature's use of "any" as an immediately preceding modifier is evidence of an intent to "use[] the broadest possible language to define [the statutory term]."); *Rettkowski v. Dept. of Ecology*, 1238 Wn.2d 508, 516 (1996) ("The use of the word 'any' broadens, not narrows, the scope of the statute."). Thus, the application of RCW 36.32.330 to "any decision or order" conclusively removes any lingering doubt regarding the application of the statute.

The plain language of RCW 36.32.330 requires the Court apply the 20-day limitation period, and affirm the Trial Court's dismissal of Friends' lawsuit.

Ronken v. Board of County Comm. of Snohomish Co., 89 Wn. 2d 304 (1997), relied on by Friends, undercuts their own argument and further demonstrates the wide-ranging applicability of RCW 36.32.330. There, local union members sought injunctive relief against the County for its decision to use its own construction workers to make improvements to county roads and forego competitive bidding procedures. The court noted that the appeal process in RCW 36.32.330 was the proper vehicle to challenge these types of acts: "It is true as the commissioners contend, that a statutory right of appeal from a decision or order... exists under RCW 36.32.330." *Id.* 309. Although the *Ronken* court ultimately declined to apply the 20-day limitation period, it did so because the union members were not parties to the unlawful bid proceedings or decisions, which were undertaken without public notice and bidding required by statute. *Id.* at

307, 309-10 (“The commissioners had been using county road crews (day labor) for construction work... without calling for competitive bids.”). This concern is not present here.⁷

In addition, because the challenging union members were not harmed “by a single decision of the county commissioners, such that appeal would be an appropriate remedy... Rather, it was a continuing policy of the commissioners and ongoing series of decisions by the board which adversely affect respondents,” the underlying declaratory judgment action – not limited by the 20-day period in RCW 36.32.330 – “was particularly well-suited” to the continuing policy violations by the commissioners. *Id.*⁸

Similar to the award of public contracts at issue in *Ronken*, the County’s decision to expressly allow a road through Freddie Park via Resolution 12-0910 is a “decision or order” of the County Commissioners

⁷ It was clear the affected parties in *Ronken* had no way of knowing when their appeal rights accrued due to the county’s secret process and active concealment. Thus, this case differs from *Ronken* because Friends is deemed to have notice of the 2013 Amendment by virtue of its recording with the County Auditor. *See Strong v. Clark*, 56 Wn.2d 230, 232 (1960) (“[w]hen an instrument involving real property is properly recorded, it becomes notice to all the world of its contents.”). Moreover, the action of the County here – a Resolution and execution of the 2013 Amendment – was taken with public notice and at an open public meeting readily accessible by the public. Friends did not argue before the Trial Court, nor here on appeal, that it lacked notice of the County’s actions. No attempt has been made to explain why Friends failed to challenge the County’s decision until months after the County issued its November 7, 2012 Resolution.

that must be appealed within 20 days and requires the posting of a bond. Unlike the ongoing and offending policy in *Ronken*, the County's Resolution and adoption of the 2013 Amendment was a discrete act concerning a single piece of property. This isolated "decision or order" is easily distinguished from the continuing policy at issue in *Ronken*.

Further, it would be illogical, indeed a nightmare, for any and all action by the Counties of Washington State to be subject to unrestricted challenge in the manner suggested by Friends. Friends' argument suggests that all acts under RCW 36.32.120 constitute legislation – including authorizing the construction of "necessary public buildings," construct county roads, grant licenses, fix and assess taxes, and pay county bills. RCW 36.32.120. Clearly, the Legislature chose to curb the burdensome and absurd possibility of unlimited appeals of County Commissioner decisions by enacting the 20-day appeal period in RCW 36.32.330.

The Trial Court properly concluded RCW 36.32.330 applies to this case, and barred Friends' challenge to the County's actions.

B. The Court Should Affirm the Denial of Friends' Motion for Reconsideration as Friends Fails to Challenge any of the Trial Court's Findings of Fact and, in any Case, No Waiver of Statute of Limitations Defense Has Occurred

Friends' other assignment of error contents the Trial Court committed error when it denied its motion for reconsideration, which argued the Defendants had waived the statute of limitations defense.

As a preliminary matter, it must be noted that the time and bond requirements in RCW 36.32.330 are mandatory prerequisites to invoking the

appellate jurisdiction of the superior court. *See Sterling*, 31 Wn. App. at 470; *Clymer v. Empl. Sec. Dep't*, 82 Wn. App. 25, 27 (1996) (“Appellate jurisdiction [of the superior court] is properly exercised only after all statutory procedural requirements are satisfied.”).

Friends admits that it failed file its appeal in superior court within 20 days of the County’s acts. (Friends Opening Brief at 1). Friends never posted a bond in accordance with RCW 36.32.330. Having utterly failed in properly invoking the appellate jurisdiction of the superior court, Friends’ suit must be dismissed.

Even if Defendant could waive the jurisdictional requirements of RCW 36.32.330 – which is impossible – there has been no such conduct here. Waiver of an affirmative defense can only occur if the defense was required to be made by motion or in a responsive pleading under CR 12, or under common law waiver analysis. *See CR 12(h); Butler v. Joy*, 116 Wn. App. 291, 296 (Div. III, 2003). This latter form of waiver inquires as to whether a “defendant’s assertion of the defense is inconsistent with his or her previous behavior, or if defendant’s counsel has been dilatory in asserting the defense.” *Butler v. Joy*, 116 Wn. App. at 296.

This Court reviews both the denial of a motion for reconsideration and whether a waiver has occurred for an abuse of discretion. *Kleyer v. Harborview Med. Ctr.*, 76 Wn. App. 542, 545 (1995) (“We review a trial court's denial of a motion for reconsideration for abuse of discretion.”); *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 243-47 (2008) (trial court did abuse its discretion when finding the defendant had not

waived its affirmative defenses). A trial court abuses its discretion if its decision is manifestly unreasonable or rests upon untenable grounds or reasons, *In re Marriage of Littlefield*, 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997), or “if no reasonable person would have taken the view adopted by the trial court.” *Holaday v. Merceri*, 49 Wn. App. 321, 324 (1987).

As to common law waiver, Friends fails to assign error to any of the findings of fact the Trial Court made when denying its motion for reconsideration. (Opening Brief of Appellant at 1). Accordingly, the Trial Court’s findings “are verities on appeal.” *224 Westlake, LLC, v. Engstrom Properties, LLC*, 169 Wn. App. 700, 705, 281 P.3d 693 (2012); RAP 10.3(a)(4) (appellant must formally assign error to each finding of fact). The undisputed evidence establishes that SSI first appeared in the Trial Court on April 24, 2013 and filed a CR 12(b)(6) Motion to Dismiss on April 25, 2013, specifically citing RCW 36.32.330 and arguing the statute of limitations barred Friends’ lawsuit. (CP 69). Thereafter, Friends filed an amended complaint to which both the County and Fred Meyer answered and affirmatively asserted that Friends’ suit was barred as untimely. *Id.* SSI then filed a second motion to dismiss under CR 12(b)(6) arguing that the complaint failed to state a claim upon which relief could be granted. *Id.* SSI’s motion was granted by the Trial Court, which was affirmed in part and reversed in part by the this Court. *Id.*

Based on these facts, the Trail Court specifically found that “Friends was on notice that Defendants intended to assert the statute of

limitations as a defense.” (CP 70). SSI’s motion for summary judgment, which is the subject of this appeal, specifically argued this action was untimely filed under RCW 36.32.330. *Id.* Spokane County and Fred Meyer, co-defendants to SSI whose answers contained an affirmative defense that the complaint was untimely, joined in SSI’s motion for summary judgment. *Id.*⁹

The undisputed findings show that SSI and its co-Defendants did not act in a dilatory manner or incongruent with the assertion of a statute of limitation defense. Trial Court correctly exercised its discretion and found no waiver occurred.

Even if Friends’ had properly challenged the Trial Court’s findings of fact, its arguments are nevertheless legally unsound. Although its briefing on this subject is unclear, Friends essentially argues that SSI’s failure to join its statute of limitations defense in its earlier motion to dismiss resulted in waiver of the defense under CR 12(g). (Friends’ Opening Brief at 12).

CR 12(b) governs the presentation of defenses to a claim for relief made in any pleading. The Rule lists a number of affirmative defenses that defendants must assert either (1) by motion made before the responsive pleading, or (2) in the responsive pleading itself. CR 12(b). These defenses

⁹ Further, after this case was remanded from its first appeal, the only case activity of any kind prior to SSI’s motion for summary judgment was via parties witness disclosures. (CP 54-55). There has been no showing of delay or conduct inconsistent with assertion of the statute of limitations defense.

include lack of jurisdiction over the subject matter, lack of jurisdiction over the person, improper venue, insufficiency of process, failure to state a claim upon which relief may be granted, and failure to join a party under CR 19. *See* CR 12(b). These listed defenses do not include a statute of limitations defense.

In kind, CR 12(g) requires a party to assert all possible CR 12(b) defenses in a single motion; any defense not asserted in the motion is waived unless otherwise provided in CR 12(h):

A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule, but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in section (h)(2) hereof on any of the grounds there stated.

CR 12(g) (emphasis added). Again, a statute of limitations defense is not an enumerated 12(b) defense. By its plain terms, CR 12(g) does not require a party to include a statute of limitations defense in a CR 12(b)(6) motion to preserve the defense. Because CR 12(g) simply does not apply, Friends' did not provide the Court with any basis to reconsider its decision on summary judgment.

The statute of limitations defense under RCW 36.32.330 was properly preserved when SSI asserted it in its initial motion to dismiss, and by both the County and the Fred Meyer when asserting the statute of

limitations as a defense in their answers to Friends' amended complaint. The Trial Court did not abuse its discretion in finding the Defendants did not waive the statute of limitations defense.

C. **Alternatively, the Court Should Grant SSI's Motion for Summary Judgment and Dismiss this Case as Neither the Original or Amended Dedication Limit the County's Ability to Extend Standard Drive for Road Access through Freddy Park**

Although Friends mentions three other reasons why it believes dismissal was improper, these arguments were put in a footnote with no citation or argument. (Friends' Opening Brief at 9 fn. 2). These issues have been insufficiently raised and developed, and should not be considered. RAP 10.3(a)(5), (6); *Bercier v. Kiga*, 127 Wn. App. 809, 824 (2004) (Appellate courts do "not consider arguments that are not development in the briefs and for which a party has not cited authority.").

In contrast, there are several other arguments raised by SSI before the Trial Court and on which this Court may affirm dismissal. *Lewark v. Davis Door Servs., Inc.*, 180 Wn. App. 239, 242, 321 P.3d 274, *review denied*, 180 Wn.2d 1026, 328 P.3d 902 (2014) (appellate courts can affirm a trial court's summary judgment order on any basis supported by the record); *Blue Diamond Grp., Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 453 (2011) (This court "may affirm summary judgment on any grounds supported by the record.").

In particular, Friends' lawsuit ignores the plain language of the 2001 Deed, which does not in any way limit roadway access in the manner

proposed by the County and SSI (through Freddy Park via standard drive). Even if such a limitation existed in the 2001 Deed, this condition was specifically removed by Resolution 12-0910 and the 2013 Amendment.

Because both the original dedication to Spokane County and the 2013 Amendment allow roadway access through Freddy Park, Friends' lawsuit to prevent the development of same must be dismissed.

1. The County's Proposed Extension of Standard Drive is Expressly Permitted by Plain Language of the 2001 Deed and Original Park Providing for "Vehicular Access" to Freddy Park "from Standard Drive"

"[T]he construction of deeds," like other written documents affecting real property, "is generally a matter of law for the court" to resolve as a matter of law via summary judgment. *Donald v. City of Vancouver*, 43 Wn. App. 880, 883 (1986) (citing *Thomas v. Nelson*, 35 Wn. App. 868, 871 (1983)). Because restrictive covenants in a deed limit "the use of the property by the grantee, [they] are to be construed strictly against the grantor and those claiming benefit of such restrictions, and will not be extended beyond the clear meaning of the language so used." *Miller v. Am. Unitarian Ass'n*, 100 Wn. 555, 557 (1918) (emphasis added).

The court's function in construing the language of the 2001 Deed's restrictive covenant is to ascertain the intent of the parties. *Hollis v. Garwall, Inc.*, 137 Wash.2d 683, 695–96 (1999) (*Berg* context rule applies to the interpretation of real property documents) (citing *Berg v. Hudesman*, 115 Wn.2d 657 (1990)). The foremost consideration in

ascertaining the parties' intent is to "focus[] on the objective manifestations of the[ir] agreement." *Hearst Comm., Inc. v. Seattle Times, Co.*, 154 Wn.2d 493, 503 (2005). Courts "do not interpret what was intended to be written but what was [actually] written." *Id.*

The language of the 2001 Deed unambiguously states:

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

(CP 467). Thus, the clear language of the 2001 permits "vehicular access to the property" as long as it is "from Standard Drive." Unlike Parcels A and G of BSP-58-97,¹⁰ there are no limitations on access to the property from SSI's parcel directly to the south of Freddy Park.

SSI and the County propose to extend Standard Drive along the western boundary of the park. (CP 471) (noting the Spokane County hearing examiner approved SSI's development subject to constructing an extension of Standard Drive); *see also* (CP 493) (rendering of the "proposed extension of N. Standard Dr." along border of Freddy Park and into SSI's property).¹¹ Adopting the interpretation advanced by Friends'

¹⁰ Parcel "A" sits to the north of Freddy Park (which is depicted as Parcel "B"), while parcel "G" lies directly to the west of the park property. CP 455.

¹¹ In approving SSI's development application, the County's hearing examiner agreed with this interpretation: "The 2001 deed did not specifically prohibit the extension of Standard Drive through the 4.5 acre [Freddy Park] parcel, stating that vehicular access to the parcel only be from Standard Drive. The focus of the deed regarding access for the 4.5-

Amended Complaint would forbid road access to the property from Standard Drive and begs the Court to insert a bar on road access into the 2001 Deed that is simply not found in the agreement. This result is prohibited by fundamental rules of deed construction. *See Hearst Comm., Inc. v. Seattle Times Co.*, supra (court examines what was actually written).

Furthermore, permitting road access through Freddie Park is not inconsistent with the 2001 Deed's pronouncement that the property shall only be used as a "natural, community or regional park." In *Neighbors & Friends of Viretta Park v. Miller*, 87 Wn. App. 361 (1997), Division I considered whether the city exceeded its authority under a dedicated plat when it allowed vehicles in dedicated parkland and permitted adjacent landowners to utilize a park right-of way for vehicular access to their property. The plat, which dedicated "to the use of the Public and the City of Seattle forever, all the streets, lands, parks, fountains, and places shown and described upon this plat," contained 114 lots, as well as streets, fountains, and parks. *Id.* at 366. One of the parks contained a right of way through it, which connected to the adjacent streets. *Id.* at 366-68. The Parks Department constructed an access drive along the right of way, which both the Department and visitors to the park used for vehicular access. *Id.* at 368. A group of adjacent landowners brought suit, arguing

acre parcel appeared to be to prevent any vehicular access between the parcel and the adjoining land to the north and west owned by Fred Meyer parties, and not to prohibit the extension of Standard Drive." (CP 143) (emphasis added).

that the Parks Board exceeded its authority when it permitted construction of the access drive because the intent of the dedicators was to grant pedestrian, not vehicle, access through the park. *Id.* at 370. Division I held the vehicle use was permitted, noting that the park plat was not ambiguous “with respect to the intent of the dedicators to allow vehicles onto the Park right of way and to allow vehicular access” through the park. *Id.* at 377.

Other jurisdictions are in accord with this view. For instance, the Texas Court of Appeals in *King v. City of Dallas*, 374 S.W.2d 707 (1964), held that where the city received a deed from a private grantor providing that the land must be used “exclusively for public park purposes,” the city did not violate dedication when it constructed and widened a paved road and bridge “along the edge of the area in question.” *Id.* at 710. The *King* court also opined that “the enjoyment of the remaining area as a park or parkway would be enhanced” by such a use, thus it “would actually be a use for park purposes.” *Id.*

Here, the County previously determined that road access would be consistent with the intent of the dedication – as seen through the 2013 Amendment – and specifically such a use would be beneficial to the area. (CP 471) (County consulted with traffic engineers as well as state and local officials and determined that a road “would be beneficial to area traffic.”).

Friends is unable to demonstrate the County’s proposed action, i.e., developing and extending Standard Drive, is contrary to the terms and

intent of the original dedication. Summary judgment is SSI's favor is appropriate.

2. The County Had the Authority to and Has Properly Amended the 2001 Deed Restrictions via the 2013 Amendment Thereby Specifically Allowing a Public Road Through Freddy Park.

Even if the Court were to somehow determine the 2001 Deed does not allow the proposed road through Freddy Park, any such limitation was specifically removed by the County through the 2013 Amendment.

In order to survive SSI's motion for summary judgment, Friends must meet its burden of raising a genuine issue of material fact as to Fred Meyer and the County's authority and ability to execute the 2013 Amendment. *White v. State*, 131 Wn.2d 1, 9 (1997) ("nonmoving party may not rely on speculation or on argumentative assertions... [but] must set specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as to a material fact.").

Friends make the threadbare allegation that the 2013 Amendment was executed without legal authority and is therefore void. (Friends' Opening Brief at 9 fn. 2) This baseless argument must be disregarded. RAP 10.3(a)(5), (6). Even if this were not the case, it is not subject to dispute that the 2013 Amendment, like the 2001 Deed, was executed by Robert Currey-Wilson for Wilmington Trust, Fred Meyer, Inc., Fred Meyer Stores, Inc., and Roundup Co. *Compare* (CP 459) and (CP 462-464) *with* (CP 478). The 2013 Amendment was acknowledged by Fred Meyer as "Grantor," and indicated the company, through Robert Currey-

Wilson, “on oath stated that he[] w[as] authorized to execute said instrument” for “the uses and purpose therein mentioned.” (CP 478) (emphasis added). Once executed, this acknowledgment constitutes “prima facie evidence of the facts therein recited.” RCW 64.08.050 (acknowledgements on real property conveyances).¹² Fred Meyer and Mr. Currey-Wilson properly executed the 2013 Amendment.

Friends also argue – again without citation – that it is impossible to amend the original dedication. (Friends’ Opening Brief at 9 fn. 2). However, it is well settled that the County had authority to make such an amendment under the circumstances herein, *i.e.*, with grantor consent. 11A McQuillin Mun. Corp. §33:81 (3d. ed., West 2015) (“*dedicator and dedicatee* may change the purposes of the dedication.”).¹³ The County

¹² Further, Wilmington Trust Company, listed as Grantor in the 2001 Deed, merely held title to the Freddy Park property as security. *Friends of North Spokane County Parks v. Spokane County*, 184 Wn. App. 105, 336 P.2d 632, 633 (2014). In examining the merits of SSI’s plat application, the County hearing examiner noted 2013 Amendment “has been executed by the grantors.” (CP 125). County records also reflect Roundup Co. was the fee owner at this time. (CP 659) (June 29, 2001, Modification to Lease and Loan “conveying fee title to the Released Parcels [i.e., Freddy Park] to Operating Company [i.e., Roundup Co.]”). The 2001 Dedication also states that Roundup Co. was “owner/grantee of the property described in this Deed [i.e., Freddy Park].” (CP 458). Friends argument, then, is that Roundup (and the related Fred Meyer entities) had authority to make the 2001 dedication, but somehow were improper or unauthorized parties to the 2013 Amendment.

¹³ While no Washington case squarely addresses this issue, the Supreme Court has at least alluded to the possibility of modifying or rededicating a prior dedication. *Lewis v. City of Seattle*, 174 Wn. 219, 225 (1933), *adopted after rehearing en banc*, 174 Wn. 219, 27 P.3d 1119 (1933)

made such an authorized amendment when it executed the 2013 Amendment. *See* (CP 470-72); (CP 475-79).

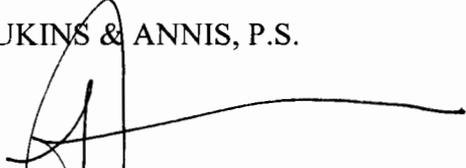
The 2013 Amendment was an effective method of allowing a road through Freddy Park. The Court must grant SSI's motion for summary judgment, and dismiss Friends' lawsuit.

V. CONCLUSION

Based on the foregoing, SSI respectfully requests the Court affirm the Trial Court or otherwise conclude summary judgment dismissal is appropriate.

Dated this 16th day of May, 2016.

LUKINS & ANNIS, P.S.

By 

MICHAEL A. MAURER, WSBA #32760
LAURA J. BLACK, WSBA #35672
Attorneys for Defendant / Respondent Star
Saylor Investments, LLC

(noting that there was no rededication because the present owners had not "joined therein.").

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing document on the 16th day of May, 2016, addressed to the following:

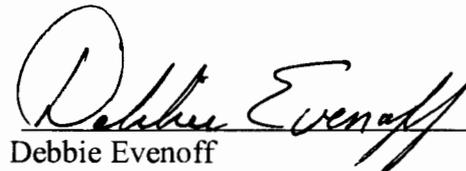
Ronald Paul Arkills
Attorney at Law
1115 W. Mallon Ave.
Spokane, WA 99201

VIA FIRST CLASS MAIL
VIA CERTIFIED MAIL
VIA HAND DELIVERY
VIA FACSIMILE
VIA EMAIL

Stephen K. Eugster
Attorney at Law
2418 W. Pacific Ave.
Spokane, WA 99102

VIA FIRST CLASS MAIL
VIA CERTIFIED MAIL
VIA HAND DELIVERY
VIA FACSIMILE
VIA EMAIL

EXECUTED on May 16th, 2016, at Spokane, Washington.


Debbie Evenoff