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**COURT OF APPEALS, DIVISION NO. III  
OF THE STATE OF WASHINGTON**

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MARC KEITH

v.

FERRY COUNTY

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**APPELLANT'S BRIEF**

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**A. INTRODUCTION**

COMES NOW Appellant Marc Keith, (“Keith”) by and through his undersigned attorneys of record, and appeals the trial Court’s decisions; denying Keith’s motion for summary judgment and granting summary judgment of dismissal in favor of Ferry County (“Ferry”).

**B. ISSUES FOR REVIEW**

(1) Whether the Superior Court erred in granting Ferry’s motion for dismissal of Keith’s lawsuit by summary judgment;

(a) When Ferry failed to meet its’ burden of proof as the party asserting the validity of a public dedication?

(b) When Ferry failed to properly assert a statute of limitations defense?

(c) When there were disputed, material facts precluding dismissal of Keith’s Complaint by summary judgment?

(2) Whether the Superior Court erred in denying Keith’s motion for partial summary judgment;

(a) When the Court erred in failing to declare the ‘Disputed Area’ of Lot 1 a private road?

(b) When the Court erred in failing to grant partial summary judgment quieting title to the Lot 1 in favor of Keith through the doctrine of prescriptive easement?

(c) When the Superior Court should have ordered a trial on the issues of inverse condemnation of 'Lot 1'?

**C. STATEMENT OF THE CASE**

This case involves a land dispute between Marc Keith and Ferry County. The primary issue is whether the 'disputed area' (a section of Empire Creek Road also termed County Road #5520) that traverses Keith's land, is a public or private roadway. *See Clerk's Papers ("CP")* at 1-4. Keith maintains that the area (referred to herein as Parcel 3101), while offered as a public right of way to the County in 1992, was not properly dedicated, nor accepted by Ferry, and thus remained in private ownership. *CP at 58; CP at 61-64.* Ferry argues that the disputed area was properly dedicated to the County and has been maintained at public expense as a county road since 1992. *CP 114-115.*

**History of the Wutzke Shinnell Short Plat (Ferry County #92-003):**

In the early 1990's, members of the Wutzke and Schinnell families filed the Wutzke Schinnell Short Plat (the "WSSP") in order to create four lots in a new subdivision. This short plat was assigned number 92-003 and filed at Vol I, page 84 of Short Plats and under Auditor's number 221125. *See Clerk's Papers ("CP")* at 61 and 75. The WSSP subdivision was four unequally sized lots. *CP at 75.*

Parcel 3101 of Lot 1 of the WSSP is the parcel of land at issue herein. This lot is in the Southeast corner of the subdivision. The plat shows an existing interconnected road system with access roads from Lots 4, 3, and 2 which intersect from the north on Lot 1; and two existing roads from the south which intersect Lot 1. *CP at 75. CP at 192.* The face of the plat references this road system, stating:

The owners, by their consent to this Short Subdivision, grant to Ferry County a right-of-way for Empire Creek Road as indicated on this plat. *Id.*

The face of the plat contained written evidence acknowledging the signatures of the subdivision applicants and written certificates by the plat administrator, auditor, treasure and by a surveyor. The health department placed a ‘sewer disposal’ condition on further development and the plat administrator noted an ‘open range’ item (related to fencing). *CP at 75; 192.*

The face of the plat contained a condition precedent to acceptance of the proposed right of way by Ferry. *Id.* This condition was distinctly set apart on the plat with this heading: “VARIANCE from Minimum Road Standards,” (caps in original) which states:

The access roads to lots 2 and 3 (16% grade) and Lot 4 (13% grade) do not meet the minimum road standards in Section 29.00 of the Ferry County Short Subdivision Ordinance No. 72-1. The Ferry County Planning Commission has granted a variance to such road standards, finding that the public use and interests will be served.

**The developers, lot purchasers, or any other parties with an interest in the lots, shall at their sole expense bring these roads up to county road standards prior to acceptance of such roads as county roads.** The question of whether the roads meet county road standards shall be within the sole discretion of the Ferry County Engineer.

*CP at 75 (bold added, underline in the original)*

The conditions of the Variance lack clarity; no time frame is stated and no bond or other security is noted for accomplishing the road improvements. The ‘ACKNOWLEDGEMENT’ (caps on plat) contains a disclaimer which confirms the conditions precedent for the dedication: “Owners grant a waiver of all claims for damages against any governmental authority arising from construction and maintenance of public facilities”. *Id*

Acceptance by Ferry is conditioned on the satisfaction of the two-step condition precedent: (1) “The developers, lot purchasers, or any other parties with an interest in the lots, shall at their sole expense bring these roads up to county standards prior to acceptance of such roads as county roads”. *Id.* (italics and underlining added); and (2) by express inspection and approval of the Ferry County Engineer. *Id.*

The WSSP was approved by the County Platting Administrator on May 28, 1992. The face of the plat did not contain evidence of a bond nor approval or certification by the Ferry County Engineer. *CP 75; CP 192.* Findings related to the granting of the condition precedent/variance were

recorded by Ferry under file #221124. *CP* 106; *CP at* 34-42; 165-173. See also *CP at* 61-62; 116-117. These findings did not reference a bond to secure construction of the improvements required for acceptance. *CP at* 36 and 106. Nor did the findings include approval by the county engineer. See *CP at* 38 (which provided approval of existing power by a PUD engineer). At the request of the Ferry County Planner, but without approval of the County Engineer, the Auditor filed the WSSP on June 1, 1992. *CP* 75, 192.

**History of Lot 1 of WSSP (#92-003): 1992 – 2008 (Prior to Keith)**

In 2005 Harry and Ruth Simenson acquired Lot 1 from Daryl and Linda Schinnell (co-developers of the WSSP with the Wutzkes in 1992). *CP at* 103. Lot 1 of the WSSP consisted of two parcels of land in Ferry County, near Malo, Washington (tax parcels: 3380534000-3100 (“Parcel 3100”) and 3380534000-3101 (“Parcel 3101”)). *CP* 77-78.

The Simonsons conveyed both parcels of Lot 1 to Mr. Keith and his late wife by statutory warranty deed recorded March 27, 2008 under Ferry County Auditor’s File Number 271350. *CP at* 77-78. *CP at* 194-195. The consideration for the Lot 1 deed, as described on the conveyance, was for both parcels, 33805340003100 (“Parcel 3100”) and 33805340003101 (“Parcel 3101”). Parcel 3100 is the parcel upon which Keith’s home is sited; Parcel 3101 is the area in which the WSSP developers offered a conditional

right-of-way; Parcel 3101 is referenced as the ‘disputed area’ (*viz.* whether the intended “right of way” became a public road). *CP* 05; *CP* 43; *CP* 75.

Ferry did not present any evidence at summary judgment that either Schinnell or Simonson satisfied the dual conditions stated in the variance during their years of ownership (Schinnell, 1992-2005; Simonson, 2005-2008). When Keith acquired Lot 1 (March 2008), Ferry had not yet accepted the dedication of a right-of-way on the ‘disputed area’. Ferry did not take steps to ‘recognize’ the WSSP dedication until July 25, 2016. Ferry provided no evidence that the WSSP was ever properly accepted.

**History of Lot 1: Keith Ownership (March 2008 to present)**

Marc and Vivian Keith lived in the home on Parcel 3100 as their primary residence from 2008 to 2014 (year of Vivian’s passing); thereafter Marc continued to reside at Lot 1 through the date of the Amended Complaint. *CP at 27*. Because of the unlawful taking of his property, Keith left his Lot 1 residence, moving to New York in March 2018.

Keith was in actual, open and notorious possession of Parcel 3101 since he took possession of it in March of 2008. This possession persisted until the passage of Resolution 2016-21 on July 25, 2016 – or for nearly eight years and four months. He acquired possession under claim and color of title, made in good faith – i.e. based upon acquisition of title via statutory warranty deed (*CP at 44-45 and 77-78; CP at 194-195*). He paid all taxes

legally assessed on his land as well. *CP at 46-49*. See also *CP at 65-67*.

From 2009 through 2016, Mr. Keith was assessed and paid property taxes on Parcel 3101. *CP at 20-23; CP at 46-49*. Over the same period of time, and continuing to the present, Keith was assessed and paid separate property taxes on Parcel 3100. Ferry provided testimony from Colleen Cox (Assessor's Office). Ferry agrees that Keith was assessed property taxes for both parcels during the time Ferry issued separate tax statements for Parcel 3100 ("residence") and Parcel 3101 ("road"). *CP at 157-159*. Nor does Ferry dispute that Keith paid property taxes assessed on Parcels 3100 and 3101 (2009 – 2016). *Id.*

Ferry admits that starting in tax year 2017, it consolidated the two tax parcels into one 'unified' billing (subsequent to the July 25, 2016 'recognition' by the county commissioners that the 'disputed area' is a county road). *CP at 50-52, CP 103*. Ms. Cox improperly offers a legal opinion, explaining that Keith's tax is the same either way. She fails to offer a factual explanation as to the timing of the assessor's change in Lot 1 tax records for tax year 2017, the first possible year subsequent to Ferry's July 25, 2016 Resolution. *CP at 157-159 and CP 103*.<sup>1</sup>

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<sup>1</sup> CP 103 is the 2020 Ferry County Taxslifter for Lot 1 (Keith property). Under the "Parcel" heading only one parcel is identified (33805340003100). Under the "Comment" subheading Ferry notes that "Administrative Seg parcels combined 33805340003101 to 33805340003100 for 2017 taxes"

### **Ferry County Commissioners' Resolution 2016-21**

Resolution 2016-21 purports to recognize Empire Creek Road as a County Road and purports that acceptance occurred in 1992. *CP at 50-52*. There is no evidence that Ferry Commissioners accepted the dedication by a resolution pursuant to RCW 36.75, nor that the process to pass Resolution 2016-21 was under the 'supervision and direction' of the county engineer.

Keith received a deed for Parcel 3101 in 2008; he received property tax assessments for the same, which he (and his predecessors in interest) paid. *CP 77-78; CP at 46-49*. After Resolution 2016-21 was passed, the parcel designation was removed from Parcel 3101. A notation in the TaxSifter records explains that the parcels were administratively combined for 2017 tax purposes. *CP at 103*. See also, footnote (1), above. Other than passage of Resolution 2016-21, twenty-four years after the offer of dedication, there is no evidence of acceptance by Ferry.

At summary judgment, Ferry did not submit evidence that any person or entity, public or private, ever improved the section of Empire Creek Road on Parcel 3101 to county road standards. For example, there are portions of Empire Creek road within Parcel 3101 that are in clear and desperate need of culverts to conform to §29.05 of Ordinance 72-1, and no *cul-de-sac* was created to conform to §03.06, §29.04. *CP at 85-89; CP at 107-108*. See *CP 175-190* for Ordinance 72-1. See *CP at 184-185* for §29.

At summary judgment, Ferry did not submit evidence that a county engineer had inspected and approved the road improvements, as required by the variance on the face of the 1992 plat. Defendant Ferry's counsel was very clear that Ferry Resolution 2016-21 was *not* an acceptance, but rather, a recognition of prior acceptance (in 1992 when the WSSP was filed). See Ferry's Response to Plaintiff's Motion. *CP at 122-125.*

Ferry's cross-motion provided no evidence or allegation of undisputed facts in support of its motion to dismiss Keith's causes of action for Quiet Title (prescriptive easement) nor for Inverse Condemnation. Ferry's basis to dismiss Keith's prescriptive easement claim rests on Ferry's assertion that "Keith does not pay taxes on Parcel 3101". *CP at 129-130.* Keith opposed Ferry's argument (non-payment of taxes). *CP at 233 – 234.* Keith's motion describes his claims for prescriptive easement, *CP at 65-66;* and for Inverse Condemnation (*CP at 71-72*).

### **Procedure Prior to Summary Judgment**

On August 19, 2019, Keith moved for summary judgment on the claims in his Complaint (*CP 58*); Ferry's Response and Cross-Motion for Summary Judgment were filed November 7, 2019 (*CP 110*). Supplemental briefing was filed by Keith on January 6, 2020 (*CP 229*) and by Ferry on January 21, 2020 (*CP 254*, which is erroneously listed as *CP 154* in the Index to Clerk's Papers). Hearing was set for January 27, 2020.

### **Summary Judgment**

The evidence before the judge at summary judgment was primarily documentary evidence, attached to affidavits and pleadings. Neither party objected to the documents before the court. There was no oral argument.

### **Both Parties Requested Declaratory Relief at Summary Judgment**

A primary objective of the summary judgment was to obtain declaratory relief and to quiet title to Lot 1. Each side requested the court to declare whether the section of road in question was ‘private’ or ‘public’. The Court failed to make a ruling on these issues.

### **D. SUMMARY OF ARGUMENT**

In 2008 Keith purchased Lot 1 of a Ferry County subdivision (“WSSP”) created in 1992. Lot 1 consisted of two separate tax parcels (3100 and 3101). Lot 1 was conveyed twice since 1992 (2005; 2008). Ferry assessed property taxes (which Keith paid) on each parcel (3100 and 3101) from 2009 through 2016. Tax statements for that period did not evidence that parcel 3101 was ‘exempt’ as a county easement or right-of-way under RCW 84.36.210.

In 1992 the WSSP developers made a conditional offer to dedicate a public right-of-way on the subdivision. The plat was not approved by the County Engineer as required by RCW 58.17.150(3) and RCW 58.17.160(1). Ferry filed the final subdivision in 1992; but the proposed road dedication

was not accepted at the time the final plat was filed. Instead, Ferry inscribed a ‘variance’ on the plat, conditioning acceptance of the proposed dedication on road improvement. This condition precedent required that the developers (or successors) ‘bring the roads to county standards’ and that the county engineer approve construction on the roads. These two conditions were never satisfied. The proposed dedication was not accepted by Ferry.

From March 27, 2008 to July 25, 2016 (8 years), Keith lived on Lot 1, also developing medical marijuana for his wife (who died of cancer in 2014). Keith constructed fences and treated the road on parcel 3101 as his private road. A group of hostile neighbors lobbied the county to ‘correct the disputed road issue’. On July 25, 2016 the Ferry County Commissioners passed “Resolution 2016 – 21”, which ‘recognized’ that in 1992 Ferry had accepted the proposed WSSP right-of-way. The commissioners then sent Keith a letter, threatening criminal action against him. The Ferry tax assessor ‘consolidated’ the tax parcels in 2017, eliminating parcel 3101.

In April 2017 Keith filed a Complaint against Ferry citing three causes of action: Declaratory Relief (requesting the ‘disputed area’ be declared a private road); Quieting Title (to parcel 3101); and for Inverse Condemnation. Keith moved for summary judgment (August 2019). Ferry filed a cross-motion for dismissal (by summary judgment). The trial court

heard both motions on January 27, 2020 (without oral argument), filing its' Order dismissing Keith's lawsuit on April 9, 2020.

Both parties requested declaratory relief from the trial court. The court granted neither party's request. Even though Ferry filed a cross-motion, Keith opposed it by contesting the ten alleged 'undisputed facts' in Ferry's motion. The trial court should have denied Ferry's motion to dismiss. The court should have granted partial summary judgment in favor of Keith, quieting title, and ordering a trial on the merits.

## **E. ARGUMENT & AUTHORITY**

### **1. The Trial Court Erred by Granting Ferry's Motion for Summary Judgment, thereby dismissing Plaintiff's Complaint**

Washington case law describes the parameters of granting or denying a summary judgment motion pursuant to CR 56, as follows:

"Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998). When reviewing a summary judgment order, an appellate court engages in the same inquiry as the trial court. *Id.* Facts and reasonable inferences from the facts are considered in the light most favorable to the nonmoving party. *Bishop v. Miche*, 137 Wash.2d 518, 523, 973 P.2d 465 (1999). Conclusions of law are reviewed de novo. *Id.*".

*M.K.K.I., Inc. v. Krueger*, 135 Wash. App. 647, 653, 145 P.3d 411 (2006).

**(1)(a) Ferry failed to meet its' burden of proof as the party asserting the validity of a public dedication.**

“Dedication is a term of art, and is a devotion of property to a public use by an unequivocal act of the owner of property and an acceptance of that dedication by the public”. 11A *McQuillin, Municipal Corporations* (3d ed.) § 33.2 The party asserting the validity of the dedication of a public street or road has the burden to establish all essential elements. These basic elements, mirroring contract formation principles of ‘offer’ and ‘acceptance’, are reviewed in *Sweeten v Kauzlarich*, 38 Wn.App. 163, 165-166, 684 P.2d 789, 791 (1984).

“Dedications are classified as either statutory or common law. 26 C.J.S. *Dedication* § 1, at 399 (1956). To find a dedication, two elements must be present: “(1) An intention on the part of the owner to devote his land, or an easement in it, to a public use, followed by some act or acts clearly and unmistakably evidencing such intention; and (2) an acceptance of the offer by the public.” *Seattle v. Hill*, 23 Wash. 92, 97, 62 P. 446 (1900). One asserting that the public has acquired a right to use an area as a public street has the burden of establishing these essential elements. *Karb v. Bellingham*, 61 Wash.2d 214, 219, 377, P.2d 984 (1963)”, cited in *Sweeten v. Kauzlarich*, 38 Wn. App. 163, 165–66, 684 P.2d 789, 791 (1984), (underlining added).

Dedications are analyzed within the framework of the law of subdivisions, and are a subset of the subdivision statute (RCW 58.17), which defines ‘dedication’:

"Dedication" is the deliberate appropriation of land by an owner for any general and public uses, reserving to himself or herself no other rights than such as are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted. The intention to dedicate shall be evidenced by the owner by the presentment for filing of a final plat or short plat showing the dedication thereon; and, the acceptance by the public shall be evidenced by the approval of such plat for filing by the appropriate governmental unit.

RCW 58.17.020 (3)

The Washington Real Property Deskbook describes the two-part *Sweeten* test for dedication in three elements, stating:

“The requisites of a valid dedication are:

- (1) an intentional offer, express or implied, by the owner of real property, to appropriate the property, or an easement of interest therein;
- (2) a public use; and,
- (3) acceptance of the offer, express or implied, by the public.”

Vol. 6, Washington Real Property Deskbook (Chapter 3: Dedication and Vacation) §3.2, page 3-3 (underlining added for emphasis).

### **Offer**

Case law evaluating the creation of a dedication uses language and concepts from contract formation (offer and acceptance). Washington contract law requires: “The offeror should make certain that the offer is

clear, definite, and explicit and leaves nothing to negotiate”. § 2:11.*Offer—Overview*, 25 Wash. Prac., Contract Law And Practice § 2:11 (3d ed.), (relying on *Washington Greensview Apartment Assoc. v Travelers Property Cas. Co of America*, 173 Wn.App 663, 295 P.3d 284 (2013)). “Once an offer is made, there can be no valid contract until the offer is accepted. A counteroffer is an offer made by an offeree to the offeror relating to the same matter as the original offer and proposing a substitute bargain differing from that proposed by the original offer. An expression of assent that changes the terms of an offer in any material respect may operate as a counteroffer, but it is not an acceptance”. § 2:20.*Acceptance—Effect of counteroffer*, 25 Wash. Prac., Contract Law And Practice § 2:20 (3d ed.); underlining added. See also *Johnson v Star Iron & Steel Co.*, 9 Wn.App. 202, 511 P.2d 1370 (1973).

Consistent with Washington contract law, the property owner offering to dedicate the use of his or her property for public use, must communicate an offer that is ‘clear, manifest, and unequivocal’. See *Johnson v Medina Imp. Club*, 10 Wn.2d 44, 56, 116 P.2d 272 (1941). The owner’s intention may be communicated by a written instrument (grant) or by actions that manifest clear intention to devote property to public use. *Id.* The owner's intent to dedicate will not be presumed; the party asserting it must prove the intent is unmistakable. *Richardson v. Cox*, 108 Wash. App.

881, 891, 26 P.3d 970, 976, opinion amended on denial of reh'g, 34 P.3d 828 (Wash. Ct. App. 2001), underlining added.

In a statutory dedication, the offer must comply with subdivision requirements: “The intention to dedicate shall be evidenced by the owner by the presentment for filing of a final plat or short plat showing the dedication thereon”. RCW 58.17.020(3). The court then looks to the plat itself to determine if the offer is clear, manifest, and unequivocal. This issue is a question of law. *Tilzie v. Haye*, 8 Wn 187, 189, 35 P.583 (1894).

Modern case law incorporates the ‘*Tilzie*’ rule:

The intent of the plat applicant determines whether a plat grants an easement. *Selby v. Knudson*, 77 Wash.App. 189, 194, 890 P.2d 514 (1995). If possible, the intent of the applicant is ascertained from the plat itself. *Id.* When a plat is ambiguous, the applicant's intention may be determined by considering the surrounding circumstances. *Id.* When the terms of a written instrument are uncertain or capable of being understood as having more than one meaning, the instrument is ambiguous. *Id.* at 194–95, 890 P.2d 514.

*M.K.K.I., Inc. v. Krueger*, 135 Wash. App. 647, 654, 145 P.3d 411 (2006)

The WSBA Real Property Deskbook (Volume 6), a respected commentary, discusses the rules of construction in a statutory dedication to determine the intention of the offerer from the plat itself:

“If the plat is unambiguous, the court will establish the intention of the dedicator from the plat (citations omitted).

“Plats are construed as a whole and every part of the instrument is given effect (citations omitted).

“No part of the plat is rejected as meaningless if such a result can be avoided (citations omitted).

“Lines and designations are considered, as well as words (citations omitted). The court will look to all marks and lines on the face of the plat to deduce the intent of the dedicator (citations omitted).

“In some cases, intent of the dedicator will be presumed (reciting as an example: that a person recording a plat intends to provide convenient access to all lots).

“When a plat is ambiguous, extrinsic evidence to establish the intention of the dedicator is admissible (citing *Tilzie*, at 187)”.

*Washington Real Property Deskbook: Vol 6 Land Use Development*  
Chapter 3 (Dedication and Vacation), §3.3(7): Rules of construction - plats

The offer of dedication must comply with the subdivision statute (RCW 58.17), and a title report must be provided when a dedication is evidence on the plat (RCW 58.17.165). “Every short subdivision as defined in this chapter shall comply with the provisions of any local regulation (Ferry Ordinance 72-1) adopted pursuant to RCW 58.17.060.” *Bunnell v. Blair*, 132 Wash. App. 149, 152, 130 P.3d 423, 425 (2006).

The Ferry County subdivision ordinance (72-1) contains several provisions that are of import to this case. For example, the variance referenced above is done under the authority of Ordinance 72-1 § 11.00 (CP 182). The section concerning road standards makes explicit reference to §03.14 (CP 179), defining “road” as:

An improved and maintained public right of way which provides vehicular circulation or principal means of access to abutting properties, and which

may also include provisions for public utilities, pedestrian walkways, public open spaces and recreation areas, cut<sup>2</sup>

The Ordinance, §35.18, also states that the County has no responsibility to accept roads until the subdivider has constructed them in accordance with §29.00 (*CP* 188, *CP* 184-185). The County Engineer must<sup>3</sup> advise the Administrator that these proposed roads and survey conform to these standards per §10.03 (*CP* 181). §23.00 (and RCW 58.17.130) require the posting of a bond “to insure completion of each dedication” (*CP* 184). Ferry did not meet its’ burden to prove the requirements of the Ferry Ordinance were satisfied – no engineer approval was granted (a variance was instead granted); no bond was posted, and the dedication was not completed (i.e. improved to county standards and approved by the county engineer).

Dedications are either statutory or common-law. *Sweeten* at 165. A statutory dedication must comply with the formalities of the subdivision statute (RCW 58.17). It must be approved by the county engineer (RCW 58.17.150(3); RCW 58.17.160(1)). When a dedication fails to meet these formalities, it should be rejected by the auditor. RCW 58.17.190. If treated as a common law dedication the party so asserting has a burden to prove that the offer is ‘clear, manifest, and unequivocal’. *Sweeten*, 165-166.

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<sup>2</sup> Sic. This subsection appears to end thusly without explanation.

<sup>3</sup> The ordinance reads “shall notify” – this use of shall indicates a mandatory obligation which is, here, also condition precedent.

“Common law dedications are controlled by common law principles while statutory dedications are governed by specific statutes. See *Karb*, 61 Wash.2d at 218–19, 377 P.2d 984. Another distinction between a statutory and a common law dedication is that the former operates by way of grant and the latter by way of equitable estoppel. *Id.*” *Kiely v. Graves*, 173 Wash. 2d 926, 931–32, 271 P.3d 226 (2012) (underlining added). However, under either approach, the offer must be clear and unmistakable. *Sweeten v. Kauzlarich*, at 165 – 167. “When acceptance occurs by public use, there is acceptance, and so a completed dedication, only of the area or width that the public actually uses” § 5.10. *Common-law Dedication*, 17 Wash. Prac., Real Estate § 5.10 (2d ed), underlining added, citation within quote omitted)

The ‘offer’ of dedication found on the face of the Wutzkee-Schinnell Short Plat (#92-003) states:

*\*The owners, by their consent to this Short Subdivision, grant to Ferry County a right-of-way for Empire Creek Road as indicated on this plat.*

This words of “the offer” are ambiguous and circular. Following the Washington Deskbook rules of construction, one looks to the plat, including all sections, and all words and ‘marks’, etc. It is not possible to discern the exact location for the proposed right-of-way. As a practical matter, the copy of WSSP 92-003 before the court is unclear, if not illegible. See *CP 75*. Ferry failed to meet its burden of a clear and unambiguous offer.

“The offer”, as shown on the plat is conditional and incomplete. It cannot be accepted by solely filing the subdivision (plat). Ferry, not the dedicators, inserted a mandatory condition precedent (or counter-offer) which must be satisfied prior to acceptance by Ferry. It states:

The access roads to lots 2 and 3 (16% grade) and Lot 4 (13% grade) do not meet the minimum road standards in Section 29.00 of the Ferry County Short Subdivision Ordinance No. 72-1. The Ferry County Planning Commission has granted a variance to such road standards, finding that the public use and interests will be served.

**The developers, lot purchasers, or any other parties with an interest in the lots, shall at their sole expense bring these roads up to county road standards prior to acceptance of such roads as county roads.** The question of whether the roads meet county road standards shall be within the sole discretion of the Ferry County Engineer.

*CP at 75 (bold added)*

At summary judgment, Ferry argued that this condition should apply only to the access roads that connect with an extension of Empire Creek Road and not to the roads as an interconnected unit. However, the dedication was filed with “the” subdivision (which consists of four lots). The common sense interpretation of the condition precedent (or counter-offer) is that the unsuitable, non-conforming access roads need to be brought to county standards to facilitate the use of the proposed right-of-way. Ferry added this condition to the proposed dedication. It is a condition to ‘the offer’ (of a right-of-way). “Dedications shall be clearly shown on a

final plat”. RCW 58.17.110(2) This includes a clear designation of what is private and what is public. See *Bunnell v Blair*, at 152 – 154. The offer (intention of the WSSP dedicators) is NOT clear on the plat; it fails as a statutory dedication. *Bunnell* at, 154; *Sweeten* at 165-166.

A dedication which fails as an express (statutory) dedication may also be evaluated as a common-law dedication. Whether a common-law dedication has occurred is a ‘legal issue’ (a mixed question of law and fact). *Sweeten*, at 166-167. In *Sweeten*, the court emphasized that the “offer” must evidence proof of clear intention, “followed by some act or acts clearly and unmistakably evidencing such intention”. *Sweeten*, at 165.

Ferry did not identify ‘acts’ by the dedicators, performed in way that ‘unmistakably evidenced’ an intention to dedicate. The variance required the developers (or successors) to ‘bring these roads to county standards’. There is no evidence that they did so. Likewise, the proposed dedication fails as a common-law dedication. The offer to dedicate was not complete; it cannot be accepted without satisfying the condition precedent.

### **Public Use**

“A public street is commonly created by one of four methods: (1) grant, (2) condemnation, (3) dedication, and (4) prescription or user.” 10 *McQuillin, Municipal Corporations* (3d ed.) § 30.21, p. 557, cited in *Karb v. City of Bellingham*, 61 Wash. 2d 214, 216, 377 P.2d 984, 985 (1963).

In *McConiga v Riches*, this Court ruled: “In order to prevail on a theory of common law dedication, it must be established by clear and unmistakable evidence that the landowner intended to dedicate land to a public use. *Seattle v. Hill*, supra; *Spokane v. Catholic Bishop*, 33 Wash.2d 496, 206 P.2d 277 (1949). The use must be for the public generally. The applicable rule in this regard is as follows:

The essence of dedication is that it shall be for the use of the public at large, that is, the general, unorganized public, and not for one person or a limited number of persons, or for the exclusive use of restricted groups of individuals. There may be a dedication for special uses, but it must be for the benefit of the public. Properly speaking, there can be no dedication to private uses or for a purpose bearing an interest or profit in the land. (Footnotes omitted.) 23 Am.Jur.2d, Dedications 5 (1965). Accord, E. McQuillin, 11 Municipal Corporations s 33.08 (3d ed. 1979); 4 H. Tiffany, Law of Real Property s 1099 (3d ed. 1975)”.

*Knudsen v. Patton*, 26 Wash. App. 134, 141–42, 611 P.2d 1354 (1980)

The apparent primary use of the ‘disputed area’ of Empire Creek Road was to tie together private access roads for use by their owners (see Variance, CP 75). Ferry did not provide evidence from any members of the public. It did not meet its burden to prove “public use”.

Viewing the plat and other summary judgment evidence, the most reasonable inference is that the Variance was added by Ferry to facilitate private transportation within the short plat. The court failed to make a finding, declaring the ‘disputed area’ to be either public or private. Plaintiff’s Complaint should not have been dismissed.

### **Acceptance of ‘the Offer’**

Analyzing the validity of acceptance of a proposed dedication depends on whether the offer was express (statutory) or implied (common law). In a bona fide statutory dedication, there is a rebuttable presumption that acceptance occurred at the time the final plat was recorded. See RCW 58.17.020(3). When ‘the offer’ written on the plat has conditions or is unclear or ambiguous, then “the acceptance” of ‘the offer’ is not ‘automatic’, upon filing. *Sweeten*, at 165-167; *McConiga*, at 537 (below).

#### *-Acceptance Did Not Occur At Filing (1992)*

The Court of Appeals case of *McConiga v Riches*, is similar to the Keith matter. In *McConiga*, the court negated acceptance of a conditional plat, holding: “While approval of filing is evidence of acceptance by the public, the statement on the plat warning that the county is “in no way obligated until the road is brought up to the standard and accepted by the county” negates any acceptance”. *McConiga v. Riches*, 40 Wash. App. 532, 537, 700 P.2d 331, 336 (1985).

The *McConiga* opinion further rejected the proposed road as a statutory dedication because requirements of the county ordinance had not been met. *Id.* The face of the plat in the Keith v Ferry dispute has nearly identical language, requiring that the road system be brought up to county standards, therefore negating acceptance by filing.

Ferry's summary judgment position was clear: acceptance of the WPPS dedication occurred when the short-plat (92-003) was filed. *CP* at 122-125. Ferry's position on acceptance is premised on its assertion of a valid statutory dedication. Ferry clearly failed to meet the 'formalities' test to establish the clear and unambiguous 'offer' necessary for a valid statutory dedication. The condition precedent requires approval by the county engineer. The plat lacks evidence of approval by the Ferry County engineer. Acceptance did NOT occur when the plat was filed in 1992.

By its' terms, the 'Variance' operates as a counter-offer or condition-precedent to acceptance. It requires approval by the county engineer under either contract law analysis. Ferry has provided no evidence that it accepted the dedication by the required approval of the roads (to county standards) and by approval of the county engineer (1992 through July 25, 2016). Improvement of the roads in the subdivision was required by the terms of the variance and by Ordinance 72-1. A bond was required by the Ordinance. These conditions (formalities) were not met. Acceptance of the proposed dedication did not occur at the time of filing of the subdivision (WSSP) in 1992, nor at any moment, subsequently. The primary evidence before the court was documentary: the plat and deeds. Viewed in a light most favorable to Keith (the non-moving party) the court could not conclude that Ferry had met its burden to prove acceptance.

*-Failure of Acceptance by Ferry through Resolution 2016-21*

Other than the perfunctory step of filing the WSSP in 1992, there is no objective manifestation of Ferry's acceptance of the disputed area as a county road until July 2016. By its' express terms, Ferry's July 25, 2016 resolution did not accomplish acceptance of the proposed, conditional dedication. Ferry County Resolution No. 2016-21 concludes:

**NOW THEREFORE BE IT RESOLVED** the Ferry County Board of Commissioners formally recognize that Ferry County had accepted the Empire Creek Road as County Road #5520 as it is recorded in the Wutzkie/Schinnell Short Plat #92-003 in 1992.

CP at 52 (bold, all caps in original)

The next day (July 26) the Ferry Commissioners sent Marc Keith a politically-charged letter, on behalf of 'adjoining neighbors'. CP at 50-51. Relying on slanted evidence and a misapplication of RCW 36.75, the letter's purpose was to threaten Keith with criminal charges. Invoking the statutory process of RCW 36.75 required the Ferry Commissioners to 'exercise their powers under the supervision and direction of the county road engineer' (RCW 36.75.050). Ferry failed to include the mandatory involvement of the county engineer in the plat process. Ferry failed to rely on the supervision of the county engineer in Resolution 2016-21. Ferry did not accept the dedication in 2016. Instead, Ferry bulled ahead, directing the assessor to delete Keith's Parcel 3101 from county tax records in 2017.

*-Revocation of Acceptance of the Proposed Dedication*

Ferry Resolution 2016-21 purports to recognize acceptance of the disputed area of Empire Creek Road as a County Road and further purports that this occurred in 1992. However, Mr. Keith received a deed for Parcel 3101 in 2008; he received property tax assessments for the same, which he (and his predecessors in interest) paid. *CP at 46-49*. After Resolution 2016-21 was passed, the parcel designation was removed from Parcel 3101. A notation in the Assessor's TaxSifter records explains that the parcels were administratively combined for 2017 tax purposes *CP at 103*.

The abrupt action of the Ferry assessor's office in 2017 contradicts the established practice of not taxing the servient property when a county obtains a written easement over private property. The statute is clear:

Whenever the state, or any city, town, county or other municipal corporation has obtained a written easement for a right-of-way over and across any private property and the written instrument has been placed of record in the county auditor's office of the county in which the property is located, the easement rights shall be exempt from taxation and exempt from general tax foreclosure and sale for delinquent property taxes of the property over and across which the easement exists; **and all property tax records of the county and tax statements relating to the servient property shall show the existence of such easement and that it is exempt from the tax;** and any notice of sale and tax deed relating to the servient property shall show that such easement exists and is excepted from the sale of the servient property. (Underlining and bold added for emphasis).

RCW § 84.36.210

Keith's Ferry tax records and statements did not show the existence of a public right-of-way easement on Parcel 3101 when he purchased the land (*CP* 46, 48) nor in 2016 (when Ferry 'recognized' dedication of a right-of-way). *CP* 47, 49. Even the 2017 Ferry Taxisfter record does not comply with the requirements of RCW 84.36.210: Parcel 3101 is eliminated (consolidated), but not 'shown as a tax-exempt, public easement'.

Washington law recognizes instances where an intended dedication may be properly revoked. In a 1916 case, *Hanford v City of Seattle*, the court found that when a dedication had been offered, but not yet accepted, two types of intervening actions can work a revocation of the intended dedication: one private (subsequent conveyances); and one governmental (taxing the property). In *Hanford*, the court stated:

"After having reserved this particular block by expressions in a deed, they transferred the land, and it was again transferred. If the dedication was ever a donation in intention, it was a revocable donation prior to acceptance or use by the donee. Revocation may be effected in such case by conveying the land as private property. 9 Am. & Eng. Enc. Law, 78".

*Hanford v. City of Seattle*, 92 Wash. 257, 261, 158 P. 987 (1916)

The *Hanford* court also cited 'taxing' a parcel as a basis to revoke a dedication:

"Where there has been no acceptance by the city or the public, either formal or otherwise, the levy and collection of taxes and special assessments shows an intention not to accept the dedication. *Spokane v. Security Savings Society*, 82 Wash. 91, 143 Pac. 435. *Id.*

Parcel 3101 (the disputed area) had been conveyed at least twice since 1992 and taxed continuously until deleted from the tax records in 2017 (*CP* 103 shows conveyances and change in tax status). See also *CP* 68 – 70.

At summary judgment, the court should have viewed the material facts of ‘conveyances’ and ‘assessed taxes’ provided in opposition of Ferry’s motion to dismiss, in a light most favorable to the non-moving party (Keith). That ‘favorable’ light requires that the court construe the 2017 ‘tax consolidation’ as evidence that Ferry’s acceptance of the road (if at all) was no sooner than 2017. The same ‘undisputed fact’ (change in tax billing), viewed most favorably for Keith should also be construed as a taking of Keith’s property, defeating Ferry’s motion to dismiss Keith’s lawsuit.

*Summary: Keith Opposition to Dismissal of Dedication Argument*

To prevail on its’ motion to dismiss Keith’s lawsuit by summary judgment, Ferry needs to prevail as a matter of law on all three causes of action in Keith’s Complaint. As to the First Cause of Action (Declaratory Judgment), Ferry has the burden of proof to establish all elements of a valid dedication: offer, public use, and acceptance.

Offer: In both express and implied dedications the offer must be clear, manifest, and unequivocal. Statutory dedications must comply with formalities in the subdivision statute (RCW 58.17). The plat must contain an offer that is clear and complete. The plat did not comply with RCW

58.17.150(3): it contained NO approval by the county engineer and should have been rejected (RCW 58.17.190). Failure to comply with the formalities negates a statutory dedication. Under common-law principles the “offer” must evidence proof of clear intention to dedicate, “followed by some act or acts clearly and unmistakably evidencing such intention”.

In granting Ferry’s motion to dismiss, the court erred by failing to view the material facts in a light most favorable to Keith, the non-moving party. The WSSP offer to dedicate fails under either analysis: express or implied. The WSSP offer, as manifested on the plat, is ambiguous, conditional, and incomplete and fails to comply with RCW 58.17.150. It fails to satisfy statutory formalities (title insurance; approval of the county engineer); and the requirements of Ordinance 72-1 (such as improvement of the subdivision roads to ‘county standards’, with approval by the county engineer, and a bond to secure the subdivision road improvements).

Summary judgment dismissing Keith’s request for declaratory relief also fails under a common law analysis. The offer is incomplete (ambiguous as to time-frame, conditioned on future actions of the developers) and because the developers failed to take the key actions to ‘unmistakably evidence their intention to dedicate: bringing the subdivision roads up to county standards, obtaining approval by the county engineer’. Viewed in a light favorable to Keith, the WSSP offer was not valid, as a matter of law.

Public Purpose: Both Keith and Ferry asked the court for declaratory relief to answer the key issue: “Is the disputed area a private or a public road?” Ferry failed its’ burden to prove public use by undisputed material facts. The trial court failed to grant declaratory relief. Plaintiff’s Complaint should not have been dismissed by summary judgment.

Acceptance: Keith opposed Ferry’s assertion of ‘acceptance’ by Ferry of the WSSP subdivision (#92-003) on three grounds: (1) Acceptance could not have occurred upon filing (1992); (2) The July 2016 Resolution of the Ferry County Commissioners was not an acceptance; and (3) If there was an intended dedication, it was revoked by the conveyances and taxes to the disputed area (Parcel 3101) between 1992 and 2017.

The language of the Variance clearly conditions ‘acceptance’ on ‘bringing the roads to county standards’ and ‘approval by the county engineer’. Viewing the evidence in a light favorable to Keith, the court should not have determined that acceptance occurred as a matter of law. Cause of Action #1 in Keith’s Complaint should not have been dismissed.

**(1)(b) Ferry failed to properly assert a Statute of Limitations defense.**

Ferry contends that Keith’s challenge to the validity of the right-of-way dedication (WSSP) is time barred. See Ferry’s outline: *CP* 111 and Ferry’s statute of limitations argument: *CP* 119 – 122. Ferry’s statute of

limitations argument must fail for two reasons: (1) Ferry failed to plead this affirmative defense in its Answer (or otherwise) and (2) Keith's causes of action did not accrue prior to July 25, 2016.

The Civil Rules require that certain affirmative defenses be pled in response to a prior pleading, or be waived. A claim that an action is barred by the statute of limitations is an affirmative defense and, as such, the claim must be pleaded and proved by the party who asserts it; such a statutory affirmative defense has no effect unless pleaded. CR 8(c).

“Under CR 8(c), a defendant must raise the issue of the statute of limitations and any other matter constituting an avoidance or affirmative defense” in its answer or in another appropriate pleading. The failure to do so in a timely manner results in a waiver of the defense. *Davis v. Nielson*, 9 Wash.App. 864, 876, 515 P.2d 995 (1973)”. *Alexander v. Food Servs. of Am., Inc.*, 76 Wash. App. 425, 428–29, 886 P.2d 231, 233 (1994).

Ferry filed an Answer to Keith's May 15, 2017 Amended Complaint on June 2, 2017. CP 53-57. Ferry did not plead the affirmative defense of statute of limitation in its Answer, nor in a subsequent pleading. Ferry waived the affirmative defense of statute of limitation as to all three causes of action in Keith's Amended Complaint.

Even if Ferry had properly pleaded a statute of limitations defense, Ferry failed to prove Keith's Complaint was not timely. Keith filed his

initial Complaint on April 17, 2017 (*CP* 1) and his Amended Complaint on May 15, 2017 (*CP* 27). On July 25, 2016, less than one year prior to filing, Ferry gave notice that it ‘recognized’ the WSSP dedication. This key act by Ferry, (and the 2017 Ferry Assessor’s notice of change in tax status of Parcel 3101) gave notice to Keith of a justiciable controversy (was the disputed road section public or property?), and of inverse condemnation of the ‘disputed area’ of Keith’s Parcel 3101.

Failure by Ferry to plead the affirmative defense of statute of limitations stands alone as grounds to deny Ferry’s argument that Keith’s claims are time barred. Ferry’s statute of limitation argument was not a valid basis for the trial court’s dismissal of Keith’s Amended Complaint.

**(1)(c) Ferry’s Cross-Motion for Summary Judgment was based on disputed material facts and did not include all material facts: Keith’s Complaint should not have been dismissed.**

Keith filed a motion for partial summary judgment (liability only). *CP* 58. Ferry responded by filing a cross-motion for summary judgment (of dismissal). *CP* 110. The general rule is that by filing cross motions for summary judgment, the parties concede there were no material issues of fact. *Tiger Oil Corp. v. Dep’t of Licensing*, 88 Wn.App. 925, 930, 946 P.2d 1235 (1997)

*Pleasant v Regence BlueShield*, 181 Wn. App. 252, 325 P.3d 237 (2014)

In *Regence*, the trial court allowed the plaintiff to oppose defendant's cross-motion by submitting alleged material facts countering the cross-motion. Upon considering plaintiff's evidence in response to defendant's motion, the court granted partial summary judgment, refusing to grant the defendant's motion to dismiss. The court's reason: there was insufficient evidence before the court make a ruling. The trial court then allowed a second summary judgment hearing before making a final decision *Regence* at 258-261. The final judgment was then affirmed on appeal.

In Keith's case, the trial court should have denied Ferry's dismissal motion because Ferry failed to meet its burden to prove a valid dedication. Based on the agreed documentary evidence (e.g. the plat itself), Ferry failed to prove the elements of 'offer', public use, and acceptance, especially in a light 'most favorable' to Keith. Ferry's Answer failed to allege a statute of limitations affirmative defense. Dismissal of Keith's lawsuit by summary judgment was unwarranted, substantively.

Dismissal of Keith's lawsuit was also unwarranted, procedurally. Ferry's cross-motion to dismiss was premised on ten allegedly undisputed material facts. See *CP* 115 – 119. Ferry's list contains many facts disputed by Keith (as evidence in Keith's motion or Keith's Response to Ferry's Motion, *CP* 229 – 253). Ferry's list also omits certain material facts necessary for the court to make a ruling on the cross-motion to dismiss.

Regarding Ferry's ten alleged 'undisputed facts, Keith responded by opposing each:

1. "Plat Approval". Keith agrees that the WSSP plat was filed in 1992. Keith disputed that the plat was clear, complete, unambiguous or compliant with RCW 58.17.150(3). Keith disputed the conditions for acceptance were ever satisfied. *CP* 65-70; *CP* 230-231.
2. "Ferry Ordinance 72-1". Keith agrees that Ordinance 72-1 is the correct version and that the WSSP dedication must comply with the requirements of the Ordinance. Keith disputed that Ferry quoted all relevant sections of the Ordinance (compare *CP* 116 and *CP* 66-68). For example, Ferry omits §10.03 (*CP* 181), §23.00 (*CP* 184) and §35.18 (*CP* 188). Keith disputed that the WSSP plat and its dedicators complied with all essential requirements of the Ordinance (*CP* 67-68). For example, there was no proof by Ferry of approval of the plat or the Variance conditions by the county engineer (§10.03; §35.18). Ferry supplied no evidence of a bond, as required by the ordinance (§23.00) and RCW 58.17.130. Ferry supplied no evidence the developers improved the subdivision roads (§29.00).
3. "Variance". Keith agrees that the WSSP contains a Variance. Keith disputed that the dedicators and their successor (or Ferry County)

ever satisfied the variance conditions ('bring the roads to county standards; approval by county engineer')

4. "Short-Plat No. 92-003" (also "WSSP"). Keith agrees that the WSSP was filed (6/1/92). Keith disputed that the filing proves a valid dedication (and disputed that the dedication was properly accepted (*CP* 65-72, *CP* 230 - 231).
5. "Keith ownership of Lot 1/WSSP". Keith agrees that he and his (deceased) wife became owners of Lot 1 and that a Statutory Warranty Deed was filed in March 2018 (recording the conveyance from his predecessor: Simonsen). Keith disputed that the words 'Subject to' included the proposed, conditional right of way. *CP* at 77-78. The proposed dedication had not been accepted as an easement in 1992. See also Keith's argument re: RCW 84.36.210.
6. "WSSP - \*note, and plat note(s)". Keith agrees that the plat contains the words, drawings, notes, and markings, as recorded in 1992. Keith disputes that the copy of WSSP 92-003 provided to the trial court by Ferry was legible, or accurately quoted (See *CP* 192). Keith disputed that there is a '*cul-de-sac*' on his property that complies with Ferry Ordinance §03.06. (See *CP* 178, *CP* 61-64). Keith disputed that that Ferry quoted the plat accurately on *CP* 118 (the plat does not state: "the cul-de-sac immediately west of Keith's

house”, as represented on *CP* 118). The plat simply has an arrow drawn and the words “end-county maintained road” (underlining added). See *CP* 192. Keith disputes that the words on the 1992 plat provide an accurate measurement (and time frame) of the ‘end-county maintained road’. See *CP* 230 – 231, *CP* 237, 239-245. (Note: the copies of *CP* 237, 239-245 transmitted by Ferry County Superior Court are not accurate representations of the documents filed by Keith in Ferry County Superior Court #17-2-00019-5).

7. “Other Notes on Plat”. Keith agrees that the plat was recorded with several notes and markings, some of which are stated in *CP* 118. See Keith Legal Argument 1(a), herein. Keith disputes that the ‘notes on the plat’ are legible in the version provided by Ferry to the court (*CP* 192).
8. “Rowton Affidavit – Ferry Maintenance”. Keith opposed and disputed allegations related to Ferry County road maintenance and measurement of the distances and locations of the maintenance claimed by Ferry. See *CP* 230 – 231 and *CP* 80-89; *CP* 237, 244-249. Keith disputes that maintenance, if any, by Ferry satisfies the condition precedent to acceptance by the county, on the plat (‘Variance’), i.e. ‘bringing roads up to county standards; approval by county engineer’). Of note is that Ferry submitted an affidavit

from an employee, not from the County Engineer! See *CP* 62-64 (*viz.*: ‘county records in conflict’, *CP* 63). See referenced Keith affidavit and pictures. *CP* 107- 109, *CP* 80 – 89; *CP* 66 – 67. (Note: *CP* 80 – 89 were clear, color photos provided by Keith to the Ferry County court clerk in 2019. The documents (*CP* 80-89) transmitted to Keith’s counsel by the Ferry County clerk are not accurate copies of what Keith filed with Ferry County Superior Court).

9. “Cox Legal Opinion- Tax”. Keith disputes Ferry’s tax opinion. See *CP* 113 and argument herein (Legal Argument; 1(a)).
10. “Allegations of Keith’s ‘self-help campaign’”. ‘Material Fact #10 is clearly a disputed fact, slanted in an unfavorable view of Keith, the non-moving party. It is also an inadmissible legal argument. Keith disputed throughout this case that the contested section of road is ‘public’. Ms. Hulse’s production of statements by others, is are not admissible facts, and even if so, are not ‘undisputed’ by Keith.

All ten of Ferry’s alleged ‘undisputed material facts’ relate only to Keith’s request that, pursuant to RCW 7.24, the court declare the ‘disputed area’ to be a private road (Cause Action # 1), *CP* 30 – 31. No list of ‘undisputed material facts’ was provided by Ferry enabling the court to consider a motion to dismiss Keith’s causes of actions for Quiet Title (Prescriptive Easement) and Inverse Condemnation.

Ferry's list of alleged 'undisputed facts' is incomplete. Ferry bears the burden to prove all elements asserting the proposed dedication. *Sweeten v Kauzlarich*, at 165-166. Ferry failed its' burden to submit undisputed evidence that the dedication offer was clear, manifest, and unambiguous; that the disputed area was used by the public; and, that the 'roads were brought up to county standards, as approved by the county engineer'. Ferry failed to provide all relevant evidence necessary for the trial court to consider dismissal of all three causes of action, as a matter of law.

*Summary- Issue 1: The court erred in granting Ferry's motion to dismiss*

Ferry failed to meet its' burden to prove the three elements of a valid dedication by the WSSP sub-dividers: offer, public use, and acceptance. Viewed in a light favorable to Keith, the court did not have a basis to dismiss Keith's cause of action requesting declaratory relief. Ferry did not provide a factual nor legal basis to dismiss Keith's causes of action to quiet title nor for inverse condemnation. The court erred in dismissing Keith's lawsuit.

Keith's lawsuit was timely. Further, Ferry failed to plead and prove the affirmative defense of 'statute of limitations' as to the three causes of action in Keith's amended complaint.

Even though the parties filed cross-motions for summary judgment, Keith properly opposed Ferry's motion to dismiss. Keith raised material factual issues as to Ferry's list of ten 'undisputed' facts. Ferry's list of

material facts was incomplete and based on illegible exhibits (e.g. *CP 192*). Even if there were no material facts in dispute, the court failed to view the evidence and inferences in a light most favorable to Keith. Dismissal was inappropriate and the Court of Appeals should reinstate Keith's lawsuit, remanding all causes of action for resolution by trial on the merits (or by granting Keith's request for partial summary judgment).

**2. The Trial Court Erred in Denying Partial Summary Judgment in Favor of Keith.**

**2(a) The trial court erred by failing to declare the 'Disputed Area' (on Parcel 3101) a private road.**

Both parties requested affirmative relief from the court on the same issue: to make a finding or declaration whether or not the disputed area of Empire Creek Road is public or private. (*CP 72*; *CP 132*). Keith concedes that his position in resisting the trial court's dismissal of his lawsuit rests in part on opposing Ferry's assertion that there are 'no material facts in dispute' related to the status of the road (public or private).

If the reviewing court agrees with Ferry related to undisputed material facts, then Keith's argument is clear: the only reasonable inference from the facts is that the road is now, and has always been, private. This conclusion is premised on Keith's argument that the right-of-way proposed in 1992 was never accepted by Ferry. Acceptance requires that Ferry prove that the WSSP sub-divider satisfied the conditions of the variance: bringing

the road up to county standards and obtaining express approval from the county engineer. Ferry did not, and cannot, prove what did not occur. There is only one reasonable conclusion, the road remained private.

If in its' de novo review the court finds that there are material facts in dispute related to declaring the status of the road, then the logical result is that the appellate court remand this issue to the trial court for further determination. This result is in harmony with procedure followed and approved in *Pleasant v Regence Blue Shield* (181 Wn.App. 252, 325 P.3d 237 (2014)).

**2(b) The trial court erred in failing to grant partial summary judgment to quiet title to Lot 1 (Parcel 3101) by prescriptive easement.**

In 2015 our Supreme Court refined the standards for evaluating prescriptive easement cases, providing the following guidelines:

“Prescriptive rights ... are not favored in the law, since they necessarily work corresponding losses or forfeitures of the rights of other persons.” (*Citation omitted*). To establish a prescriptive easement, the person claiming the easement must use another person's land for a period of 10 years and show that:

(1) he or she used the land in an “open” and “notorious” manner, (2) the use was “continuous” or “uninterrupted,” (3) the use occurred over “a uniform route,” (4) the use was “adverse” to the landowner, and (5) the use occurred “with the knowledge of such owner at a time when he was able in law to assert and enforce his rights.” *Id.* at 83, 85, 123 P.2d 771.

*Gamboia v. Clark*, 183 Wash. 2d 38, 43, 348 P.3d 1214, 1217 (2015)

When the claimant has paid taxes on the parcel at issue, the statutory time period for adverse possession (ownership) or prescriptive rights (use) is seven (7) years. This is clear from RCW 7.28.070:

Every person in actual, open and notorious possession of lands or tenements under claim and color of title, made in good faith, and who shall for seven successive years continue in possession, and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section.

RCW 7.28.070 (underlining added)

The party opposing a claim for adverse possession or prescriptive easement has a statutory affirmative duty to please the nature of his/her estate in the Answer. Ferry failed to do so in this matter. See *CP 53-57*.

The quiet title statute requires the court to make a ruling in favor of Keith, granting partial summary judgment as to liability, stating:

“The defendant shall not be allowed to give in evidence any estate in himself, herself, or another in the property, or any license or right to the possession thereof unless the same be pleaded in his or her answer.”

RCW 7.28.130

The elements of RCW 7.28.070 are met. Mr. Keith was in actual, open, and notorious possession of Lot 1-Parcel 3101 pursuant to his statutory warranty deed conveying the same by explicit reference to the parcel number and by description of the land. See *CP 77-78*. He continued

this possession from March 27, 2008 until July 25, 2016 – a period of more than seven successive years. His acquisition of title was in good faith. He paid all taxes assessed on Parcel 3101. *CP* 46-49. Under RCW 7.28.070 he is therefore the lawful owner of the land to the same extent as purported in his paper title.

Ferry waived their right to defend against Keith’s claim for adverse possession of Parcel 3101 and prescriptive rights to the use of the disputed area as his private road. The trial court erred by failing to quiet title to Lot 1 (once two tax parcels, now only one). Keith requests the reviewing court to grant partial summary judgment (liability) to him on his second cause of action, and remand to the court to complete the quiet title actions and to determine damages.

**2(c) The Superior Court should have ordered a trial on the issues of Inverse Condemnation of ‘Lot 1’**

There was insufficient evidence and briefing before the court at the hearing to dismiss or grant Keith’s claim for inverse condemnation. The subdivision statute interfaces with Keith’s inverse condemnation claim, stating: “No dedication ... shall be allowed that constitutes an unconstitutional taking of private property” (RCW 58.17.110 (2)) in relevant part. This Court should remand Keith’s inverse condemnation claim to the trial court for a trial.

A key case addressing “takings” (inverse condemnation) in the context of county requirements for a ‘right of way’ is *Sparks v Douglas County*. The rule of law considered by the County Commissioners, Superior Court, Court of Appeals, and, finally, to the Supreme Court was:

“The federal and Washington state constitutions provide that private property may not be taken for public use without just compensation. Where the government physically appropriates a portion of a person's private property, such as through an easement or right-of-way, a taking has occurred which requires compensation. This rule does not necessarily apply, however, where conveyance of a property right is required as a condition for issuance of a land permit.” *Sparks v. Douglas Cty.*, 127 Wash. 2d 901, 907, 904 P.2d 738, 741–42 (1995) (underlining added).

Keith’s case differs factually from *Sparks*, in that the party claiming harm from an unlawful taking was the subdivision developers; and the state action was the requirement that the developer grant a right-of-way (as a condition for approving his plats). The common ground is the presumptive rule that “where the government physically appropriates a portion of a person’s private property, such as through an easement or right-of-way, a taking has occurred, which requires compensation”. The undisputed fact is that Ferry ‘took’ Parcel 3101 from Keith, as evidenced by the 2017 Taxifter (PR 103).

The essence of an inverse condemnation claim is a governmental taking effected without the formal use of the eminent domain power. This is what transpired here, where the County simply removed the designator from Parcel 3101 and passed a resolution declaring that this parcel had been public land since the early 1990s. *See Ferry County Resolution No. 2016-21*. Mr. Keith was not compensated for this taking, and the County has not returned the taxes he paid. *See CP 103 and CP 71-73; CP 230-234*. Because of the taking, Keith lost access to his well which constructively evicted him. *CP 230-232; CP 246 and CP 251-253*.

To prevail on an inverse condemnation claim, Mr. Keith must demonstrate: “(1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal proceedings.” *Fitzpatrick v. Okanogan Co.*, 169 Wn.2d 598, 605-06, 238 P.3d 1129 (2010) (citing *Dickgieser v. State*, 153 Wn.2d 530, 535, 105 P.3d 26 (2005)).

Here, only some elements are at issue. For example, Ferry cannot dispute that the land is being putatively used as a public road, so the third element is not at issue. The primary question here is whether the land was private property. The reasons this was private property are discussed at length above.

Ferry did not compensate Mr. Keith for this taking, nor were there formal proceedings. Resolution 2016-21 was not a formal use of the County's power under Chapter 8.08, RCW. For example, Ferry never offered to purchase the land, there was no petition regarding this land filed by the prosecuting attorney, and there was no judicial determination of the compensation for the land, as contemplated in RCW 8.08.010. There was no compliance whatsoever with Article 1, § 16 of the Washington Constitution.

The "taking" element is clearly satisfied. The County's own official records used to show that Mr. Keith owned Parcel 3101. Now, these same records are nonexistent because the County deleted the parcel designation and passed a resolution declaring Parcel 3101 to have been public lands since 1992. At best, the process involved was an administrative taxing matter – well short of the due process, notice, and compensation requirements of valid exercise of eminent domain.

But even if the Court finds, over the arguments above, that the County properly accepted the dedication in 1992, Mr. Keith received a statutory warranty deed in March of 2008. He paid taxes on the property until the effective date July 25, 2016, when Resolution 2016-21 was signed. Regardless of whether the County accepted the dedication in 1992, the subsequent taxing of the parcel renders it private property and estops the

County from claiming public use. The trial court had no basis to dismiss the inverse condemnation claim; it should be remanded for trial for a determination of liability, damages, and attorneys fees (RCW 8.25.070).

#### **F. ATTORNEYS FEES AND COSTS**

The party who succeeds in the appellate court may be entitled to be reimbursed by the opposing party for costs and attorneys' fees. Title 14 of the Rules of Appellate Procedure (RAP) governs costs on review, and RAP 18.1 addresses attorney fees. "Costs" are awarded to the *substantially* prevailing party by rule. "Fees awards" are governed by the applicable statute, contract, or equitable rule. Washington Appellate Practice Deskbook; (Wash. State Bar Assoc., 4<sup>th</sup> ed. 2016), §17.1

A court may award attorney fees as part of the costs of litigation only when there is a contractual, statutory, or recognized equitable basis. *Miotke v. City of Spokane*, 101 Wash. 2d 307, 338, 678 P.2d 803, 820 (1984). Keith requests statutory fees for Declaratory Relief – private status of road, (RCW 58.17.210); Prescriptive Easement- affecting title to Parcel 3101, (RCW 7.28.083); and for Inverse Condemnation, (RCW 8.25.070).

Historically, there are limited 'equitable exceptions' that have been recognized in Washington. There are four such grounds: bad faith conduct of the losing party, preservation of a common fund, protection of constitutional principles, and private attorney general. *Miotke*, at 338.

*Miotke* involved unlawful dumping of pollutants into the Spokane river. The plaintiffs were private citizens acting to protect the public welfare. In 1984, our Supreme Court apparently adopted ‘private attorney general’ as a recognized equitable ground for awarding attorneys’ fees, stating: “a private attorney general may be awarded attorney fees whenever the successful litigant (1) incurs considerable economic expense, (2) to effectuate an important legislative policy, (3) which benefits a large class of people. *Id.*”

Two years later, a group of private citizens sued the Attorney General of our State for ‘legal malpractice’. *Blue Sky Advocates v. State*, 107 Wash. 2d 112, 727 P.2d 644 (1986). In a divided decision the Washington the majority abrogated the ‘private attorney general doctrine’ finding that the apparent adoption by the *Miotke* court lacked a clear majority of justices. *Blue Sky* at 120-121. Justice Dore wrote a cogent dissent, arguing for clear adoption of the ‘private attorney general’ exception, applying and dissecting the same three elements as the *Miotke* court. His reasoning was that equitable exceptions should be based on the court’s inherent equitable powers, and in furtherance of sound public policy. See *Blue Sky*, at 122-127. He argued that the private attorney general doctrine should be applied on a case by case basis. *Id* at 127.

Keith's theory for recovery of attorneys' fees may require the court to extend the parameters of current law, yet in harmony with established legal principles. Ferry violated the subdivision statute by failing to comply with several sections of RCW 58.17 (e.g. RCW 58.17.150(3) and RCW 58.17.160(1); RCW 58.17.060, 100, and 110; RCW 58.17.130). The Planning Administrator should not have presented the plat to the auditor without assuring statutory compliance. The auditor should not have filed the WSSP until assuring that the statute had been followed for a 'statutory dedication'. See primary remedial process in RCW 58.17.190.

This 'safety-check' is implied by the alternative remedy required in RCW 58.17.190: that the prosecuting attorney take legal action to remove the plat (or assure that it complies). Neither the auditor nor the prosecutor took the corrective action required by the statute to protect an 'innocent purchaser' under RCW 58.17.210. That task was left to Mr. Keith to resolve through an expensive legal procedure as a 'private attorney general'.

No attorneys' fees were granted at summary judgment. Keith requests that the trial court be ordered to determine attorneys' fees for any cause of action remanded. If found to be the substantially prevailing party of this appeal, Keith reserves the right to present his requests for statutory attorneys' fees and other allowable costs. RAP 14.3. If found to be the

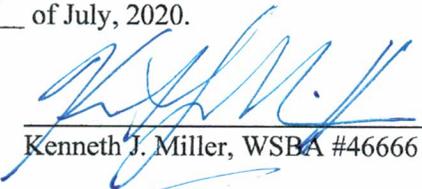
prevailing party in this appeal, Keith requests attorneys' fees pursuant to RAP 18.1.

**G. CONCLUSION**

For the foregoing reasons Keith requests this Court to reverse the April 9, 2020 summary judgment of the trial court, which granted Ferry's motion to dismiss Keith's lawsuit. Keith further requests this Court to remand this matter to the Ferry County Superior Court with instructions that the trial court:

- (1) Declare the disputed road area (Lot 1-Parcel 3101) to be a private road,
- (2) Quiet title to Keith's property by granting partial summary judgment,
- (3) Try all issues of inverse condemnation; and for all causes of action:
- (4) Determine any remaining issues of liability, damages, and attorneys fees

Respectfully submitted this 29<sup>th</sup> of July, 2020.

  
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