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

MARC KEITH,

Petitioner,

v.

FERRY COUNTY,

Respondent.

**BRIEF OF RESPONDENT
FERRY COUNTY**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II ISSUES FOR REVIEW	2
1. Whether a short plat approved and recorded by the county platting administrator and containing the owners' unequivocal statement of intent to grant a public right of way satisfies the requirements for dedicating a public right of way as a matter of law?	
2. Whether an abutting property owner can adversely possess a dedicated public right of way?	
3. Whether deeded interests that do not included a dedicated public right of way can give rise to inverse condemnation against a County that defends public use of the right of way?	
III STATEMENT OF THE CASE	2
IV ARGUMENT	7
A. Standard of Review	7
B. The Legal Requirements for Dedication of a Public Right of Way for Empire Creek Road Were Satisfied by the Express Grant on the Face of a Plat that the County Approved and Recorded	8

1.	The Owners Unequivocally Stated Their Intent to Grant Ferry County a Right of Way for Empire Creek Road on the Face of Short Plat 92-003	9
2.	Owners' Grant to Ferry County of a Right of Way for Empire Creek Road was Publicly Accepted by Approval of Short Plat 92-003 and by County Maintenance of the Road	12
C.	Keith Does not Own the Right of Way and Has Paid no Taxes on the Right of Way	18
D.	The Superior Court Correctly Dismissed Keith's Amended Complaint	21
1.	Keith's Collateral Attach on the Platting Process 28 Years After Short Plat 92-003 was Approved is Untimely	22
2.	Keith Cannot Claim Disputed Issues of Fact Preclude Summary Judgment on Claims He Moved for Summary Judgment	25
a.	There are No Disputed Issues of Material Fact	25
b.	The Superior Court's Grant of Summary Judgment in Favor of the County Determined that Short Plat 92-003 Dedicated, Granted and Conveyed a Public Right of Way .	28

	c.	A Public Right of Way Cannot be Extinguished by Prescription . . .	29
	d.	The County Cannot Condemn Property from Keith that Keith Does Not Own	31
	E.	Keith's Amended Complaint Does Not Seek Recovery of Attorney Fees	33
V		CONCLUSION	34

TABLE OF AUTHORITIES

<u>Campau v. City of Detroit</u> , 104 Mich. 560, 62 N. W. 718-719	20
<u>City of Bainbridge Island v. Brennan</u> , 128 Wn. App. 1046 (2005)	9, 12
<u>City of Seattle v. Hinckley</u> , 67 Wash. 273, 277, 121 P. 444, 446 (1912)	20, 27, 30
<u>Cnty. Treasures v. San Juan Cty.</u> , 192 Wn.2d 47, 52, 427 P.3d 647, 650 (2018)	24
<u>Concerned Organized Women & People Opposed to Offensive Proposals, Inc. v. City of Arlington</u> , 69 Wn. App. 209, 219, 847 P.2d 963, 969 (1993)	24
<u>Deschenes v. King County and DiGiovanni</u> , 83 Wash. 2d 714, 521 P.2d 1181 (1974)	24
<u>Dewey v. Tacoma Sch. Dist. No. 10</u> , 95 Wash. App. 18, 26, 974 P.2d 847 (1999)	34
<u>Ditty v. Freeman</u> , 55 Wn.2d 306, 309, 347 P.2d 870, 872 (1959)	9
<u>Fabre v. Town of Ruston</u> , 180 Wn. App. 150, 158 321 P.3d 1208 (2014)	8, 29
<u>Fitzpatrick v. Okanogan Co.</u> , 169 Wn.2d 598, 238 P.3d 1129 (2010)	31

<u>Goedecke v. Viking Inv. Corp.</u> , 70 Wash.2d 504, 509, 424 P.2d 307 (1967)	30
<u>Hanford v. City of Seattle</u> , 92 Wn. 257, 259-260, 158 P. 987 (1916)	12, 20, 21
<u>Howe v. Douglas Cty</u> , 146 Wn2d 183, 190, 43 P.3d 1240, 1244 (2002)	33
<u>Lewis v. Bell</u> , 45 Wash. App. 192, 197, 724 P.2d 425 (1986)	34
<u>Lyons v. U.S. Bank, N.A.</u> , 181 Wn.2d 775, 783, 336 P.3d 1142 (2014)	8, 29
<u>McConiga v. Riches</u> , 40 Wash. App 532, 537, 700 P.2d 331, 336 (1985)	15, 16
<u>State ex rel. Macri v. City of Bremerton</u> , 8 Wash. 2d 93, 112, 111 P.2d 612 (1941)	33
<u>Tiger Oil Corp. v. Dep't of Licensing</u> , 88 Wn. App. 925, 930, 946 P.2d 1235 (1997)	26
<u>Wenatchee Sportsmen Ass'n v. Chelan County</u> , 141 Wash.2d 169, 4 P.3d 123 (2000)	24
<u>Wilson v. Steinbach</u> 98 Wash.2d 434, 437, 656 P.2d 1030 (1982)	8
Statutes	
§ 36.87.090, RCW	31
§ 58.17.020(3), RCW	Passim

§ 58.17.100	23
§ 58.17.150(3)	23
§ 58-17-160(1)	23
§ 58.17.165, RCW	Passim
§ 58.17.190	23
§ 84.36.210, RCW	18

Ordinances

Ferry County Ordinance

72-1	10
72-1, § 29.01	13
72-1, § 03.07	10
72-1, § 35.12	11
72-1, § 4.00	23

City of Seattle Code of 1881

§§ 2332 and 2339	20
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I. INTRODUCTION

Keith's amended complaint alleges that Empire Creek Road, which crosses his property is private. The three claims alleged in Petitioner, Keith's, amended complaint are controlled by two undisputed facts. First, Short Plat No. 92-003 was approved and recorded with an express grant of the depicted right of way for County Road 552 (Empire Creek Road). This satisfies the requirements for dedicating a public right of way, as a matter of law. Abutting landowners cannot extinguish public rights of way by prescription, also as a matter of law.

Second, sixteen years after the plat was approved and recorded Marc Keith took title to Lot 1 of Short Plat No. 92-003, subject to matters of record. Short Plat No. 92-003 describes Lot 1 as 3.3 acres, less the County right of way for Empire Creek Road depicted on the plat. Keith never owned the right of way. It follows that the County cannot be held liable in damages for inverse condemnation for taking action to protect public use.

Based on these facts, the Superior Court correctly granted the County's motion for summary judgment by dismissing Keith's complaint with prejudice.

II. ISSUES FOR REVIEW

4. Whether a short plat approved and recorded by the county platting administrator and containing the owners' unequivocal statement of intent to grant a public right of way satisfies the requirements for dedicating a public right of way as a matter of law?
5. Whether an abutting property owner can adversely possess a dedicated public right of way?
6. Whether deeded interests that do not include a dedicated public right of way can give rise to inverse condemnation against a County that defends public use of the right of way?

III. STATEMENT OF THE CASE

In 2008, Petitioner, Marc R. Keith, and his wife, Vivian I. Keith ("Keith") took title to property in Ferry County by statutory warranty deed. See Clerk's Papers ("CP") 29 (Amended Complaint ¶ 3.3. The deed gives the following legal description for Keith's property:

Lot One (1) of Wutzke/Shinnell Short Plat Number 92-003 as filed I June 1, 1992 under Ferry County Auditor's File Number 221125.

CP 44 (Amended Complaint Ex. C).

Short Plat No. 92-003 was recorded by the County Auditor on June 1, 1992, at page 84, col. 1 of Short Plats. CR 192 (Hulse Affidavit, Exhibit 3).¹ Lot 1 is platted as “3.30 ac[res] (less Co. R/W).” The county right of way that is subtracted from Lot 1 is 60-foot wide for “*EMPIRE CR. CO. RD 552.” Id. The asterisked note 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.

Id. The right of way for the Empire Creek Road *cul-de-sac* depicted on Lot 1 is identified as the “end of county maintained road.” Id. Ingress and egress to Lots 2, 3, and 4 as shown on the plat is by easements and existing access roads that connect to the Empire Creek Road *cul-de-sac*. See also CP 167 (findings)

Katherine Meade, Ferry County’s Platting Administrator granted final approval, indicating that Short Plat No. 92-003 conformed with Ordinance 72-1 “except where noted.” CR 165.

¹ Petitioner complains that the plat in the clerk’s papers is not legible. Petitioners Brief at 35. Petitioner did not object to admission of the plat. Keith also complains that the County did not accurately quote the plat. Id. citing CP 118. However, the cited page of the record shows that the County did not quote the plat as represented. As a courtesy, a legible copy of Short Plat No. 92-003 is attached to this brief to assist this Court in interpreting the document. CP 192 (Hulse Affidavit Ex. 3).

(Hulse Affidavit, Exhibit 1). It is noted that Short plat 92-003 was approved with a variance from the county's minimum road standards. CR 166. The road standards are found Section 29 of Ordinance 72-1. CP 184.

The final plat approval, recorded with the plat on June 1, 1992, at Ferry County Auditor File Number 221124, included specific findings and recommendations in support of the requested variance. CR 167. Those findings state the existing access roads to newly created lots 2, 3, and 4 are too steep to comply with the County's adopted road standards. Id. The Administrator recommended plat approval with existing roads and with a disclaimer for the variance. Id. The planning commission recommended approval of the requested variance from section 29 of Ordinance 72-1, which was granted by the Administrator. Id.

The Owners signed Acknowledgement on the face of the plat includes states:

This short plat is made with the free consent and in accordance with the desires of the owners. Owners grant a waiver of all claims for damages against any

government authority arising from the construction and maintenance of public facilities.

CR 192. Also, on the face of the plat is the recommended disclaimer for a “VARIENCE from Minimum Road Standards” stating:

The access roads to Lots 2 and 3 (16% grade) and Lot 4 (13% grade) do not meet the minimum road standard 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.

Id.

The disclaimer is specific to Lots 2, 3, and 4, and their access roads. It does not mention and has nothing to do with Lot 1 or Empire Creek Road. The disclaimer is fully consistent with the Administrator’s findings and recommendations which are specific to existing access roads for Lots 2, 3, and 4. CP 167.

The County has maintained Empire Creek Road since 1992 when the dedication was accepted. CP 136 (Rowton Aff.). Keith has paid no taxes on the dedicated right of way. CP 157 (Cox Affidavit, ¶ 6).

Vivian Keith died of cancer in 2014. Petitioner's Brief at 11; CP 29 (Amended Complaint at 3.3). Beginning in 2013 and continuing for a number of years following Ms. Keith's death, Mr. Keith engaged in a program of self-help based on his stated position that the County does not own a right of way for Empire Creek Road on Lot 1. Mr. Keith removed his neighbors' mailboxes, and he erected fences and gates that interfered with the public's right of way, and he attempted to intimidate county employees by accusing them of unlawful conduct. CR 161 (Hulse Aff, ¶ 2); See also CR 196-228 (Hulse Aff, Exhibit 6).

On July 16, 2016, acting on complaints from the owners of other property served by the section of Empire Creek Road on Keith's property, the Ferry County Board of County Commissioners ("BOCC") ordered Keith to cease and desist

from obstructing Empire Creek Road and from interfering with the US Postal Service deliveries. CP 209.

Keith filed suit against the County, seeking a declaration that Empire Creek Road crossing his property is a private road. CP 27 (Amended Complaint). In the alternative, Keith alleged counts for title by prescription, and for inverse condemnation. The County answered. Following discovery Keith filed a motion for summary judgment as to liability, which was supported by the Affidavit of Marc Keith and a declaration of counsel. The County responded and filed a cross-motion for summary judgment supported by Affidavits of Marissa Hulse, William Rowton, and Colleen Cox. The Superior Court decided the cross motions in favor of the County based on the pleadings, briefs, and supporting papers. Keith appealed from the order dismissing his complaint with prejudice.

IV. ARGUMENT

A. Standard of Review

Summary judgment is proper if the pleadings, affidavits, depositions, and admissions on file demonstrate that there are no

genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). When reviewing a motion for summary judgment, courts consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. Wilson v. Steinbach, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982).

A superior court's decision to grant summary judgment is reviewed de novo. Lyons v. U.S. Bank NA, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014). The “[s]uperior court[’s] findings of fact and conclusions of law are superfluous.” Fabre v. Town of Ruston, 180 Wn.App. 150, 158, 321 P.3d 1208 (2014); *accord* CR 52(a)(5).

B. The Legal Requirements for Dedication of a Public Right of Way for Empire Creek Road Were Satisfied by the Express Grant on the Face of a Plat that the County Approved and Recorded.

Keith’s opening brief correctly sets forth the statutory and common law requirements for dedicating land to public use. See Petitioner’s Opening Brief at 14. Owners’ must intentionally offer to dedicate land for public use, and the grantee must publicly accept the dedication. Keith contends the owners’ offer

was “ambiguous and circular” or “conditional and incomplete.” Petitioners Opening Brief at 19-20. Keith also contends that the County acceptance was ineffective because it was conditioned on bringing access roads up to County standard. Id. at 20. The plain language of the plat shows that Keith is wrong on both counts.

1. The Owners Unequivocally Stated Their Intent to Grant Ferry County a Right of Way for Empire Creek Road on the Face of Short Plat 92-003.

The face of Short Plat No. 92-003 meets both the statutory and common law requirements for a dedication. The meaning of language on a plat is interpreted by the court as a matter of law. Ditty v. Freeman, 55 Wn.2d 306, 309, 347 P.2d 870, 872 (1959) (so stating). As the County argued before the lower court, common law dedication of a public right-of-way requires an expression of intent by the owner of property. CP 122 citing City of Bainbridge Island v. Brennan, 128 Wn. App. 1046 (2005) (holding that a petition to dedicate constitutes sufficient proof of intent even though it was executed before petitioner owned the property). By statute, “dedication” is defined as:

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) (*emphasis added*)

Ferry County Ordinance 72-1 implementing that statute provides as follows:

The intention to dedicate shall be evidenced by the owner by the presentment for filing a short plat showing the dedication thereon; and, the acceptance by the public shall be evidenced by the approval of such plat in the manner provided in this ordinance.

CP 178 (Ord 72-1, 03.07).

The ordinance further required each short plat to include “[a] certificate bearing the typed or printed names of all persons having an interest in the divided land, signed and acknowledged by them before a notary public, which:

States their consent to the division of land;

Recites a dedication by them of all land shown on the short plat to be dedicated for public uses; and

Grants a waiver by them and their successors of all claims for damages against any governmental authority arising from the construction and maintenance of public facilities and public property within the short subdivision. . .

CP 187 (Ord 72-1, § 35.12). See also RCW 58.17.165.

In compliance with these requirements, all owners of the land depicted on Short Plat No. 92-003 signed the face of the plat. Compare CP 192 (plat 92-003) with CP 170 (title report, certifying ownership in the named persons). The signed acknowledgement states:

This short plat is made with the free consent and in accordance with the desires of the owners. Owners grant a waiver of all claims for damages against any government authority arising from the construction and maintenance of public facilities.

CP 192.

The face of the plat also depicts a 60-foot right of way on Lot 1 for “*EMPIRE CREEK RD. CO RD #552.” The asterisk corresponds to an annotation on the face of the plat that 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.

Id. This is a clear expression of the owners’ intent to grant a dedication. The only thing “circular” about the stated dedication

is the *cul-de-sac* depicted on Lot 1 at the “end of county maintained road.” Id.

This Court should hold that owners’ grant and other foregoing acts, memorialized in writing on the face of the plat evidence the owners’ intent to dedicate a public right of way for County Road #552 (*aka* Empire Creek Road) in satisfaction of statutory and common law dedication requirements. RCW 58.17.020(3); City of Bainbridge Island *supra*.

2. Owners’ Grant to Ferry County of a Right of Way for Empire Creek Road was Publicly Accepted by Approval of Short Plat 92-003 and by County Maintenance of the Road.

As noted, public acceptance of a dedicated right of way is evidenced by “approval of such plat for filing by the appropriate governmental unit.” RCW 58.17.020(3). Public acceptance is further evidenced by recording of a dedicated right of way. See e.g., Hanford v. City of Seattle, 92 Wn. 257, 259-260, 158 P. 987 (1916). It is undisputed that Short Plat No. 92-003 was approved for filing by the Ferry County Platting Administrator. CP 165. It is further undisputed that Short Plat No. 92-003 was made of record 16 years before Keith acquired title to Lot 1. Compare

CP 192 to CP 194. The owners' dedication evidenced on the face of Short Plat No. 92-003 was conclusively accepted by Ferry County upon approval and recording of the plat.

According to Keith, the County's acceptance of the dedication is defeated by a variance. Keith is wrong. The variance was granted for the access roads to lots 2, 3, and 4. It does not apply to Empire Creek Road. The County road standards require "[t]he gradients on all roads will be shown not over 8%." CP 184 (Ord 72-1, § 29.01). The access roads on Short Plat No. 92-003 do not meet that standard. The Administrator made three findings: (1) Access road to lot 2 and lot 3 are served by a road that is 16% grade. . . (2) Access road to lot 4 is served by a road that is 13% grade, and (3) addresses access from Empire Creek Rd to property outside of Short Plat No. 92-003. CP 167.

The variance does not apply to Empire Creek Road. Based on the findings that were made the Administrator concluded "[a]ttaining 8% grade *from Empire Creek Road* may not be possible by any method." Id. The Administrator recommended

plat approval with “existing access” and a disclaimer on the face of the plat. Id. The variance applies only to access roads “*from*” Empire Creek Road to Lots 2, 3, and 4. The variance is not ambiguous. It does not apply to Empire Creek Road. Keith’s interpretation is without merit.

The disclaimer on the face of the plat is consistent with the Administrator’s findings and decision to grant a variance for the access roads. It states:

The access roads to Lots 2 and 3 (16% grade) and Lot 4 (13% grade) do not meet the minimum road standard 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 192 (*emphasis added*).

The plain language of the disclaimer is limited to the “access roads” to lots 2, 3, and 4. In reference to the access roads,

the disclaimer states that “these roads” are not accepted as county roads. It says nothing about Empire Creek Road, which is separately identified in the owners’ grant quoted above. Again, the plat is not ambiguous. Keith’s interpretation is at odds with the plain language of the variance and disclaimer.

Keith cites authority in support of his contention that approval of a plat does not constitute acceptance if the approval is conditioned on bringing the dedication up to county standards. Petitioner’s Brief at 23 citing McConiga v. Riches, 40 Wash.App 532, 537, 700 P.2d 331, 336 (1985). Keith contends that language on the face of Short Plat No. 92-003 is “nearly identical” to language on the plat considered in McConiga. The provision in McConiga relied on by Keith dealt with a “private road” that had to be brought up to county code before it could be accepted. 40 Wash.App at 534, 700 P.2d 334. Indeed, the plat, which is reproduced in the opinion, says “private road.” Keith might have a point if this dispute was about the status of private access roads to Lots 2, 3, and 4. That is not what the dispute is about. Short Plat No. 92-003 expressly grants Ferry County a

right of way for County Road 552, and shows where county maintenance of County Road 552 ends. The holding of McConiga does not apply to the facts of this case.

Keith's interpretation is also at odds with undisputed evidence that the County has maintained Empire Creek Road since 1992 when the dedication was accepted. CP 136 (Rowton Aff.). Keith admits that the County maintained Empire Creek Road before he acquired title to Lot 1. CP 233. He admits that the County plows Empire Creek Road on Lot 1). CP 199. Keith nevertheless contends Mr. Rowton's testimony is "highly suspect." CP 232. Keith's unfounded suspicion is not evidence. It is undisputed that the County maintained Empire Creek Road since it was dedicated for public use in 1992. By those acts the County affirmed its acceptance of the dedicated public right of way.

Keith next contends the dedication was not accepted because the County engineer did not approve construction of the roads and no bond issued. Petitioners Brief at 11. As explained below, Keith's argument improperly conflates the requirements

for dedication (a conveyance), with platting requirements (a land use decision). Empire Creek Road is shown as an existing road on Short Plat No. 92-003 when the right of way was dedicated to the County. The Administrator entered findings that the access roads “from” Empire Creek Road to Lots 2, 3, and 4 did not meet the County road standards because they are too steep.

As Keith acknowledges, the County granted a variance from its road standards for the access roads with a disclaimer stating that the County would not accept the access roads unless or until they are brought up to county standards “within the sole discretion of the Ferry County Engineer.” CP 192. No finding suggests that the existing Empire Creek Road failed to meet the County’s road standards. There is no construction required to bring Empire Creek Road up to County standards. Hence, plat approval did not require Engineer approval or a bond.

Lastly, Keith contends that a resolution adopted by the County in 2016 somehow failed to establish acceptance of the dedication. Petitioner’s Brief at 25. Resolution 2016-21 simply states the County “*had* accepted the Empire Creek Road as

County Road #5520 (sic) as it is recorded in the Wutzkie/Schinnell Short Plat #92-003 in 1992.” CP 52. The resolution was not adopted to accept dedication of the right of way; that was done upon approval and recording of the plat. RCW 58.17.020(3). The resolution was adopted in support of the County’s order requiring Keith to cease and desist interfering with public access and the US Mail. CP 50-51.

C. Keith Does not Own the Right of Way and Has Paid No Taxes on the Right of Way.

Mr. Keith’s arguments regarding payment of taxes are factually incorrect and immaterial as a matter of law. Keith asserts that the County is statutorily required to show the existence of written easements on all tax documents. Petitioners Brief at 26 citing RCW 84.36.210.

This case does not involve any written easements. It addresses conveyance of a dedicated right of way. An easement would be needed only if Keith owned the land. He does not. It is undisputed that Keith’s statutory warranty deed conveyed title to Lot 1 of Short Plat No. 92-003. CP 194. It is undisputed that Lot 1 of Short Plat No. 92-003 is surveyed and platted as 3.3

acres “less” the county right of way. CP 192. The right of way was not conveyed to Mr. Keith. To the contrary, it was conveyed to the County in 1992 by operation of law. Under the Platting Act,

Any dedication, donation or grant as shown on the face of the plat shall be considered to all intents and purposes, *as a quitclaim deed* to the said donee or donees, grantee or grantees for his, her or their use for the purpose intended by the donors or grantors as aforesaid.

RCW 58.17.165.

Not only did Keith never own the dedicated right of way, he never paid any taxes on the right of way. Keith’s property is taxed as a unit and the existence of a right of way has no effect on his payment of taxes. Id. In other words, Keith paid no taxes for the right of way. CP 157 (Cox Affidavit, ¶ 6). Even if Keith could show he paid taxes on the right-of-way (he cannot), it would have no effect on the public right to use Empire Creek Road. The Supreme Court held more than 100 years ago,

The rights of the public in a highway are not affected by the listing of the premises for taxes, or payment of taxes when assessed. It is not within the province of assessing or collecting officers to thus admit away the rights of the public.’

City of Seattle v. Hinckley, 67 Wash. 273, 277, 121 P. 444, 446 (1912) citing Campau v. City of Detroit, 104 Mich. 560, 62 N. W. 718-719.

In support of his faulty tax argument, Keith misstates the holding of Hanford v. City of Seattle, 92 Wn. 257, 259-260, 158 P. 987 (1916). The facts and holding of Hanford conclusively support the County's position. At issue was the dedication of a park. In holding against the City, the Court distinguished the dedication of streets, lanes, and alleys from dedications for other purposes (such as parks). In the Court's words,

“The town plat law in force at the time of the dedication of the plat of this land is found in the Code of 1881, §§ 2332, 2329. The first section contains the following:

‘All streets, lanes and alleys, laid off and recorded in accordance with the foregoing provisions, shall be considered, to all intents and purposes, public highways.
* * *’

The second section is as follows:

‘Every donation or grant to the public, or to any individual or individuals, religious society or societies, or to any corporation or body politic, marked or noted as such on the plat of the town, or wherein such donation or grant may have been made, shall be considered, to all intents and purposes, as a quitclaim deed to the said donee or donees, grantee or grantees, for his, her or their use, for the purposes intended by the donor or donors, grantor or grantors, as aforesaid.’

By these provisions of the law then in force it will be noted that the first provision constituted a legislative acceptance of all streets, lanes, and alleys laid off in accordance with the law providing for the platting and subdivision of land. But as to the second section it will be observed that, if any grounds other than those designated as streets, lanes, or alleys are intended to be donated or granted to the public or to any other person or concern, it was necessary to mark or note on the plat that such grounds were donated or granted, and for what use or purposes intended by the donor or grantor.”

Hanford, 92 Wash. at 259–60 (*emphasis* added).

Thus, as far back as 1916 the act of recording constituted public acceptance of street dedications. This case does not deal with the dedication of a park that was never used for that purpose. It deals with dedication of a right of way depicted on a recorded plat for a road that has been continuously used. Hanford supports dismissal of Keith’s complaint.

D. The Superior Court Correctly Dismissed Keith’s Amended Complaint,

Keith’s amended complaint alleges three counts: (1) declaratory judgment that the road is private, (2) quiet title by adverse possession, and (3) inverse condemnation. Keith’s amended complaint alleges no errors in the approval of Short Plat No. 92-003. As noted above, a dedication is valid when property

is offered for public use and that offer is publicly accepted. RCW 58.17.020(3). Those elements are satisfied for reasons already given. In his motion for summary judgment on liability Keith went outside the pleadings in an attempt to show the dedication was invalid by collaterally attacking the platting process. For example, he argued on summary judgment, as he does here, that a bond and engineer review were required for plat approval.

The County responded to Keith's collateral attack as untimely. Keith did not object but now argues, for the first time, that the County did not plead statute of limitations as a defense. That is because Keith's amended complaint does not allege flaws in the approval of Short Plat No. 92-003. The County properly countered Keith's summary judgment arguments.

1. Keith's Collateral Attack on the Platting Process 28 Years After Short Plat 92-003 was Approved is Untimely

Keith erroneously asserts that the County failed to comply with the subdivision code in approving Short Plat No. 92-003. Keith then contends, without authority, that supposed errors in the platting process deprive the County of authority to accept a

dedication on the face of the plat. Keith's attempt to collaterally attack the dedication through the platting process improperly conflates plat approval (a land use decision) with dedication (a conveyance). Moreover, it is decades too late.

In attempting to introduce platting as a new requirement for making dedications Keith misstates the platting act. According to Keith,

It [a plat] 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 [the plat] should be rejected by the auditor. RCW 58.17.190.

Petitioner's Brief at 18.

That is not what the statute says. It says, "[t]he county auditor shall refuse to accept any plat for filing until approval of the plat has been given *by the appropriate legislative body, or such other agency as authorized by RCW 58.17.100.*" RCW 58.17.190 (*emphasis added*). Consistent with RCW 58.17.100, Ferry County delegated final platting authority by ordinance to the Administrator. CP 179 (Ord 72-1, § 4.00). It is undisputed that the Administrator duly approved Short Plat No. 92-003. CP 165. The auditor correctly accepted the plat for recording.

Keith also fails to cite authority for challenging local land use decisions decades after they are made. Indeed, all authority is to the contrary. The long-established policy of the state to promote finality in land use decisions predates LUPA. As the Supreme Court noted in 1993,

We agree with the policy goals expressed in *Deschenes v. King County* and *DiGiovanni*: to promote certainty and finality in land use decisions while giving the opponents a *reasonable* time to take their concerns to the courts. It is hard to seriously argue that 30 days is an unreasonably short time, and indeed many ordinances provide a shorter appeal period from land use decisions.

Concerned Organized Women & People Opposed to Offensive Proposals, Inc. v. City of Arlington, 69 Wn. App. 209, 219, 847 P.2d 963, 969 (1993)

The policy of finality in land use decision is retained today under LUPA. As the Supreme Court explained:

Mindful of the policy of finality in land use decisions, this court in *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 4 P.3d 123 (2000), likewise held that an untimely petition under LUPA ***precluded collateral attack of the land use decision and rendered the improper approval valid***. Similar considerations apply here.

Cnty. Treasures v. San Juan Cty., 192 Wn.2d 47, 52, 427 P.3d 647, 650 (2018) (***emphasis*** added).

Thus, even if he were right (he is not) Keith is time barred from collaterally attacking the approval of Short Plat 92-003 decades after the decision was made.

2. Keith Cannot Claim Disputed Issues of Fact Preclude Summary Judgment on Claims He Moved for Summary Judgment.

Keith moved for summary judgment on liability for all claims in his amended complaint. The two alternative claims (prescription and inverse condemnation) are legally dependent on the first claim for declaratory judgment regarding the public dedication. By law if the right of way was properly dedicated Keith cannot adversely possess. Nor the County's action to protect public use give rise to inverse condemnation. Also, because title to the right of way was never conveyed to Keith, the County cannot be held liable for inverse condemnation. Thus, each of Keith's claims are fully resolved by the plain language of Short Plat No. 92-003 and Keith's deed, as a matter of law.

a. There are No Disputed Issues of Material Fact

After moving for Summary Judgment on liability under all claims, Keith now contends disputed issues of fact preclude

dismissal of those claims. Keith acknowledges the rule that parties filing cross motions for summary judgment concede the absence of material facts. Petitioner’s Brief at 32 citing Tiger Oil Corp. v. Dep’t of Licensing, 88 Wn.App. 925, 930, 946 P.2d 1235 (1997). Yet, Keith attempts to rely on an exception to the rule for insufficiency of evidence. He lists a number of facts he now claims as disputed. Most are legal issues. To the extent factual issues are implicated, they are not material. Taking them in order.

1. **Plat Approval** is not properly before the court. Keith’s amended complaint does not allege errors in platting approval and any such challenge is untimely for reasons explained above.
2. **Ferry Ordinance 72-1** Same response as No. 1.
3. **Variance.** Whether the variance imposes a condition on acceptance of the dedicated right of way for Empire Creek Road requires the Court’s legal interpretation.
4. **Short Plat.** Whether county approval of Short Plat No. 92-003 for recording constitutes acceptance of the dedicated right of way is a legal issue.
5. **Keith ownership.** Whether Keith took title “subject to” the recorded right of way for Empire Creek Rd is a legal issue.
6. **Plat note.** Whether there a right of way for a *cul-de-sac* was dedicated is a legal issue. Keith did not object to the legibility or accuracy of Short Plat No.

92-003, which is attached to his amended complaint and relied on in support of his motion for summary judgment.

7. **Other notes.** Same response as No. 6.
8. **Rowton Aff.** Whether undisputed testimony of County maintenance establishes public acceptance or public use is a legal issue.
9. **Cox Aff.** Keith provided no evidence that he paid taxes on a right of way that he does not own. Any dispute is immaterial because public rights cannot be extinguished by the payment of taxes. Hinckley supra
10. **Self Help.** Keith may want to dispute that he interfered with the US Mail and public access. He may want to dispute that he sent many intimidating emails, accusing County staff of misconduct. But, he did not do so by affidavit. Thus, for the purpose of summary judgment, and to the extent its material, the fact that Keith engaged in self-help is undisputed.

Keith contends that he disputed these issues in response to the County's cross motion for summary judgment, but Keith's response is not supported by the affidavit of any witness with personal knowledge or expertise. The declaration of counsel merely attests that attached exhibits are true and correct copies of documents produced in the case. CP 235. Respectfully, Mr. Miller is not a witness with personal knowledge, and none of the proffered documents create a disputed issue of material fact.

The County's cross motion was supported by sworn testimony that (1) the County has maintained Empire Creek Road in the right of way since 1992, (2) that Keith paid no taxes on land encumbered by the right of way, and (3) that Keith engaged in self-help. Nothing offered by Keith disputes these facts.

b. The Superior Court's Grant of Summary Judgment in Favor of the County Determined that Short Plat 92-003 Dedicated, Granted and, Conveyed a Public Right of Way.

Keith concedes that the County's motion for summary judgment sought a declaration that plat 92-003 dedicated a public right of way. Petitioner's Brief at 39. The Superior Court reviewed the pleadings, briefs and affidavits filed in support of cross motions for summary judgment before granting the County's motion. CP 268. Clearly, judgment in favor of the County necessarily granted the requested relief. In a letter ruling the Court found that the "[c]ounty has established the absence of any material issue of fact and is entitled to judgment as a matter of law dismissing the Plaintiff's claims with prejudice." CP 266-67. The trial court thereafter entered its order on cross motions for summary judgment, dismissing Plaintiff's claims with

prejudice. CP 268-69. The County owns a public right of way for Empire Creek Road located in Lot 1 of Short Plat No. 92-003.

Keith next complains that the trial court made no findings in support of its ruling. However, a superior court's decision to grant summary judgment is reviewed de novo. Lyons v. U.S. Bank NA, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014). In such cases, the “[s]uperior court[’s] findings of fact and conclusions of law are superfluous.” Fabre v. Town of Ruston, 180 Wn.App. 150, 158, 321 P.3d 1208 (2014); *accord* CR 52(a)(5). The trial court correctly concluded that no disputed issues of material exist and that the County was entitled to judgment as a matter of law. The absence of detailed findings and conclusions by the Superior Court will not save Keith’s claims.

c. A Public Right of Way Cannot be Extinguished by Prescription.

Keith alleged a claim seeking to quiet title in the public right-of-way under the adverse possession statute. Keith cannot satisfy the requirements for adverse possession because the road has been continuously maintained and used for public purposes.

CP 167. Keith even admits that the County has maintained the road in the right of way, including snowplowing. CP 199.

But that does not even matter because it is firmly established in law that “An abutting property owner does not acquire by adverse possession any part of a right of way to which a municipal corporation has title.” Goedecke v. Viking Inv. Corp., 70 Wash.2d 504, 509, 424 P.2d 307 (1967). A plat dedication has the effect of a quitclaim deed. RCW 58.17.165. Ferry County is the named grantee. CP 192. Moreover, Keith’s deed is for Lot 1 of Short Plat No. 92-003, which is 3.3 acres minus the dedicated right of way. Thus, the County holds title and Keith cannot quiet title by adverse possession even if he could meet the criteria, which he cannot.

Statutory vacation is the exclusive process for ending a public right-of-way. City of Seattle v. Hinckley, 67 Wash. 273, 279, 121 Pac. 444 (1912). Under the vacation statute, “Any county road, or part thereof, which remains unopen for public use for a period of five years after the order is made or authority granted for opening it, shall be thereby vacated, and the authority

for building it barred by lapse of time. As shown, Empire Creek Road was open for public use at the time it was dedicated, and there is no evidence of non-use. The statute goes on to state:

PROVIDED, That this section *shall not apply to any highway, road, street, alley, or other public place dedicated as such in any plat*, whether the land included in such plat is within or without the limits of an incorporated city or town, or to any land conveyed by deed to the state or to any county, city or town for highways, roads, streets, alleys, or other public places.

RCW § 36.87.090 (*emphasis* added). The road in question was dedicated in a plat, so can only be extinguished by the process for vacating a public road. There are no bases in law or in fact supporting Keith's action to quiet title. The County is entitled to summary judgment.

d. The County Cannot Condemn Property from Keith that Keith Does Not Own.

Inverse condemnation requires private property to be taken for a public use. Fitzpatrick v. Okanogan Co., 169 Wn.2d 598, 238 P.3d 1129 (2010). The right of way is not private property. It was granted to the County. Consistent with that grant, Keith's deed describes the property conveyed as Lot 1 of Short Plat No. 92-003 and states title is subject to matters of

record. CP 194. Short Plat 92-003 is of record and states on its face that Lot 1 is 3.30 acres minus the county right of way. CP 192. The conveyance to Keith does not include the County right-of-way. The right of way was dedicated not taken. The right of way is not Keith's private property and therefore cannot be taken.

In addition, Short Plat 92-003 is recorded with an express waiver of all claims for damages related to construction or maintenance of the public infrastructure (i.e., a road). CP 192. This waiver applies to Keith as a successor, who is therefore barred from claiming damages related to the use or maintenance of Empire Creek Road

The plat says, “[o]wners grant a waiver of all claims for damages against any governmental authority arising from the construction and maintenance of public facilities.” The provision satisfies a requirement of the County's short plat ordinance. Hulse Aff, Ex 2 (Ferry County Ordinance, 72-1, 31.12.03). The plat and the ordinance are consistent with state law requiring plats with dedications to include a “waiver of all claims for damages against any governmental authority which

may be occasioned to the adjacent land by the established construction, drainage and maintenance of said road.” RCW 58.17.165; see also Howe v. Douglas Cty., 146 Wn.2d 183, 190, 43 P.3d 1240, 1244 (2002) (restricting waiver to claims related to roads and associated drainage systems).

Keith’s effort to extract damages from the County is exactly why state law requires persons subdividing land to waive claims for damages related to infrastructure. Without such waivers counties could be sued for damages by the dedicator or its successors every time a plat is approved, which is exactly what Keith is trying to do here.

E. Keith’s Amended Complaint Does Not Seek Recovery of Attorney Fees.

Keith’s amended complaint does not allege or plead any theory for recovery of attorney fees and he is therefore barred from doing so. A party seeking attorney fees must bring himself within the operation of some provision to be entitled to a judgment against his opponent. State ex rel. Macri v. City of Bremerton, 8 Wash.2d 93, 112, 111 P.2d 612 (1941). A complaint for relief should contain: “(1) a short and plain

statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled.” CR 8(a). A pleading is insufficient when it does not give the opposing party fair notice of a claim and the ground on which it rests. Lewis v. Bell, 45 Wash.App. 192, 197, 724 P.2d 425 (1986). “A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along.” Dewey v. Tacoma Sch. Dist. No. 10, 95 Wash.App. 18, 26, 974 P.2d 847 (1999). In the unlikely event he prevails, Keith’s request for fees should be denied.

V. CONCLUSION

Keith acquired title to property burdened by a recorded public right of way that had been conveyed to Ferry County years earlier. Keith’s deed did not convey the County right of way. For reasons never made clear, he appears to find these facts intolerable. Following an extended campaign of interference with public use, including US postal delivery, he was ordered to cease and desist, which led to this lawsuit.

The prior owners' intent to convey a public right of way to Ferry County at the time of plat approval is clear and unambiguous on the face of the plat. The County approved and accepted the plat for recording. These undisputed facts satisfy the requirements for dedication of a public right of way as a matter of law. Abutting landowners cannot quiet title to public rights by adverse possession. Nor can use of a public right of way, to which Keith does not have title, give rise to liability for inverse condemnation.

The County respectfully requests this Court to affirm the Superior Court's order granting summary judgment and dismissing Keith's amended complaint with prejudice.

Respectfully submitted this 30th day of September, 2020.

s/ Peter G. Scott

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CERTIFICATE OF SERVICE

The undersigned declares on penalty of perjury under the laws of the State of Washington that on this 30th day of September, 2020, the undersigned caused the electronic original and true and correct copies of the foregoing Brief of Appellee, Ferry County, to be served on the persons listed below in the manner shown:

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