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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 320561

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

FRIENDS OF NORTH SPOKANE COUNTY PARKS,

Appellant,

vs.

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

Respondents.

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

This case is a taxpayer action, the purpose of which is to preserve and protect Freddy Park located in north Spokane County. Spokane County wants to allow a private party to use the park for a roadway from and to its real estate development of property contiguous to the park on its south border. To do so, the county will have to violate the deed by which Freddy Park was dedicated to Spokane County.

II. ASSIGNMENT OF ERROR

A. Assignments of Error.

Friends assigns error to the trial court's dismissal of Friends' Amended Complaint with prejudice on October 25, 2013. Order, CP 212.

The error extends to the Findings of Fact and Conclusions of Law in the Order (1) pertaining to Friends' motion to disqualify the Spokane County Prosecuting Attorney from representing Fred Meyer Stores, Inc., and (2) pertaining to Star Saylor Investments, LLC's¹ motion to dismiss under CR 12(b)(6). CP 213-14.

The error also extends to the Orders (1) denying Friends' motion to disqualify attorney, (2) granting Star Saylor's motion to dismiss under CR

¹ Sometimes referred to herein as "Star Saylor."

12(b)(6), and (3) the dismissal of Friends' Amended Complaint with prejudice. CP 214.

B. Issues Presented.

1. To have taxpayer standing, is it a requirement that the taxpayer show that his taxes go specifically to the project in question?

2. Does the trial court, on a motion under CR 12(b)(6), have the authority to make findings of fact of matters outside of the record that Spokane County will not violate the gift of public funds, lending of credit prohibitions of Wash. Const. Art. VIII, Section 7?

3. Whether Friends' Amended Complaint has sufficiently pled its claim that Wash. Const. Art. VIII, Section 7 makes illegal the conduct sought to be implemented by Spokane County regarding Freddy Park?

4. Whether the Spokane County Prosecuting Attorney and Attorney Ronald Arkills should be disqualified from representing Fred Meyer Stores, Inc. in these proceedings?

III. STATEMENT OF FACTS

Prior to July 24, 2001, Roundup Company, in connection with the property being developed for a Fred Meyer store near the corner of US Highway 395 and Hastings Rd., approached Spokane County with its desire of donating a 3.99 acre parcel of property to the County to be used only as a "County – owned and operated natural or community Park."

Amended Complaint, Paragraph 12², CP 20.

Spokane County, by Resolution Number 1-0660, accepted the donation on July 24, 2001. AC 13, CP 20. Spokane County specifically agreed to accept the property for park purposes as originally set forth in the Deed and as originally understood under Resolution 1-0660, adopted July 24, 2001; that is, for “a natural, community or regional park.” AC 14, CP 20.

Freddy Park was created on August 12, 2001 when Wilmington Trust conveyed undeveloped land adjacent to a Fred Meyer Store at the intersection of US Highway 395 and Hastings Road to Spokane County for use as a park and with further restrictions that there be no roads through the park and the county accepted the donation with the restriction. AC 15, CP 20. The Spokane County Assessor assigned Parcel Number 36082.91612 to Freddy Park. AC 16, CP 21.

The Deed, in Exhibit B, Restrictions on use provided:

Exhibit B

Restrictions on Use and Development of Property

The herein described real property shall be held, conveyed, sold, and improved only as a natural, community, or

² Hereinafter, “AC” shall mean Friends’ Amended Complaint found at CP 223. The number following AC means the corresponding paragraph number in the Amended Complaint.

regional park. This condition and restriction of use shall constitute a covenant and encumbrance which shall run with the land and shall be perpetually binding upon Grantee, its successors-in-interest and assigns, and all parties having or acquiring any right, title, or interest in, or to, any part of the subject property.

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

A pedestrian walkway to Parcel G maybe allowed subject to Grantor's review and approval of the location; design, and construction of the walkway.

Grantee shall install and maintain a fence within the boundaries of the property along the adjacent boundaries of Parcels A and G. The design, materials and height of the fence shall be subject to approval by Grantor. [Emphasis added.]

AC 26, CP 22; AC 57, CP 27-28

Thus, Spokane County specifically accepted the property for park purposes as originally set forth in the park deed and as originally understood under Resolution 1-0660 adopted July 24, 2001. *Id.*

Freddy Park is bordered on its southerly property line by property owned by Star Saylor Investments LLC. AC 17. Star Saylor wants to have Spokane County allow it to build and have a roadway through the park property from Standard Drive to its property. AC 23, CP 21.

On November 7, 2012, Spokane County adopted Resolution 12-0910 which authorized the County to sign a document entitled

“Amendment to Restrictions on Use and Development of Property” pursuant to which Fred Meyer Parties (Fred Meyer Stores, Inc.) and Spokane County will amend Exhibit B to the documents entitled “Deed with Covenant and Joinder with Warranties and Title to Real Property” as recorded in the records of the Spokane County Auditor on August 22, 2001, under Auditor Recording No. 464178. AC 26, CP 22. The alleged amended Exhibit B provides:

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

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

A pedestrian walkway to Parcel G may be allowed subject to Grantor's review and approval of the location, design, and construction of the walkway.

Grantee shall install and maintain a fence within the boundaries of the property along the adjacent boundaries of Parcels A and G. The design, materials and height of the

fence shall be subject to approval by Grantor."

Fred Meyer Stores, Inc., was not the grantor under the original Deed, nor was it the grantee of any interest in the Freddy Park property. AC 27.

Spokane County and Fred Meyer Stores, Inc. signed a document entitled "Amendment to Restrictions on Use and Development of Property" dated November 19, 2012. AC 30, CP 24. County records fail to show that any of Fred Meyer Parties were owners of the property in question and thus could not be a grantor. AC 31, CP 24. The deed was not signed by Wilmington Trust, the grantor of the deed dated August 13, 2001. AC 32, CP 24. Wilmington Trust, the grantor of the deed dated August 13, 2001 did not reserve any rights to the property and according to County documents, no longer exists. AC 33. CP 24. Declaration of Stephen K. Eugster, CP 41 at CP 55.

On April 2, 2013, a document entitled "Amendment to Restrictions on Use and Development of Property" was filed with the Spokane County Auditor under receiving number 6193631. AC 35, CP 24. The document was signed by Fred Meyer Stores, Inc. It was not signed by Wilmington Trust. *Id.*

Wilmington Trust, the grantor of the deed dated August 13, 2001, did not reserve any rights to the property, and according to County

documents, no longer exists. AC 36, CP 24. Nor is there anything in the deed which indicates that the Fred Meyer Stores had any sort of reserved interest in Freddy Park. AC 37, CP 24. County Records fail to show that on April 2, 2013, any of Fred Meyer stores as an owner of the property in question at the time the document was filed on, and thus could not be a grantor. AC 38. The deed was not signed by Wilmington Trust, the grantor of the deed dated August 13, 2001. AC 39, CP 29.

Fred Meyer Stores, Inc. did not have any legal interest in Freddy Park, nor did the Fred Meyer Parties acquire at any later time any legal interest in Freddy Park. AC 40, CP 25.

The deed provides:

The Grantor, WILMINGTON TRUST COMPANY, a Delaware corporation, not in its individual capacity, but solely as Owner Trustee under the FMS Trust 1997-1 a Delaware business trust, for and consideration of TEN DOLLARS AND OTHER GOOD AND VALUABLE CONSIDERATION, in hand paid, bargains, sells and conveys to SPOKANE COUNTY, whose address is 1116 W. Broadway, County Courthouse, 1st Floor, Spokane, WA 99260-0100, Grantee, the real property described on the attached Exhibit A, TOGETHER WITH all the tenements, hereditaments and appurtenances belonging thereto, and the reversion, and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right and

title to the property whether in law or in equity,
and subject to the Restrictions on Use and
Development of Property as stated in Exhibit B,
and the encumbrances shown on Exhibit C.

TO HAVE AND TO HOLD all and singular the
above mentioned and described real property,
together with appurtenances thereof, unto the
Grantee, and its heirs, successors and assigns
forever. [Emphasis added.]

Declaration of Stephen K Eugster, CP 53.

IV. SUMMARY OF ARGUMENT

Friends has taxpayer standing to question the power of Spokane County to use Freddy Park for a roadway for a private developer, or a roadway for any other purpose. Using Freddy Park for a roadway would violate the terms of the deed under which the County accepted Freddy Park, which specifically limits the uses of the park. The County would be acting illegally.

In addition, Spokane County cannot use Freddy Park for a roadway for a private developer, or a roadway for any other purpose, because to do so would be a violation of Art. VIII, Section 7.

The document entitled “Amendment to Restrictions on Use and Development of Property” signed by Fred Meyer Stores, Inc. is void because the Grantor did not have any interest in the property at the time,

and to this day, does not have any interest in the property. AC 37, 38.

The Spokane County Prosecuting Attorney is disqualified from representing Fred Meyer Stores, Inc. because the prosecuting attorney (1) does not have authority to provide legal services to a private party, (2) has an inherent conflict of interest which cannot be waived, and (3) because providing legal services to a private party is a violation of Wash. Const. Art. VIII, Section 7. Concerning this last point, the constitutional prohibition against “lending of credit and gifts” is violated because what is provided, illegal use of Freddy Park, itself is a misuse of county resources and is an illegal transfer of government power.

V. ARGUMENT

A. Appellate Standard of Review of Dismissal under CR 12(b)(6).

Defendant’s motion is one to dismiss for failure to state a claim under CR 12(b)(6).

A CR 12(b)(6) motion is only granted when it appears from the face of the complaint that the plaintiff would not be entitled to relief even if he proves all the alleged facts supporting the claim. A trial court's ruling on a CR 12(b)(6) motion presents a question of law that the appellate court reviews de novo. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007) (citing *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d 322, 329-30, 962 P.2d 104 (1998)).

When factual discrepancies exist, the court must resolve them in the plaintiff's favor because no dismissal for failure to state a claim under CR 12(b)(6) should be granted unless it appears, beyond doubt, that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *See Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187 (1977).

In *Lightner v. Balow*, 59 Wn.2d 856, 370 P.2d 982 (1962), the court recognized that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Lightner*, 59 Wn.2d at 858 (quoting *Sherwood v. Moxee Sch. Dist. No. 90*, 58 Wn.2d 351, 353, 363 P.2d 138 (1961) (quoting *Conley v. Gibson*, 355 U.S. 41, 45, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) (emphasis added)).

Under CR 12(b)(6), a plaintiff states a claim upon which relief can be granted if it is possible that facts could be established to support the allegations in the complaint. *See Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978) ("On a [CR] 12(b)(6) motion, a challenge to the legal sufficiency of the plaintiff's allegations must be denied unless no state of facts which plaintiff could prove, consistent with the complaint, would entitle the plaintiff to relief on the claim."); *see also, Christensen v. Swedish Hosp.*, 59 Wn.2d 545, 548, 368 P.2d 897 (1962) (citing *Conley v.*

Gibson, 355 U.S. 41(1957)).

Consideration of "[d]ocuments whose contents are alleged in a complaint but which are not physically attached to the pleading may also be considered in ruling on a CR 12(b)(6) motion to dismiss,' especially if 'the parties do not dispute the authenticity of the documents the court considered and they do not constitute testimony.'" *Futureselect v. Tremont Holdings*, 175 Wn. App. 840, 865-66 and n. 63, 309 P.3d 555 (2013) citing *Rodriguez v. Loudeye*, 144 Wn. App. 709, 726 and n. 45, 189 P.3d 168 (2008).

Thus, the use of the use of the document entitled "Amendment to Restrictions on Use and Development of Property" dated November 19, 2012 and recorded on April 2, 2012 with the Spokane County Auditor does not turn the CR 12(b)(6) motion into a motion for summary judgment. AC 37.

B. Friends Does Not Claim to Be a Party to The Freddy Park Deed.

Friends does not bring this action on the basis that it is "a party to the deed or the [or] a successor in interest to any of the parties. The claims asserted by Friends are taxpayer claims which seek to prevent the County from making illegal use of Freddy Park.

Again, Friends has taxpayer standing to enforce the restrictions in

the Freddy Park Deed. *Donald v. Vancouver*, 43 Wn. App. 880, 886, 719 P.2d 966 (1986)(“Donald, as a resident of Vancouver and, presumably, a taxpayer, could dispute the City's action, because taxpayers of a local government can hold the governmental entity to dedicated uses. 2A C. ANTIEAU, MUNICIPAL CORPORATION LAW § 20.21, at 20-81 (1984); ANNOT., *Right and Capacity of Taxpayer To Attack Sale by Municipal Corporation or Other Taxing Unit of Its Property*, 17 A.L.R.2d 475, 484-85 (1951).

Friends does not claim that it has standing because it is a party to the Freddy Park Deed. Friends does assert that as a taxpayer, and as an organization whose members are taxpayers and some of whose members are property owners of property adjacent to Freddy Park, Friends has standing to cause the county to honor the terms of the Freddy Park Deed.

C. Friends Has Taxpayer Standing.

The court dismissed Counts 1 - 5 of Friends' Amended Complaint because it said that Plaintiff did not have taxpayer standing. The court said: “Friends has not alleged and can not allege facts sufficient to confer taxpayer standing because it has not alleged and can not allege a taxpayer cause of action, nor that Friends pays the type of taxes ‘funding’ the project that is the subject matter of this action.” CP 213, lines 23 - 25.

The court went on to say in its order “[a]ccordingly, Friends does

not have standing to pursue Counts 1 - 5, as alleged in the Amended Complaint.” CP 214, lines 1 - 2.

What standing is necessary in Washington for a taxpayer to bring an action questioning legality of an action by a municipal entity?

There should be no confusion about this, but there is. Some assert that a taxpayer must show that it pays the type of taxes which fund the project in question. The proponents of this requirement of taxpayer action look to *Dick Enters., Inc. v. King County*, 83 Wn. App. 566, 572 – 572, 922 P.2d 184 (1996):

In order to bring a taxpayer suit, the complaint must allege both a taxpayer’s cause of action and facts supporting taxpayer status. Among other things, the plaintiff must show that it pays the type of taxes funding the project, and that it asked the Attorney General’s office to take action before bringing suit.[Footnotes omitted.]

Dick Enterprises is not good law on the issue of taxpayer standing. *Dick Enterprises* comes out of Division I of the Court of Appeals. About four years after the decision, Division I addressed the standing issue differently in *Robinson v. City of Seattle*, 102 Wn. App. 795, 804 – 05, 10 P.3d 452 (2000):

Washington recognizes ‘litigant standing to challenge governmental acts on the basis of status as a taxpayer.’ Under the doctrine of taxpayer standing, ‘a taxpayer need not allege a personal stake in the matter, but may bring a claim on behalf of all taxpayers.’ Taxpayers need not allege a direct, special, or pecuniary interest in the outcome of the

suit, but must demonstrate that their demand to the Attorney General to institute the action was refused, unless such a request would have been useless. [Footnotes omitted.] [Emphasis added.]

This language is directly contrary to the language of *Dick Enterprises*. Gone is the language that “[i]n order to bring a taxpayer suit, the complaint must allege both a taxpayer’s cause of action and facts supporting taxpayer status” that the plaintiff must show that it pays the type of taxes funding the project.” *Dick Enters., Inc. v. King County*, 83 Wn. App. at 572 – 572; *Robinson v. City of Seattle*, 102 Wn. App. 795, 804–05, 10 P.3d 452 (2000).

Court of Appeals Division II has specifically not adopted the *Dick Enterprises* rule. In fact, it specifically declared that the rule is limited to situations where a lawful act of the municipal entity is in question. *Kightlinger v. Pub. Util. Dist. No. 1 of Clark County*, 119 Wn. App. 501, 506, 81 P.3d 876 (2003), wherein the court said:

A taxpayer must show special injury where he or she challenges an agency’s lawful, discretionary act. *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7-8, 802 P.2d 784 (1991)]. Where a municipal corporation acts illegally, ‘it is a fair presumption that every taxpayer will be injured in some degree by such illegal act.’ *Barnett v. Lincoln*, 162 Wash. 613, 623, 299 P. 392 (1931). [Emphasis added.]

The court pointed out that “[t]axpayers do not challenge a lawful discretionary act. Rather, they argue that the PUD lacks lawful authority to

operate an appliance repair business. Thus, the taxpayers are not required to demonstrate a unique injury.” *Id.*, citing *State ex rel. Boyles v. Whatcom County Superior Court*, 103 Wn.2d 610, 694 P.2d 27 (1985).

Division III has taken the same position. In *Eugster v. Spokane*, 139 Wn. App. 21, 28, 156 P.3d 912 (2007), the court said:

Ordinarily, an individual taxpayer must show special injury in order to sue a municipality. *Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7-8, 802 P.2d 784 (1991). But every taxpayer is presumed injured if the city acts illegally. *Kightlinger v. Pub. Util. Dist. No. 1 of Clark County*, 119 Wn. App. 501, 506, 81 P.3d 876 (2003).

The court went on to say:

However, taxpayers must first request the appropriate government entity — here, the attorney general — take action on their behalf. *Id.* at 508 (citing *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 269, 534 P.2d 114 (1975)). Alternatively, the taxpayer may show that a request for government action would be useless. *Wash. Pub. Trust Advocates ex rel. City of Spokane v. City of Spokane*, 117 Wn. App. 178, 182, 69 P.3d 351(2003).

The Washington Supreme Court says rules regarding taxpayer standing can be found in *State ex rel. Boyles v. Whatcom County Superior Court*, 103 Wn.2d 610, 614, 694 P.2d 27 (1985); *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 269, 534 P.2d 114(1975).

But some may say the rules have been changed. They attempt to use *Greater Harbor 2000*, 132 Wn.2d at 300-01, 937 P.2d 1082 (1997) for support of their argument — that the taxpayer has to be tied to the taxes

used on the project in question.

But in that case, the lead opinion had one concurring justice. Three justices concurred in the result on other grounds. Two justices agreed with the conclusion on the merits but disagreed with the lead opinion that the taxpayers had to show a personal stake in the outcome to have standing. *Greater Harbor 2000*, 132 Wn.2d at 286-87.

And, two justices dissented, reasoning in part that the taxpayers did not have to show particular injury because they were challenging an unlawful act, not a discretionary act. *Greater Harbor 2000*, 132 Wn.2d at 300-01, 937 P.2d 1082 (1997).

Thus, the Supreme Court has not changed its position that for standing in a taxpayer action requires that the plaintiff is a taxpayer and that a request has been made that the attorney general act but that the attorney general has declined to take action. *See* the discussion of this point in *Robinson v. City of Seattle*, 102 Wn. App. at 805 fn. 2, 10 P.3d 452 (2000).

Friends, in its complaint, contends it has taxpayer standing.³ It

³ *See also, Robinson v. Seattle*, 102 Wn. App. 795, 804 - 805, 10 P.3d 452 (2000).

Washington recognizes "litigant standing to challenge governmental acts on the basis of status as a taxpayer." [fn8]

wrote to the attorney general asking him to act in the matter. The attorney general declined. AC 7-11.

Friends has taxpayer standing under the law of Washington.

D. Article VIII, Section 7 of the Washington State Constitution.

The court dismissed Count 6 of Friends' Amended Complaint.

This count asserted there was a violation of Wash. Art. VIII, § 7 – the constitutional prohibition of a county from lending of credit to, or gifts of public funds to a private party.

The court dismissed Count 6 “because there has been no transfer or[sic] public property and there is no donative intent.” CP 214, lines 3 - 6.

The trial court had no basis upon which to find as it did. The case is a case about what the county is planning to do – that is, to violate the deed to Spokane County of Freddy Park which limits use of the park land to use as a park and without any roads running through it.

Plaintiff asserts that what the county intends to do which is set

Under the doctrine of taxpayer standing, "a taxpayer need not allege a personal stake in the matter, but may bring a claim on behalf of all taxpayers[.]"[fn9] Taxpayers need not allege a direct, special, or pecuniary interest in the outcome of the suit, but must demonstrate that their demand to the Attorney General to institute the action was refused, unless such a request would have been useless. [Footnotes omitted.]

forth in the allegations of the complaint applicable to all counts, that is the allegations in paragraphs 1 - 40 of the Amended Complaint (CP 18 - 35), the allegations in Counts 1 - 5 (CP 25 - 30), and the allegations in Count 6 (CP 30 - 31).

The specific allegations in Count 6 are these:

74. Yet another reason why the county cannot provide the Developer with a road through Freddy Park is that it would constitute a gift of public property or funds to a developer in violation of Wash. Const. Art. VIII, Section 7

75. The Spokane County Commissioners desire to assist a private developer who intends to build a number of residences south of the park and bordering the park property. The Commissioners want to allow the Developers to construct a road through the park – the road is to be 34 feet wide with the paved portion 24 feet wide.

76. The proposed roadway is contingent on the construction of the development; that is, it is solely for the purposes of the development – the proposed development must have the road in order to pursue the land use of creation of multiple living units.

77. What the county intends to do is clearly a violation of Wash. Const. Art. VIII, Section 7.

AM 74 - 77, CP 30-31.

The trial court, in its consideration of the CR 12(b)(6) motion, must take the plaintiffs' complaint allegations as if they are true. *See* the discussion above regarding the standard of review of the appellate court. *Supra* 8.

In doing so, the court cannot go beyond the record. Here, Friends alleged that the county intended to make a roadway available to a private party (Star Saylor Investments, LLC), and that to do this (see the general allegations of the complaint and the allegations in Counts 1 - 5), it would illegally amend the Dedicated Freddy Park Deed.

E. Spokane County Prosecuting Attorney and Attorney Ron Arkills Cannot Represent Fred Meyer Stores, Inc.

1. A Word About Fred Meyer Stores, Inc. – No Interest in Freddy Park Which Would Allow it to Amend the Freddy Park Deed.

Fred Meyer Stores, Inc. has no interest in the property of Freddy Park. When the property was deeded to Spokane County, the Grantor gave up, transferred, all and any rights it had, including remainder and reversionary interests, in the property. AC 31-40, CP24-25. The deed provides:

The Grantor, WILMINGTON TRUST COMPANY, a Delaware corporation, not in its individual capacity, but solely as Owner Trustee under the FMS Trust 1997-1 a Delaware business trust, for and consideration of TEN DOLLARS AND OTHER GOOD AND VALUABLE CONSIDERATION, in hand paid, bargains, sells and conveys to SPOKANE COUNTY, whose address is 1116 W. Broadway, County Courthouse, 1st Floor, Spokane, WA 99260-0100, Grantee, the real property described on the attached Exhibit A, TOGETHER WITH all the tenements, hereditaments and appurtenances belonging thereto, and the reversion, and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right and title to the property whether in law or in equity, and subject to

the Restrictions on Use and Development of Property as stated in Exhibit B, and the encumbrances shown on Exhibit C.

TO HAVE AND TO HOLD all and singular the above mentioned and described real property, together with appurtenances thereof, unto the Grantee, and its heirs, successors and assigns forever. [Emphasis added.]

Complaint, CP 15, Declaration of Stephen K. Eugster, CP 53.

The records of the Spokane County Auditor show that there was no conveyance before or after the Freddy Park Deed which provided Fred Meyer Stores, Inc. with an interest in the park property. Wilmington Trust Company completely divested itself from any interest it had in Freddy Park. The divestment operated at the time, and as to any interest which might come about at a future time.

2. No Authority to Act.

Government officers “may only perform those duties . . . as made applicable by legislative act or which may be applied [from the act].” 3 MCQUILLIN, MUNICIPAL CORPORATIONS § 126 (3rd ed. 1990); *Brougham v. Seattle*, 194 Wash. 1, 6, 76 P.2d 1013 (1938).

The office of prosecuting attorney is a creation of the state. As a creature of the state, the prosecuting attorney derives his authority and powers from the legislature. *See generally, Town of Othello v. Harder*, 46 Wn.2d 747, 752, 284 P.2d 1099 (1955). Such powers are limited to those

powers conferred in express terms or those necessarily implied in or incident to the powers expressly granted, along with the powers essential to the declared objects and purpose of the position. *See generally, State ex rel. Port of Seattle v. Superior Court*, 93 Wash. 267, 269, 160 P. 755 (1916).

The powers of a prosecuting attorney are granted and circumscribed by RCW 36.27.020. Nothing in that section provides, or allows, a prosecuting attorney to represent a private party. *State v. Bryant*, 100 Wn. App. 232, 241 fn 26, 996 P.2d 646 (2000) (“State prosecutors, elected by their constituents to prosecute crimes occurring in their counties, do not have the authority to either alter or foreclose another county's prosecution rights without that county's consent.

RCW 36.27.020(4), which outlines the duties of the prosecuting attorney, provides only that county prosecutors are authorized to “[p]rosecute all criminal and civil actions in which the state or the county may be a party. . . .” It does not extend this authority to other counties.

Similarly, a county prosecuting attorney does not have the authority to represent a private party.

3. *Inherent Conflict of Interest.*

The Prosecuting Attorney for Spokane County and Deputy Attorney Ron Arkills have an inherent conflict under the Washington Rules of Professional Conduct for attorneys. RPC 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

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

(b) [However,] “[n]otwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

RPC 1.7

Under Comment [2] 3) to RPC 1.7, the lawyer must “decide whether the representation may be undertaken despite the existence of a

conflict, i.e., whether the conflict is consentable.”

Here, the conflict of interest in the representation of both Spokane County and Fred Meyer Stores is inherent – it is not “consentable.” *Id.* The conflict is inherent in the divided loyalties. *See, e.g. Lettley v. State*, 358 Md. 26, 746 A.2d 492, 500 (Md., 2000).

What is the office of the Spokane Prosecuting Attorney doing in this case?

First, it is representing the county. The county’s rights and obligations regarding Freddy Park are set forth in the deed from Wilmington Trust to the county creating a park. The property takes dedicated park property as if it was a trust for the people of the county and especially those in and about the park area.

Second, Spokane Prosecuting Attorney is working with Fred Meyer Stores, Inc. to amend the Dedicated Park Deed so as to allow for a road for a developer through the park to the property of the developer. The interest of Fred Meyer Stores, Inc. is contrary to the obligations of the county with regard to the park, as to the provisions of the Freddy Park Deed.

Third, making things worse in terms of the conflict of interest the county prosecutor is engaging in, Fred Meyer Stores, Inc. is asserting that it has a property interest in the Park Property which allows it to go back in

time and amend the deed of the property to the county for park purposes. This assertion simply cannot be made. It is not based in fact or law. Fred Meyer Stores, Inc. does not have any interest in the property either in the present or in the past.

The deed to the county was from the then title holder, Wilmington Trust Company. The deed provided that Spokane County received all right and title to the property. Nothing was left in the grantor – “[t]he Grantor, WILMINGTON TRUST COMPANY, a Delaware corporation, for and consideration of TEN DOLLARS AND OTHER GOOD AND VALUABLE CONSIDERATION, in hand paid, bargains, sells and conveys to SPOKANE COUNTY . . . Grantee, the real property described on the attached Exhibit A, TOGETHER WITH all the tenements, hereditaments and appurtenances belonging thereto, and the reversion, and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right and title to the property whether in law or in equity, and subject to the Restrictions on Use and Development of Property as stated in Exhibit B, and the encumbrances shown on Exhibit C.” The deed further provided that Spokane County “TO HAVE AND TO HOLD all and singular the above mentioned and described real property, together with appurtenances thereof, unto the Grantee, and its heirs, successors and assigns forever.” [Emphasis added.] Deed, Declaration of Stephen K

Eugster, CP 53.⁴

4. Conflict of Interest: County Representation Prohibited by Law.

Along this particular point, there is another reason why the attorneys must be disqualified: Consent is not authorized where “(2) the representation is [...] prohibited by law.” RPC 1.7 (b)(2). Obviously, if the prosecuting attorney does not have authority to represent a private party (see the first part of this section), he is prevented from acting as the attorney for the private party, Fred Meyer Stores, Inc.

5. County Legal Representation of Fred Meyer Stores, Inc. Violates Wash. Const. Art. VIII, § 7.

Here, the County’s representation of Fred Meyer Stores constitutes an illegal use of County resources under the provisions of Wash. Const. Art. VIII, §7.

⁴ Also to be noted is that whatever undocumented imaginary interest Fred Meyer Stores, Inc. might have would be meaningless because such an “interest” would violate Washington's version of the rule against perpetuities would therefore be void.

“The rule against perpetuities requires that future estates vest or fail within "a life or lives in being at the time of the testator's death and twenty-one years thereafter." *Estate of Lee*, 49 Wn.2d at 258 [49 Wn.2d 254, 258, 299 P.2d 1066 (1956)]. Otherwise, the limitation is void. *Id.*” *Hosp. Dist. v. Howe*, 151 Wn. App. 660, 664-65, 214 P.3d 163 (2009).

VI. CONCLUSION

In light of the above, the dismissal of the case by the trial court should be reversed.

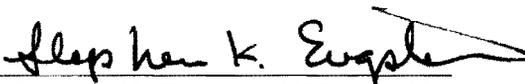
Respectfully submitted this 17th day of December, 2013.

EUGSTER LAW OFFICE PSC

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CERTIFICATE OF SERVICE

I certify that I served the Opening Brief of Appellant, by personal service, on the attorneys for Spokane County and Fred Meyer Stores Inc. and the attorneys for Star Saylor Investments, LLC, on December 17, 2013.


Stephen K. Eugster, WSBA 2003