IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOY JOHNSON, EARL JOHNSON, and PEDER JOHNSON, individuals, Respondents and Cross-Appellants, v. WAHKIAKUM COUNTY, a political subdivision of the State of Washington, Appellant and Cross-Respondent.	No. 37439-1-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Grantors John and Helen Johnson conveyed real property to Wahkiakum County by a 1936 deed for the declared purpose of a public park or school. Heirs of the grantors challenged the County's use of the deeded property in a quiet title action. We hold that the deed did not constitute a common law dedication with reverter, as the trial court determined, but instead conveyed title to the land in fee simple. We reverse and remand with directions to quiet title in the County.

FACTS

By deed dated December 1, 1936, the Johnsons "granted, bargained, sold and conveyed" approximately 18 acres of land to the County for the noted purpose of "a public park forever," or as necessary, a public school. Clerk's Papers (CP) at 15. The deed stated in relevant part as

follows:

> Know all men by these presents, that John Johnson and Helen M. Johnson, his wife, of the County of Wahkiakum, in the State of Washington, in consideration of the benefits and other valuable considerations, and the sum of One Dollar, paid them by the County of Wahkiakum, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said Wahkiakum County, the following described real property, situated in Wahkiakum County, State of Washington, to wit: [legal description]; to have and to hold the same unto the said Wahkiakum County, for the purposes of a public park forever, provided however, that School District No. 66, or its successors, shall have the right in the event that it shall deem it necessary and proper to construct and maintain a public school building or buildings and playgrounds on so much of said above described premises as shall be considered necessary and proper for the purposes of said district. In witness thereof, we have hereunto set our hands this 1st day of December, 1936.

CP at 15. On December 7, 1936, by resolution of the County commissioners, the County "accept[ed] the gift of this tract of land on behalf of the people of Wahkiakum County to be hereafter known and referred to as Johnson Park." CP at 18.

In the latter 1930s, the school district built a school on the property which operated for the next 60 years until the mid-1990s. The parties agree that the school district ceded the property to the County in 2006. The parties also agree that the County has used the property and school buildings for additional purposes including renting classrooms for private use, housing government operations, and housing a computer center operated by the local grange. The County also admits that it is contemplating using some school buildings for a satellite sheriff's office and is considering logging merchantable timber on the property.

On May 17, 2007, the grantors' heirs[1] filed a complaint against the County, seeking a declaratory judgment that the 1936 deed constituted a common law dedication for purposes of a

[1] Earl and Peder Johnson are the grantors' great-grandsons. Joy Johnson is the grantors' widowed granddaughter-in-law.

public park, public school, or playground. The heirs also asked the trial court to rule that any contrary uses violate the dedication and that the fee simple interest in the property reverts to the heirs/successors if the County continues using the property in contravention of the dedicated purposes or so uses the property in the future. Additionally, the heirs sought injunctive relief ordering the County to cease using the property in any manner inconsistent with the dedication and to refrain from any contrary use in the future. Finally, the heirs/successors asked the trial court to quiet title in them, seemingly by way of the dedication's reversionary interest in the event the County refuses to comply with the dedication.

The County answered, asserting an affirmative defense that the complaint failed to state a claim (CR 12(b)(6)), and it counterclaimed that if the heirs recovered as requested in their complaint, they would be unjustly enriched. The heirs responded to the County's counterclaim with the affirmative defense that the counterclaim failed to state a claim.

The County filed a motion for judgment on the pleadings seeking dismissal of the heirs' suit based on its asserted CR 12(b)(6) defense.[2] The heirs responded and filed a cross-motion for judgment on the pleading under CR 12(c).[3]

By written order dated January 28, 2008, reflecting a prior letter opinion, the trial court

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[2] CR 12(b)(6) authorizes a responding party to assert via motion the affirmative defense of "failure to state a claim upon which relief can be granted."

[3] CR 12(c) provides:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

granted the heirs' cross-motion and denied the County's motion. The trial court ruled that the 1936 deed "constitutes a common law dedication." CP at 120. The trial court further ruled that the property "shall revert to [the heirs or their successors] if the County is ever from this day forward found to have used the Property to [sic] any use other than use as a public park or public school." CP at 120. The trial court ruled that "equity rests with [the heirs] and not with the County." CP at 120.

The County subsequently moved for clarification of the meaning of "park purposes." CP at 112. On February 25, 2008, the trial court issued an appendix to its January order, amending the order by adding the following conclusion of law: "The intent of the parties controls the extent of the dedication. Therefore, the meaning of the dedication for 'park purpose' is limited to 'park purpose' as the phrase would have been understood on the date of the dedication." CP at 114. The County appealed, and the heirs cross-appealed.[4]

[4] The heirs' cross-appeal challenged the inclusion of the language "from this day forward" in the original order. Br. of Resp't at 5. The heirs also raise a procedural issue in their response brief, contending that we should dismiss the case because we lack jurisdiction. This is an odd contention given that the heirs cross-appealed. In any event, they contend that factual issues should be determined before we address the case. But the fact issues they identify (i.e., what activities constitute park purposes in 1936, and whether past, present, or contemplated uses of the property violate the park purposes restriction) are irrelevant given our resolution of the case. Moreover, the heirs brought a quiet title action based on the deed, and the trial court granted their cross-motion for judgment on the pleadings, thereby fully determining the County's and the heirs' interests in the property. *See Grove v. Payne*, 47 Wn.2d 461, 466, 288 P.2d 242 (1955) (gravamen of a quiet title action is a determination of all interests claimed by defendants). Under RAP 2.2(a)(3), a party may appeal "[a]ny written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action." *See also White Coral Corp. v. Geyser Giant Clam Farms, LLC*, 145 Wn. App. 862, 866 n.3, 189 P.3d 205 (2008), *review denied*, 165 Wn.2d 1018 (2009). The trial court's order denying the County's motion for judgment on the pleadings and granting the heirs' cross-motion was appealable. We reject the heirs' request that we dismiss this case for lack of jurisdiction.

ANALYSIS

Standard of Review

We review the trial court's decision on a motion on the pleadings de novo. *Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 634, 128 P.3d 627 (2006), *review denied*, 158 Wn.2d 1029 (2007). A motion to dismiss for failure to state a claim (CR 12(b)(6)) and a motion for judgment on the pleadings (CR 12(c)) raise identical issues and are subject to the same standard of review. *Gaspar*, 131 Wn. App. at 634-35; *see also N. Coast Enters., Inc. v. Factoria P'ship*, 94 Wn. App. 855, 859, 974 P.2d 1257, *review denied*, 138 Wn.2d 1022 (1999); *Suleiman v. Lasher*, 48 Wn. App. 373, 376, 739 P.2d 712, *review denied*, 109 Wn.2d 1005 (1987). In either case, dismissal is appropriate only if it is beyond doubt that the plaintiff can prove no facts that would justify recovery, considering even hypothetical facts outside the record. *Gaspar*, 131 Wn. App. at 635.

Common Law Dedication or Grant In Fee

Based on selected language in the deed, the heirs' complaint alleged that the deed constituted a common law dedication, the legal operation of which reverted title to the grantors or their successors upon the grantee's noncompliance with a condition stated in the deed. The County's position in moving for judgment on the pleadings was that the deed conveyed the real property to the County in fee simple. Thus, this dispute turns on the language of the 1936 deed. Before turning to that language, we note the relevant legal standards and requirements of common law dedications.

A. Dedication

"A common law dedication is the designation of land, or an easement on such land, by the

owner, for the use of the public, which has been accepted for use by or on behalf of the public." *Richardson v. Cox*, 108 Wn. App. 881, 890, 26 P.3d 970, 34 P.3d 828 (2001), *review denied*, 146 Wn.2d 1020 (2002). "A dedication may be either express (i.e., the intent is expressly set forth in a deed, or by oral or written declaration) or implied (i.e., evidenced by some act or course of conduct by the property owner from which a reasonable inference of dedication may be drawn)." *Richardson*, 108 Wn. App. at 890-91 (citing Black's Law Dictionary 412 (6th ed. 1990)). "A statutory dedication must be made in conformity with the laws regulating the property." *Richardson*, 108 Wn. App. at 891 (citing Black's, *supra* 413).

"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.'" *Sweeten v. Kauzlarich*, 38 Wn. App. 163, 165, 684 P.2d 789 (1984) (quoting *Seattle v. Hill*, 23 Wash. 92, 97, 62 P. 446 (1900)). "By dedicating the property, the owner reserves no rights that would either be incompatible or interfere with the full public use." *Richardson*, 108 Wn. App. at 891. The intent to dedicate property for public use is evidenced, for instance, by presenting for filing a final plat or short plat that shows the dedication on its face. *Richardson*, 108 Wn. App. at 891. "Acceptance by the public is evidenced by approval of the final plat or short plat for filing with the appropriate governmental unit." *Richardson*, 108 Wn. App. at 891 (citing RCW 58.17.020(3)).

"A party asserting that a dedication exists has the burden of establishing that all the essential elements are present under the facts of the case." *Richardson*, 108 Wn. App. at 891 (citing *Karb v. City of Bellingham*, 61 Wn.2d 214, 218-19, 377 P.2d 984 (1963)). "The owner's

intent to dedicate will not be presumed, the party asserting it must prove the intent is unmistakable." *Richardson*, 108 Wn. App. at 891 (citing *Cummins v. King County*, 72 Wn.2d 624, 627, 434 P.2d 588 (1967)). "Although the issue of an owner's intent to dedicate is a question of fact, whether a common law dedication has occurred is a legal issue." *Sweeten*, 38 Wn. App. at 166 (citation omitted).

B. Conveyance

Generally, "a conveyance of land includes the entire estate in the land, even though it may restrict its use or allocation." *Hodgins v. State*, 9 Wn. App. 486, 494, 513 P.2d 304 (1973) (citing *Loose v. Locke*, 25 Wn.2d 599, 603, 171 P.2d 849 (1946)). Put another way, "Washington courts do not favor estates upon condition and if the creating language is unclear that a conditional estate was intended, courts will generally construe a fee simple absolute." *Niemann v. Vaughn Cmty. Church*, 154 Wn.2d 365, 373 n.6, 113 P.3d 463 (2005) (citing 17 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Property Law § 1.8 (2d ed. 2004)).

More than a half century ago, our Supreme Court explained, "[i]t is the almost universal rule that, in order to make an estate conditional, the words used in the deed must clearly indicate such an intent, either by express terms or by necessary implication from the language used." *King County v. Hanson Inv. Co.*, 34 Wn.2d 112, 119, 208 P.2d 113 (1949); *see also Brown v. State*, 130 Wn.2d 430, 437, 924 P.2d 908 (1996) (citing *Wright v. Olsen*, 42 Wn.2d 702, 257 P.2d 782 (1953), for the proposition that "absent limiting language, State acquired fee title to land acquired for highway purposes under statutory bargain and sale deed"); *cf. Brown*, 130 Wn.2d at 437 (where parties used statutory warranty form deed and the granting clauses convey definite strips

of land, court must find that grantors intended to convey fee simple title unless additional language in deeds clearly and expressly limits or qualifies the interest conveyed).

The *Hanson* court explained that it is also the "settled rule" in this state, as elsewhere, that "a deed which by its terms *conveys* the land to a grantee operates as a grant of the fee, although it may also contain a recital designating, or even restricting, the use to which the land may be put." *Hanson*, 34 Wn.2d at 119. *Hanson* states:

> The effect of such recitals in a deed of conveyance is well stated in 19 Am. Jur. 536, Estates, § 71, as follows:
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> "A condition will not be raised by implication from a mere declaration in the deed that the grant is made for a special and particular purpose without being coupled with words appropriate to make such a condition. Such recitals are usually construed as giving rise, at most, to an implied covenant that the grantee will use the property only for the specified purpose. They are merely to restrain the generality of the preceding clauses; and in the case of sales to municipal and other corporations, they are considered as having been inserted merely for the purpose of showing the grantee's authority to take, even though the authorization under which the land is taken itself limits its use to the purpose specified."

34 Wn.2d at 119-20.

In *Hanson*, the deed in question did not expressly make conditional the nature of the estate held by the county under the deed, nor did the deed contain any provision, express or implied, to the effect that the grantee's estate was to terminate upon the happening of any specified event. *Hanson*, 34 Wn.2d at 119.[5] Accordingly, the *Hanson* court determined that the

[5] The deed in *Hanson* stated:

> "The grantor herein Hanson Investment Company for the consideration of One & 00/100 Dollars and also of benefits to accrue to *them* by reason of laying out and establishing a public road through their property, and which is hereinafter described, conveys, releases, and quit-claims to the County of King, State of Washington, for use of the public forever, as a public road and highway, all interest in the following described real estate, viz:
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> "A strip of land in Govt. Lot 5, Section 4, Twp. 21 N.R. 6 E.W.M., described as follows:
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> "[Description by metes and bounds.] Right-of-way A. J. Hanson Road,

deed did not create a determinable, defeasible, or qualified fee, subject to a possibility of reverter. *Hanson*, 34 Wn.2d at 118. Thus, the court opined, "we are convinced that the parties intended that the deed convey, and that the grantee take, the highest estate that a municipal corporation is empowered to hold." *Hanson*, 34 Wn.2d at 120.

As we stated above, the deed at issue here, like the deed in *Hanson*, did not expressly make the nature of the estate held by the County conditional, nor did the deed contain any provision that expressly stated or clearly implied that the grantee's estate was to terminate upon the happening of a specific event. The heirs focus on language in the deed following the legal description, which states "to have and to hold the same unto the said Wahkiakum County, for the purposes of a public park forever." CP at 15. As noted, the deed in *Hanson* similarly described a use and that such use was to be "forever." 34 Wn.2d at 115-16. But under *Hanson*, such language does not operate to provide or create a reversionary interest.

Such a determinable fee is typically created by using the words "so long as," "during," or "until." 17 Stoebuck & Weaver, *supra* §§ 1.7, 1.8, at 10-12. For example, in *Hodgins*, the following deed language created a fee simple determinable regarding forest land conveyed to the University of Washington.

> To have and to hold said land *only so long* as the same shall be allocated for the use of the College of Forestry . . . for forestry experimental purposes under the exclusive direction and control of the Board of Regents . . . it being the intent of the grantors herein to vest in the State of Washington an estate *in determinable fee in* said land *which shall terminate* upon the allocation of said land for any purposes other than those herein described.

9 Wn. App. at 487-88 (emphasis added). No such language clearly creating a conditional estate

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situated in the County of King, State of Washington."
34 Wn.2d at 115-16 (alteration in original).

and specifying a terminating event is present here.

Moreover, the heirs' position ignores the operative language in the deed, which, "in consideration of the benefits . . . and the sum of One Dollar, paid them by the County of Wahkiakum," did "grant, bargain, sell and convey" to the County the described real property. CP at 15. Given this clear language conveying the property to the County, and the absence of any language that clearly makes the conveyance conditional or identifies a triggering event for reversion, the trial court's determination that the deed constitutes a common law dedication subject to reversion is untenable. Therefore, in accord with *Hanson*, *Hodgins*, and *Niemann*, we reverse the trial court and remand with direction to enter an order granting the County's motion for judgment on the pleadings.

Other Substantive Issues

The above discussed threshold issue is dispositive of the parties' remaining substantive contentions. The County additionally challenges the trial court's ruling that the deed's dedication "for the purposes of a public park" means "park purposes" as would have been understood on the date of the dedication. CP at 15, 114; Br. of Appellant at 9. Our disposition renders this issue moot.

The same is true for the heirs' cross-appeal, which asserts that the trial court erred in ruling that reversion would be triggered by any future use of the property by the County that is not in accord with the dedication. Aside from being rendered moot by the above analysis, the heirs' contention would fail in any event, because the order complied with the heirs' request for relief in their complaint and with their argument to the trial court. *See Estate of Stalkup v. Vancouver Clinic, Inc.*, 145 Wn. App. 572, 589, 187 P.3d 291 (2008) (invited error doctrine does

not permit counsel to set up an error at trial and then complain of it on appeal). For the stated reasons, we do not address these issues further. *Schmidt v. Cornerstone Invs., Inc*., 115 Wn.2d 148, 165, 795 P.2d 1143 (1990) (reviewing court need not decide all issues raised by the parties, but only those that are determinative).

We reverse the trial court's order, which denied the County's motion for judgment on the pleadings and which granted the heirs' cross-motion. We remand, directing the trial court to grant the County's motion and deny the heirs' cross-motion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, J.

VAN DEREN, C.J.