ARIZONA COURT OF APPEALS

DIVISION ONE

TMS VENTURES, LLC, Plaintiff/Appellee/ Cross-Appellant, v. TERESA C. ZACHARIAH, et al., Defendants/Appellants/ Cross-Appellees.	Court of Appeals Division One No. 1 CA-CV 18-0712 1 CA-CV 19-0388 (Consolidated) Maricopa County Superior Court No. CV2016-005381

DEFENDANTS/APPELLANTS/CROSS-APPELLEES' REPLY BRIEF AND CROSS-APPEAL ANSWERING BRIEF

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I. The public never accepted the Easement.

A. TMS does not dispute that it has the burden of establishing public acceptance and that it cannot enforce an inchoate dedication without public acceptance.

As the opening brief explained (at 34-35), TMS's public dedication claim, if successful, would require the neighbors to forever forfeit a fundamental property right—the right to exclude. The right to exclude is one of the central and most important rights a property owner has. *State v. Adams*, 197 Ariz. 569, 573, ¶ 22 (App. 2000) ("[H]e had the right to exclude anyone he wished from his property. One of the main rights attached to property is the right to exclude others." (footnote omitted)).

Unlike an implied way of necessity, a successful public dedication would require the neighbors to open their private property to the entire world, not just to TMS and TMS's invited guests. The public dedication would be 50 feet wide, not just the limited route necessary for TMS to access its property as in the case of the implied way of necessity. The public dedication also would last forever, regardless of whether the conditions establishing the implied way of necessity ever change.

Because of the serious deprivation of property rights, TMS bears the burden of establishing a public dedication. TMS does not dispute this point, but quibbles (at 44) with whether it is a "heavy" one. *See City of Scottsdale v. Mocho*, 8 Ariz. App. 146, 149 (1968) ("The courts have placed a heavy burden upon one asserting or claiming a dedication."). This Court got it right in *Mocho*. The government should use only sparingly its power to take away someone's fundamental private property rights. This Court already recognized this bedrock principle: "It is not a trivial thing to take another's land, and for this reason the courts will not lightly declare a dedication to public use." *Id.* at 150 (citation omitted). These principles apply with strong force to public dedications because they are "an exceptional and peculiar mode" of shifting private property rights. *Id.* (citation omitted). Consequently, "the proof must usually be strict, cogent, and convincing, and the acts proved must not be consistent with any construction other than that of a dedication." *Id.* (citation omitted).

TMS does not dispute any of these reasons for making its burden a heavy one. Instead, TMS (at 45-49) collects cases concerning the burden of showing the first element of public dedication (intent to dedicate), which the

neighbors do not dispute on appeal. Many cases undoubtedly turn on the intent element, but this one does not. This case turns on public acceptance.

Public dedication has two elements; TMS must prove public acceptance, not just intent to dedicate. Mere intent to dedicate without public acceptance does not create a public dedication. "The *acceptance* of the dedication is *equally as important* . . . ." *Chalkley v. Tuscaloosa Cty. Comm'n*, 34 So. 3d 667, 672 (Ala. 2009) (emphases added); *accord Drescher v. Johannessen*, 45 A.3d 1218, 1230-31 (R.I. 2012) ("Nevertheless, this Court's inquiry is not predicated solely upon ascertaining of an owner's intent to dedicate—it is necessary to *prove acceptance* of the road by the public in order to establish its dedication.") (emphasis added).

TMS acknowledges (at 49) that acceptance "must be shown," but that passive-voice construction obscures the fact that TMS bears the burden of proving public acceptance. Although no Arizona case squarely addresses the issue, TMS does not actually dispute that its burden of establishing a dedication extends to both elements. *See Vestavia Hills Bd. of Educ. v. Utz*, 530 So. 2d 1378, 1385 (Ala. 1988) ("[A]cceptance of a dedication must be proved by the party asserting that there was such an acceptance."); *Drescher*, 45 A.3d at 1230-31 ("Nevertheless, this Court's inquiry is not predicated solely upon

ascertaining of an owner's intent to dedicate—it is necessary to prove acceptance of the road by the public in order to establish its dedication.").

TMS suggests that proving acceptance is trivial by saying (at 49) that "anything showing acceptance can be sufficient." But that refers to the different *methods* of acceptance, a point not in dispute. TMS's heavy burden extends to both intent and acceptance. In particular, the acts of acceptance must be *unequivocal* and *unambiguous*. *See, e.g.*, *Drescher*, 45 A.3d at 1230-31 (Proof of acceptance "must be *clear and convincing*. . . .") (emphasis added) (citation omitted); *Tri City Broad. Co. v. Howell*, 240 A.2d 556, 559 (Pa. 1968) ("township did not *unequivocally and unambiguously* accept.") (emphasis added); *City of Pensacola v. Walker*, 167 So. 2d 634, 635 (Fla. Dist. Ct. App. 1964) ("The proof of acceptance by the public of an offer of dedication must be clear, satisfactory and *unequivocal*.") (emphasis added).

When Phoenix Title and Trust Company recorded the Easement, it merely started the process. Without public acceptance, its effort was only an incomplete, inchoate attempt.

B. As a matter of law, TMS has not established public acceptance.

The neighbors' opening brief cataloged (at 30-32) the three main ways for showing acceptance (governmental acceptance, recorded plat, and public

use). Although TMS claims (at 49) that "anything" can show acceptance, TMS has not identified any other relevant method of acceptance.

TMS does not dispute that no governmental entity ever accepted the Easement, whether formally or informally. TMS admits (at 12) that "[t]here was no formal document by which Maricopa County (as the predecessor jurisdiction) or Paradise Valley had ever accepted a dedication. . . ."

Consequently, this case focuses solely on acceptance by conveyance deed (§ I.B.1, below) and acceptance by public use (§ I.B.2, below).

1. The public never accepted the Easement by deed.

(a) The conveyance documents for Lots 22 and 23 never referenced the Easement.

The neighbors acknowledged in their opening brief (at 31) that courts recognize public acceptance by conveyance documents. This form of acceptance requires "a sale of property that referred to the plat dedicating property to the public." *Lowe v. Pima Cty.*, 217 Ariz. 642, 647, ¶ 19 (App. 2008).

The plat for the neighborhood unquestionably did not include the easement. [Tr. Ex. 239 at 1 (APP180).] In addition, the opening brief explained (at 36-37) that no recorded document within the chains of title for

Lots 22 or 23 ever referred to the Easement, from Phoenix Title's first sale in the 1960s to today. The superior court found that the Easement was "not expressly included in the conveyance document" for Lots 22 and 23. [IR-228 at 8, ¶ 36 (APP090).]

Decisively, TMS does not dispute any of that. It concedes (at 60) that "[w]ith respect to both Lots 22 and 23, no deed was found specifically referring to the Easement for Roadway." That concession should end the inquiry. Under Arizona law, if the recorded plat (or perhaps the recorded conveyance documents) do not reference the dedication, then this method of acceptance does not apply.

TMS invites this Court to improperly expand the doctrine by allowing conveyance documents on *other* lots to satisfy the requirement as to Lots 22 and 23, and by allowing other forms of notice to substitute for the plat required by this doctrine. The Court should not accept TMS's implicit request to expand the doctrine.

(b) References to the Easement in the conveyance documents for *other* lots do not suffice.

Although TMS expressly concedes (at 60) that the conveyance documents for Lots 22 and 23 do not refer to the Easement, TMS repeatedly

cites references to the Easement in the chains of title for *other* lots (e.g., at 15, 17, 58, 63). As a matter of law, however, references in deeds to other lots do not satisfy the public acceptance requirement as to Lots 22 and 23.

The doctrine "require[s] a sale of property that referred to the plat dedicating property to the public." *Lowe*, 217 Ariz. at 647, ¶ 19. "That requirement ensures that when a subsequent purchaser buys part or all of the property, he or she will have notice of the public dedication impacting the land. . . . [W]hen a conveying instrument expressly refers to a prior dedication, knowledge of the dedication can be imputed to a title holder." *Id.* (quotation marks omitted). In *Lowe*, like here, a separate recorded document (not in the chain of title) reflected an intent to dedicate, but that "is insufficient to meet the *Pleak* test for acceptance of a common law dedication." *Id.* at 646, ¶ 18.

Referencing a contemplated public dedication in one lot (and not even a plat) does not satisfy the acceptance requirement as to another lot. As *Lowe* explained, a purchaser is not "bound to search for a recorded deed dedicating property that they were not purchasing." *Id.* at 647, ¶ 21. The purchasers of Lot 22 have no obligation to search the records for Lot 25, and TMS doesn't contend otherwise. TMS claims (at 58) that the deeds "stated

they were subject to easements of record," but TMS does not dispute that the Easement was not properly within the relevant records *for these lots*.

TMS also claims (at 60-61) that "both [Lots 22 and 23] are among those specifically identified in the Easement for Roadway and that document is there to be found in their chain of title because it was recorded by Phoenix Title which then was the common owner of all of that land." But TMS cites no principle of fact or law justifying its sleight of hand. The Easement unquestionably was not actually in any recorded document within the chains of title for Lots 22 and 23. The fact that someone could have found the recorded document via some other method, by reference to some other lot, misses the point and contradicts this Court's holding in *Lowe*. In *Lowe*, the original landowner recorded a contemplated public dedication and then sold several parcels. 217 Ariz. at 643, ¶ 3. A family bought one of the lots, but "their chain of title did not reflect the dedication." *Id.* at 647, ¶ 20. Although the family *could have* found the recorded document, "nothing in the deeds" referred to it, so there was no acceptance. *Id.* at 646, ¶ 18.

(c) As a matter of law, mere notice cannot substitute for acceptance.

The opening brief explained (at 39-43) that the superior court made an error of law by ruling that some of the neighbors' "notice" of the Easement could satisfy the public acceptance requirement. The opening brief also explained (at 40-41) that Judge Warner had already decided that public dedication "requires acceptance, not just notice." [IR-61 at 2 (APP080).] Judge Gates's later ruling contradicted Judge Warner's correct statement of the law. TMS's response (at 59 n.12) does not dispute this, but claims that notice can be considered "as part of determining whether acceptance occurred."

This argument concerns the fact that the Appels' and Zachariahs' title insurance policies referenced the Easement, which TMS relies on again (at 58-61). Tellingly, TMS has identified no case finding public acceptance based on a title insurance policy. Indeed, TMS concedes (at 59) that "[s]uch notice may not be conclusive by itself," then immediately says that "it should still be a relevant consideration." But a private title insurance policy is not a relevant consideration for the *public* acceptance element.

TMS (at 60) relies on *Lowe*, but *Lowe* explained that requiring the recorded conveyance documents to refer to the dedication "ensures that when a *subsequent purchaser* buys part or all of the property, he or she will have notice of the public dedication impacting the land." 217 Ariz. at 647, ¶ 19 (emphasis added). Here, by contrast, no subsequent purchaser will have notice of what a private title insurer disclosed to its private client.

The touchstone of public acceptance is *the public*. No Arizona case has found public acceptance based on fundamentally private facts unknown to the rest of the world. As a matter of law, a private title policy between a private insurer and a private client is insufficient for public acceptance. A public dedication would irrevocably bind all future property owners, even though they may have no knowledge, notice, or anything in their chains of title.

Moreover, even as to the Zachariahs and the Appels, the title insurance policy did not provide notice of a valid public dedication. At most, it provided notice that someone had *intended* to create a road, but that only created an inchoate public dedication waiting for acceptance. The neighbors found no evidence of any valid public acceptance—no government acceptance, nothing in the chains of title, and no public use. At bottom,

notice to a private party of an inchoate public dedication does not satisfy the public dedication requirement.

(d) The Court should not expand the questionable doctrine of acceptance by deed.

TMS has cited no case holding that recorded deeds on *other* lots or notice in an insurance policy of an inchoate intent to dedicate can satisfy the public acceptance element. Ruling for TMS on this issue would require expanding the doctrine.

This Court should not do so, particularly because the doctrine is already peculiar and suspect. The two elements of public dedication focus on different actors. The first element (intent to dedicate) focuses on the *private landowner's* actions. The second element (public acceptance), by contrast, focuses on the *public's* actions—typically by either the government or the general public. The conveyance documents between two private citizens should not satisfy the *public* acceptance element.

As noted in the opening brief (at 31 n.*), the neighbors intend to challenge this aspect of the doctrine in the Arizona Supreme Court if necessary. But this Court should simply deny TMS's implicit invitation to expand the doctrine.

2. As a matter of law, the use identified by TMS and the superior court does not satisfy the public acceptance requirement.

Under the undisputed facts of the case, the general public has not accepted the Easement by public use. TMS's answering brief tries to frame the issue as a dispute about facts, but this presents a question of law because the facts are not in dispute.

Although TMS cites what at first glance looks like loads of evidence, in fact its evidence of use falls into one of two categories: the adjoining neighbors' use of their own driveway, and various uses of the separately described and separately delineated easement to expand the width of San Miguel Avenue. The neighbors do not dispute that either of the types of use occurred—i.e., those facts *are not in dispute.* Instead, the question is whether, as a matter of law, use limited to adjoining landowners constitutes use *by the general public*, and whether, as a matter of law, use of a separately described and separately delineated easement for width expansion constitutes acceptance of the purported dedication over the driveway.

(a) TMS does not dispute that use by only a limited class does not constitute public acceptance.

The opening brief (at 33-34) explained that acceptance by use requires use by the general public. Land used by only a "limited class" of the public

is not enough. *Mocho*, 8 Ariz. App. at 151. Although Arizona has not addressed this issue in recent years, the principle remains good law throughout the country. "Requiring the dedication to be to the public, and not to individuals or to a class of private grantees, is a widely accepted principle. . . ." *Coward v. Hadley*, 246 P.3d 391, 398 (Idaho 2010); *see also Wagon Wheel Landowners Ass'n, Inc. v. Wallace*, 838 P.2d 361, 399 (Ct. App. Kan. 1992) ("Dedication for public use shall be for the use of the public at large, that is, the general unorganized public, and not for one person or a limited number of persons, or for the exclusive use of restricted groups of individuals."). This requirement makes good sense. Unlike many other types of easements (such as implied way of necessity), public dedication is, in its very essence, a *public* doctrine that allows *the general public* to use the land.

TMS does not dispute the principle that dedications must be public. TMS emphasizes (at 48-49) that Phoenix Title *intended* the Easement to be used by the public. But that's not enough. If Phoenix Title wanted the Easement to be valid immediately, then it should have included the Easement in the plat (like it did for the original San Miguel Avenue). [Tr. Ex. 239 at 1 (APP180).] By omitting it (whether intentionally or accidentally),

the public dedication becomes complete only upon acceptance. Public dedication requires acceptance *by the public*. For the public to accept the land by use, it must be used *by the public*.

TMS does not dispute that only use by the general public (and not a subset, such as adjoining landowners) constitutes public acceptance. Nor could it. The *public* nature applies as much to the acceptance element as to the intent element. As one court put it, "the only evidence presented was to the effect the use of defendant's land was by abutting land owners, which would be *insufficient to show public use*." *Pitts v. Roberts*, 562 P.2d 231, 232 (Utah 1977) (emphasis added).

TMS also briefly argues (at 50-51) that "use by the public is not necessarily a condition to common law dedication." That's true in the sense that other forms of public acceptance exist (e.g., municipal acceptance). But someone relying on acceptance by public use must show actual use by the public.

(b) As a matter of law, the neighbors' use of their own driveway is not public acceptance.

The opening brief explained (at 37-39) that, as a matter of law, adjacent landowners using a private, gated, locked driveway is not acceptance by the public. As shown below, the driveway is not a public road:

[Tr. Ex. 149 at 11 (APP165).]

As to the driveway, TMS does not dispute this point of law. TMS mentions the neighbors' use of the common driveway only briefly (e.g., at 62-63), and only to make irrelevant or undisputed points. TMS cites historical photographs, but they are irrelevant. TMS describes them (at 62) as "show[ing] the establishment of the common driveway shared by those

lots prior to their current ownership," but TMS cites no evidence that the private, gated, locked driveway was ever used for anything other than a driveway, or by anyone other than the lot owners and their invited guests. That's what matters.

TMS also cites (at 62-63) evidence showing that part of the driveway used by Lot 22 falls on Lot 23, and vice-versa, and claims (at 58-59) that when one of the neighbors uses the part of the driveway on the other neighbor's lot, they are "part of the public." The neighbors do not dispute that the driveway straddles both lots and is used by the owners of both lots. But as a matter of law, "the use made by property owners abutting" a dedication is not public use. *Pitts*, 562 P.2d at 233; *accord Mocho*, 8 Ariz. App. at 150 ("[A] parking lot for the private use of the customers of [the] businesses adjoining the property" does not establish a public dedication); *Vick v. S.C. Dept. of Transp.*, 556 S.E.2d 693, 698 (S.C. Ct. App. 2001) (no acceptance by use because the only use was "from the buyers of the five lots" adjacent to the street); *Foulk v. City of Louisville*, 110 S.W.2d 665, 666 (Ky. Ct. App. 1937) (no public dedication of alley "used by the owners of property abutting on the alley" and by "parties having business with abutting owners").

Driveways and alleys are not public because they are used only for the *adjacent landowners*:

> In the very nature of things, an alley differs from an ordinary way intended for public use. Its purpose is to enable the abutting property owners and those having business with them to enter the premises from the rear, and to that end it must be kept open. In view of the fact that *this character of use is solely for the accommodation of the abutting landowners* for whose benefit the alley was laid out, it may be doubted if such use is in any sense a public use.

Id. at 667 (emphasis added).

The undisputed fact is that the neighbors used the Easement only as a driveway. If "[t]he record shows that the users of the road involved in this case did not regard it as a public road," then there can be no acceptance by public use. *Body v. Skeen*, 160 S.E.2d 751, 754 (Va. 1968).

TMS also questions (at 65) whether the Zachariahs and Appels use the shared driveway "because of mere neighborly cooperation, or because each recognizes the legal right of the other. . . ." This, too, is irrelevant. It doesn't matter whether using the shared driveway is a right or a privilege. A driveway used only by two lot owners, each of which adjoins the Easement, has not been used by the public. Adjoining lot owners are not *the general public*.

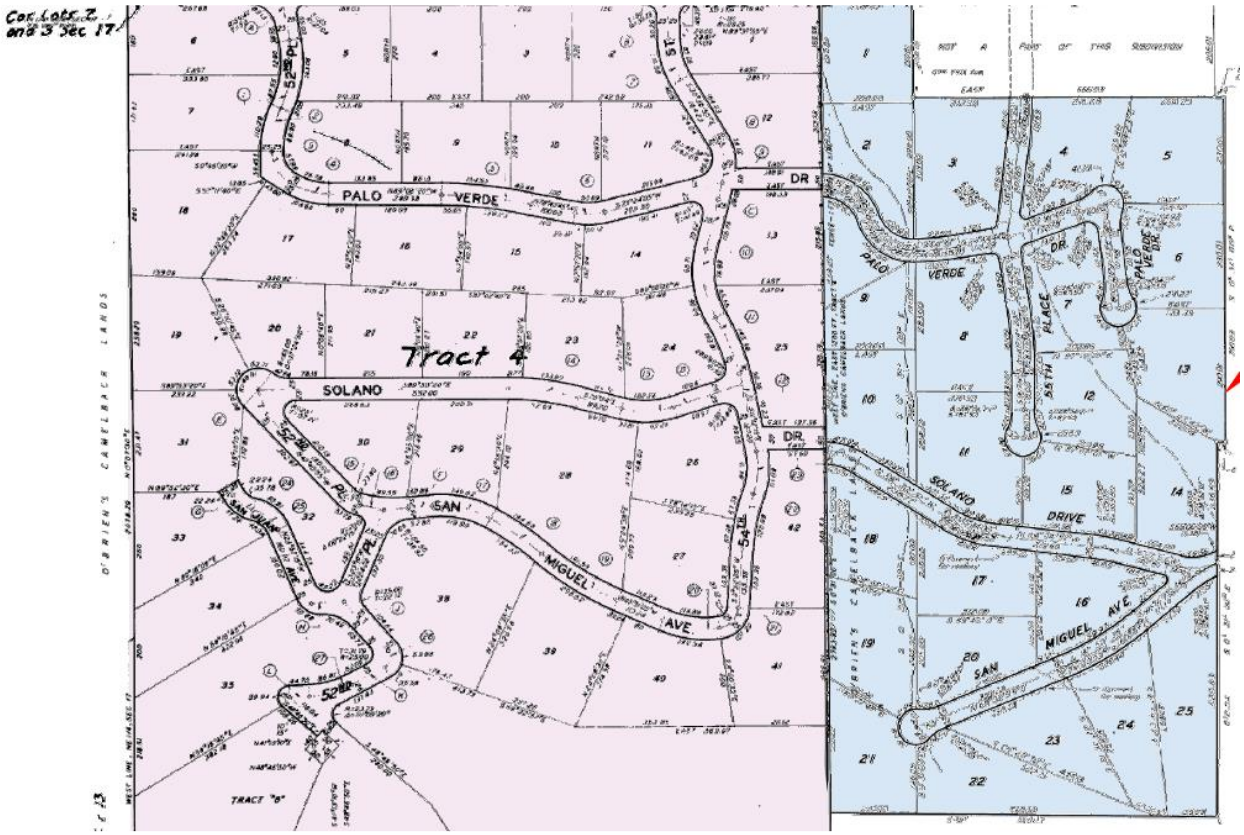
In addition, TMS claims (at 51) that "*Pleak* rejected the notion of conditioning dedication on the 'amount of public usage.'" Tellingly, TMS does not quote from or even cite *Pleak* on that point. Instead, it cites only *Hunt v. Richardson*, 216 Ariz. 114, 120, ¶ 18 (App. 2007). *Hunt*'s characterization of *Pleak* is irrelevant for several reasons. First, *Pleak* addressed public use because the defendant argued that a road could be publicly accepted *only* by public use—in other words, the defendant argued that even if "conveyance documents specifically referred to the" dedication, the dedication was invalid unless the public had *also* used the dedication. *Pleak v. Entrada Prop. Owners Ass'n*, 207 Ariz. 418, 424, ¶¶ 23-24; *see also id.* at 425, ¶ 26 ("Entrada's proposed rule, which would require proof of actual use by the public . . . ."). In rejecting this argument, *Pleak* explained that requiring actual use "would inevitably result in detailed case-by-case inquiries regarding whether and how the public had used a particular roadway." *Id.* Those case-by-case inquiries could be avoided by finding acceptance *via another acceptance method* (e.g., through a recorded plat). But there's simply no way to avoid case-by-case inquiries about "whether and how the public had used a particular roadway," *id.*, when, as here, the proponent of the dedication claims *acceptance by public use*. In other words,

when ruling that acceptance by use was not the *only* way to prove public acceptance, *Pleak* did not jettison the entire body of law concerning public acceptance.

Second, when *Hunt* summarized *Pleak*, it had already found public acceptance. *See Hunt*, 216 Ariz. at 119, ¶ 15 ("It is undisputed that the [parties] purchased their properties with reference to the Survey, thus constituting sufficient acceptance of the common law dedication."). *Hunt* discussed *Pleak* regarding public purpose, not acceptance by use. Contrary to TMS's suggestion, no Arizona court has held that a court may find acceptance *by public use* regardless of whether and to what extent the general public actually used the alleged dedication.

TMS claims (at 52) that *Hunt* held that the presence of a gate did not necessarily preclude common law dedication. But the section of the opinion addressing common law dedication (¶¶ 12-19) does not mention the gate. The opinion discusses the gate when evaluating whether a landowner was *allowed* to have a gate over an easement (¶¶ 20-35). *See* 216 Ariz. at 119-25. The gate matters because it shows that the general public does not—and cannot—use the driveway. TMS does not argue that anyone else used the driveway.

TMS also claims (at 53) that "development [of roads] may be over time as the need arises." That's true, which is why the law provides several different ways to create public roads that become valid regardless of whether, when, or how the public uses the roads. (E.g., statutory dedication, municipal acceptance, a recorded plat.) Under all of these options, the roads may become valid long before use. For example, all of the public roads in the neighborhood shown below became valid without public use because Phoenix Title followed the proper procedures:



[Tr. Ex. 166.]

Phoenix Title decided not to follow those same procedures with the Easement, presumably because no one would have approved the road or been crazy enough to build it. Phoenix Title's attempt to sneak the road in the back door remains inchoate until the public has accepted it. It's a "wildcat" easement that the County and the Town never added to the roadway system. [8/2/2018 Transcript at 218:12-21 (APP250).]

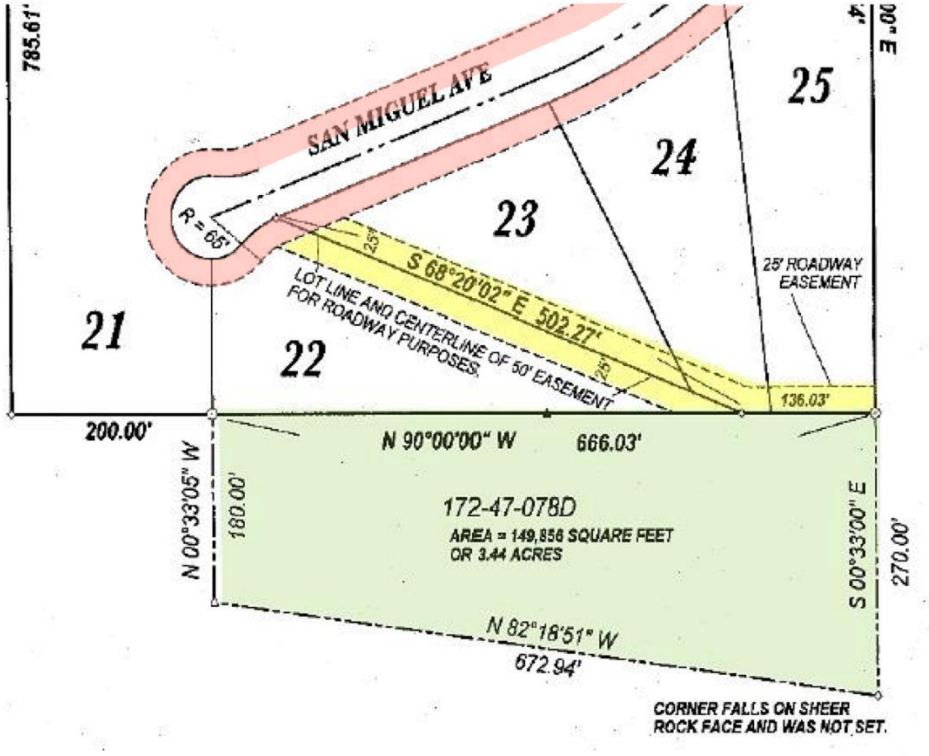
In sum, although the law allows developers to create public roads that can be built and used over time, no one can rely on acceptance by public use to validate an inchoate public dedication until the road has actually been used by the general public.

(c) As a matter of law, using the San Miguel Avenue width expansion does not constitute acceptance of the relevant Easement.

i. Acceptance of part of a public dedication does not create a public dedication as to the unaccepted portion.

TMS repeatedly refers to public use of small portions of the separately described and separately delineated easement to potentially expand the width of San Miguel Avenue. The diagram below illustrates the argument. The yellow region shows the Easement at issue. The area for the possible expansion of Miguel Avenue's width is highlighted in pink. The evidence

concerning paving, utilities, etc. outside the originally platted area for San Miguel Avenue all takes place within the *pink* area—not the yellow area.



[IR-150 at 4 (APP135) (pink highlighting added).] The pink and yellow regions were separately described and separately delineated, with separate purposes. The pink area was "to increase the width of San Miguel Avenue"; the yellow area was "to provide for another roadway not shown in the plat." [Tr. Ex. 1 (APP144).]

As a matter of law, using bits and pieces of the pink area does not constitute acceptance of the yellow area (the Easement at issue here, which primarily runs along the border between Lots 22 and 23).

The opening brief (at 31-32) explained that the law generally allows for partial acceptance, meaning that the unaccepted portion of an intended dedication remains inchoate and unenforceable. The brief collected several cases stating that proposition.[1] TMS's answering brief cites none of them and provides no reason to depart from this majority rule.

The opening brief later addressed (at 45-46) the superior court's fleeting reference to the paved portion of San Miguel Avenue, calling back to the earlier discussion of partial acceptance and then citing *Sweeten v. Kauzlarich*, 684 P.2d 789, 792 (Wash. Ct. App. 1984), for the proposition that when the public has used part of a road but not "the full width of the dedication," acceptance was limited "to that part actually accepted through public use." TMS's answering brief does not cite *Sweeten* or otherwise respond to this argument.

Thus, although TMS repeatedly refers to bits of the width expansion that were used, TMS has no real response to the neighbors' argument that under settled law, using that expansion does not constitute acceptance of the

[1] *Smith v. Borough of New Hope*, 879 A.2d 1281, 1289 (Pa. Commw. Ct. 2005); *Ford v. Dickerson*, 662 S.E.2d 503, 507 (W. Va. 2008); *Chalkley*, 34 So. 3d at 674.

relevant Easement in dispute. Said another way, using part of the pink area does not constitute acceptance of the yellow area.

TMS's argument would fail even under a more extreme version of the facts. Under *Sweeten* and other cases, not even the entire pink area (the width-expansion easement) has been accepted because only bits and pieces have been paved or otherwise used. When "public use [has] never extended to the full width of the dedication," courts "limit[] acceptance to that part actually accepted through public use." *Sweeten*, 684 P.2d at 168.

But this case is even easier. It doesn't matter whether the entire pink area or just bits and pieces have been accepted. Using bits and pieces of the pink area simply does not qualify as public acceptance of the separately described and separately delineated yellow area.

ii. The cases TMS cites stand for irrelevant propositions.

TMS does not cite or address any of the neighbors' authorities concerning partial acceptance. (*See* footnote 1, above.) It discusses (at 53-57) several cases that TMS claims "are inconsistent with" partial acceptance. Not so. None of the cases address the doctrine, and none of them stand for the proposition that partial public use of one part of an inchoate dedication

constitutes acceptance of a separately defined and separately delineated part.

As discussed in more detail below, in the first two cases (*Allied* and *Leidendeker*), the opinions specifically articulate what issues the opinions address; the actual issues have nothing to do with partial acceptance. In those first two cases, the opinions also relied on a different form of dedication than at issue here—statutory dedication involving selling lots with reference to a recorded plat. The plat in this case unquestionably did not include the Easement, and TMS does not contend otherwise. [*See* Tr. Ex. 239 at 1 (APP180).] The second and third cases (*Drane* and *Leidendeker*) addressed whether partial use leads to *abandonment* of a dedication. Whether partial use constitutes abandonment has nothing to do with whether an inchoate dedication has been accepted in the first place. And the fourth case (*Collins*) has nothing to do with this issue at all.

In *Allied Am. Inv. Co. v. Pettit*, 65 Ariz. 283 (1947), the Court expressly did not "rely upon the general law" of common law public dedication because a statute specifically allowed for dedicating parks by plat. *Id.* at 290. The opinion specifically said "the dedication was different from a dedication at common law." *Id.* Although the opinion briefly mentioned acceptance,

that did not appear to be the focus of the case, especially in light of how the opinion expressly articulated the issue: "the question here presented is: Did the dedicator in the instant case by inscribing the word 'Park' on Block 5 comply with this paragraph" of the statute. *Id.* To top it off, the brief mention of acceptance relied not just on use by the purchasers, but also use by "the general public." *Id.*

In *Drane v. Avery*, 72 Ariz. 100 (1951), *overruled in part by Chadwick v. Larsen*, 75 Ariz. 207 (1953), the validity of the dedication (including acceptance) was "undisputed by the parties herein on appeal." 72 Ariz. at 102. In dicta (because the point was not disputed), the opinion again relied on the use by "the general public" (not just adjacent lot owners). *See id.* ("use thereof by purchasers of lots and the general public"). (On top of that, the opinion addressed the sale of lots referencing a recorded plat, as in *Allied* but not relevant here.) The opinion instead addressed two irrelevant issues: standing and laches as to removing obstacles in the road. *See id.* at 103 ("The only questions presented by this appeal . . ."). TMS's block quote (at 55) has nothing to do with dedication or acceptance at all. It presupposed a valid highway and addressed only whether partial use caused *abandonment*. *See id.* at 105. No one here contends abandonment of a valid public road.

Yuma Cty. v. Leidendeker, 81 Ariz. 208 (1956), like *Drane*, addressed acceptance by sale of lots referring to a plat (an issue not relevant here). *See id.* at 213. TMS again block-quoted (at 56) an irrelevant discussion about partial use leading to *abandonment*. *See id.* at 214-15 (analyzing whether nonuse "constitutes an abandonment of any dedication"). TMS bolded/underlined (at 56) the proposition that some public roads have never been graded or used. That, again, refers to whether *validly dedicated* roads have been *abandoned*. *See id.* The public roads that are valid without ever having been paved or used typically have been formally accepted by the government or by formal plat (as in *Leidendeker*). *Leidendeker* does not stand for the proposition that an unused road has been accepted by use; TMS cites no authority supporting that proposition.

Collins v. Wayland, 59 Ariz. 340 (1942), primarily addressed government acceptance and other procedural issues; acceptance by use was "practically undisputed." *Id.* at 345. Although the initial plat was not authenticated, it was "evidence of an intention" to dedicate an alley. *Id.* at 344. The municipality annexed the property (via a map showing the alley) and constructed a sewer system. *Id.* at 343-44. It says nothing about partial acceptance.

C. The neighbors do not dispute the superior court's factual findings; this is a question of law.

TMS suggests (at 64-66) that the neighbors invite this Court to second-guess the superior court's factual findings. Not so. TMS has not identified any facts actually in dispute.

TMS's brief includes dozens of citations to supposed acts of acceptance, but they all fall into one of three buckets: (1) documents not within the chain of title for Lots 22 and 23 (e.g., documents relating to *other people's lots*); (2) use of the separately described and separately delineated easement to expand the width of San Miguel Avenue (e.g., the bits and pieces of paving, driveways, and utilities within the pink region on the above map, but not within the yellow region); and (3) use of the shared driveway by the adjoining landowners (e.g., the parts of the driveway that fall on Lot 22 used by Lot 23, and vice-versa).

TMS, of course, does not separate its evidence into these buckets, but it cannot dispute that no evidence falls outside them. But each of the three buckets suffers from a fatal flaw. Bucket 1 does not satisfy the already questionable doctrine of allowing recorded deeds referencing a recorded plat to constitute acceptance. Bucket 2 ignores the rule that the public may

accept part of an inchoate dedication without accepting all of it. Bucket 3 ignores the rule that using an inchoate dedication by adjoining landowners does not constitute *public* acceptance.

These are all questions of law that should be resolved based on the undisputed facts. "Where the facts are undisputed, the question of acceptance is one of law." *Elliott v. H. B. Alexander & Son, Inc.*, 399 A.2d 1130, 1134 (Pa. Commw. 1979).

At bottom, TMS has not identified any facts that the neighbors disputed, and has not disputed any of the facts the neighbors rely on. The parties' dispute the law, not the facts.

D. The Court should not expand the doctrine of public dedication.

TMS does not confront the cases that undermine its position. By ignoring the core legal issues, TMS implicitly asks the Court to unjustifiably expand the doctrine of public dedication in multiple ways.

As for the already questionable doctrine of public acceptance via recorded conveyance documents, TMS invites the Court to expand that to cover documents from *other lots*. As for the use of the neighbors' shared driveway, TMS invites the Court to rule—contrary to Arizona law—that use of an easement for adjoining lot owners and their invited guests is use by the

general public. As for the bits and pieces of the width-expansion easement for San Miguel Avenue that have been paved or used for driveways or utilities, TMS invites the Court to rule—contrary to cases around the country—that acceptance of part of one easement constitutes acceptance of a separately described and separately delineated easement. And to top it off, TMS's unstructured approach to the evidence invites the Court to ignore the separate aspects of the legal doctrine and instead smoosh everything together, as if defective acceptance by deed plus defective acceptance of use will suffice, so long as there's a lot of evidence.

But as the neighbors explained, permanently purging private property rights is one of the most consequential things a court can do. The peculiar doctrine of public dedication should not be expanded.

The rationale for exercising caution applies doubly here, where an existing legal doctrine (implied way of necessity) already provides TMS with access to its property. TMS now contends (at 42-43) that implied way of necessity "does not adequately protect TMS or provide it with access in fact." Its brief reveals (at 42) that a private doctrine (implied way of necessity) isn't good enough because the Town of Paradise Valley might subject TMS's project to "additional Hillside Building requirements" and "disturbance

calculations" that apply to private roadways, but not public roadways. So what? The neighbors' driveway is not a public roadway and does not look like one. When TMS bought its land, the seller disclosed that no public roadway touched the property. (Opening Br. at 16.) TMS now wants to slip through the backdoor of the Town's zoning requirements to avoid the "Hillside Building requirements" and "disturbance calculations" that apply to everyone else.

When a private driveway has purely private characteristics and the original developer (Phoenix Title) chose not to include the strip of land on the original official plat, a party desiring access must turn to the more conventional forms of private easement. As a matter of law, public dedication does not fit these facts. *Cf. Coward*, 246 P.3d at 398 ("Accordingly, the Cowards could have no dedicated easement over Hadley's lot. The proper way to acquire an easement is to resort to existing legal and equitable theories.").

II. The superior court erred as a matter of law in awarding fees and costs.

A. TMS did not prevail on any claim eligible for fees under A.R.S. § 12-1103.

1. Under binding authority, neither public dedication nor implied way of necessity qualifies for attorneys' fees.

The opening brief (at 48-51) explained why neither TMS's claim for public dedication nor TMS's claim for implied way of necessity qualifies for attorneys' fees under A.R.S. § 12-1103, which applies only to quiet title actions. TMS barely addresses these arguments.

Perhaps most important, the Supreme Court ruled in *Pleak* that "a common law dedication of a roadway easement to public use leaves fee title to the roadway in the landowner, and [the landowner] therefore properly refused in this case to issue a quit claim deed to the [party seeking dedication]." 207 Ariz. at 425 n.6. The Court therefore did not award the plaintiffs' requested fees under § 12-1103. This ruling controls. Despite that, all TMS says is "that should not be determinative," apparently because TMS disagrees with the Supreme Court's analysis. But the Supreme Court's ruling unquestionably is determinative.

Pleak's reasoning also applies to implied way of necessity. Even though TMS prevailed on that claim, the neighbors retain "fee title to the

roadway" and "therefore properly refused in this case to issue a quit claim deed" to TMS. 207 Ariz. at 425 n.6. As the opening brief explained (at 51), even TMS's right of access under the implied way of necessity is not irrevocable. If ownership merges or a new route opens, TMS would lose its rights. TMS is not entitled to any quitclaim deed, so the neighbors properly refused the request. The purpose of § 12-1103(B) is to avoid litigation by incentivizing defendants to execute the tendered deed. But when the plaintiff is not entitled to the deed, the defendants should not be penalized for "properly refus[ing]," as *Pleak* explained.

2. TMS did not bring a quiet title action for the relevant claims.

TMS's primary response (at 68) is that a party *may* bring a quiet title action to protect an easement. TMS's argument suffers from several problems. First, even if it *could have*, TMS did not assert a quiet title action on these claims. TMS asserted two quiet title claims (for express easement and implied easement), but the claims on which TMS prevailed, and on which the superior court awarded fees, were not quiet title actions. (*See* Opening Br. at 50 (comparing IR-22 at 7-10 (APP115-18), *with* IR-22 at 10-11, 14 (APP118-19, APP122)).) Even in the joint pretrial statement, the parties

characterized some claims—but not public dedication or implied way of necessity—as quiet title claims. [IR-150 at 2 (APP133).]

Second, TMS relies (at 68) on cases concerning quiet title for various easement claims. None of them involve attorneys' fees under A.R.S. § 12-1103(B), so none of them overcome the Supreme Court's holding in *Pleak*. And none involve either public dedication or implied way of necessity. TMS apparently thought that its express and implied easement theories should be quiet title actions, but that its public dedication and implied way of necessity claims should not. Generic holdings concerning other types of easements, not in the context of fee-shifting, do not change the analysis.

Finally, TMS argues (at 69) that the superior court could have instead awarded attorneys' fees under A.R.S. § 12-341.01. But it offers no argument on that point. The public dedication and implied way of necessity claims did not arise out of contract,[2] and the Court should not reverse on that basis when TMS did not develop the argument on appeal.[3]

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[2] *See* Cross-Appeal Argument § III.C, below.

[3] If the Court thinks there is a basis for awarding fees based on § 12-341.01 despite TMS's failure to develop the argument on appeal, the Court should remand to allow the superior court to consider the issue in the first instance.

B. TMS does not defend the superior court's improper award of costs.

A.R.S. § 12-332 controls taxable costs. TMS lists (at 70) allegedly permissible taxable costs, but ignores the costs disputed by TMS and improperly recharacterizes some costs. For example, TMS contends (at 70) that it spent "$200.25 for process server fees," but its costs application describes that as "Scanned Documents" (a nontaxable cost). TMS provides no basis for its apparent attempt to reclassify the charge. The only other charge TMS addresses is the $2,925.00 charge for "Expert Witness Fee," which TMS claims (without citation) was for the opposing party's expert witness. TMS also does not attempt to defend the entries for $5,186.75 for "Photocopy Expense" or the charges for color copies, UPS, meals, etc.

CONCLUSION

The Court should vacate, reverse, and remand the ruling that TMS can enforce the Easement as a common law dedication and the award of fees and costs.

CROSS-APPEAL ANSWERING BRIEF

CROSS-APPEAL INTRODUCTION

TMS's cross-appeal is about whether the neighbors' anticipatory nuisance counterclaim (a tort claim) arises out of contract for purposes of awarding attorneys' fees under A.R.S. § 12-341.01. It does not. The superior court properly refused to award attorneys' fees on the anticipatory nuisance counterclaim and this Court should affirm that ruling.

CROSS-APPEAL STATEMENT OF FACTS & CASE

After TMS sued the neighbors, the neighbors filed a counterclaim. The first seven counts in the counterclaim generally concerned the legal issues with access to the TMS Parcel. [IR-11 at 37-46.] The eighth count sought declaratory judgment and a permanent injunction regarding anticipatory nuisance. [IR-11 at 46-49.] The anticipatory nuisance counterclaim was based on anticipated risk and damage from the construction activities for TMS's contemplated home and driveway—e.g., from dislodged boulders, vibration, etc. [*See id.*] On a motion from TMS, the superior court bifurcated the case: "The court will conduct a bench trial on the claims which concern access to the property and a separate jury trial on the counterclaim for nuisance." [IR-76 at 1.]

TMS moved for summary judgment on the neighbors' anticipatory nuisance counterclaim, principally on the theory that the claim was not ripe and that the nuisance was not highly probable. [IR-95.] TMS contended that the development plans were "preliminary and very likely to change." [*E.g.*, IR-95 at 11 n.4.] In other words, the thrust of the motion was not about the merits, but rather claimed that the neighbors asserted their claim too soon. In their response, the neighbors focused on the "risk of boulder dislodgment," confirming that the counterclaim involved only the construction activities, not legal access. [IR-110 at 3.]

The superior court granted summary judgment without prejudice, based solely on whether harm was "merely possible" versus "highly probable." [IR-246 at 3.]

TMS filed an application for attorneys' fees, in which it invoked A.R.S. § 12-341.01 for the first time. [IR-249 (fee application); *see also* IR-267 (opposition); IR-273 (reply).] The superior court did not issue a separate minute entry concerning fees, but the final judgment did not award fees based on the work of the law firm that handled the anticipatory nuisance counterclaim. [IR-275 at 2 (APP106).]

CROSS-APPEAL ISSUE

Anticipatory nuisance is a tort claim. A.R.S. § 12-341.01 permits the superior court to make a discretionary award of attorneys' fees only in claims "arising out of a contract." Did the superior court have discretion to deny attorneys' fees concerning the anticipatory nuisance counterclaim?

CROSS-APPEAL STANDARD OF REVIEW

Whether to award fees is "a matter in the discretion of the trial court." *Suciu v. AMFAC Distrib. Corp.*, 138 Ariz. 514, 520 (App. 1983). This Court "cannot substitute [its] judgment for that of the trial judge." *Id.*

"[T]he burden is on [TMS] to show the trial court abused its discretion" in denying fees. *Ayres v. Red Cloud Mills, Ltd.*, 167 Ariz. 474, 481 (App. 1990). This Court should "uphold a decision on attorneys' fees under A.R.S. § 12–341.01 if it has any reasonable basis." *Uyleman v. D.S. Rentco*, 194 Ariz. 300, 305, ¶ 27 (App. 1999).

Even if the superior court gave no reasons for denying fees, "[t]he question on appeal is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason. We cannot substitute our discretion for that of the trial judge."

Tucson Estates Prop. Owners Ass'n, Inc. v. McGovern, 239 Ariz. 52, 56, ¶ 12 (App. 2016) (quotation marks and citation omitted).

CROSS-APPEAL ARGUMENT SUMMARY

The superior court had ample discretion to deny TMS's request for attorneys' fees on the anticipatory nuisance counterclaim. First, TMS had never disclosed that it would seek fees under A.R.S. § 12-341.01, so this Court may affirm on that basis alone. (Cross-Appeal Argument § I.)

Second, A.R.S. § 12-341.01 applies only to claims "arising out of a contract," but the anticipatory nuisance counterclaim sounds only in tort. (Cross-Appeal Argument § II.) TMS does not dispute that nuisance is a tort, but instead contends that that counterclaim is intertwined with contract claims and depends on a contract. Contrary to TMS's arguments, however, it is not intertwined with any fee-eligible claims. Indeed, both TMS and the superior court always viewed the anticipatory nuisance counterclaim as completely independent from the rest of the case. (Cross-Appeal Argument § III.A.) The duty not to create a nuisance arises out of common law, not contract, so the anticipatory nuisance counterclaim could have existed without any contract, meaning that A.R.S. § 12-341.01 does not apply. (Cross-Appeal Argument § III.B.) And to top it off, the rest of the claims in

the case do not trigger A.R.S. § 12-341.01, so TMS is not entitled to fees anyway, regardless of any intertwining. (Cross-Appeal Argument § III.C.) TMS's remaining arguments concerning the *Warner* factors and public policy ignore that A.R.S. § 12-341.01 does not apply in the first place. (Cross-Appeal Argument § IV.)

CROSS-APPEAL ARGUMENT

Because A.R.S. § 12-341.01 is permissive ("may award"), whether to award fees is "a matter in the discretion of the trial court." *Suciu*, 138 Ariz. at 520. The superior court does not need to give any reasons when denying a discretionary award under this statute. *Tucson Estates*, 239 Ariz. at 56, ¶ 12 ("We may uphold a decision on attorney fees under § 12–341.01 if it has any reasonable basis, even if the trial court gave no reasons for denying the request for fees."); *Uyleman*, 194 Ariz. at 305, ¶ 27 ("[T]he trial court gave no reasons for denying the request for fees, we uphold a decision on attorneys' fees under A.R.S. § 12–341.01 if it has any reasonable basis."). In addition, this Court may affirm on any basis supported by the record. *Leflet v. Redwood Fire & Cas. Ins. Co.*, 226 Ariz. 297, 300, ¶ 12 (App. 2011).

I. The superior court had discretion to deny attorneys' fees because TMS had never disclosed A.R.S. § 12-341.01 as a basis for attorneys' fees.

When the superior court resolved the claims concerning implied way of necessity and public dedication, it ruled that TMS could recover fees under A.R.S. § 12-1103. [IR-228 at 15, ¶ 4 (APP097).] The superior court postponed determining the amount of fees, "find[ing] submission of an application for attorneys' fees and costs prior to resolution of Count 8 [anticipatory nuisance] is premature." [*Id.* at 15 n.6 (APP097).]

When the superior court granted summary judgment on the anticipatory nuisance counterclaim, the superior court noted its earlier decision to grant fees under A.R.S. § 12-1103 on the other claims. [IR-246 at 4.] The superior court then invited a fee application for the fees "previously awarded pursuant to A.R.S. § 12-1103." [IR-246 at 4.] The superior court did not invite a fee application on the anticipatory nuisance counterclaim, nor did it award fees on any basis other than A.R.S. § 12-1103 (which TMS does not contend applies to the counterclaim).

Until then, TMS had never disclosed A.R.S. § 12-341.01 as a basis for attorneys' fees. Its reply to the counterclaim disclosed that it would seek fees, but did not specify any basis. [*See* IR-19 at 11, ¶ B.] In opposing TMS's

fee application, the neighbors argued that TMS had never disclosed that it would seek fees based on A.R.S. § 12-341.01—not in any pleading, disclosure statements, or any other filing or correspondence. [IR-267 at 6.] In reply, TMS did not dispute that it had never disclosed this theory. Instead, it merely claimed that a naked claim for attorneys' fees sufficed. [IR-273 at 3-4.]

Rule 54(g) requires that "[a] claim for attorney's fees must be made in the pleadings or in a Rule 12 motion filed before the movant's responsive pleading." Ariz. R. Civ. P. 54(g)(1). Rule 26.1, in turn, requires parties to disclose "the legal theory on which each of the disclosing party's claims or defenses is based, including—if necessary for a reasonable understanding of the claim or defense—citations to relevant legal authorities." Ariz. R. Civ. P. 26.1(a)(2).

TMS contended below [IR-273 at 3-4] that it satisfied its Rule 54(g) obligation by disclosing that it intended to seek fees. It completely ignored Rule 26.1's requirements, however. Rule 54(g) requires disclosure of a fee claim in the pleadings, and then Rule 26.1 requires disclosure of a party's legal theories, including citations. Rules 54(g) and 26.1, when read in

tandem, require a party to disclose the legal basis for any claim for attorneys' fees.

Disclosure concerning potential claims for attorneys' fees serves an obvious purpose—to put parties on "notice that he or she risks a fees award." *Balestrieri v. Balestrieri*, 232 Ariz. 25, 27, ¶ 8 (App. 2013). Requiring disclosure of the basis for attorneys' fees furthers this purpose. Without disclosure of the basis, a party could reasonably conclude—as here—that a particular claim is not fee-eligible, only to face an unusual claim for attorneys' fees based on a statute that on its face does not apply to the particular claim. Disclosing the basis prevents this surprise, which is precisely what Rule 26.1 was designed to avoid. *See Schwartz v. Ariz. Primary Care Physicians*, 192 Ariz. 290, 296, ¶ 21 (App. 1998) ("This rule was intended to deter parties from practicing 'litigation by ambush,' such as occurred here.") (citation omitted).

TMS's lack of disclosure gave the superior court discretion to deny TMS's claim for attorneys' fees based on A.R.S. § 12-341.01; this Court should affirm on that basis.

II. The superior court had discretion to deny attorneys' fees because the anticipatory nuisance counterclaim sounded only in tort.

In the cross-appeal concerning the anticipatory nuisance counterclaim, TMS seeks attorneys' fees based solely on A.R.S. § 12-341.01. That statute applies only in cases "arising out of a contract."

That statute does not warrant awarding attorneys' fees here because the anticipatory nuisance counterclaim sounded only in tort. Under Arizona law, claims for "public and private nuisance . . . [are] clearly based in tort." *Amparano v. ASARCO, Inc.*, 208 Ariz. 370, 373, ¶ 5 (App. 2004). The Arizona Supreme Court has repeatedly characterized nuisance claims as "tort" claims. *See, e.g.*, *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. 1, 7 (1985) ("Under general tort law, liability for nuisance may be imposed . . . ."); *see id.* at 5 (discussing "[t]he torts" of public and private nuisance); *City of Phoenix v. Johnson*, 51 Ariz. 115, 126 (1938) ("The action is one in tort . . . ."); *see also Hopi Tribe v. Ariz. Snowbowl Resort Ltd.*, 245 Ariz. 397, 401 n.1 (2018) ("nuisance within the concept of tort law") (quoting *Armory Park*); *Quiroz v. ALCOA Inc.*, 243 Ariz. 560, 569, ¶ 34 (2018) ("torts of public and private nuisance") (citing *Armory Park*).

Until TMS sought attorneys' fees, TMS agreed that anticipatory nuisance sounded in tort. In its summary judgment motion, TMS characterized the counterclaim as "the *tort claim* of anticipatory nuisance," or as "the *tort* of nuisance." [IR-95 at 14 (capitalization altered; emphases added).] TMS also argued that the neighbors could not receive declaratory relief for a "tort action." [IR-95 at 16 n.6.] In the reply supporting summary judgment, TMS doubled down on characterizing the counterclaim as a "tort." [IR-164 at 9.]

At bottom, anticipatory nuisance is a tort and is not eligible for fees under A.R.S. § 12-341.01.

III. None of TMS's arguments make the anticipatory nuisance counterclaim fee-eligible under A.R.S. § 12-341.01.

TMS does not contend that anticipatory nuisance itself arises out of contract. Instead, it claims that the anticipatory nuisance counterclaim was intertwined with, or depends on, contract claims or a contract. None of its arguments work.

A. Contrary to TMS's contention, the anticipatory nuisance counterclaim was not intertwined with the claims concerning legal access.

TMS principally relies on the doctrine that a court has discretion to award fees on a tort claim that is both "intertwined" with and "could not

exist but for the breach of contract." *Sparks v. Republic Nat. Life Ins. Co.*, 132 Ariz. 529, 543 (1982).

As a threshold matter, TMS always viewed the claims and counterclaims regarding legal access as independent from the anticipatory nuisance counterclaim. For example, TMS engaged separate counsel for the two parts of the case. As TMS itself explained, "Plaintiff has two sets of lawyers: one to establish legal access to the Property (Burch & Cracchiolo, P.A.) and the other to defend against the anticipatory nuisance counterclaim (Beus Gilbert PLLC)." [IR-69 at 5.]

TMS also moved to bifurcate the case, drawing a sharp distinction between the claims and counterclaims regarding legal access, versus the anticipatory nuisance counterclaim. [*See* IR-69.] In the motion to bifurcate, TMS characterized the case as "about legal access. The one exception is Defendants' counterclaim for an anticipatory nuisance based on construction-related concerns." [*See* IR-69 at 2.]

TMS's separate counsel for the anticipatory nuisance counterclaim told the superior court that she would not participate in the trial concerning legal access, and even "request[ed] that any testimony or evidence regarding the nuisance claim not be binding on the second phase of trial." [IR-178 at 2.]

The superior court likewise viewed the claims as independent. It granted TMS's motion to bifurcate, conducted separate proceedings, and issued separate rulings on the access claims versus the anticipatory nuisance counterclaim. [*See* IR-76 ("The court will conduct a bench trial on the claims which concern access to the property and a separate jury trial on the counterclaim for nuisance."); IR-228 (APP083) (ruling on claims regarding legal access); IR-246 (APP101) (ruling on anticipatory nuisance counterclaim).]

In addition, in its fee application, TMS separated out the fees concerning the legal access claims and counterclaims ($385,756.75, collected in Exhibit A to the fee application) from the fees concerning the anticipatory nuisance counterclaim ($234,488.50, collected in Exhibit B to the fee application). [IR-249 at 10.] The fee application also noted the division of labor between the claims. [IR-249 at 2 n.1.]

In a similar case, this Court ruled that claims were not intertwined in part because the fee application contained separate exhibits itemizing the fees on the separate claims. *See WB, The Bldg. Co. v. El Destino, LP*, 227 Ariz. 302, 313, ¶ 31 (App. 2011) ("Appellees submitted two exhibits in support of their petition for fees. 'Exhibit A' lists only the services performed in

connection with the civil action—a total of $100,010.75; whereas 'Exhibit B' lists only the services performed in connection with the arbitration itself—a total of $310,325.75."). On this basis, this Court held that "[t]he record, accordingly, compels a conclusion that the fees incurred in arbitration and in the civil action were not intertwined." *Id.*

TMS and the superior court thus consistently viewed the claims and counterclaims regarding legal access as independent from the anticipatory nuisance counterclaim. The superior court had discretion to deny fees.

B. The anticipatory nuisance counterclaim does not arise out of contract because the duty not to create a nuisance is implied by law and the counterclaim could have existed without any contract.

"The test to determine if an action arises out of contract is whether the plaintiff would have a claim even in the absence of a contract." *ML Servicing Co., Inc. v. Coles*, 235 Ariz. 562, 570, ¶ 31 (App. 2014) (quotation marks and citation omitted). A "tort claim will 'arise out of a contract' only when the tort could not exist 'but for' the breach or avoidance of contract." *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 15–16, ¶ 27 (App. 2000).

One of the key inquiries is the source of the duty. *Id.* at 14-16, ¶¶ 22-27 (summarizing the duty-focused analysis under § 12-341.01). The source

of the duty in the tort of a private nuisance comes not from contract, but from the common law. It "found its roots in civil law," and arises out of a common law duty not to "interfere[] with a person's interest in the enjoyment of real property." *Armory Park*, 148 Ariz. at 4. The duty is implied by law; the nuisance cause of action involves no contractual duty whatsoever. "Even a 'mere bystander' having no contractual relationship could recover from the seller." *Barmat v. John & Jane Doe Partners A-D*, 155 Ariz. 519, 523 n.1 (1987). Consequently, because "the duty breached is one implied by law," TMS "would have a duty of care . . . even in the absence of a contract," and the claim does not arise out of contract. *Ramsey*, 198 Ariz. at 15-16, ¶ 27; *see generally id.* at 14-15, ¶¶ 22-27 (summarizing the duty-focused analysis under § 12-341.01).

TMS argues (at 78) that its "right to construct that roadway arises out of the Easement for Roadway." But the anticipatory nuisance counterclaim addressed the *construction process* of the contemplated driveway and house and the accompanying *physical risks*, not the right to build. The issues concerning legal access were a predicate, if at all, only in the factual sense, not the legal sense. TMS couldn't build the house if it had no way to access the property. But "[t]he existence of a contract that merely puts the parties

within tortious striking range of each other does not convert ensuing torts into contract claims." *Ramsey*, 198 Ariz. at 15, ¶ 27.

Case after case has refused to apply § 12-341.01 to tort claims where the parties' relationship originated in contract, but where the duty arose from law, not contract. The statute does not apply to a legal malpractice claim, even though a contract is fundamental to the attorney-client relationship. *Barmat*, 155 Ariz. at 523. It does not apply to an accounting malpractice claim, even though "[t]here is no doubt that a contract to perform accounting services existed between the parties." *Lewin v. Miller Wagner & Co.*, 151 Ariz. 29, 35 (App. 1986). The statute does not apply to the sale of defective chattel, even when "the relationship between buyer and seller arose out of a contract" for the sale of goods. *Barmat*, 155 Ariz. at 523, n.1. The statute does not apply to a claim about a real estate broker's failure to disclose, even though the parties had a real estate contract. *Haldiman v. Gosnell Dev. Corp.*, 155 Ariz. 585, 591 (App. 1987). The statute does not apply to a claim of fraudulent inducement of a contract with a third party because the "duty not to commit fraud . . . exists . . . even when there is no contractual relationship between the parties at all." *Morris v. Achen Constr. Co.*, 155 Ariz. 512, 514 (1987). The statute does not apply to a negligence

claim despite a contract "to supply pilot services." *Ramsey*, 198 Ariz. at 16, ¶¶ 27-29. Likewise for many other claims. *See id.* at 15, ¶¶ 24-25 (collecting cases). "The mere existence of a contract somewhere in the transaction is not enough to support a fee award." *Id.* at 14, ¶ 21 (quotation marks and citation omitted).[4]

Based on these principles, the fact that TMS could not begin construction without legal access over the Easement does not mean that a nuisance claim about physical risks from construction arose out of contract. At most, the Easement "merely put[] the parties within tortious striking range of each other." *Ramsey*, 198 Ariz. at 15, ¶ 27.

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[4] TMS claims (at 77) that the question is "whether a contract 'was a factor causing the dispute.'" (Quoting *ASH, Inc. v. Mesa Unified Sch. Dist. No. 4*, 138 Ariz. 190, 192 (App. 1983)). That quotation is not the controlling test in Arizona. This Court undermined that sentence shortly after writing it, explaining that "the contract in *ASH* was not merely 'a factor', but *the* factor giving rise to the litigation. We therefore do not construe the 'factor test' adopted in *ASH* to mean that simply because a contract is peripherally involved in a cause of action, A.R.S. § 12–341.01(A) is always applicable." *Lewin*, 151 Ariz. at 37. This Court called the test into question again more than a decade later. *See Ramsey*, 198 Ariz. at 13-14, ¶¶ 19, 22 (calling *ASH* into question and explaining that "[t]he landscape of 'arising out of a contract' analysis was transformed in 1987 with the supreme court's decision in *Barmat*.") (citation omitted). The *ASH* standard is no longer good law in Arizona. And in any event, even if it did remain good law, no contract in this case was a factor in causing the anticipatory nuisance claim.

Consider an extreme example. Even without the Easement, TMS theoretically could access its property by helicopter or drone. If TMS's flight activities interfered with the neighbors' enjoyment of their property, they could assert a nuisance claim. The claim simply does not depend on the Easement in a legal sense.

To think about it another way, any property owner may assert a private nuisance claim against anyone nearby expected to create a nuisance, regardless of whether the property owner has any contract (express or implied) with the nuisance-maker. Conversely, even if TMS owned title free and clear to a path to the TMS Parcel, the neighbors still could have (and likely would have) asserted an anticipatory nuisance claim because building the contemplated house and driveway risked massive damage, regardless of who owned title to the land beneath the contemplated driveway.

C. For purposes of § 12-341.01, the Easement is not a contract, and the claims concerning access do not arise out of contract.

To top it all off, TMS's theory for fees under § 12-341.01 suffers from another fatal flaw. Although TMS claims the anticipatory nuisance was intertwined with § 12-341.01-eligible claims and arose out of the Easement,

the other claims are not fee-eligible and the Easement is not a contract for purposes of the statute.

TMS prevailed on two theories: implied way of necessity and public dedication. Neither claim arises out of contract. "[A]n implied way of necessity is dependent on a unity of ownership of the dominant and servient estates, followed by a severance thereof." *Bickel v. Hansen*, 169 Ariz. 371, 374 (App. 1991). It does not arise out of contract, and TMS cites no authority for the notion that it does. Public dedication "is the intentional appropriation of land by the owner to some proper public use." *City of Chandler v. Ariz. Dept. of Transp.*, 224 Ariz. 400, 403, ¶ 9 (App. 2010). The public dedication claim in effect confirmed a right for the general public, not just TMS. It likewise does not arise out of contract, and again TMS cites no contrary authority. The Easement itself likewise is not a contract for purposes of § 12-341.01. It is merely a recorded document that a prior landowner recorded to indicate a unilateral intent to create a road.

Thus, even if the anticipatory nuisance counterclaim were intertwined with these claims or somehow depended on the Easement, that still would not make the counterclaim eligible for fees under A.R.S. § 12-341.01.

IV. TMS's remaining arguments lack merit.

A. Because the anticipatory nuisance counterclaim did not arise out of contract, the superior court did not err in not awarding fees.

TMS claims (at 78-79) that the superior court erred by not addressing the factors set out in *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570 (1985). That argument fails for several reasons. First, and most important, the anticipatory nuisance counterclaim did not arise out of contract, so it was not fee-eligible at all and the superior court had no reason to apply the *Warner* factors.

Second, the superior court has "broad discretion" in deciding whether to award fees. *Id.* The statute is permissive, "and there is no requirement that the trial court grant attorney's fees to the prevailing party in all contested contract actions." *Id.* (quotation marks and citation omitted). "The trial judge's failure to explain his reasons for a denial of attorney's fees does not mean he exercised 'no discretion' nor does it indicate an abuse of discretion." *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 350 (1984).

Third, the *Warner* factors are just guideposts; the superior court has no obligation to apply the factors in every case. Other reasons justified denying

fees. The neighbors sought to protect important interests—the safety of themselves and their homes from the risk of enormous boulders rolling down the mountain. Awarding fees "would discourage other parties with tenable claims or defenses from litigating." *Warner*, 143 Ariz. at 570.

B. TMS's public policy argument ignores the default rule in Arizona.

TMS repeatedly invokes (at 76, 78, 80) the statutory statement that fees should be awarded "to mitigate the burden of the expense of litigation to establish a just claim or a just defense." A.R.S. § 12-341.01. TMS even claims that it is entitled to recover its fees "to satisfy the purposes of" the statute.

Contrary to TMS's suggestion, that purpose does not justify awarding fees in all cases. It applies only to claims arising out of contract, as set forth in subsection A of the statute. Under "the prevailing American Rule, . . . attorney's fees are *not* normally awarded in tort actions as to do so has a chilling effect on seeking legal redress for wrongs." *Lewin*, 151 Ariz. at 37 (emphasis added). As the Supreme Court explained, "[t]he legislature clearly did not intend that every tort case would be eligible for an award of fees whenever the parties had some sort of contractual relationship or

ingenious counsel could find authority for an implied-in-law contractual claim." *Barmat*, 155 Ariz. at 524.

CROSS-APPEAL CONCLUSION

The superior court should affirm the superior court's denial of TMS's request for attorneys' fees on the tort-based anticipatory nuisance counterclaim.

RESPECTFULLY SUBMITTED this 28th day of February, 2020.

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