STATE OF IDAHO)
County of BONNER)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

ROBERT D. LANDWEHR and JULIE J. LANDWEHR, husband and wife, and RICHARD OHME, *Plaintiffs*, vs. **INDEPENDENT HIGHWAY DISTRICT,** *Defendant*.	Case No.**BON CV 2013 1101** **MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendant Independent Highway District's (IHD) Motion to Dismiss. Plaintiffs Robert and Julie Landwehr and Richard Ohme (plaintiffs) filed this lawsuit on July 5, 2013, seeking to quiet title to their real property in addition to seeking a writ of mandate requiring IHD to sign plaintiff Ohme's application for a Bonner County Building Location Permit for Plaintiff Ohme's deck and roof extension. Plaintiffs Landwehr own lot 27A and plaintiff Ohme owns 27B, both in Block 7 in the First Addition to Schweitzer Basin Village. Complaint, p. 3, ¶¶ 1.1, 1.2. IHD is a political subdivision of Idaho. *Id.,* ¶ 1.3.

Lots 27A and 27B are next to Telemark Road and lie within an area that was platted by the original developers in 1968. Verified Complaint, p. 4, ¶ 3.2; Ex. A-3, A-4. Lot 27A and 27B began as simply lot 27. Prior owners of Lot 27 quitclaimed half of Lot 27 to an owner and the other half to a different owner, and eventually the half interests

and the lot was deeded to the current owners, plaintiffs Landwehrs and Ohme. *Id.,* pp. 4-5, ¶¶ 3.4-3.10 These plaintiffs re-platted Lot 27 and re-divided it in 1993, with 27A going to the Landwehrs and 27B going to Ohme. *Id.,* p. 5, ¶ 3-11.

In 1994 plaintiffs paved approximately 124 square yards of asphalt between the dwelling and Telemark Road. *Id.,* ¶ 3-12; Exhibit L. They also improved that area of the property with rock and vegetation landscaping. *Id.,* ¶ 3-13. They did not apply for or receive an encroachment permit from Bonner County. *Id.,* ¶ 3-12.

The plaintiffs allege that in 2000 the Bonner County Commissioners voted to validate the streets, highways, and rights-of-way of Schweitzer Village as public rights-of-way. *Id.,* ¶ 3-15. Plaintiffs allege that in November 2005 the Schweitzer area roads were annexed into jurisdiction of the Independent Highway District. *Id.,* p. *6,* ¶ 3-16.

Some time prior to June 2008, plaintiffs realized that a portion of both dwellings on 27A and 27B extended easterly, over the eastern boundaries of the properties and into the right-of-way of Telemark Road. *Id.,* p. *6,* ¶ 3-19. In June 2008, plaintiffs requested that Independent Highway District vacate the portion of right-of-way where the dwellings exist plus five feet (for setback). *Id.,* p. *6,* ¶ 3-20. The Commissioners of IHD denied this request. *Id.,* p. *6,* ¶ 3-21; Exhibit M.

After the IHD Commissioners' vote denying the request for vacation and abandonment, plaintiff Ohme rebuilt the deck on the northeast corner of his house. *Id.,* p. *6,* ¶ 3-22. Apparently Ohme feels that even after they asked permission and were refused, it was still somehow a good idea to build, and after building, to then sue IHD, which really had nothing to do with Ohme's problems which Ohme created. The new roof line extended a few feet further into the Telemark right-of-way, and Plaintiff Ohme did not obtain a Building Location Permit at the time, but now concedes that a permit is

required. *Id.,* p. *6,* ¶ 3-23. Plaintiffs claim the County will only issue the Building Location Permit if the Independent Highway District signs off on it. *Id.,* p. 7, ¶ 3-24, citing *Bonner County Revised Code* § 11-110A. Plaintiffs allege the IHD sent a letter to the County Planning Director indicating that the Board of the IHD did not intend to sign a building location permit for the deck. *Id.,* p. 7, ¶ 3-25.

Plaintiffs filed this lawsuit seeking to quiet title, alleging adverse possession of the property in question. *Id.,* pp. 7-8. If the plaintiffs are successful in this action, plaintiff Ohme seeks a writ of mandate compelling the defendant to sign a Building Location Permit application for Ohme's deck and roof construction. *Id.,* pp. 8-9.

On July 26, 2013, IHD filed its Motion to Dismiss and "Brief in Support of Motion to Dismiss." On October 9, 2013, plaintiffs filed "Plaintiffs' Response Brief to Defendant's Motion to Dismiss." On October 11, 2013, IHD filed a Motion to Strike Portions of Plaintiffs' Response Brief and a Motion to Shorten Time for hearing on that motion to strike. On October 16, 2013, IHD filed "Defendant's Reply Brief in support of Motion to Dismiss." Oral argument on IHD's motion to dismiss was held on October 17, 2013. At that hearing, counsel for plaintiffs had no objection to the motion to shorten time, thus, it was granted. The Court then heard the motion to strike, and granted IHD's motion to strike. The Court will only consider the pleadings in IHD's motion to dismiss so as to avoid turning the motion to dismiss into a motion for summary judgment. The Court then heard argument on IHD's motion to dismiss.

II. STANDARD OF REVIEW.

The standard for reviewing a dismissal for failure to state a cause of action pursuant to I.R.C.P. 12(b)(6) is the same as the standard for reviewing a grant of summary judgment. See *Idaho Schs. For Equal Educ. v. Evans*, 123 Idaho 573, 578,

850 P.2d 724, 728 (1993); *Rim View Trout Co. v. Dep't. of Water Resources*., 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). The grant of a 12(b)(6) motion will be affirmed where there are no genuine issues of material fact and the case can be decided as a matter of law. See *Moss v. Mid-American Fire and Marine Ins. Co.,* 103 Idaho 298, 302, 647 P.2d 754, 758 (1982); *Eliopulos v. Idaho State Bank,* 129 Idaho 104, 107-08, 922 P.2d 401, 404-05 (Ct.App.1996). When reviewing an order of the district court dismissing a case pursuant to I.R.C.P. 12(b)(6), the non-moving party is entitled to have all inferences from the record and pleadings viewed in its favor, and only then may the question be asked whether a claim for relief has been stated. See *Idaho Schs. for Equal Educ*., 123 Idaho at 578, 850 P.2d at 729; *Miles v. Idaho Power Co.,* 116 Idaho 635, 637, 778 P.2d 757, 759 (1989). "The issue is not whether the plaintiff will ultimately prevail, but whether the party 'is entitled to offer evidence to support the claims.' " *Orthman v. Idaho Power Co*., 126 Idaho 960, 962, 895 P.2d 561, 563 (1995) (quoting *Greenfield v.. Suzuki Motor Co. Ltd.,* 776 F.Supp. 698, 701 (E.D.N.Y.1991)).

III. ANALYSIS.

A. Introduction and Positions of the Parties.

IHD has filed a motion to dismiss based on the following Idaho Rules of Civil Procedure:

> 12(b)(1): lack of subject matter jurisdiction
> 12(b)(6): failure to state a claim over which relief can be granted
> 12(b)(7): failure to join an indispensable party
> 12(c): motion for judgment on the pleadings

Motion to Dismiss, p. 3.

This Court cannot base dismissal on 12(b)(1) because this Court can hear property issues when the property is located in Idaho. District courts in the state of

Idaho are courts of general jurisdiction. *See* I.C. § 1-705 (original jurisdiction); *see also* I.C. § 5-401 (2013)(actions in determining rights of property are properly brought within county where property is located); § 5-514 (ownership of property within state subjects a person to courts of Idaho). Although the Court might not have authority to grant the relief requested, limits on the relief a court can grant does not necessarily affect subject matter jurisdiction. *See e.g.*, I.C. § 67-5379 (the type of relief available under a judicial review pursuant to the Idaho Administrative Procedure Act).

Regarding IHD's motion to dismiss under I.R.C.P. 12(b)(6) and Motion for judgment on the pleadings [I.R.C.P. 12(c)], a Rule 12(b)(6) motion to dismiss for "failure to state a claim upon which relief can be granted" must be considered against the Rule 8(a) requirement that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." I.R.C.P. 12(b)(6); 8(a)(1); *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct. App. 1992). Inferences are construed in favor of the plaintiff: "The nonmoving party is entitled to have all inferences from the record viewed in his favor and only then may the question be asked whether a claim for relief has been stated." *Idaho Branch Inc. of Associated General Contractors of America, Inc. v. Nampa Highway Dist. No. 1*, 123 Idaho 237, 240, 846 P.2d 239, 242 (Ct. App. 1993); *see also Independent School Dist. of Boise City v. Harris Family Ltd. Partnership*, 150 Idaho 583, 587, 249 P.3d 382, 386 (2011). A 12(b)(6) motion to dismiss may be granted "when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief." *Harper*, 122 Idaho at 536, 835 P.2d at 1347 (Ct. App. 1992)(internal quotations omitted). The same liberal construction is afforded to a complaint under a 12(c) motion for judgment on the pleadings. *See Bowman v. Bohney*, 36 Idaho 162, 210 P. 135, 136 (1922).

IHD's arguments are as follows:

As to the **writ of mandate**, IHD argues it does not have legal authority to enforce building codes or to issue building permits. IHD argues that it only gave a recommendation to Bonner County when the County sought its advice. Brief in Support of Motion to Dismiss, p. 4. Plaintiffs did not respond to this argument in briefing. IHD then added plaintiffs' request for a writ of mandate fails to meet the statutory criteria of I.C. § 7-302. Defendant's Reply Brief in Support of Motion to Dismiss, pp. 6-7.

Alternatively, regarding the writ of mandate, IHD argues that Bonner County is an indispensable party, and because Bonner County has not been named a party, the Court should dismiss the complaint pursuant to Rule 12(b)(7). *Id.,* p. 8. Plaintiffs argue that in order for them to obtain a building location permit from Bonner County, they must first prove they own the land under their house and driveway. Plaintiffs' Response Brief to Defendant's Motion to Dismiss, pp. 6-7.

> Once proof of ownership is established, then Ohme may apply to Bonner County for a BLP (Building Location Permit). Bonner County will not process the application until IHD signs off. Ohme is simply requesting that after this court quiets title in Plaintiffs, it then mandate that IHD sign Plaintiffs' BLP application to Bonner County.

Id., p. 7. IHD responds that since plaintiffs admit the building location permit may be issued only by Bonner County, "to the extent plaintiffs desire a court order that a permit must be issued, such an order can be directed only to Bonner County." Defendants' Reply Brief in Support of Motion to Dismiss, p. 7. IHD points out:

> Bonner County is the agency which conducted the validation proceedings and issued the Validation Order. Any questions Plaintiffs may have regarding the validity of the Validation Order or proceeding must be addressed to Bonner County. Plaitniffs chose not to appeal the Bonner County Validation Order. They should not now be allowed to do so indirectly through this proceeding.

Id. IHD argues "Bonner County is an indispensable party to this litigation because complete relief (as required in I.R.C.P. 19(a)(1)) cannot be accorded without the presence of the County." *Id.* IHD notes plaintiffs admit that IHD's signature does not in any way guarantee that Bonner County will approve Plaintiffs' BLP [Permit] application." *Id.,* citing Plaintiffs' Response Brief to Defendant's Motion to Dismiss, p. 7.

As to the **quiet title action**, IHD argues Idaho law does not allow for adverse possession of a public right-of-way, nor does Idaho law allow for a district court to grant permission for a permanent obstruction into a public right-of-way. Brief in Support of Motion to Dismiss, pp. 5-7. Plaintiffs argue "…they adversely possessed the land before it became a public road." Plaintiffs' Response Brief to Defendant's Motion to Dismiss, p. 1. (emphasis in original). Plaintiffs then set forth their argument as to why they have stated a claim for adverse possession. *Id.,* pp. 3-6. IHD notes the adverse possession issue as to the location of the building cannot be decided on the motion to dismiss, as it requires looking outside the pleadings, specifically at the Bonner County Validation Order. Defendant's Reply Brief in Support of Motion to Dismiss, p. 4. However, IHD argues that as to the deck and roofline, as a matter of law plaintiffs cannot establish adverse possession (*Id.,* p. 8), and as to the paving the driveway and planting landscaping, plaintiffs' claims of adverse possession also fail. *Id.,* pp. 8-16.

B. Analysis of Writ of Mandate.

As set forth above, IHD argues plaintiffs' request for a writ of mandate should be dismissed because the highway district does not have independent legal authority to issue building location permits. IHD only provided advice and a recommendation when asked by Bonner County. Because Bonner County made the decision not to issue the permit, IHD argues it cannot be sued to perform a duty that, by law, it cannot perform.

Alternatively, IHD argues that because Bonner County makes the permit decision, Bonner County is a necessary party that either must be joined or else this case must be dismissed. The Court agrees with both propositions: a writ of mandate is not the appropriate relief and Bonner County is a necessary party (and IHD is not the appropriate party).

Plaintiffs seek a "peremptory writ of mandate compelling Defendant to sign a Building Location Permit application for Plaintiff Ohme's deck and roof construction." Verified Complaint, pp. 8-9. Plaintiff Ohme is applying for a Building Location Permit, which is required for the construction in Bonner County. *See* Bonner County Code 11-101 (2013). Plaintiffs argue they are entitled to a writ of mandate under statute:

> The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It must be issued upon affidavit, on the application of the party beneficially interested.

I.C § 7-303. Plaintiffs' Response Brief to Defendant's Motion to Dismiss, p. 7. "Existence of an adequate remedy in the ordinary course of the law, either legal or equitable in nature, will prevent issuance of a writ, and the party seeking the writ must prove that no such remedy exists." *Idaho Falls Redevelopment Agency v. Countryman*, 118 Idaho 43, 44 (1990).

A writ of mandate is not the appropriate relief in this case. In *McCuskey v. Canyon County*, a property owner sought a writ of mandate with an Idaho district court for a building permit that the county denied. The Idaho Supreme Court denied this relief: "It is well-established that a writ of mandate will not issue to compel the performance of a discretionary act." *McCuskey v Canyon County*, 123 Idaho 657, 663, 851 P.2d 953, 959 (1992). The Court went on to note that Idaho Code § 67-6519 of the Local Land Use Planning Act gives a county the discretion to deny an application. *Id.*

"[A] writ of mandate is not available to compel the issuance of such a permit." *Id.* Instead, judicial review of a county's decision regarding a land-use application is likely governed by the Idaho Administrative Procedure Act. *See* I.C. § 67-6519 (judicial review of application decision to be reviewed pursuant to chapter 52, title 67 of the Idaho Code). The scope of review under the Administrative Procedure Act is to affirm, set aside, or to remand as necessary. I.C. § 67-5279. Because the Court cannot give the plaintiffs the relief they seek, the writ of mandate, the Court must dismiss this request.

IHD correctly argues plaintiffs' brief points to no statute or ordinance that directs IHD to recommend approval of the permit. The defendant is correct in its citation that writs of mandate cannot be issued to control matters of discretion or compel the performance of a discretionary act. *Total Success Investments, LLC v. Ada County Highway District*, 148 Idaho 688, 691 (Ct.App. 2010).

Here, a writ of mandate is prevented by a legal procedure for building location permit and remedies in appealing the denial of a permit. The governing law is the Local Land Use Planning Act. *See* Idaho Code § 67-6503 (participation of local governments in Local Land Use Planning Act), I.C. § 67-6504 (powers of county commissioners), and I.C. § 67-6519 (permit granting process). Judicial reviews of this governing law are under the Idaho Administrative Procedure Act. *See* Idaho Code § 67-6521(1)(d)(Local Land Use Planning Act decisions are reviewed by Idaho Administrative Procedure Act), and I.C. § 67-5279 (limiting the type of relief to setting aside an agency's decision and remanding for further proceedings if necessary). Under the Idaho Administrative Procedures Act, administrative remedies must be exhausted before a judicial review can occur. I.C. § 67-5271.

The process for a Building Location Permit is to first apply with the Bonner County Planning Department. Bonner County Code § 11-101. The planning director reviews the application and approves or denies the permit application. *See* Bonner County Code §§ 11-112, 11-114. Decisions are appealed to the Bonner County Board of Commissioners. Bonner County Code § 11-116.

In this case, plaintiffs have not alleged that they have even applied to the Bonner County Planning Director, and plaintiffs have not alleged that they have appealed to the Board of County Commissioners. Additionally, by alleging that an appeal would be futile in their complaint, the plaintiffs have implied that administrative procedures and remedies exist. *See Verified Complaint*, ¶ 5.5. Because the plaintiffs have admitted that there is a remedy at law, and because case law requires this issue is an administrative review governed by the Local Land Use Planning and Administrative Procedure Acts, a writ of mandate is inappropriate and this Court must dismiss that request.

Alternatively, regarding the writ of mandate, IHD argues that Bonner County is an indispensable party, and because Bonner County has not been named a party, the Court should dismiss the complaint pursuant to Rule 12(b)(7). Defendant's Reply Brief in Support of Motion to Dismiss, p. 8. This Court agrees. This Court finds IHD is simply not the appropriate party for a review of a building-location-permit claim. Cities and counties exercise the powers conferred in the Local Land Use Planning Act. I.C. § 67-6503. In Bonner County, building location permits are granted at the discretion of a planning director who is appointed by the Bonner County Board of Commissioners. *See* Bonner County Revised Code §§ 11-101.01, 11-112, 11-114. Denials are appealed to the board of county commissioners. *Id.* § 11-116. Because this decision

and appellate process do not involve determinations by the IHD, the IHD is simply not the appropriate party.

C. Analysis of IHD's Motion to Dismiss Plaintiffs' Adverse Possession Claims.

As to the extension of plaintiff Ohme's roof and the deck some time after 2008 (Verified Complaint, p. 6, ¶ 3-22, 3-23), plaintiffs do not claim adverse possession based on those improvements as the statutory time period would not have run, and because they cannot adversely possess a public road. Realizing that, plaintiffs claim that in 1994, plaintiffs improved their front and side yards by paving a driveway and installing landscaping, and that such improvements are the basis of their adverse possession claims. Plaintiffs' Response Brief to Defendant's Motion to Dismiss, p. 2. The recent extension of Ohme's roof line and deck were apparently "…constructed over his driveway and landscaped area." *Id.*

IHD argues Telemark Road is a public road. The complaint alleges that this public road was validated in 2000. IHD argues that it further meets the criteria through prescriptive use: five or more years of public use and public maintenance. I.C. §§ 40-202(3); 40-109(5).

IHD argues public roads cannot be adversely possessed. "Possession and use of an unused portion of a highway by an abutting owner is not adverse to the public and cannot ripen into a right or title by lapse of time no matter how long continued." *Rich v. Burdick*, 83 Idaho 335, 345, 362 P.2d 1088, 1094 (1961). Non-use over a portion of highway does not constitute abandonment, nor does it stop the public from asserting its right over the property. *Id.* IHD argues in *Boise City v. Sinsel*, 72 Idaho 329, 241 P.2d 173 (1952), a city permitted an encroachment onto a public right-of-way and demanded that it be removed 25 years later. The Idaho Supreme Court held "no right to use the

street for private purposes can be acquired by prescription against the municipality." 72 Idaho 329, 339, 241 P.2d 173, 179. IHD argues that it is well-settled Idaho case law that "an abutting landowner's use or possession of an unused portion of a highway is not adverse to the public and cannot ripen into a right of title no matter how long continued." *Pullin v. City of Kimberly*, 100 Idaho 34, 36, 592 P.2d 849, 851 (1979); *see also Pines, Inc. v. Bossingham*, 131 Idaho 714, 963 P.2d 397 (Ct. App. 1998)(noting that unused portions of right-of-ways cannot be subject to adverse possession). IHD argues that, because plaintiffs' quiet title claim rests primarily on adverse possession of a right-of-way, which is not permitted in Idaho law, the case should be dismissed for failure to state a claim.

Additionally, IHD argues it does not have the legal authority to grant permission for a permanent obstruction into a public right-of-way. A highway district has exclusive general supervision, jurisdiction, and authority over the highways and public rights-of-way within its highway system. *See* I.C. 40-13-1(1), (8). Although the highway district has authority over the public rights-of-way in its highway system, IHD argues Idaho case law holds that permanent rights for encroachment cannot be granted, referring to *Boise City v. Sinsel*, 72 Idaho 329, 339, 241 P.2d 173, 179 (1952)(holding that a city does not have the authority, without a statute, to grant a permanent encroachment on a public use). Because IHD cannot grant the relief requested as to the encroachment, IHD argues that the claim should be dismissed.

IHD is correct in the law cited above. This Court must dismiss plaintiffs' adverse possession claims because the plaintiffs are attempting to argue that they have acquired title to land that is part of a public right-of-way. The plaintiffs' argument is that they have adversely possessed the Telemark Road right-of-way.

Highways include roads that are established for the public. *See* Idaho Code § 40-109(5). By the pleadings, the plaintiffs and IHD agree that Bonner County has established Telemark Road as a public right-of-way.

A person cannot claim title to property by adverse possession when the property is acquired for a public use. In *Rich v. Burdick*, claimants had erected gasoline pumps and a concrete island on land that the court found to be on a highway right-of-way. 83 Idaho 335, 337, 362 P.2d 1088, 1089 (1961). The Court was not swayed by the claimants' argument that they had occupied that area, uninterrupted, for thirty years: "Possession and use of an unused portion of a highway by an abutting owner is not adverse to the public and cannot ripen into a right or title by lapse of time no matter how long continued." *Rich v. Burdick*, 83 Idaho 335, 345, 362 P.2d 1088, 1094 (1961); *see also Pullin v. City of Kimberly*, 100 Idaho 34, 592 P.2d 849 (1979); *Pines, Inc. v. Bossingham*, 131 Idaho 714, 717, 963 P.2d 397, 400 (1998).

Here, plaintiffs have a deck that has been encroaching onto a right-of-way where the street is located. Because one cannot adversely possess public property, plaintiffs' adverse possession claim must be dismissed as to extension of the roof and the deck.

Additionally, even accepting plaintiffs' claims that they improved with a driveway and landscaping in 1994, before Telemark Road was arguably a public road, plaintiffs' claims fail for two reasons. First of all, plaintiffs have not met the 20 year requirement set forth in I.C. § 5-210. If the landscaping and driveway occurred in 1994, only nineteen years have passed. This fact does not apply to the actual footprint of the house, but that issue need not be decided in order to decide IHD's motion to dismiss (because IHD has made no counterclaim that plaintiffs' houses must be moved). The

fact that less than 20 years has passed since plaintiffs installed the driveway and landscaping is dispositive on the later encroachment of the roof and deck.

A second dispositive issue on plaintiffs' adverse possession claims is there is no proof that plaintiffs' driveway and landscape meets the "substantial enclosure" or "cultivated or improved" as set forth in I.C. § 5-210. Plaintiffs have shown no evidence that the driveway and/or landscaping was hostile to the true owner by an unequivocal act (*Berg v. Fairnman,* 107 Idaho 533, 681 P.2d 1008 (1984)); there has been no showing by plaintiffs that IHD did not have the need to use the full width of their right of way (*Winn v. Eaton,* 128 Idaho 670, 673, 917 P.2d 1310, 1313 (Ct.App. 1996)) and no showing by plaintiffs that their landscape and driveway amounted to improvements that "sufficiently delineate the area adversely occupied to meet the statutory requirements." *Owen v. Boydstun,* 102 Idaho 31, 642 P.2d 413 (1981) (partial fence, building a firepit, clearing brush and removing rocks not enough); *Kolouch v. Kramer,* 120 Idaho 65, 818 P.2d 876 (1991) (planting trees down the center of a private driveway to prevent its use), *Utter v. Gibbins,* 137 Idaho 361, 365, 48 P.3d 1250, 1254 (2002) (planting fruit trees not enough to meet the improvement or enclosure element), *Persyn v. Favreau,* 119 Idaho 154, 804 P.2d 327 (Ct.App. 1990) (installing a fence and clearing brush not enough to prove hostile or adverse). These cases had improvements that occupied more, obstructed more, and interfered more with others' property rights as compared to plaintiffs' driveway and landscaping in the instant case, yet these more egregious acts were insufficient to prove "substantial enclosure" per Idaho's appellate courts.

D. When Title Vests is not a Relevant Issue at this Juncture.

Idaho does not have case law holding when title vests under adverse possession. In Washington, title vests automatically when the elements of adverse

possession are fulfilled through the statutory period. *Gorman v. City of Woodinville*, 283 P.3d 1082, 1083 (Wash. 2012). Because title invests automatically, an owner who had lost his interest in the property cannot extinguish the adverse possessor's title by transferring the property to the government. *See Id.* at 1083-84; *see also Morrison v. Linn*, 147 P. 166 (Mont. 1915) (holding that perfect title vests in adverse possessor when statute of limitations runs, which perfects title in the adverse possessor and can extinguish a paper title).

In this case, based on the plaintiffs' pleading, plaintiffs allege that the title vested before the right-of-way became public. *See Verified Complaint* ¶¶ 4.5-4.6. However, this title would only extend to the original footprint of the structure and the original deck. IHD states: "To this point in this litigation, IHD has not asked that Plaintiffs' building be removed." Defendant's Reply Brief in Support of Motion to Dismiss, p. 17. According to the complaint, after Plaintiff Ohme discovered that his dwelling extended past the true boundary of his lot, he rebuilt the deck on the northeast corner and extended it further into the right-of-way. *Verified Complaint* ¶¶ 3.19, 3.22. As to when title vested for the original deck, Idaho courts have not addressed when this happens. This would seem to be a matter of first impression in Idaho. The Court need not reach that issue on IHD's motion to dismiss.

As to the part of the deck and roofline that was more recently built, which further extends into the right-of-way, the Court must dismiss any adverse possession claim because plaintiff Ohme constructed the deck after the road was made an official public right-of-way. Idaho case law holds that adverse possession claims cannot succeed against property held for public use. *See Rich v. Burdick*, 83 Idaho 335, 345, 362 P.2d

1088, 1094 (1961); *Pullin v. City of Kimberly*, 100 Idaho 34, 592 P.2d 849 (1979); *Pines, Inc. v. Bossingham*, 131 Idaho 714, 717, 963 P.2d 397, 400 (Ct. App. 1998).

IV. CONCLUSION AND ORDER.

Because a writ of mandate is inappropriate relief for a party seeking a building permit that a county has denied, and because it is not possible to acquire property by adverse possession when the property is designated for a public use, all of plaintiffs' claims must be dismissed. For the reasons stated above,

IT IS HEREBY ORDERED defendant IHD's motion to strike is GRANTED.

IT IS FURTHER ORDERED defendant IHD's motion to dismiss is GRANTED as to plaintiffs' claims for a writ of mandate. Plaintiffs' claims for a writ of mandate are DISMISSED.

IT IS FURTHER ORDERED defendant IHD's motion to dismiss is GRANTED as to all of plaintiffs' claims regarding adverse possession. Plaintiffs' claims based upon adverse possession are DISMISSED.

IT IS FURTHER ORDERED plaintiffs' Verified Complaint is DISMISSED in its entirety. Defendant IHD is the prevailing party in this litigation.

IT IS FURTHER ORDERED counsel for IHD prepare a Judgment consistent with this Memorandum Decision and Order Granting Defendant's Motion to Dismiss.

Entered this 12th day of December, 2013.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of December, 2013, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
William M. Berg	208-263-7557	David E. Wynkoop	208-887-4865

_____
Deputy Clerk