No. 68618-6-I

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I

Crystal Ridge Homeowners Association, et al.,

Respondents,

vs.

City of Bothell,

Appellant.

RESPONDENTS' ANSWER TO AMICUS CURIAE BRIEF OF WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

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TABLE OF CONTENTS

I. INTRODUCTION

The Washington Association of Municipal Attorneys ("Amicus") reiterates the arguments of Bothell and continues its recasting or ignoring of basic irrefutable facts established below before the Honorable Judge Ronald Castleberry. The arguments of Amicus concerning Comcast, Puget Sound Energy, the Growth Management Act, the Burien code, side sewers and public policy are all unavailing.

II. ARGUMENT

A. The Developer Of Crystal Ridge Made An "Express" Statutory Dedication.

It is irrefutable that there is a "drainage easement" dedicated by the Developer of Crystal Ridge to the County, which it duly accepted pursuant to RCW 58.17.020. CP 45-47. It is also irrefutable that the designation is noted as "Tract 999 OPEN SPACE." *Id.* It is a long rectangular lot that traverses the entire western edge of the plat and is not in any way an "individual" lot[1]. *Id.* Dr. Denby, the geotechnical engineer who testified before the Hearings Examiner at the time of plat development, personally observed the infiltration pipe's installation in the trench in the "drainage easement" called out on the plat. CP 296. Engineer Trepanier, who

[1] The Disclosure document cannot be construed as extending to Tract 999. It is not an "individual lot." It cannot be sold. The City has never submitted any evidence that the Disclosure was filed of record on Tract 999 or that it had a proper legal description. We adopt our argument at pages 12-14 of Respondent's Brief and will not be reiterating the arguments here.

designed the drainage controls for this site testified that the interceptor pipe is the only thing that is within the 25 foot dedicated easement on Tract 999. CP 291. An express dedication of the pipe was made to Snohomish County over twenty-five years ago.[2]

Amicus claims that the only argument made on appeal is that the interceptor pipe benefits the roads within the subdivision and therefore it is not private. *See Amicus Brief,* p. 2. This assertion is incorrect. At the trial level and before this Court, it is irrefutable that the interceptor pipe currently deals with offsite, uphill flows a half mile away and flows from leaking municipal storm drains and waterlines. CP 296-297. At the time of its installation, it was also draining flows from failing uphill septic systems. *Id.* Dr. Denby testified that without the interceptor pipe, flows

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[2] The citation to the Auburn Code is odd since a perusal of it shows it supports the Respondents. The definition section, ACC 13.10.010s states that: " 'Drainage Facility' or 'storm water facility' means a constructed or engineered feature that collects, conveys, stores or treats storm and surface water runoff." The definition for "surface and storm water" includes groundwater and the springs and seeps that were noted as such a problem in the development of the Crystal Ridge site. The Code states that "surface and storm water means water originating from rain fall and other precipitation that is found on ground surfaces and in *drainage facilities*, rivers, streams, *springs, seeps*, ponds lakes, wetlands and *shallow ground water*." *Id. (emphasis added).* Finally "runoff" is even more specifically defined and includes groundwater:

> Runoff means that portion of water originating from rainfall and other precipitation that flows over the surface or just below the surface from where it falls and is found in *drainage facilities,* rivers, streams, *springs, seeps,* ponds, lakes wetlands and *shallow groundwater* as well as on ground surfaces. For purposes of this definition *"groundwater" means all waters that exist beneath the land surface or beneath the bed of any stream, lake or reservoir, or other body of surface water, whatever may be the geological formation or structure in which such water stands or flows, percolates or otherwise moves.*

See Burien City Code 13.10.010 (*emphasis added*).

would course beyond the plat of Crystal Ridge offsite down and beyond 9th Avenue. CP 296. There is also a regional sewer pipe in the same easement. Engineer Trepanier testified that the interceptor pipe aids in stabilizing the sewer pipe and that, given its function, private property owners would never be allowed to make decisions regarding the maintenance and repair of the interceptor pipe. CP 292.

Neither the City nor Amicus has addressed any of these irrefutable facts, but prefer to ignore them. Amicus ends this section of its brief stating that the Developer, in conjunction with the municipality, must be free to decide who is responsible for what in a plat. In this case, it is clear that decision was made and embodied in the plats of Crystal Ridge. CP 45-47. The City, upon annexation, became the successor to Snohomish County and it is therefore responsible for the maintenance and operation of all the drainage easements on the Crystal Ridge plats that were dedicated to the County. CP 45-47; 730.

B. <u>The Interceptor Pipe Is Not Owned By Alderwood Water District and It Is Not Privately Owned.</u>

In the next two sections of its brief, Amicus discusses utility and telecommunication easements and private easements. *See Amicus Brief.* pp. 2, 3, sub-sections a & b. Respondents have no argument with the proposition that, if an easement is granted to Comcast or Puget Sound,

those entities have the maintenance obligations for their utilities, not the local municipality. In this case, if there was sewage effluent emanating from the trench area, Alderwood Water District would be answerable for the repair and maintenance of its easement for sewer purposes. The facts Amicus presumes are not before this Court. The City's interceptor pipe is in disrepair and needs to be maintained.

The interceptor pipe is not private since it was dedicated to Snohomish County. The County accepted the dedication via the signatures of its Director of Public Works, Director of Planning and Development and the Chairman of the County Council. CP 45. This is not a case involving downspouts and side sewers. Private side sewers, by definition, can never become part of a municipal wastewater facility. *See* WAC 173-240-020 (gravity side sewers that connect to individual dwellings excluded in definitional section of wastewater facilities). The arguments Amicus makes in this section of its brief, and again later (p. 4, 5, Section 2), are unavailing.

C. The Growth Management Act And Future Planning Have Nothing To Do With This Case.

In the final section of this part of its argument, Amicus states that the easement might be a dedication for "future" use as is required under the Growth Management Act ("GMA"). *See Amicus Brief,* p. 4, sub-

section c (*emphasis in original*). Dr. Denby witnessed the infiltration pipe being placed in the trench which is in the twenty-five foot easement on the plat labeled "Tract 999." CP 296. So, no "future" use was contemplated. The plat was accepted in 1987 and the GMA was not passed until 1990, so it cannot apply here. *See* RCW 36.70A.020. Amicus's arguments have no merit.

D. The Interceptor Pipe and Trench Were Designed by Engineer Trepanier As Part of the "Detailed Drainage Plan" for Crystal Ridge Under the 1979 County Code.

As a practical matter, one cannot "divorce" the interceptor pipe from the rest of the drainage features designed for the Crystal Ridge plats. The groundwater flows through four large lateral pipes that carry the flows to a rectangular retention detention facility on site and a circular pond on neighboring property (they become surface flows) which, in turn, both send the flows to a natural stream (they become riparian flows). CP 810. It is irrefutable that Engineer Trepanier designed the drainage facilities for Crystal Ridge and he filed the plats for the Developer. CP 809. He read the City's Answers to Interrogatories (CP 778-804) where it first articulated its theory that the groundwater interceptor drain was not a "drainage facility" because it conveyed groundwater and therefore it was somehow not part of the system. Engineer Trepanier testified that this position was "simply wrong." CP 810-811. He clearly testified about the

process of the County accepting drainage easements in those years. *Id.* The plats unmistakably were accepted by the proper officials of Snohomish County. There was no "carve out" of the interceptor pipe as is suggested by the City and Amicus twenty-five years later. No testimony exists to refute Engineer Trepanier—only theoretical assertions.

Amicus asserts that Respondents' analysis here will have such a "broad brush" that it will encompass "roof rain gutters." *See Amicus Brief,* p. 7. No such result is predicated on the facts before the Court. In fact, Engineer Trepanier testified that it is "customary that drains from individual lots, for example, the six-inch pipes that connect house downspouts...are considered privately owned and not part of the county or city easement." CP 809. He went on to explain: "However, if a drain is in a designated ten foot or greater easement dedicated to a city or county, it is considered to be public in nature and its repair and maintenance is the responsibility of the city or county." *Id.*

Engineer Trepanier testified that he made mylars showing the interceptor drain and submitted them to the County so that it could maintain and repair the system. CP 291. It is immaterial that the County or the City lost them and that the interceptor pipe is not depicted in detail on the plat. In fact, several other features are not depicted on the plat, such as the four lateral drains or the circular pond on the neighbor's

property. CP 45-52. That does not mean the features do not exist or they are not part of the "drainage facilities" that the City is responsible for.

Finally, Engineer Trepanier also noted that the City's (and now Amicus's) position that Snohomish County Code 24.28.040 was a formal process which was properly documented was "incorrect" because "[p]aperwork was pretty poor back in those years." CP 291. The County signing off and accepting the final plat document for filing with the County Auditor was the most important and definitive part of the process. *Id.* As the trial court noted, if the maintenance was to be awarded the homeowners, under the County's Code, it had to have a maintenance plan in hand. CP 27. He also observed that the State's platting statute, RCW 57.17, would pre-empt any county code. CP 26-27.

In terms of public policy, there are no great surprises here that will thrust an onerous burden onto the cities of Washington State. Upon contemplating annexing an area, cities need only read the plats and the easements called out on them to ascertain their maintenance responsibilities. Municipal authorities collect surface water fees which should be used to pay for the long-term maintenance of facilities within their jurisdictions. In terms of public policy, it makes no sense to thrust onto homeowners the responsibility to make decisions concerning a pipe twelve feet beneath the surface which safeguards a regional sewer pipe.

III. CONCLUSION

The Court is respectfully requested to uphold the trial court's decision granting summary judgment to the Respondent Crystal Ridge Homeowners' Association.

DATED this 28th day of May, 2013.

TERRELL MARSHALL DAUDT & WILLIE, *PLLC*

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CERTIFICATE OF SERVICE

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I, RACHEL E. HOOVER, declare the following to be true and correct under penalty of perjury under the laws of the State of Washington:

That I am now and at all times herein mentioned was a citizen of the United States and a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action and am competent to be a witness herein.

That on the 29th day of May, 2013, I cause to be served via messenger service a copy of the following documents:

1. Respondents' Answer to Amicus Curiae Brief of Washington State Association of Municipal Attorneys; and

2. Certificate of Service

to the following parties:

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Additionally, I am filing, via Pacific Coast Attorney Services, the

above referenced documents with the Clerk of the above-entitled court.

DATED this 28th day of May, 2013, at Seattle, Washington.

RACHEL E. HOOVER