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No. 69255-1-I

Skagit County Superior Court No. 11-2-00063-2

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

WEST COAST, INC., a Washington Corporation

Appellant,

v.

CAMANO CO-OPERATIVE WATER AND POWER CO.,

Respondent.

BRIEF OF RESPONDENT

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ORIGINAL

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I. STATEMENT OF THE CASE

Camano Co-Operative Water and Power Company ("Co-op" hereinafter) is a small cooperative utility owned by approximately 550 residential property owners on the west side of Camano Island. (Vol.I, p. 81) Because the Co-op has no professional staff it contracts with an operator to manage the water system. The operator is Water & Wastewater Services, which is owned by Kelly Wynn. (Vol.I, p.177) In 2004 the engineer on contract with the Co-op was George Bratton. (Vol.I, p.198)

In 2004 Appellant, West Coast, Inc. ("West Coast" hereinafter) decided to purchase a large vacant parcel of property on Camano Island and was told by Island County that to develop the property the owners had to provide a fire hydrant with adequate fire flow. (Vol.I, p.34 and 108) West Coast also knew that an 8-inch line to the property would be required and the only source of water was the Co-op. (Vol.I, p. 34-35) West Coast intended to plat the property for residential development. *Finding No. 6.* The subdivision project was called Saratoga Ridge. (Vol.I, p. 181) A condition of County plat approval was sufficient fire flow of water to the property. (Vol.II, p. 79)

In 2004 the Co-op had a utility system that was not optimal and the Board of Directors ("board" hereinafter) wanted to make water system improvements that would improve reliability and circulation. (Vol.I,

p.123) The existing system was constructed in 1928 and there were no as-built drawings for the water lines so that the actual location of some lines was not known to the Co-op. (Vol.I, p. 124-125) The existing system was described as consisting of "antiquated" technology. (Vol.II, p. 58-59)

The owner of West Coast was John Robinett who wanted to buy and develop the vacant parcel of land and approached the Co-op about providing water because Saratoga Ridge was in the Co-op's service area. (Vol.II, p. 80) He first approached Kelly Wynn and then the board of the Co-op. (Vol.II, p.164) Kelly Wynn faxed to Mr. Robinett a memo prepared by engineer Bratton in 2003 for a prior interested party that discussed the possibility of bringing water in sufficient volume to the subject property. *Finding No. 11*. Mr. Robinett and his former partner went to a Co-op board meeting in February 2004 to discuss providing water to the property. (Vol.II, p.166) Mr. Robinett had with him the Bratton memo about providing fire flow. He determined that he wanted to pursue option number one on the memo that discussed providing 500 gallons per minute to the property. (Vol.II, p. 166)

Because the Co-op wanted to improve its water system the board agreed to cost share with West Coast, hoping to make the needed upgrades at the same time that West Coast installed a new main line in the system along West Camano Drive. *Findings No. 26 & 28*. That agreement was

verbal and never included in the written agreement between the parties. (Exhibit 13) A written Developer Extension Agreement dated October 27, 2004 was signed between the parties, but the plans and specifications for the project that are referenced as being attached were never attached and did not exist at the date the agreement was signed by Mr. Robinett. (Vol.II, p. 143)

After engineer Bratton developed plans (Exhibit 23) for the provision of water to West Coast's property they were presented to the board for approval. (Vol.II, p. 37-38) The Co-op is required to have its six-year comprehensive plan approved by the State Department of Health. (Vol.II, p. 67-68) The engineering plans were approved by the Co-op board and then sent to the Department of Health for approval. (Vol.II, p.92-93) After initial problems getting the plans approved, the Department of Health did grant approval for the Bratton design. (Vol.II, p.98-99)

Mr. Robinett subsequently determined that the Bratton engineering plans approved by the Coo-op, Island County and the State Health Department were not acceptable, so he hired Omega Engineering. New plans by Omega Engineering were submitted to the Co-op but were not acceptable. The Co-op sent a letter to West Coast on August 16, 2006 (Exhibit 14) advising Mr. Robinett that the plans had to be revised to include the crossing on West Camano Drive.

Before any construction commenced on the water lines disagreement arose between the parties over the meaning of the cost sharing oral agreement. The disagreement was about what portion of the project was to be cost shared between the parties. (Exhibit 6) West Coast filed a Complaint[1] for breach of contract on October 26, 2010 one day before the six-year statute of limitations expired on written contracts. The issue of the dispute over the oral agreement was resolved on summary judgment.

The trial was about Plaintiff's allegation that "additional conditions" not in the Developer Extension Agreement were imposed on West Coast in violation of the Agreement. The Co-op denied West Coast's allegations. The issue for the Defendant was whether there was any mutual assent for a contract to even exist.

II. ARGUMENT

2.1 Standard of Review

Appellant argues that this Court should "make a de novo review" of the trial court decision in this matter. *Brief of Appellant, page 11.* This argument is based on Appellant's misinterpretation of *Devine v.*

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[1] The Complaint is attached **Appendix A** because it is not a document with Skagit County Superior Court and is not among the Clerk's Papers. The Complaint was filed in Island County and then venue was changed by agreement of the parties. For that reason the list of documents available to designate does not include the Complaint.

Employment Sec. Dept., 26 Wn.App. 778, 641 P.2d 231 (1980), which involved appeal of an administrative decision by a governmental agency commissioner. This Court determined in that case that "In the subject case no questions of fact are at issue." *Devine, supra*, at page 781. In the present case the trial court was called upon to make findings of fact, which are not reviewed de novo, but are subject to the substantial evidence test on appeal.

> In a civil case, the trial court's findings of fact will not be disturbed on appeal if they are supported by substantial evidence. Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.
>
> 21 *Wash. Prac.*, Fam. And Community Prop. L. § 51.29

This test is based upon the notion that the trier of fact is in the best position to decide factual issues. This Court has followed the rule in Washington that factual disputes resolved by a trial court will not be disturbed on appeal.

> The findings are amply sustained by the proofs. If we were of the opinion that the trial court should have resolved the factual dispute the other way, the constitution does not authorize this court to substitute its finding for that of the trial court. The judgment must be affirmed
>
> *Thorndike v. Hesperian Orchards, Inc.*, 54 Wash. 2d 570, 575, 343 P.2d 183, 186 (1959)

This proposition in the law has been repeatedly affirmed. The rule is well stated by Tegland *Washington Practice*, Civil Procedure, citing the *Thorndike*, *supra*, holding as follows:

> In the event of an appeal, the appellate court normally defers to the trial courts findings. Theoretically the appellate court has the authority to review factual determinations, but in the vast majority of cases, the trial court's findings will dictate the facts of the case as far as the appellate court is concerned.
> In a civil case, the trial court's findings of fact will not be disturbed on appeal if they are supported by substantial evidence. The rule is based upon the notion that the trier of fact is in the best position to decide factual issues.
>
> 14A *Wash. Prac.*, Civil Procedure § 33:17 (2d ed.)

In a recent decision from this Court *Endicott v. Saul*, 142 Wash. App. 899, 176 P.3d 560 (2008) the standard of review on appeal was discussed as follows:

> We review the trial court's decision following a bench trial to determine whether the findings are supported by substantial evidence and whether those findings support the conclusions of law. *Dorsey v. King County,* 51 Wash.App. 664, 668–69, 754 P.2d 1255 (1988). Substantial evidence is the quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County,* 141 Wash.2d 169, 176, 4 P.3d 123 (2000). In determining the sufficiency of evidence, an appellate court need only consider evidence favorable to the prevailing party. *Bland v. Mentor,* 63 Wash.2d 150, 155, 385 P.2d 727 (1963). In evaluating the persuasiveness of the evidence, and the credibility of witnesses, we must defer to the trier of fact. *Burnside v. Simpson Paper Co.,* 123 Wash.2d 93, 108, 864 P.2d 937 (1994). "[C]redibility determinations are solely for the trier of fact [and] cannot be reviewed on appeal." *Morse v. Antonellis,* 149 Wash.2d 572, 574, 70 P.3d 125 (2003).

> Unchallenged findings of fact are also verities on appeal. *In re Estate of Jones,* 152 Wash.2d 1, 8, 93 P.3d 147 (2004); RAP 10.3(g). We review questions of law de novo. *Sunnyside Valley Irrigation Dist. v. Dickie,* 149 Wash.2d 873, 879–880, 73 P.3d 369 (2003).
>
> *Endicott v. Saul*, 142 Wash. App. 899, 909, 176 P.3d 560, 566 (2008)

Appellant's argument that a de novo review is the standard for this appeal is incorrect and should be rejected. The substantial evidence test is the correct standard for review by this Court.

2.2 Parties Had No Meeting of the Minds On Cost Sharing

Appellant does not challenge the trial court's determination that the oral agreement about cost sharing was beyond the statute of limitations and thus dismissed upon summary judgment. The disagreement about cost sharing however is indicative of the larger failure of the parties to agree on several important factors. Kelly Wynn testified that the Co-op thought it was to share the West Camano Drive portion and Mr. Robinett thought the agreement was to share the entire cost of the project, which was described as West Camano Drive and Uplands Drive. Mr. Wynn testified using the term "we" as a reference to the Co-op:

> Q. Did you know what Mr. Robinett thought?
>
> A. He thought that we would pay 50 percent of the West Camano and Uplands portion of the project.
>
> (Vol.II, p.105)

Mr. Robinett confirmed this during cross-examination when asked about his understanding of the oral agreement on cost sharing. His testimony in response to a question about the oral agreement was:

> Q. What agreement are you talking about?
>
> A. The agreement to cost share in both the Uplands at the time, cost sharing in the Uplands and West Camano Drive, because in the [board meeting] minutes it said they would cost share for both.
>
> (Vol.III, p. 105)

This disagreement was never resolved and because West Coast waited until after the statute of limitations for oral agreements had expired, its claim was dismissed upon motion for summary judgment. CP 203-204.

After summary judgment disposed of the oral agreement cost share issue, the only remaining issue was the claim that the Co-op imposed additional conditions on West Coast after the Developer Extension Agreement was signed. CP 240-243.

2.3 No Mutual Assent About Project Design

The disagreement about alleged additional conditions imposed by the Co-op on West Coast involved the construction of crossover connections across West Camano Drive. The trial judge succinctly described the water main system in unchallenged Findings of Fact as follows:

> 13. The Bratton drawings show a 4" water main along the west side of West Camano Drive. This 4" main supplies water to 11 houses on the west side of West Camano Drive. It runs from a fire

hydrant on the east side of West Camano Drive through a crossover under the road and then south along the west side of West Camano Drive, extending beyond the intersection of West Camano Drive and Uplands Road.

14. The Bratton drawings also show 1½" PVC water mains on the east side of West Camano Drive. One 1½" main runs south from the same fire hydrant. The other 1½" main runs north from the intersection of West Camano Drive and Uplands Road. These two 1½" mains do not connect and have been described as "spurs."

15. The Bratton drawings do not depict a 4-inch main on the east side of West Camano Drive between the fire hydrant and Uplands Road. The only 4-inch main on West Camano Drive in this vicinity was located on the west side of the drive.

The reason the trial judge described the water system in such detail was because at trial it became obvious that West Coast did not understand the existing water system and had parts of it reversed. This became obvious even during the first day of trial when counsel for Appellant called a Co-op board member Ron Little to the stand for testimony and drew a diagram of the water system on a whiteboard for illustrative purposes:

Q. And something that you said this morning that I'm trying to understand, okay? You see this line that I have drawn? For purposes of my question can you assume that this is West Camano Drive?

A. I will assume that.

Q. Okay. And I may have north and south wrong, and I think I do, but I don't know. I know I've – maybe not, that's west. I got west right.

A. That had better be east.

MR. MOSER: I don't think so Counsel.

MR. COGDILL: Okay, the water is over here then.

Q. (BY MR. COGDILL) Okay, the water is over here then. We will do that. I don't much care whether it's north or south, but I just want to make sure we got the water right, okay? As I understand it, as of 2004, there was a 4-inch main on the east side of West Camano Drive?

A. No, sir, the west side.

(Vol.I, p. 101-102)

This colloquy is not pointed out to embarrass experienced and learned counsel for Appellant, but to demonstrate the confusion about the direction and location of the water line that was option number one of the Bratton 2003 memo.

Appellant argues that it was told all it had to do was install 2660 feet of 8-inch pipe to get water to its property and it was justified in relying on that information. As the trial judge pointed out, that information and assumption was flawed from the very beginning. The central document to reveal the flaw is Exhibit 71, which is attached **Appendix B** to this Brief. On page one at paragraph 1.b somebody has changed the word "south" to "north" which changed the entire understanding of the project.

The Bratton memo to a third-party gave two options for bringing water for fire flow to the subject property. Option number one was from the south and option number two was from the north. The 2,660 feet of water line is found on page one the Developer Extension Agreement

(handwritten) is based on the fourth page of Exhibit 71 which is a Computer Schematic prepared by engineer Bratton. As the trial judge pointed out in Conclusion of Law No. 2(a):

> The length of the new 8-inch main set out in the Developer Extension Agreement (2660 lineal feet) is the sum of 750 feet and 1910 feet from option number one of the Bratton memo. These distances describe water mains south of Uplands Road, however, not where the proposed 8-inch extension was to be built.

The project as proposed by Appellant was to bring water in a new 8-inch line from a fire hydrant at the north end of West Camano Drive down to Upland Road and then to Saratoga Ridge for adequate fire flow for the development. (Exhibit 23) The trial judge correctly noted that the 2,660 lineal feet is based on the project coming to Uplands Road from the south, not the north. This fundamental misunderstanding explains why a person (not identified in the record) struck out the word "south" on the Bratton memo and wrote "north" not understanding that the engineer foresaw two options from two different directions for delivery of water to the subject property.

During trial the judge even asked Mr. Robinett about this very issue to make sure of his position:

> THE COURT: Just a minute. Just out of curiosity, is 2,660 lineal feet the distance from the fire hydrant on the north end of Camano – West Camano Drive down to the boundary line of Saratoga Ridge?
>
> THE WITNESS: Yes, ma'am. (Vol.III, p. 121-122)

The failure of the parties to reach agreement was literally the failure to agree on north and south.

The Co-op had two operational wells, one on the south end of the utility and one at the north end. (Vol.I, p. 81-82, 107) For that reason the Bratton memo provided for options to bring water pressure from the north or from the south.

The same problem existed for east and west. It was not clear that West Coast understood the location of a 4-inch line that served as "an hourglass" (Vol.II, p.80) restricting the flow of water between the reservoirs. In the colloquy printed above between Appellant's counsel and board member Ron Little, counsel had to be corrected about what side of West Camano Drive the 4-inch line was located. The trial judge pointed out this confusion in Conclusions of Law No. 2(b):

> The location of the existing 4-inch main on West Camano Drive was never discussed by the parties. This 4-inch main, which was "to be replaced with 8-inch PVC," was thought by West Coast to run along the east side (or perhaps both sides) of the Drive. The Bratton diagram shows the 4-inch main only on the west side. Without agreement on the location of the existing main it was impossible to know which existing customer would need to be re-connected to the new main.

2.3 Appellant's View of Project

Appellant's view of the project was fundamentally different than the Co-op's view of what was required and different than any project

description or design proposed when the parties signed the only written contract. West Coast wanted an exclusive 8-inch mainline installed on the east side of West Camano Drive buried on top of the exiting water lines. The trial judge asked Plaintiff's counsel to explain what Mr. Robinett wanted for his property to provide adequate fire flow capacity. In a series of questions and answers the Plaintiff explained what he wanted to do with the Developer Extension Agreement to create the fire flow capacity to Saratoga Ridge:

> THE COURT: I am a little curious, now that I understand from Mr. Wynn what his idea of the plan was, when your client contemplated putting this 8-inch main down the east side of West Camano Road, was it his understanding that that was going to be in addition to the 4-inch existing on the west side?
>
> MR. COGDILL: Yeah, absolutely. (Vol. III, p. 173)
>
> . . .
>
> THE COURT: So in terms of the spaghetti [of pipe lines] that Mr. Wynn talks about, then the 8-inch main, if installed on the east side of West Camano Road, would run on top of, or under, the service lines to the house on the east side of West Camano Road. (Vol. III, p.174,174)
>
> . . .
>
> THE COURT: His new 8-in main is just going to lay on top of them or - -
>
> MR. COGDILL: Well, you would put it next to it or - - yeah. Right. (Vol. III, p.175)
>
> . . .
>
> THE COURT: So your client's idea was, he was going to install an 8-inch main that would run parallel with that - -
>
> MR. COGDILL: That's right. (Vol. III, p.177)

Appellant had a view of constructing only on the east side of West Camano Drive by connecting from a fire hydrant that was on the east side of the road an 8-inch line that would be buried on top of existing utility lines and connect to Saratoga Ridge property. This was in contrast to the Co-op's need to integrate the entire system any proposed additions or extensions. Kelly Wynn testified about the need to develop comprehensively:

> A. Well, I think one of the things that is glaring for me in this, water systems cannot be spaghetti. They have to be – you have to have – you don't want parallel mains. It's just bad engineering to have pipes running all over the place. It's – you never build a water system for one specific purpose or one specific customer; it's – you build it for the entire system. You have to look at the entire system. It's just not for one house or one subdivision.
>
> Q. That's why you had a comprehensive plan?
>
> A. Yes.
>
> Q. And the design by Mr. Bratton was a comprehensive review of everything that needed to be done –
>
> A. Absolutely.
>
> (Vol.III, p. 147-148)

2.4 No Valid Agreement Between the Parties

Appellant argues the trial court erred in concluding there was no valid agreement between the parties. *Brief of Appellant, p. 26*. The trial

court correctly determined that the signed Developer Extension Agreement was inconsistent with what Appellant intended to construct. The parties were literally talking about development on different sides and different ends of West Camano Drive and thus had no meeting of the minds or mutual assent.

The signed Developer Extension Agreement was not a manifestation of a valid agreement between the parties. The failures were several and continuous, including the following:

- The Developer Extension Agreement referenced plans and specifications approved by the Co-op, but no plans were attached. *Finding No. 39.*
- The Developer Extension Agreement did not incorporate the oral agreement to share the cost of construction. *Finding No. 33.*
- The construction plans did not even exist at the time Appellant signed the Developer Extension Agreement. *Conclusion 2(c).*
- After the Agreement was signed construction plans were prepared by the engineer showing three crossings under West Camano Drive. Appellant did not notice that detail. *Finding No. 45.*
- To make matters worse, Appellant never talked to the engineer before signing the October 2004 Developer Extension Agreement and never talked to him at all in 2004. *Finding No. 45.*
- The engineering plans were approved by the Camano Coop board and sent to the State Department of Health, but not accepted by that agency. *Finding No. 47.*
- A disagreement between the parties occurred about what portion of the project was to be a shared cost. A meeting was

scheduled to discuss this disagreement but Mr. Robinett declined to attend, so the issue never got resolved. *Finding No. 49.*

- The Co-op attempted a second time to discuss the disagreement over cost sharing with West Coast, but the invitation to resolve the issue was ignored by Mr. Robinett. *Finding No. 54.*

- The disagreement about the scope of the developer extension project surfaced in January 2006 when Mr. Robinett first objected to the engineering plans approved by the Co-op. *Finding No. 55.*

The parties were working with different assumptions and expectations about the work to be performed and the scope of the project. The parties did not even reach accord on how the project would be designed.

2.5 No Mutual Assent Means No Valid Contract

There can only be a contract where there is objective mutual assent between the parties. In older cases the mutual assent element of a contract was also called "meeting of the minds" by the parties:

> Washington follows the objective theory of contracts which focuses on the objective manifestations of the agreement, rather than the less precise subjective intent of the parties not otherwise manifested.
>
> The objective theory of contracts focuses on the outward manifestation of assent made to the other party, which is in contrast to the older concept that a contract came into existence when there was a "meeting of the minds." Today, mutual assent is the modern expression for the concept of "meeting of the minds." Mutual assent cannot be based upon subjective intent, but rather must be founded upon "an objective manifestation of mutual intent on the essential terms of the promise."
>
> 25 *Wash. Prac.*, Contract Law And Practice § 2:1

Appellant seeks to impose contract terms that were in the mind of Mr. Robinett and his former partner that they claim were heard at a board meeting of the Co-op. Washington law applies an objective manifestation test in determining whether there was meeting of the minds. In *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wash. 2d 493, 115 P.3d 262 (2005) our Supreme Court affirmed that the objective manifestation test is used to determine whether there is a contract and interpreting a contract.

> We take this opportunity to acknowledge that Washington continues to follow the objective manifestation theory of contracts. Under this approach, we attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties. *Max L. Wells Trust v. Grand Cent. Sauna & Hot Tub Co. of Seattle,* 62 Wash.App. 593, 602, 815 P.2d 284 (1991). We impute an intention corresponding to the reasonable meaning of the words used. *Lynott v. Nat' l Union Fire Ins. Co. of Pittsburgh, Pa.,* 123 Wash.2d 678, 684, 871 P.2d 146 (1994). Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. *City of Everett v. Estate of Sumstad,* 95 Wash.2d 853, 855, 631 P.2d 366 (1981).
>
> *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wash. 2d 493, 503-04, 115 P.3d 262, 267 (2005)

The trial judge correctly applied the objective manifestation test and determined that there was no mutual assent to the essential terms of the contract and therefore the written contract was not valid.

2.5 It Makes No Sense For Developer To Upgrade The Water System

Appellant argues that "it makes absolutely no sense to believe a developer" would upgrade a water system to get water to its development. *Brief of Appellant, p. 32.* This is why, as the trial judge noted, the Co-op agreed to share the cost of construction. *Finding No. 27.* The Coop was going to obtain upgrades and repairs during the project and it would "avoid additional cost and disruption of service" to do the work at the same time the developer extension was being installed. For that reason it does make sense for a developer to agree to upgrade the Co-op's water system in exchange for the Co-op paying half the cost of the developer's project.

Kelly Wynn testified about the reasons it made economic sense and why it would avoid service disruption to install the developer's improvements and at the same time improve the existing infrastructure:

> Q. And the design by Mr. Bratton was a comprehensive review of everything that need to be done - -
>
> A. Absolutely
>
> Q. - - while you're putting in this 8-inch line; correct?
>
> A. Absolutely. That's why we have a latecomer agreement. If Mr. Robinett put this piping in, and then there was another development next to it, they would pay him back a pro rata share of what they used in that 8-inch line. (Vol.III, p.148)
>
> . . .

Q. And do you think that's what the Bratton plans were doing, is –

A. Yes.

Q. Is planning for getting it all done at one time?

A. Yes, absolutely.

Q. And was that part of the reason that the Co-op made the decision to share cost on this then?

A. Yes. (Vol.III, p. 149-150)

It became obvious at trial that Mr. Robinett never understood the reasons the Co-op agreed to share costs back in 2004 and Appellant now argues that there was no reason for West Coast to upgrade the water system. The fact is there was a mutual benefit to the parties, but West Coast still fails to understand the reason the Co-op agreed to share costs. There was not only a failure in mutual assent about the cost sharing, West Coast also failed to understand the economic and engineering reasons West Coast was offered the opportunity to share costs with the Co-op.

2.6 Co-op Could Only Require Installation of 2,660 Feet Of Pipe

Appellant argues that under the Developer Extension Agreement "the only thing Camano Water can require of West Coast is installation of 2,660 lineal feet of 8 inch pipe without road crossings." *Brief of Appellant, p. 32.* This argument ignores the detailed document that was incorporated

by reference into the Agreement. Before the Agreement was signed Kelly Wynn sent to Mr. Robinett a copy of the "DE Manual" which provided detailed information about the expectations of the Coop in conducting construction on the utilities pipelines. *Findings No.32 & 33*. In addition the Agreement specifically required the developer to install according to the plans approved by the Coop. *Finding No. 39*. The Manual that was given to Appellant before the Agreement was signed specifically required that existing water connections were to be reconnected by the developer doing the extension project. *Finding No. 40*.

The DE Manual was given to Mr. Robinett by Kelly Wynn on October 22, 2004. (Exhibit 24, p. 318 and 329) Kelly Wynn testified it was delivered to Mr. Robinett. (Vol.II, p. 62). The document was also called the Developer Project Manual and was admitted as Exhibit 69. (Vol.II, p. 64) The purpose of the DE Manual is to ensure that a developer performs an extension of the Co-op's utility to the engineering standards required by the Co-op (Vol.II, p. 69) and the State Department of Health (Vol.II, p. 67). That fundamental document given to West Coast before the Developer Extension Agreement was signed was never given to the second engineer hired by West Coast, Joe Smeby. On cross-examination Mr. Smeby was asked if he ever received or had ever seen the DE Manual, Exhibit 69 and he said he had not. (Vol.I, p. 170).

The DE Manual contains numerous engineering and construction requirements that are the responsibility of the developer, including the responsibility to inform consultants and contracts of the various requirements in the manual. Kelly Wynn testified about the contents of the manual (which had un-numbered pages) and stated:

> Q. Okay, Go to the next page, please. Do you see the heading there, it says information for developer's engineers and contractors?
>
> A. Yes.
>
> Q. First sentence says the developer is responsible to inform its consultants, its contractors and all subcontractors of the water company's requirements. Do you see that?
>
> A. Yes.
>
> Q. And Mr. Smeby admitted he never go this documents; correct?
>
> A. Yes.
>
> Q. The next sentence we recommend the developer provide his energy, slash, architect and contract with a development project manual. Do you see that?
>
> A. Yes.
>
> Q. Go to the next section entitled selection of engineer. Would you read that first sentence?
>
> A. The developer may have his own engineer prepare the construction plans and specifications and have them reviewed by the water company's engineer, or it may request the water company to have their engineers prepare them.
>
> Q. So when you are working with the engineers, are you assuming that they have this manual and know what specifications are?
>
> A. Yes. (Vol.II, p. 71-72)

This comprehensive document given to West Coast before the Agreement was signed was ignored by Mr. Robinett and never provided to his engineer. There is no evidence that anybody working for West Coast, other than engineer Bratton, ever reviewed the DE Manual. A review of the document would convince any property developer intending to extend water service on the Co-op's existing system that an exclusive tight line to the developer's property was unrealistic and inconsistent with the goals and requirements of the Co-op.

2.7 Respondent Misrepresented Work Required

Appellant argues that the Co-op "made material misrepresentations in forming the contract." *Brief of Appellant, p. 36*. Appellant claims "Camano Water supplied false information." *Brief of Appellant, p. 37*. The claim is that the Co-op failed to tell West Coast about the Amendment to Water System Plan Upland Road Extension which called for extensive upgrades to the water system. *Brief of Appellant, p. 37*. And Appellant states that "Camano Water was negligent in communicating the false information." *Brief of Appellant, p. 38*. However, the very person that developed the plans to upgrade the system was the engineer hired by West Coast (*Finding No. 30*) and Mr. Robinett admitted he never talked with the engineer about his work or the plans he developed before or after the

Agreement was signed. Mr. Robinett testified in direct examination as follows:

> Q. Let me stop you right there. Did you ever have any personal contact or conversation with Mr. Bratton in 2004?
>
> A. No.
>
> Q. Have you ever met him face-to-face at any time?
>
> A. Once.
>
> (Vol. III, p.169)

If any allegation of negligence should be made it would be against Mr. Robinett in failing to communicate with his own engineer about this project before he signed the Agreement or even after it was signed. The information was there to be had and all Appellant had to do was talk with its own engineer.

Appellant also challenges the trial court's finding that Appellant chose to hire the Coop's engineer. The challenged Findings of Fact Number 30 states:

> 30. Robinett chose Camano Co-op's engineer, George Bratton, to design the plans for the water main.

Yet at trial Mr. Robinett admitted exactly that, stating to the trial judge that it made sense for West Coast to hire the Co-op's engineer:

> A. Mr. Wynn asked me if I would like to use George Bratton to design the construction plans, and I said sure, that would seem to be a smart thing to do, because he's familiar with it. So I said okay.

Appellant attempts to limit the date on which it bases its claim of negligence to several months before the Agreement was signed by either party. Appellant argues that "It is inconceivable Camano Water had plans to upgrade the entire Uplands Water system and did not communicate that to West Coast at the February 19, 2004 meeting." *Brief of Appellant, p.38.* The problem for Appellant is that if it was not stated at the February meeting the information was still available before Mr. Robinett signed the Agreement in October 2004 and available when the plans were sent to Mr. Robinett in November 2004 (*Finding No. 45*) and available before the Co-op signed in August 2005. (Vol III, p.137)

It should also be noted that Appellant's argument supports the underlying issue of failure of the parties to have a meeting of the minds. The failure to understand the motive behind the offer to share the cost of this project was another reason West Coast and the Co-op did not have mutual assent about essential elements of any agreement. What is conceivable is that if Mr. Robinett had taken time to meet with the Co-op's engineer to discuss his project he would have easily understood the reasons for the drawings that he rejected after they were approved by the Co-op and State Department of Health.

2.8 Trial Court Ruling On Money Owed for Shares is Inconsistent With Finding No Agreement Between Parties

Appellant argues that "The trial court's ruling that West Coast owed money to Camano Water for water shares was inconsistent with the finding of no agreement." *Brief of Appellant, p. 43*. Appellant does not cite to the record of any testimony or evidence in the record to support its argument and challenge to the trial court's findings. The trial court found that West Coast purchased 20 shares in the Co-op (*Finding No. 65*) and shareholders in the Co-op are required to pay membership dues and assessments (*Finding No. 64*). West Coast discontinued payment of dues after it believed the Co-op was not cooperating (*Finding No. 65*) and the balance due at the time of trial was $107,894.65 (*Finding No. 66*). All these findings are unchallenged by Appellant.

Exhibit 63, 64 and 65 were admitted at trial with no objection (Vol.I, p. 121) and those documents support the testimony from board member Ron Little that West Coast owed dues of $107,894.65. Mr. Little testified that the dues rate imposed on West Coast was for nonuser fee for a shareowner who had not connected to the water system. (Vol.I, p. 133-134) West Coast had a total of 21 shares in the Co-op because the property he purchased before it was platted already had one share (Vol.II, p. 158) and Mr. Robinett purchased 20 additional shares so that West Coast could bring water service to each lot in Saratoga Ridge.

III. ATTORNEY FEES

3.1 Trial Court Award of Attorney's Fees for Unpaid Dues

Appellant has also appealed an award of attorney fees to the Co-op made by the trial judge. These fees and costs were limited to the Co-op's Counterclaim against West Coast for unpaid dues. Appellant now admits that this issue of attorney fees was preserved during trial. However, Appellant objected to an award of attorney fees in opposition to the Co-op's post-trial motion, arguing incorrectly that the Co-op failed to present evidence at trial in support of attorney fees:

> Furthermore, Defendant did not present evidence of attorney's fees at the time of trial and is now asking the Court to consider new evidence and argument well beyond the deadline to do so. Attorney's fees recoverable pursuant either to a contractual indemnity provision or to the theory of equitable indemnity are damages that must be proven by competent evidence at trial. (citation omitted) Expenses such as costs and attorney's fees are a measure of damages that must be proved to the trier of fact. (citation omitted) Here, Defendant presented no evidence of such damages at trial, and for this reason Defendant's motion for fees and costs should be denied.
>
> CP 886-889 (p.2)

In granting the post-trial motion for award of attorney fees the trial judge correctly noted that the issue was reserved for post-trial proceeding by stipulation on the record. (Vol.III, p. 64)

Appellant has abandoned the argument that the issue should have been litigated at trial and now argues that "No evidence was provided by

Camano Water to show the reasonableness of the fees . . ." (*Brief of Appellant, p. 46*) The fees awarded by the trial court are very modest and reflect a very small percentage of the work involved in preparing for and conducting a three day trial. The Co-op's motion sought only $1,896.00 in attorney fees, $240 filing fee for the Counterclaim and $200 statutory attorney fees. (CP 906-908) After West Coast responded to the motion (CP 886-889) the Co-op filed Defendant's Reply (CP 890-896) which included a declaration of counsel for the Co-op in support of the motion for award of attorney fees and a copy of the detailed billing records for the time spent by counsel on the issue of pursuing the claim for unpaid dues. West Coast argues "there was no declaration in support of the fees and there was no segregation of fees/time devoted to his single issue supported by sworn testimony." (*Brief of Appellant, p. 46*) The fact is there was sworn testimony and the billing clearly states it was for "Unpaid Dues" as opposed to much larger billable time for the alleged breach of contract defense.

It should be noted that West Coast's response to the Co-op's motion for attorney fees produced no evidence that the number of hours worked by counsel was excessive, or that the hourly rate charged by counsel for the Co-op was unreasonable. (CP 886-889) West Coast complains that "the 'Lodestar Method' requires a break down of hours

multiplied by reasonable rates with a determination of reasonableness made based on the circumstances of the case (citation omitted)" (*Brief of Appellant*, p. 45-46) West Coast's criticism of the trial court is unwarranted. West Coast provided no evidence in opposition to the request for attorney fees and costs. West Coast did not argue that more hours were spent than necessary in litigating the Counterclaim and produced no evidence that $240 per hour was in excess of what counsel in Skagit County reasonable charge for litigation.

West Coast has failed to show that the trial court manifestly abused its discretion in awarding a modest attorney fee recovery to the Co-op:

> In order to reverse an attorney fee award, an appellate court must find the trial court manifestly abused its discretion. *Boeing Co. v. Sierracin Corp.,* 108 Wash.2d 38, 65, 738 P.2d 665 (1987). That is, the trial court must have exercised its discretion on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker,* 79 Wash.2d 12, 26, 482 P.2d 775 (1971).
>
> *Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wash. 2d 527, 538, 151 P.3d 976, 981 (2007)

3.2 Respondent's Request For Award of Attorney Fees

The Co-op requests that this Court award attorney fees on appeal. This request is pursuant to RAP 18.1 which states in part:

> **(a) Generally.** If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this

> rule, unless a statute specifies that the request is to be directed to the trial court.

In this matter there was an award of attorney fees, as noted by Appellant, "based on the Bylaws of Camano Water, which has an attorney's fees provision." (Brief of Appellant, p. 45)

IV. CONCLUSION

West Coast did not perform due diligence in its approach to the development of Saratoga Ridge. Mr. Robinett failed to understand the motive behind the ill-fated agreement to cost share on this project. He failed to meet with his engineer. He failed to review the DE Manual provided to him before he signed the Agreement. He failed to provide the DE Manual to his consultants. He had in his mind nothing more than installing an 8-inch water line from a source north of his property, down the east side of West Camano Drive and failed to understand the broader requirement of continuing to provide water to existing customers. This single focus on installing nothing but 2660 feet of pipe line created blind spots and he did not hear or see what was being said to him and written to him by his own engineer and the Co-op. It was only after he was told of the cost of construction as the engineering plans provided that he finally saw that we were working on a comprehensive project that could not be viewed in isolation solely for his economic benefit. These blind spots and

false assumptions were the failure of the parties to reach a mutual assent on the essential terms of the Agreement. The plans which were to be attached to the Agreement were not attached and the parties went into the project with different understandings of north and south, and east and west, as the trial court correctly determined.

The utility project never turned a shovel of dirt and the plans for the installation of the pipe line were never used, because of this failure to come to an agreement on the terms of the project.

This Court should apply the substantial evidence test in reviewing this matter. This Court should determine that substantial evidence supports the trial court's findings of fact and conclusions of law and affirm the trial court decisions. This Court should affirm the award of attorney fees below and award additional attorney fees to the Respondent in this appeal.

DATED this 16 day of January, 2013.

C. Thomas Moser
Attorney for Respondents
1204 Cleveland Avenue
Mount Vernon, WA 98273
360-428-7900
WSBA # 7283

FILED - COPY

OCT 26 2010

PATRICIA TERRY
ISLAND COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF ISLAND

WEST COAST, INC., a Washington corporation, Plaintiff, vs. CAMANO CO-OPERATIVE WATER AND POWER CO., a Washington corporation, Defendant.	No.: 10 2 00905 6 COMPLAINT

COMES NOW the Plaintiff, West Coast, Inc. ("West Coast"), and for causes of action against the Defendant states and alleges as follows:

I. PARTIES

1.1 Plaintiff. Plaintiff West Coast, a Washington corporation in good standing, has its registered office and principal place of business in Snohomish County, Washington.

1.2 Defendant. Defendant Camano Co-Operative Water and Power Co. ("Camano Water"), is a Washington corporation and a cooperative/association formed under the laws of the State of Washington and has its registered office and principal place of business in Island County, Washington.

COGDILL NICHOLS REIN WARTELLE
3232 Rockefeller Avenue
Everett, WA 98201
Phone: (425) 259-6111

II. JURISDICTION/VENUE

2.1 Venue/Jurisdiction. The Court has subject matter jurisdiction over the Parties and action. Pursuant to RCW 4.12.020 and RCW 4.12.025, Island County Superior Court represents the proper venue for this action involving an agreement entered into and involving real property in said County and involving a Defendant having its registered office and principal place of business in said County.

III. FACTS

3.1 Saratoga Ridge Development.

West Coast owns certain undeveloped real property in Island County, Washington and legally described in Exhibit A attached hereto (the "Real Property"). West Coast intended to develop that Real Property as the "Saratoga Ridge Development." The Saratoga Ridge project includes property located generally east of West Camano Drive and property located generally north of Uplands Road. In order to complete said development, West Coast requires utility services, including water service, to the Real Property.

3.2 Agreement to Cost Share.

Camano Water provides water service to the area including the Real Property. Beginning in/around 2004, the Parties had discussions for Camano Water to provide upgraded service for the Saratoga Ridge Development.

Part of the process of obtaining water service to the Real Property involved making upgrades and other improvements necessary in extending the existing waterline maintained by Camano Water from the nearby West Camano Road to the Saratoga Ridge Development. The Parties agreed to cost share by equally dividing the costs of making those improvements for providing the upgrades, which included an upgrade in the size of pipe to be used. Camano Water

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also agreed West Coast would receive reimbursement from any late comer's fees for off-site water improvements over a ten year period of up to the value in expenses which West Coast agreed to pay toward the improvements. This agreement is evidenced by Defendant's Board of Directors taking action and passing a motion on February 19, 2004 concerning what was referred to as the West Camano Upgrade. Based on, and in reliance on this Agreement by the Board of Defendant, which was agreed to be reduced to writing in the form of a Developer Extension Agreement, Plaintiff purchased the Saratoga Ridge Property in April 2004, and commenced to incur carrying costs and liabilities incident to that purchase. It was not until October 2004 that Defendants, through its Agent, Kelly Wynn, finally provided Plaintiff a document entitled "Developer Extension Agreement". Plaintiff executed that Agreement and returned it to Camano Water but provided a cover letter stating the Agreement remained silent concerning the parties' agreement to split the cost to upgrade and extend the existing waterline on West Camano Drive and Uplands Road, as well as to reimburse West Coast from late comer's fees for off-site water improvements. Plaintiff's letter was consistent with the agreement the parties had reached. Initially Camano Water did not object to West Coast's letter, and the parties proceeded until it was finally apparent that Defendant would not cost share for the improvements on West Camano Drive. In addition, Camano Water sought to impose a series of additional conditions to the Agreement which were not part of the parties agreement.

3.3 Costs Incurred by West Coast in Reliance Upon Camano Water's Representations.

Reasonably relying on the representations of Camano Water about equally dividing the costs of upgrades, reimbursement for off-site water improvements, and the terms and conditions of the Developer Extension Agreement, West Coast incurred significant costs. Such costs included the interest charges and carrying costs of having purchased the subject property, real estate taxes, additional engineering, and other related and miscellaneous costs and expenses to be proved at trial.

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IV. FIRST CAUSE OF ACTION/ BREACH OF CONTRACT/ANTICIPATORY REPUDIATION

4.1 Re-Allegation. Plaintiff re-alleges Sections I through III above.

4.2 Breach of Contract/Anticipatory Repudiation. Camano Water breached and/or anticipatorily repudiated the Parties' agreement, including by refusing to pay for half the cost of upgrades and reimburse Plaintiff for off-site improvements resulting in damages to West Coast in an amount it will prove at trial.

4.3 Good Faith/Fair Dealing. Defendant's conduct resulted in a breach of the implied covenant of good faith and fair dealing existent in all contracts, entitling Plaintiff to damages in an amount it will prove at trial.

V. SECOND CAUSE OF ACTION/INTENTIONAL/NEGLIGENT MISREPRESENTATION

5.1 Reallegation. Plaintiff re-alleges Sections I through IV above.

5.2 Intentional /Negligent Misrepresentation. Camano Water and its agents intentionally and/or negligently misrepresented to West Coast it would equally split the costs of the upgrades and reimburse Plaintiff for its off-site improvements. West Coast reasonably relied on Camano Water's representations, proximately resulting in damages in an amount West Coast will prove at trial.

VI. THIRD CAUSE OF ACTION/ESTOPPEL

6.1 Reallegation. Plaintiff re-alleges Sections I through V above.

6.2 Promissory/Equitable Estoppel. Defendant and its agents' actions, including misrepresenting it would split the upgrade costs, reimburse West Coast for off-site improvements, resulted in reasonable and detrimental reliance by West Coast. Accordingly, Defendant became estopped from refusing to perform as promised.

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VII. FOURTH CAUSE OF ACTION/DECLARATORY JUDGMENT

7.1 Reallegation. Plaintiffs re-allege Sections I through VI above.

7.2 Declaratory Judgment. Pursuant to RCW 7.24.010, Plaintiff moves the Court for a declaratory judgment regarding the Parties' agreement and holding such agreement requires Defendant to pay for one half the upgrade costs, and reimburse Plaintiff for off-site water improvements.

7.3 Costs. RCW 7.24.100 makes costs of this action available to Plaintiff.

VIII. RELIEF SOUGHT

WHEREFORE, Plaintiff prays for a judgment as follows:

8.1 For an order awarding damages against Defendant and in favor of Plaintiff for breach of contract and misrepresentation;

8.2 For a declaratory judgment and/or order holding Defendant estopped from refusing to equally split the cost of upgrades, reimbursing Plaintiff for off-site water improvements and complying with the terms of the parties agreement;

8.3 For reasonable attorney's fees and costs available under contract or at law; and

8.4 For all further and other relief the court deems just or equitable.

DATED this 26 day of October, 2010.

COGDILL NICHOLS REIN WARTELLE ANDREWS

By: _____

W. Mitchell Cogdill, WSBA #1950
Patrick L. Vail, WSBA #34513
Attorney for Plaintiff

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SIGNATURE AND VERIFICATION

JOHN ROBINETT, the officer, director and shareholder of the Plaintiff, West Coast, Inc., in the above action, declares to have read the foregoing and believes it to be true and correct under penalty of perjury under the laws of the State of Washington.

Signed at Everett, Washington this 21 day of October, 2010.

WEST COAST, INC.

By: John Robinett, Its Officer

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3232 Rockefeller Avenue
Everett, WA 98201
Phone: (425) 259-6111

You have a FAX from:

Water & Wastewater Services

Utilities Management, Operation & Maintenance

14263 Calhoun Road
Mount Vernon, WA 98273
360-466-4443; 360-466-1713 Fax
800-895-8821

Date: 1-24-04

Number of pages, including cover: 6

TO: John Robinett

FAX: 425-259-0288

FROM: Kelly Wynn

RE: Crop - Uplands

FYI

APPENDIX B

Ex 71

USGS Datum 309 Feet

GEORGE BRATTON, P.E
Civil Engineer.
1252 S. Farragut Drive
Coupeville, WA 98239
Tel. (360) 678-4552
FAX (360) 678-5374

MEMORANDUM

July 30, 2003

TO: Jeff Holbeck

COPY TO: Kelly Wynn, Water/Wastewater Services

FROM: George Bratton – 360-678-4552

SUBJECT: CAMANO COOP – SERVICE TO PROPOSED DEVELOPMENT

This memo is written in reply to your enquiry about obtaining water services for a proposed development on Parcel 110-211 at the east end of Uplands Road.

The attached drawings show the Coop's water distribution system. To supply fire flow to the site the Coop's distribution system would need to be upgraded. The extent of the work will depend upon two factors:

- The elevation of the fire hydrants relative to the reservoirs that supply the system by gravity, and
- The fire flow required for the density of the development.

The elevation contours shown on the attached drawing are from the USGS map. A preliminary hydraulic analysis shows the following:

1. To supply 500 gpm to a hydrant at the 195-foot elevation (apparent highest point on Parcel 110-211), the following Coop water mains would need to be replaced with 8-inch PVC:

   a. Approx. 750 feet of 3-inch AC pipe on Uplands Road.
   b. Approx. 1,910 feet of 4-inch AC pipe on W. Camano Dr. south of Uplands Road.

2. To supply 750 gpm to the same location, the following additional Coop water mains would need to be replaced with 8-inch PVC:

   a. Approx. 4,120 feet of 4-inch AC pipe on W. Camano Dr. from Uplands Dr. to Chapman Road.
   b. Possibly 1,350 feet of PVC pipe on Weston Road east of W. Camano Dr.

The static pressure supplied by gravity from the Coop reservoirs is adequate (49 psi) to supply the highest portion of Parcel 110-211.

Caroline

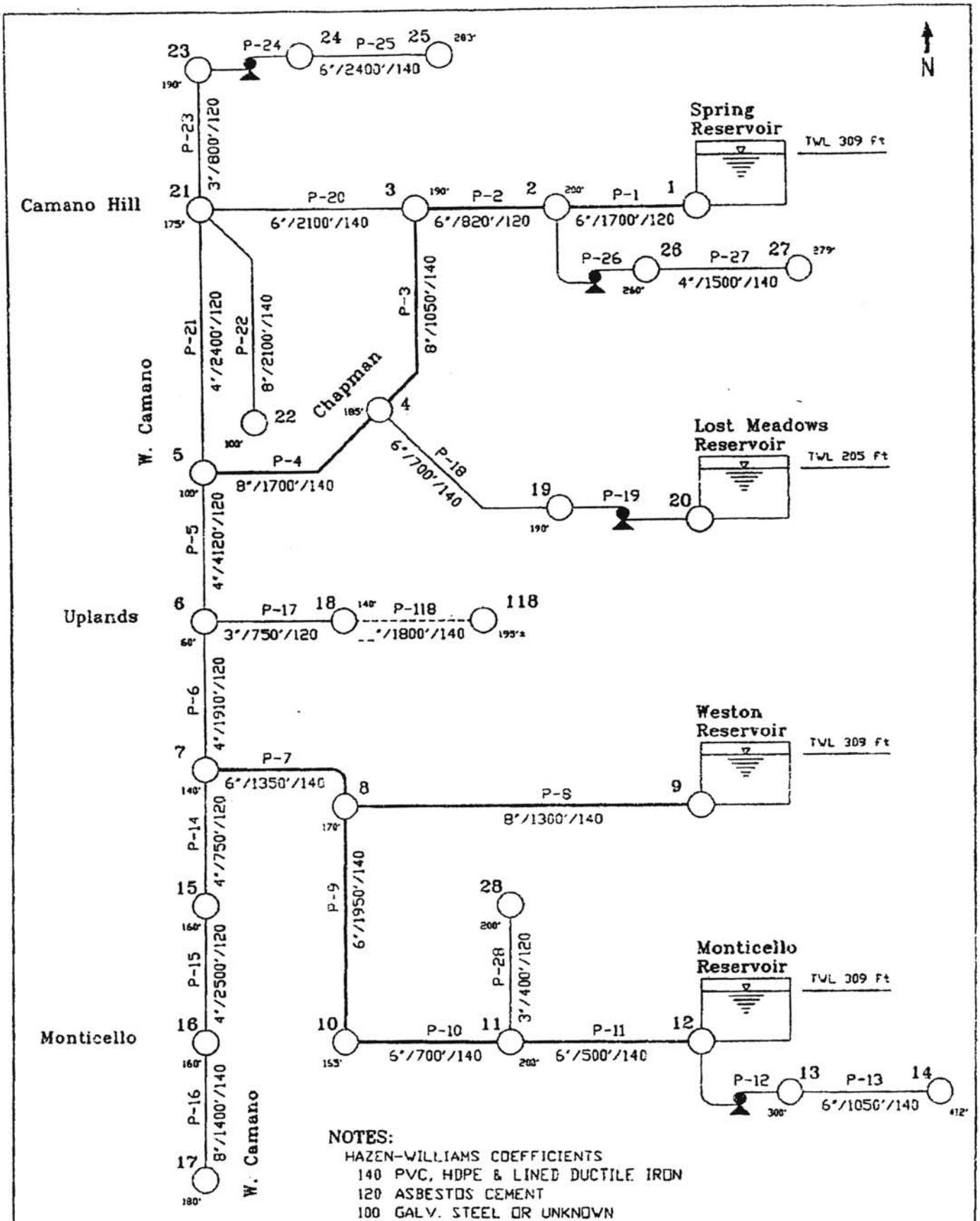
To supply fire flow, the pressure loss in the distribution system from the reservoirs to Parcel 110-211 needs to be reduced to the minimum. The 4-inch AC pipe on W. Camano Dr. and 3-inch on Uplands Road severely limits hydraulic capacity.

I hope that this information will be sufficient for you to assess the feasibility to develop this site.

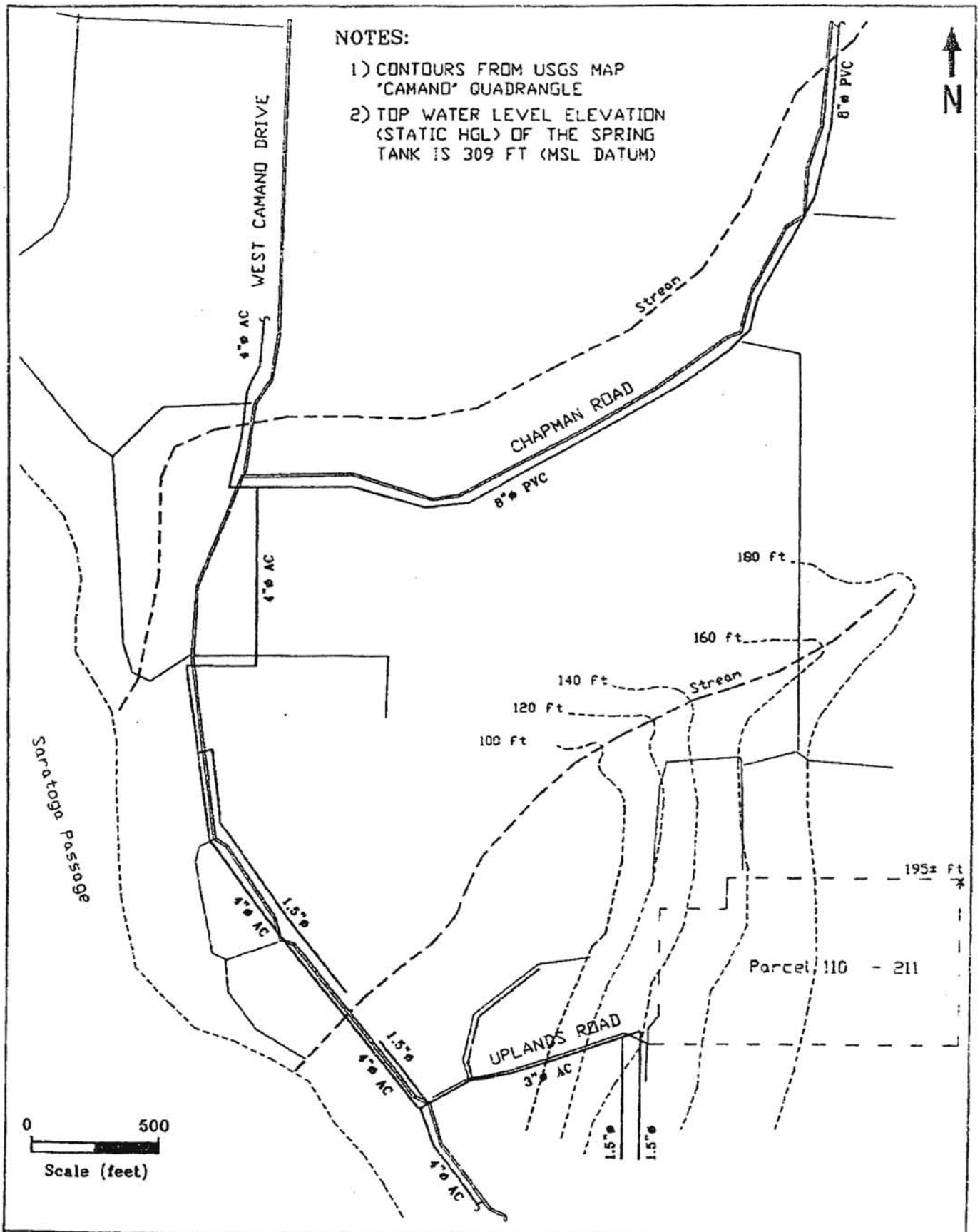
If you wish to pursue obtaining service from the Coop, please contact Kelly Wynn at (800) 895-8821. For approval from the WA DOH to upgrade the system a more detailed hydraulic analysis would be needed. Based on the layout of the development and required fire flow (determined by the Island County Fire Marshal), a refinement would be made to the required improvements to the distribution system.

A copy of the hydraulic analysis for the above is attached.

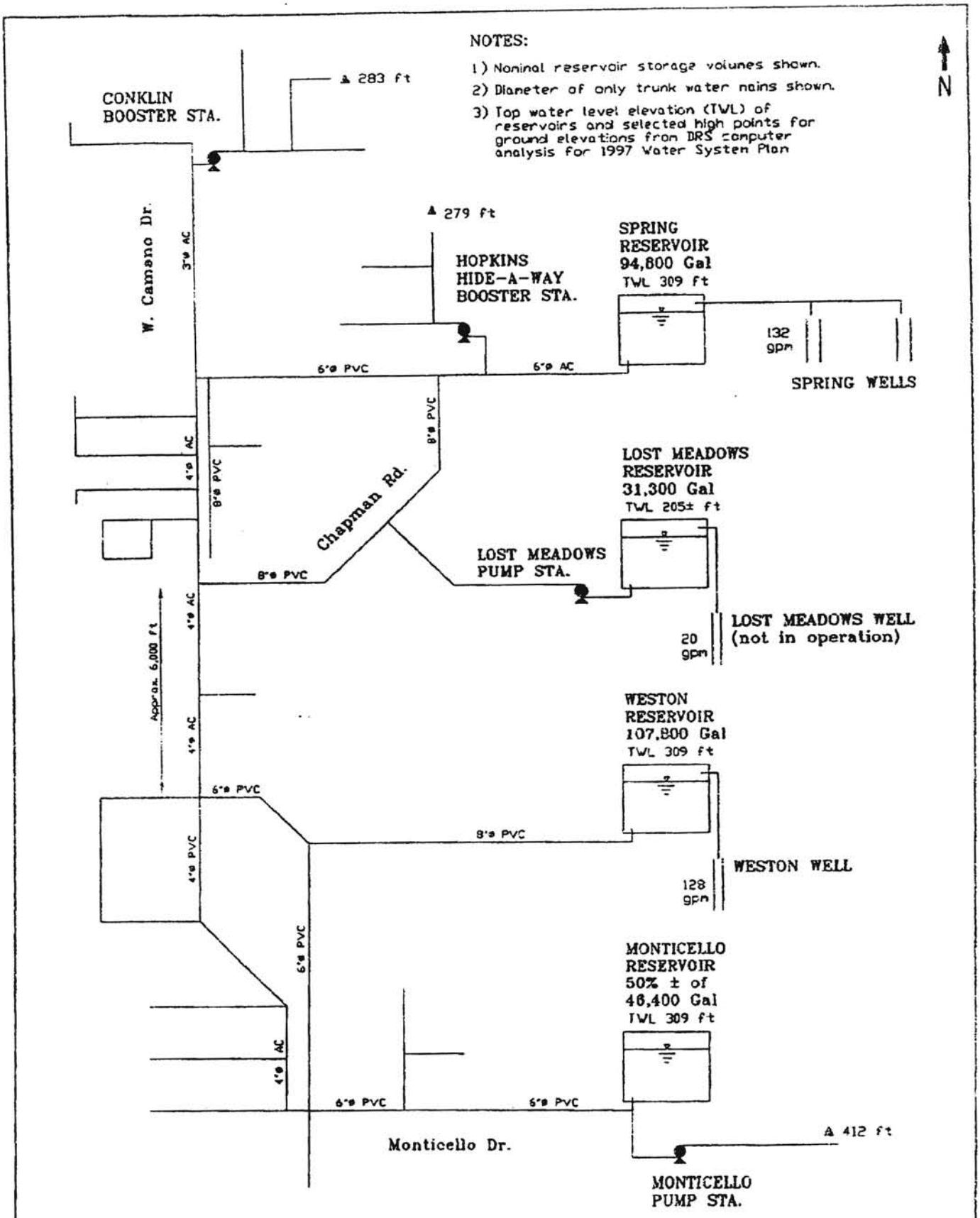
Please call me if you have any questions.



Date: July 03	Scale: N.T.S.	CAMANO COOP WATER & POWER WATER DISTRIBUTION SYSTEM Computer Schematic – Primary Grid	Dwg. NETW
By: GEORGE BRATTON, P.E. CIVIL ENGINEER			



Date: July 03	Scale: as shown	CAMANO COOP WATER & POWER WATER DISTRIBUTION SYSTEM Uplands Road & W. Camano Dr.	Dwg.
By: GEORGE BRATTON, P.E. CIVIL ENGINEER			



Date: Jun. 03	Scale: N.T.S.	CAMANO COOP WATER & POWER WATER DISTRIBUTION SYSTEM System Schematic	Dwg. P-1
By: GEORGE BRATTON, P.E. CIVIL ENGINEER			