Supreme Court Case No. 89533-3

Court of Appeals Div. I Case No. 68618-6-I

SUPREME COURT OF WASHINGTON

CRYSTAL RIDGE HOMEOWNERS ASSOCIATION, a Washington nonprofit corporation; J. ABULTZ, et al.,

Respondents,

vs.

CITY OF BOTHELL, a municipal corporation,

Petitioner.

RESPONDENTS' RESPONSE TO AMICUS CURIAE BRIEF OF WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS IN SUPPORT OF CITY OF BOTHELL'S PETITION FOR REVIEW

Karen A. Willie, WSBA No. 15902
Email: kwillie@tmdwlaw.com
TERRELL MARSHALL DAUDT
& WILLIE PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603
Facsimile: (206) 350-3528

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

STATE CASES

STATE STATUTES

COUNTY CODES

I. INTRODUCTION

The Court is asked to disregard the *Amicus Curiae* Brief of the Washington Association of Municipal Attorney's ("WSAMA" and "*Amicus Brief*") since it was filed in violation of the appellate rules.

II. ARGUMENT

A. The City's Unconstitutional Gift of Public Funds Argument Was Never Before the Trial Court

Lacking a basis for discretionary review, the City embraced a new theory on appeal to this Court. Without complying with RAP 2.5 (a)(3), it argues that the facts here create an unconstitutional gift of public funds. The argument entirely relies upon the City's myopic view that the interceptor pipe is entirely private in nature.[1] From this premise, it then asserts that the Court of Appeal's decision, which did not discuss the unconstitutional gift of public funds argument that was never before it or the trial court, is somehow in conflict with other appellate decisions that did address the unconstitutional gifting of public funds. *See* Petition pp. 12-14 *citing CLEAN v. State,* 130 Wn.2d 782, 928 P.2d 1054 (1996); *Citizens Prot. Res. v. Yakima Cty.*, 152 Wn. App. 914, 219 P.3d 730 (2009). Rather than file a proper *amicus curiae* brief under RAP 10.6 and 13.4 (b), WSAMA came to the City's aid by way of an improper rebuttal brief claiming it "carefully reviewed the record" and that the

[1] There was irrefutable evidence before the Hearing Examiner that the pipe addressed regional groundwater, failing septic systems in an uphill development, leaking municipal storm drains and water lines and that it supports a regional sanitary sewer main. *See infra* pp. 3-4 and *citations.*

unconstitutional gift of public funds argument was indeed before the trial court. *See Amicus Brief*, pp. 1-2.

Rather astoundingly, WSAMA relies on two sentences in the City's opening brief at the trial court level as providing the basis to assert that the unconstitutional gifting of public funds argument was before that court. The two sentences are:

> This is not the type of drainage facility the City would ever agree to maintain, as local governments do not maintain drainage facilities to solely benefit private property.
>
> ...
>
> As noted previously, local government does not maintain drainage facilities that solely benefit private property.

CP 317, 320.

The words "unconstitutional gift of public funds" do not appear in the City's opening brief at all. CP 314-341. No such words appear in its reply brief. CP 258-268. Notably, WSAMA could not find any sentences in that brief to support its position. The two sentences WSAMA advances appear in the factual section of the City's opening brief before the trial court. CP 316-323. Its argument section analyzed whether the underground pipe fit the statutory definition of a "stormwater facility" under the Snohomish County Code (CP 324-333, Section A) or the Bothell

Code (CP 333-339, Section B).[2] The unconstitutional gifting of public funds was never addressed in the argument section and no case was ever cited to the trial court that involved that doctrine. *Id.* Issues that are "not supported by argument and citation of authority" will not be considered by the appellate courts. *See McKee v. Am. Home Prods., Corp.*, 113 Wn.2d 701, 705, 782 P. 2d 1045 (1989), 58 USLW 2352, Prod.Liab.Rep. (CCH) P. 12,399 (1989) *citing Transamerica Ins. Group v. United Pac. Ins. Co.*, 92 Wn.2d 21, 28-29, 593 P.2d 156 (1979). WSAMA admits in a footnote that because it found that the unconstitutional gift of public funds was before the trial court, that it need not -- and by implication -- the City need not, address RAP 2.5(a)(3) which requires proving "manifest error" when a constitutional right is involved. *See Amicus Brief*, p. 2, n.3. WSAMA's position should be disregarded, as should the City's new argument.

B. The Interceptor Pipe Irrefutably Provides a Public Benefit

WSAMA merely echoes the City's chant that the interceptor pipe is not benefitting the public. It complains that unsupported "bare assertions" have been made by Crystal Ridge's witnesses forgetting that Dr. Denby testified before the Hearing Examiner and Mr. Trepanier designed the system and interacted with the County's employees. *See Amicus Brief*, p. 3. However, putting the expert testimony aside, the Hearing Examiner found that the groundwater flows that the interceptor pipe would capture were coming from the uphill region, failing septic

[2] The Bothell Code was completely irrelevant to the inquiry since the Snohomish Code controlled the filing of the plat twenty-five years ago.

tanks in the uphill development and leakage from municipal storm drains and water lines. CP 721 (finding 8). He noted that the Alderwood Water District would be providing sanitary sewer services to the uphill area. *Id.* (finding 9). The regional sanitary sewer line is irrefutably in the interceptor trench. CP 475. None of these facts has anything to do with mitigating "adverse environmental effects of the private development of Crystal Ridge as required by RCW58.17.110 and SEPA." *See Amicus Brief*, p. 4. WSAMA's basic premise is faulty and should be rejected.

Moreover, the consequences of private development were not foisted upon an unsuspecting Snohomish County. The plat is clear that the drainage easements are dedicated to the County. The County's Director of Public Works, Director of Planning and Development and Chairman of the County Council specifically signed off on this plat. CP 654. Any city intending to incorporate a county area into its jurisdiction need only look at the plats on file to ascertain whether it has the maintenance responsibility for them.[3]

WSAMA's cry of unfair tax burdens being shifted onto the general public also makes no sense. Individual homeowners must pay surface water management fees to their localities every year for this type of maintenance. The 1992 Interlocal agreement between Bothell and Snohomish County shows that it obtained $231,500 from the County in

[3] The legends on the Crystal Ridge plats are all in caps and appear in several places. The City was able to understand the import of the legends because at the investigative stage, it removed them from the plats before giving the plats to one of the Crystal Ridge residents, Nick Fix. CP 763.

watershed management fees at the time of the annexation. CP 736. Finally, in another case where WSAMA filed an *amicus curiae* brief, it was specifically recognized that many municipalities accept new stormwater facilities in order to assure proper maintenance of them. *See Phillips v. King County,* 136 Wn.2d 946, 965-66, 968 P.2d 871 (1998).

C. The Drainage Disclosure Does Not Award Maintenance of the Interceptor Pipe to the Homeowners

First, the four-page Drainage Disclosure, which has a general legal description, was never before the trial court.[4] As WSAMA admits, it was first submitted to the Court of Appeals in the City's Reply brief dated December 21, 2012. *See Amicus Brief*, p. 6 n. 8, Appendix No.1. As a preliminary matter, the arguments on appeal concerning record notice and title searches should be disregarded by this Court since no evidence at the trial court level exists to support them. Further, the disclosure submitted to the Court of Appeals does not have a separate legal description for Tract 999 in which the interceptor pipe is located or provide any proof that it is an "individual lot." *Id.*

Putting those infirmities aside, the arguments offered by WSAMA mimic those of the City which ignore the plain language of the disclosure.[5] Division One noted that the City "simply asserts, without argument or citation to authority that 'it is clear' that the disclosure means the owners

---

[4] The two page document that was before the trial court is at CP 472-473.

[5] The disclosure states: "Substantial surface and subsurface drainage controls have been necessary in the development of the subject property, and that special and/or extraordinary drainage controls may be necessary on individual lots.

of individual lots were responsible for maintenance of the interceptor pipe." *Crystal Ridge Homeowner's Assn v. City of Bothell,* 2013 WL 3872223 at*10 (Wash. Ct. App. July 22, 2013). It stated that the more "plausible, common sense interpretation" is that it was "simply intended to disclose to prospective purchasers...that substantial surface and subsurface drainage controls were put in place on the plat." *Id. at* *11. The disclosure states that, in the "future," special or extraordinary drainage controls may be necessary on "individual lots." Both courts interpreted "individual lots" to be those of individual persons, not Tract 999 which is held in common by the homeowners. This also makes sense because the interceptor pipe was put in prior to any site clearing or grading. CP 727. It is a "subsurface drainage control" and cannot also be some sort of special or extraordinary drainage control in the "future" that may be necessary on "individual lots."

WSAMA states that the courts are both wrong on this issue and that Crystal Ridge repeatedly misled them by dropping out the following language from the Hearing Examiner's Decision: "Said document shall be recorded in such a fashion as to be included in any title search conducted regarding any portion of the subject property." *See Amicus Brief,* p. 6, and n. 8.[6] It apparently argues that "any portion" of the property could include Tract 999. However, no title search would ever be conducted for Tract

[6] We think this accusation is rather odd given that we stated at page six of the Response to the Petition for Review that the Hearing Examiner required the disclosure to be filed "in such a fashion as to be included in any title search."

999 because it is a common area and cannot be developed or sold. The Hearing Examiner's decision makes clear that: "All open space areas shall be left in a substantially natural state. No clearing, grading, filling or construction of any kind shall occur in these areas..." CP 727. The trial judge was not misled, he noted: "This particular drainage facility was not on any individual lot. It was, as I indicated, held in common by the homeowner's association." CP 26. No buyer can purchase Tract 999 therefore no title policy would ever be issued for it. The aspersions being cast by WSAMA were indeed unnecessary.

D. The Common Law Dedication Argument is New on Appeal and Therefore Barred

First, the common law dedication argument completely ignores that a "statutory dedication" was accomplished twenty-five years ago. *See* RCW 58.17.020 (3); *Crystal Ridge,* WL 3872223 at*11. WSAMA asserts another careful combing of the trial court records resulted in it finding that the City had argued common law dedication below. *See Amicus Brief,* p. 7-8. However, the words "common law dedication" do not appear in any of the City's trial briefs. CP 314-341; 258-268. No citation to any authority involved in common law dedication was ever made. *Id.* The quotation to the trial judge's decision is in error. His words appear at CP 23, not CP 77 and all the quotes refer to the City's argument that the County never maintained the pipe.[7] WSAMA is in error; the City's

[7] The City's argument that the County or City had never maintained the pipe is undercut by the fact that no one maintains a pipe until it begins to fail. The City's own Surface /Stormwater Coordinator explained that the pipe was failing because of its age. CP 763.

argument should not be entertained. *See McKee v. American Home Products, Corp.*, 113 Wn.2d 701.

E. The Scope of an Easement is Not An Issue of First Impression or of Substantial Public Importance

WSAMA opens its argument claiming that because there are no cases on the scope of a drainage easement in a plat, the issue is one of first impression. The argument fails because the language in a plat is "interpreted by the court as any other writing would be." *Ditty v. Freeman,* 55 Wn.2d 306, 347, P.2d 870 (1959).[8] It also ignores the much more complicated case cited by Crystal Ridge which analyzed a park easement in a three-phase plat. *See Rainier View Court HOA Inc., v. Zenker,* 157 Wn. App. 710, 238 P. 3d 1217 (2010).

Similar to the City, WSAMA's next argument is a house of cards that hinges upon ignoring the public nature of the interceptor pipe. It claims the Court of Appeals only focused on 11 words in one Snohomish County Code for its analysis which it deems "nonsensical." *See Amicus Brief,* p. 9. Contrary to this representation, numerous code sections were discussed in Division One's opinion that emphasized the propriety of its public use finding for the interceptor pipe. *See Crystal Ridge,* WL 3872223 at*5-*9 (compared chapters 24 & 25; *analyzed* SCC 25.01.010; SCC 25.05.040; SCC 25.02.030; SCC 24.08.120; SCC 25.02.080). The

[8] The fallacy of this position would be clear if one assumes this is a contract interpretation case involving a French Drain. WSAMA's argument is that because it cannot find a case involving a French Drain, this must be an issue of first impression concerning contracts. This confuses issues of law with unique facts. Courts deal with unique facts all the time.

state statutes cited by WSAMA also apply to this case because the "flood waters" and "storm waters" do endanger public property – public streets inside and outside of the plats and a regional sanitary sewer line. *See* RCW 86.15.010 (3) & (5).

WSAMA next takes a curious and misguided foray into the County's September 1979 Procedures Manual (CP 350-439) comparing the size of pipes described therein to argue that the 6-inch interceptor pipe is private. The Manual has a disclaimer that states it was written to save design costs for routine drainage plans and it is not "intended to represent the only methods acceptable" to the County. CP 356. The pipe sizes that WSAMA refers to are for pipes in a closed system with catch basins. CP 395-398. The pipes normally used for this type of system are sized using the "Manning Formula" with a 12-inch pipe being the smallest recommended size. CP 398. In this case, Ted Trepanier irrefutably designed, and the County accepted, the 6-inch interceptor pipe. CP 811. The design was obviously more involved than sizing pipes for a closed system with catch basins. WSAMA's argument is woefully misplaced.

Finally, WSAMA re-visits an argument abandoned by the City on appeal based upon SCC 24.28.040.[9] It claimed all the requirements of the ordinance were not met—no proof of an inspection, an accounting of expenses or a payment based on a ten year pro-ration. *See* SCC 24.28.040

[9] WSAMA cites to the Drainage Manual (CP 439) and the ordinance (CP 687). Since SCC 24.28.040 is more detailed, we will only be addressing the ordinance. However, it should be noted that this argument is improperly brought before this Court. *See Coburn v. Seda,* 101 Wn. 2d 270, 279, 677 P.2d 173 (1984).

(2) (4) (5). First, as was recognized by the trial judge, a dedication is complete under RCW 58.17 upon acceptance of the plat. CP 26. To the extent that the County's Code attempts to add other conditions, it was the trial court's opinion that the statute would prevail. CP 27. Second, Ted Trepanier, who was personally involved in the process, testified that it was not formal and "paperwork was pretty poor back in those days." CP 291. The trial court also noted that if the maintenance of the interceptor pipe was to be awarded to the homeowners, the County had to have in hand a maintenance plan for them. CP 27; SCC 24.28.080 (Operation and Maintenance by Owners.) WSAMA's arguments are all unavailing.

III. CONCLUSION

Division One's decision does not conflict with any Supreme Court decision or any appellate decision, and it does not present a significant issue of law under any constitution or involve an issue of substantial public interest. RAP 13.4 (b) (1-4). The Supreme Court is respectfully asked to deny discretionary review.

RESPECTFULLY SUBMITTED AND DATED this 10th day of January, 2014.

TERRELL MARSHALL DAUDT & WILLIE

By: _____

Karen A. Willie, WSBA No. 15902
Email: kwilliw@tmdwlaw.com
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603
Facsimile: (206) 350-3528

Attorney for Respondents

CERTIFICATE OF SERVICE

I, Karen A. Willie, hereby certify that on the 10th day of January, 2014, I caused to be served via electronic email and U.S. Mail, postage prepaid from Seattle, Washington, a true and accurate copy of the foregoing upon the following parties:

Joseph N. Beck
Email: Joe.Beck@ci.bothell.wa.us
CITY OF BOTHELL
18305 101st Ave. NE
Bothell, Washington 98011-3499

Stephanie Croll
Email: scroll@kbmlawyers.com
KEATING BUCKLIN & McCORMACK, INC., P.S.
800 Fifth Avenue, Suite 4141
Seattle, Washington 98104

Daniel B. Heid
Email: dheid@auburnwa.gov
City Attorney, City of Auburn
Attorney for Amicus Curiae Washington
State Association of Municipal Attorneys
25 West Main Street
Auburn, Washington 98001-4998

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10th day of January, 2014.

Karen A. Willie

Karen A. Willie, WSBA No. 15902

OFFICE RECEPTIONIST, CLERK

From: Bradford Kinsey <bkinsey@tmdwlaw.com>
Sent: Friday, January 10, 2014 11:31 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Karen Willie; Bradley Neunzig
Subject: 89533-3-Crystal Ridge Homeowner's Association/City of Bothell: Respondent's Response to Amicus Brief
Attachments: Crystal Ridge-Respondent's Response.pdf

Greetings,

Please find attached for filing with the court Respondents' Response to Amicus Curiae Brief of Washington State Association of Municipal Attorneys in Support of City of Bothell's Petition for Review

Thank you.

Bradford Kinsey
Legal Secretary to Karen A. Willie, WSBA #15902
TERRELL MARSHALL DAUDT & WILLIE PLLC
936 N. 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603
Facsimile: (206) 350-3528