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No. 68618-6-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

CRYSTAL RIDGE HOMEOWNERS ASSOCIATION, a Washington nonprofit corporation, etc., et al.

Plaintiffs/Respondents,

vs.

CITY OF BOTHELL, a municipal corporation,

Defendant/Appellant.

BRIEF OF APPELLANT CITY OF BOTHELL

Stephanie E. Croll, WSBA No. 18005
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175
Attorneys for Defendant/Appellant
City of Bothell

Joseph N. Beck, WSBA No. 28789
City of Bothell
18306 101st Avenue NE
Bothell, WA 08011-3499
City Attorney, Defendant/Appellant
City of Bothell

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I. INTRODUCTION

This lawsuit arises out of flooding in a residential neighborhood of Bothell called Crystal Ridge, Divisions I & II. Unfortunately for the homeowners in Crystal Ridge, the subdivision was built on and adjacent to underground springs and seeps that have historically made the property extremely wet. The subdivision was approved by Snohomish County well before the area was incorporated by the City. The County's approval documents – including hydrology, geology, hydrogeology reports, and drainage plans – indicate the property's propensity to flood.

The County's approval documents also clearly show that the County intended it to be the responsibility of the private homeowners in Crystal Ridge to comply with any specialized drainage features that might be required to control flooding on their own individual lots. In fact, it is undisputed that in 1987 the County required the developer to record a document entitled "Drainage Disclosure" with the County Assessor's Office, giving notice to all future homeowners of flooding problems with the property and, in addition, advising future homeowners that complying with measures to control such flooding would be *their responsibility* should they choose to purchase in Crystal Ridge.

The main drainage feature installed by the developer in Crystal Ridge to prevent the residential homes from flooding was a perforated

pipe buried in a trench 12 feet underground, known as the "interceptor pipe." This buried pipe is intended to collect and remove groundwater from the site. Apparently this pipe is in disrepair and, according to Plaintiffs, is causing flooding on some of their residential real properties.

Both parties moved for summary judgment below. Plaintiffs asked the trial court to enter an order finding that the City of Bothell has a duty to maintain the buried interceptor pipe. The City asked the trial court to find that it had no such duty as a matter of law, and to dismiss Plaintiffs' lawsuit in its entirety. The City's motion was based upon the undisputed fact that the interceptor pipe is a private (not public) drainage feature. Pursuant to all of the applicable drainage codes, rules, and regulations, the interceptor pipe does not meet the definition of a public "stormwater facility." Furthermore, it is undisputed that the City has never in the past maintained this private structure (nor did the County when the property was under Snohomish County's jurisdiction); nor would it be in the public's best interest to do so as the interceptor pipe only benefits private property.

In light of these undisputed facts– especially the recorded Drainage Disclosure providing notice to all homeowners in Crystal Ridge that they would be responsible to control flooding on their own properties – Plaintiffs' attempt to hold the City legally accountable for Crystal Ridge's

drainage issues should be denied. Regrettably, the trial court inexplicably granted the Plaintiffs' motion and entered an order finding that the City has a duty to repair Plaintiffs' private drainage system. Accordingly, the City filed this request for discretionary review to ask that the trial court order granting Plaintiffs' motion for summary judgment be reversed, and that the City's cross-motion for summary judgment to dismiss this lawsuit be granted.

II. ASSIGNMENTS OF ERROR

The trial court erred by granting the Plaintiffs' Motion for Summary Judgment, and by failing to grant the City's Cross-Motion for Summary Judgment to dismiss this case in its entirety, upon one or more of the following bases:

(1) The City does not have a duty to maintain the interceptor pipe because it is a private drainage facility and not a public facility;

(2) The City does not have a duty to maintain the interceptor pipe as the pipe was not included in the drainage easement for "stormwater facilities" that was expressly dedicated to Snohomish County when the plat of Crystal Ridge was recorded, because the interceptor pipe does not meet the statutory definition of a "stormwater facility" as a matter of law;

(3) The City does not have a duty to maintain the interceptor pipe as the pipe has not been dedicated to the City via any theory of common law dedication, because neither the County nor the City has never taken any action to accept responsibility to inspect and/or maintain the interceptor pipe, and because the pipe benefits only private parties;

(4) The City does not have a duty to maintain the interceptor pipe because the property owners in Crystal Ridge bought their properties subject to the Drainage Disclosure recorded on the properties, which gave them notice that "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" and that "the disclosures and terms and conditions runs [sic] with the land . . . and the compliance and/or knowledge are the obligation of any owner of the subject property."

III. STATEMENT OF THE CASE

A. Introduction

The main issue in this lawsuit can be simply stated: Does the City of Bothell have a duty to maintain the private drainage facility known as the "interceptor pipe" that is located within the residential development of Crystal Ridge? Plaintiffs' sole argument as to why the City has such a duty is based upon their contention that the developer of Crystal Ridge

dedicated drainage easements for "stormwater facilities" to Snohomish County on the face of the plats when the subdivisions were approved, that the County accepted those easements pursuant to RCW Ch. 58, that the City of Bothell subsequently incorporated the area which included the Crystal Ridge subdivision and took over all storm water maintenance duties that the County had upon incorporation, and, therefore, the City must now have a duty to maintain the interceptor pipe. This argument is a red herring. This argument misses the point entirely, as the pipe at issue here – the interceptor pipe – is simply not covered by the dedicated easement because it is a private drainage facility. The County never had a duty to maintain Crystal Ridge's private interceptor pipe upon dedication of the plats for Divisions I & II; and, likewise, the City never had a duty to maintain this private drainage facility upon incorporation.

When the Court looks at the plain language of the easement, it will see that it clearly and specifically covers only "stormwater facilities." And here, the City presented undisputed evidence to the trial court below to show that the interceptor pipe was not, and is not, a "stormwater facility" as defined by either the applicable Snohomish County codes or City of Bothell codes. Thus, the interceptor pipe was not included in the "facilities" covered by the dedicated easements. Furthermore, the City also presented undisputed evidence below that neither the County nor the

City has ever maintained this pipe. Based upon this evidence, the City has no duty to maintain and repair the interceptor pipe. Accordingly, the City respectfully asks this Court to reverse the trial court's order denying the City's motion to dismiss.

B. The Development Of Crystal Ridge

1. The County Required Installation of the Interceptor Pipe and a Surface Water Swale Drain as Conditions of Approval of the Crystal Ridge Plat.

This lawsuit arises out of flooding in a residential neighborhood of Bothell called Crystal Ridge, which was approved by Snohomish County in 1987[1] and incorporated into the City of Bothell in 1992.[2] The County's approval documents indicate the property's extensive history of flooding problems.[3] The primary problem with the site was a substantial subsurface (groundwater) flow coming from adjacent upland property.[4] The developer's geotechnical engineer addressed the groundwater flows in several geotech reports issued during the approval process, emphasizing the need for two specialized drainage improvements to de-water (dry-out) the site and make it suitable for "residential construction."[5] First, a deeply buried perforated pipe (the "interceptor pipe") was to be located directly

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[1] Division I of the Plat of Crystal Ridge was recorded on April 15, 1987 (CP 660) and Division II on November 10, 1987. CP 654.
[2] CP 345.
[3] CP 692-729; 463-473.
[4] CP 713.
[5] CP 697.

adjacent to the upland property for the purpose of intercepting groundwater and conveying it away from the new residential development of Crystal Ridge;[6] and second, a drainage swale was to be located on the ground upslope of the interceptor pipe, to intercept surface water flows from the adjacent upland property and convey them away from the site.[7]

The developer's geotech specifically recommended that the surface water swale drain be installed upslope of the interceptor trench: "The swale drain should be located immediately **upslope** of the interceptor drain and should be designed to intercept surface runoff from the upslope properties."[8] Unfortunately, the surface water swale drain no longer exists, as the Plaintiff property owners have used the easement area where it was originally located for their own purposes, such as to install fences, landscaping, and the like.[9]

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[6] CP 697; 713-715. The geotech engineer also indicated that the interceptor trench, in which the perforated pipe was to be laid, "should be approximately 2 feet wide and should extend as deep as possible but not less than 12 feet." CP 715.

[7] CP 699; 713-715.

[8] CP 699 (emphasis added).

[9] Plaintiffs disagree that the now vanished swale had to have been located "upslope" of the buried interceptor drain, contending that the second geotech report stated that the "swale drain may be located *independently* of the location of the interceptor trench." (Emphasis added.) CP 715. They argue that "independently" must mean in a different easement (an unsubstantiated leap in logic.) Then, they argue that the only other easement in the area is located downslope of the interceptor drain; ergo, according to Plaintiffs, the swale must have been in the separate easement downslope of the interceptor drain. This makes no sense. Also, the geotech statement Plaintiffs' rely upon is not a complete quote of the report, which actually reads as follows: "The swale drain may be located independently of the location of the interceptor trench and should be designed to intercept surface runoff from the upslope properties..." (Emphasis added.) CP 715. This indicates that the swale should still be located upslope of the interceptor

The County's conditions of approval required installation of both the interceptor pipe and the surface water swale, as recommended by the developer's geotech.[10]

2. The Drainage Easements Conveyed to Snohomish County on the Plat Are Limited to Easements for "Stormwater Facilities" Only.

The Crystal Ridge plats were recorded in the Snohomish County's Assessor's Office with limited easements conveyed to the County. Specifically, the easements were for "stormwater facilities" only as evidenced by the plain language on the face of each plat:

> DRAINAGE EASEMENTS DESIGNATED ON THIS PLAT ARE HEREBY RESERVED FOR AND GRANTED TO SNOHOMISH COUNTY FOR THE RIGHT OF INGRESS AND EGRESS FOR THE PURPOSE OF MAINTAINING AND OPERATING ***STORMWATER FACILITIES.***[11]

The City submitted overwhelming evidence to the trial court proving that the interceptor pipe was not a "stormwater facility," and, thus, was simply not included within the scope of this easement.[12] The City's evidence on this issue was uncontested.

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drain; how else would it be able to intercept surface runoff from the upslope properties? *See, also,* CP 255-256.

[10] CP 719-729.

[11] CP 655; 661 (emphasis added).

[12] CP 324-326 (introduction); CP 326-328 (the interceptor pipe does not meet the definition of a stormwater facility in Former Snohomish County Code 24, in effect at the time of plat approval); CP 329-331 (*same,* 1979 Snohomish County Drainage Procedures Manual, in effect at the time of plat approval); CP 331-333 *(same,* Former Title 25 of the Snohomish County Code, in effect at the time of plat approval); CP 334-337 (*same,*

a) 25-foot Sanitary Sewer and Drainage Easement

Of particular importance to this lawsuit is the existence on the plats of two easement areas. Looking at the plat documents for Division II, for instance, in the upper right hand section of the second page there is a legend that states: "25' SANITARY SEWER (AWD) AND DRAINAGE EASEMENT."[13] This 25-foot easement area was dedicated to both the sewer district for a sanitary sewer easement, and the County for an easement for "stormwater facilities."[14] It is undisputed, however, that fee title to the property remained with the Crystal Ridge Homeowner's Association (HOA).

b) 15-foot Easement Lying Downslope of the Interceptor Pipe

The plats also dedicated another easement area to Snohomish County marked "15 foot drainage easement."[15] With regard to this easement, it is of particular importance to note that it is located downslope of the 25-foot easement area.

1972/1973 Comprehensive Trunk Storm Drain Plan); CP 337-338 (*same,* 1977 City of Bothell Surface Water Runoff Policy, in effect at the time the property was incorporated by the City); CP 338-339 (*same,* City of Bothell Current Codes).

[13] CP 655.

[14] CP 655.

[15] CP 655.

3. The Alderwood Water District Also Has an Easement For its Sanitary Sewer Main in the Same Trench as the Interceptor Pipe

It is also important to note that as part of the development, another separate municipal corporation, the Alderwood Water District ("AWD")[16] installed its sanitary sewer main in the exact same trench as the interceptor pipe.[17] In fact, installation of the interceptor pipe was required to protect AWD's sanitary sewer main.[18]

4. The Easement for "Stormwater Facilities" Does Not Include the Interceptor Pipe

For purposes of this appeal, the Court should assume that the interceptor pipe was buried in the 25-foot easement area.[19] Although it is uncontested that the easement for "stormwater facilities" was contained on the face of the Crystal Ridge plats (Divisions I & II), the *scope* of this easement with regard to the City is contested.[20] The plain language of the easement itself clearly limits the easement to "stormwater facilities." It is the City's position – supported by the record – that when the interceptor pipe was approved by Snohomish County and then installed by the

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[16] Now named the *Alderwood Water and Sanitary Sewer District.*
[17] CP 475.
[18] CP 467.
[19] Despite some efforts by both parties to dig-up and physically locate the interceptor pipe, to the best of the City's knowledge, it has not been found on Plaintiffs' properties. CP 799.
[20] The AWD obviously has a right to this easement area to maintain its sanitary sewer. As the City noted, because the interceptor pipe was required as a condition of the sanitary sewer's installation, it is logical to presume AWD also has a responsibility to maintain the interceptor pipe. Plaintiffs' failure to name AWD in this lawsuit is a mystery.

developer, that it did not then, and does not now, meet any of the relevant definitions for a "stormwater facility." For instance, it is undisputed that a de-watering system for excessive ground water was not part of the County's drainage system, or surface and storm water management system, at the time the plat of Crystal Ridge was approved in the 1980s. *See* former Snohomish County Code (SCC) Title 24; former SCC Title 25; and the County's formerly adopted Drainage Procedures Manual.[21] Furthermore, a de-watering system for groundwater that protects only private property has never been a component of the City's drainage system, or surface and storm water management system, either at the time of annexation or at any time since. *See* the former Bothell Municipal Codes (BMCs) for drainage and stormwater management, and the currently enacted Code, BMC Title 18.[22]

Instead, the interceptor pipe is either a private facility installed on private property (a parcel held in fee title by the HOA), used to benefit the private residential development of Crystal Ridge and intended to be maintained by the HOA; or it is, perhaps, a mixed use facility between the HOA and the Alderwood Sewer District.[23]

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[21] CP 324-333; 349-454; 665-691.
[22] CP 333-339; 343-344; 485-616.
[23] CP 250-251.

5. Neither the County Nor the City Ever Inspected or Maintained the Interceptor Pipe

Finally, the City reviewed all available County records with regard to this plat and the interceptor pipe, and it is undisputed that there is not a scintilla of evidence in the record to support a finding that the County ever accepted maintenance of this facility, or that it ever actually maintained this facility.[24] Had Plaintiffs been able to find such evidence, it surely would have made its way into the record on appeal; instead, Plaintiffs did not submit any evidence below to indicate that the interceptor pipe had ever been maintained by *anyone* (not Snohomish County, or the City, or the HOA) at any time. It is also undisputed that since incorporation in 1992, the City has never considered the buried interceptor pipe a public facility, and the City has never maintained it.[25] Furthermore, the City's witnesses provided undisputed testimony that the type of interceptor pipe installed at Crystal Ridge is not the type of drainage facility the City would normally ever agree to take over from a private developer.[26]

6. The Recorded Drainage Disclosure Requires the Private Property Owners in Crystal Ridge to Maintain the Interceptor Pipe Themselves

In addition to requiring installation of the specialized drainage features discussed above (*i.e.,* the buried interceptor drain and the surface

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[24] CP 245; 248-249; 344.
[25] CP 245-46.
[26] CP 250-253; 343-346; 482; 784-789.

swale), prior to plat approval on Division II, the County also required the developer to record on the property a document entitled "Drainage Disclosure" with the County Assessor's office,[27] a disclosure that runs with the land in perpetuity and reads, in part, as follows:

> The filing of the document:
>
> 1) [Discloses] to all the following: 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.**
>
> ***
>
> 3) Serves as notice to any heir, successor, assign or prospective purchaser [that] the disclosures and terms and conditions runs [sic] with the land pursuant to Section 19.40 SCC and the **compliance and/or knowledge are the obligation of any owner of the subject property.**
>
> This condition has been issued without expiration date.[28]

This recorded document undeniably gave notice to all purchasers in Division II that the property they were buying had severe flooding problems and that in the future "special and/or extraordinary drainage controls may be necessary on individual lots." More importantly, the recorded Drainage Disclosure mandates that future "compliance" with

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[27] CP 727.
[28] CP 472-473 (emphasis added).

"drainage controls" on "individual lots" is "the obligation of any owner of the subject property."

Based on this recorded Drainage Disclosure, it is clear that the Plaintiffs in this lawsuit, i.e., the owners of "individual lots" in Crystal Ridge, are "obligated" to comply with the drainage controls on their own properties. Additionally, it is undisputed that the HOA (Plaintiffs in this lawsuit) own the lot where the interceptor pipe is buried. The interceptor pipe is buried on Tract 999, which is an open space lot that is owned by the HOA.

C. Procedural Status

Plaintiffs filed a motion for partial summary judgment asking the trial court to find that the City had a duty to maintain the interceptor pipe.[29] The City filed a cross-motion for summary judgment asking the trial court to hold that no such duty exists and, in addition, to dismiss Plaintiffs' lawsuit in its entirety.[30] Plaintiffs' motion was granted and the City's cross-motion was denied.[31] The trial court entered an order granting an immediate appeal;[32] and this Court accepted review.

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[29] CP 632-649.
[30] CP 314-341.
[31] CP 97-100.
[32] CP 66-69.

IV. ARGUMENT

A. The Interceptor Pipe Was Not Expressly Dedicated to Snohomish County

In this case, the interceptor pipe was not expressly dedicated to Snohomish County because, *inter alia*, it was not – and is not – a "storm water facility." A dedication is an owner's voluntary donation of land or its use to the public. *City of Spokane v. Catholic Bishop*, 33 Wn.2d 496, 503, 206 P.2d 277 (1949). An easement is a nonpossesory right to use in some way another's land without compensation. *City of Olympia v. Palzer*, 107 Wn.2d 225, 229, 728 P.2d 135 (1986). The party asserting that there has been a public dedication, whether of land or of an easement, bears the burden to prove all the elements that comprise a public dedication. *Karb v. City of Bellingham,* 61 Wn.2d 214, 218-19, 377 P.2d 984 (1963).

A common law dedication must be evidenced by "an intention on the part of the owner to devote his land, or an easement in it, to a public use, followed by some act or acts clearly and unmistakably evidencing such intention," and acceptance by the City. *City of Spokane*, 33 Wn.2d at 502-03 (*citing City of Seattle v. Hill,* 23 Wash. 92, 97, 62 Pac. 446 (1900)). The intention of a dedicator must be "clear, manifest, and unequivocal." *City of Spokane*, 33 Wn.2d at 503 (*quoting Corning v.*

Aldo, 185 Wash. 570, 576, 55 P.2d 1093 (1936)). Acceptance may be express, or implied by municipal acts or public usage. *City of Spokane*, 33 Wn.2d at 503. And the dedicated land must be used by the public at large, not just "one person or a limited number of persons, or for the exclusive use of restricted groups of individuals." *Knudsen v. Patton*, 26 Wn. App. 134, 141, 611 P.2d 1354, *review denied*, 94 Wn.2d 1008 (1980) (emphasis added).

1. The Plats Were Recorded With Drainage Easements For "Stormwater Facilities" Only, and the Interceptor Pipe Is Not A "Stormwater Facility" As A Matter Of Law

The broad issue on appeal, which is an issue of first impression before this Court, is whether the dedication of a drainage easement for "stormwater facilities" on a residential plat includes an express dedication of every drainage feature buried within the designated easement area, even those features that do not meet local government's definition of public "stormwater facilities." For example, does such a dedication include private drainage pipes and/or facilities? Certainly, it does not include facilities belonging to other municipal entities, such as the AWD.[33]

[33] It is obvious that the easement for "stormwater facilities" did not impose a duty on the County, or subsequently the City, to maintain the AWD's sanitary sewer main, even though the sewer main was buried within the exact same 25-foot easement area. This is just one example of how the granting of a drainage easement to the City does not convey a duty to maintain *all* drainage facilities that exist within the easement area.

The specific question presented to the Court of Appeals in this case is whether the interceptor pipe is a "stormwater facility"? It is the City's position that the trial court committed reversible error when it held that the interceptor pipe was a public "stormwater facility." Based on the undisputed facts of this case, the interceptor pipe does not meet the definition of "stormwater facility" under any applicable code or regulation as a matter of law. Thus, the duty to maintain the interceptor pipe was not included in the express drainage easement dedicated on the face of the Crystal Ridge plats.

As set forth in the declarations submitted by the City's Utility Manager and Environmental Engineer, the interceptor pipe does not meet either the County codes or the City codes definitions of a "stormwater facility."[34] In interpreting statutory provisions, the court's primary objective is to ascertain and give effect to the intent and purpose of the legislature in creating the statute. *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). To determine legislative intent, the court looks first to the language of the statute. If a statute is clear on its face, its meaning is to be derived from the plain language of the statute alone. *Watson*, 146 Wn.2d at 954. A statute is unclear if it can be reasonably interpreted in more than one way. However, it is not ambiguous simply because

[34] *See,* footnote 12, *supra;* and generally CP 250-253; 254-257; 342-400; 477-600.

different interpretations are conceivable. *Id.* at 955. The court is not required to create ambiguity by "imagining a variety of alternative interpretations." *Id.* Washington courts have consistently held that an unambiguous statute is not subject to judicial construction and have declined to insert words into a statute where the language, taken as a whole, is clear and unambiguous. *Id.* If a statutory term is ambiguous, however, then the local jurisdiction's interpretation of its own statute is accorded great weight in determining legislative intent. *Cowiche Cannon v. Bosley,* 118 Wn.2d 801, 813-14, 828 P.2d 549 (1992).

In this case, based on the plain language of the relevant codes, the interceptor pipe does not meet the statutory definition of a "stormwater facility" as a matter of law. If, for any reason, the Court feels that the applicable codes, rules, and/or regulations are ambiguous, then it should defer to the local jurisdiction's interpretation of its own codes. Here, the City's interpretation of its stormwater and drainage codes is that the type of interceptor pipe installed at Crystal Ridge does not meet the definition of a public "stormwater facility," and is not the type of drainage facility the City would normally agree to take over from a private developer.[35]

In conclusion, based upon the record below, it is undisputed that the interceptor pipe was not a "stormwater facility" under the County

[35] CP 244-247; 250-253; 254-257; 342-400; 477-600; 784-789.

codes at the time of the dedication. The groundwater pipe was not part of the County's drainage system, or surface and storm water management system, at the time the plat of Crystal Ridge was approved in the 1980s. Nor does it meet the definitions for a "stormwater facility" at the time the property was annexed by the City of Bothell, or even under Bothell's codes today. Thus, based on these uncontested facts, the trial court committed reversible error. The City respectfully requests that the trial court order be reversed, and that this Court grants the City's Cross-Motion for Summary Judgment and enters an order dismissing Plaintiffs' lawsuit in its entirety.

2. The Mere Existence of the Easement Does Not Mean The City Has A Duty to Maintain The Interceptor Pipe

Plaintiffs have argued that the County (and thus the City) has a duty to maintain the interceptor pipe because no other drainage facilities were located within the 25-foot easement area at the time of the dedication and, therefore, the easement must refer to the interceptor pipe. This argument has several flaws. First, it is very likely that the interceptor pipe was <u>not</u> the only drainage feature in the 25-foot easement. Recall that both geotech reports prepared for the developer indicate that there would need to be <u>two</u> types of drainage facilities installed on the plat for the purpose of making it dry enough for residential development; (1) an

interceptor pipe to collect groundwater, and (2) a surface water swale drain that was to be specifically located "upslope" of the interceptor pipe (to capture surface water and divert it offsite before it could percolate into the ground and overwhelm the interceptor pipe.)[36] The fact that the developer granted the County a drainage easement in this area is likely due to the existence of the surface water swale drain, which did meet the definition of a public "stormwater facility" under the County Code at the time; not the interceptor pipe, which is not a "stormwater facility" under either the applicable County or City codes.[37]

Plaintiffs do not agree, contending that the swale drain was likely placed in the separate 15-foot easement called out on the plat. But that easement is located downslope of the interceptor pipe, which is contrary to the instructions in both geotech reports. The first geotech report specifically calls for the surface water swale drain to be located "upslope" of the interceptor pipe,[38] while the second geotech report requires it to be located so as "to intercept surface run-off from the upslope properties."[39] If, in fact, the swale drain was located upslope of the interceptor pipe (as intended by both geotech reports), then it could not – as a matter of law – be located in the separate 15-foot easement, which is undeniably

[36] CP 699; 713-715.
[37] CP 255.
[38] CP 697.
[39] CP 715.

downslope of the 25-foot easement. Thus, Plaintiffs' contention that the interceptor pipe was the only drainage facility within the 25-foot easement is not supported by the record.

Second, even if we assume there were no drainage facilities whatsoever within the 25-foot easement area, it is common practice for local governments to require an easement for future needs, as testified to by the City's Environmental Engineer:

> 4. [E]ven if we assume there were no drainage facilities in the easement for "stormwater facilities" on the Crystal Ridge Plat, it would not be unheard of for the County and then the City to require an easement for potential future needs. Local jurisdictions, including Bothell, reserve utility (including drainage facility) easements regularly and routinely. This is especially true where, as here, the easement (along the western border of the Crystal Ridge Plat) is part of a street vacation. . . .
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> 5. Also, it is also common for the City to have easements on privately owned tracts in the City that contain private drainage facilities, especially facilities that connect to the municipal drainage system, not because the City has a duty to maintain private drainage facilities – or ever will maintain those private drainage facilities – but because if there is an emergency, then the City has the ability to reach such facilities.[40]

In conclusion, even if there were no facilities at all in the 25-foot area designated as a "drainage easement," it is still the type of easement the City would require for the various reasons set forth above. The fact

[40] CP 255-256 (emphasis in original).

that there is a private interceptor pipe in that area does not automatically cause the City to have a duty to maintain that private pipe.

3. AWD required installation of the interceptor pipe to protect its sanitary sewer line.

Finally, it is uncontested that the interceptor pipe was required to be installed in the same location as the Alderwood Water and Sewer District's sanitary sewer main. In fact, it is the Sewer District's plans that show the location of the interceptor pipe, **not** the developer's final plat. It is also undisputed that the Sewer District has an easement in the exact same location as the interceptor pipe.

The evidence in the record is uncontested that the interceptor pipe benefitted the District's sanitary sewer main.[41] Had the interceptor trench not been installed, it is extremely likely that the sanitary sewer system would have failed. In fact, the County issued a Stop Work Order to the developer in February 1987, halting installation of the sanitary sewer system based on drainage concerns. That Stop Work Order was only lifted after those concerns were addressed:

> Re: Plat of Crystal Ridge. . . . The Stop Work Order can be temporarily lifted to allow the remaining sanitary sewer installation to be constructed abutting the west property line in [sic] the Plat of Brentwood Heights. It is my understanding that the installation of the sanitary

[41] CP 252; 344.

> sewer will directly benefit the onsite ground water and erosion control problems.[42]

The City believes (and argued below) that the existence of the sanitary sewer main buried in the same trench as the interceptor pipe, in addition to documentation proving that the interceptor pipe was required as a condition of installation of the sanitary sewer main, suggests that the maintenance responsibility for the interceptor trench – if entrusted to any municipal corporation – was entrusted to the Sewer District, not the City.

B. The City Does Not Have a Duty To Maintain The Interceptor Pipe Under a Theory of Implied or Common Law Dedication.

In this case, the interceptor pipe was not expressly dedicated to the City because it did not meet the statutory definitions of a public stormwater facility, as set forth above. The City also demonstrated to the trial court below that the interceptor pipe was never impliedly dedicated to the County (or subsequently the City). Recall that a common law dedication must be evidenced by "an intention on the part of the owner to devote his land, or an easement in it, to a public use, followed by some act or acts clearly and unmistakably evidencing such intention," and acceptance by the City. *City of Spokane*, 33 Wn.2d at 502-03. The intention of a dedicator must be "clear, manifest, and unequivocal." *Id.* at 503. Acceptance may be express, or **implied by municipal acts or**

[42] CP 467.

public usage. *Id.* **And the dedicated land must be used by the public at large, not just "one person or a limited number of persons, or for the exclusive use of restricted groups of individuals**." *Knudsen v. Patton*, 26 Wn. App. at 141 (emphasis added).

Here, the facts are not in dispute, and the Court should find that there has been no implied or common law dedication in this case because neither the County (nor the City) ever "accepted" the pipe; for instance, neither the County (nor the City) ever took any actions to inspect or maintain the pipe. Furthermore, the pipe does not benefit the public at large, but only a limited, exclusive group of individuals, *i.e.,* the private property owners living in Crystal Ridge. For these reasons, as set forth more fully below, the City does not have a duty to repair the interceptor pipe under an implied dedication theory.

1. Neither the County Nor the City of Bothell Has Ever Taken Any Action To Inspect or Maintain the Interceptor Pipe.

It is undisputed that from 1988 through 1992, when the property was under Snohomish County's jurisdiction, the County never once performed any maintenance or inspection of the interceptor pipe.[43] The City annexed the Property in 1992; and the evidence is clear and undisputed that the City has never once performed any maintenance of the

[43] CP 248-249; 251-252; *Suppl. Fiene Decl.*, para. 3.)

interceptor pipe.[44] In fact, the City does not even know where, physically, the interceptor pipe is located.[45] To the best of the City's knowledge, the Plaintiffs have not physically located the interceptor pipe either.[46]

The first time the City appears to have heard about the interceptor pipe was sometime in 2008.[47] When the City was asked whether it would maintain this pipe, it responded by advising Plaintiffs that the groundwater pipe, if it actually exists where shown on site plans and as-builts of the Sewer District,[48] it is located on private property owned by the Crystal Ridge Homeowner's Association. Because it is located on private property and benefits only private property, the City responded to Plaintiffs' enquiry with a letter indicated that maintenance of the interceptor pipe is the responsibility of the Homeowner's Association:

> To summarize my assessment of your problem with encroaching surface water into your back yard I see potentially one primary cause. As the geo report details, surface water from springs, seeps, and streams have historically been of concern. The western property line, within the Alderwood Sewer Easement, had a deep interceptor trench installed which given its age now of 23-years, maybe failing. It may no longer be intercepting ground and surface water flows at the same efficiency it did when newly constructed.

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[44] CP 246; 344.
[45] CP 345; 799.
[46] CP 345; 799.
[47] CP 763.
[48] The Court may recall that the interceptor pipe is not, in fact, shown on the plat of Crystal Ridge. Instead, it is shown only on the site plans filed by the Sewer District.

> **My records show that this trench and it's [sic] associated drainage system of other interceptor trenches and pipes within the open space tracts are the responsibility of the Home Owner's Association (HOA).** It should be reviewed by the HOA for consideration of further analysis to determine precise cause of problem and subsequent solutions.[49]

Since this letter was written, the City's investigation turned up the 1987 Drainage Disclosure, and confirmed that neither the County nor the City has ever assumed maintenance responsibility for the private interceptor trench. Given these undisputed facts, it is clear that the City has never taken any action to "accept" the interceptor pipe, thus, the City does not have a duty to maintain the interceptor pipe under any theory of common law dedication.

2. The pipe benefits only private property.

It is undisputed that the developer's geotech reports for the property indicate that the intent of draining the site was to make it suitable for "residential construction,"[50] not to benefit any public property or public infrastructure. It is also clear that in addition to benefiting the AWD's sanitary sewer line, the interceptor pipe has only one function, and that is to benefit the private property owners in Crystal Ridge. Thus, the interceptor pipe is not the type of drainage facility that Snohomish

[49] CP 763.
[50] CP 697.

County (nor the City) would ever agree to maintain.[51] Frankly, local governments do not maintain drainage facilities that solely benefit private property, as this would be a gift of public funds to a private party in violation of the Washington State Constitution, art. 8, sec. 7. As a matter of law, local government does not (cannot legally) maintain drainage facilities that solely benefit private property. Instead, they only assume maintenance of facilities located on public property, or those that protect public property, such as infrastructure, roads, etc.[52]

Plaintiffs argued below that the interceptor pipe does not solely benefit private property, because it also benefits the roads within the subdivision as well, which have been dedicated to the City. Thus, they argue, it benefits public infrastructure. This argument is without merit as is demonstrated by testimony submitted by the City's Utilities Manager:

> Plaintiffs' allege that the interceptor trench benefits the residential streets within Crystal Ridge, which were dedicated to the County after the Plat was approved. Thus, they say, the groundwater system does not just benefit private property. First, those streets may now be maintained by the City to ensure public health and safety, but they were only built to serve the private residential community of Crystal Ridge. Also, the interceptor trench in question was not constructed in close proximity to City roads (as are those rare systems that are meant to protect roads, which such systems the City does maintain as set forth in my First Declaration, paragraph 2).

[51] CP 343-344.
[52] CP 343-344.

> Instead, the groundwater interceptor trench in Crystal Ridge was located adjacent to Private houses and directly above the Alderwood Sewer District's sanitary sewer main, making it plainly obvious that the private homes and sanitary sewer were the benefactors of the system. As such, this system should be maintained by the homeowners and the Alderwood Sewer District (since this case was first filed, I have not understood why the Alderwood Sewer District was not involved).[53]

Although the roads within the development may be dedicated to the City, they aid only the residents and their guests, which does not make the benefit of the interceptor pipe "public." It is uncontested that the interceptor pipe does not directly benefit the public roads. Thus, neither the County, nor the City, would have needed to assume maintenance of the trench to protect public property.

Plaintiffs also argued below that the interceptor pipe is a "component" of the municipal drainage and/or storm water system because it eventually discharges into the municipal system. Pursuant to this argument, anything and everything that eventually discharges into a municipal system is, *ipso facto*, part of the municipal system. This is clearly not correct. Many, many private systems are allowed to connect to and discharge into the City's stormwater drainage system, but this does not transfer the obligation to maintain the private system to the City. Instead, the City's responsibility for the storm water system ceases, by

[53] CP 251.

statute, at the point where the private line connects to the public line. *See, for example*, BMC 18.04.050:

> **City/user responsibility.**
>
> The city shall use reasonable diligence and care to maintain free flow of storm water and to avoid any interruption in service. The use of the storm drainage side sewer on the premises of the user shall be at the risk of the user, and the responsibility and the liability of the city shall cease at the connection of the storm drainage side sewer to the main or catch basin. (Emphasis added.)

Furthermore, Plaintiffs argument that the interceptor pipe (which is a 6" pipe) must be part of the City's system simply because it ultimately discharges into the municipal system somewhere down the line is also inconsistent with the definitions of "trunk lines" and "lateral lines" that the City had in place in 1992 when the property was annexed. Pursuant to the City's 1972/1973 Drainage Plan, public lateral storm sewer lines were required to be 12" in diameter; and public trunk storm sewer lines were required to be 12" in diameter or larger.[54] The City had, and still has, a policy of only installing and maintaining municipal lines that are at least 12" in diameter. Private lines that connect to the City's laterals are often less than 12" in diameter, which is one way to distinguish between public and private lines.

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[54] CP 519-520.

Finally, contrary to Plaintiffs' assertion otherwise, the City does not have a duty to maintain every drainage feature lying within a designated municipal drainage easement. For instance, the City may have a 15-foot wide drainage easement for a 12" lateral line; yet also located within that designated easement are the following: several private 4" lines tight-lining downspouts from private residences to the City's lateral; a sanitary sewer line operated by a Sewer District; and a water line operated by a Water District. Despite the fact that all these features are within the 15-foot easement, the City is only responsible for the 12" lateral line.

C. Recorded Drainage Disclosure Requires All of the Property Owners in Crystal Ridge to "Comply" With Any Special Drainage Controls That Are Necessary to Protect Their Individual Lots.

On March 25, 1987, due to the excessive groundwater and seepage problems on the site, the County ordered the developer to prepare a preliminary document entitled "Disclosure of Required Drainage Controls." [55] This preliminary document was intended to act as notice to any future purchaser of the extensive drainage problems with the site. This initial disclosure read as follows (underline added, additional emphasis in original):

> I/We, the owner(s) of that certain property . . . have applied for and been granted PLAT

[55] CP 469-470.

> APPROVAL for the Plat of CRYSTAL RIDGE by Snohomish County Hearing Examiner . . .
>
> The filing of this document with the County Auditor constitutes the current owners acknowledgement of the terms and conditions under which Plat Approval was granted and fulfills the condition that the following information about the property be disclosed to all:
>
> SUBSTANTIAL SURFACE AND SUBSURFACE DRAINAGE CONTROLS HAVE BEEN NECESSARY IN THE DEVELOPMENT OF THE SUBJECT PROPERTY, AND SPECIAL AND/OR EXTRORDINARY DRAINAGE CONTROLS MAY BE NECESSARY ON INDIVIDUAL LOTS AT THE TIME OF SUBSEQUENT PERMIT APPLICATIONS.[56]

Based upon the "substantial" drainage problems in Crystal Ridge, however, Snohomish County felt that the above disclosure was inadequate and it was never recorded. Instead, on November 9, 1987, the County required the developer to record a different Drainage Disclosure with the Snohomish County Auditor's Office, with additional warnings and conditions.[57] This document undeniably serves as notice to all subsequent purchasers of substantial drainage problems on the property and – in addition – that compliance with future drainage requirements will be "the obligation of any owner of the subject property." (Emphasis added.)

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[56] CP 469-470.
[57] CP 472-473.

Specifically, the recorded Drainage Disclosure reads as follows (emphasis added):

> The filing of the document:
>
> * * *
>
> 2) [Discloses] to all the following: 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.**
>
> * * *
>
> 3) Serves as notice to any heir, successor, assign or prospective purchaser [that] the disclosures and terms and conditions runs [sic] with the land pursuant to Section 19.40 SCC and the **compliance and/or knowledge are the obligation of any owner of the subject property.**
>
> This condition has been issued without expiration date.[58]

It is telling that this condition was issued "without expiration date." It is indisputably in effect today. This recorded Drainage Disclosure would have been listed on the Title Report obtained by each and every resident purchasing property located within Crystal Ridge Division II. In other words, every member of the Homeowner's Association that is a Plaintiff in this action would have received a copy of this document prior to purchasing their residence within Crystal Ridge. This is a recorded document that runs with the land. It undeniably supports two facts. First,

[58] CP 472-473.

that the County did not intend to take responsibility for any future drainage problems on individual lots within the private residential development of Crystal Ridge after the plats were recorded. Second, that each Plaintiff in this lawsuit had notice of the potential for serious and substantial drainage problems before they bought their properties, and further, they had notice that controlling drainage and flooding problems on their individual lots would be their own responsibility – not the County's.

It is undisputed that here, the interceptor trench is located on Tract 999, which is an individual lot within the Plat, designated as open space. Tract 999 is owned by the Homeowner's Association. The recorded Drainage Disclosure clearly applies to Tract 999, thus it applies to the interceptor trench, making maintenance of the trench the "obligation" of the Homeowner's Association.

Plaintiffs argued below that the Drainage Disclosure does not apply to the interceptor pipe because it is not located on a "lot" owned by an "individual." Recall that the Disclosure states that "special and/or extraordinary drainage controls may be necessary on **individual lots.**" Plaintiffs' argument is a tortured reading of the Disclosure; it is not intended to apply to "lots" owned by "individuals," but to "individual lots." The trial court below inexplicably made an error of law when it entered a finding that the Drainage Disclosure applied to "lots" owned by

"individuals," and not "individual lots."[59] Based upon this error of law, the trial court then held that Tract 999 was not owned by an "individual," but the HOA, and, therefore, the Drainage Disclosure did not apply to Tract 999 or the interceptor pipe buried thereon.[60] The trial court committed reversible error and this error should be corrected on appeal.

V. CONCLUSION

The City presented uncontested evidence that the interceptor pipe does not meet the relevant definitions of "stormwater facility," and that neither Snohomish County nor the City has ever taken on the duty to inspect and/or maintain this groundwater collection system. Further, it is uncontested that there is a recorded document, called the Drainage Disclosure, which provided advance notice to all property owners in Crystal Ridge that not only were there substantial drainage problems associated with their properties, but that they – the individual property owners – would personally be required to comply with any special drainage or flooding problems on their individual properties.

Based upon these uncontested facts, the City respectfully requests that the trial Court's Order Granting Plaintiffs' Motion for Summary Judgment and Order Denying Defendant City of Bothell's Motion for Summary Judgment be reversed. The City further requests that its Cross-

[59] CP 176.
[60] CP 176.

Motion for Summary Judgment be granted and Plaintiffs' lawsuit be dismissed in its entirety.

Respectfully submitted this 20th day of September, 2012.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.

By: Stephanie Croll
Stephanie E. Croll, WSBA # 18005
Attorneys for Defendant/Appellant
City of Bothell

Stephanie Croll, per
Joseph N. Beck, WSBA No. 28789
City Attorney, Defendant/Appellant
City of Bothell

DECLARATION OF SERVICE

I hereby declare that on September 20, 2012, a true and correct copy of the foregoing document was sent to the following parties of record via electronic transmission, as authorized by recipient, as follows:

Attorneys for Plaintiffs/Respondents:

Karen A. Willie
kwillie@tmdwlaw.com
Terrell Marshall Daudt & Willie PLLC
936 N 34th St Ste 400
Seattle, WA 98103-8869
Ph: (206) 816-6603
Fx: (206) 350-3528

DATED this 20th day of September, 2012.

Cathy Hendrickson, Legal Assistant
Keating, Buckling & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175
chendrickson@kbmlawyer.com