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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.

PETITION FOR REVIEW TO THE SUPREME COURT OF THE STATE OF WASHINGTON: CITY OF BOTHELL

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I. IDENTITY OF PETITIONER

The City of Bothell ("City"), Appellant and Defendant below, respectfully petitions this Court for Review.

II. INTRODUCTION

This lawsuit arises out of flooding in a private residential neighborhood in Bothell called Crystal Ridge. The Crystal Ridge Homeowners Association (the "HOA") sued the City, alleging the City was responsible for their damages, which they claim were caused by the failure of an old groundwater pipe (the "interceptor pipe" or "pipe"). Based upon Findings made by the County Hearings Examiner at the time of plat approval, the purpose of this pipe was entirely private; *i.e.,* to permit construction of a residential neighborhood (Crystal Ridge) which otherwise would have been unbuildable due to high groundwater levels and onsite seeps and springs at the project site. CP 719-728. The pipe is buried 12-feet underground on private property owned in fee by the HOA. The pipe drains to a private pond located on private property adjacent to the subdivision, and is not directly tied-in to the City's public system.

Plaintiffs contend the pipe was expressly dedicated to the City's predecessor in interest (Snohomish County) as part of a drainage easement on the face of the Crystal Ridge plats, pursuant to RCW 58.17.020 (the subdivision dedication statute). The City claims that the pipe – which was

not depicted on the plat maps and solely benefits private property – was not expressly dedicated to the public. Further, it is undisputed that there is no evidence in the record showing that either the County or the City has ever inspected or maintained this pipe in the past 25 years.

The main issue presented here is one of first impression: What is the scope of a drainage easement dedicated on the face of a plat? Does it include pipes and/or other facilities that are not shown on the plat map? Does it include facilities that are normally private, such as undersized pipes, or pipes that benefit only private property? As this case presents questions of importance to local governments and citizens alike, the City of Bothell respectfully requests that this Petition for Review be granted.

III. CITATION TO THE COURT OF APPEALS DECISION

The City seeks review of *Crystal Ridge HOA v. City of Bothell*, No. 68618-6-I filed by Division I on July 22, 2013. App. A.

IV. ISSUES PRESENTED FOR REVIEW

Issue No. 1: Does the *Crystal Ridge* decision sanction the unconstitutional gifting of public funds for a private purpose in violation of the Washington State Constitution, Art. 8, sec. 7, by requiring the public to maintain a groundwater pipe that benefits only private parties?

Issue No. 2: Is the *Crystal Ridge* decision in conflict with the Supreme Court's decision in numerous cases, including *Citizens v. Yakima County*, which prohibit the gifting of public funds for a private purpose under the Washington State Constitution, Art. 8, sec. 7?

Issue No. 3: Does the dedication of a drainage easement for

stormwater facilities on a plat necessarily include *all* drainage facilities located within the easement area, even those pipes not depicted on the plat map, and/or those pipes belonging to private parties that benefit only private parties; or does the dedication include only public stormwater facilities?

Issue No. 4: Is the *Crystal Ridge* decision in conflict with the Supreme Court's decision in *Spokane v. Catholic Bishop* regarding common law dedications of an easement; and further in conflict with the Court of Appeals decision in *Knudsen v. Patton* on the same issue?

V. STATEMENT OF THE CASE

A. History & Development of Crystal Ridge

This lawsuit arises out of flooding in a residential neighborhood in Bothell called Crystal Ridge, which consists of two divisions that were approved by Snohomish County in 1987. CP 660, 654. The area was later incorporated into the City of Bothell in 1992. CP 345.

1. Drainage Problems at Crystal Ridge

Crystal Ridge was built in an area that historically had severe and chronic flooding problems. The primary problem with the site is the flow of groundwater coming from the adjacent upland residential neighborhood. As set forth below, without installation of the interceptor pipe to collect this groundwater and direct it offsite, the Property would not have been buildable due to onsite springs, seeps, and groundwater saturation issues.

a) Interceptor pipe and swale drain

The developer's geotechnical engineer acknowledged the substantial groundwater flows in several reports submitted during the approval process, emphasizing the need for two specialized drainage improvements to make the property suitable for private residential construction. First, he recommended installation of an interceptor pipe, to be buried at least 12 feet underground, for the purpose of intercepting groundwater seeping toward the Property from the adjacent upland residential development. *See* CP 698 (emphasis added):

> A key element in the site development will be the collection and control of surface runoff and subsurface seepage...**a permanent interceptor trench** should be installed along the west property line and partway along the north and south property lines.

Second, the geotech recommended installation of a surface drainage swale, to be located "upslope" of the interceptor pipe, also for the purpose of intercepting surface water flows from the upland development:

> The swale drain should be located immediately ***upslope*** **of the interceptor drain** and should be designed to intercept surface runoff from the upslope properties.

CP 699 (emphasis added). In sum, the interceptor pipe and surface swale were both required to develop this site. Historically, groundwater and surface water had flowed from the upland property directly onto Crystal Ridge; thus, the only way to make the Property suitable for private residential development was to capture these historical flows and direct

them offsite. Of importance, the groundwater captured by the interceptor pipe was directed offsite into a private pond on adjacent private property, not into a public facility. CP 475-476.

b) Recorded Drainage Disclosure

Because of the drainage problems, the County required the developer to record a document on the Property entitled "Drainage Disclosure." *See* App. C. The evolution of this disclosure is significant.

First disclosure: On March 25, 1987, the County ordered the developer to prepare a document entitled "Disclosure of Required Drainage Controls." CP 469-70, App. D. This document was simply intended as notice to all future purchasers of lots in Crystal Ridge that their properties had an extensive history of drainage problems:

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

Id. (underline added).

Based upon the substantial, overwhelming and unique drainage problems at Crystal Ridge, however, Snohomish County felt that the above disclosure was inadequate and it was never recorded.

Second disclosure: In the end, the County required the developer to not only give notice that there was a history of drainage problems with the Property, but also – most importantly – give notice that the future private property owners would be responsible for the installation and **maintenance** of any and all future drainage controls necessary to protect their private properties. Thus, on November 9, 1987, the County required the developer to record a new, more comprehensive Drainage Disclosure. App. C. This document serves as notice to all subsequent purchasers of substantial drainage problems on the property, and in addition specifically states that compliance with future drainage requirements will be "the obligation of any owner of the subject property." *Id.* (emphasis added). The actual Drainage Disclosure that was recorded for Crystal Ridge (App. C) reads as follows (emphasis added):

> 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.**
>
> * * *
>
> 2) 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**.

2. The Drainage Easement for "Stormwater Facilities"

The Crystal Ridge plats were recorded with only a limited drainage easement conveyed to the County. Specifically, the drainage easement on the face of the plat was only for access to maintain "stormwater facilities," as evidenced by the plain language of the easement itself:

> 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**.

App. E; CP 655, 661 (all-caps in original; additional emphasis added).

a) First easement, a 25-foot drainage easement

The plat map for Division II conveys a "25' SANITARY SEWER (AWD)[1] AND DRAINAGE EASEMENT." App. E; CP 655-656. This 25-foot easement is located on the western boundary of the plat, on property owned in fee by the HOA (known as Tract 999, an open space tract). The interceptor pipe was installed in a trench within this 25-foot easement, along with AWD's sanitary sewer main. CP 475-476, App. B. Thus, the pipe had two clear functions: (1) to allow the developer to build

[1] AWD stands for "Alderwood Water District," which was the local water and sanitary sewer district at the time.

a subdivision on property that would otherwise have been unbuildable; and (2) to protect AWD's sewer line.

b) Second easement downslope of the interceptor pipe

The plats also dedicated a second easement to the County marked "15-foot drainage easement," located next to and downslope of the 25-foot easement referenced above. Crystal Ridge unsuccessfully tries to argue that the swale drain was located in this downslope easement. But according to both geotech reports, the swale had to have been located in the 25-foot easement, as it was intended to be upslope from the interceptor pipe (within the 25-foot drainage easement).[2] CP 699, 713-715.

B. The Interceptor Pipe Is Not a Public Stormwater Facility

1. The definition of a public "stormwater facility" in the County Code at the time does not include this interceptor pipe, which addresses only *private groundwater* problems

The interceptor pipe did not meet the County's definition of a public "stormwater facility" in effect at the time the plat was approved. The Court of Appeals decision to the contrary is incorrect. For instance, the sole intention of the pipe (other than to protect AWD's sewer line) is to protect Crystal Ridge by collecting groundwater and conveying it away

[2] Crystal Ridge submitted a declaration from the geotech, Mr. Denby, purporting to state that he ignored both of his own reports (CP 692-704; 706-717) and placed the swale drain downslope of the interceptor pipe. He cannot raise an issue of fact by contradicting two of his own written reports– both submitted into the record and verified as "true and correct." *Wash. Sch. Dist.*, 99 Wn. App. 107, 111, 992 P.2d 511 (1999). CP 651.

from the site. It does not collect surface or storm water, it collects groundwater. Further, it is undisputed that the pipe drains to a private pond on private property adjacent to the subdivision. CP 655-656. The pipe does not drain to a public facility; the pipe is not part of a regional surface or flood water conveyance system. In sum, it is not a "stormwater facility" under the County's codes.

2. Neither the County nor the City ever accepted, inspected, or maintained the interceptor pipe

Neither party located a scintilla of evidence to support a finding that the County or the City ever accepted responsibility for maintenance of the interceptor pipe, much less ever actually inspected or maintained the pipe. CP 245-246, 249, 251-252, 344. Further, the granting of an easement alone does not meet Snohomish County's former requirements to convey maintenance responsibility to the County. Instead, it is only the first of five requirements, which include inspections and the execution of a formal written acceptance. CP 687. There is no evidence in the record that any of these other required steps were taken, much less completed.

C. Procedural History

The parties filed cross motions for summary judgment. The City's objections to Plaintiffs' attempts to rely upon hearsay, speculation, and conclusory opinions were granted in part. CP 15-17. However, the trial

court ultimately granted Plaintiffs' motion for summary judgment and denied the City's motion. CP 5-8. In rendering its decision, the trial judge relied, primarily, on the testimony of two of Plaintiffs' witnesses, both of whom worked for the developer of Crystal Ridge, who presented hearsay/ speculative declarations claiming the County (for whom they did not work) probably "intended" to take over maintenance of the interceptor pipe. CP 15-17. Although it granted the City's objections (in part) as to speculative testimony, the trial court relied on this inadmissible testimony in granting plaintiff's motion.[3] CP 18-28. The trial court entered an order granting immediate review by the Court of Appeals, noting in part that "for purpose of the dedication statute, **this is a case of first impression** on this set of unique facts." (Emphasis added.) CP 13.

On July 22, 2013, Division I issued a decision affirming the trial court, but on different grounds. In its decision, Division I presented a limited (and incorrect) analysis of Snohomish County's codes in effect in the mid-1980s, when the plat was approved. After quoting from some of the County's code provisions out of context, and ignoring the remainder of the applicable laws, in addition to ignoring state statutes cited in the County's codes (which were inconsistent with its theory of the case), Division I found that the County's definition of "stormwater facilities" included the

[3] Contrary to the Court of Appeals footnote at p. 4 of its decision, the City has not waived its evidentiary objections below.

interceptor pipe, and, thus, the pipe had been expressly dedicated to the County.

VI. ARGUMENT

The *Crystal Ridge* decision warrants review by this Court for a number of reasons. First, by holding that the City is responsible for maintaining the interceptor pipe, which benefits only the homeowners living in the private residential subdivision of Crystal Ridge, the Court of Appeals effectively ratified a gift of public funds to a private party in violation of the Washington State Constitution, Art. 8; sec. 7. This decision creates a dilemma of constitutional magnitude. Further, the decision conflicts with Washington case law regarding gifts of public funds to a private party, such as *Citizens v. Yakima County, infra.*

Second the decision presents concerning consequences for Washington Cities and Counties, and for private property owners alike. Division I has held that a public entity is suddenly responsible for facilities it never agreed to maintain, rendering drainage disclosures and code language to the contrary meaningless. As a result, public entities and private homeowners will no longer be able to avail themselves of the certainty and clarity of municipal codes, state statutes, and recorded documents. Also, the costs involved in taking over a pipe that has not been maintained for over 25 years are tremendous; and now Crystal Ridge's neighbors must

bear these costs, even though the pipe benefits only Crystal Ridge.

Finally, because the interceptor pipe was not expressly dedicated via the plat, the Court should analyze whether a common law dedication ever occurred. Here, there is no evidence that the County or the City ever accepted maintenance of the pipe any time in the past 25 years, a crucial element of a common law dedication. Thus, the decision is in conflict with the Supreme Court's decision in *Spokane v. Catholic Bishop, infra,* in addition to the Court of Appeals decision in *Knudsen v. Patton, infra.*

A. The Court of Appeals Decision Ratifies the Unconstitutional Gifting of Public Funds

The sole purpose of the interceptor pipe is to intercept groundwater and direct it away from the residential development of Crystal Ridge — private property. Even Division I agrees: "The interceptor pipe which is similar to a French drain, was a perforated pipe buried approximately 12 feet below ground **for the purpose of intercepting excess water and conveying it away from the *residential* development."** Slip Op. at 3 (emphasis added). Despite this acknowledgment, the Court of Appeals went on to hold that the City is responsible for maintaining this private pipe, creating a constitutional dilemma. If this decision is allowed to stand, then (as noted by the City in its Opening Brief to Div. I, p. 27) the Court will have sanctioned a municipality's gifting of public funds in

violation of the Washington Constitution, Art. 8 sec. 7. App. F. Article 8, section 7 of our constitution provides in relevant part as follows:

> No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm[.]

A two-pronged analysis is employed to determine whether a gift of state funds has occurred. *CLEAN v. State*, 130 Wn.2d 782, 797-798, 928 P.2d 1054 (1996). First, the court asks if the funds are being expended to carry out a fundamental purpose of the government. *Id.* If the answer is yes, then no gift of public funds has been made. When the expenditures are held to not serve a fundamental government purpose, then the court focuses on the consideration received by the public for the expenditure of funds and the donative intent of the appropriating body. *Id.*

Here, the public funding required by Division I would not be expended to carry out a fundamental purpose of the government. Quite the opposite, it would be expended solely to protect private homeowners. Further, no consideration has been given to the public, nor is there evidence of any donative intent on the part of the City. Again neither the County nor the City has ever accepted, inspected, or maintained the pipe. Under the analysis employed by Washington Courts, the lower courts have endorsed an unconstitutional gift of state funds to Crystal Ridge.

The Court of Appeals decision is also contrary to the recent holding in *Citizens Protecting Resources v. Yakima County*, 152 Wn. App. 914, 219 P.3d 730 (2009), which looked at the public gifting provisions in the context of regional flood prevention, explaining how and when such monies can be spent by a Flood District. The facts in *Citizens* are in stark contrast to the facts of this case. In *Citizens,* the County had suffered significant area-wide flooding for many years. A major flood in 1996 was described as "near catastrophic" in terms of damage to public and private property. Thus, the County formed a flood district to address reducing the risk of flooding through various means, one of which was to relocate wrecking yards from designated flood plains. Ultimately, the County relocated a wrecking yard off of an island (located in a flood plain), after which the wrecking yard deeded the island to the County. The Court held that the money provided for relocation of the wrecking yard was not an unconstitutional gift of public funds, explaining that it was necessary on a **regional level** and benefitted **public** property and **public** infrastructures **throughout the County**. *Citizens,* 152 Wn. App. at 920-22. Here, there has been no persuasive argument that the interceptor pipe has city-wide, much less regional, implications. Instead, the pipe prevents flooding on private property only, *i.e.*, property within Crystal Ridge.[4]

[4] The only "public" benefit Crystal Ridge even attempts to assert is that the pipe

B. There is no Evidence to Support Common Law Dedication

A dedication is an owner's voluntary donation of land or its use to the public. *Spokane v. Catholic Bishop of Spokane*, 33 Wn.2d 496, 503, 206 P.2d 277 (1949). 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 grantee. *Spokane*, 33 Wn.2d at 502-03. Acceptance may be express, or implied by municipal acts or public usage. *Id.* at 503. 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 (1980) (emphasis added).

Here, the facts are not in dispute. There has been no 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.

C. The Scope of a Drainage Easement Dedicated on a Plat is an Issue of First Impression *and* Presents This Court with a

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supposedly reduces flooding on the streets within the subdivision, which were dedicated to the County, and subsequently the City, for ownership and maintenance. *See* Slip. Opinion at p. 8.

Question of Substantial Public Importance

Whether the dedication of a drainage easement on a residential plat includes an "express" dedication of every drainage feature buried within the designated easement, even those features not shown on the plat map and even those features that are private facilities, presents an issue of first impression in Washington. Here, to resolve this issue, the lower courts looked at the code language in effect at the time of plat approval to determine if the interceptor pipe met the definition of a "stormwater facility." The Court of Appeals (at p. 7) cited former SCC, Ch. 25 (a good start), but then disregarded other applicable provisions and – importantly – the state statutes cited therein, RCW 86.12.020, 86.13, and 86.15. On the issue of stormwater facilities, former Ch. 25 (App. G.) provides:

> "Storm and Surface Water Management Facilities and Features," as used in this chapter, shall mean any facility, improvement, development, property or interest therein, made, constructed, or acquired for purpose of controlling, or protecting life or property from, any storm, waste, flood or surplus waters, wherever located within the county, and shall include . . . the improvements and authority described in RCW 86.12.020 and Chapters 86.13 and 86.15 RCW.[5]

RCW 86.15.010(3); (5), referenced in Ch. 25, defines of "flood waters" and "storm waters" (emphasis added) (App. H):

[5] The Court of Appeals noted that an earlier version of this code provision contained the language "or other surface waters" and that removal of the phrase made it "clear that the definition of 'Storm and Surface Water Management Facilities' does not apply only to "surface waters." Slip Op. at pp. 8-9. This leap by the Court of Appeals is unsupported by any testimony in the record; and is not consistent with rules of statutory construction.

> (3) "Flood waters" and "storm waters" means any storm, waste or surplus waters, including surface water, wherever located within the county or a zone or zones where such waters endanger **public** highways, streams and water courses, harbors, life, or property.
>
> (5) "Storm water control improvement" means any works, projects, or other facilities necessary to control and treat storm water within the county or any zone or zones.

First, these provisions are clearly intended to apply to waters that endanger "public" property, as noted by the highlighted provision of subsection (3) above. [6] Second, neither mentions groundwater. Certainly, if the Legislature had intended to include groundwater within the definition of "stormwater," it would have done so. *See, e.g., Queets Band of Indians v. State,* 102 Wn.2d 1, 5, 682 P.2d 909 (1984).

Rather than engaging in a complete analysis of the code provisions and statutes in place at the time of plat approval, Division I stated:

> The proper inquiry to determine whether the definition set forth in SCC 25.02.080 applies to the interceptor pipe is not the depth at which the pipe collects excess water; rather, **the proper inquiry is whether the interceptor pipe was "constructed ... for purpose of controlling or protecting life or property from, any storm, waste, flood or surplus waters[.]**" . . . The record here shows the interceptor pipe was constructed for such a purpose.

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[6] *See also* Attorney General Opinion dated 4/2/56 interpreting RCW 86.12 (the Court can take judicial notice per ER 201): "County road funds may not be used for drainage of private property within the county, except the county may provide adequate drainage for its roads which may incidentally benefit adjacent private property" (emph. added). This language is unequivocal. The Opinion states: "We conclude that the fact that the county officials have granted a building permit to a landowner within the county does **not** empower the county to provide drainage for the property on which the building permit was granted" (emph. added). Although the County granted permits to develop Crystal Ridge, that act did not empower the County to maintain the interceptor pipe. App. I.

Slip Op. at 7 (emphasis added).

In other words, Division I held that the definition of a public pipe is every pipe that is "constructed for [the] purpose of controlling or protecting life or property from, any storm, waste, flood or surplus waters." This cannot be true. Pursuant to this definition, every pipe is transformed into a "public" pipe, because every pipe – whether public or private – is constructed for this purpose. This is simply an overly broad and meaningless interpretation of the former County code.

Further, Division I's decision renders other provisions of applicable codes regarding the distinction between public and private pipes meaningless; *see, e.g.,* BMC 18.04.050, which mandates that the City's responsibility for the storm water system ceases, by statute, at the point where the private line connects to the public line:

> **City/user responsibility**...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.

CP 590-591; App. J (emphasis added).

Finally, the Court should note that Crystal Ridge has failed to cite a single Washington case addressing the scope of a public drainage easement dedicated on the face of a plat pursuant to RCW Ch. 58.17.[7]

[7] Plaintiffs cited to *M.K.K.I. v. Krueger*, 135 Wn. App. 647, 145 P.3d 411 (2006) (30" private access easement granted via a three-lot short plat across one lot for the benefit of

Many of the cases cited by Crystal Ridge do not even address the dedication statute at all.[8] This is because the facts of this case present an issue of first impression in Washington. But with diligent research, the City discovered that similar issues have been addressed by courts in several other states, and those courts have held, under analogous facts, that the dedication of a "drainage easement" on a recorded plat does not impose a duty upon local government to operate and maintain private drainage pipes. *See, Kaplan v. Sandy Springs*, 286 Ga. 559, 690 S.E.2d 395 (2010) (City has no duty to maintain a 36-inch drainage pipe simply because it accepted a drainage easement on the face of a recorded plat; even though pipe was tied into a public catch basin, it drained only private property); *Lewis v. DeKalb County*, 251 Ga. 100, 303 S.E.2d 112 (1983) (County has no duty to maintain storm drains to benefit private homeowner simply because "drains" were dedicated on the face of the plat, absent some action showing that the County accepted the drains as

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the remaining two lots*); and Rainier View v. Zucker*, 157 Wn. App. 71 238 P.3d 1217 (2010) (private "community park" dedicated via plat to solely benefit the owners of the development*)*.

[8] *Kiely v. Graves*, 173 Wn.2d 926, 271 P.3d 926 (2012) (dedication on a plat of a 15" alley in 1908, before RCW Ch. 58.17 was even adopted in 1969); *Sunnyside Valley Irr. Dist. v. Dickie,* 149 Wn.2d 873, 73 P.3d 369 (2003) (dedication of "floating easements" made via deeds filed in 1908, 1912 and 1925 for access to maintain irrigation ditches); *Seattle v. Nazarenus*, 60 Wn.2d 657, 374 P.2d 1014 (1962) (interpretation of a recorded "Easement Agreement" for the construction, operation and maintenance of an electric transmission system); *Dickson v. Kates*, 132 Wn. App. 724, 133 P.3d 498 (2006) (private restrictive view covenant executed by two residential property owners); and *Dreger v. Sullivan*, 46 Wn.2d 36, 278 P.2d 647 (1955) (easement for a private way of necessity).

their own and performed maintenance for the benefit of the homeowner); *Lawrenceville v. Macko*, 211 Ga. App. 312, 439 S.E.2d 95 (1993) (same); *DiMartino v. Orinda,* 80 Cal.App.4th 329, 95 Cal.Rptr.2d 16 (2000)(City has no duty to maintain a pipe that was not depicted on the plat map at the time of dedication, and which benefits only private property). App. K.

VII. CONCLUSION

The Court of Appeals foresaw the momentous problems that its decision in this case creates, summarily stating:

> The Association also argues that there is no duty for a municipality to maintain private facilities. We agree, and nothing in our opinion states otherwise.

Slip Op. at 12. Unfortunately the 11 pages preceding this empty proclamation render it hollow. This case presents a question of constitutional magnitude, involves issues of first impression and substantial issues of public importance and conflicts with prior Court of Appeals and Supreme Court decisions. As a result, the City respectfully requests that its Petition for Review be granted.

Respectfully submitted this 9th day of October, 2013.

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DECLARATION OF SERVICE

I declare that on October 9, 2013, a true and correct copy of the foregoing document was sent to the following parties of record via method indicated:

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DATED this 9th day of October, 2013.

Cathy Hendrickson, Legal Assistant

APPENDIX

Appendix A: *Crystal Ridge Homeowners Association, et al. v. City of Bothell*, Washington State Court of Appeals, Div. I, Case No. 68618-6-I, Unpublished Opinion, July 22, 2013.

Appendix B: Alderwood Water District (AWD) site plan.

Appendix C: The Drainage Disclosure filed with the Snohomish County Auditor's Office.

Appendix D: The *unrecorded* version of the Drainage Disclosure.

Appendix E: Crystal Ridge Division 2 Plat.

Appendix F: Washington State Constitution, Art. 8, Sec. 7.

Appendix G: Various Snohomish County Codes.

Appendix H: RCW 86.15.010.

Appendix I: Attorney General's Opinion.

Appendix J: BMC 18-04.

Appendix K: Out-of-state cases.

APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

CRYSTAL RIDGE HOMEOWNERS ASSOCIATION, a Washington a Washington nonprofit corporation; J. ABULTZ, LAURIE AND WILSON AMARAL, CRAIG ARNO, CARON BEAR, JOSEPH N. BECK, DAVID BENNETT, GLORIA BLADES, DUANE AND GWEN BOWMAN, THOMAS CYNDY BOYER, JEFF AND KERI BROWN, DON COLEMAN, DON DACHENHAUSEN, ANH-VIET AND LISA DANG, BRAD AND JULIE DELUCA, BELARMINO DIAZ, GARY JOHANN FELT, NICHOLAS AND MYUNG FIX BARRY AND BONNIE FRETWELL, TATSUICHIRO FURUKAWA, MARGARET CHRIS GAZEY, PHILL AND ANNE HASTINGS, LINDA AND JEROME HODGES, RAYMOND AND PAM HUTCHINSON, JAZ JANG, PETER AND BEVERLY JOHNSON, STEVE AND MANTI JOLLENSTEN, JAMES AND MAILLE KESSENICH, KRISTI AND BRIAN KING, VICKI AND JOHN KLEIN, CORRIE KRAP, JOHN AND DEBBIE LAMB, RICHARD AND JANET LARSON, JEFF LONGAKER, LYNNE and ROBERT LUCKEY, TOM McKEY, MICHAEL MEYER, DAWN MONCALIERI, PHYLLIS AND WAYNE MURPHY, BRUCE and KATHERINE NGUYEN, KATHLEEN AND CLIFFORD OCONNELL, CHOON PARK, STEVEN PFISTER, RUSSELL AND PAULINE PORTER, LARRY AND JANICE RENDAHL, CRAIG AND KAREN RENFROW, PAUL AND DIANE ROBERTS, MARGARET ROMANO,	No. 68618-6-I UNPUBLISHED OPINION FILED: July 22, 2013

STEVEN RUBENSTEIN, AARON and SHAUNA RUCKMAN, FAYE SCANNELL, BEN and JACLYN SETTER, MARIANNE SHAW, JOHN AND KARIN SHIPMAN, DONALD AND MARY SIDES, JOHN and NORMA SMITH, RICHARD SMITH, SCOTT and SHARI TRAIL, JOHN TRAXLER, DEAN AND MARIE VAUGHAN, DIANE WING, KENNETH and LEA WOOD, MARIA WYATT,

Respondents,

v.

CITY OF BOTHELL, a municipal corporation,

Appellant.

SPEARMAN, A.C.J. — At issue in this case is an interceptor pipe, buried 12 feet below ground as part of a drainage plan for a development called Crystal Ridge in the City of Bothell. The Crystal Ridge Homeowners Association sued the City after the pipe allegedly failed and contributed to flooding. The Association argued the City was responsible for maintenance of the pipe because the plat for the Crystal Ridge development dedicated the pipe to what was then unincorporated Snohomish County as part of a drainage easement depicted upon the plat application. The trial court agreed and granted summary judgment to the Association.

The plat dedicated an easement for the purpose of maintaining "stormwater facilities." Because the interceptor pipe qualified as such a facility under the provisions

of the Snohomish County Code in place at the time the plat application was approved, we affirm the trial court.

FACTS

This case arises out of flooding in a residential neighborhood in Bothell called Crystal Ridge. The neighborhood was developed in 1987 in what was then unincorporated Snohomish County, and it is undisputed that the neighborhood has an extensive history of flooding. The hearing examiner who approved the preliminary plat for the Crystal Ridge development found, based on the testimony of geotechnical engineer Gordon Denby, that the Crystal Ridge development was "characterized by excessively wet soils due to the geologic conditions which exist in the area[.]" Clerk's Papers at 721. He found that "a surface drain and an interceptor trench or trenches . . . would be necessary" in order to develop the site. Id. On this basis, he concluded, "[t]he simple reality is that this site is not your typical piece of property and that typical drainage standards would probably not adequately protect the public use and interest." As such, the hearing examiner made a comprehensive drainage plan, including the interceptor trench, a requirement of approval of the plat application.

The developer built the interceptor trench and placed a pipe in the trench. The interceptor pipe, which is similar to a french drain, was a perforated pipe buried approximately 12 feet below ground for the purpose of intercepting excess water and conveying it away from the residential development. The interceptor pipe is located within a drainage easement depicted on the plat for the Crystal Ridge development.

In 1992, the Crystal Ridge development was incorporated into the City of Bothell. In 2010, the Crystal Ridge Homeowners Association, along with individual homeowners ("Crystal Ridge"), filed suit against the City of Bothell, alleging that the interceptor drain was no longer working properly, and was causing water to concentrate and exit in springs and seeps, damaging properties within the development. Crystal Ridge alleged causes of action for negligence, trespass, nuisance, inverse condemnation, and sought a declaratory judgment that the City of Bothell had assumed responsibility for maintaining the drainage system.

Crystal Ridge moved for summary judgment, seeking a ruling that the City had assumed responsibility for maintaining the drainage system when it annexed the development. The City cross-moved for summary judgment on the same issue. The trial court granted Crystal Ridge's motion, and denied the City's motion. The City filed a notice of appeal, and the court certified the appeal to this court under CR 54(b).[1]

DISCUSSION

The City's chief argument on appeal is that it did not have a duty to maintain the interceptor pipe at issue in this case because the dedication of a drainage easement to Snohomish County found on the Crystal Ridge plat did not include the interceptor pipe. According to the City, that easement gave Snohomish County a right of ingress and

[1] Although the City has appealed six orders of the trial court, it makes no argument as to any orders other than the order granting Crystal Ridge's motion for summary judgment and denying the City's cross motion. As such, the City has abandoned their appeal of the other five orders and we do not address them here.

egress to maintain and repair only "stormwater facilities," and the interceptor pipe does not qualify as a stormwater facility. We reject the City's argument and affirm.

The plat for the Crystal Ridge development depicts a "drainage easement" in which the interceptor pipe was located, and states:

> 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

CP at 655, 657. The gravamen of the City's argument is that the interceptor pipe, which was buried twelve feet below ground, was meant to deal with "groundwater" and therefore cannot be part of a stormwater facility, which the City contends deals only with "surface" water.

In support of its argument, the City cites to several provisions of the Snohomish County Code, former chapters 24 and 25. Former chapter 24 is titled "drainage." CP at 666. Its purposes included: "protect[ing] the public from stormwater runoff originating on developing land"; "minimiz[ing] adverse effects of alteration in groundwater quantities, locations, and flow patterns"; and "decreas[ing] drainage related damage to public and private property." CP at 667-68. Former chapter 24 does not define "groundwater," "surface water," "stormwater," or "stormwater facility." It does, however, define "drainage treatment/abatement facilities":

> "Drainage Treatment/Abatement Facilities" means any facilities installed or constructed in conjunction with a drainage plan for the purpose of treatment or abatement of stormwater runoff.

CP at 669 (SCC 24.08.120).

The ordinance enacting former chapter 25 of the Snohomish County Code is titled "providing for storm and surface water management." Former chapter 25 was meant to complement and supplement former chapter 24. The legislative findings for chapter 25 incorporate the findings for chapter 24, (SCC 25.01.010), and chapter 25 specifically states that the chapter was to "augment the County's Drainage Ordinance, SCC Title 24[.]" (SCC 25.05.040). (CP at 450). The purposes of former chapter 25 included: "control, accommodate, and discharge storm runoff" and "provide for groundwater recharge[.]" CP at 442. As was the case with former chapter 24, former chapter 25 does not define "groundwater," "surface water," or "stormwater." It does define "drainage facilities":

> "Drainage Facilities," as used in this chapter, shall mean any structural or nonstructural feature, element, or mechanism designed to accommodate storm and surface water runoff.

CP at 444 (SCC 25.02.030).

According to the City, the definitions of "drainage treatment/abatement facilities" in former chapter 24 and "drainage facilities" in former chapter 25 apply only to storm and surface water, and not to groundwater. As a preliminary matter, the City provides no authority defining "groundwater," nor does it provide authority indicating that "groundwater" is excluded from "storm" water as used in former chapters 24 and 25 of the SCC. Moreover, even if the City is correct regarding its interpretation of SCC 24.08.120 and 25.02.030, it is unclear how this helps the City, given the easement at

issue here did not mention "drainage treatment/abatement" or "drainage" facilities. Rather, as the City points out, the easement granted Snohomish County a right of ingress and egress to maintain and repair "stormwater facilities."

On the issue of stormwater facilities, former chapter 25 provides the following definition:

> "Storm and Surface Water Management Facilities and Features," as used in this chapter, shall mean any facility, improvement, development, property or interest therein, made, constructed, or acquired for purpose of controlling, or protecting life or property from, any storm, waste, flood or surplus waters, wherever located within the county, and shall include but not be limited to the improvements and authority described in RCW 86.12.020 and Chapters 86.13 and 86.15 RCW.

CP at 456-57 (SCC 25.02.080). The City contends this portion of the code supports its interpretation because "[u]se of the terms 'storm, waste, flood or surplus waters,' coupled with the omission of the term 'groundwater,' indicates that the County did not intend for 'groundwater' facilities to be included in its definition[.]" Reply Brief at 10-11. We reject this argument.

The proper inquiry to determine whether the definition set forth in SCC 25.02.080 applies to the interceptor pipe is not the depth at which the pipe collects excess water; rather, the proper inquiry is whether the interceptor pipe was "constructed . . . for purpose of controlling or protecting life or property from, any storm, waste, flood or surplus waters[.]" CP at 457 (SCC 25.02.080). The record here shows the interceptor pipe was constructed for such a purpose. The hearing examiner who approved the preliminary plat found, based on the testimony of geotechnical engineer Gordon Denby,

that the Crystal Ridge development was "characterized by excessively wet soils due to the geologic conditions which exist in the area[.]" CP at 721. He found that "a surface drain and an interceptor trench or trenches . . . would be necessary" in order to develop the site. Id. On this basis, he concluded, "[t]he simple reality is that this site is not your typical piece of property and that typical drainage standards would probably not adequately protect the public use and interest." CP at 725.

Likewise, Denby testified that he observed construction of the interceptor trench where the pipe was located, and that the pipe "benefits the County because it reduces the amount of surface water runoff flowing on and emanating from the site." CP at 296. He further testified that the pipe "definitely protects the public roads and public facilities in the plat" and that without the pipe, "it is likely that water would be flowing out of and around the catch basins on occasions creating a nuisance and hazard during freezing conditions." Id.

This evidence, which is undisputed, shows that the interceptor pipe was "constructed . . . for purpose of controlling, or protecting life or property from, any storm, waste, flood or surplus waters[.]" CP at 457 (SCC 25.02.080). As such, the interceptor pipe fits the definition of stormwater facility, and it was included in the dedication on the Crystal Ridge plat.

Moreover, the City's interpretation that this definition applied only to surface water is belied by the history of the ordinance. Before former SCC 25.02.080 was amended in 1983, it read:

> "Storm and Surface Water Management Facilities and Features," as used in this chapter, shall mean any facility, improvement, development, property or interest therein, or other structural or non-structural element, made, constructed, or acquired for the purpose of controlling, or protecting life and safety, natural resources, or property from, any storm, waste, flood, surplus, **or other surface waters** wherever located within the County, and shall include but not be limited to the improvements and authority described in RCW 86.12.020 and chapters 86.13 and 86.15 RCW.

CP at 445-46 (emphasis added). In 1983, the County Council amended the code and removed the clause highlighted above ("or other surface waters"), thereby making it clear that the definition of "Storm and Surface Water Management Facilities" does not apply only to "surface waters." We reject the City's arguments on this issue.

The City advances several other arguments in an attempt to show there was no intent that the interceptor pipe be included in the dedication on the Crystal Ridge plat. We conclude they are without merit. For example, the City notes that the location of the easement for the interceptor pipe also includes a sanitary sewer main; the implication apparently being that if the interceptor pipe was deeded to the County, so was the sanitary sewer, which is an absurd result. But Crystal Ridge has not argued the sanitary sewer fits the Snohomish County Code definition of stormwater facility, and moreover, the plat specifically indicates the easement for the sanitary sewer belongs to the "AWD" (Alderwood Water District).[2]

Likewise, we reject the City's argument about the drainage disclosure requirement. Before the Crystal Ridge plat was approved, the County required the

[2] The City also argues that the purpose of the easement at issue in this case was for ingress and egress to repair and maintain a swale, not the interceptor pipe. This argument, however, is largely a response to Crystal Ridge, who contends there were no other drainage instruments located within the easement.

developer to record a document titled "Drainage Disclosure." CP at 472-73. The drainage disclosure includes the legal description of and tax assessor number for the Crystal Ridge plat, and gives notice to anyone who looks up property that extensive drainage control occurred on the plat:

> The filing of this document:
>
> (1) Constitutes the current acknowledgment of the conditions and terms of Plat Approval for the Plat of Crystal Ridge pursuant to the Hearing Examiner's decision dated October 11, 1984, to wit:
>
> That this document has been recorded with the County Auditor disclosing 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.
>
> (2) Constitutes the current owner's acknowledgment of the current terms and conditions under which Approval was granted.
>
> (3) Serves as notice to any heir, successor, assign or prospective purchaser the disclosures and terms and conditions runs 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.

CP at 472.

The City simply asserts, without argument or citation to authority, that "it is clear" that the disclosure means the owners of individual lots were responsible for maintenance of the interceptor pipe. The City's interpretation is that this disclosure "mandates that future 'compliance' with 'drainage controls' on 'individual lots' is 'the obligation of any owner of the subject property.'" Opening Brief at 13-14. According to the City, there is no other possible purpose for this disclosure. We disagree. A far more

plausible, common-sense interpretation of the "drainage disclosure" is that it was simply intended to disclose to prospective purchasers of the real property that "Substantial surface and subsurface drainage controls" were put in place on the plat.

Additionally, the City appears to argue that there is no evidence the interceptor pipe was actually located within the easement dedicated on the Crystal Ridge plat. But the City's argument is based on two geotechnical reports that discuss a proposed location for a swale drain. From there, the City simply guesses as to where the interceptor pipe might be in relation to the proposed swale drain. This is nothing but speculation. By contrast, Denby testified that he personally observed construction of the interceptor pipe trench, and that it was, in fact, located within the easement.

Finally, the City makes an argument that Crystal Ridge failed to meet the elements of an implied, common law dedication. But this argument rests on the City's premise that there was no statutory dedication because the interceptor pipe did not fit the definition of "stormwater facility."

The brief of amicus curiae Washington State Association of Municipal Attorneys is focused on the potential danger of a holding too broad in this case. The Association notes the fact that municipalities require developers to reserve easements for utilities does not mean that the municipality has placed upon itself a duty to maintain those easements for the benefit of service providers such as Comcast or Puget Sound Energy. The Association also provides an example of water service being provided by multiple water districts from jurisdictions outside of the plat location. The Association

argues "[t]he dedication on a plat for utilities to be provided by one of those separate municipalities cannot reasonably be interpreted to require the City to be responsible for the maintenance, inspection, and repair of those facilities that are owned by the ratepayers of those other municipalities." Amicus Brief at 3.

The Association is correct as to both of these examples. The decision in this case, however, does not implicate the Association's concerns because the drainage easement here was specifically granted to Snohomish County for the purpose of the County "maintaining and operating" the stormwater facilities. Moreover, nothing in the opinion indicates a municipality is prohibited from entering into an interlocal agreement with a different municipality delegating any maintenance obligations to the other municipality.

The Association also argues that there is no duty for a municipality to maintain private facilities. We agree, and nothing in our opinion states otherwise. The Association also argues that the interceptor pipe was not included in the easement because it collects groundwater. We reject that argument for the reasons stated above.

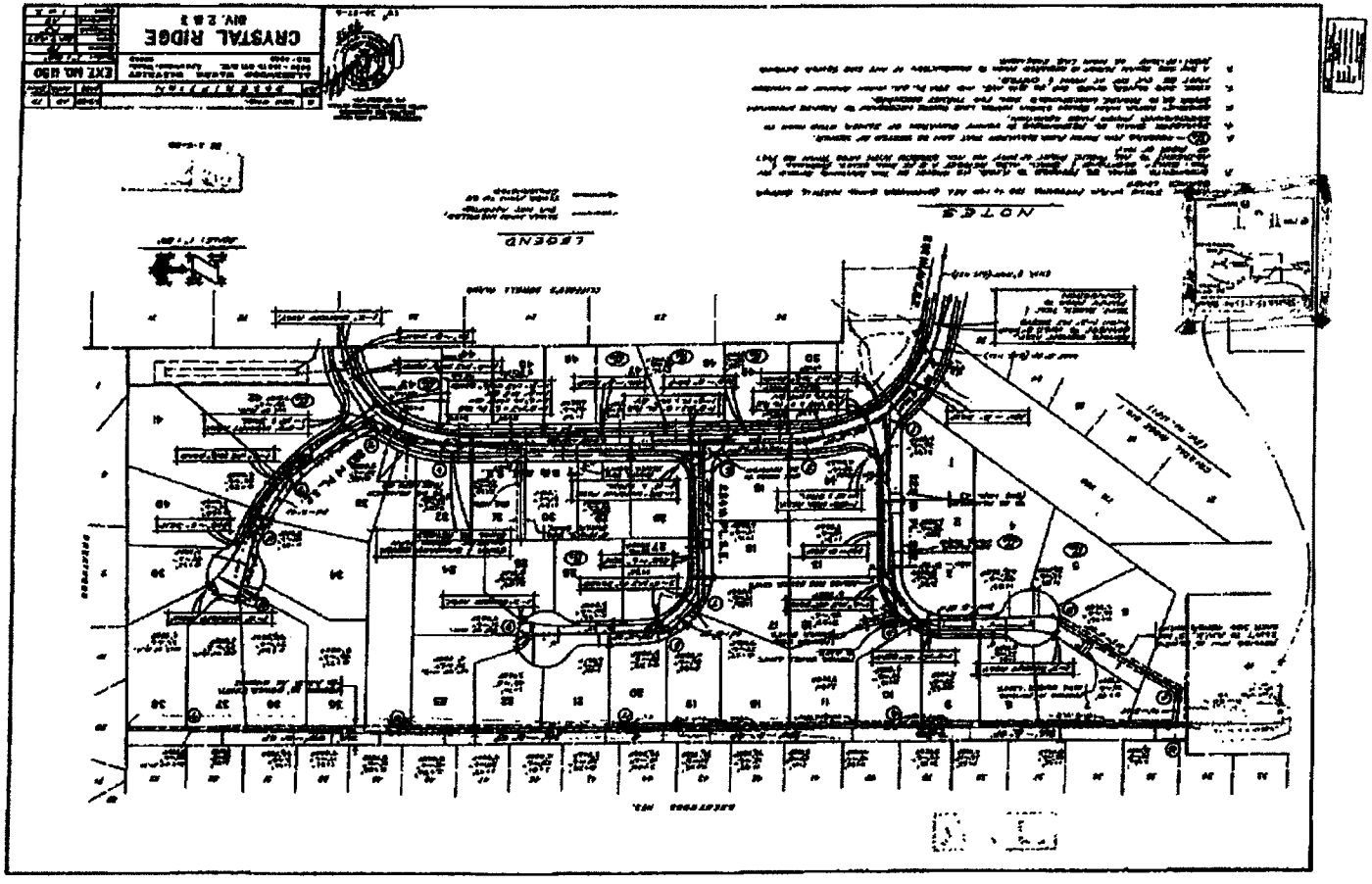
Affirmed.

Spearman, A.C.J.

WE CONCUR:

Becker, J.

APPENDIX B


CRYSTAL RIDGE
NOTES
LEGEND

APPENDIX C

DTRIMEDC147QS

TRIMEN DEVELOPMENT CO.

(206) 486-1700
(206) 486-1920

17930 WOODINVILLE-SNOHOMISH ROAD
WOODINVILLE, WA 98072

DRAINAGE DISCLOSURE

87110903 61

I/We, the owner(s) of that certain property, situated in unincorporated Snohomish County, Washington, being legally described as attached: See Schedule "A".

and bearing Assessor's Tax Account No (s): 414-00-010-010 and 4146-000-010-0104 have applied for and been granted PLAT APPROVAL for the Plat of CRYSTAL RIDGE Division 2 by Snohomish County Hearing Examiner pursuant to Chapter 19.40 Snohomish County Code. The official case record has been assigned county file number ZA8405140 and may be viewed in the office of the Department of Community Affairs, 4th floor, County Administration Building, Everett, WA during normal business hours.

The filing of the document:

1) Constitutes the current acknowledgment of the conditions and terms of Plat Approval for the Plat of Crystal Ridge pursuant to the Hearing Examiners decision dated Oct. 11, 1984, to wit:

That this document has been recorded with the County Auditor disclosing 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.

2) Constitutes the current owners acknowledgment of the current terms and conditions under which Approval was granted.

3) Serves as notice to any heir, successor, assign or prospective purchaser the disclosures and terms and conditions runs 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.

Dated this 29 day of OCTOBER, 1987.

TRIMEN DEVELOPMENT COMPANY

PER KEN WOLCOSKI
(Owner - TYPE IN NAME)

(Owner - Signature) 11/2/87

87110903 61

#TRIMEDC147QS

TRIMEN DEVELOPMENT CO.

(206) 486-1700
(206) 486-1920

19534 WOODINVILLE-SNO ROAD
WOODINVILLE WA 98072

State of Washington)
)
County of Snohomish)

On this 9 day of November, 1987, before me, the undersigned a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Kenneth Stanley Wolcoski
~~and~~ WDL WOLCOKS598KP
to me known to be the ~~President~~ and Secretary, respectively, of TRIMEN DEVELOPMENT CO., the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated ~~the~~ THAT HE WAS authorized to execute the said instrument ~~and that the seal affixed is the corporate seal of said corporation~~.
Witness my hand and official seal hereto affixed the day and year first above written.

Cicki Reeves-Lubin
Notary Public in and for the State of Washington, residing at Monroe
Com Exp 2/1/89

NOTARY PUBLIC STATE OF WASHINGTON

RECORDED
87 NOV -9 PM 3:46
DEAN V. WILLIAMS, AUDITOR
SNOHOMISH COUNTY, WASH
BY Cicki Lubin

8711090861

The land referred to in this certificate is situated in the county of Snohomish, state of Washington, and described as follows:

A portion of Tracts 10, 11, 12 and 13, Plat of Crystal Springs Interurban Tracts, according to the plat thereof recorded in Volume 8 of Plats, page 36, in Snohomish County, Washington, also a portion of vacated 5th Avenue Southeast and 7th Avenue Southeast, all described as follows:

Beginning at the southwest corner of Tract 26, Plat of Clifford's Bothell Farms, according to the plat thereof recorded in Volume 11 of Plats, page 12, in Snohomish County, Washington;
thence north 0°08'21" west, along the west line of said Plat of Clifford's Bothell Farms begin the east line of said vacated 7th Avenue Southeast, for 942.31 feet to the southeast corner of the Plat of Brentwood, according to the plat thereof recorded in Volume 37 of Plats, pages 197 and 198, in Snohomish County, Washington;
thence south 89°30'15" west, along the south line of said Plat of Brentwood being also the north line of Tract 13, said Plat of Crystal Springs Interurban, for 529.05 feet to the northwest corner of said Tract 13;
thence south 0°06'30" east, along the west line of said Plat of Crystal Springs interurban tracts, being the centerline of 5th Avenue Southeast, vacated, for 1385.50 feet to a point 350.0 feet north of the southwest corner of said Tract 10;
thence north 89°37'00" east, along a line 350.0 feet north of the south line of said Tract 10, for 135.0 feet;
thence south 0°07'11" east, along a line 135.0 feet east as measured at right angles to the west line of said Tract 10, for 350.0 feet to the south line of said Tract 10;
thence north 89°37'00" east, along the south line thereof to the southeast corner of the corrected Plat of Crystal Ridge, according to the plat thereof recorded in Volume 47 of Plats, pages 233 through 235, inclusive, in Snohomish County, Washington;
thence north 0°07'11" west, along the west line of Tract "B" of said corrected Plat of Crystal Ridge, for 388.65 feet;
thence continue along boundary of Tract "B" for 496.76 feet;
thence north 89°33'52" east, along the north line of said Tract "B" for 15.0 feet to the true point of beginning.

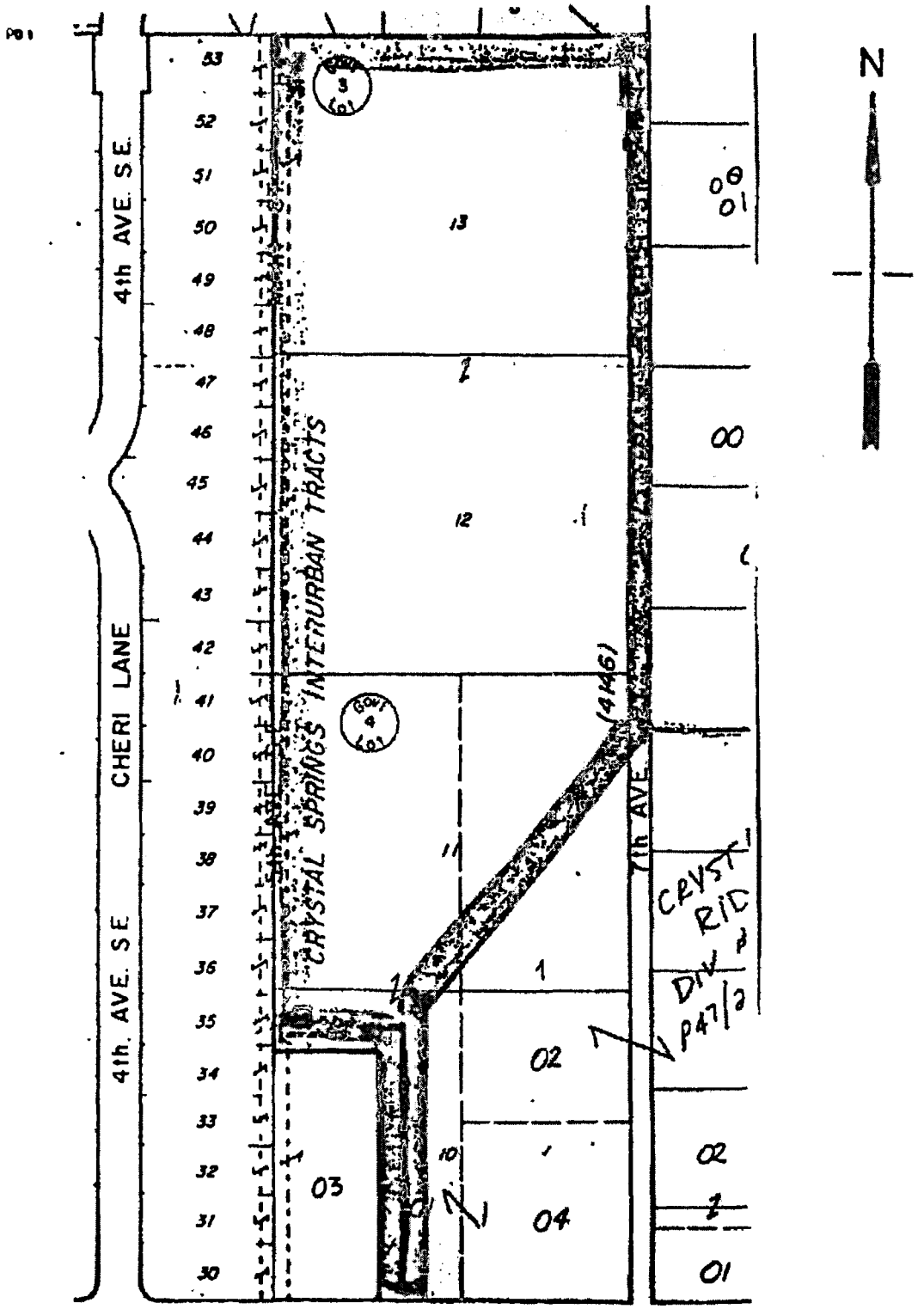
8711090861

Snohomish County, Inc.

SCHEDULE "A"
PAGE 2

ORDER NO. 6739

IMPORTANT: This is not a Plat of Survey. It is furnished as a convenience to locate the land indicated hereon with reference to streets and other land. No liability is assumed by reason of reliance hereon.



8711090361

APPENDIX D

Disclosure of Required Drainage Controls

I/We, the owner(s) of the herein described property, situated in unincorporated Snohomish County, Washington, being legally described on the attached schedule "A", and bearing Assessor's Tax Account No(s): 27112[illegible]-027-0007 + 4146-000-019-0203 have applied for and been granted PLAT APPROVAL for the Plat of CRYSTAL RIDGE by Snohomish County Hearing Examiner pursuant to Chapter 19 Snohomish County Code. The official case record has been assigned County File number ZA8405140 and may be viewed in the office of the Department of Community Affairs, 4th floor, County Administration Building, Everett, WA during normal business hours.

The filing of this document with the County Auditor constitutes the current owners acknowledgment 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 EXTRAORDINARY DRAINAGE CONTROLS MAY BE NECESSARY ON INDIVIDUAL LOTS AT THE TIME OF SUBSEQUENT PERMIT APPLICATIONS.

This condition has been issued without expiration date.

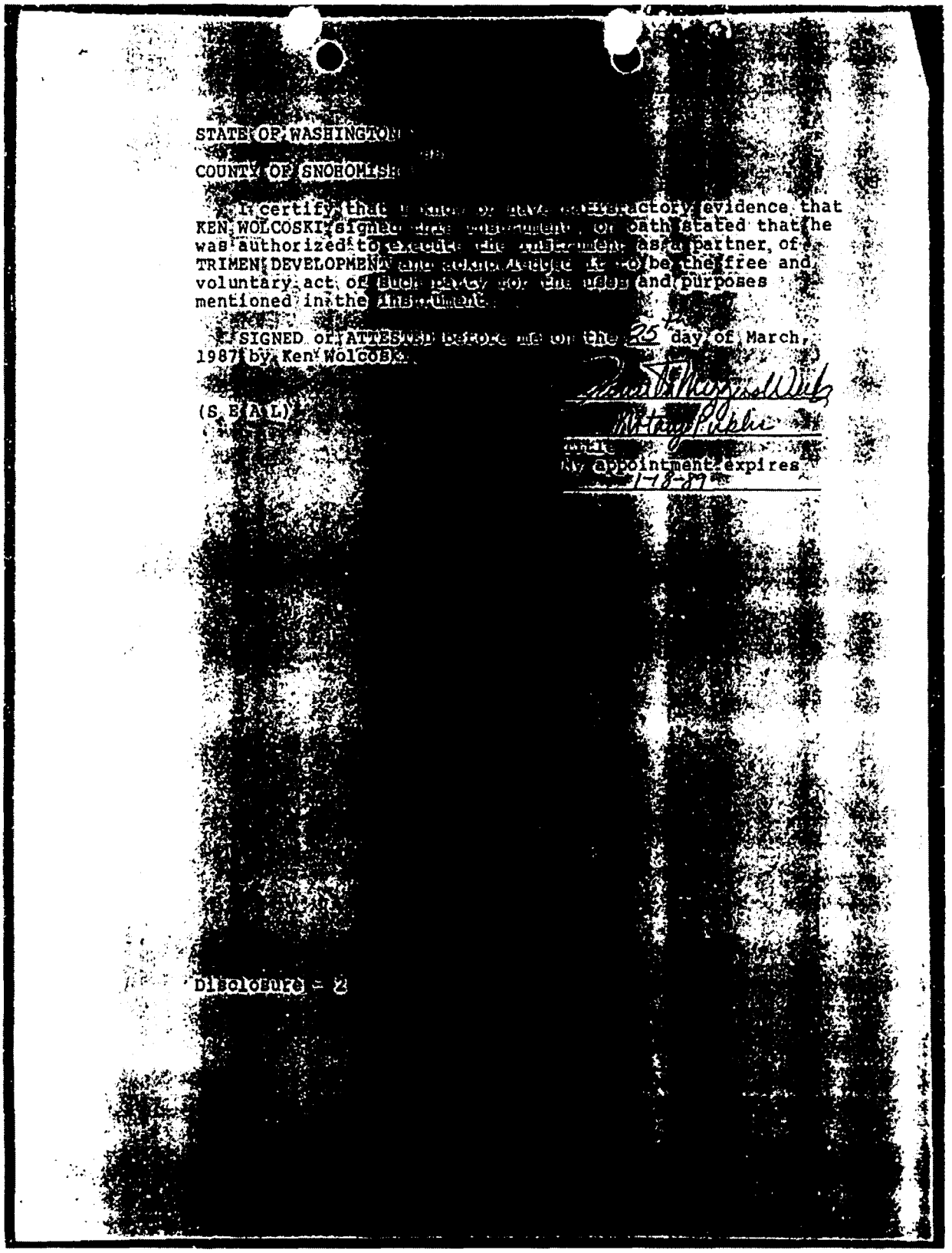
Dated this 25 day of March, 1987.

[illegible]TRIMEL DEVELOPMENT

By [illegible]
[illegible]KEN WOICOSKI, Partner

Approved as to form:

Sue A. Tanner
SUE A. TANNER
Deputy Prosecuting Attorney



STATE OF WASHINGTON)

COUNTY OF SNOHOMISH)

I certify that I know or have satisfactory evidence that KEN WOLCOSKI signed this instrument, on oath stated that he was authorized to execute the instrument as a partner of TRIMEN DEVELOPMENT and acknowledged it to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

SIGNED or ATTESTED before me on the 25 day of March, 1987 by Ken Wolcoski.

(S E A L)

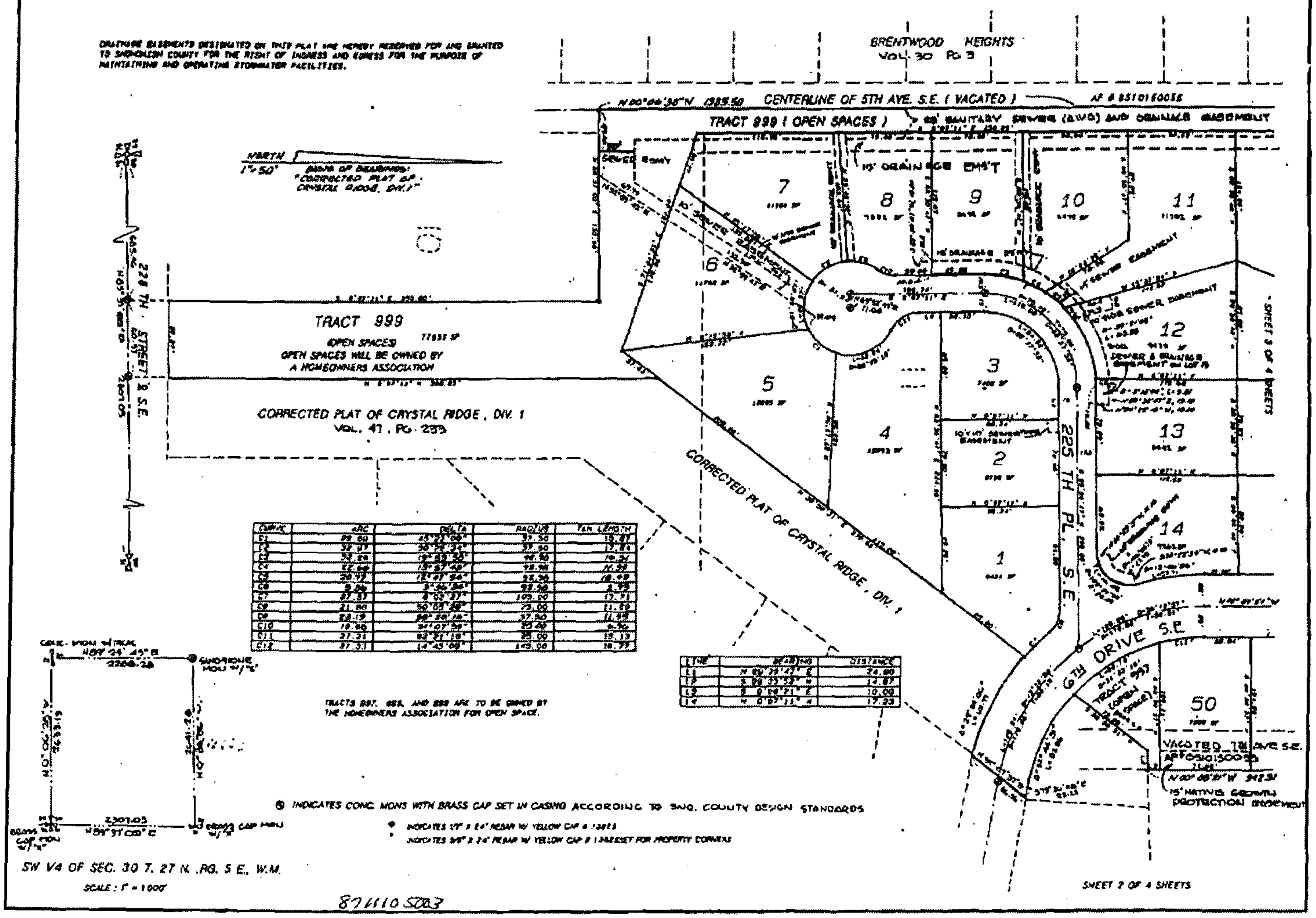
Notary Public in and for the State of Washington, residing at Everett
My appointment expires 1-18-89

Disclosure - 2

APPENDIX E

CRYSTAL RIDGE, DIV. 2

REPLAT CRYSTAL SPRINGS INTERURBAN TRACTS
SW 1/4 OF SECTION 30, TWN. 27 NO., RG. 5 EAST, W.M.



CURVE	ARC	DELTA	RADIUS	TAN LENGTH
C1	29.80	45°32'00"	37.50	15.87
C2	32.97	50°22'34"	37.50	17.64
C3	32.80	19°53'55"	94.50	16.56
C4	22.60	13°57'49"	92.90	11.50
C5	20.77	12°47'54"	93.30	10.47
C6	9.06	5°34'58"	93.30	4.53
C7	27.37	8°02'27"	195.00	13.71
C8	21.80	50°03'28"	25.00	11.59
C9	22.19	90°50'10"	37.50	11.94
C10	19.90	34°07'29"	25.40	6.70
C11	27.21	62°21'18"	25.00	15.13
C12	37.31	14°43'00"	145.00	18.75

LINE	BEARING	DISTANCE
L1	N 89°20'47" E	24.80
L2	S 00°33'52" W	14.87
L3	S 0°06'21" E	10.00
L4	N 0°07'11" W	17.23

TRACTS 997, 998, AND 999 ARE TO BE OWNED BY THE HOMEOWNERS ASSOCIATION FOR OPEN SPACE.

⊕ INDICATES CONC. MONS WITH BRASS CAP SET IN CASING ACCORDING TO SNO. COUNTY DESIGN STANDARDS

SCALE: 1" = 1000'

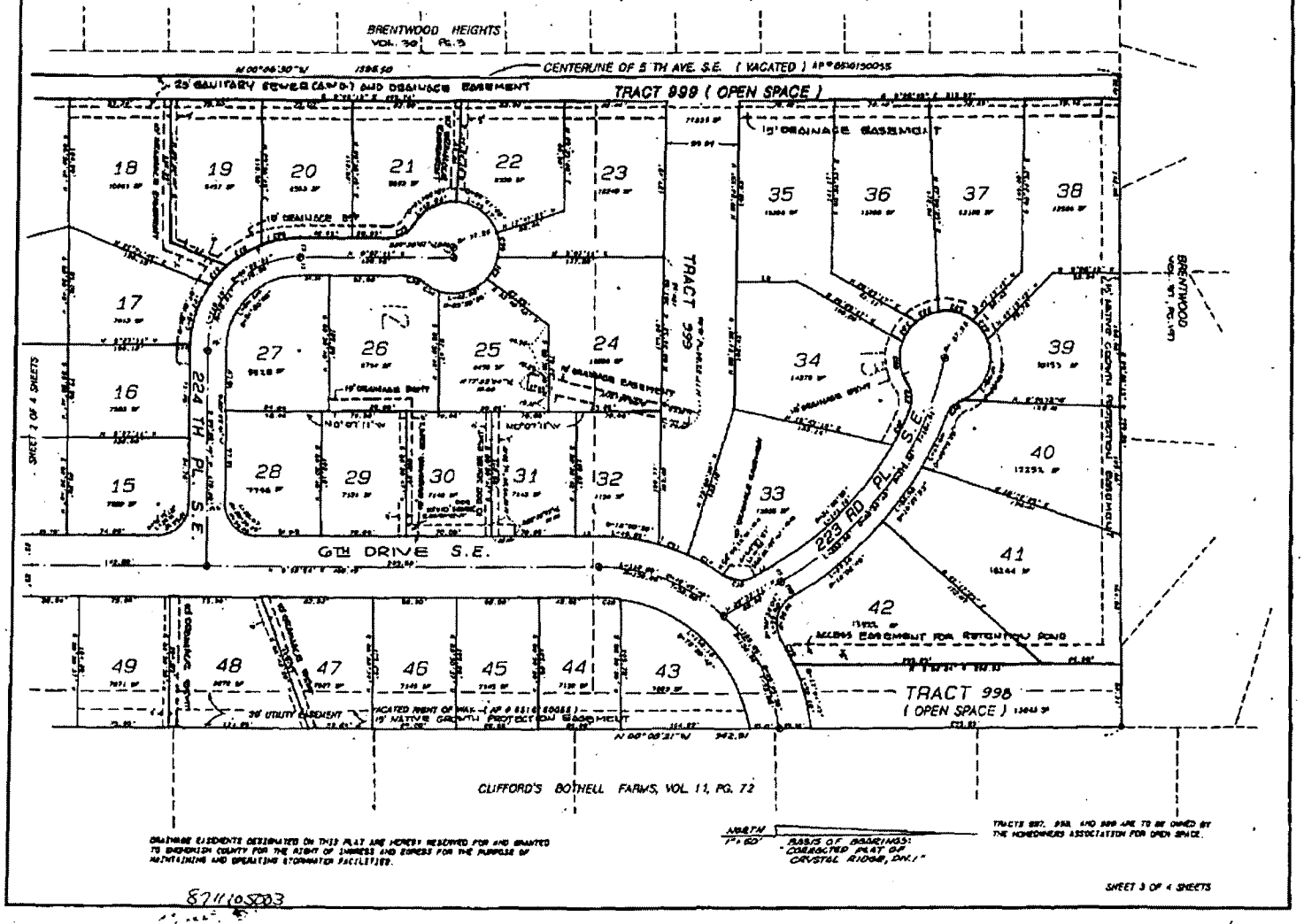
8711105003

SHEET 2 OF 4 SHEETS

#2531

CRYSTAL RIDGE, DIV. 2

REPLAT CRYSTAL SPRINGS INTERURBAN TRACTS
SW 1/4 OF SECTION 30, TWN. 27 NO., RG. 5 EAST, W.M.



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.

BASIS OF BEARINGS: "CORRECTED PLAT OF CRYSTAL RIDGE, DIV. 1"

TRACTS 997, 998, AND 999 ARE TO BE OWNED BY THE HOMEOWNERS ASSOCIATION FOR OPEN SPACE.

8711050003

#2531

APPENDIX F

ARTICLE VIII
STATE, COUNTY, AND MUNICIPAL INDEBTEDNESS

SECTION 1 STATE DEBT. (a) The state may contract debt, the principal of which shall be paid and discharged within thirty years from the time of contracting thereof, in the manner set forth herein.

(b) The aggregate debt contracted by the state, as calculated by the treasurer at the time debt is contracted, shall not exceed that amount for which payments of principal and interest in any fiscal year would require the state to expend more than the applicable percentage limit of the arithmetic mean of its general state revenues for the six immediately preceding fiscal years as certified by the treasurer. The term "applicable percentage limit" means eight and one-half percent from July 1, 2014, through June 30, 2016; eight and one-quarter percent from July 1, 2016, through June 30, 2034; eight percent from July 1, 2034, and thereafter. The term "fiscal year" means that period of time commencing July 1 of any year and ending on June 30 of the following year.

(c) The term "general state revenues," when used in this section, shall include all state money received in the treasury from each and every source, including moneys received from ad valorem taxes levied by the state and deposited in the general fund in each fiscal year, but not including: (1) Fees and other revenues derived from the ownership or operation of any undertaking, facility, or project; (2) Moneys received as gifts, grants, donations, aid, or assistance or otherwise from the United States or any department, bureau, or corporation thereof, or any person, firm, or corporation, public or private, when the terms and conditions of such gift, grant, donation, aid, or assistance require the application and disbursement of such moneys otherwise than for the general purposes of the state of Washington; (3) Moneys to be paid into and received from retirement system funds, and performance bonds and deposits; (4) Moneys to be paid into and received from trust funds and the several permanent and irreducible funds of the state and the moneys derived therefrom but excluding bond redemption funds; (5) Moneys received from taxes levied for specific purposes and required to be deposited for those purposes into specified funds or accounts other than the general fund; and (6) Proceeds received from the sale of bonds or other evidences of indebtedness.

(d) In computing the amount required for payment of principal and interest on outstanding debt under this section, debt shall be construed to mean borrowed money represented by bonds, notes, or other evidences of indebtedness which are secured by the full faith and credit of the state or are required to be repaid, directly or indirectly, from general state revenues and which are incurred by the state, any department, authority, public corporation, or quasi public corporation of the state, any state university or college, or any other public agency created by the state but not by counties, cities, towns, school districts, or other municipal corporations, but shall not include obligations for the payment of current expenses of state government, nor shall it include debt hereafter incurred pursuant to section 3 of this article, obligations guaranteed as provided for in subsection (g) of this section, principal of bond anticipation notes or obligations issued to fund or refund the indebtedness of the Washington state building authority. In addition, for the purpose of computing the amount required for payment of interest on outstanding debt under subsection (b) of this section and this subsection, "interest" shall be reduced by subtracting the amount scheduled to be received by the state as payments from the federal government in each year in respect of bonds, notes, or other evidences of indebtedness subject to this section.

(e) The state may pledge the full faith, credit, and taxing power of the state to guarantee the voter approved general obligation debt of school districts in the manner authorized by the legislature. Any such guarantee does not remove the debt obligation of the school district and is not state debt.

incorporated cities the assessment shall be taken from the last assessment for city purposes: *Provided,* That no part of the indebtedness allowed in this section shall be incurred for any purpose other than strictly county, city, town, school district, or other municipal purposes: *Provided further,* That (a) any city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding five per centum additional for supplying such city or town with water, artificial light, and sewers, when the works for supplying such water, light, and sewers shall be owned and controlled by the municipality and (b) any school district with such assent, may be allowed to become indebted to a larger amount but not exceeding five per centum additional for capital outlays. [**AMENDMENT 27,** 1951 House Joint Resolution No. 8, p 961. Approved November 4, 1952.]

Provisions of Art. 7 Section 2 (Limitation on Levies) also subject to limitations contained in Art. 8 Section 6: Art. 7 Section 2 (b).

Original text -- Art. 8 Section 6 LIMITATIONS UPON MUNICIPAL INDEBTEDNESS -- *No county, city, town, school district or other municipal corporation, shall for any purpose become indebted in any manner to an amount exceeding one and one-half percentum of the taxable property in such county, city, town, school district or other municipal corporation, without the assent of three-fifths of the voters therein, voting at an election to be held for that purpose, nor in cases requiring such assent shall the total indebtedness at any time exceed five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state, and county purposes previous to the incurring of such indebtedness; except that in incorporated cities the assessment shall be taken from the last assessment for city purposes;* Provided, *That no part of the indebtedness allowed in this section, shall be incurred for any purpose other than strictly county, city, town, school district, or other municipal purposes.* Provided further; *that any city or town, with such assent may be allowed to become indebted to a larger amount but not exceeding five per centum additional for supplying such city or town with water, artificial light, and sewers, when the works for supplying such water, light, and sewers shall be owned and controlled by the municipality.*

SECTION 7 CREDIT NOT TO BE LOANED. No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

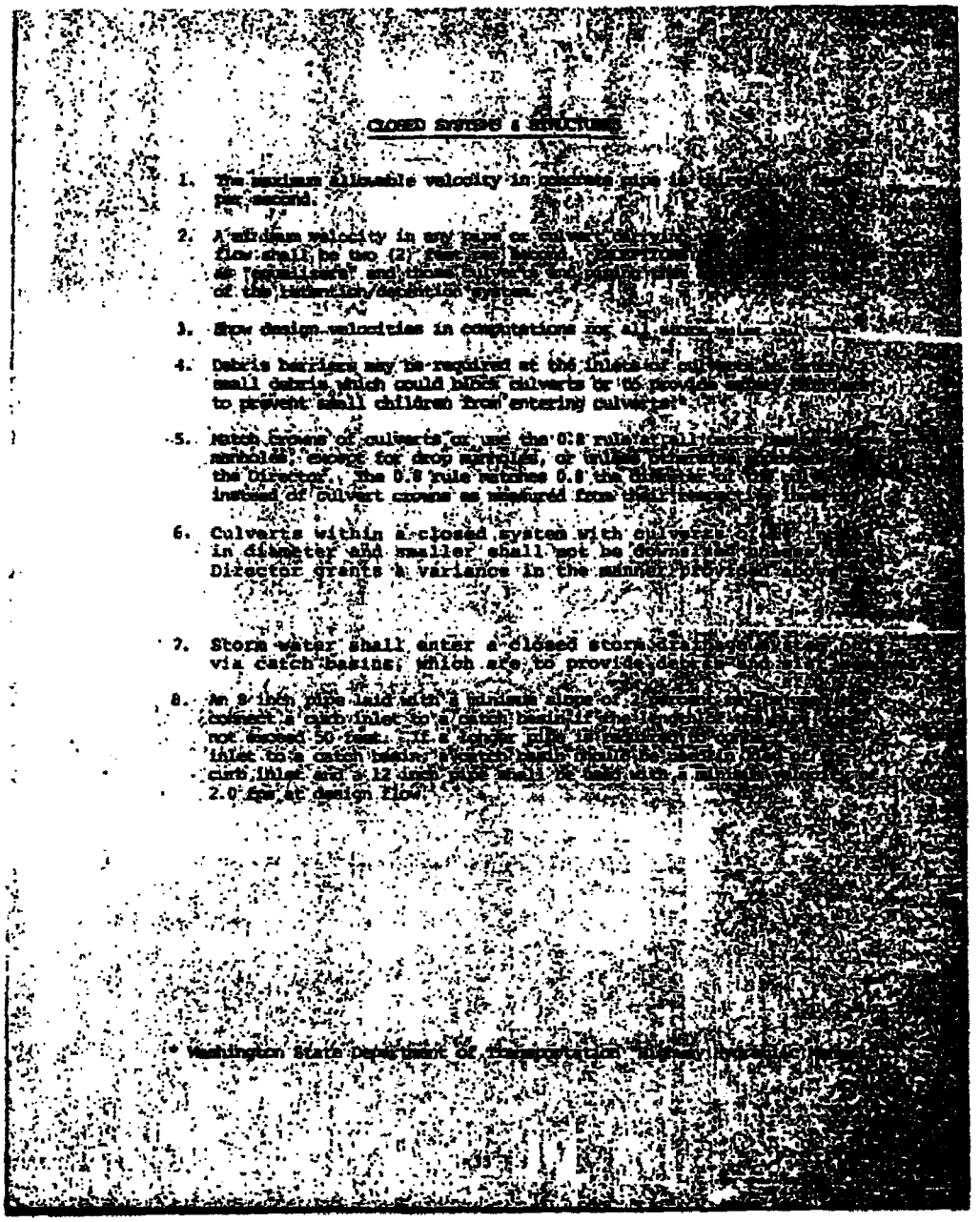
SECTION 8 PORT EXPENDITURES -- INDUSTRIAL DEVELOPMENT --PROMOTION. The use of public funds by port districts in such manner as may be prescribed by the legislature for industrial development or trade promotion and promotional hosting shall be deemed a public use for a public purpose, and shall not be deemed a gift within the provisions of section 7 of this Article. [**AMENDMENT 45,** 1965 ex.s. Senate Joint Resolution No. 25, p 2819. Approved November 8, 1966.]

SECTION 9 STATE BUILDING AUTHORITY. The legislature is empowered notwithstanding any other provision in this Constitution, to provide for a state building authority in corporate and politic form which may contract with agencies or departments of the state government to construct upon land owned by the state or its agencies, or to be acquired by the state building authority, buildings and appurtenant improvements which such state agencies or departments are hereby empowered to lease at reasonable rental rates from the Washington state building authority for terms up to seventy-five years with provisions for eventual vesting of title in the state or its agencies. This section shall not be construed as authority to provide buildings through lease or otherwise to nongovernmental entities. The legislature may

Amendment 70 (1979) -- Art. 8 Section 10 RESIDENTIAL ENERGY CONSERVATION -- *Notwithstanding the provisions of section 7 of this Article, until January 1, 1990 any county, city, town, quasi municipal corporation, municipal corporation, or political subdivision of the state which is engaged in the sale or distribution of energy may, as authorized by the legislature, use public moneys or credit derived from operating revenues from the sale of energy to assist the owners of residential structures in financing the acquisition and installation of materials and equipment for the conservation or more efficient use of energy in such structures. Except as provided in section 7 of this Article, an appropriate charge back shall be made for such extension of public moneys or credit and the same shall be a lien against the residential structure benefited. Except as to contracts entered into prior thereto, this amendment to the state Constitution shall be null and void as of January 1, 1990 and shall have no further force or effect after that date.* [AMENDMENT 70, Substitute Senate Joint Resolution No. 120, p 2288. Approved November 6, 1979.]

SECTION 11 AGRICULTURAL COMMODITY ASSESSMENTS --DEVELOPMENT, PROMOTION, AND HOSTING. The use of agricultural commodity assessments by agricultural commodity commissions in such manner as may be prescribed by the legislature for agricultural development or trade promotion and promotional hosting shall be deemed a public use for a public purpose, and shall not be deemed a gift within the provisions of section 5 of this article. [**AMENDMENT 76,** 1985 House Joint Resolution No. 42, p 2402. Approved November 5, 1985.]

APPENDIX G



CLOSED STORM [illegible]

1. The maximum allowable velocity in concrete pipe is [illegible] per second.

2. A minimum velocity in any pipe or culvert during [illegible] flow shall be two (2) feet per second. Exceptions [illegible] as "pollutants" and [illegible] of the detention/retention system.

3. Show design velocities in computations for all storm [illegible]

4. Debris barriers may be required at the inlet of culverts [illegible] small debris which could block culverts or to provide safety [illegible] to prevent small children from entering culverts.

5. Match crowns of culverts or use the 0.8 rule at all [illegible] manholes, except for drop manholes, or unless otherwise [illegible] the Director. The 0.8 rule matches 0.8 the diameter of the [illegible] instead of culvert crowns as required from [illegible]

6. Culverts within a closed system with culverts [illegible] in diameter and smaller shall not be [illegible] Director grants a variance in the manner provided above.

7. Storm water shall enter a closed storm [illegible] via catch basins, which are to provide [illegible]

8. An 8 inch pipe laid with a minimum slope of [illegible] connect a catch inlet to a catch basin if the length of [illegible] not exceed 50 feet. If a longer pipe is [illegible] inlet to a catch basin, a catch basin shall be placed [illegible] curb inlet and a 12 inch pipe shall be used with a minimum [illegible] 2.0 fps at design flow.

* Washington State Department of Transportation [illegible]

OPERATIONS & MAINTENANCE

The Drainage Ordinance 24.28.040 provides for [illegible] Operations & Maintenance of drainage facilities [illegible] where the facilities are:

1. Appropriately a part of a County maintained regional system;

2. Unlikely to be adequately maintained privately; and

3. Proposed for County maintenance in an approved detailed drainage plan after the expiration of a two (2) year maintenance period.

Each specific facility proposed for County operation and maintenance must comply with the following:

1. All requirements of the Drainage Ordinance, Chapter [illegible] have been fully complied with.

2. If, after two years of operation, the facilities [illegible] inspected and approved by the Director.

   a. Any inadequacies in design, construction and [illegible] have been corrected.

   b. A detailed cost accounting of operation and maintenance expenses and a schedule of maintenance work done [illegible] been submitted for the two-year period after construction.

3. All necessary easements entitling the County to properly operate and maintain the facility have been conveyed to the County and recorded with the Snohomish County Auditor, [illegible] the County has agreed to assume the responsibility.

4. The applicant pays the County an Operation and Maintenance assessment based on a ten (10) year prorated [illegible] to operate and maintain the permanent drainage facilities [illegible] constructed by the applicant.

The County has the right to inspect the facilities both during and after the two-year period in order to [illegible] continued use of the facilities for the purposes for which they were built and in accordance with [illegible] by the Director.

DEFINITIONS

25.02.010 Comprehensive Drainage Basin Plan: "Comprehensive Drainage Basin Plan", as used in this chapter, means the plan adopted by the County Council for managing storm and surface water facilities and features within individual drainage basins. Such plans shall at a minimum determine the capabilities and needs for runoff accommodation due to various combinations of development, land use, structural and non-structural management alternatives. Such plan shall also recommend the form, location and extent of quantity and quality control measures which would satisfy legal constraints, water quality standards, and community standards, and identify the institutional and funding requirements for plan implementation.

25.02.020 Drainage Basin Master Program: "Drainage Basin Master Program", as used in this chapter, means the overall strategy and framework of the storm and surface water management activity described in this chapter.

25.02.030 Drainage Facilities: "Drainage Facilities", as used in this chapter, shall mean any structural or non-structural feature, element, or mechanism designed to accommodate storm and surface water runoff.

25.02.040 Fees: "Fees", as used in this chapter, shall mean any revenues generated as a result of providing storm and surface water management services.

25.02.050 Program Revenues: "Program Revenues", as used in this chapter, shall mean any financial revenues, generated in any manner, for use in managing storm and surface waters.

25.02.060 Service Charges: "Service Charges", as used in this chapter, shall mean that portion of program revenues generated by specific charges to landowners or users for the service of accommodating storm and surface water runoff.

25.02.070 Rates: "Rates", as used in this chapter, shall mean the formula employed to assess different sizes and types of land uses for the accommodation of storm and surface water runoff.

25.02.080 Storm and Surface Water Management Facilities and Features: "Storm and Surface Water Management Facilities and Features", as used in this chapter, shall mean any facility, improvement, development, property or interest therein, or other structural or non-structural element, made, constructed, or acquired for the purpose of controlling, or protecting life and safety, natural resources, or property from, any storm, waste, flood, surplus, or other surface waters wherever located within the County, and shall include but not

24.08.040 Critical Area. "Critical Area" refers to those areas identified in Chapter 24.24 as presenting high risk drainage problems.

24.08.060 Design storm. "Design storm" means that rainfall event selected by the Director for purposes of design. The minimum design shall be for a 10-year return period storm, except that if the water shed within which the development is located exceeds 50 acres or the design discharge of such water shed exceeds 20 cfs then the minimum design shall be for a 25-year return period storm.

24.08.070 Detention facilities. "Detention facilities" means facilities designed to hold runoff while gradually releasing it at a predetermined maximum rate.

24.08.080 Development Coverage. "Development Coverage" means all improved impervious surface areas within the subject property including, but not limited to: rooftops, driveways, carports, walkways, accessory buildings and parking areas.

24.08.090 Director. "Director" means the Director of the Department of Public Works or his designee.

24.08.110 Drainage plan. "Drainage plan" means a plan for collection, transport, treatment, and discharge or recycling of water within the subject property.

24.08.120 Drainage treatment/abatement facilities. "Drainage treatment/abatement facilities" means any facilities installed or constructed in conjunction with a drainage plan for the purpose of treatment or abatement of stormwater runoff.

24.08.130 Large Lot Subdivision. "Large Lot Subdivision" is the division of land for the purpose of sale, lease or development into two (2) or more lots, tracts or parcels each of which is at least 1/128th of a section, or is five (5) acres if the land is not capable of subdivisional description.

CHAPTER 24.28
OPERATION & MAINTENANCE

24.28.040 County Assumption of Operation & Maintenance.

Drainage Facilities shall be dedicated to the County where the Director determines that such facilities either are appropriately a part of a county maintained regional system or are unlikely to be adequately maintained privately.

The County shall assume the operation and maintenance responsibility of retention/detention or other drainage conveyance systems and drainage treatment/ abatement facilities proposed for county maintenance in an approved detailed drainage plan after the expiration of the two (2) year maintenance period if:

(1) All of the requirements of Chapter 24.28 have been fully complied with; and

(2) The facilities have been inspected and approved by the Director after two (2) years of operation in accordance with the Procedures Manual; and

(3) All necessary easements entitling the County to properly operate and maintain the facility have been conveyed to the County and recorded with the Snohomish County Auditor; and

(4) The applicant has supplied to the County an accounting of maintenance expenses for the permanent drainage facilities up to the end of the two year period.

(5) The applicant pays the County an Operation and Maintenance Assessment based on a ten (10) year prorated cost to operate and maintain the permanent drainage facilities constructed by the applicant.

24.28.080 Operation and Maintenance by Owners.

In the event that the County is not to assume the operation and maintenance responsibility for the facilities it will be the responsibility of the applicant to make arrangements with the owners of the subject property for assumption of operation and maintenance in a manner subject to the approval of the Director. Such arrangements shall be completed and approved prior to the end of the two year period of applicant responsibility. The County may inspect the facilities in order to ensure continued use of the facilities for the purposes for which they were built and in accordance with arrangements approved by the Director.

APPENDIX H

86.15.010. Definitions

The definitions set forth in this section apply through this chapter.

(1) "Board" means the county legislative authority.

(2) "Flood control improvement" means any works, projects, or other facilities necessary for the control of flood waters within the county or any zone or zones.

(3) "Flood waters" and "storm waters" means any storm waste or surplus waters, including surface water, wherever located within the county or a zone or zones where such waters endanger public highways, streams and water courses, harbors, life, or property.

(4) "Participating zones" means two or more zones found to benefit from a single flood control improvement or storm water control improvement.

(5) "Storm water control improvement" means any works, projects, or other facilities necessary to control and treat storm water within the county or any zone or zones.

(6) "Supervisors" means the board of supervisors, or governing body, of a zone.

(7) "Zones" means flood control zone districts which are quasi municipal corporations of the state of Washington created by this chapter.

Enacted by Laws 1961, ch. 153, § 1. Amended by Laws 1983, ch. 315, § 11.

Historical and Statutory Notes

Severability—Laws 1983, ch. 315: See Historical and Statutory Notes following § 90.03.500.

86.15.020. Zones—Creation

The board may initiate, by affirmative vote of a majority of the board, the creation of a zone or additional zones within the county,

APPENDIX I

COUNTIES -- FLOOD CONTROL -- DRAINS -- FLOOD WATERS -- SURFACE WATERS -- COUNTY ROAD FUNDS -- BUILDING PERMITS -- RIVER IMPROVEMENT FUNDS -- FLOOD CONTROL MAINTENANCE FUNDS.

Chapter 86.12 RCW, which is derived from chapter 204, Laws of 1941, empowers the various counties of this state to condemn land for and make culverts and waterways to alleviate flood conditions caused by "flood waters" only, but does not empower counties to alleviate flood conditions caused by "surface waters" comprising rain water moving across country and not coming from any definite source. Expenditures for flood water improvements must be made out of a county river improvement fund and not out of the general or current expense fund.

County road funds may not be used for drainage of private property within the county, except the county may provide adequate drainage for its roads which may incidentally benefit adjacent private property.

Chapter 36.43 RCW does not give counties the power to drain private property within a county merely because county officials have issued building permit for such property.

April 2, 1956

Honorable Mark Litchman, Jr.
State Representative, 45th District
800 American Building
Seattle 4, Washington

Cite as:
AGO 55-57 No. 238

Dear Sir:

In your letter of March 1, 1956, previously acknowledged, you have requested the opinion of this office on the following questions:

[[Orig. Op. Page 2]]

1. Would chapter 86.12 RCW allow a county to condemn, make culverts, waterways, etc. out of the general fund so as to rid a certain area of surplus waters brought about by excessive rains and flood waters?

2. Can county road funds or flood water funds be used for the purpose of eliminating water hazards in residential areas in King County?

3. Does the fact that a county issues a building permit for single family residences in such a residential area allow the county to provide funds for drainage of this area?

Our answer to questions 1 and 3 is in the negative. Our answer to question 2 is in the negative, except that (1) flood water funds may be used to alleviate conditions caused by "flood waters" but not "surface waters," and that (2) the county may provide funds for

adequate drainage of county roads from the county road fund which may incidentally provide drainage for private property adjacent to such roads.

ANALYSIS

1. With regard to your first question, we must consider whether a county has the power to spend general funds or current expense funds to control surplus waters brought about by heavy rains within the county. Our opinion is that it lacks this power. Counties are local subdivisions of the state created by the sovereign power of the state, without the consent of the inhabitants and with direct exclusive reference to the policy of the state, and are but a branch of the general administration of that policy. State v. Vantage Bridge Co., 134 Wash. 568. As instrumentalities of the state, they have no powers except those expressly conferred by the constitution and state laws, or those which are reasonably or necessarily implied from the granted powers. State ex rel. Taylor v. Superior Court of King County, 2 Wn. (2d) 575. County commissioners have only such powers as are expressly granted to them or necessarily implied from those given. State ex rel. Becker v. Wiley, 16 Wn. (2d) 340.

Powers of counties relating to disbursement of public funds are wholly regulated by statute. State ex rel. Thurston County v. Department of L. & I., 167 Wash. 629. At common law a municipal corporation is under no obligation to provide drainage or sewerage for its inhabitants. 18 McQuillin on Municipal Corporations (3rd ed.) 471, § 53.119.

[[Orig. Op. Page 3]]

We have been unable to discover any authority, statutory or constitutional, empowering a county to provide for surface drainage of private property lying within the county from current expense or general funds. We refer you to our opinion of March 7, 1956, AGO 55-57 No. 218 [[to Charles O. Carroll, Prosecuting Attorney, King County]], a copy of which is enclosed herewith.

You suggest, however, that chapter 86.12 RCW may give counties this power. The preamble to chapter 86.12 RCW (§ 1, chapter 204, Laws of 1941), which is not contained in the Revised Code of Washington, sets forth the policy behind the enactment of this chapter as follows:

"It is hereby recognized that destructive floods upon the streams and other bodies of water in the State of Washington, subject to flood conditions, upsetting orderly processes and causing loss of life and property, including erosion of lands and impairing and obstructing navigation, highways and railroads and other channels of commerce, constitute a menace to general welfare. It is the purpose of the State of Washington in the exercise of its sovereign and police powers, and in the interests of public welfare, to establish a state and local participating flood control maintenance policy."

RCW 86.12.010 and 86.12.020 are derived from §§ 8 and 9, chapter 204, Laws of 1941. As there is some variance between the code and session law, we quote from the latter as follows:

"...

"The County Commissioners of any county may annually levy a tax, beginning with the year 1907, in such amount as, in their judgment they may deem necessary or advisable, but not to exceed one (1) mill upon all taxable property in such county, for the purpose of creating a fund to be known as 'river improvement fund.' There is hereby

created in each such river improvement fund an account to be known as the 'flood control maintenance account.'"

"...

"Said fund shall be expended for the purposes in this act provided. Any county, for the control of waters subject [[Orig. Op. Page 4]] to flood conditions from streams, tidal or other bodies of water affecting such county, may inside or outside the boundaries of such county, construct, operate and maintain dams and impounding basins and dikes, levees, revetments, bulkheads, riprap or other protection; may remove bars, logs, snags and debris from and clear, deepen, widen, straighten, change, relocate or otherwise improve and maintain stream channels, main or overflow; may acquire any real or personal property for the prosecution of such works; and may construct, operate and maintain any and all other works, structures and improvements necessary for such control; and for any such purpose may purchase, condemn or otherwise acquire land, property or rights, including beds of non-navigable waters and state, county and school lands and property and may damage any land or other property for any such purpose, and may condemn land and other property and damage the same for any other public use after just compensation having been first made or paid into court for the owner in the manner prescribed in this act. The purposes in this act specified are hereby declared to be county purposes."

There is a clear distinction between "flood waters" and mere "surface waters." "Surface waters" comprising rain water moving across the county and not coming from any definite source are clearly distinguished from "flood waters." or waters spreading out from overflowing streams having definite channels. Alexander v. Muenscher, 7 Wn. (2d) 557; Dahlgren v. Chicago M. & St. P. Ry. Co., 85 Wash. 395; Miller v. Eastern Railway and Lumber Co., 84 Wash. 31, 35;Seufert v. Cook, 241 Pac. 418, 420, 74 Cal.App. 528;Poole v. Sun Underwriters Ins. Co. of New York, 274 N.W. 658, 660, 65 S.D. 422.

A reading of the statutes cited above indicates that they were intended by the legislature to apply to waters subject to flood conditions from streams, watercourses and other bodies of water. We must emphasize the apparent intention of the legislature to exclude from the scope of these statutes all waters except flood waters. Drainage of surface waters may be undertaken through local improvement districts organized pursuant to chapter 85.04 RCW.

[[Orig. Op. Page 5]]

We conclude that a county does not have the power to use general funds or flood water funds for drainage of surface waters within the county. The flood water account of the river improvement fund may only be used by the county for alleviation of flood conditions caused by the overflow of rivers, streams, watercourses or bodies of water having definite channels or courses.

2. Your second question is whether or not county road funds may be used for drainage of private property within the county.

RCW 36.82.070 authorizes the county to use road funds for maintenance of county roads. If the roads in the area you have referred to are county roads, then the county may use road funds to maintain these roads in a normal, usable condition and may thereby incidentally provide beneficial drainage to the private property in this area. However, we have not discovered any authority which would allow a county to use road

funds for drainage of private property within the county. See AGO 55-57 No. 218 [[to Charles O. Carrol, Prosecuting Attorney, King County on March 7, 1956]].

3. Your third question is whether the granting of a building permit by county officials for the construction of a residence in an area within the county would authorize the county issuing such permit to provide funds for drainage of the area.

The county commissioners have authority by virtue of chapter 36.43 RCW to regulate construction of new buildings by means of enacting building codes and issuance of building permits. See 47 OAG 24 [[to Stanley J. Krause, Prosecuting Attorney, Grays Harbor County on March 31, 1947]]. Such building codes are penal issuance of building permits. See 47 OAG 24. Such building codes are penal or regulatory in nature, and their primary purpose is to secure to the municipality as a whole the benefits of a well-ordered municipal government and not to protect the personal or property interests of individuals. Building codes require strict construction. 7 McQuillin on Municipal Corporations (3rd ed.) 493, § 24.507. Chapter 36.43 RCW contains no language authorizing counties to undertake any type of drainage improvement on property where such permits have been granted.

We conclude that the fact that county officials have granted a building permit to a landowner within the county does not empower the county to provide drainage for the property on which the building permit was granted.

We hope that the above information will be of assistance to you.

Very truly yours,
DON EASTVOLD
Attorney General

DUANE S. RADLIFF
Assistant Attorney General

APPENDIX J

Chapter 18.04
STORM WATER AND DRAINAGE CONTROL CODE

Sections:

18.04.010 Title – Codification.

This code shall be referred to as the Bothell storm water and drainage control code and shall be codified as Chapter 18.04 BMC. (Ord. 2023 § 1 (Exh. A), 2009; Ord. 1634 § 1, 1996; Ord. 843 § 1, 1977).

18.04.020 Intent.

The city council finds that the ordinance codified in this chapter is necessary in order to minimize water quality degradation by preventing the siltation of the city's creeks, streams, rivers, lakes, and other water bodies; to protect property owners adjacent to developing land from increased runoff rates which could cause flooding and erosion of abutting property; to promote sound development policies which respect and preserve the city's watercourses; to ensure the safety of city roads and rights-of-way; and to decrease surface water damage to public and private property. (Ord. 2023 § 1 (Exh. A), 2009; Ord. 1634 § 1, 1996; Ord. 843 § 1, 1977).

18.04.030 Authority.

This code constitutes an exercise of the police power of the city to promote the public health, safety and welfare and its provisions shall be liberally construed for the accomplishment of that purpose. (Ord. 2023 § 1 (Exh. A), 2009; Ord. 1634 § 1, 1996).

18.04.040 Permits required.

No person shall make any additions, betterments or extensions to the existing storm drainage system without first obtaining a permit to do so. The following permits apply to grading, excavating, and storm drainage system work:

A. ROW Permit. A right-of-way invasion permit shall be required whenever storm drainage system additions, betterments or extensions are made within the street right-of-way or a public easement.

B. Storm Drainage Side Sewer Permit. A storm drainage side sewer permit shall be required for the construction of any storm drainage side sewer or on-site storm drainage system.

C. Grading Permit. A grading permit shall be required whenever grading activities are performed.

D. A right-of-way invasion permit, storm drainage side sewer permit and grading permit shall expire two years from the date of issuance; except that permits issued through December 31, 2011, shall expire four years from the date of issuance. The director is authorized to approve a request for an extended expiration date where a construction schedule is provided by the applicant and approved prior to permit issuance.

E. Every permit which has been expired for less than one year may be renewed for a period of one year for an additional fee, based on the valuation of the work remaining, as long as no changes have been made to the originally approved plans. For permits that have been expired for longer than one year, a new permit must be obtained and full new fees paid. No permit shall be renewed more than once.

Exemption from the permit requirements of this title shall not be deemed to grant authorization for any work to be done in any manner in violation of the provisions of the BMC or the BSWDM. (Ord. 2043 § 2 (Exh. B), 2010; Ord. 2023 § 1 (Exh. A), 2009; Ord. 1634 § 1, 1996).

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 catchbasin. (Ord. 2023 § 1 (Exh. A), 2009; Ord. 1634 § 1, 1996).

18.04.060 Inspection – Powers and authority.

The public works director bearing proper credentials and identification shall be permitted, during city business hours, to enter property to which storm sewer service is being supplied by the city for the purpose of inspecting the condition of exterior connections to the city system and related apparatus. (Ord. 2023 § 1 (Exh. A), 2009; Ord. 1634 § 1, 1996).

18.04.070 Drainage plan – Review and approval.

All persons applying for any development permit and/or approvals shall submit for approval a drainage plan with their application and/or request in accordance with the BSWDM, except for applications for the following permits:

Administrative Interpretations	Plumbing Permit
Sign Permit	Electrical Permit
Street Vacation	Mechanical Permit
Demolition Permit	Sewer Connection Permit
Street Use Permit	Utility Permit (waste, sewer, storm)
Interior Alterations with no change of use	Water Meter Permit
Right-of-Way Invasion Permit	Hydrant Use Permit
Single-Family Remodeling with no change of use	Side Storm Sewer Connection
Single-Family Building Permit not associated with any subdivision	

(Ord. 2023 § 1 (Exh. A), 2009; Ord. 1634 § 1, 1996).

18.04.080 Additions, betterments, extensions – Compliance with comprehensive storm water plan.

Additions, betterments and extensions to the existing storm drainage system of the city shall be made in accordance with the storm drainage comprehensive plan and Bothell Standards adopted by the city council and shall require a permit. The fee for said permit shall be as established by resolution of the city. (Ord. 2023 § 1 (Exh. A), 2009; Ord. 1634 § 1, 1996).

18.04.090 Additions, betterments, extensions – Financing.

The cost of making additions, betterments and extensions to the existing storm drainage system may be paid from such sources and by such means as the city council from time to time may direct, in accordance with the provisions of the laws of the state as the same now exist or as they may hereafter be amended. (Ord. 2023 § 1 (Exh. A), 2009; Ord. 1634 § 1, 1996).

APPENDIX K

251 Ga. 100
Supreme Court of Georgia.

J. Keith LEWIS et al.
v.
DeKALB COUNTY.

No. 39572. | June 2, 1983.

Property owners, who suffered water damage in their home due to insufficient capacity of culverts on neighboring property, and experienced flooding caused by alteration of dam by county, brought action against county and adjoining property owners seeking injunctive relief and damages. The Superior Court, DeKalb County, Luther C. Hames, Jr., J., granted summary judgment to neighbors on basis of relief obtained in earlier action, and granted summary judgment to county on two remaining counts of complaint dealing with continuing nuisance and taking without compensation, and property owners appealed. The Supreme Court, Clarke, J., held that: (1) mere requirement that subdivision plat contain language of **dedication** of areas commonly dedicated did not constitute acceptance on part of county of **drainage** easements so as to make county responsible for maintaining easements; (2) county was not liable to property owners either for maintaining continuing nuisance or taking their property without compensation in regard to flooding from stream through their property; and (3) in breaching dam, county acted pursuant to police powers and therefor increased water flow through property caused by breach did not constitute constitutional taking.

Judgment affirmed.

West Headnotes (5)

[1] **Dedication**
Official Acts or Proceedings

Mere requirement that subdivision plat contain language of **dedication** of areas commonly dedicated did not constitute acceptance on part of county of **drainage** easement so as to make the county responsible for maintaining the **drainage** easement.

4 Cases that cite this headnote

[2] **Eminent Domain**
Nature and grounds in general
Water Law
Nuisance

Where insert to plat contained language specifically releasing county from liability or responsibility for flooding or erosion from storm drains or from flooding from high water of natural creeks or rivers, property owner's deed recited that property was conveyed subject to the subdivision plat, and county did not assume responsibility for maintenance of ditch through acceptance of dedication of easement, county was not liable to property owners either for maintaining continuing nuisance or taking their property without compensation in regard to flooding from stream through their property. Const. Art. 1, § 3, Par. 1.

2 Cases that cite this headnote

[3] **Eminent Domain**
Flooding

Where dam on lake was in dangerous condition, heavy rains caused lake to rise within five feet of top of dam, county and state officials, as well as Corps of Engineers, became concerned for stability of dam should it overtop, and breaching was necessary since during heavy rains drain pipe was inadequate to lower dam and keep it at safe level, county, in breaching dam, acted pursuant to its police powers; therefore, increased water flow through property owners' land caused by breaching of dam did not constitute taking within meaning of Constitution. Const. Art. 1, § 3, Par. 1.

1 Cases that cite this headnote

[4] **Municipal Corporations**
Use of property in general

States
Police power

Prohibition against taking of private property for public purpose without compensation has no relevance to exercise of police power by state or its political subdivisions. Const. Art. 1, § 3, Par. 1.

2 Cases that cite this headnote

[5] **Water Law**
Injuries by overflow, breakage, leakage, or seepage from artificial watercourses or impoundments

Where breaching of dam was necessary and lawful exercise of police power, breaching could not constitute nuisance nor could increased flow of water constitute continuing nuisance.

Attorneys and Law Firms

**113 *103 William Boyd Lyons, Atlanta, for J. Keith Lewis et al.

George P. Dillard, Richard W. Calhoun, Decatur, for DeKalb County.

Opinion

*100 CLARKE, Justice.

Mr. and Mrs. Lewis bought a lot in DeKalb County in 1973 and applied for a building permit. They were informed that a stream ran across the property and that they would have to build their driveway in a manner which would avoid obstruction of the stream. The stream originates in Silver Lake, a privately owned 27.5 acre lake near Oglethorpe University to the east of the Lewis property, and drains westerly into Nancy Creek. The Lewises built a bridge over their driveway. Adjoining property owners attempted to solve the driveway problem by putting in large pipes and filling the area around them with dirt. The pipes on the lower property were insufficient to prevent backup of water onto the Lewis property. The county investigated the situation and required that the owner replace the pipes with larger ones. There were no changes made to remedy the flooding caused by the upstream property owner's culverts being clogged with debris. The Lewises contend that the culverts should be replaced by bridges.

In addition to flooding caused by the insufficient capacity of culverts on neighboring property, the Lewises experienced flooding caused by the alteration of a dam on Silver Lake. Because of concern that the dam was unsafe, the county lowered Silver Lake and then cut a v-shaped notch into the dam face. The Lewises allege that they have suffered damage because of water in their home as a result of the actions of the county. During a flood in August, 1979, the water level reached 30"' in their house.

Mr. and Mrs. Lewis settled an earlier action against the builders of the houses on either side. They filed the present suit against the county, seeking injunctive relief and damages and against the county and adjoining property owners. The trial court granted summary judgment to the neighbors on the basis of a release obtained in the earlier action. The court granted summary judgment to the county on the two remaining counts of plaintiffs' complaint dealing with continuing nuisance and taking without compensation. Mr. and Mrs. Lewis appeal the grant of summary judgment to the county.

1. The first question on appeal is whether the county maintained the drainage ditch as a continuing nuisance. We held in *Miree v. United States,* 242 Ga. 126, 134, 249 S.E.2d 573 (1978), that "... where a county causes a nuisance to exist which amounts to a taking of property of one of its citizens for public purposes, the county is liable." The Lewises bought the property subject to **114 the drainage easement which had been dedicated to the county. Although the Lewises contend that the **dedication** had been accepted by the *101 county, the county insists that there was no acceptance of the **dedication** so as to make the county responsible for maintaining the **drainage** easement. The Lewises argue that acceptance of the **dedication** was manifested by (1) the county's recording the subdivision plat which contained an express **dedication** of the **drainage** easement required by ordinance; (2) the maintenance of the easement by the county; and (3) the use of the ditch by the public to maintain flood control.

The Lewises rely upon our recent decision in *Smith v. Gwinnett County,* 248 Ga. 882, 286 S.E.2d 739 (1982), for the proposition that where an ordinance requires dedication of an easement to the county before the county will approve a subdivision plat, the county will be deemed

to have accepted the dedication. The Lewises point out that the DeKalb County Code of 1963, § 17-25, in effect at the time of the recordation of the plat containing the subject property, required that the plat contain a certified acknowledgement by the owner "... that this plat was made from an actual survey and dedicates to the use of the public forever all streets, alleys, parks and watercourses, drains, easements and public places thereon shown for the purposes and considerations therein expressed."

[1] In *Smith v. Gwinnett County,* supra, we said: "It may be that where a county would not approve a subdivision plat unless a park area were dedicated to the county, approval of the plat would constitute an acceptance of the dedication." Id. at 886, 286 S.E.2d 739. However, we went on to say that mere approval of plats containing offers of dedication did not constitute acceptance. We find that the mere requirement that the plat contain language of dedication of areas commonly dedicated does not constitute acceptance on the part of the county.

The Lewises' other theories as to the county's acceptance of the dedication involve a contention that the county maintained the ditch or streambed. There is no evidence that the county ever exerted any control over the easement or that the county took any action to control the flow of water through the ditch except to require that the contractor for the property next to the Lewises place corrugated pipes supplied by the county in the ditch to act as culverts.

[2] Finally, and most importantly, an insert to the plat contains language specifically releasing DeKalb County from liability or responsibility for flooding or erosion from storm drains or from flooding from high water of natural creeks or rivers. The Lewis deed recited that the property was conveyed subject to the subdivision plat.

DeKalb County did not assume responsibility for maintenance of the ditch in question through acceptance of a dedication of the ***102** easement. There is no allegation that the county took any action which caused any change in the flow of the stream other than breaching the dam at Silver Lake. Since, as we point out in the discussion which follows, this constituted an exercise of the police power during an emergency rather than a taking of private property for a public purpose, this action cannot amount to the creation of a nuisance. Therefore, DeKalb County is not liable to the Lewises either for maintaining a continuing nuisance or taking their property without compensation in regard to the flooding from the stream through their property. For that reason, cases cited by appellants, such as *Reid v. Gwinnett County,* 242 Ga. 88, 249 S.E.2d 559 (1978); *Baranan v. Fulton County,* 232 Ga. 852, 209 S.E.2d 188 (1974); *McFarland v. DeKalb County,* 224 Ga. 618, 163 S.E.2d 827 (1968); *DeKalb County v. McFarland,* 223 Ga. 196, 154 S.E.2d 203 (1967), are inapposite.

2. The second question before us is whether the breaching of Silver Lake Dam by the county, which caused an increase in the flow of water through the stream of which the lake is the source, constituted a taking of appellants' property.

On November 7, 1977, as a result of the tragic loss of life caused by the failure of ****115** the dam on Kelly Barnes Lake in Stephens County, the Governor's Task Force on Dam Safety was created for the purpose of identifying possible future dam failures in Georgia and recommending alternative corrective measures. Shortly thereafter it was determined by Georgia's Civil Defense Office and the U.S. Army Corps of Engineers that the dam at Silver Lake was in a dangerous condition and that it should be lowered to facilitate closer inspection. By December 15, 1977, the lake had been lowered some 20 feet, and the DeKalb County Commission Chairman informed the Governor's office that he was requiring that the lake level be maintained 20 feet down until an adequate spillway was provided to guard against the hazard posed by the lake's remaining too full. In late January 1978, because heavy rains caused the lake to rise within 5 feet of the top of the dam, county and state officials, as well as the Corps of Engineers, became concerned for the stability of the dam should it overtop. Pumping was begun to lower the dam. On January 27, 1978, the Chairman of the Governor's Task Force on Dam Safety recommended breaching of the dam. The Corps of Engineers and the State concurred in recommending that breaching was necessary since during the heavy rains the drain pipe was inadequate to lower the dam and keep it at a safe level. The primary concern was for the safety of the residents in the area of the lake. On January 31, 1978, the Chairman of the DeKalb County Board of Commissioners declared a state of emergency and authorized the breaching of the dam. The record contains a letter from Mr. Lewis commending the county for its action in averting a disaster and expressing the hope that the dam be breached as soon as possible in order to assure safety of the area residents. Finally on February 7, 1978, the Governor, acting pursuant to the Georgia Civil Defense Act, 1951 Ga.Laws, p. 224 (former Code Ann. § 86-1801, et seq. (O.C.G.A. § 38-3-1 et seq.)), declared a state of emergency in regard to Silver Lake Dam and ordered the Department of Transportation and Department of Natural Resources to assist DeKalb County in taking necessary action, including taking

temporary possession of the dam and carrying out any structural changes necessary to insure the safety of downstream residents.

[3] [4] [5] This chain of events clearly shows that the county in breaching the dam acted pursuant to its police powers. The provisions of Constitution of the Georgia, Art. I, Sec. III, Para. I (Code Ann. § 2-301), prohibiting the taking of private property for a public purpose without compensation have no relevance to the exercise of the police power by the state or its political subdivisions. *McCoy v. Sanders,* 113 Ga.App. 565, 148 S.E.2d 902 (1966). Therefore, the increased water flow through the appellants' property caused by the breaching of Silver Lake Dam did not constitute a taking within the meaning of the Constitution. Further, since the breaching of the dam was a necessary and lawful exercise of the police power, the breaching could not constitute a nuisance. Clearly, therefore, the increased flow of water cannot constitute a continuing nuisance. Indeed, the Constitution of Georgia, Art. IX, Sec. IV, Para. III (Code Ann. § 2-6103) prohibits a county's spending public funds to improve private property. Since the record indicates that Silver Lake and Silver Lake Dam are private property (although their owner may be unknown) there is a real question whether in the absence of an emergency or condemnation of the property the county could make further structural changes in the dam.

Judgment affirmed.

All the Justices concur.

Parallel Citations

303 S.E.2d 112

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211 Ga.App. 312
Court of Appeals of Georgia.

CITY OF LAWRENCEVILLE
v.
MACKO et al.

No. A93A1830. | Dec. 9, 1993.

Purchasers of home brought nuisance and negligence action against municipality and residential builder for damages that they sustained as result of periodic flooding of their basement. The Superior Court, Gwinnett County, Henderson, Senior Judge, entered judgment in favor of plaintiffs, and municipality appealed. The Court of Appeals, Blackburn, J., held that: (1) purchasers failed to establish affirmative waiver of municipality's sovereign immunity; (2) municipality's duty to inspect property pursuant to building codes and to exercise due care in issuance of building permit was duty owing to public in general that did not support negligence claim; and (3) municipality's approval of plat that contained offers of dedication did not constitute acceptance of responsibility for maintaining drainage system.

Reversed.

West Headnotes (14)

[1] **Municipal Corporations**
Nature and Grounds of Liability

Doctrine of sovereign immunity is available to municipality against claims based on negligence.

4 Cases that cite this headnote

[2] **Municipal Corporations**
Evidence

Sovereign immunity is not affirmative defense that must be established by party seeking its protection; rather, it is in nature of a privilege, any waiver of which must be established by party seeking to benefit from waiver.

4 Cases that cite this headnote

[3] **Municipal Corporations**
Evidence

To demonstrate that municipality, by means of its purchase of liability insurance, had waived its sovereign immunity against claims arising out of its issuance of certificate of occupancy for home, homeowners had to produce copy of policy at trial; no determination of waiver could be made if policy was not produced.

4 Cases that cite this headnote

[4] **Pretrial Procedure**
Order and Record or Report

Until pretrial order is signed by judge, it is ineffective for any purpose.

[5] **Municipal Corporations**
Nature and Grounds of Liability

Counsel for municipality cannot waive defense of sovereign immunity by his actions or inactions, in absence of express statutory or constitutional authorization.

1 Cases that cite this headnote

[6] **Municipal Corporations**
Particular Officers and Official Acts

Municipality's duty to properly inspect property pursuant to building codes, and to exercise due diligence in issuance of building permit for construction of home, was duty owed to public in general, any breach of which by municipality

would not support negligence claim by purchasers of defective home.

4 Cases that cite this headnote

[7] **Evidence**
Nature and Admissibility

Hearsay evidence has no probative value, even if it is admitted without objection.

1 Cases that cite this headnote

[8] **Municipal Corporations**
Nuisances

Municipality may be liable for maintaining nuisance even in absence of waiver of its immunity.

[9] **Municipal Corporations**
Nuisances

To be liable for nuisance, municipality must be charged with performing a continuous or regularly repetitious act or condition which causes injury, and municipality must have knowledge or be charged with notice of dangerous condition or of repetitive acts causing injury.

1 Cases that cite this headnote

[10] **Nuisance**
Nature and Elements of Private Nuisance in General

One-time occurrence does not amount to "nuisance."

2 Cases that cite this headnote

[11] **Municipal Corporations**
Obstruction or Diversion of Flow of Surface Water

Municipality cannot be liable for creating a nuisance solely by virtue of its approval of construction projects which increase surface water runoff.

[12] **Municipal Corporations**
Nuisances

Municipality will not be liable on nuisance theory, no matter how egregious plaintiff's damages, if act, omission or defect alleged to constitute a nuisance is merely negligent.

[13] **Municipal Corporations**
Obstruction or Diversion of Flow of Surface Water

Municipality's approval of plat that contained offers of dedication did not constitute acceptance of responsibility for maintaining drainage system, such as might support nuisance claim by property owners whose home was flooded.

3 Cases that cite this headnote

[14] **Municipal Corporations**
Defects or Obstructions After Construction of Sewer or Drain

Municipality was not liable on nuisance theory for failing to properly maintain and repair drainage system, even assuming that municipality was responsible for maintaining

system, where evidence showed at most that municipality was negligent in its repair and maintenance of system; municipality's alleged negligence was insufficient to support cause of action for nuisance.

3 Cases that cite this headnote

Attorneys and Law Firms

**97 *317 Drew, Eckl & Farnham, T. Bart Gary, for appellant.

John E. Mahan, for appellees.

Opinion

*312 BLACKBURN, Judge.

On August 23, 1991, the appellees, William and Patricia Macko, brought the instant action for damages and injunctive relief sounding in negligence and nuisance against the City of Lawrenceville, Georgia (hereinafter referred to as the City), and Gaines Brown, a residential builder and the seller of their home based upon the periodic flooding of their basement. The City responded, asserting several defenses, including sovereign immunity, and asserting a cross-claim against Brown and third-party claims against B.J. Goble,[1] a topographical surveyor of the site, and Appalachee Enterprises, Inc., the developer of the subdivision. Brown responded to the Mackos' complaint, asserting several defenses and a cross-claim against the City based upon its alleged negligence in the approval of the construction of the home and negligence in its acceptance and maintenance of the subdivision's drainage system.

Following a trial by jury, judgment was entered on the jury's special verdict returned in favor of the Mackos on both theories, $90,000 against the City and $60,000 against Brown.[2] The City's alternative motion for judgment n.o.v. or new trial was denied by the trial court, and this appeal followed.[3]

The evidence produced at trial shows that Brown applied for a building permit from the City and began construction on the Mackos' home in March 1987. Pursuant to the requirement of the subdivision's final plat, and after the building permit had been issued, Brown obtained a site plan and topographical survey on the lot, which was prepared by Goble. The plan was needed because of the drainage conditions on the lot. The subdivision plat further provided that the City *313 disclaimed any responsibility for the overflow or erosion of natural or artificial drains beyond the right-of-way. Thereafter, the City began its three-phase inspection of the home with the initial inspection involving the footings of the home, and subsequent inspections involving the home's structure and mechanical systems. The City's inspectors do not evaluate the drainage systems of homes or the elevation of the home on the property.

At all times relevant to this action, the City had in force a standard building code governing its inspections of homes. Section 101.2.3 of this building code specifically provided that "[t]he inspection or permitting of any building or plan by any jurisdiction, under the requirements of this Code shall not be construed in any court as a warranty of the physical condition of such building or the adequacy of such plan." Section 101.2.1 provided that the building code was remedial in nature and "shall be construed to secure such beneficial interests and purposes thereof-which are public safety, health, and general welfare...." Following its approval of the home's construction, the City issued a certificate of occupancy on the home to Brown.

The Mackos initially saw the home in September 1987, at which time the construction **98 of the home was nearly completed. The Mackos subsequently purchased the home on December 9, 1987, and it is undisputed that the Mackos did not have any discussions with any representatives of the City prior to their purchase. The warranty deed conveying the property to the Mackos provided that the deed was subject to the subdivision plat recorded with the county. It was not until July 16, 1989, that the Mackos experienced the first of three major floods in their drive-under garage, resulting in damage to the home in addition to personal property maintained in the garage, which forms the basis for this action.

1. Initially we must address the City's third enumeration of error concerning sovereign immunity inasmuch as a ruling on this issue may render many of the City's remaining enumerations of error moot. Specifically, the City maintains that the trial court erred in failing to direct a verdict and motion notwithstanding the verdict in its favor on the Mackos' negligence claim based upon the Mackos' failure to affirmatively show that the City waived its immunity from suit. We agree.

[1] [2] "[I]t is the public policy of the State of Georgia that there is no waiver of the sovereign immunity of municipal corporations of the state and such municipal corporations shall be immune from liability for damages. A municipal

corporation shall not waive its immunity by the purchase of liability insurance ... unless the policy of insurance issued covers an occurrence for which the defense of sovereign immunity is available, and then only to the extent of the limits of such insurance policy." OCGA § 36-33-1. See ***314** Ga. Const. 1983, Art. IX, Sec. II, Par. IX. *Hiers v. City of Barwick,* 262 Ga. 129, 414 S.E.2d 647 (1992); *Peeples v. City of Atlanta,* 189 Ga.App. 888, 377 S.E.2d 889 (1989). "The doctrine of sovereign immunity is available to a municipality against claims based on negligence." *City of Atlanta v. Atlantic Realty Co.,* 205 Ga.App. 1, 3(2), 421 S.E.2d 113 (1992). "Sovereign immunity is not an affirmative defense that must be established by the party seeking its protection. Instead, immunity from suit is a privilege ... and the waiver must be established by the party seeking to benefit from the waiver." (Citations and punctuation omitted.) *Ga. Dept. of Human Resources v. Poss,* 263 Ga. 347, 348(1), 434 S.E.2d 488 (1993).

[3] In the case sub judice, it is undisputed that the Mackos failed to present any evidence showing the City's affirmative waiver of its immunity from suit. The policy of insurance was not presented at trial, and a determination of a waiver of immunity cannot be made if an insurance policy has not been furnished. *Hancock v. Hobbs,* 967 F.2d 462 (11th Cir.1992). Since there was no evidence of any kind showing the City's waiver of sovereign immunity, a directed verdict on the negligence claim was demanded. *Moore v. American Suzuki Motor Corp.,* 203 Ga.App. 189(1), 416 S.E.2d 807 (1992).

[4] [5] In an effort to explain their failure to submit evidence of liability insurance, the Mackos maintain in their brief that they were not "compelled" to submit such evidence because of their reliance upon the alleged narrowing of the issue of coverage in a pretrial order signed by the parties. Specifically, the Mackos relied upon the following question included in the order and presented by the City on the issues for trial: "Is the City of Lawrenceville entitled to sovereign immunity to the extent that the damages awarded against the City of Lawrenceville are not covered by liability insurance." The Mackos' reliance upon this statement was unjustified inasmuch as this interrogatory was not a factual stipulation or admission that liability insurance existed. In addition, the pretrial order was not signed by the judge, and " '[u]ntil an order is signed by the judge it is ineffective for any purpose.' [Cit.]" *Roman v. Terrell,* 195 Ga.App. 219(1), 393 S.E.2d 83 (1990). More importantly, it is well settled that counsel for a municipality cannot waive the defense of sovereign immunity by his actions or inactions in the absence of express statutory or constitutional authorization. *Collins v. Byrd,* 204 Ga.App. 893(3), 420 S.E.2d 785 (1992); *Kelleher v. State of Ga.,* 187 Ga.App. 64(1), 369 S.E.2d 341 (1988). The Mackos' failure to produce the insurance policy was fatal to their action for negligence, and consequently, the trial court erred in failing to grant their motion for a directed ****99** verdict or motion notwithstanding the verdict in their favor on the negligence claim.

[6] 2. Even assuming arguendo that the City waived its immunity from suit through its procurement of insurance covering the event, ***315** considering the merits of the Mackos' claim for damages under a traditional negligence analysis, the City was also entitled to a judgment in its favor because the Mackos have not shown that the City owed to them a duty of care. In *City of Rome v. Jordan,* 263 Ga. 26, 426 S.E.2d 861 (1993), an action wherein the plaintiff alleged a failure of the municipality to provide police protection, our Supreme Court adopted the public policy doctrine. Under this doctrine, "liability does not attach where the duty owed by the governmental unit runs to the public in general and not to any particular member of the public, except where there is a special relationship between the governmental unit and the individual giving rise to a particular duty owed to that individual." (Citation and punctuation omitted.) *Id.* at 27, 426 S.E.2d 861. As a result, liability attaches to the municipality only where a special relationship exists between the municipality and the injured individual which sets the individual apart from members of the general public. Such a special relationship is created if the municipality explicitly assures, through its actions or promises, that it would act on behalf of the injured, the municipality has knowledge that its inaction could lead to harm, and the injured party justifiably and detrimentally relies on the municipality's undertaking. *Id.* at 29, 426 S.E.2d 861.

Although this "public duty doctrine" has not been applied in this State to municipalities in actions involving the negligent inspections of homes or negligent issuance of building permits, other jurisdictions have applied this doctrine to actions of a municipality in this capacity. *Rich v. Mobile,* 410 So.2d 385 (Ala.1982); *Trianon Park Condo. Assn. v. City of Hialeah,* 468 So.2d 912 (Fla.1985); *Ribeiro v. Town of Granby,* 395 Mass. 608, 481 N.E.2d 466 (1985); *Dinsky v. Framingham,* 386 Mass. 801, 438 N.E.2d 51 (1982); *Cracraft v. St. Louis Park,* 279 N.W.2d 801 (Minn.1979); *Delman v. City of Cleveland Heights,* 41 Ohio St.3d 1, 534 N.E.2d 835 (1989). As the Supreme Court of Ohio stated in *Delman,* 534 N.E.2d at 836, "[t]he primary purpose of building codes and ordinances is 'to secure to the municipality as a whole the benefits of a well-ordered municipal government, or, as sometimes expressed, to protect the health and secure the safety of occupants of buildings, and

not to protect the personal or property interests of individuals.' (Footnotes omitted.) [Cit.]" The Code adopted by the City of Lawrenceville expressly provides that it is to protect the safety, health, and general welfare of its citizens. Accordingly, any negligence in failing to properly inspect property pursuant to the building codes and its negligence in the issuance of the building permit does not create any duty of care to a particular resident.

[7] Applying this public duty doctrine to the facts of this case, we must determine whether a special relationship existed between the Mackos and the City at the time that the alleged negligent acts occurred. It is undisputed that the City did not make specific assurances ***316** to the Mackos or promises *prior* to the inspection and approval of the home. In fact, the Mackos did not speak with any representatives of the City prior to their purchase of the home, and did not see the home until the dwelling was nearly completed. Although Ms. Macko testified that after the first major flood of her home, she talked with a city representative who said that he would prepare a work order and have a drainage pipe repaired, this representative was not present at trial. This testimony was hearsay, and " '[h]earsay evidence has no probative value even if it is admitted without objection.' [Cits.]" *Shaver v. State,* 199 Ga.App. 428, 405 S.E.2d 281 (1991). See also *Turpin v. Worley,* 206 Ga.App. 341(2), 425 S.E.2d 895 (1992). Accordingly, this statement cannot be used to establish the necessary assurance on behalf of the City to satisfy the special relationship requirement in light of the explicit disclaimer provided by the City in its building code. As the Mackos did not establish that a duty of care was owed to them by the City based upon a special relationship, the trial court erred in failing to grant the City's motion for directed verdict.

****100** [8] [9] [10] [11] [12] 3. In addition, the City was entitled to a directed verdict as a matter of law on the Mackos' nuisance claim. While a municipality may be liable for maintaining a nuisance even in the absence of a waiver of its immunity to suit, "[t]o be liable for nuisance, a municipality must be charged with performing a continuous or regularly repetitious act or condition which causes injury, and it must have knowledge or be charged with notice of the dangerous condition or repetitive acts causing injury. [Cit.] A one-time occurrence does not amount to a nuisance. [Cits.]" *Banks v. Mayor etc. of Savannah,* 210 Ga.App. 62, 435 S.E.2d 68 (1993). "Liability of a [municipality] cannot arise *solely* from its approval of construction projects which increase surface water runoff. Rather, it is the [municipality's] *failure* to maintain properly the culvert, resulting in a nuisance, which creates its liability. (Cit.) (Emphasis in original.) [Cit.]" *Provost v. Gwinnett County,* 199 Ga.App. 713, 714(5), 405 S.E.2d 754 (1991). Moreover, "[i]f the act, omission, or defect alleged to constitute a nuisance is merely negligence, no matter how egregious the result, the municipality will not be liable for damage suffered. [Cit.]" *Denson v. City of Atlanta,* 202 Ga.App. 325, 327, 414 S.E.2d 312 (1991).

[13] [14] In the case sub judice, the Mackos asserted in their pleadings that the City "negligently allowed Defendant Brown to construct the improvements on the aforementioned property in violation of Building Codes and the recorded plat governing the property." At trial, the Mackos' expert evidence showed that their home flooded because of the filling of the front of the lot by the builder, the building of the home below the minimum floor elevation level mandated by the subdivision plat and the Goble site plan, the improper installation of the drainage pipes, the lack of high back curbs, and the filling of the retention pond by the builder. The Mackos also produced evidence showing that the City was negligent in approving the construction of the home and issuing a certificate of occupancy in light of these defects in addition to issuing a building permit prior to receipt of the requisite site plan. While the Mackos produced evidence at trial that the City accepted **dedication** of the **drainage** system, and thus were responsible for the maintenance and repair of the system, on the contrary, approval of a **plat** that contains offers of dedication does not constitute acceptance of the responsibility for the drainage system on the part of a municipality. *Lewis v. DeKalb County,* 251 Ga. 100, 303 S.E.2d 112 (1983). There is no evidence that the City exercised any control over this drainage system. *Provost,* supra. Even assuming arguendo that the City was responsible for maintaining the drainage system, viewing the evidence in the light most favorable to the verdict, the evidence showed at most that the City was negligent, and, negligence is insufficient to support a cause of action for nuisance. *Denson,* supra. Accordingly, the judgment rendered against the City must be reversed.

4. Based upon our holdings above, we need not address the City's remaining enumerations of error.

Judgment reversed.

McMURRAY, P.J., and JOHNSON, J., concur.

Parallel Citations

439 S.E.2d 95

Footnotes

1 On September 11, 1992, prior to trial, the City dismissed its third-party complaint against Goble without prejudice.

2 The jury apportioned the damages against the City and Brown, awarding $40,000 against Brown on the negligence claim and $20,000 based upon nuisance, and awarding $60,000 against the City on negligence and $30,000 on nuisance. The jury awarded Brown $30,000 on his cross-claim against the City but the City's cross-claim against Brown was denied. However, the City was awarded $18,750 in its cross-claim against the developer of the subdivision, Appalachee Enterprises, Inc.

3 Following the filing of this appeal, the City dismissed its third-party complaint against Appalachee Enterprises, Inc. Brown did not appeal the judgment entered against him on the jury's verdict.

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80 Cal.App.4th 329
Court of Appeal, First District, Division 2, California.

Robert B. DIMARTINO et al., Plaintiffs and Appellants,
v.
CITY OF ORINDA, Defendant and Appellant.

No. A085725. | March 28, 2000. | As Modified April 26, 2000. | Review Denied June 14, 2000.

Property owners brought against city seeking damages for negligence, trespass, nuisance and inverse condemnation for presence of a storm drain pipe under their residence. The Superior Court, Contra Costa County, Super. Ct. No. C95–04673, James R. Trembath, J., entered judgment on inverse condemnation claim in favor of property owners for $35,000. City appealed and property owners cross-appealed measure of damages. The Court of Appeal, Kline, P.J., held that: (1) no evidence supported conclusion that city or county substantially participated in the planning, construction, or maintenance of drain pipe; (2) no evidence established that city or county accepted a dedication of drainage pipe or ever exercised dominion and control over the pipeline; and (3) evidence established that purpose of pipe was entirely private.

Reversed.

West Headnotes (14)

[1] **Eminent Domain**
Nature and Grounds in General

Public entity may be liable in an inverse condemnation action for any physical injury to real property proximately caused by a public improvement as deliberately designed and constructed, whether or not that injury was foreseeable. West's Ann.Cal. Const. Art. 1, § 19.

[2] **Eminent Domain**
Nature and Grounds in General

Storm drainage system constructed and maintained by a public entity is a public improvement for which a public entity may be liable in an inverse condemnation action. West's Ann.Cal. Const. Art. 1, § 19.

2 Cases that cite this headnote

[3] **Eminent Domain**
Nature and Grounds in General

Action in inverse condemnation will lie when damage to private property is proximately caused by use of a storm drainage system for its intended purpose. West's Ann.Cal. Const. Art. 1, § 19.

1 Cases that cite this headnote

[4] **Eminent Domain**
Nature and Grounds in General

Fact that a part of a storm drainage system may have been actually constructed by a private person will not insulate a public entity from liability in an inverse condemnation action, if the system has been accepted or otherwise approved by the public entity. West's Ann.Cal. Const. Art. 1, § 19.

3 Cases that cite this headnote

[5] **Eminent Domain**
Weight and Sufficiency

There was no evidence to support the conclusion that county constructed, required, or supervised portion of drain pipe running under property owners' residence, as was required to support imposition of inverse condemnation liability, even though it is inferable that the corrugated metal pipe under the 50–foot–wide road right-of-way was deliberately designed and

constructed to protect road, and that either county or the developer constructed storm drain across property before house was built. West's Ann.Cal. Const. Art. 1, § 19.

2 Cases that cite this headnote

[6] **Appeal and Error**
Judgment

In determining whether a judgment is supported by substantial evidence, the Court of Appeal may not confine its consideration to isolated bits of evidence, but must view the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision of the trial court.

33 Cases that cite this headnote

[7] **Appeal and Error**
Substituting Reviewing Court's Judgment
Appeal and Error
Reasonably Supported Findings

Court of Appeal may not substitute its view of the correct findings for those of the trial court; rather, the Court must accept any reasonable interpretation of the evidence which supports the trial court's decision without deferring to that decision entirely.

3 Cases that cite this headnote

[8] **Appeal and Error**
Substantial Evidence

"Substantial evidence," for purposes of determining whether a judgment is supported by substantial evidence, implies that such evidence must be of ponderable legal significance; it must be reasonable in nature, credible, and of solid value and must actually be "substantial" proof of the essentials which the law requires in a particular case.

53 Cases that cite this headnote

[9] **Eminent Domain**
Nature and Grounds in General

To state a cause of action for inverse condemnation, the plaintiff must allege the defendant substantially participated in the planning, approval, construction, or operation of a public project or improvement which proximately caused injury to plaintiff's property. West's Ann.Cal. Const. Art. 1, § 19.

1 Cases that cite this headnote

[10] **Eminent Domain**
Nature and Grounds in General

Inverse condemnation liability will not lie for damage to private property allegedly caused by private development approved or authorized by the public entity, where the public entity's sole affirmative action was the issuance of permits and approval of the subdivision map. West's Ann.Cal. Const. Art. 1, § 19.

[11] **Eminent Domain**
Weight and Sufficiency

City did not accept and approve "drainage system" for subdivision, including the storm drain pipe under property owners' home, for purposes of inverse condemnation action, by allowing recording and filing of the subdivision map; no indication of acceptance or approval of either storm drain pipe or easement appeared on subdivision map itself, and there was evidence that neither county nor city knew of location of pipe until its discovery by property owners. West's Ann.Cal. Const. Art. 1, § 19.

3 Cases that cite this headnote

[12] **Dedication**
Official Acts or Proceedings
Eminent Domain
Nature and Grounds in General

Silence by county board of supervisors as to offers to **dedicate** storm **drainage** improvements was not same as acceptance of offers of dedication, for purposes of inverse condemnation action brought by property owners for presence of a storm drain pipe under their residence. West's Ann.Cal. Const. Art. 1, § 19; West's Ann.Cal.Gov.Code § 66477.1(a); West's Ann.Cal.Bus. & Prof.Code §§ 11500–11628 (Repealed)

1 Cases that cite this headnote

[13] **Dedication**
Designation in Maps or Plats, and Sale of Lots
Eminent Domain
Nature and Grounds in General

Even if reservation of five feet on either side of the property line and across the back of lots, as it appeared on subdivision map, was an offer to **dedicate** a storm **drainage** easement, words of dedication on map did not accomplish a dedication, even upon recordation and filing of the map, for purposes of inverse condemnation action brought by property owners for presence of a storm drain pipe under their residence. West's Ann.Cal. Const. Art. 1, § 19.

5 Cases that cite this headnote

[14] **Dedication**
Official Acts or Proceedings
Eminent Domain
Nature and Grounds in General

Use of improperly located and installed corrugated metal pipe running under property owners' home connected to city-owned culvert crossing under road was not an implied acceptance of the storm drainage system by county and city and did not transform maverick drainage pipe into a public improvement, for purposes of inverse condemnation action. West's Ann.Cal. Const. Art. 1, § 19.

4 Cases that cite this headnote

Attorneys and Law Firms

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Gary Meredith Lepper, Lepper, Schaefer & Harrington, Walnut Creek, for Defendant and Appellant.

Opinion

KLINE, P.J.

INTRODUCTION

The City of Orinda (City) appeals from a judgment of the Contra Costa County Superior Court, finding City liable in inverse condemnation for the presence of a storm drain pipe under the residence of plaintiffs, husband and wife Robert B. DiMartino and Lise K. Tong. City contends the evidence is insufficient to support findings that City substantially participated in the construction, management or operation of the storm drain pipe or that it exercised dominion or control over the drainage pipe or that the pipe was part of a communitywide public drainage system.

Plaintiffs cross-appeal, arguing the court applied an erroneous measure of damages in awarding them the cost to relocate the pipe, rather than the asserted loss in market value of their property.

FACTS AND PROCEDURAL BACKGROUND

On October 20, 1995, plaintiffs filed a complaint against the City of Orinda seeking damages for negligence, trespass, nuisance and inverse condemnation. Trial proceeded only on the inverse condemnation cause of

action. The matter was tried to the trial court and the following evidence was presented.

*332 Plaintiffs own lot 37 within Tarabrook Unit No. 2 subdivision, as it appears on the subdivision map recorded with the County of Contra Costa (County) on February 18, 1948. A building permit was issued on May 25, 1956, for construction of plaintiffs' home. The residence itself is located south of public Tara Road and "sits some distance lower than the surface of Tara Road." Slightly northeast of plaintiffs' **19 driveway, Tara Road is joined in a "T" intersection with Monterey Terrace, a private road.

As found by the court, "[a]ccess to Lot 37, otherwise described as 86 Tara Road, Orinda, California, is by Tara Road, a public street, 50 feet wide, which was constructed over a swale requiring a corrugated metal culvert beneath the public street to control and manage storm waters collected in an upstream swale and Tara Road."

Property to the north and uphill from Tara Road and the catch basin within the Tara Road right-of-way is mostly unimproved watershed or open space for a substantial distance up to the ridge line. The surface drainage of that watershed is led by natural topographic contours into the creek which terminates at the catch basin. It was undisputed that the natural flow of water, if unable to enter the catch basin on the north side of Tara Road, would flow across Tara Road and across plaintiffs' property because of the topography of the area.

The recorded map of the Tarabrook Unit No. 2 subdivision (dated June 1947) reveals five-foot-wide easements on both sides of the property line between lots 36 and 37. The drainage pipe at issue does not exist within those easements except where it "crosses the easement at one spot" in the transition between lots 36 and 37.

Instead, as found by the trial court, "[t]he surface storm water inlets and underground drainage facilities beneath Tara Road include an underground pipe connected to a manhole on Lot 36. [The lot adjacent to plaintiffs' lot 37.] From there the pipe continues diagonally across the 5 foot wide storm drainage easement and ... under plaintiffs' carport, the home, and beneath the remaining unimproved portion of plaintiff's lot." The pipe was approximately 10 feet deep at the location of the manhole on lot 36 and came to the surface at its exit into the natural watercourse on the western edge of plaintiffs' property. The corrugated metal pipe was deteriorated, as its 40–year useful life had passed.

The City of Orinda was incorporated in 1986. At that time it succeeded to the rights, duties and obligations of the County. In 1947 and 1948, subdivision map approval rested with the Contra Costa County Board of Supervisors. There is *333 no record that the board of supervisors required the subdivision developer to construct any improvements as a condition of acceptance and filing of the subdivision map and there is no record of the board's formal acceptance for maintenance of any of the streets or drainage easements shown on the map. There are no documents memorializing the construction of Tara Road, or any of the storm drainage facilities. However, it may reasonably be inferred, as the court did, that the underground metal culvert was constructed sometime before May 25, 1956, when the County issued a building permit to construct plaintiffs' home. It may also be reasonably inferred that "[e]ither the County of Contra Costa constructed the storm drain across plaintiffs' property, or the developer did at the time prior to the construction of the residence on plaintiffs' property by plaintiffs' predecessors" and that "the County of Contra Costa constructed that portion of the drainage under Tara Road, a public street, since it is unlikely that a private contractor did so for the private owner."[1]

In late 1995 or early 1996, during design stages of a planned remodel, plaintiffs discovered the storm drain pipe. Neither plaintiffs, their predecessors in interest in the property, County, nor City were aware **20 of the pipe's location until plaintiff's discovery.

The City admitted that the portion of the drainage system directly under the Tara Road right-of-way was constructed to protect Tara Road. Beth Thayer, City's Public Works Director and City Engineer, testified that the portion of the storm drain running beneath the publicly maintained Tara Road would be maintained by the City. To the extent a pipe might exist south of Tara Road in the manner depicted in exhibit 5 (showing the subject pipe), she testified it was not included in the inventory of public works of the City. The City maintains facilities running from one side of a publicly maintained street to the other, and only within the right-of-way. The City does not consider a pipe on private property to be a public facility and does not maintain it, "unless it is an easement to and accepted by the County or the City for public maintenance...."

Thayer also testified that prior to her coming to work for the City in October 1994, a consulting firm of hydrologists had been employed and was in the process of creating a draft Storm Drainage Master Plan for the City. As the new project manager, she reviewed the text and some of its conclusions and determined that "the foundation, the data that the consultant had been given to

work with, was not adequate to provide the City with a useful tool, *334 and that substantial work would need to be done in order to create a document that we could use to determine which facilities were in need of upgrading." The document purported to be a survey of all storm drainage facilities or pipes 24 inches in diameter or more and the basis of the report was from a series of maps obtained by the City from the County, which showed drainage facilities. Thayer denied that exhibit 2 (a copy of one of the County source documents for the draft Storm Drainage Master Plan) indicated what culverts the consultants considered to be City owned, although acknowledging that the draft Storm Drainage Master Plan "purported to do so". The Storm Drainage Master Plan indicated which pipes were greater than 24 inches and deficient (that is the diameter of the pipe was insufficient to take the flow), greater than 24 inches and not deficient, and less than 24 inches and not analyzed. The storm drain across plaintiffs' property is represented by a dark black line entering plaintiffs' property, apparently along the described five-foot easement at the border of the neighbor's property (Lot 36). The line then becomes a thin broken line as it turns across the rear of plaintiffs' property, representing a "channel" according to the map legend.[2] According to the legend on the Storm Drainage Master Plan map, a dark black line, such as that under Tara Road and entering along the easement, represents a "storm drain greater than or equal to 24 inches, not deficient or private," meaning that it was public. However, the City had not actually checked out the pipes. Thayer acknowledged referring to the City Storm Drainage Master Plan in a staff report of April 1, 1996, wherein she stated: "The City Storm Drainage Master Plan was prepared in draft form in 1994. Storm Drain Master Plan was developed by evaluating the capacity of *city-maintained* culverts greater than 24 inches." (Italics added.) However, Thayer denied that the dark black lines were City-maintained culverts in fact. She testified there were no maps showing the City-maintained culverts. The City Storm Drains Master Plan was used by the City "as a starting basis for some of the calculations that were done to determine whether a particular facility is in any way, shape, or form a problem." Along with other information, such as a field examination of the actual facility, this information was used as a basis for analysis of storm drain capacity. **21 There were no improvement plans for the subdivision Tarabrook Unit No. 2.

Plaintiffs' civil engineer testified that "runoff is draining off of Tara Road down into [plaintiffs'] front yard." However, such runoff was not measured or quantified. Plaintiffs' engineer, Howard Martin testified it would cost $35,000 to remedy the situation by relocating the storm drainage pipe into the existing easement. Plaintiff DiMartino testified that in its present *335 condition the house was worth from $525,000 to $550,000 and that if it did not have the storm drain pipe underneath and no storm waters flowed across the property, the value of the house would be $750,000.

The court issued its statement of decision on October 29, 1990, finding for plaintiffs in the sum of $35,000 (the cost to relocate the storm drainage pipe to the easement), plus attorney fees, statutory condemnation costs, and interest.

In ruling for plaintiffs, the trial court made several critical findings of fact and conclusions of law, which City contends were without support in the evidence. These included:

"5.1 The storm drain was constructed and installed with the substantial participation of the County of Contra Costa in design, direction, supervision and approval. [¶] ... [¶]

"6.2 The purpose of the corrugated metal storm drain pipe is to provide storm drainage management of surface waters from Tara Road, emanating in part from runoff of uphill properties and in part from the road itself. The court concludes that the storm drain culvert is part of the community-wide system maintained by the City of Orinda. [¶] ... [¶]

"8.1 The court concludes that Contra Costa County substantially participated in the planning, design, supervision and approval of the storm drain beneath plaintiffs' property. [¶] ... [¶]

"8.2 The county substantially and directly participated in storm drainage management activity for public benefit by its community-wide storm drain system, which includes the deteriorating corrugated metal pipe located on and damaging plaintiffs' property."

Judgment was entered thereupon on December 22, 1998. This appeal and cross-appeal followed.

I. CITY'S APPEAL

[1] [2] [3] [4] " 'Article I, section 19 (formerly art. I, § 14) of the California Constitution requires that just compensation be paid when private property is taken or damaged for public use. Therefore, a public entity may be liable in an inverse condemnation action for any physical injury to real property proximately caused by a public improvement as deliberately designed and constructed, whether or not that injury was foreseeable....' " (*Chatman*

v. ***336** *Alameda County Flood Control etc. Dist.* (1986) 183 Cal.App.3d 424, 431, 228 Cal.Rptr. 257, quoting *Souza v. Silver Development Co.* (1985) 164 Cal.App.3d 165, 170, 210 Cal.Rptr. 146.) "A storm drainage system constructed and maintained by a public entity is such a public improvement. [Citations.] An action in inverse condemnation will lie when damage to private property is proximately caused by use of a storm drainage system for its intended purpose. [Citation.] The fact that a part of the system may have been actually constructed by a private person will not insulate a public entity from liability, if the system has been accepted or otherwise approved by the public entity. [Citation.]" (*Souza v. Silver Development, supra,* 164 Cal.App.3d at p. 170, 210 Cal.Rptr. 146; accord *Chatman v. Alameda County Flood Control etc. Dist., supra,* 183 Cal.App.3d at pp. 431–432, 228 Cal.Rptr. 257.)

[5] [6] [7] [8] City contends reversal is required as there was insufficient evidence that the drain pipe was a public improvement. "In determining whether a judgment ****22** is supported by substantial evidence, we may not confine our consideration to isolated bits of evidence, but must view the whole record in a light most favorable to the judgment, resolving all evidentiary conflicts and drawing all reasonable inferences in favor of the decision of the trial court. (*People v. Johnson* (1980) 26 Cal.3d 557, 576–578 [162 Cal.Rptr. 431, 606 P.2d 738]) We may not substitute our view of the correct findings for those of the trial court; rather, we must accept any reasonable interpretation of the evidence which supports the trial court's decision. However, we may not defer to that decision entirely. '[I]f the word "substantial" means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with "any" evidence. It must be reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case.' (*Estate of Teed* (1952) 112 Cal.App.2d 638, 644 [247 P.2d 54]; see also *People v. Johnson, supra,* 26 Cal.3d at p. 576, 162 Cal.Rptr. 431, 606 P.2d 738; *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1134 [234 Cal.Rptr. 630])" (*Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1203–1204, 52 Cal.Rptr.2d 518.)

[9] As we observed in *Wildensten v. East Bay Regional Park Dist.* (1991) 231 Cal.App.3d 976, 979, 283 Cal.Rptr. 13: "To state a cause of action for inverse condemnation, the plaintiff must allege the defendant substantially participated in the planning, approval, construction, or operation of a public project or improvement which proximately caused injury to plaintiff's property. (*Holtz v. Superior Court* (1970) 3 Cal.3d 296, 302–304 [90 Cal.Rptr. 345, 475 P.2d 441]; *Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 263–264 [42 Cal.Rptr. 89, 398 P.2d 129]; *Ullery v. County of* ***337** *Contra Costa* (1988) 202 Cal.App.3d 562, 568 [248 Cal.Rptr. 727]; *Souza v. Silver Development Co., supra,* 164 Cal.App.3d 165, 170 [210 Cal.Rptr. 146]; see Landslide and Subsidence Liability (Cont.Ed.Bar 1974) § 8.3, p. 166; Condemnation Practice in Cal. (Cont.Ed.Bar Supp.1990) § 13.3, pp. 241–242.)"

Having combed the record in vain for evidence in support of the trial court's judgment, we must conclude the court erred in holding the City liable in inverse condemnation.

As the court found, there is no record that the County "required the subdivision developer to construct any improvements as a condition of acceptance and filing of the Subdivision Map. There is no record of the Board of Supervisors['] formal acceptance for maintenance for any of the streets or drainage easements shown on the map." Although the subdivision map shows the location of the five-foot-wide reserved storm drainage easement on either side of the property line between plaintiffs' and their neighbor, the pipe was not located there. "The City's Storm Drainage Inventory Maps erroneously show a non-existent storm drainage, corrugated metal culvert within the reserved storm drainage easement, as shown on the Subdivision Map to be common to the boundary of Lot 36 and 37...." There are no other storm drainage easements or culverts of record on the privately owned lots, on the subdivision map, or City records. (Statement of Decision ¶ 4.2.) The court could reasonably infer that the corrugated metal culvert was constructed sometime before May 25, 1956, when the building permit was issued to construct plaintiffs' house.

The absence of documents relating to the construction of the metal storm drain culvert or to the construction of Tara Road is striking. Although it is inferable that the corrugated metal pipe under the 50–foot–wide Tara Road right-of-way was deliberately designed and constructed to protect Tara Road, as conceded by City, and ****23** that either the County or the developer constructed the storm drain across plaintiffs' property before their house was built, there simply is *no evidence* to support the conclusion that the County constructed, required or supervised the portion of the drain pipe running through plaintiffs' property. It is as likely that a private developer constructed this private drain to render lots 36 and 37 buildable.[3] There was no evidence whatsoever that the drain was "constructed and installed with the ***338** substantial participation of the County of Contra Costa in design, direction, supervision and approval." Indeed, no

evidence was offered concerning the construction, design, supervision of construction or maintenance of the underground pipe—except denial of the City's ever having maintained it. The trial court expressly found that neither the County nor the City were reasonably aware of the pipe's location until plaintiffs' discovery of it. At no time did the County or the City expressly accept either the easements shown on the maps on plaintiffs' border with lot 36 or the underground pipe. No evidence revealed any prior request to the City or County for maintenance, inspection or repair of the underground pipe.

The evidence here falls far short of that held sufficient to support imposition of inverse condemnation liability.

In *Marin v. City of San Rafael* (1980) 111 Cal.App.3d 591, 168 Cal.Rptr. 750, relied upon by plaintiffs and by the trial court in its tentative statement of decision, homeowners sued a city for inverse condemnation for damages resulting from the rupture of a storm drain pipe laid beneath their home. A previous owner had laid the pipe in the location of a natural watercourse running downhill. Pipes and catch basins installed by the city emptied their waters into this pipe. The appellate court reversed a judgment in favor of the defendant city, holding as a matter of law that the plaintiffs' damages had resulted from the City's "maintenance and use of a public improvement as deliberately planned and designed by the City" where the evidence showed (1) that the drain pipe had been installed by the previous homeowner under the supervision and direction of the city engineer; (2) the city knowingly used the pipe for drainage purposes over many years; and (3) the city *conceded* at trial that the pipe was part of its "storm drainage system." (*Id.* at p. 596, 168 Cal.Rptr. 750.) Plaintiffs here rely upon language of *Marin* as follows: "The construction and maintenance of storm drainage systems are matters of 'public policy,' and such a system created by a public entity becomes a 'public improvement' and a 'public use.' [Citation.] 'Drainage systems concern the whole community.' [Citation.] [¶] Where a public improvement has been constructed and private property is proximately damaged in the maintenance or use of it, the fact that the work of construction was performed by a private property owner does not necessarily exonerate the public agency from liability. It is enough that the work is somehow *approved* or *accepted* by the public agency. [Citations.] Such an approval or 'acceptance need not be by formal action but may be implied from official acts of dominion or control over the property, ...' [Citation.] And: 'Use of the land [for a public purpose] over a reasonable period of time constitutes an acceptance ..., without any formal action in relation thereto by ***339** governmental authority....' (*McKinney v. Ruderman* (1962) 203 Cal.App.2d 109, 115 [21 Cal.Rptr. 263].)" (*Id.* at pp. 595–596, 168 Cal.Rptr. 750.)

Particularly seizing upon the last sentence of *Marin* —that use for a public ****24** purpose over time constitutes acceptance—plaintiffs argue the storm drainage pipe here was used as part of City's public drainage system and, consequently, was impliedly "accepted" by County and City. Such construction separates *Marin* from its facts, particularly ignoring the city's concession in that case (absent here) that the pipe was part of its storm drainage system, as well as evidence that it was installed under the supervision of the city engineer, and was knowingly used for drainage purposes.

This distinction was recognized in *Ullery v. County of Contra Costa, supra,* 202 Cal.App.3d 562, 248 Cal.Rptr. 727, affirming a trial court finding in favor of the public entities. In *Ullery,* landowners in abutting subdivisions sought damages for landslides allegedly caused by erosion from within an intermittent stream which provided storm drainage for its source, a 40–acre natural watershed. The county had expressly rejected an offer of dedication of a storm drainage easement by one subdivision's developer. After citing the passage of *Marin* quoted above, the *Ullery* court added, "[o]n the other hand, where 'there is no acceptance of a street or the drainage system within it, there is no public improvement, public work or public use and therefore there can be no public liability for inverse condemnation.' (*Yox v. City of Whittier* (1986) 182 Cal.App.3d [347] at p. 354, 227 Cal.Rptr. 311, fn. omitted.)" (*Id.* at pp. 568–569, 248 Cal.Rptr. 727.) *Ullery* distinguished *Marin* on its facts from the situation before it where the county and the city "took no affirmative steps exhibiting dominion and control" over the creek; no employees or agents of these public entities participated in any improvement, maintenance or repair of the creek; the public entities and the public at large had no right of access to the creek as it was located on private property; and the public entities had expressly rejected the offer of dedication. That the creek was part of the drainage system of the 40–acre watershed was not sufficient to overturn the court's finding of no public use in the absence of any exhibition of dominion and control by the public entities. (*Id.* at pp. 569–570, 248 Cal.Rptr. 727.)

[10] *Ullery* also rejected the plaintiffs' attempt to analogize the county's subdivision map approval of the two tracts to acceptance of an offer of dedication. (*Ullery v. County of Contra Costa, supra,* 202 Cal.App.3d at p. 570, 248 Cal.Rptr. 727.) "[I]nverse condemnation liability will not lie for damage to private property allegedly caused by private development approved or authorized by the public

entity, 'where the [public entity's] sole affirmative action was the issuance of permits and approval of the subdivision map.' (*Yox v. City of Whittier, supra,* 182 Cal.App.3d at p. 353, 227 Cal.Rptr. 311.)" (*Ibid.*) In so holding, *Ullery* ***340** distinguished the case of *Frustuck v. City of Fairfax* (1963) 212 Cal.App.2d 345, 28 Cal.Rptr. 357 in which the private property damage resulted from the public entity's approval of significant upstream development which diverted storm waters from natural channels and the enlargement of facilities causing water to flow onto the plaintiff's property. *Ullery* also distinguished *Sheffet v. County of Los Angeles* (1970) 3 Cal.App.3d 720, 735, 84 Cal.Rptr. 11 in which the county had expressly accepted dedication of privately constructed streets, and thus became liable for damages caused by improper construction and inadequate drainage thereon. (*Ullery, supra,* at p. 570, 248 Cal.Rptr. 727.)

Chatman v. Alameda County Flood Control etc. Dist., supra, 183 Cal.App.3d 424, 228 Cal.Rptr. 257, appears similar to the case at hand insofar as it addresses the consequences of a lack of public entity participation or action. In *Chatman,* the appellate court affirmed summary judgment in favor of a water district in an inverse condemnation action by a homeowner whose house was subsiding due to erosion of a culvert built by a private developer, which culvert carried creek water under her property. The evidence showed the culvert was privately planned and built; the district did not plan, design, ****25** create, install, approve or accept the culvert; the district owned no easements or rights-of-way in the culvert; it had not maintained or repaired the culvert. Although the district had conducted channel-clearing activities in the creek, the portion cleared did not include the culvert under the plaintiff's property and neither that clearing nor the district's inspection of the culvert was sufficient to show control. (*Id.* at pp. 428, 431, 228 Cal.Rptr. 257.) Nor did the district's requirement of preapproving all work done on the culvert manifest its control. "A homeowner frequently must obtain a building permit prior to repairing or remodeling his or her house. This does not imply, however, that the regulatory agency 'controls' that home." (*Id.* at p. 431, 228 Cal.Rptr. 257.) The *Chatman* court concluded that "[b]ecause the District neither built, accepted, approved, nor maintained the culvert, it is not liable." (*Id.* at p. 432, 228 Cal.Rptr. 257.)

In the instant case we face an evidentiary void. There is simply no evidence of any actions of either City or its predecessor County, from which the court could infer substantial participation in the construction, management or operation of the storm drain pipe or the exercise of dominion and control by either public entity.

[11] Plaintiffs contend that the recording and filing of the subdivision map (exhibit 4) constitutes government acceptance and approval of the drainage system for the subdivision, including the storm drain pipe under their home. However, they cite no authority for this proposition; it appears contrary to the express holdings of ***341** *Yox, supra,* at p. 353, 227 Cal.Rptr. 311 and *Ullery, supra,* at p. 570; no such indication of acceptance or approval of either the storm drain pipe or the easement appears on the subdivision map itself (indeed, the actual location of the pipe is not indicated on the map); and it contravenes the finding of the trial court that neither County nor City had knowledge of the location of the pipe until its discovery by plaintiffs.

[12] Plaintiffs argue that under the Subdivision Map Act in effect in 1947, when the subdivision map here was processed, express acceptance by the board of supervisors of offers to **dedicate** the **drainage** improvements was unnecessary and recordation must be deemed to constitute acceptance, absent an express rejection. Specifically, plaintiffs contend that "at that time the approval and recordation and/or filing of the Subdivision Map by the approving public agency is deemed acceptance of all of the dedicated rights-of-way and easements and improvements acquired by the map, unless the approving local agency has enacted an ordinance reserving its right to approve the dedicated easements and reservations when the improvements required by agreement with the subdivider are completed or the reservation of that right or rejection of the dedication is noted on the approved map when recorded or filed." Our review of the relevant provisions of the Subdivision Map Act in force during the time this subdivision map was processed and recorded (Stats.1943, extra session, ch. 128, § 1, pp. 865–877, comprising Bus. & Prof.Code, §§ 11500 to 11628) discloses no such scheme.[4] Like the current provision of the ****26** Subdivision Map Act (***342** Gov.Code, § 66477.1, subd. (a))[5] its predecessor required that the governing body accept or reject the offer of dedication at the time it approves the final map.[6] "The governing body *shall at that time also accept or reject any or all offers of dedication and may, as a condition precedent to the acceptance of any streets or easements, require that the subdivider, at his option, either improve or agree to improve the streets or easements.*" (Former Bus. & Prof.Code, § 11611, added by Stats.1943, ch. 128, § 1, p. 875, italics added.) We see nothing in this language that equates silence by the governing body as to an offer of dedication with acceptance.

Indeed, the California Supreme Court held as much in 1946 in *Stump v. Cornell Construction Co.* (1946) 29 Cal.2d 448, 175 P.2d 510. There, plaintiffs argued the

offer to dedicate certain streets had been rescinded prior to acceptance by the city. The court rejected this contention, holding that the offer to dedicate remained open, despite the city's implied rejection of an offer to dedicate a "future alley." According to the court: "[U]nder the Subdivision Map Act, words of dedication on a map are treated merely as an offer and that the dedication is not completed until the offer is accepted by the city. ([Former] Bus. & Prof.Code, §§ 11590, 11591, 11611 and 11616.) Therefore, the words of dedication on the map filed in the present case must be regarded as an offer to dedicate." (*Stump v. Cornell Construction Co., supra,* at p. 451, 175 P.2d 510.) "The statute requires that the city either accept or reject an offer of dedication at the time it approves the final map. In the present case the city's acceptance of the offer to dedicate certain streets and alleys specifically excepted 'those strips marked "future street" and "future alley." ' This constituted a rejection by the city of the offer to dedicate the 'future alley,' but by the terms of the statute the rejection was not final, the offer was deemed to remain open, and the city was authorized to rescind the rejection and accept the offer of dedication at any later date. The offer to dedicate the alley here involved was accepted and the dedication was completed in conformity with the statute by the resolution of the city council ***343** on August 22, 1944." (*Id.* at pp. 451–452, 175 P.2d 510; see also, ****27** *Galeb v. Cupertino Sanitary Dist.* (1964) 227 Cal.App.2d 294, 301, 38 Cal.Rptr. 580 [a dedication is not effective until the offer contained in the final map has been expressly accepted by the city]; California Subdivision Map Act Practice (Cont.Ed.Bar.1987) § 7.19, p. 179 [same].)

[13] Consequently, were we to construe the reservation of five feet on either side of the property line and across the back of lots 37, 38 and 39 as appears on the subdivision map to constitute an offer to **dedicate** a **drainage** easement, it is well established that such words of dedication on the map do not *accomplish* a dedication, even upon recordation and filing of the map. Moreover, the storm drainage pipe was not located accurately on the subdivision map. Recordation and filing of the subdivision map did not effect an acceptance of the drainage pipe by County.

[14] Plaintiffs next contend that the use of the improperly located and installed corrugated metal pipe running under plaintiffs' home connected to the City-owned culvert crossing under Tara Road constituted an implied acceptance of the storm drainage system by County and City. The key question is whether connection of a private pipe segment to an admittedly public pipe segment converts the former to a public improvement. As City points out, such a rule would allow circumvention of the Subdivision Map Act: a developer would no longer need to comply with requirements of dedication and acceptance, connection of any pipe on private property to a public roadway cross-culvert would transform the private pipe to a public one. We have found no case recognizing such a doctrine. Indeed, in *Chatman v. Alameda County Flood Control etc. Dist., supra,* 183 Cal.App.3d 424, 228 Cal.Rptr. 257, an analogous argument was rejected where the court held that district maintenance of a portion of the creek did not transform the culvert flowing under the plaintiffs' property into a public improvement. (*Id.* at pp. 430–431, 228 Cal.Rptr. 257.) Dedication to public use of Tara Road and the cross-culvert under it does not transform the maverick drainage pipe into a public improvement.

The court concluded that the drainage pipe under plaintiffs' property was used as part of a City-wide storm drainage system. This conclusion finds no support in the record. Were we to discount the testimony of Director of Public Works Thayer denying that the dark black lines were City-maintained culverts, we would still conclude there is no evidence in the record that the maverick drainage pipe was City-owned, controlled, or maintained. The Storm Drainage Master Plan map itself does not identify this drainage pipe as City-owned. Rather, it appears to identify the culvert crossing Tara Road as public, but at the point the pipe crosses over plaintiffs' lot it is indicated by ***344** a broken line as a "channel."[7] There is no indication from the map that the drain pipe is other than private.

In sum, the record contains no evidence supporting the trial court's conclusion that the City or County substantially participated in the planning, construction or maintenance of the subject drain pipe. There is no evidence that either public agency accepted a dedication of the drainage pipe, expressly or impliedly, or that either City or County ever exercised dominion and control over the pipeline. The only evidence in the record indicates that the pipe was likely laid at the same time as the culvert under Tara Road (an admittedly public improvement), using the natural drainage channel across the property and was connected to that pipeline at the storm drain manhole on the neighboring lot. The purpose of the pipe appears to have been entirely private: to permit construction of private residences on lots 36 and 37, which otherwise would have been unbuildable due to waters flowing in a natural watercourse.

****28 II. PLAINTIFFS' CROSS–APPEAL

Plaintiffs cross-appeal from the court's award of $35,000 damages, contending the court applied a wrong measure of their damages in an inverse condemnation case. Our determination of the appeal and reversal for lack of substantial evidence, makes it unnecessary to consider this contention.

The judgment in favor of plaintiffs is reversed.

HAERLE, J., and LAMBDEN, J., concur.

Parallel Citations

80 Cal.App.4th 329, 2000 Daily Journal D.A.R. 4351

Footnotes

1 It may be that County required a private developer to construct the portion of the drainage under Tara Road as a condition for subdivision approval. The legal effect here would be the same as if the County had constructed it.

2 We note again that this map does *not* represent the actual location of the drainpipe, which does not enter plaintiffs' property along the easement, but crosses the neighboring lot 36 to the manhole and then crosses across to plaintiffs' lot.

3 That the pipe was not placed along the easement makes it perhaps even more likely that the pipe was placed by a private developer. We do not second guess the trial court on inferences it could reasonably draw from the evidence. The problem here is that there was no evidence from which the court could draw the inference that the pipe was installed by or under the supervision of the County rather than by a private person in order to benefit the private lots 37 and 36.

4 At most, it provides with respect to tentative maps that "in case there is no local ordinance, the governing body may, as a condition precedent to the approval of the map or maps of a subdivision, require streets and drainage ways properly located and of adequate width, but may make no other requirements." (Stats.1943, extra session, ch. 128, former Bus. & Prof.Code, § 11551, added by Stats.1943, ch. 128, § 1, p. 869.) If no act is taken by the governing board within certain time limits, "the tentative map as filed shall be deemed to be approved and it shall be the duty of the clerk of the governing body to certify the approval." (*Id.* § 11553, added by Stats.1943, ch. 128, § 1, p. 870.) With respect to final maps, the Act provided in relevant part, "[I]n event of dedication, there is required a certificate, signed and acknowledged by those parties having any record title interest in the land subdivided, offering certain parcels of land for dedication for certain specified public uses, subject to such reservations as may be contained in any such offer." (*Id.* § 11590, added by Stats.1943, ch. 128, § 1, p. 872.) "There is required a certificate for execution by the clerk of each approving governing body stating that the body approved the map and accepted or rejected on behalf of the public any parcels of land offered for dedication for public use in conformity with the terms of the offer of dedication." (*Id.* § 11591, added by Stats.1943, ch. 128, § 1, p. 872.) No such certificate was in evidence.

Finally, "[i]f at the time the final map is approved any streets are rejected, the offer of dedication shall remain open and the governing body may by resolution at any later date, and without further action by the subdivider, rescind its action and accept and open the streets for public use, which acceptance shall be recorded in the office of the county recorder." (*Id.* § 11616, added by Stats.1943, ch. 128, § 1, p. 876.)

5 Government Code section 66477.1 currently provides as follows:

"(a) At the time the legislative body or the official designated pursuant to Section 66458 approves a final map, the legislative body or the designated official shall also accept, accept subject to improvement, or reject any offer of dedication. The clerk of the legislative body shall certify or state on the map the action by the legislative body or designated official.

"(b) The legislative body of a county, or a county officer designated by the legislative body, may accept into the county road system, pursuant to Section 941 of the Streets and Highways Code, any road for which an offer of dedication has been accepted or accepted subject to improvements."

6 Effective January 1, 1999, Government Code section 66458(d) was added to authorize the legislative body to adopt an ordinance that allows a designated official, instead of the legislative body, to approve or disapprove a final map, where the ordinance meets certain requirements. (California Subdivision Map Act Practice (Cont.Ed.Bar. March 1999 Supp.) § 7.19, p. 95.)

7 We again note the pipe is erroneously located on the Storm Drainage Master Plan as within the five-foot wide easement as it leaves Tara Road.

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286 Ga. 559
Supreme Court of Georgia.

KAPLAN et al.
v.
CITY OF SANDY SPRINGS et al.

No. S09A1435. | March 1, 2010.

Synopsis
Background: Landowners brought action against city, county, and school district for damages for nuisance and trespass stemming from flow of water across their land and mandamus to order repair of 36-inch drainage pipe under landowners' driveway. The Superior Court, Fulton County, Christopher S. Brasher, J., granted summary judgment in favor of county. Landowners appealed.

Holdings: The Supreme Court, Thompson, J., held that:

[1] county did not expressly accept dedication of pipe, and

[2] county did not impliedly accept dedication of pipe.

Affirmed.

See also, 286 Ga. 160, 686 S.E.2d 115.

West Headnotes (6)

[1] **Judgment**
Absence of issue of fact

Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.

7 Cases that cite this headnote

[2] **Appeal and Error**
Cases Triable in Appellate Court

Appellate courts use a de novo standard of review on appeal from a grant of summary judgment, and view the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the nonmovant.

8 Cases that cite this headnote

[3] **Judgment**
Particular Cases

In applying summary judgment standard to the facts of case in which landowner brought action against county for nuisance and trespass stemming from flow of water across their land and mandamus to order repair of 36-inch drainage pipe under landowners' driveway, court must bear in mind that questions of dedication and acceptance should ordinarily be resolved by a jury.

1 Cases that cite this headnote

[4] **Dedication**
Official Acts or Proceedings

County did not expressly accept dedication of 36-inch drainage pipe under landowners' driveway by approving final subdivision plat which showed dedication of pipe to county; approval of the revised final plat did not by itself show an acceptance, county ordinance in effect at time of approval of plat required owner of a subdivision to execute and record an easement if he or she wanted to dedicate a storm drainage component to county, and owner of landowners' subdivision did not execute easement to county for any portion of subdivision's storm drainage system.

[5] **Dedication**
Nature and essentials in general
Dedication

Necessity

To prove a dedication of land to public use, there must be an offer, either express or implied, by the owner of the land, and an acceptance, either express or implied, by the appropriate public authorities or by the general public.

[6] **Dedication**
Improvement and repair

County did not impliedly accept dedication of 36-inch drainage pipe under landowners' driveway, although county investigated and photographed the pipe, cleared it of debris at landowners' request on two occasions, and offered to reline the pipe if they paid for materials; none of county's acts supported an inference that it exercised dominion and control over the drainage pipe.

Attorneys and Law Firms

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Opinion

THOMPSON, Justice.

*559 This is a companion case to *City of Sandy Springs v. Kaplan,* 286 Ga. 160, 686 S.E.2d 115 (2009). In that case, the city sought, and this Court granted, interlocutory review of an order denying the city's motion for summary judgment. We affirmed the denial of the city's summary judgment motion, but remanded for further consideration and clarification of the trial court's order. In this case, Fulton County filed a motion for summary judgment which the trial court granted. On appeal, the Kaplans enumerate error upon the grant of summary judgment to the county.

Ronnie and Richard Kaplan filed suit against Fulton County, the City of Sandy Springs and the Fulton County School District, seeking, inter alia, a mandamus to order defendants to repair a *560 36-inch drainage pipe under their driveway, as well as damages stemming from defendants' failure to repair the pipe. The pipe was installed at the time of construction of the Kaplans' subdivision in 1980. It is part of a storm drainage easement described on the final plat of the subdivision.

The final plat contains the following language:

> Owner of land shown on this plat ... acknowledges that this plat was made from an actual survey and dedicates to the use of the public forever, all streets, parks, drains, easements and public grounds thereon shown, which comprise a total of 0.66 acres, for purposes of street right of way.

Although the 36-inch drainage pipe does not appear on the final plat, it does appear on a revised final plat which was recorded and approved by the county in 1981. At that time, the county's subdivision regulations provided that after a one-year period in which the owner of a subdivision was responsible for maintaining storm drainage facilities, "maintenance responsibility will revert to the county. Properly executed and recorded easements shall be provided for this purpose prior to the recording of the final plat." No easements were executed or recorded with regard to the Kaplans' subdivision.

The county moved for summary judgment, asserting it neither expressly nor impliedly accepted the dedication of the 36-inch pipe. The trial court agreed and granted summary judgment to the county. This appeal followed.

[1] [2] [3] 1. Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. OCGA § 9-11-56(c). We use a de novo standard of review on appeal from a grant of summary judgment, and view the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the nonmovant. In applying this standard to the facts of this case, we must bear in mind that questions of dedication and acceptance should ordinarily be resolved by a jury. *Johnson & Harber Constr. Co. v. Bing,* 220 Ga.App. 179, 181, 469 S.E.2d 697 (1996); *Bryant v. Kern & Co.,* 196 Ga.App. 165, 167, 395 S.E.2d

620 (1990).

[4] [5] 2. "To prove a dedication of land to public use, there must be an offer, either express or implied, by the owner of the land, and an acceptance, either express or implied, by the appropriate public authorities or by the general public. [Cits.]" *Smith v. State of* ****397** *Ga.,* 248 Ga. 154, 158, 282 S.E.2d 76 (1981). See also *MDC Blackshear v. Littell,* 273 Ga. 169, 170, 537 S.E.2d 356 (2000). The Kaplans assert that the county expressly accepted the dedication of the 36-inch drainage pipe when it approved the revised final plat. We disagree. Although the ***561** recording of the revised subdivision plat shows a dedication of the drainage pipe to the county, *Smith v. Gwinnett County,* 248 Ga. 882, 885, 286 S.E.2d 739 (1982), the county's approval of the revised final plat does not by itself show an acceptance. *Lewis v. DeKalb County,* 251 Ga. 100, 101, 303 S.E.2d 112 (1983) ("mere approval of plats containing offers of dedication did not constitute acceptance"). The county ordinance in effect at the time of the approval of the plat required the owner of a subdivision to execute and record an easement if he or she wanted to dedicate a storm drainage component to the county. The owner of the Kaplans' subdivision did not execute an easement to the county for any portion of the subdivision's storm drainage system. In the absence of this easement, it cannot be said that the county expressly accepted the dedication.

The Kaplans argue that the deposition testimony of John Didicher, an engineer who surveyed and designed the subdivision, raises a question of fact concerning acceptance of the drainage pipe by the county. Didicher averred that he designed hundreds of subdivisions in the county and that it never required the execution of an easement in addition to dedication language contained in a final plat. This testimony does not raise a fact question for the simple reason that it does not suggest that "the appropriate public authorities" accepted the drainage pipe. *Smith v. Gwinnett County,* supra. See also OCGA § 45-6-5 ("public may not be estopped by the acts of any officer done in the exercise of an unconferred power"); *City* of *Buchanan v. Pope,* 222 Ga.App. 716, 720, 476 S.E.2d 53 (1996) (city not estopped from relying on provision of city charter even though it had not abided by terms of charter in past).

[6] 3. "Acceptance of a dedication may be shown by any act of a governmental entity treating a structure as its own." *Johnson & Harber Constr. Co. v. Bing,* supra at 182, 469 S.E.2d 697. The Kaplans contend the county impliedly accepted the dedication of the drainage pipe because it investigated and photographed the pipe, cleared it of debris at the Kaplans' request on two occasions, and offered to reline the pipe if the Kaplans paid for materials. However, none of these acts support an inference that the county exercised dominion and control over the drainage pipe. See *Teague v. City of Canton,* 267 Ga. 679, 681(3), 482 S.E.2d 237 (1997) (it is the government's exercise of dominion and control of the property which indicates acceptance of the dedication). Compare *Hibbs v. City of Riverdale,* 227 Ga.App. 889, 890, 490 S.E.2d 436 (1997) (implied acceptance not shown by fact that city investigated subdivision's drainage problems and required compliance with its regulations) with *Bryant v. Kern & Co.,* supra (county accepted dedication of road by inspecting it on numerous occasions, requiring it to meet county standards, requiring the posting of a maintenance bond, and undertaking the placement of traffic signs).

***562** *Judgment affirmed.*

All the Justices concur.

Parallel Citations

690 S.E.2d 395, 10 FCDR 533

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