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68618-6

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.

REPLY BRIEF OF APPELLANT CITY OF BOTHELL

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I. INTRODUCTION

Plaintiffs, in their Response, resort to raising red herrings and straw man arguments that they then easily knock down. The actual issues in this case, however, get little attention from Plaintiffs. For instance, this case is not about whether a drainage easement was conveyed to local government via dedication on a plat. It is uncontested that a drainage easement was indeed conveyed to Snohomish County when the Crystal Ridge Plats were recorded. The City has never contested this fact. Instead, the issue before the trial court, and this Court on appeal, is the scope of that easement. Specifically, the issue on appeal is as follows: Does the drainage easement on the face of the plat include a groundwater pipe buried 12 feet underground on private property owned in fee title by the Plaintiffs? Given the facts of our case, the answer to this question is "no." The drainage easement reads as follows (emphasis added):

> 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 655; 661.[1]

Based upon the plain language of the easement itself, it is limited

[1] Plaintiffs argue, for the first time on appeal (and contrary to their repeated arguments to the trial court below), that the Court should not look to this language, but to some writing on the second page of the plats. *Pls' Response*, pp. 27-28. This argument has no merit. Furthermore, the Court generally does not consider arguments raised for the first time on appeal. *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991).

to "stormwater facilities," a term that generally does not include groundwater pipes. And here, based upon evidence submitted into the record, it is undisputed that the interceptor pipe does not meet the relevant statutory definition of a "stormwater facility." Furthermore, neither the County nor the City ever inspected or maintained this pipe; thus, the City has no common law duty to maintain it at this time. Finally, the Drainage Disclosure recorded on the properties not only gave the Plaintiffs notice of drainage problems with their properties before they purchased them, but also confirms that the County was not going to take responsibility for future flooding and drainage problems at this site, and that the Plaintiffs themselves would be responsible for any future flooding or drainage problems on their individual properties. Given these facts, the City respectfully requests that this Court overturn the trial court's order and, in addition, grant the City's motion to dismiss as a matter of law.

II. STATEMENT OF UNDISPUTED FACTS

Based on the record, the following facts are not in dispute:

1. The Crystal Ridge Plats were developed in the 1980s under King County's jurisdiction. The Hearing Examiner's approval was signed on October 11, 1984 (CP 728) and the plats were recorded in 1987. CP 654-662.

2. The interceptor pipe is buried at least 12 feet underground

on Tract 999[2]. CP 296; 474. The parties agree that Tract 999 is a single, individual parcel that is owned in fee simple by Plaintiffs', members of the Crystal Ridge Homeowners Association. *See Pls' Response*, pp. 1; 12.

3. There is no documentary evidence in the record to support Plaintiffs' contention that the interceptor pipe was intended to be maintained as a public facility by Snohomish County; in fact, to the contrary, all documentary evidence in the record indicates that the interceptor pipe was to be maintained as a private facility by Plaintiffs. *See, e.g.,* CP 343-346, and the following:

a. The Hearing Examiner's Report does <u>not</u> require the County to take over maintenance of the interceptor pipe (CP 719-729); to the contrary, the Examiner's Report requires the developer to record a Drainage Disclosure on the property to give notice of drainage problems to any subsequent residential purchasers and advise those purchasers that they will be responsible to address drainage problems on their own properties (CP 727);

b. The first geotechnical report does <u>not</u> require the County to take over maintenance of the interceptor pipe (CP 692-704);

c. The second geotechnical report does <u>not</u> require the County

[2] The City assumes the pipe exists in this location for purposes of motion for summary judgment. The pipe has actually never been physically located by either party. CP 344.

to take over maintenance of the interceptor pipe (CP 706-717);

d. The interceptor pipe is not depicted on the plat drawings for Divisions 1 & 2 (CP 655-56; 661; App. B); to the contrary, the interceptor pipe is shown only on the plans of the Sanitary Sewer District, which has its sanitary sewer line in the same trench as the interceptor pipe (CP 475; App. A) (Plaintiffs presented hearsay testimony that the interceptor pipe would have been shown on the drainage mylars submitted by the developer of Crystal Ridge to Snohomish County; but it is undisputed that Plaintiffs did not submit these phantom mylars into evidence. CP 291; *Pls' Response*, p. 16).

4. The interceptor pipe is intended to collect groundwater, not surface water. CP 245-46; 345-46; 477-82. With limited exceptions not applicable here, local government does not maintain groundwater facilities; instead, local government maintains only surface and stormwater systems and facilities. CP 343-46.

5. Based upon undisputed contemporaneous documentary evidence in the record, a surface drainage system (the swale drain) was constructed and located within the 25-foot drainage easement dedicated to

Snohomish County on the face of the Plats (CP 699; 715).[3] Based upon its description in both geotech reports prepared by Plaintiffs own expert, Mr. Denby, this swale drain does meet the statutory definition of a "Stormwater Facility." *See* Mr. Denby's Reports (CP 699; 715); *see* County Codes regarding "stormwater facilities" (669; 396; 444).

6. Neither Snohomish County nor the City ever maintained the interceptor pipe. CP 246; 248-49; 251; 344.

a. Plaintiffs did not submit any evidence into the record (documentary or otherwise) to show that the County ever maintained the interceptor pipe; and

b. The City never maintained the pipe. CP 246; 251.

7. The County required the Developer to record a Drainage Disclosure applicable to all property located within the plats; giving notice to future homeowners that the site has substantial drainage problems, and that "special and/or extraordinary drainage controls may be necessary on

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[3] Plaintiffs' contention that the swale drain was located *downslope* of the interceptor drain is not based upon contemporaneous documentary evidence. *Pls' Response*, pp. 17-18. Instead, it is based only upon a hearsay statement by one of Plaintiffs' experts. CP 291-292. Tellingly, this expert (Mr. Trepanier) contradicts the contemporaneous written reports prepared for the site by Plaintiffs' other expert (Mr. Denby). CP 699; 715. *See* discussion at footnote 9 of *City's Opening Brief.* Mr. Trepanier's new, contradictory testimony must be viewed with a grain of salt. Plaintiffs should not be allowed to try to raise an issue of fact with hearsay testimony by one expert that contradicts written contemporaneous testimony from their other expert. This is akin to presenting Sham Declarations to the court in an effort to raise an issue of fact in a summary judgment proceeding, which is uniformly disallowed and stricken by the courts. *See, e.g., Van Asdale v. Int'l Game Tech*, 577 F.3d 989 at 998 (9th Cir. 2009).

individual lots" in the future, and that **"compliance and/or knowledge are the obligation of the owner of the subject property."** CP 472-73 (emphasis added).[4]

III. ARGUMENT

A. Introduction

Plaintiffs' sole argument as to why the City has a duty to maintain the interceptor pipe is based upon the fact that the developer of Crystal Ridge dedicated a 25-foot drainage easement to Snohomish County for "stormwater facilities" on the face of the subdivision plats, and that the interceptor pipe is buried 12 feet underground within this same 25-foot area; thus, according to Plaintiffs, the interceptor pipe must, *ipso facto*, have been dedicated for maintenance purposes to Snohomish County.

Plaintiffs' argument – that the interceptor pipe was included, *ipso facto*, in the dedicated drainage easement for "stormwater facilities" – is without merit. This argument misses the point entirely, as the easement is limited to "stormwater facilities," and the interceptor pipe is simply not covered by the scope of the easement. For instance, the City presented undisputed evidence to the trial court below showing that the interceptor

[4] Plaintiffs' repeated assertions that the City did not produce a copy of the Drainage Disclosure to them in response to their discovery requests are untrue. *Pls' Response*, pp. 12, n. 10; p. 24, n. 26. Counsel for the City produced a copy of this public, recorded document (which Plaintiffs' could also have obtained themselves) in response to Plaintiffs' Requests for Admission.

pipe was not, and is not, a "stormwater facility" as defined by either the applicable Snohomish County codes or City of Bothell codes.[5] Furthermore, the City also presented undisputed evidence below that neither the County nor the City has ever maintained this pipe. Finally, the City submitted a copy of the Drainage Disclosure that was recorded on the Plaintiffs' properties, which indisputably shows that Snohomish County and the developer intended that the individual property owners in Crystal Ridge not only be made aware of drainage issues with their properties, but receive notice that they were buying at their own risk and would be responsible for any future drainage problems associated with their own properties. Had the "Drainage Easement" on the face of the plats been meant to shift responsibility for this drainage issue to Snohomish County (and subsequently the City) as Plaintiffs argue, then the Drainage Disclosure would be meaningless.

Given these facts, the City respectfully requests that the trial court order be reversed and, in addition, that the Court of Appeals grant its motion to dismiss on summary judgment.

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[5] Plaintiffs' contention that the City did not include copies of these codes in the Record is incorrect. These codes are submitted at the following Clerk's Papers: CP 665-691 (Former Snohomish County Code Title 24); CP 342-440 (1979 Snohomish County Drainage Procedures Manual); CP 441-462 (Former Title 25 of the Snohomish County Code); CP 485-487 (1972/1973 Comprehensive Trunk Storm Drain Plan); CP 485-574 (1977 City of Bothell Surface Water Runoff Policy); CP 583-629 (City's Current Codes).

B. The Interceptor Pipe is a Private Drainage Facility That Does Not Meet the Statutory Definition of a Municipal "Stormwater Facility" As a Matter of Law.

Plaintiffs' contention that the developer and Snohomish County intended the interceptor pipe to become a public facility is based only upon bare hearsay assertions by their witnesses, Mssrs. Denby and Trepanier. Not only are these assertions unsupported, but they fly in the face of the actual evidence in the record, such as the applicable Snohomish County Code Provisions, set forth below.[6]

1. Former Title 24 of the Snohomish County Code (SCC).

The drainage code in effect in Snohomish County from 1984 through 1988, when Crystal Ridge was approved, was codified at Title 24 of the SCC. CP 665-691. Nothing within former Title 24 indicates that an interceptor pipe buried 12 feet underground, collecting only groundwater, would ever be accepted by the County as a public "stormwater facility." For instance, the term "groundwater" is not included in the County's definition of "Drainage Facilities":

> SCC 24.08.120 - Drainage Treatment/Abatement Facilities.
>
> "Drainage Treatment/Abatement Facilities" means

[6] In their Response, Plaintiffs admitted that the only relevant code provisions were those in existence when the plats were approved. *Pls' Response*, p. 38. But then, for the first time on appeal, they cite to definitions allegedly obtained from the dictionary and McQuillan (a municipal treatise). *Pls' Response*, pp. 30-31. These definitions are not in the record below and should be rejected. Furthermore, the City responds by citing to the correct provisions of the applicable codes in this section of its Reply.

> any facilities installed or constructed in conjunction with a drainage plan for the purpose of treatment or abatement of stormwater runoff. (Emphasis added.)

CP 669. Had the County intended for a "drainage facility" to include groundwater, it would have said so here. It did not. Instead, its definition of drainage facility is one that handles "stormwater runoff" only; not groundwater.

2. Snohomish County's 1979 Drainage Procedures Manual.

The County also relied on the 1979 Drainage Procedures Manual when it approved Crystal Ridge. CP342-440. Based on several provisions in the Manual, the definition of "stormwater" does not include groundwater. For instance, groundwater is designed to enter the interceptor pipe through holes in the pipe itself, in a manner like infiltration. Thus, groundwater is plainly not considered "stormwater," which is only intended to enter a closed drainage system (such as the system at Crystal Ridge) via a catch basin, *i.e.,* from the surface (not from underneath the ground):

> CLOSED SYSTEMS AND STRUCTURES
>
> **Stormwater** shall enter a closed storm drainage system **only via catch basins,** which are to provide debris and silt removal. (Emphasis added.)

CP 396; App. C.

3. Former Title 25 of the Snohomish County Code.

Finally, the County had also adopted a Surface and Stormwater Management Code in 1981, former SCC Title 25, which it relied upon when it approved Crystal Ridge. CP 441-462. A look at former SCC Title 25 shows that the County's definitions of "Drainage Facilities" and "Stormwater Facilities" did not include systems that exclusively collected subterranean groundwater, such as the interceptor pipe:

> 25.02.030 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. (Emphasis added.)

CP 444; App. C. It is clear that this provision defines a "Drainage Facility" as collecting only storm and surface water; not groundwater.

The same is true with regard to the County's applicable provisions defining a "Storm Water Facility":

> 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, made, constructed, or acquired for the purpose of controlling or protecting life or property from, any storm, waste, flood or surplus waters wherever located within the County[.] (Emphasis added.)

CP 445; App. C. Use 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 of Storm and Surface Water Facility. Under Washington's law of statutory construction, this is where the principle of *expressio unius est exclusio alterius* comes into play. Under this principle, the court must assume that where the legislature included a list of subjects covered by the statute (here, "storm, waste, flood, or surplus waters"), it also intended to exclude those not listed ("groundwater"). "Where a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions." *Queets Band of Indians v. State,* 102 Wn.2d 1, 5, 682 P.2d 909 (1984).

In sum, groundwater systems were not included in the County's relevant codes as "Stormwater Facilities." Even broadening our definition to "Drainage Facilities," groundwater systems were not included.

4. Plaintiffs' arguments are contrary to the undisputed facts and law of this case.

Plaintiffs' response to the undisputed facts and law set forth above is weak. Basically, they set forth two simplistic arguments. First, they claim that the definition of "stormwater" should include rain and surface water, and that "groundwater" is also made up of rain and surface water (based upon their presumption that all water on earth was once in the form

of rain). *Pls' Response*, p. 31. Under this definition, all water on earth could be defined as stormwater, including water captured by the interceptor pipe. Thus, according to Plaintiffs, there is no difference between "stormwater" and "groundwater."

Second, Plaintiffs' argue that because groundwater from the interceptor pipe is eventually directed to above-ground ponds, *i.e.,* ponds located on the surface of the land, then such water must be deemed to be surface water – even when it is still 12 feet underground. *Pls' Response*, p. 31-32. Again, their basic argument is that all water is "surface water," including groundwater.

Clearly, the engineers and scientists who have designed surface water, stormwater, and groundwater drainage systems have developed distinct and separate definitions for waters existing in various locations, mainly because these waters must be collected and disposed of in different ways with different facilities. It is not up to Plaintiffs to define groundwater facilities and/or stormwater facilities with simplistic definitions that ignore adopted code provisions. Plaintiffs' definitions and arguments in this regard should be rejected.

5. The dedication of an easement was only one of five steps needed to convey a private drainage facility to the County.

Finally, the Snohomish County codes in effect in 1988 provided

that even if the County wanted to take over maintenance of a private drainage facility, it could only do so after certain requirements were met. *See, e.g.,* SCC 24.28.040(3) (CP 687) and 1979 Drainage Procedures Manual, p. 71 (CP 439). These provisions specifically clarify that the granting of an easement is only one of five requirements that must have been met before the County could take over a developer's drainage facility. In other words, the dedication of a drainage easement to the County did not automatically mean the County was required to maintain all drainage facilities located within the easement area, as Plaintiffs' suggest. Instead, it was merely one of five requirements that had to have occurred in order to transfer a maintenance duty to the County. Here, there is absolutely no evidence in the record to support a finding that even one, much less all four, of the remaining requirements listed in these provisions were ever met. CP 249.

C. Neither the County Nor the City Ever Maintained the Interceptor Pipe, thus, the City Does Not Have a Common Law Duty to Maintain the Pipe at this Time.

It is undisputed that from 1988 through 1992, when the Property was under Snohomish County's jurisdiction, the County never once performed any maintenance or inspection of the interceptor pipe. The record is devoid of any evidence to the contrary. Plaintiffs submitted no testimony from a County witness to the contrary (they submitted no

testimony from a County witness at all), nor did they submit a single sheet of documentary evidence to show that the County ever inspected or maintained their interceptor pipe.

The City annexed the Property in 1992 (CP 730); and, as noted above, it is undisputed that the City has never once performed any maintenance of the interceptor pipe.

Plaintiffs' sole evidentiary response to this issue was to present hearsay testimony from two engineers who worked for the developer of Crystal Ridge (not employees of Snohomish County), speculating that they believe the County intended to assume the duty to maintain the interceptor pipe in 1988. *Pls' Response*, p. 16. These witnesses do not say that the County did, in fact, assume the duty to maintain the pipe, just that they believe the County intended to do so. These witnesses further urge the Court to ignore the County's drainage codes in effect in 1988 – which, as set forth above, all indicate that the County did not intend to accept the maintenance responsibility for the interceptor pipe – because, in their opinion, the County did not generally enforce its codes. *Pls' Response*, p. 21, n. 24. Again, these witnesses do not testify that the County did, in fact, fail to enforce its codes in this case, just that in their opinion the County did not enforce its codes generally.

The assertions by Plaintiffs' engineers regarding what they think

the County intended back in the 1980s is classic hearsay. Neither the trial court below, nor this Court, should consider hearsay testimony in a summary judgment motion pursuant to the Rules of Evidence and CR 56(e).[7] At a minimum, hearsay is insufficient to defeat the City's motion for summary judgment, which is based on actual evidence in the record.

Because neither the County nor the City has ever taken any action to accept the interceptor pipe it is clear that it does not have a common law duty to maintain that pipe at this time.[8]

D. The Drainage Disclosure Is Valid And Plaintiffs' Argument To The Contrary, Raised For The First Time On Appeal, Is Without Merit

The City has pointed out that the Drainage Disclosure supports two facts. First, that the County did not intend to take responsibility for any future drainage problems within the private residential development of Crystal Ridge after the plats were recorded. Second, that each Plaintiff in this lawsuit had notice of the potential for serious and substantial drainage

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[7] *King County v. Housing Authority*, 123 Wn2d 819, 826, 872 P.2d 516 (1994). The trial court indicated it would not consider inadmissible testimony in this matter. But based upon a review of the trial court's oral ruling with regard to the City's evidentiary objections, the trial court did, in fact, consider some inadmissible evidence. CP 74-75. Trial judge indicates that he will not consider "conclusory legal summaries" or opinion testimony speculating as to "the intent of the county" contained in the Declarations of Mr. Trepanier. *But see,* CP 79-80, where the trial court does, in fact, consider opinion testimony from Mr. Trepanier. The City believes consideration of this evidence constitutes reversible error.

[8] Plaintiffs' contention that the City raised this defense for the first time on appeal is blatantly incorrect. *Pls' Response*, p. 2. This defense was the main argument raised by the City below. CP 320-321, 258, 260. The trial judge even articulated this as the City's defense when rendering his oral decision. CP 77.

problems before they bought their properties, and further, had notice that addressing drainage and flooding problems on their individual lots would be their own responsibility – not the County's.[9]

In response, Plaintiffs argue, for the first time on appeal, that the Drainage Disclosure is not binding because it did not contain a legal description sufficient to satisfy the statute of frauds.[10] *Pls' Response*, p. 48. This argument has no merit. First, the record indicates that the properties are identified in the recorded Drainage Disclosure by tax parcel numbers. CP 472. Plaintiffs cite *to Martin v. Seigel*, 35 Wn. 2d at 229 (1949), for the proposition that "the statute of frauds requirement is not satisfied with descriptions containing only tax parcel numbers[.]" *Pls' Response*, p. 49 (emphasis added). In fact, the *Martin* case did not address tax parcel numbers as implied by Plaintiffs. Furthermore, the Washington Supreme Court has held that reference to a tax parcel number is indeed sufficient to satisfy the statute of frauds. *Bingham v. Sherfey*, 38 Wn.2d 886, 889, 234 P.2d 489 (1951) (holding reference to a tax parcel number adequate because a tax parcel number is statutorily required on the assessor' public record and "reference to this public record furnishes the

[9] Plaintiffs claim that the City did not "prove" this document actually appeared on Plaintiffs' Title Reports. *Pls' Response*, p. 12; 46. This is a red herring. The City does not have to prove this fact, which is only of relevance as between each Plaintiff and their title company, assuming they want to make a claim against their title company. All the City had to show, as it did, is that the disclosure was recorded with the assessor's office.

[10] Again, the Court generally does not consider arguments raised for the first time on appeal. *Doe,* 117 Wn.2d at 780.

legal description of the real property involved with sufficient definiteness[.]"). Furthermore, had this argument been raised below, the City could have easily corrected the record by supplying the trial court with all four pages of the Drainage Disclosure, which includes the legal description of the affected properties. App. D.[11]

Plaintiffs' second argument, also raised for the first time on appeal, is that the Disclosure should be construed as nothing more than a "real covenant or equitable servitude."[12] *Pls' Response, p. 48.* Even if the Court were to consider this new argument, it is another red herring that misses the point. The main import of the Disclosure is to give notice to Plaintiffs that they will be responsible for addressing drainage and flooding problems on their own properties. The Drainage Disclosure is unambiguous. It conclusively demonstrates the County's "intent" not to assume responsibility for the "substantial drainage controls," including the

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[11] The Court can take judicial notice of the entire recorded Drainage Disclosure pursuant to ER 201. *Gardner v. Am. Home Mort. Serv.*, 691 F. Supp. 2d 1192 (E.D. Cal. 2009) (Court will take judicial notice of publicly recorded documents related to foreclosure of plaintiff's property on motion to dismiss). The last two pages contain a legal description and a map attached as Schedule "A." Schedule "A" is also referenced on the first page of the Drainage Disclosure, which is in the record:

> 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 Assessors Tax 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[.]

CP 472; App. D.

[12] Again, the Court need not consider arguments raised for the first time on appeal. *Doe,* 117 Wn.2d at 780.

interceptor pipe, that were installed in Crystal Ridge by the developer in an effort to make the site dry enough to be suitable for residential construction. When viewed in light of the other uncontested facts – such as the fact that the statutory requirements necessary to transfer maintenance responsibility to the County were not complied with (CP 249), and the fact that neither the County nor the City ever maintained this system – the Court can reach only one conclusion: that the Homeowner's Association has the duty and obligation to maintain its own interceptor pipe. Alternatively, as the Disclosure states, property owners can install specialized drainage features on their own lots to combat flooding caused by the alleged failure of the interceptor pipe. Either way, the County has made it clear that it will not be responsible for any flooding on residential property within Crystal Ridge, no matter what the cause of the flooding may be, including the alleged failure of the Plaintiffs' interceptor pipe.

Another circumstance supporting the City's position is the fact that the County required the developer to prepare a second drainage disclosure when it found that the first one was not explicit enough. The developer's first attempt at a disclosure document is included in the record at CP 469-470. But this initial document was never recorded, because the County required more. The County, in fact, wanted to make it clear that it was

not assuming responsibility for the drainage problems onsite at Crystal Ridge; instead, such responsibility would lie with the property owner(s). The recorded document indicates that "substantial drainage controls" have been installed in the Plat, and "special and/or extraordinary drainage controls may be necessary on individual lots" in the future, and that **"compliance and/or knowledge are the obligation of the owner of the subject property."** CP 472 (emphasis added).

Finally, Plaintiffs continue to argue that the Drainage Disclosure simply does not apply to any drainage features on Tract 999, because this Tract is owned by the Homeowners Association, not by an "individual," and, according to Plaintiffs, the Disclosure only applies to lots owned by individuals. *Pls' Response*, p. 12. Plaintiffs were successful in convincing the trial court to accept this tortured reading of the Disclosure. CP 80. The trial court committed an error of law when it accepted this interpretation of the Drainage Disclosure. The City respectfully requests that the Court of Appeals reverse this error of law on review.

The facts relevant to this issue are not in dispute. Plaintiffs' admit that the interceptor pipe is located on Tract 999, which is an individual lot within the Plat, designated as open space. *Pls' Response*, p. 12. Plaintiffs also admit that Tract 999 is owned by the Homeowner's Association. *Pls' Response*, p. 12. Recall that the Disclosure states: "special and/or

extraordinary drainage controls may be necessary on **individual lots.**" Given these facts, and the plain reading of the Disclosure, it is clear that the recorded Drainage Disclosure applies to all lots within the Plat, including Tract 999. The trial court committed reversible error when it held otherwise and this error should be corrected on appeal.

CONCLUSION

Based on the above undisputed facts and law, the City asks the Court of Appeals to overturn the trial court's order granting Plaintiffs' motion for partial summary judgment and denying the City's cross-motion for summary judgment. In addition, the City also asks this Court to grant the City's cross-motion and dismiss this case as a matter of law.

Respectfully submitted this 21st day of December, 2012.

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

By: Stephanie Croll

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City of Bothell

Joseph Beck, sec per approval

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City Attorney, Defendant/Appellant
City of Bothell

DECLARATION OF SERVICE

I declare that on December 21, 2012, a true and correct copy of the foregoing document was sent to the following parties of record via electronic transmission, as authorized by recipient, and First Class U.S. Mail as follows:

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DATED this 21st day of December, 2012.

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APPENDIX

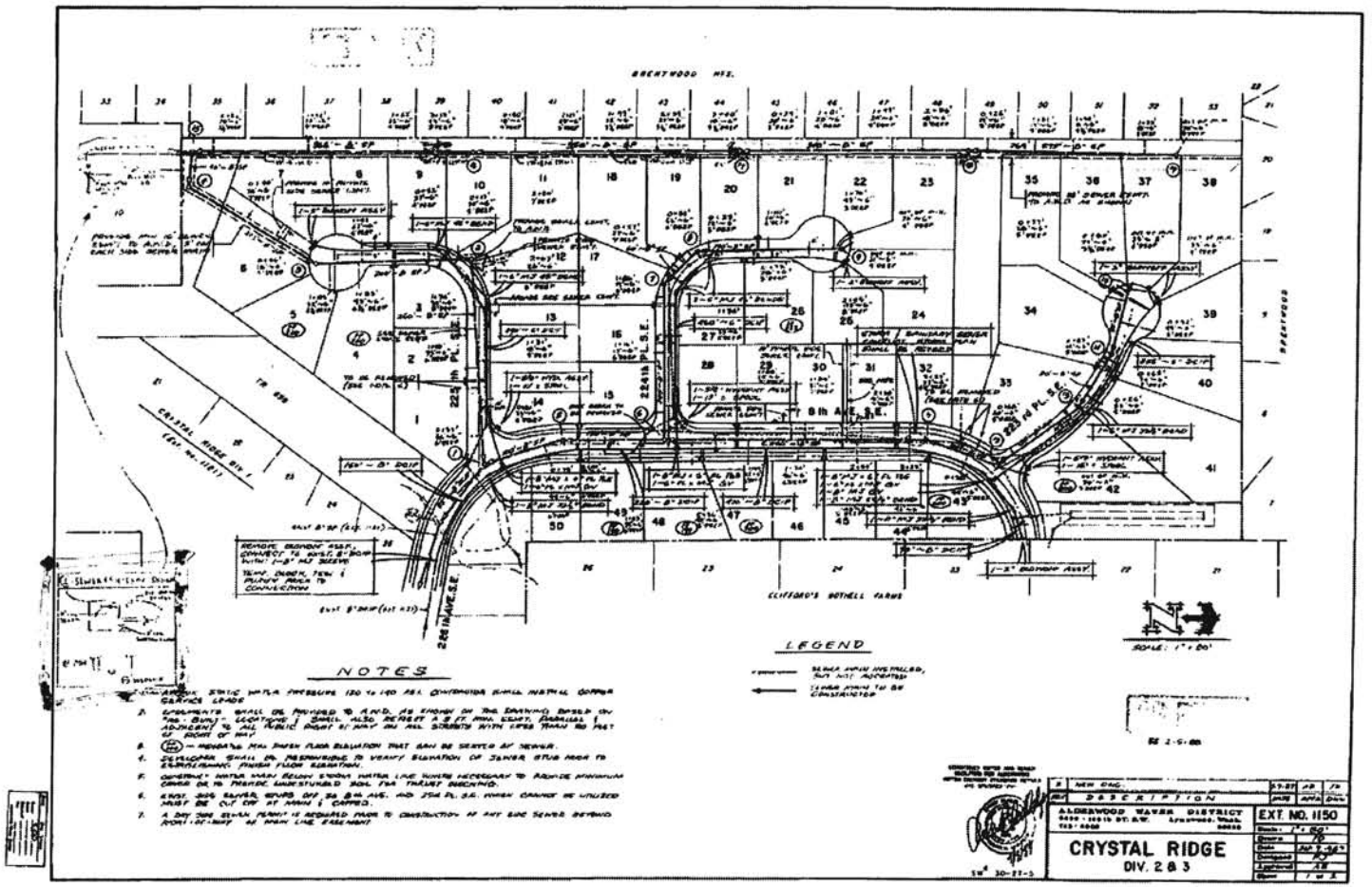
Appendix A: Alderwood Water District (AWD) site plan, which shows the existence of the interceptor pipe in the same trench as the District's sanitary sewer main (CP 475).

Appendix B: The plat of Crystal Ridge, Division 2, showing Tract 999 is designated as "Open Spaces" and that it contains a "25' SANITARY SEWER (AWD) AND DRAINAGE EASEMENT" (CP 475).

Appendix C: Various Snohomish County Codes that were in effect when the Crystal Ridge Plats were considered and approved by the County (CP 396; 439; 444; 445; 669; and 687).

Appendix D: The Drainage Disclosure filed with the Snohomish County Auditor's Office, including Schedule "A" which contains a legal description of the properties to which it applies, including Tract 999 of the Plat of Crystal Ridge.

APPENDIX A

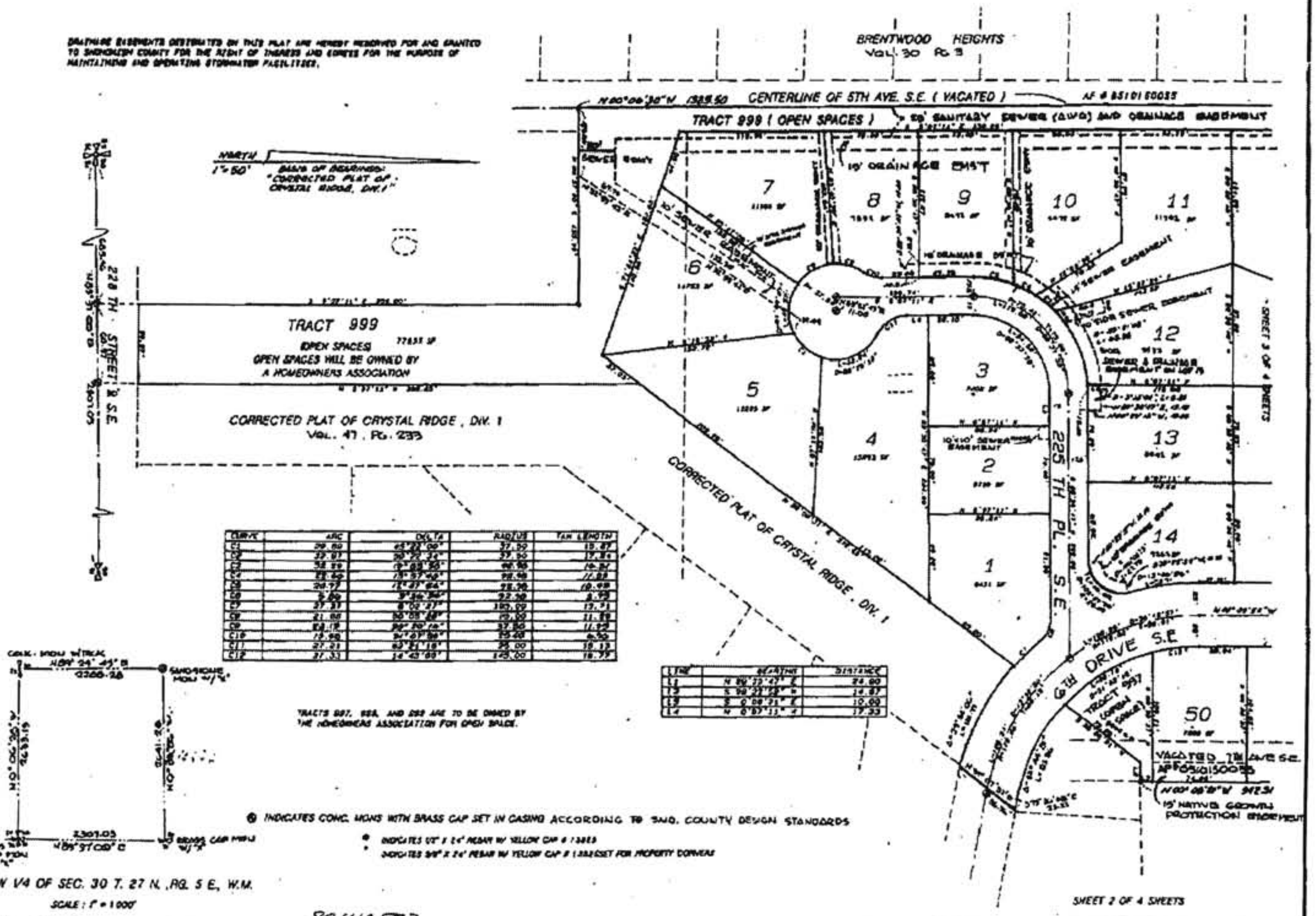

BRENTWOOD HTS.
CRYSTAL RIDGE DIV. 2
CLIFFORD'S BOTHELL FARMS
LEGEND
NOTES
CRYSTAL RIDGE
DIV. 2 & 3
ALDERWOOD WATER DISTRICT
EXT. NO. 1150

APPENDIX B

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.



CURVE	ARC	DELTA	RADIUS	TAN LENGTH
C1	29.80	45°22'00"	37.50	15.67
C2	32.97	50°22'24"	37.50	17.64
C3	38.39	19°05'55"	66.95	19.37
C4	23.60	15°57'40"	98.98	11.88
C5	20.77	12°47'64"	93.70	10.48
C6	5.00	3°26'30"	92.50	2.95
C7	27.37	8°02'27"	195.00	13.71
C8	21.00	50°05'48"	25.00	11.19
C9	68.19	99°39'16"	37.50	11.53
C10	13.90	31°07'30"	25.00	6.50
C11	27.21	62°21'18"	25.00	15.13
C12	37.33	14°45'09"	145.00	18.77

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

LINE	BEARING	DISTANCE
L1	N 89°33'47" E	24.00
L2	S 79°27'45" W	14.87
L3	S 0°08'21" E	10.00
L4	N 0°07'13" W	17.33

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

• INDICATES 1/2" x 24" REBAR W/ YELLOW CAP # 13893

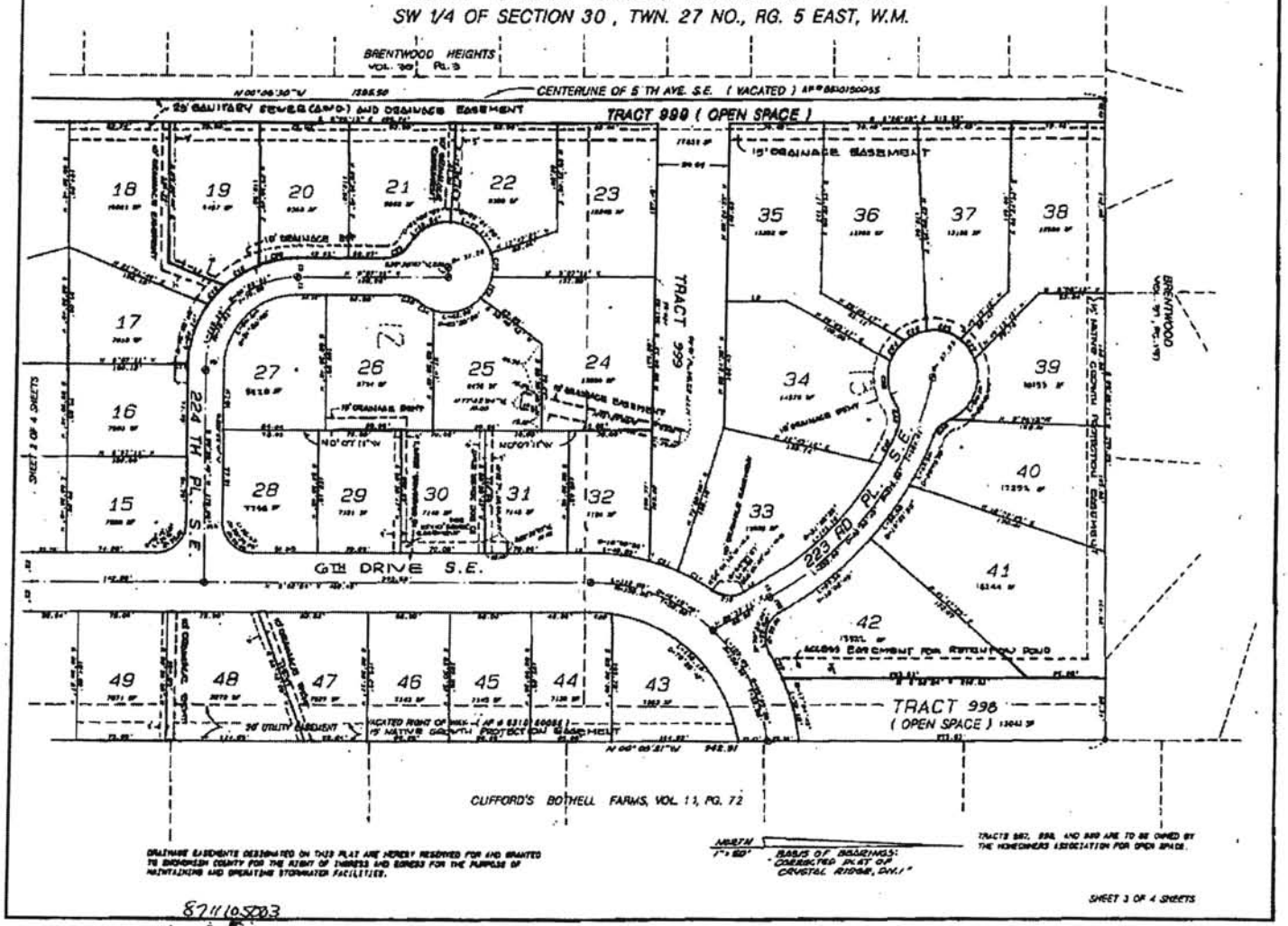
• INDICATES 5/8" x 24" REBAR W/ YELLOW CAP # 13893 SET FOR PROPERTY CORNERS

8706105003

#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 INSTALLING AND OPERATING STORMWATER FACILITIES.

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

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

8711050203

#2521

APPENDIX C

CLOSED SYSTEMS & STRUCTURES

1. The maximum allowable velocity in concrete pipe is thirty (30) feet per second.

2. A minimum velocity in any pipe or culvert carrying the design storm flow shall be two (2) feet per second. EXCEPTIONS: Culverts installed as "equalizers" and those culverts and piping that are a direct part of the retention/detention system.

3. Show design velocities in computations for all storm water culverts.

4. Debris barriers may be required at the inlets of culverts to catch small debris which could block culverts or to provide safety barriers to prevent small children from entering culverts.*

5. Match crowns of culverts or use the 0.8 rule at all catch basins and manholes, except for drop manholes, or unless otherwise approved by the Director. The 0.8 rule matches 0.8 the diameter of the culverts instead of culvert crowns as measured from their respective inverts.

6. Culverts within a closed system with culverts of 18 inches in diameter and smaller shall not be downsized unless the Director grants a variance in the manner provided above.

7. Storm water shall enter a closed storm drainage system only via catch basins, which are to provide debris and silt removal.

8. An 8 inch pipe laid with a minimum slope of 2 percent may be used to connect a curb inlet to a catch basin if the length of the pipe does not exceed 50 feet. If a longer pipe is required to connect a curb inlet to a catch basin, a catch basin should be used in lieu of the curb inlet and a 12 inch pipe shall be used with a minimum velocity of 2.0 fps at design flow.

* Washington State Department of Transportation "Highway Hydraulic Manual"

OPERATIONS & MAINTENANCE

The Drainage Ordinance 24.28.040 provides for Assumption of Operations & Maintenance of drainage facilities by the County 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 24.20, have been fully complied with.
2. If, after two years of operation, the facilities have been inspected and approved by the Director.
   a. Any inadequacies in design, construction and operation have been corrected.
   b. A detailed cost accounting of operation and maintenance expenses and a schedule of maintenance work done has 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 after 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 cost to operate and maintain the permanent drainage facilities constructed by the applicant.

   The County has the right to inspect the facilities both during and after the two-year period 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.

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 24.20 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 D

#TRIMEDC147QS

TRIMEN DEVELOPMENT CO.

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

DRAINAGE DISCLOSURE

8711090361

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 11/9/87
(Owner - TYPE IN NAME) (Owner - Signature)

8711090361

#TRIMEDC147QS

TRIMEN DEVELOPMENT CO.

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

11924 MCCOLLUM ROAD
MUKILTEO, WA 98272

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.

Vicki Kleinsek-Fubrin
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
DEARLY WILLIAMS, AUDITOR
SNOHOMISH COUNTY, WASH
BY Vicki Fubrin

87110903 61

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.

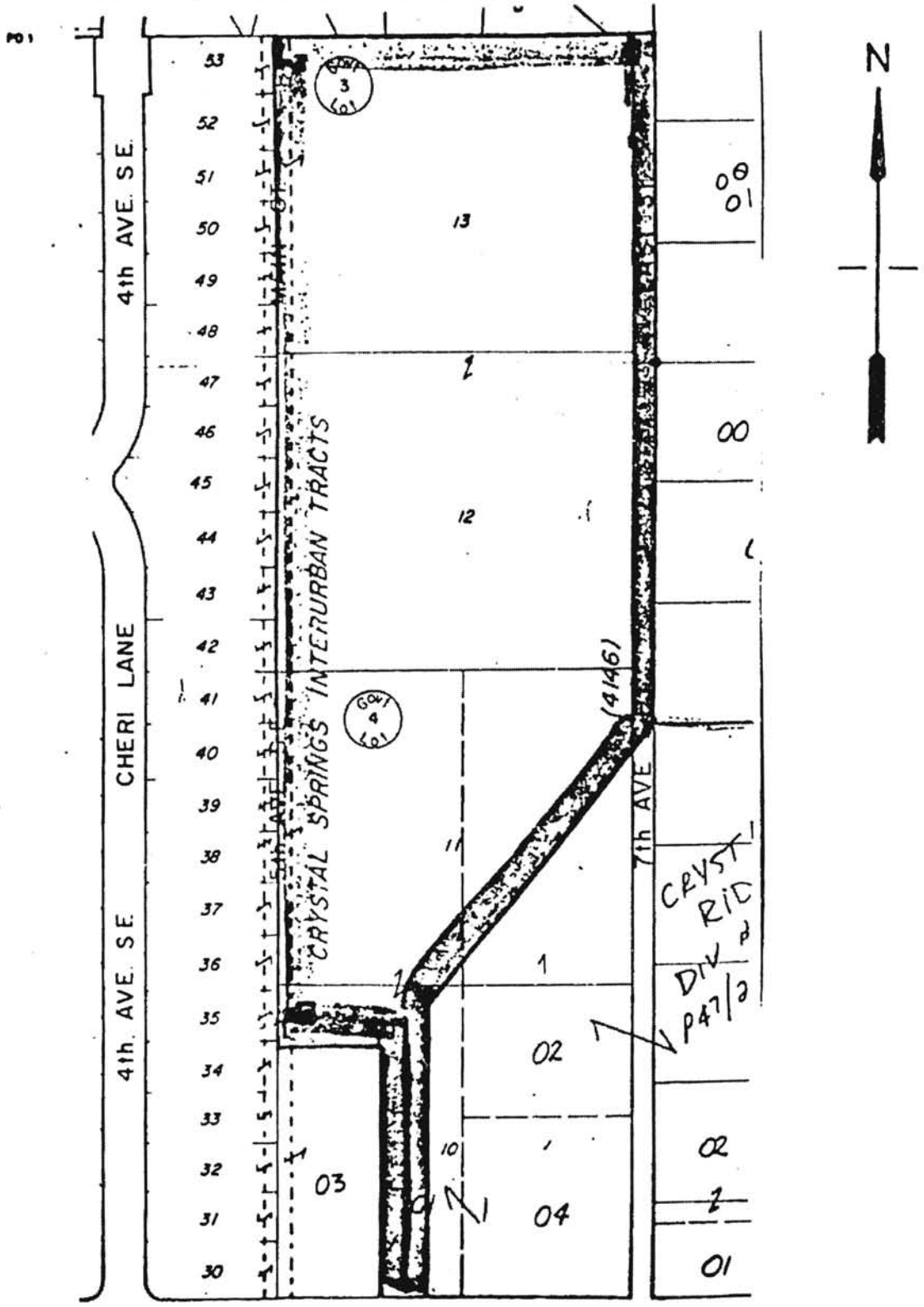
8711090861

of 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.



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