

CASE NO: 66156-6-I

COURT OF APPEALS, DIVISION I OF THE STATE OF
WASHINGTON

CRYSTAL LOTUS ENTERPRISES, LTD.,

Appellant,

v.

CITY OF SHORELINE and CITY OF LAKE FOREST PARK,

Respondents.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR:

Was it error for the trial court to grant Respondents' motion for summary judgment dismissing Appellants case in full where:

- a) The facts and law show an undisputed pattern of continuous trespass by Respondents' actions of collecting, concentrating, channeling and discharging public stormwaters onto private property which public stormwaters create surface pools on Appellant's lots 6 & 7 and which adversely impact Appellant's lots 6 & 7;
- b) Without providing any clear "equitable basis" the trial court ruled that the Respondents were entitled to an order of summary judgment despite the Respondents' clear and unequivocal history of misrepresentations and false promises over the years that they would either make provisions for the outflow of the public stormwaters or abate the diverted stormwaters which Respondents have collected, concentrated, channeled and discharged onto private property and thereby eliminate the adverse impact on Appellant's lots 6, 7 or on lot 8; illustrative of the Respondents' attempt to lull Appellant into a false sense of security and Respondents' lack of "clean hands"?

Was it error for the trial court to deny Appellant's motion for partial summary judgment requiring that the Respondents immediately abate the collection, concentration, channeling and discharging of public stormwaters onto private property which adversely impact Appellant's lots 6 & 7 where:

- a) It is undisputed that Respondents have never made any provision at any time for the outflow of the public stormwaters which Respondents have collected, concentrated, channeled and discharged onto private property;
- b) It is undisputed that the Respondents have never abated or eliminated the discharge of public stormwaters onto private property which Respondents have collected, concentrated, channeled, diverted from their normal flow and discharged onto private property;
- c) It is undisputed that the Respondents could easily abate or eliminated the discharge of public stormwaters on private property which Respondents have collected, concentrated and channeled by simply blocking the diversion pipe which discharges these public stormwaters onto private property, thereby allowing the public stormwaters to naturally flow down the western –side of 25th Ave NE to NE 178 St. which it

would normally do BUT FOR the diversion through a pipe across 25th Ave. NE from west to east onto private property?

STATEMENT OF CASE:

A Brief Summary of the Case without Reference to the Record: The Respondents have collected and channeled public stormwater from approximately forty [40] to fifty [50] acres of city residences. The natural flow of these collected and channeled public stormwaters would be downhill along the western side of 25th Ave. N. E. from N.E. 175th St. to N.E. 178th St. The Respondents have diverted the public stormwaters from their natural flow down the western side of 25th Ave N.E. The collected, channeled and diverted public stormwaters which are channeled, diverted and re-directed through a pipe across 25th Ave NE from west to east, emerge on Eric Gorbman's lot 8. The aforementioned pipe which discharges the collected, channeled and diverted public stormwaters is dry when there is no rain. The aforementioned pipe which discharges the collected, channeled and diverted public stormwaters disgorges a high volume of water when there is heavy rain. The public stormwaters which are disgorged from the aforementioned pipe go into the ground on Eric Gorbman's property. The diverted public stormwaters then surface in pools on Appellant's lots 6 & 7. The Respondents have made various promises over the past two years to Appellant and for many more years

before that to the owner of lot 8, that they would make adequate provisions for the outflow of the public stormwaters or abate the problem which Respondents have caused by the collecting, concentrating, channeling and discharged of these waters onto private property and thereby eliminate the adverse impact on Appellant's lots 6, 7 and on lot 8. The Respondents have never at any time made any provision of any type for the outflow of the public stormwaters which Respondents have collected, concentrated, channeled and discharged onto private property and which adversely impact Appellant's lots 6 & 7. The Respondents have never abated or eliminated the discharge of public stormwaters onto private property which Respondents have collected, concentrated, channeled, diverted from their normal flow and discharged onto private property which adversely impact Appellant's lots 6 & 7. The Respondents could easily abate or eliminated the discharge of public stormwaters which Respondents have collected, concentrated, channeled by simply blocking the diversion pipe which discharges these public stormwaters onto private property which adversely impacts Appellant's lots 6 & 7, thereby allowing the public stormwaters to naturally flow down the western side of 25th Ave NE from NE 175th St. to NE 178 St. which it would normally do BUT FOR the diversion through a pipe across 25th Ave. NE from west to east onto private property.

STATEMENT OF THE CASE WITH REFERENCE TO THE

RECORD:

It is undisputed by the City of Shoreline and the City of Lake Forest Park
[“Respondents”] that:

**The Respondents have collected and channeled public stormwater
from approximately forty [40] to fifty [50] acres of city residences:**

“have collected, concentrated, gathered and channeled their public stormwaters from approximately 40 to 45 acres of streets, roof tops and drainways and then discharged these public stormwaters onto private property across 25th Ave. N.E. in the 17700 block of 25th Ave. N.E. which then goes into the ground and thereby raises the watertable” [Sub # 23 Donald Koler declaration Pg 4 Para 9 lines 5-9 / Sub 19 Perry Gravelle Declaration Pg. 3 Para 5 lines 11 to 15 Sub 20 Vinish Gounder declaration Pg. 3 Para 3 lines 4 to 8 & Exhibits A-1 to A-3] The public stormwaters that the Respondents *have collected, concentrated, gathered and channeled their public stormwaters from approximately 40 to 45 acres of streets, roof tops and drainways [are] from N.E. 171st, 172nd & 175th Streets and 22nd Avenue N. E. are merged at the intersection of 25th Avenue N. E. 175th Street, with the collected public stormwaters from N.E. 170th Street and 25th Avenue N. E., which*

collected public stormwaters then proceed north on 25th Avenue N. E. picking up the collected public stormwaters from N.E. 177th Street, see Exhibits A-1, A-2 & A-3” [Sub # 23 Donald Koler declaration Pg 4 Para 9 lines 5-9 / Sub # 19 Perry Gravelle Declaration Pg. 3 Para 5 lines 11 to 15 Sub # 20 Vinish Gounder declaration Pg. 3 Para 3 lines 4 to 8 & Exhibits A-1 to A-3]

The natural flow of these collected and channeled public storm waters would be downhill along the western side 25th Ave. N. E. from N.E. 175th St. to N.E. 178th St.:

“the natural flow of the stormwater drainage along the western side of 25th Ave. N.E. to the point where the Defendants’ pipe line diverts the public stormwater drainage from the natural drainway, by which these waters would naturally and normally flow in draining from higher to lower lands, downhill on 25th Ave NE from the intersection of NE 175th St. to NE 178th St.” [Sub # 23 Donald Koler declaration Pg 7 Para 18 lines 7 to 12 / Sub # 19 Perry Gravelle Declaration Pg. 5 Para 12 lines 14 to 18 Sub # 20 Vinish Gounder declaration Pg. 5 Para 8 (a) lines 3 to 10 & Exhibit D a series of video shots attached to Vinesh Gounder’s Declaration]

The Respondents have diverted the public storm waters from their natural flow down the western side of 25th Ave NE:

The aforementioned channeled and collected public stormwaters would naturally flow downhill on 25th Ave. N. E. from N.E. 175th St. to N.E. 178th St. IF the Respondents had not begun “*diverting the collected public stormwater at the 17700 block of 25th Ave NE. and causing it to cross 25th Ave NE from west to east where:*

- a) *the public stormwater is thereafter discharged onto private property; and [Sub # 23 Donald Koler declaration Pg 5 Para 12 lines 8 to 10 / Sub # 19 Perry Gravelle Declaration Pg. 5 Para 10 lines 1 to 4 Sub # 20 Vinish Gounder declaration Pg. 4 Para 5 lines 1 to 5 & Exhibit D a series of video shots attached to Vinesh Gounder’s Declaration]*

The collected, channeled and diverted public stormwaters which are channeled by re-directing them through a pipe across 25th Ave NE from west to east; which pipe daylights on Eric Gorbman’s lot 8:

- b) *“The pipe daylights in an outflow approximately 20 to 30 feet down-slope on the eastern side of 25th Ave NE. on my lot 8.” [Sub # 18 Eric Gorbman declaration Pg 2 Para 9 lines 24 to 25]*

The aforementioned pipe which discharges the collected, channeled and diverted public stormwaters is dry when there is no rain:

c) *“The aforementioned pipe is approximately 17 to 18 inches in diameter... when there is no appreciable rain the aforementioned pipe is dry.”* [Sub # 18 Eric Gorbman declaration Pg 3 Para 11 & 12 (a) lines 4 & 11]

The aforementioned pipe which discharges the collected, channeled and diverted public stormwaters disgorge a high volume of water when there is heavy rain:

d) *“When it was raining heavily, I have observed a high volume of water being discharging from the aforementioned pipe which makes a lot of racket as it arcs in a sloping curve and which creates a raging torrent and waterfall which is discharged from the aforementioned pipe.”* [Sub # 18 Eric Gorbman declaration Pg 3 Para 12 lines 12 to 15]

The public stormwaters which are disgorged from the aforementioned pipe go into the ground on Eric Gorbman’s property [lot 8]:

e) *“The public stormwater then goes into the ground raising the water table in the lowest topographical points downhill on private property notably Plaintiff’s lots 6 and 7”* [Sub # 23 Donald Koler declaration Pg 5 Para 12 lines 10 to 13 / Sub # 19 Perry Gravelle Declaration Pg. 5 Para 10 lines 4

to 6 Sub # 20 Vinish Gounder declaration Pg. 4 Para 5
lines 5 to 7]

The diverted public stormwaters surface in pools on Appellant's lots 6

& 7:

f) *“...the above referenced public stormwater discharge goes underground, raising the water table, and the only spots it surfaces are the lowest sites in the area then based upon the topographical maps of this area that would be the southernmost part of lot 5 and the largest portion of lot 6 and the north eastern most portion of lot 7, attached as Exhibit G, and incorporated herein by this reference is a copy of a topographical map of the area.”* [Sub # 23 Donald Koler declaration Pg 10 Para 24 lines 3 to 7]

“The aforementioned arcing water flow discharging from the aforementioned pipe, appeared to be made up of water about 17 to 18 inches in diameter and it arcs in a sloping curve... most of the water disappears into the groundwater, the groundwater then comes to the surface on the low lying areas of the following lots: the eastern portion of lot 8A, the northeastern portion of lot 7 and the eastern portion of

6... ” [Sub # 18 Eric Gorbman declaration Pg 3 Para 13 &
14 lines 16 to 23]

The Respondents have made various promises over the past few years to Appellant and for many more years before that to the owner of lot 8, that they would make adequate provisions for the outflow of the public stormwaters which Respondents have collected, concentrated, channeled and discharged onto private property and thereby eliminate the adverse impact on Appellant’s lots 6, 7 and on lot 8.

Jesus Sanchez an employee of Respondents in the Surface Water Management Department stated “... *that the water being collected through the city’s stormwater channels and then dumped onto a neighbor’s private property that ultimately impacts lots 6 & 7 had been simply been routed to an existing water channel on lot 8.... [T]hat he found that it was usually better for all concerned parties to try and resolve disputes of this kind rather than going to court...[and] suggested a possible solution would be to tight-line the pipe where it day-lighted on Eric Gorbman’s property and channel the stormwater to the ditch on the west side of 28th Ave NE which was on the eastern border of lots 5, 6, 7, 8 & 8A.*” [Sub # 23 Donald Koler declaration Pg 8 Para 20 lines 1 to 9]

“Over the years, I had been in contact with the City of Shoreline Washington regarding the dumping of public stormwater onto my lot 8, in which the City of Shoreline Washington described how they would eliminate the flooding of my lot 8 by the public stormwater and suggested various means of rerouting or re-diverting the piped public stormwater diversion from 17700 block of 25th Ave. N.E. to allow it to flow downhill to NE 178th St. and eliminate the problem from the public stormwaters which are being dumped onto my property [lot 8] and ultimately affects lot and lots 5, 6, 7 & 8 A.” [Sub # 18 Eric Gorbman declaration Pg 4 Para 18 lines 15 to 22]

The Respondents have never at any time made any provision of any type for the outflow of the public stormwaters which Respondents have collected, concentrated, channeled and discharged onto private property and which adversely impact Appellant’s lots 6 & 7:

“At no time has either the City of Lake Forest Park and the City of Shoreline made any provision for the proper outflow of the public stormwaters which are collected “concentrate[d] and gather[ed]...into artificial drains or channels and throw[n]...onto my land and the land of my neighbors including Plaintiff’s lots 6 & 7” [Sub # 18 Eric Gorbman declaration Pg 3 Para 12 lines 5 to 9]

“Neither...the City of Lake Forest Park or the City of Shoreline have to this date:

- a. Made any provision for the outflow of public stormwater that [they].. have been collecting, channeling and discharging through a piped diversion across 25th Ave N.E. to the eastern side of 25th Ave N.E. thereof in the city of Lake Forest Park; or*
- b. Paid any compensation to the Plaintiff for the taking of these properties caused by the consequential damages to lots 6 & 7 from the outflow of public stormwater” [Sub # 23 Donald Koler declaration Pg 11 Para 31 lines 11 to 19]*

The Respondents have never abated or eliminated the discharge of public stormwaters onto private property which Respondents have collected, concentrated, channeled, diverted from their normal flow and discharged onto private property which adversely impact Appellant’s lots 6 & 7:

“The City of Shoreline Washington never followed through on any of its promises and never abated or eliminated the dumping of public stormwater which is still being continuously discharged onto my property through the aforementioned pipe when it rains.”

[Sub # 18 Eric Gorbman declaration Pg 5 Para 19 lines 1 to 5]

“On the 8th of April 2009, Jesus Sanchez sent a letter, attached as Exhibit F and incorporated herein by this reference, stating that the City of Shoreline could not tight-line the public stormwater pipe outflow and therefore would not abate the continuing trespass...”

[Sub # 23 Donald Koler declaration Pg 9 Para 22 lines 11 to 15]

The Respondents could easily abate or eliminated the discharge of public stormwaters which Respondents have collected, concentrated, channeled by simply blocking the diversion pipe which discharges these public stormwaters onto private property, thereby allowing the public stormwaters to naturally flow down the western side of 25th Ave NE to NE 178 St. which it would normally do BUT FOR the diversion through a pipe across 25th Ave. NE from west to east onto private property:

“In order to abate or eliminate the discharge of public stormwater which is discharged onto these properties it would be a simple matter to block to the diversion pipe in the 17700 block of 25th Ave. N.E., which currently diverts the public stormwater across 25th Ave NE and instead allow the public stormwaters to flow naturally downhill along the western side of 25th Ave N.E. which it would normally do if not for the public stormwater diversion pipe which diverts the public stormwaters onto private property.

The aforementioned abatement... would be neither difficult nor expensive and could be done by simply blocking the diversion pipe allowing it to flow downhill along the western side of 25th Ave. NE from the 17700 block of 25th Ave. N.E. through the already existing storm drainage channel down to N.E. 178th St.” [Sub # 18 Eric Gorbman declaration Pg 4 Para 16 & 17 lines 3 to 14]

The Respondents have made promises to Appellant and others over the years to abate or eliminate the impact of these collected & channeled public stormwater from approximately forty [40] to fifty [50] acres of city residences but have never followed through & have instead made various excuses yet at no time has any agent for Respondents ever made any claim of an intent to make a hostile take-over of Appellant’s right to its private property nor made claim that the Respondents had a hostile, open and continuous claim of right to Appellant’s property:

“...at no time did Jesus Sanchez claim that the City of Shoreline had any intent to make a hostile take over of any interest or right in the private property comprised of lots 6, 7 or 8; nor did he claim that the city had acquired any proscriptive easement rights; at all times he recognized that the dumping of the City’s public storm water was creating a problem for the property owners and said that we should all be able to negotiate a

reasonable collective solution which was acceptable to all parties without having to go to court." [Sub # 23 Donald Koler declaration Pg 9 Para 21 lines 3 to 11]

ARGUMENT:

Continuous Trespass:

It is undisputed that the Respondents have collected and channeled public stormwaters by artificial means and diverted these public stormwaters from their normal flow by re-directing them through a pipe across 25th Ave NE from west to east, which pipe daylights on Eric Gorbman's lot 8 and the public stormwaters surface in pools on lots 6 & 7... on the land of a private person, to *his or her* [the Plaintiff's] injury, which is a continuous trespass. Further it is also undisputed that the Respondents could easily abate or eliminate the discharge of public stormwaters which Respondents have collected, concentrated and channeled by simply blocking the diversion pipe which discharges these public stormwaters onto private property and allow the public stormwaters to naturally flow down the western side of 25th Ave NE to NE 178 St. which it would normally do BUT FOR the diversion through a pipe across 25th Ave. NE from west to east.

Phillips v. King County, 136 Wn.2d 946, 968 P.2d 871 (1998) Defines a **continuous water trespass** as follows:

“...[a] municipality may not collect surface water by an artificial channel . . . and pour it . . . on the land of a private person, to his or her injury...” [emphasis added]

In Fradkin v. Northshore Util. Dist 96 Wn. App. 118, 977 P.2d 1265 (1999) the court states that the trespasser in a continuous trespass is *“under a continuing duty to remove the intrusive substance or condition”* and is liable for damages until the wrong is abated. It is undisputed by the Respondents that they have not abated the continuous trespass of the public stormwaters which Respondents have collected, concentrated, channeled and diverted from their natural course through a diversion pipe which discharges these public stormwaters onto private property and which stormwaters surface in pools on Appellant’s lots 6 & 7. In Fradkin the court further held that:

“... if an encroachment is abatable, the law does not presume that such an encroachment will be permanently maintained. *The trespasser is under a continuing duty to remove the intrusive substance or condition.* Periodic flooding due to defective construction of a drainage system is a recognized fact pattern in the category of continuing trespass...the Court instead approved a rule permitting recoveries in such cases 'by successive actions until the

wrong or nuisance shall be terminated or abated'..."

[emphasis added]

In Woldson v. Woodhead 159 Wn. 2d. 215 149 P.3d 361 (2006) the Court described the scope of the statute of limitation on continuous trespass as follows:

“With respect to the tort of continuing trespass, we hold: first, the statute of limitations does not run from the date the tort begins; it is applied retrospectively to allow recovery for damages sustained within three years of filing. Second, damages are recoverable from three years before filing *until the trespass is abated or, if not abated, until the time of trial*... Third, prospective damages are not allowed; if the trespass continues past trial, successive suits may be brought to remedy such injuries until the trespass ceases.” [emphasis added]

The Respondents have asserted that the “common enemy” rule provides a justification and or “right” to discharge these collected and channeled public stormwaters onto private property and therefore they are not “trespassers”. But the courts have carved out exceptions to the unrestrained actions of public entities attempting to use the “common enemy rule” in order to cause damage to private property.

The Washington appellate courts in Ripley v. Grays Harbor Co. 107 Wn. App. 575, 27 P.3d 1197 (2001), Rothweiler v Clark Co 108 Wn. App. 91, 29 P.3d 758 (2001) & Currens v. Sleek 138 Wn.2d 858, 983 P.2d 626, 993 P.2d 900 (1999) have set forth an exception to the “common enemy rule”:

“Another exception provides that surface waters may not be artificially collected and discharged on adjoining lands in quantities greater than or in a manner different from the natural flow thereof. It is not permitted to concentrate and gather such water into artificial drains or channels and throw it on the land of an individual owner in such manner and volume as to cause substantial injury to such land and without making adequate provision for its proper outflow, unless compensation is made.” [emphasis added]

The “rule” in Washington allows landowners to alter the flow of surface water and discharge it on their neighbors property, “*so long as they do not block a watercourse or natural drainway, nor collect and discharge water onto their neighbors' land in quantities greater than, or in a manner different from, its natural flow*”. It is undisputed by the Respondents that they have collected, channeled and diverted public stormwaters and discharged these public stormwater onto private property (1) “*in quantities*

greater than... the natural flow thereof” and (2) without “*making adequate provision for its proper outflow*”.

It is likewise undisputed that the means that the Respondents used was to collect stormwaters from forty [40] to fifty [50] acres and divert these channeled and collected stormwaters from their natural drainway along the western side of 25th Ave NE from NE 175th St. to NE 178th St. The Respondents’ public stormwater system which channels the water along the western side of 25th Ave N.E. if un-diverted and undisturbed would result in the public stormwaters flowing downhill on the western side of 25th Ave N.E. from NE 175th St. to NE 178th St. It is also undisputed that Respondents have not ever abated the collection and channeling of public stormwaters which are being discharged onto private property.

It is also undisputed that the Respondents’ continuous trespass can easily be abated which is Respondents’ continuing duty as described in Fradkin (supra), all with a minimum of effort. It would be a very easy matter to simply block the diversion pipe, which diverts the collected, channeled and diverted public stormwaters and once the diversion pipe is blocked, these public stormwaters will flow downhill on 25th Ave. NE in the established drainway from NE 175th St. to NE 178th St.

In consequence of the above referenced undisputed facts and law the Appellant respectfully request that the Court of Appeals reverse the trial

courts Order of Summary Judgment dismissing Appellants case in full as there is clear and convincing evidence of Appellant's claim of a continuous trespass.

An Abatement is Necessitated in a Case of Continuous Trespass in Order to make Sense of the Woldson (supra) holding:

As the Court held in Fradkin (supra):

The trespasser is under a continuing duty to remove the intrusive substance or condition.

And as the court explained in Woldson (supra) the trespasser's failure to comply with this duty creates a limited cause of action:

"...prospective damages are not allowed; if the trespass continues past trial, successive suits may be brought to remedy such injuries until the trespass ceases..."

Therefore it is important that the Appellate court enter an order consistent with Appellant's motion for partial summary judgment compelling the Respondents to immediately abate the collecting, channeling and diversion of public stormwaters and discharging of these public stormwater onto private property and immediately block the diversion pipe. In order to accurately calculate the damages of the Appellant's injuries from the continuous public stormwater trespass the Respondents must be ordered to abate the continuous trespass, to do otherwise would leave the Appellant

with the empty “*right to bring suit every three years for damages*” but unable to use the property to its highest and best use until an abatement is ordered. Without an order of abatement the Appellant is left with a significant interference with Appellant’s property rights so as to effect a key fundamental attribute of property ownership. The Appellant’s property would become effectively, economically and permanently unbuildable.

Clearly it is time that the Woldson (supra) holding that “...**successive suits may be brought to remedy such injuries until the trespass ceases...**” is clarified regarding when this never ending succession of lawsuits every three years, becomes an “unconstitutional taking”. As illogical as it would appear from a cursory reading of the Woldson (supra) holding the court would leave an injured plaintiff to only one remedy i.e. to bring a lawsuit every three [3] years until at some point the trial court realizes that there has been a de facto permanent “unconstitutional taking” of private property.

If the Court of Appeals fails to order the Respondents to abate the continued collecting, channeling and diversion of public stormwaters and discharging these public stormwater onto private property then Appellant is denied its constitutional right to due process being left in a limbo of uncertainty where Appellant’s only recourse is to bring an unending series

of lawsuits UNTIL an abatement is ordered. As has been stated above it is undisputed that the Respondents have been collecting, channeling and diverting public stormwaters and discharging these public stormwater onto private property without making any provision for the outflow thereof for a number of years despite promises to make provisions for the outflow or abating the problem. They have to date never abated this collection, channeling and diversion of public stormwaters and discharging of these public stormwater onto private property. Appellant rather than attempting to devise some mathematical model to determine how many of these three (3) year lawsuits as suggested by the Woldson (supra) holding are needed before the court says “enough is enough”, Appellant suggests a more reasoned approach. Clearly at some point in time after “enough” years of lawsuits has passed all reasonable parties would acknowledge that the continuous trespass is no longer a temporary action but an “unconstitutional taking” in violation of Article 1 Section 16 of the Washington State Constitution. Rather than engage in a mathematical uncertainty, and because it would be difficult to ascertain when “enough is enough” a more reasoned approach would be to interpret the Woldson (supra) holding so that (1) judicial economy is met and (2) the holding meets some form of common sense. This would also avoid a situation where the trespasser might decide that paying a judgment amount every

three (3) years in “rent” for using someone’s property as a retention pond’ as in the instant case, is more economical than paying the full purchase price of the property for having taken it. To that end Appellant would recommend to the Court of Appeals that the court make the following interpretation / clarification of Woldson (supra):

“...*prospective damages are not allowed; if the trespass continues past trial* **and the Defendant fails to abide by the trial court’s order of abatement, once the Court so orders, then the Plaintiff shall be required to bring/ successive suits may be brought [in order]** *to remedy such injuries until the trespass ceases.*“ {the words in “*italics*” are the original text of the ruling – those words in **bold and underlined** are the Appellant’s suggested reasoned interpretation thereof which would (1) met the desire for judicial economy [eliminating the need for a long series of lawsuits] and the “clarified” holding (2) makes common sense}. Consequently in future the trial court in the first instance would order an abatement of the continuing trespass and then only if the offending party refuses to obey a lawful court order would there be a necessity for future lawsuits on this same issue. To hold otherwise means that until the trial court finally orders an abatement then

allowing an action for an “unconstitutional taking” is arguably the only solution.

Article 1 Section 16 of the Washington State Constitution states that:

- a. **“SECTION 16 EMINENT DOMAIN.** Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefore be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such,

without regard to any legislative assertion that the use is public: *Provided*, That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.” [emphasis added]

Consequentially the only reasonable way to avoid an “unconstitutional taking” of private property by a never ending succession of lawsuits for each three (3) year period of continuous trespasses by public stormwater, would be to order that the Respondents be required to immediately abate the continuous trespass and block the diversion pipe and let the stormwaters flow downhill on the western side of 25th Ave N.E. from NE 175th St. to NE 178th St. Appellant respectfully requests that the Court of Appeals grant Appellant’s motion for partial summary judgment and require that the Respondents immediately abate the discharge of public stormwaters onto private property and block the diversion pipe which discharges these public stormwaters onto private property, thereby allowing the public stormwaters to naturally flow down the western side of 25th Ave NE from NE 175th St. to NE 178 St. which it would normally do BUT FOR the diversion through a pipe across 25th Ave. NE from west to east onto private property.

Equitable Relief is not Available to the Respondents Where they lack

“Clean Hands”:

The Respondents have no claim in equity to avoid the consequences of their continuous trespass regardless of the number of years the condition has existed. The trial court's disingenuous inference that Respondents are entitled to some undefined form of equity relief is negated by the Respondents' conduct which establishes their lack of "clean hands". Any delay in bringing suit or other equitable claim arising out of the number of years the Respondents and their predecessors in interest have willfully, knowingly and deliberately dumped public stormwaters on private property and all the while making misrepresentations, false promises and assertions to the trespass victims. Respondents have consistently failed to abate the continuous trespass and rather than address the situation forthrightly they have set forth various misrepresentations and deceptive practices in order to lull the affected private property owners into a false sense of security and a belief that the Respondents would quickly abate the stormwater trespass. It is undisputed that the Respondents have made various promises over the years that they would make either provisions for the outflow of the public stormwaters or abate the diverted stormwaters which Respondents have collected, concentrated, channeled and discharged onto private property and thereby eliminate the adverse impact on Appellant's lots 6, 7 or on lot 8. It is equally undisputed that the Respondents have never abated or eliminated the discharge of public

stormwaters onto private property which Respondents have collected, concentrated, channeled, diverted from their normal flow and discharged onto private property which adversely impact Appellant's lots 6 & 7. The general equitable rule regarding "clean hands" is summarized in Income Investors Inc v. Chauncey w. Shelton 3 Wn.2d 599 101 P. (2d) 973 (1940)

"It is a well-known maxim that a person who comes into an equity court must come with clean hands. A person may, by his misconduct, be precluded from a right to an accounting in equity by virtue of the maxim stated. 1 Am. Jur. 304, § 56; 1 C. J. S. 661, § 29; Macauley v. Elrod, 16 Ky. L. 549, 28 S. W. 782, 29 S. W. 734. Equity will not interfere on behalf of a party whose conduct in connection with the subject matter or transaction in litigation has been unconscientiously, unjust, or marked by the want of good faith, and will not afford him any remedy. 1 Pomeroy's Equity Jurisprudence (4th ed.), 739, § 398; Dale v. Jennings, 90 Fla. 234, 107 So. 175; Bearman v. Dux Oil & Gas Co., 64 Okla. 147, 166 Pac. 199; Dewese v. Reinhard, 165 U. S. 386, 41 L. Ed. 757, 17 S. Ct. 340. Other authorities might be cited, but the rule appears to be universal. If the parties were guilty of the conduct which the trial court found that they were, the appellant comes squarely within the rule that equity will deny it relief, because coming into a

court of equity and asking relief after willfully concealing, withholding, and falsifying books and records, is certainly not coming in with clean hands.”

Based upon the a review of the above legal and factual issues it is clear that Respondents do not have “clean hands” and are not entitled to equitable relief. Therefore Appellant respectfully request that the Court of Appeals reverse the trial courts Order of Summary Judgment dismissing Appellants case in full as (1) there is clear and convincing evidence of Appellant’s claim of a continuous trespass and (2) the Respondents’ because of their lack of good faith are not entitled to equitable relief. Further the court should order that the Respondents be required to immediately abate the continuous trespass and block the diversion pipe and let the stormwaters flow downhill on the western side of 25th Ave N.E. from NE 175th St. to NE 178th St.

CONCLUSION:

It is undisputed that the Respondents have collected and channeled public stormwaters by artificial means and diverted these public stormwaters from their normal flow by re-directing them through a pipe across 25th Ave NE from west to east, which pipe daylights on Eric Gorbman’s lot 8 and the public stormwaters surface in pools on lots 6 & 7... on the land of a private person, to *his or her* [the Appellant’s] injury, which is a

continuous trespass. Further it is also undisputed that the Respondents could easily abate or eliminated the discharge of public stormwaters. In consequence of the above referenced undisputed facts and law regarding continuous trespass outlined in Phillips (supra) Fradkin (supra) and Woldson (supra) the Appellant respectfully request that the Court of Appeals reverse the trial courts Order of Summary Judgment dismissing Appellants case in full as there is clear and convincing evidence of Appellant's claim of a continuous trespass.

Further the only reasonable way to avoid an "unconstitutional taking" of private property by a never ending succession of lawsuits for each three (3) year period of continuous trespasses by public stormwater, would be to order that the Respondents be required to immediately abate the continuous trespass and block the diversion pipe and let the stormwaters flow downhill on the western side of 25th Ave N.E. from NE 175th St. to NE 178th St.

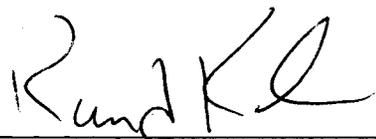
Based upon the a review of the above legal and factual issues regarding Respondents' misrepresentations and false promises it is clear that Respondents do not have "clean hands" and are not entitled to equitable relief. Therefore Appellant respectfully request that the Court of Appeals reverse the trial courts Order of Summary Judgment dismissing Appellants case in full as there is clear and convincing evidence of Appellant's claim

of a continuous trespass. Further the court should order that the Respondents be required to immediately abate the continuous trespass and block the diversion pipe and let the stormwaters flow downhill on the western side of 25th Ave N.E. from NE 175th St. to NE 178th St.

Relief Sought:

Reverse the trial court's Order of Summary Judgment on behalf of Respondents and deny Respondents' motion for summary judgment as unsupported in fact or in law. Grant Appellant's motion for partial summary judgment and enter an order that Respondents immediately abate the diversion of the collected & channeled public stormwater from approximately forty [40] to fifty [50] acres of city residences, by blocking the pipe which diverts the aforementioned water across 25th Ave. NE from west to east and allow the public stormwater to flow downhill along the west side of 25th Ave. NE from the NE 175th St. to NE 178th St.

Dated this 13th day of January, 2011.



Rand L. Koler, WSBA # 7679
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on January 13, 2011, I caused a true and correct copy of the Appellant Brief to be served on the following in the manner indicated below to the following counsel of record:

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