

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY JW
DEPUTY

No. 41353-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

KIM LORD, Personal Representative
of the Estate of Barbara Winde,

Appellant

v.

PIERCE COUNTY,

Respondent

BRIEF OF APPELLANT

Thomas J. Westbrook, WSBA #4986
Attorney for Appellant

Law Office of Thomas J. Westbrook, PLLC
P.O. Box 1
Little Rock, Washington 98556-0001
(360) 357-7400
tjw@w3net.net

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A. INTRODUCTION

This case involves the efforts of a landowner to protect his property from damage due to surface water flooding of the Puyallup River. The subject property has been frequently and significantly damaged due the surface waters from flood events over the past 20 years. Having unsuccessfully tried to protect the property during the past flood events by taking increasingly aggressive emergency actions in the face of each flood event, in 2009 Mr. Lord constructed a dirt levee to protect his property. As the project was being completed, Pierce County issued a stop work order and Correction Notice/Cease and Desist Order claiming that Mr. Lord was in violation of the land use and storm water regulations of the Pierce County Code for failure to get a permit prior to taking his protective action. Mr. Lord appealed the administrative action of Pierce County to the Pierce County Hearing Examiner. The Hearing Examiner denied the appeal. Mr. Lord then filed a Petition for Review of Land Use Decision to the Thurston County Superior Court. The Court affirmed the primary findings and conclusions of the Hearing Examiner concluding that the common enemy doctrine did not exempt Mr. Lord from Pierce County's permitting requirements. Accordingly, Mr. Lord made this appeal.

B. ASSIGNMENTS OF ERROR AND ISSUES

ASSIGNMENTS OF ERROR

The trial court erred in entering its Order on LUPA Petition dated September 23, 2010 by affirming the decision of the Pierce County Hearing Examiner on AA 17-09 upholding the Correction Notice/Cease and Desist Order dated October 5, 2009.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was the action of Mr. Lord to protect the subject property from surface water flooding of the Puyallup River the kind of action of a landowner is authorized to take under the common enemy doctrine?

2. Does either RCW 86.12 or the flood control regulations by Pierce County under Titles 17A and 18 of the Pierce County Code (PCC) supercede, amend, or eliminate the common enemy doctrine?

3. Did the Hearing Examiner erroneously conclude that based upon RCW 86.12 and the adoption of flood control regulations by the Pierce County Council that the common enemy doctrine does not negate or amend the enforcement of those regulations?

C. STATEMENT OF THE CASE

Procedural History.

Pierce County issued a Correction Notice/Cease and Desist Order dated October 5, 2009 regarding activity on Parcel No. 0520303022 in the Rural 10 (R10) zone classification, located at

7426 Riverside Road East, Sumner, Washington in Pierce County. AR¹ 26 & 27. The property subject to the referenced Correction Notice/Cease and Desist Order is owned by the Estate of Barbara Winde.

Mr. Lord, as Personal Representative of the Estate of Barbara Winde, timely appealed the Correction Notice/Cease and Desist Order on October 16, 2009. AR 27& 33-36.

The appeal by Mr. Lord was assigned Case No. AA17-09 and hearing was held before Pierce County Hearing Examiner, Stephen K. Causseaux on March 4, 2010. AR 2&3.

Mr. Lord's appeal was denied by the Hearing Examiner on April 20, 2010. AR 2 &19.

On May 12, 2010, Mr. Lord timely filed a Petition for Judicial Review of Land Use Decision of the Hearing Examiner denying his appeal. CP 4-28.

By entry of the Order on LUPA Petition dated September 29, 2010, the Thurston County Superior Court affirmed the Hearing Examiner decision in part, finding that the Common Enemy Doctrine did not exempt Mr. Lord's actions from the permitting requirements of the Pierce County Code. CP 77.

Factual Background.

The subject property is located immediately adjacent the Puyallup River in what is referred to as the "Riverpark Community". AR 106, 108, 146, 148, 169 & 172.

1 - AR stands for Administrative Record

The Puyallup River has flooded the property several times over the past 20 years; specifically in 2009, 2006, 1996, 1995, 1990 & 1986. *AR 152*. The subject property has been substantially damaged during each of these flood events. Mr. Lord has attempted in the past to protect the property by taking incrementally increasing actions to no avail. *AR 8-9, TP 119-128*.

The most recent flood on January 7, 2009 caused serious damage to the entire Riverpark Community, including the subject property. This was the second flood in three years. *AR 8 & 148*. The 2009 flood was relatively fast to rise to its crest and destroyed the temporary dike being constructed by Mr. Lord to protect his property. *AR 8-9, 12, 154, 163, 165, 166, & 178 – 184*. After breaching the river and temporary dike, the flooding wrecked havoc and substantial damage to the Riverpark Community and Mr. Lord's property. *AR 12, 155 & 196 – 212*.

Mr. Lord attempted to take emergency action to protect his property by building a temporary dike on January 7, 2009 after learning from the Weather Service that the Puyallup River was projected to flood that day. *AR 5-6, 8-9 & 12*. In anticipation of a possible flood, he had taken preliminary action to have a contractor, equipment and ecology blocks staged to build the temporary dike. *AR 5-6 & 8-9 and TP 52-542*. In spite of his emergency efforts, a proper dike could not be built in time to protect his property. *AR 5-6, 8-9, 149 & 151 and TP 119-123*.

2 - TP stands for Transcript of Proceedings

It was the conclusion of Michael Ryan, PE and John W. Burkholder, AICP and CEO of HBA Design Group, LLC that it is not reasonably possible for the reasonable and prudent property owner to actually protect their property from flood damage by trying to take adequate emergency protective action after receiving notification by Pierce County or the US Weather Service that the Puyallup River is expected to flood. It was also their conclusion that the prudent action of a property owner in the Riverpark Community, having received prior advanced warning by Pierce County to take protective action in anticipation of flood season, would be to build a protective dike in advance of any actual notification of a flood event. *AR 10, 162 & TP 168-169, 175-176.*

Kim Lord, along with other Pierce County residents had received advanced written notification by Pierce County through a pamphlet distributed to county residents by the County in August 2009 called "Earth Matters". *AR 8, 12-13 and TP 128-131.* This pamphlet warned residents that "serious flooding may occur in some areas of Pierce County this winter. Prepare now to help keep you family and property safe during the flood season (usually October through March)." *AR 12.* The pamphlet also tells residents to "make an emergency plan...." *AR 144 & 186* This warning included a picture of the Riverpark community during the 2006 flood to show residents how serious of a flood they might expect. Mr. Lord's property was shown in this picture as well. *AR 144, 187.*

Acting as a prudent person, he considered what he should do. *AR 9, 188 and TP 131-134*. As suggested in the Pierce County pamphlet, Mr. Lord made an emergency plan. He used dirt on his property to construct a dirt levee to protect his property. *AR 5-6, 8-9, 10 & 12 and TP 46-47 & 128-133*. Based upon a call from a neighboring property owner Pierce County investigated the work by Mr. Lord and issued the Correction Notice/Cease and Desist Order without even talking to him or inquiring about why he took the action he took. *AR 27 and TP 137*.

Mr. Lord appealed the Correction Notice/Cease and Desist Order claiming his action was allowed under the PCC as an exemption under PCC 17A.10.050(B) and 18E.20.030(1). *AR 35-36*. He also argued during his appeal as inquired by the Hearing Examiner that his actions were warranted under the “common enemy doctrine”. *AR 18&19 and TP 138 & 182*.

Pierce County argued that Mr. Lord’s actions were not exempt from their regulations and required a site development permit. *AR 4*.

D. LEGAL ANALYSIS AND ARGUMENT

STANDARD OF REVIEW. LUPA governs land use appeals in Washington State. RCW 36.70C.030. Each appellate court reviews the original administrative decision based upon the original administrative record. *HJS Development, Inc. v. Pierce County ex rel. Dept. of Planning and Land Services*, 148 Wn.2d 451, 468, 61 P.3d

1141 (2003). The standards for review of a LUPA appeal are set out in RCW 36.70C.130(1). Weyerhaeuser v. Pierce County, 95 Wn. App. 883, 889, 976 P.2d 1279 (1999).

This Court may reverse the Hearing Examiner Decision if any one of six standards enumerated in 36.70C.130(1)(a-f) are present. In this appeal, Mr. Lord is challenging the Hearing Examiner's decision based upon the following standards:

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(d) The land use decision is a clearly erroneous application of the law to the facts.

ISSUE NO. 1. Were the actions of Mr. Lord authorized under the common enemy doctrine?

Mr. Lord's actions to protect his property from the flood waters of the Puyallup River were warranted under application of the common enemy doctrine. He has had many years of experience dealing with the flood waters of the Puyallup River, trying to protect his property and dealing with the resulting damage. In 2009, he conclusively learned that he could not wait until the flood emergency was upon him to take action. In the instant case, Mr. Lord knew that to

protect his property from a serious flood, he would have to take protective action before the flood occurred. *AR 8-9 and TP 119-123*. There was no evidence presented to the Hearing Examiner to indicate the actions of Mr. Lord were not proper or prudent under the circumstances. There was substantial evidence that his actions were prudent.

The common enemy doctrine, which provides the basic right of a landowner to protect their property from damage due to surface water, has been a fundamental rule of law in this State for over a century. That rule provides that surface water is "an outlaw and a common enemy against which anyone may defend himself, even though by so doing injury may result to others." *Cass v. Dicks*, 14 Wn. 75, 78, 44 P. 113 (1896).

The common enemy doctrine has been continued by our Supreme Court in a series of surface water cases in more recent years, most notably, *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 607, 238 P.3d 1129 (2010), *Halverson v. Skagit County*, 139 Wn.2d 1, 983 P.2d 643, (1999) and *DiBlasi v. City of Seattle*, 136 Wn.2d at 875, 969 P.2d 10 (1998).

While the line of current decisions upholding the common enemy doctrine have generally been related to issues of liability or

inverse condemnation, there is no case law in this state limiting application of the doctrine to such situations.

The basic right afforded a landowner is to protect their property from damage by surface water as stated in *Halverson, Supra at 15*, (quoting *Morton v. Hines*, 112 Wn. 612, 617, 192 P. 1016 (1920)):

“Under longstanding Washington law, [w]aters escaping from the banks of a river at times of flood are surface waters, and are waters which an owner of land may lawfully protect against by dikes and fills on his own property, even though the effect is to cause an increased flow of water on the lands of another to the damage of his lands.

This is clear language from our State Supreme Court stating that an owner of land may lawfully protect his land against surface waters by building a dike on his own property. It follows by common sense then that Mr. Lord was lawfully within his right to protect his property from the surface waters of the Puyallup River by building the dirt levee (dike) that he built.

The Hearing Examiner erroneously interpreted the law when he concluded that the common enemy doctrine was not applicable to Mr. Lord’s circumstance or that his actions were not lawful without a permit from Pierce County.

Mr. Lord was fully within his legal right to take action to protect his property from the continual damage caused by the flood waters of

the Puyallup River. He took the action that a prudent person would take to protect his property under the circumstances he was confronted. *AR 10, 12 and TP 138*. Whether he used sand bags or dirt without bags to build his levee, it does not matter. The common enemy doctrine does not limit the nature, type, size or scope of a protective levee. Mr. Lord's actions were well grounded within the common enemy doctrine to protect his property from the common enemy flood waters.

ISSUE NO. 2. Does either RCW 86.12 or the flood control regulations by Pierce County under Titles 17A and 18 of the Pierce County Code (PCC) supercede, amend, or eliminate the common enemy doctrine?

Mr. Lord contends that Conclusion of Law No. 10 of the Hearing Examiner was erroneous when the Hearing Examiner stated:

“However, upon further reflection, based upon RCW 86.12 and the adoption of flood control regulations by the Pierce County Council, the Examiner must interpret and enforce said regulations and cannot apply the Common Enemy Doctrine in a manner to amend or negate such regulations.”

In 1935, the legislature enacted RCW 86.16. The purpose of the act is to alleviate flood damage to property, natural resources, and health and safety. *Maple Leaf Investors v. Department of Ecology*, 88 Wn.2d 726, 730, 565 P.2d 1162 (1977). While this act

does not preclude any county, city or town from establishing land use control measures in areas subject to flooding or flood damages (*RCW 86.16.160*), it does not abrogate the common enemy doctrine or any basic rule allowing private citizens to protect their property from surface water damage. It also does not place the burden of protecting the property of private citizens upon any county or other political subdivision. In fact, the legislature has gone so far as to grant immunity to counties or political subdivisions from any liability due to their actions for any noncontractual acts or omissions relating to the improvement, protection, regulation, and control for flood prevention and navigation purposes of any river or its tributaries and the beds, banks, and waters thereof. *RCW 86.12.037*.

Clearly, the burden to protect their private property remains upon each citizen; not upon a county. Mr. Lord understood that it was his burden and that the County would not take on that burden. Protecting his property was solely up to him. *TP 138*.

In 1991, our legislature enacted *RCW 86.12* to regulate flood control actions by Counties. *RCW 86.12.200* allows a County to adopt a comprehensive flood control management plan for any drainage basin that is located wholly or partially within the county. The legislative purpose of this law is as follows:

Findings -- Intent -- 1991 c 322: "(1) The legislature finds that:

(a) Floods pose threats to public health and safety including loss or endangerment to human life; damage to homes; damage to public roads, highways, bridges, and utilities; interruption of travel, communication, and commerce; damage to private and public property; degradation of water quality; damage to fisheries, fish hatcheries, and fish habitat; harm to livestock; destruction or degradation of environmentally sensitive areas; erosion of soil, stream banks, and beds; and harmful accumulation of soil and debris in the beds of streams or other bodies of water and on public and private lands;

(b) Alleviation of flood damage to property and to public health and safety is a matter of public concern;

(c) Many land uses alter the pattern of runoff by decreasing the ability of upstream lands to store waters, thus increasing the rate of runoff and attendant downstream impacts; and

(d) Prevention of flood damage requires a comprehensive approach, incorporating storm water management and basin-wide flood damage protection planning.

(2) County legislative authorities are encouraged to use and coordinate all the regulatory, planning, and financing mechanisms available to those jurisdictions to address the problems of flooding in an equitable and comprehensive manner.

(3) It is the intent of the legislature to develop a coordinated and comprehensive state policy to address the problems of flooding and the minimization of flood damage." [1991 c 322 § 1.]

This statute shows a clear manifestation by the legislature that flood control is of paramount importance to the safety of people and their property. The statute does not take away from a private citizen's right to protect their own property – it simply elevates flood control and prevention of flood damage as a public health and safety concern

in this State and encourages counties to address the problems of flooding in an equitable and comprehensive manner.

A law abrogates the common law only when the provisions of the statute are so inconsistent with and repugnant to the common law that both cannot be simultaneously in place. Potter v. Washington State Patrol, 196 P.3^d 691, 165 Wash.2d 67 (2008).

RCW 86.12.200(3) allows Counties to establish land use regulations that preclude the location of structures... in critical portions of such areas subject to periodic flooding.... and RCW 86.12.200(4) allows Counties to establish restrictions on construction activities in areas subject to periodic flood that require flood proofing of structures permitted to be constructed or remodeled. But no part of this law takes away a landowner's right to protect their property from flood damage when their property and structures are already in "harm's way". While the law does talk about precluding the location of structures in such areas, it does not speak to the protection measures as to structures already in place. Many people in this State own and live in homes that were built in areas that were not considered flood control zones many years before these statutes or ordinances became law. If the legislature did not want those people to have the right to protect their property by their own actions, they would have

clearly stated that intention and would have abrogated or amended the common enemy doctrine to provide so. That was not done. While the right to build new structures upon a person's land or to create new land uses may be regulated by Pierce County, a person's right to protect themselves and their existing structures and property from flood waters under the common enemy doctrine has not been abrogated or granted to any County.

The clear legislative intent of RCW 86.12 and specifically RCW 86.12.200 as it applies to the actions of Mr. Lord and the regulatory authority of Pierce County is that the legislature is asking counties to address the hazards, damage and problems of flooding and to minimize flood damage to homes and human life as well as other concerns. There is no stated purpose to disallow a property owner to protect their private property from surface water and there is no abrogation or amendment of the common enemy doctrine.

Our State legislature has spoken. While they want to see actions taken by county governments that protect private and public property and the citizens of the State from damage due to flood waters, they have not taken any step to remove the underlying and fundamental right of a citizen to take protective action on their own accord.

The rule of law established by the common enemy doctrine has not been superseded, amended, or eliminated by our State legislature and cannot be done so administratively by Pierce County. As Justice Hale once stated, “[r]ules of law, like governments, should not be changed for light or transient causes.” State ex rel. Wash. State Finance Comm. v. Martin, 62 Wash.2d 645, 666, 384 P.2d 833 (1963) as cited in Currens v. Sleek, 138 Wash.2d 858, 983 P.2d 626 (1999).

ISSUE NO. 3: Did the Hearing Examiner erroneously conclude that the common enemy doctrine does not negate or amend the permitting requirements and enforcement of the Titles 17A and 18 of the Pierce County Code (PCC)?

The actions taken by Mr. Lord to build a dirt levee to protect the subject property and his life from the “common enemy” flood waters of the Puyallup River are not subject to the permitting requirements of Pierce County. He was simply taking a lawful action he is entitled to take under the common enemy doctrine.

The Hearing Examiner erroneously concluded that the Pierce County Code controlled the right of Mr. Lord to protect himself and his property from the damage of the flood waters of the Puyallup River. Pierce County has not been granted and does not have any legislative authority or mandate to restrict or prohibit private citizens

from availing themselves of a well established rule of law. It is clear from the cases decided by our State Supreme Court that the common enemy doctrine has continued as a rule of law subsequent to the enactment of either RCW 86.12 or RCW 86.16 and PCC 17A or PCC 18; as late as 2010 in *Fitzpatrick v. Okanogan*.

Since the legislature has not abrogated or otherwise amended the common enemy rule of law and Pierce County has not been granted any authority to take such action administratively, the actions of Mr. Lord to protect himself and his property were lawful actions under the common enemy doctrine.

E. CONCLUSION.

The common enemy doctrine allows Mr. Lord to take the action he took to protect the subject property and his life from the flood waters of the Puyallup River. The Hearing Examiner's denial of Mr. Lord's appeal of the Corrective Notice/Cease and Desist Order dated October 5, 2009 is based upon an erroneous interpretation of the law and that decision must be reversed to grant Mr. Lord's appeal and to extinguish the Corrective Notice/Cease and Desist Order.

The common enemy doctrine has not been abrogated or amended by our State Legislature and Pierce County has not been granted any authority to amend or otherwise supercede the

application of the common enemy doctrine. The land use regulations of PCC 17A and PCC 18 do not control the actions taken by Mr. Lord. The land use decision by the Hearing Examiner denying Petitioner's appeal of the Stop Work Order and Corrective Notice/Cease and Desist Order is erroneous application of the law to the facts and must be reversed to grant Mr. Lord's appeal and to extinguish the Corrective Notice/Cease and Desist Order.

DATED this 11th day of January, 2011

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Tom Westbrook", written over a horizontal line.

Thomas J. Westbrook, WSBA #4986
Attorney for Appellant, Kim Lord

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 12th day of January, 2011 he
caused service of this Brief of Appellant to be made upon the
Respondent, Pierce County, by US Mail, postage pre-paid and by e-
mail to:

Cort T. O'Connor
Deputy Prosecuting Attorney
Office of Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
(253) 798-6732
coconno@co.pierce.wa.us

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BY _____
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Dated this 12th day of January, 2011.


Thomas J. Westbrook, WSBA#4986