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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY Cn
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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

REPLY BRIEF OF APPELLANT

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Attorney for Appellant

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TABLE OF CONTENTS

A. INTRODUCTION	1
B. STATEMENT OF THE CASE	1
C. LEGAL ANALYSIS AND ARGUMENT	1
The Hearing Examiner did not correctly decide that the common enemy doctrine did not apply to this case	1
D. CONCLUSION	5
E. CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

Table of Cases

Washington Cases

Cass v. Dicks, 14 Wn. 75, 78, 44 P. 113 (1896) 2

Arborwood Idaho, LLC v. City of Kennewick, 151 Wn.2d 359,
367, 89 P.3d 217 (2004) 3

State v. Engel, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009) 3

McNeal v. Allen, 95 Wn.2d 265, 269, 621 P.2d 1285 (1980) 4

Washington Statutes

RCW 86.12 4

RCW 86.12.200 3

Court Rule

ER 201(b) 4

A. INTRODUCTION

The primary question before this Court is whether the actions of Mr. Lord to build an earthen levy to protect his property from flood waters of the Puyallup River were allowed pursuant to the common enemy doctrine or were required to be permitted by Pierce County. Mr. Lord argues that he is not required to have his protective levy permitted. Pierce County argues he must first receive a permit before he can take action to protect his property from the flood waters.

B. STATEMENT OF THE CASE

Pierce County incorrectly states on page 3 of their Brief of Respondent that Mr. Lord testified that this was his second attempt at building an unpermitted levee citing *TP 120-123*. Mr. Lord did not make that statement. Instead, he stated that it was his second attempt at building a levee to protect his property. Pierce County then goes on to incorrectly state that Mr. Lord testified that he has vulnerable tenants living on his property so he constructed another unpermitted levee to protect them, citing *TP 127*. Mr. Lord did not use the word unpermitted or vulnerable tenants – those are Pierce County's words.

D. LEGAL ANALYSIS AND ARGUMENT

REPLY ISSUE: The Hearing Examiner did not correctly decide that the common enemy doctrine does not apply to this case.

Pierce County argues that the common enemy doctrine is only

a defense to liability where one property owner diverts surface water, causing injury to another property owner, or is used as a shield to liability in tort or inverse condemnation cases. While there is no argument that the cases they cite for this proposition are correctly cited or applied, none of the cases cited by Pierce County hold that the common enemy doctrine can only be applied in those same circumstances or is in any way limited only to those types of cases.

The common enemy doctrine at its very core provides the basic right of a landowner to protect their property from damage due to surface water. The rule holds 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). There has never been a case in this State that holds the common enemy doctrine is only applicable to liability, tort or inverse condemnation cases. Pierce County has provided no authority for their position because there is no such authority or limitation.

Pierce County next argues that their permit requirements operate independently of tort and taking defenses. Since this case is not about tort or taking defenses, this argument is not even an issue in this case and is irrelevant.

Pierce County correctly states that RCW 86.12.200 authorizes counties to adopt comprehensive flood control management plans, but there is nothing in the statutory scheme that supercedes, amends, or eliminates the common enemy doctrine. "The court's fundamental objective in construing a statute is to ascertain and carry out the legislature's intent." Arborwood Idaho, LLC v. City of Kennewick, 151 Wn.2d 359, 367, 89 P.3d 217 (2004).

RCW 86.12.200 is the genesis for a county to adopt flood control regulations. How that statute is interpreted begins with its plain meaning. Plain meaning "is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." State v. Engel, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009).

It is clearly articulated in the statute and in the statutory intent of the legislature that the primary purpose of RCW 86.12.200 is to protect property and human life from floods and to minimize flood damage. However, counties were not given the responsibility for such protection – in fact, they were granted immunity from such damage. It is still the responsibility of each landowner to protect their own property from flooding. We see people on the television news during

flooding events routinely taking action to protect their property as a matter of course. No one is worried about permits – only protection. Local jurisdictions often provide sand bags for landowners to build a protective levee to keep their property out of harm's way of the flood waters. Judicial notice can be taken of such actions. *ER 201(b)*.

There is nothing stated in RCW 86.12 that takes away from a private citizen's common law right to protect their own property. Statutes in derogation of the common law are strictly construed and no intent to change that law will be found unless it appears with clarity. *McNeal v. Allen*, 95 Wn.2d 265, 269, 621 P.2d 1285 (1980). There is no such intent in RCW 86.12 to abrogate or modify the common enemy doctrine, nor were counties given any administrative authorization to do so.

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. Since the rule of law established by the common enemy doctrine has not been superseded, amended, or eliminated by our State legislature; it cannot be done so administratively by Pierce County.

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.

Finally, Pierce County argues in its Brief for the first time that the character of the water is irrelevant in this appeal. That statement alone gives a clear indication of the County's lack of understanding of the issue at hand and the application of the common enemy doctrine. Mr. Lord would have no reason to build a dike or levee to protect his property but for the flood waters (surface waters) of the Puyallup River that have ravaged his property for years. If these flood waters did not exist or occur, this appeal would not exist. His purpose was simply to protect his life and his property, as well as the life and property of tenants living on his property. That is the purpose of the common enemy doctrine.

D. CONCLUSION.

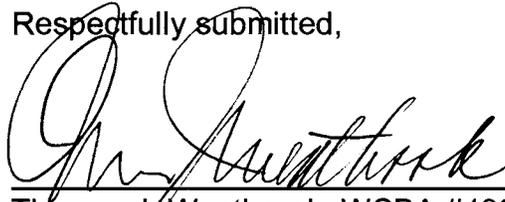
The common enemy doctrine allows Mr. Lord to take the action he took to protect the subject property and his life from the flood waters of the Puyallup River. The Hearing Examiner's denial of Mr. Lord's appeal of the Corrective Notice/Cease and Desist Order dated October 5, 2009 is based upon an erroneous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

It is not the affirmative duty of any county to take action to protect private property or private citizens; it is only the administrative duty to regulate pursuant to RCW 86.12. Certainly the regulation of new buildings and property development in flood control zones or floodways falls within the purview of Pierce County under RCW 86.12, but the rights of a private citizen to protect themselves and their property that is already located in harm's way of surface waters is still sacrosanct.

DATED this 10th day of March, 2011

Respectfully submitted,

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

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

CERTIFICATE OF SERVICE

The undersigned certifies that on the 10th day of March 2011 he caused service of this Reply Brief of Appellant to be made upon the Respondent, Pierce County, by US Mail, postage pre-paid and by e-mail to:

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Dated this 10th day of March, 2011.


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