

NO. 42110-1-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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KYLE WOOD and TAMMY WOOD,

Appellants,

v.

MASON COUNTY,

Respondent.

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BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....	1
III. STATEMENT OF THE CASE .....	2
IV. ARGUMENT.....	6
A. The Claims Arising From Mason County’s Inspection and Enforcement Are Barred by the Public Duty Doctrine. ....	6
1. The Public Duty Doctrine Defines When a County Has an Actionable Duty to a Plaintiff. ....	6
2. The Legislative Intent Exception Has No Application in this Case.....	10
3. The “Failure to Enforce” Exception Does Not Apply. ....	13
4. None of the Elements of the “Special Relationship” Exception is Present.....	25
B. The Waste Statute is Not Applicable to the Claim Against Mason County. ....	27
C. The Claims of Civil Conspiracy Are Entirely Groundless. ....	29
D. The Trespass Claim is Barred by Prescription. ....	33
1. The Defense of Prescriptive Easement Was Timely Raised by Mason County. ....	33
2. The Facts Establishing a Prescriptive Easement are Clear and Undisputed.....	36
3. Wood Has Presented No Evidence of Misuse of the Easement. ....	42
4. Plaintiffs’ Did Not Plead a Public Nuisance Claim and There is no Evidence to Support One.....	43
V. CONCLUSION.....	45

TABLE OF AUTHORITIES

	<u>Page</u>
 <b>CASES</b>	
<u>Allstar Gas, Inc. of Washington v. Bechard</u> , 100 Wn. App. 732, 998 P.2d 367 (2000) .....	31
<u>Anderson v. Secret Harbor Farms</u> , 47 Wn.2d 490, 288 P.2d 252 (1955).....	36
<u>Asche v. Bloomquist</u> , 132 Wn. App. 784, 133 P.3d 475 (2006), rev. denied, 159 Wn.2d 1005.....	25, 32
<u>Atherton Condominium Association v. Blume Development Co.</u> , 115 Wn.2d 506, 799 P.2d 250 (1990).....	14, 15
<u>Bernsen v. Big Bend Electric</u> , 68 Wn. App. 427, 842 P.2d 1047 (1993).....	35
<u>Borden v. City of Tacoma</u> , 113 Wn. App. 359, 53 P.3d 1020 (2002).....	29
<u>Chelan County v. Nykreim</u> , 146 Wn.2d 904, 53 P.3d 1 (2002) .....	25
<u>Clipse v. Michels Pipeline Construction, Inc.</u> , 154 Wn. App. 573, 225 P.3d 492 (2010) .....	28
<u>Colwell v. Etzell</u> , 119 Wn. App. 432, 81 P.3d 895 (2003).....	29
<u>Corbitt v. J. I. Case Co.</u> , 70 Wn.2d 522, 424 P.2d 290 (1967).....	27
<u>Couie v. Local Union No. 1849</u> , 51 Wn.2d 108, 316 P.2d 473 (1957).....	31
<u>Dunbar v. Heinrich</u> , 95 Wn.2d 20, 622 P.2d 812 (1980).....	34
<u>Elves v. King County</u> , 49 Wn.2d 201, 299 P.2d 206 (1956).....	44
<u>Forest v. State</u> , 62 Wn. App. 363, 814 P.2d 1181 (1991).....	19, 21
<u>Gray v. McDonald</u> , 46 Wn.2d 574, 283 P.2d 135 (1955).....	38, 39
<u>Habitat Watch v. Skagit County</u> , 155 Wn.2d 397, 120 P.3d 56 (2005).....	25
<u>Halleran v. Nu U, Inc.</u> , 123 Wn. App. 701, 98 P.3d 52 (2004), rev. den. 154 Wn.2d 1005.....	21
<u>Haslund v. Seattle</u> , 86 Wn.2d 607, 547 P.2d 1221 (1976) .....	8
<u>Honcoop v. State</u> , 111 Wn.2d 182, 759 P.2d 1188 (1988).....	9, 10
<u>Hovila v. Bartek</u> , 48 Wn.2d 238, 292 P.2d 877 (1956).....	39

<u>John Davis &amp; Co. v. Cedar Glen #Four, Inc.</u> , 75 Wn.2d 214, 450 P.2d 166 (1969) .....	30, 31
<u>Laymon v. Dept. of Natural Resources</u> , 99 Wn. App. 518, 994 P.2d 232 (2000) .....	19
<u>Lee v. Lozier</u> , 88 Wn. App. 176, 945 P.2d 214 (1997) .....	42, 43
<u>Lingvall v. Bartness</u> , 97 Wn. App. 245, 982 P.2d 690 (1999) .....	39
<u>Mahoney v. Tingley</u> , 85 Wn.2d 95, 529 P.2d 1068 (1975) .....	35
<u>Malnati v. Ramstead</u> , 50 Wn.2d 105, 309 P.2d 754 (1957) .....	38
<u>McKasson v. State</u> , 55 Wn. App. 18, 776 P.2d 971 (1989).....	21
<u>Meany v. Dodd</u> , 111 Wn.2d 174, 759 P.2d 455 (1998).....	12, 26
<u>Pedersen v. Department of Transportation</u> , 43 Wn. App. 413, 717 P.2d 773 (1986) .....	34, 39, 41
<u>Pedroza v. Bryant</u> , 101 Wn.2d 226, 677 P.2d 166 (1984).....	8
<u>Pepper v. J.J. Welcome Construction Co.</u> , 73 Wn. App. 523, 871 P.2d 601 (1994), <u>rev. den.</u> , 124 Wn.2d 1029 (1994)9, 13, 15, 16, 31	
<u>Petersen v. Bibioff</u> , 64 Wn. App. 710, 828 P.2d 1113 (1992).....	34
<u>Pierce v. Spokane County</u> , 46 Wn. App. 171, 730 P.2d 82 (1986).....	12
<u>Ravenscroft v. Water Power Co.</u> , 87 Wn. App. 402, 942 P.2d 991 (1997), <u>aff'd as to public duty doctrine</u> , 136 Wn.2d 911 .....	21, 22
<u>Samuel's Furniture v. Department of Ecology</u> , 147 Wn.2d 440, 54 P.3d 1194 (2002) .....	24, 32
<u>Sanders v. City of Seattle</u> , 160 Wn.2d 198, 156 P.3d 874 (2007).....	42
<u>Smith v. Breen</u> , 26 Wn App. 802, 614 P.2d 671 (1982).....	39
<u>Smith v. City of Kelso</u> , 112 Wn. App. 277, 48 P.3d 372 (2002)14, 16, 17, 20	
<u>Sourakli v. Kyriakas, Inc.</u> , 144 Wn. App. 501, 182 P.3d 985 (2008), <u>rev. denied</u> , 165 Wn.2d 1017 .....	25
<u>Stokes v. Kummer</u> , 85 Wn. App. 682, 936 P.2d 4 (1997).....	40
<u>Taylor v. Stevens County</u> , 111 Wn.2d 159, 759 P.2d 447 (1988)9, 11, 12, 14, 21, 26, 27	
<u>Weston New Bethel Baptist Church</u> , 23 Wn. App. 747, 598 P.2d 411 (1978) .....	12
<u>Williams v. Thurston County</u> , 100 Wn. App. 330, 997 P.2d 377 (2000).....	26
<u>Wilson v. State</u> , 84 Wn. App. 332, 929 P.2d 448 (1996) .....	31

Zimbelman v. Chaussee Corp., 55 Wn. App. 278, 777 P.2d 32  
(1989).....26

**STATUTES**

RCW 19.27.020 .....11  
RCW 36.70C.....24  
RCW 4.16.020 .....34  
RCW 4.24.630 .....1, 4, 5, 27, 28  
RCW 7.48.130 .....43  
RCW 7.48.140 .....43, 44

**OTHER AUTHORITIES**

Black’s Law Dictionary, 8<sup>th</sup> ed. p. 1220 (2004) .....34

**RULES**

CR 8(c).....33, 35

## I. INTRODUCTION

Respondent Mason County respectfully requests that this Court affirm the decision of the trial court dismissing Wood's claims against Mason County. Summary judgment was appropriate based on (a) application of the Public Duty Doctrine for the County's enforcement action vis-à-vis Wood's neighbor, Michael Dermond; (b) the absence of the elements for the statutory waste claim under RCW 4.24.630; (c) the absence of the elements of a civil conspiracy; and (d) the County's prescriptive flowage easement for its road culvert.

## II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Mason County believes that the issues pertaining to the assignments of error may be best stated as follows:

A. Whether the Public Duty Doctrine protects a local government from liability to a landowner for the government's inspection and enforcement activities relative to a neighbor's property where (1) the County had no contact with the landowner; (2) the County had no knowledge of any activity by the neighbor until the neighbor's activity was completed; (3) the County had no actual knowledge of a code violation creating a dangerous condition; and (4) there was no ordinance mandating specific enforcement action.

B. Whether a statutory waste claim under RCW 4.24.630 is properly dismissed where the defendant did not enter the plaintiff's property nor intentionally damage or remove property.

C. Whether a claim for civil conspiracy was properly dismissed where (a) the alleged conspiracy involved the County's approval of a neighbor's drainage improvement project; and (b) the County had no knowledge that a portion of the neighbor's project was over the boundary line of a neighbor's property; and (c) the plaintiff did not appeal or challenge the County's approval of the drainage improvement under the Land Use Petition Act; and (d) all parties agreed that the project improved the drainage conditions for the plaintiff and the neighbor; and (e) there is no competent evidence that a conspiracy occurred.

D. Whether a county has a prescriptive flowage easement from a roadway culvert where the culvert has been openly discharging surface water across the plaintiff's property in the same location above ground for more than 30 years.

### III. STATEMENT OF THE CASE

This case arises from a longstanding series of disputes between two neighboring property owners – Plaintiffs/Appellants Kyle and Tammy Wood (“Wood”) and defendants Michael and Norma Dermond (“Dermond”). Each owner has on multiple occasions complained about the land use and building activities on the other's property. (CP 16, 58, 253, 259, 344, 405). Recently, Wood attempted to drag Mason County into the dispute, alleging that the County had conspired with Dermond to be overly helpful to Dermond and not sufficiently supportive of Wood.

The Complaint in this case was focused on a small clearing operation performed by Dermond on his waterfront lot in June 2007, and a landslide which occurred approximately 18 months later on January 26, 2009. The slide occurred during a severe storm event which dropped several inches of rain in the vicinity during a 24-hour period. (CP 348). Plaintiffs Kyle and Tammy Wood, who live next door to Dermond, allege that the slide on the Dermond property has reduced the value of their own adjacent shoreline property.

In August 2009, Wood sued Dermond, alleging that the January 2009 slide was caused by Dermond's removal of vegetation at the top of the bank on June 13, 2007. The Complaint alleged that the clearing of vegetation destabilized the slope and ultimately caused or contributed to the slide on January 6, 2009. (CP 5-6). Dermond countered that he had removed only blackberry bushes, and that the slide was caused by the massive storm event.

Wood also joined Mason County as a defendant, alleging that the County failed to send an inspector immediately to the site on the day Wood's friend Ms. Gorman complained of the clearing by Dermond. The Complaint implied that the County had a duty to respond *instantly* when notified on the day of the vegetation clearing. The Complaint also alleges that the County's inspection, which occurred two business days after the clearing activity on the Dermond property, was inadequate, and that the

County should have taken more punitive enforcement action against Mr. Dermond after the fact. (CP 5-6).

The evidence shows that County Inspector Stephanie Pawlawski was told by Dermond that he had removed only blackberry bushes. She saw no evidence of removal of trees and therefore concluded there had not been a shoreline violation. (CP 345-346). She recommended that Dermond plant native vegetation near the top of the bank.

The Woods' Complaint also asserted that the County's culvert under Bloomfield Road discharges stormwater onto the property line between the Wood property and the Dermond property. (CP 7). The Complaint sought treble damages against Dermond and Mason County under the "Real Property Waste" statute, RCW 4.24.630.

In June 2010, Wood amended his Complaint and added a claim relating to his (Wood's) construction of a deck and balcony without obtaining permits. According to the "Supplemental Complaint," the County retaliated against Wood, and entered into a "civil conspiracy" with Dermond to require Wood to obtain an after-the-fact building permit for the deck. (CP 16-17). Wood also argued that the County must have "conspired" with Dermond to approve Dermond's mid-2009 proposal to reroute surface water through a tightline pipe to the east (away from the boundary with Wood's property). (CP 405).

On September 20, 2010, Mason County filed a motion for summary judgment. The County argued that it owed no duty to Wood

with respect to its enforcement against Dermond. The County argued that it was protected from liability by the Public Duty Doctrine. The motion also showed that any delay in the County's investigation of Dermond's June 2007 clearing activity was not a proximate cause of damage to Wood, as the work was done before the County received notice.

Further, the summary judgment motion explained that Wood's claim against Mason County was not cognizable under the waste statute, RCW 4.24.630. Finally, the motion pointed to the absence of any factual basis for a claim of civil conspiracy.

In response to the County's summary judgment motion, Wood apparently recognized that the Public Duty Doctrine was a potential bar to his "enforcement" claims, and that his claims for statutory waste and civil conspiracy were not well founded. Wood therefore argued in his response that the County engaged in a "trespass" by discharging water from the Bloomfield Road culvert along the boundary between the Wood and Dermond properties.<sup>1</sup>

In reply, the County pointed out that the road culvert had been discharging surface water in the exact same location for more than 30 years, in an open and obvious fashion and therefore any trespass claim was barred by the doctrine of prescriptive easement.

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<sup>1</sup> Neither the Complaint nor the Supplemental Complaint had specifically asserted a trespass claim against Mason County.

At the summary judgment hearing, the Honorable Carol Murphy of Thurston County Superior Court granted the County's motion as to the "negligent enforcement" claim, the conspiracy claim and the waste claim. She declined to rule at that time on the "trespass by water" claim, accepting the plaintiffs' argument that the County had not expressly addressed that claim in its original summary judgment motion and brief.

The County therefore subsequently filed a "Follow Up Motion for Summary Judgment," which asked the Court to dismiss the trespass claim based on the doctrine of prescriptive easement. The Court granted the County's motion on January 14, 2011, dismissing Wood's remaining claims against Mason County.

The case proceeded against co-defendant Dermond. That claim was subsequently settled through an agreement which included a monetary payment from Dermond and implementation of additional drainage measures. (446-447).

Following the dismissal of Wood's claims against Dermond, Wood appealed the dismissal of his claims against Mason County.

#### IV. ARGUMENT

##### A. The Claims Arising From Mason County's Inspection and Enforcement Are Barred by the Public Duty Doctrine.

##### 1. The Public Duty Doctrine Defines When a County Has an Actionable Duty to a Plaintiff.

Wood alleged that Mason County breached a duty of care by failing to enforce shoreline and critical areas regulations against Dermond.

He asserted that the County should have undertaken an investigation on the same day that it received notice from Wood's friend that Dermond had cleared his property. He also argued that the County's follow-up enforcement was inadequate. He asserts the County should be partially liable for property damage in 2009 that allegedly arose from Dermond's June 2007 clearing activity.

Mason County denies that it was negligent. Dermond's work was completed by Dermond's contractor within an hour of the time the County received notice.<sup>2</sup> Mason County Inspector Stephanie Pawlawski responded to the complaint by a neighbor a few days later and concluded based on information she received and visual observation that a shoreline violation had not occurred, because Dermond had not removed trees. (CP 345-347). The inspector recommended that Dermond replant with native ground cover vegetation.

Wood also complained that after the January 2009 storm and landslide, a County inspector met with Dermond and his hydrologist and orally approved Dermond's drainage proposal which would collect water from the County's culvert in a catch basin, and then transport it through a "tightline" pipe to the east of the Dermond property (away from the boundary with Wood). Wood did not challenge the approval of Dermond's project through a LUPA petition. Further, all parties agree

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<sup>2</sup> Mrs. Wood has testified that her neighbor called the County in the afternoon of June 13, 2007 *after* vegetation had been removed. She acknowledged Dermond's work was complete within an hour or so after a call was made to the County. (CP 48-52).

that the drainage improvement reduces the surface and groundwater flowing near the boundary between the Wood and Dermond properties. (See, CP 244). Wood nonetheless argued at the summary judgment hearing that the County should have required Dermond to obtain a shoreline permit for his drainage improvement.

The County maintains that its inspection and enforcement actions were proper, both with regard to the inspection following Dermond's 2007 clearing incident and with respect to approving Dermond's 2009 "tightline" drainage improvement. But the crucial threshold determination is whether an actionable duty of care was owed by Mason County to Wood with respect to its enforcement vis-à-vis Dermond.<sup>3</sup>

The existence of such a duty is a question of law for the court to determine. Pedroza v. Bryant, 101 Wn.2d 226, 228, 677 P.2d 166 (1984). The concept of duty is a reflection of all the considerations of public policy which lead the court, as a matter of law, to conclude that a plaintiff's interests will be entitled to legal protection against the defendant's conduct. Haslund v. Seattle, 86 Wn.2d 607, 611, 547 P.2d 1221 (1976). In this case, Mason County owed no duty to Wood.

Under Washington law, the Public Duty Doctrine generally provides that a local government owes no duty to an individual for

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<sup>3</sup> In the Brief of Appellant, Wood correctly notes that the Public Duty Doctrine is not a defense to a claim involving a proprietary government function, such as a county operating its own drainage facilities. But the issue is a straw man. Mason County has never contended that the Public Duty Doctrine is a defense to claims of trespass by water.

damages arising from an alleged failure by the government to enforce the provisions of building and land use regulations. Taylor v. Stevens County, 111 Wn.2d 159, 759 P.2d 447 (1988); Pepper v. J.J. Welcome Construction Co., 73 Wn. App. 523, 531, 871 P.2d 601 (1994), rev. den., 124 Wn.2d 1029 (1994). The trial court properly recognized that the public duty doctrine mandated summary judgment in favor of Mason County.

Simply stated, a governmental entity such as Mason County cannot be held liable in tort unless it has breached a duty owed to the particular injured person, as distinct from breaching an obligation owed to the public in general. Honcoop v. State, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988). This rule generally precludes claims based on the failure of municipalities to properly regulate or inspect private development activities:

These cases recognize that building codes, the issuance of building permits and building inspections are devices used to secure to local government the consistent compliance with ... code provisions governing design and structure of buildings. [Citations omitted]. As such, the duty to issue building permits, and conduct inspections is to protect the health and safety of the general public. Accordingly, we continue to adhere to the traditional public duty rule that building codes impose duties that are owed to the public at large.

Taylor v. Stevens County, *supra* at 164-65.

The public duty rule of nonliability applies to the claims asserted by Wood relating to Mason County's enforcement actions against

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Instead, the trespass claim was properly dismissed based on the County's prescriptive drainage easement.

Dermond. Absent a showing of a duty running to Wood from Mason County, no liability may be imposed for alleged negligence by Mason County in inspecting Dermond's clearing and in enforcing or failing to enforce shoreline regulations.

The courts have recognized certain narrow exceptions to the Public Duty Doctrine's general rule of non-liability. Mason County was entitled to summary judgment because Wood cannot establish the elements of any exception under the undisputed facts of this case.

2. The Legislative Intent Exception Has No Application in this Case.

Wood's reliance on the "legislative intent" exception suggests a misunderstanding of its limited scope. Where a municipality has violated a statute which by its terms expresses a "clear legislative intent to identify and protect a particular and circumscribed class of persons," a member of that class may have a claim for the municipality's negligence, under the "legislative intent" exception to the Public Duty Doctrine. Honcoop v. State, supra. However, the "legislative intent" exception does not apply in this context. In a series of cases involving alleged negligence by local governments in enforcing building and land use codes, the Washington courts have repeatedly held that the legislative intent exception does not apply, and that no liability may be imposed against a governmental entity for negligence in approving private development.

In Taylor v. Stevens County, supra, the purchasers of a home that did not comply with applicable building codes sought damages from the sellers and from the county which had issued a building permit and had inspected the structure prior to the sale. The plaintiffs argued that the general public duty rule of nonliability should not apply, because the state building code indicated that its purpose was to protect the “occupants or users” of buildings and structures as well as the general public. RCW 19.27.020. The plaintiffs argued that this statutory language placed their claim within the legislative intent exception to the Public Duty Doctrine.

The trial court in Taylor rejected the plaintiffs’ argument and the Washington Supreme Court affirmed, holding that building codes and land use statutes are enacted for the benefit of the public generally, and therefore the legislative intent exception does not apply to negligent enforcement of building and land use codes:

This court and the Court of Appeals have on numerous occasions rejected the contention that building codes impose a duty upon local governments to enforce the provisions of such codes for the benefit of individuals. E.g., Halvorsen, at 676, Rosen v. Tacoma, 24 Wn. App. 735, 740-41, 603 P.2d 846 (1979); Georges v. Tudor, 16 Wn. App. 407, 409-10, 556 P.2d 564 (1976); see also Haslund v. Seattle, 86 Wn.2d 607, 611 n.2, 547 P.2d 1221 (1976). These cases recognize that building codes, the issuance of building permits and building inspections are devices used to secure to local government the consistent compliance with zoning and land use regulations and code provisions governing the design and structure of buildings. See Haslund, at 611 and too, Georges at 409, 9 A.E. McQuillin, Municipal Corporations, §§ 26.200, 26.200.05. As such, the duty to issue building permits and conduct inspections is to protect the health and safety of the general

public. Accordingly, we continue to adhere to the traditional public duty rule that building codes impose duties that are owed to the public at large.

111 Wn.2d at 164.

The Taylor court emphasized that the burden of compliance with building and land use codes rests with property owners and developers. Such codes are designed to protect the public safety, not to protect individuals from losses caused by public officials while carrying out public duties. The Supreme Court summarized its holding as follows:

We hold that Stevens County cannot be held liable for its alleged negligence in administering its building code. The duty to ensure that buildings comply with county and municipal building codes rests with individual builders, developers and permit applicants, not local government.

111 Wn.2d at 161. The Supreme Court's ruling on this issue was unanimous.

The holding in Taylor v. Stevens County is consistent with other Washington cases in which liability was sought against local governments for improper issuance of permits and approvals. See, e.g., Meany v. Dodd, 111 Wn.2d 174, 759 P.2d 455 (1998) (no liability for negligent issuance of special use permit); Weston New Bethel Baptist Church, 23 Wn. App. 747, 598 P.2d 411 (1978) (no liability for negligent approval of plans for rockery); Pierce v. Spokane County, 46 Wn. App. 171, 730 P.2d 82 (1986) (no liability for negligent inspection of house and unstable soil, and issuance of building permit).

The Washington Court of Appeals had occasion to address a similar claim in Pepper v. J.J. Welcome Construction Co., *supra*, 73 Wn. App. 523. Pepper alleged that King County should be liable for negligent approval of a drainage system designed and built by a private developer. The trial court rejected Pepper’s argument that the “legislative intent” exception should apply because the county’s surface water ordinance referenced protection of “adjacent property owners.” The Court of Appeals affirmed, making clear that land use regulations and surface water ordinances are designed to protect the public generally:

Because the statute referenced here was addressed to a general class of adjacent property owners, and it referenced the public, not a narrow class of specific property owners, the legislative intent exception does not apply.

73 Wn. App. at 532. The same analysis applies here.

In short, Washington law is settled with respect to the legislative intent exception to the Public Duty Doctrine. The exception simply does not apply to a county’s actions in inspecting and approving private development and issuing permits.

3. The “Failure to Enforce” Exception Does Not Apply.
  - a. The County Had No Actual Knowledge of an Inherently Dangerous Condition.

Wood argued in response to Mason County’s summary judgment motion that his claim may fall within the “failure to enforce” exception to the Public Duty Doctrine. The trial court properly held that the exception did not apply. The failure to enforce exception applies only where a city

or county approved a building or project with *actual knowledge* of a statutory violation by the applicant which created an “inherently hazardous and dangerous condition.” In addition, the failure to enforce exception cannot apply except where the county or city had a *specific mandatory statutory enforcement obligation* which was breached and where the failure to enforce caused damage to the plaintiff. Smith v. City of Kelso, 112 Wn. App. 277, 282, 48 P.3d 372 (2002). None of these conditions was present in this case.

The failure to enforce exception is strictly construed, and has been found applicable in only very narrow circumstances, as the Washington Supreme Court held in Atherton Condominium Association v. Blume Development Co., 115 Wn.2d 506, 799 P.2d 250 (1990):

The plaintiff has the burden of establishing each element of the exception. In addition, we construe this exception narrowly. To do otherwise would effectively overrule Taylor and eviscerate the policy considerations therein identified.

115 Wn.2d at 531.

In this case, Mason County did not have actual knowledge of an inherently hazardous and dangerous code violation. Plaintiff argues that Dermond’s clearing in June 2007 violated shoreline regulations and the County should have realized that a violation had occurred. Mason County disagrees with Wood’s interpretation of the shoreline regulations. But even if there were an issue as to whether Dermond’s clearing violated the County code, there is no evidence that the inspector (Ms. Pawlowski) had

actual knowledge of an “inherently hazardous and dangerous condition” when she inspected the property in the summer of 2007. Indeed, Tammy Wood testified that Ms. Pawlawski was not provided with full information as to the extent of Dermond’s clearing, and that she apparently did not recognize that a violation had occurred. (CP 54).

There is no evidence whatsoever that Inspector Pawlawski had knowledge that a slope failure would occur 18 months later, and certainly no knowledge of an “inherently hazardous condition” created by Dermond. (CP 345-46). At most, the inspector had *constructive* notice of a code violation. But constructive notice is insufficient under the failure to enforce exception. Atherton, 115 Wn.2d at 532.

Wood argues that the “inherently dangerous” element of the special relationship exception should be required only in cases involving *building code inspections*. (Brief of Appellant, pp. 24-25). This argument is refuted by unambiguous Washington caselaw. For example, Pepper v. J.J. Welcome Construction Co., *supra*, involved surface water drainage defects and a resultant land slide. The Court held that King County could not be liable for failure to enforce its surface water drainage regulations because there was no evidence the County inspectors had actual knowledge of a dangerous and hazardous condition created by the developer. The Court rejected the notion that the failure to enforce exception could apply simply because the County was aware that the slopes and soils in the vicinity made future landslides a distinct possibility:

. . . instead, Pepper/Jaffee argue, County officials knew the slopes and soils on Novelty Hill “could pose problems” for runoff and erosion. Knowledge of a potential natural hazardous condition cannot be equated with knowledge of a statutory violation or facts constituting a violation. . . . *Actual knowledge of inherently dangerous and hazardous conditions created by the contractor is required.*

73 Wn. App. at 533-34 (Emphasis added).

Significantly, Wood’s own liability expert, David Strong, testified that even following the 2009 slide event, there is no inherent danger to either the Wood property or the Dermond property:

- Q. So from the geologic perspective, from your field of expertise and the reasons for which you were called out there, would it be fair to say that the Dermond slide has not adversely affected the Wood property except for losing a little bit of his yard and he’s going to have to plant a buffer?
- A. From a geologic standpoint – and we’re not – I’m not getting into the economics of the slide and the sale price because that’s not my area of expertise – no, it’s nothing that is going to adversely affect his property significantly into the future.

(CP 64-65).

Because the failure to enforce exception cannot apply unless it is shown that the government official had “actual knowledge” of an “inherently hazardous and dangerous condition” created by the contractor, the failure to enforce exception simply does not apply in this case, and the general public duty rule of nonliability applies.

Smith v. City of Kelso, supra, is another case in which the “inherently dangerous” element was held applicable in a landslide case. In that case, a group of homeowners sued the City of Kelso after a severe

landslide damaged their homes. The homeowners alleged that the City negligently approved the plat and later issued permits for their homes. They argued that the City failed to enforce provisions of the City's subdivision ordinance relating to soil and geology studies. The plaintiffs specifically claimed that the City should have ordered a soil investigation report, which might have revealed slope instability on their properties. The City moved for summary judgment, and the trial court granted the motion with respect to some claims and denied it as to others. On appeal, the Court of Appeals held that the trial court should have dismissed all of the homeowners' claims against the City based on the Public Duty Doctrine, because the City had no actual knowledge of statutory violations creating an inherently hazardous condition. The Smith Court held that simply because further investigation might have revealed a dangerous landslide risk, this could not constitute "actual knowledge" by the City of a statutory violation creating a hazard:

Unlike KMC 13.04.516, this provision requires something of the developer in certain circumstances: a soil investigation report. But while the City *might* have learned about slope instability from a soil investigation, had one been required or submitted, the failure to enforce exception requires actual knowledge of a violation.

112 Wn. App. at 286.

The same rule applies in this case. Indeed, Wood's case is even weaker because, not only is there no evidence that the County inspector had actual knowledge of a dangerous condition; there is no evidence that

an “inherently hazardous and dangerous condition” exists even now. To the contrary, plaintiff’s engineer David Strong has testified unequivocally that there is no threat to the Wood residence. (CP 64-65). Therefore, the “failure to enforce” exception is inapplicable.

b. There Was No Statute Placing a Mandatory Enforcement Duty on the County.

Even if Mason County had possessed actual knowledge of a code violation creating an inherently hazardous condition, there is no applicable state or County statute which imposed a mandatory duty on County officials to take specific enforcement action. This is a second, independent reason why the claim against Mason County cannot give rise to the “failure to enforce” exception to the public duty rule of nonliability. The failure to enforce exception cannot apply unless the local government violated a specific and mandatory duty of enforcement.

In this case, Mr. Wood argues that the County should have responded immediately and sent an inspector to the property while the vegetation clearing was underway. As noted above, the claim is preposterous on its face because Wood admitted the clearing was completed within an hour or so of the County receiving telephonic notice. (CP 48-52). And there is no requirement under Washington law that a local government respond immediately to a claim of a property violation. Indeed, the Washington courts have explicitly rejected the argument that a city or county may be liable in tort for failure to perform an investigation

relating to land use activities. Laymon v. Dept. of Natural Resources, 99 Wn. App. 518, 532-32, 994 P.2d 232 (2000).

Moreover, even if there were evidence that the County's response was slow, liability is foreclosed because there is no ordinance mandating specific action by the inspector under these circumstances.

In Forest v. State, 62 Wn. App. 363, 814 P.2d 1181 (1991), certain persons who were injured by a parolee sought damages from the State of Washington. A state corrections officer knew the parolee was in violation of specific conditions of his parole, and the plaintiffs argued that their claim therefore fell within the failure to enforce exception to the public duty doctrine. The trial court disagreed, and the claim against the state was dismissed. The Court of Appeals affirmed, holding that *the failure to enforce exception cannot apply unless the municipality violates a statutory mandate that it take specific corrective action*:

We conclude that even if Rose was in technical violation of the general conditions of parole that apply to all parolees, the facts of which were known to Tabet, Forest cannot establish that the state's correction officers had a mandatory duty to take specific action. McKasson v. State, 55 Wn. App. 18, 27, 776 P.2d 971 (1989); Honcoop v. State, 111 Wn.2d 182, 190, 759 P.2d 1188 (1988).

\* \* \*

Unlike the situation in Bayley, where the police officer was required to take specific action, there is no statute here that mandates that specific corrective action be taken.

62 Wn. App. at 369.

The “mandatory enforcement” element of the failure to enforce exception applies fully in the context of building and land development activities. In Smith v. City of Kelso, *supra*, the dismissal of the City was also supported by the absence of a specific mandatory enforcement requirement in the Uniform Building Code:

Moreover, even if the homeowners presented specific evidence of steep excavation or homes built on fill, the UBC did not require the City to take specific action to correct a violation.

112 Wn. App. at 286.

Similarly, in this case there was no specific, statutorily mandated enforcement action which Mason County was required to undertake. Wood cites sections of the code placing duties on *landowners and contractors* to comply with code provisions, and then jumps to the unwarranted conclusion that these provisions create mandatory enforcement obligations on the part of the city or county. No court has so held. The applicable building codes place the duty of compliance on permit applicants and contractors. They generally do not place specific mandatory duties on local government:

We hold that no duty is owed by local government to a claimant alleging negligent issuance of a building permit or negligent inspection to determine compliance with building codes. The duty to ensure compliance rests with individual permit applicants, builders and developers.

\* \* \*

Permit applicants, builders and developers are in a better position to prevent harm to a foreseeable plaintiff than are

local governments. Thus, it is more equitable to impose on such individuals the duty to ensure compliance.

Taylor v. Stevens County, 111 Wn.2d at 168, 169.

When Mason County inspector Pawlawski visited the site on June 20, 2007 and observed the clearing of blackberries at the top of the bluff, she encouraged Dermond to replant with native plants. There was no code provision which mandated that she undertake specific, more aggressive enforcement action.

The Washington courts have made clear that the “mandatory enforcement” element requires a statute which places a mandatory obligation on the local government to take *specific* action in response to the alleged violation. Forest v. State, *supra*; McKasson v. State, 55 Wn. App. 18, 25, 776 P.2d 971 (1989). Mere general provisions requiring code enforcements are insufficient to satisfy this element. Moreover, where enforcement action is left to government officials’ discretion, the “mandatory enforcement” element has not been satisfied. Forest, 62 Wn. App. at 370; Halleran v. Nu U, Inc., 123 Wn. App. 701, 714-15, 98 P.3d 52 (2004), *rev. den.* 154 Wn.2d 1005.

In Ravenscroft v. Water Power Co., 87 Wn. App. 402, 942 P.2d 991 (1997), *aff’d as to public duty doctrine*, 136 Wn.2d 911, the Washington Court of Appeals stressed the strict requirements of this element:

This exception is construed narrowly. Atherton, 115 Wn.2d at 531. In order to invoke this exception, the statute

must contain a **specific** duty to take corrective action. See, e.g., Bailey, 108 Wn.2d 262 (statute provided police officer “shall” take into custody a person incapacitated by alcohol); Campbell v. City of Bellevue, 85 Wn.2d 1, 530 P.2d 234 (1975) (statute provided building official “shall immediately sever any unlawfully made connection”). In other words, **a specific directive to the governmental employee as to what should be done must be present in the statute.**

87 Wn. App. at 415 (emphasis added).

Thus, to satisfy this element of the failure to enforce exception, Wood would have to identify a code provision which states that upon observing what Inspector Pawlawski saw, she was obligated to take a specific enforcement action which would have remedied the problem. But of course Wood cites no such code provision because no such provision exists.

c. Any Alleged Failure to Enforce Was Not a Proximate Cause of the Slide.<sup>4</sup>

Another reason why the “failure to enforce” exception to the Public Duty Doctrine is inapplicable here is that any failure to take more aggressive enforcement action against Dermond after the June 13, 2007 clearing would have had no effect on the January 2009 slide. Thus, even if a code section existed requiring more harsh enforcement penalties, the failure to impose those penalties would not have been a proximate cause of the January 2009 slide.

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<sup>4</sup> The absence of proximate causation is a defense to all of the plaintiff’s public duty doctrine theories, including the “legislative intent” exception.

Plaintiff has suggested that the County should have followed up more closely, and ensured that Mr. Dermond planted native ground cover (e.g., kinnikinnick) after the clearing occurred. The reason for planting such vegetation, of course, is that after many years a root structure develops which may help to hold soil in place. But here, the January 2009 storm occurred only 18 months after the clearing by Dermond, in a severe winter storm. It is preposterous to suggest that planting ground cover at the top of the slope one and a half years earlier would have had any appreciable effect on the stability of the slope. Tammy Wood (a “Master Gardener”) admitted this in her deposition. (CP 53-54). Her husband concurred. (CP 59).

Moreover, even if the County had required a shoreline permit in connection with Dermond’s catch basin and tightline fix, that would have had no effect on the slide, as the fix occurred approximately six months *after* the January 2009 slide event. Furthermore, plaintiffs own expert Vince McClure acknowledged in his report that Dermond’s fix was generally helpful, although McClure felt he could have designed a better improvement:

While I approve of the idea behind the catch basin, the execution leaves considerable room for improvement. In this particular case, a better method of catching the culvert discharge water and getting it into the culvert is needed.

(CP 244). No one – including plaintiffs’ own experts – alleged that the Dermond “tightline” fix was not an improvement over existing conditions.

And no one has claimed that that project has increased the risk of shoreline damage.

Thus, the failure to enforce exception fails not only because the County had no actual knowledge of an inherently hazardous and dangerous condition created by Dermond, and because there was no mandatory enforcement obligation, but also because the County's enforcement action, or lack thereof, was not a proximate cause of the January 2009 slide.

d. Wood Has No Standing to Challenge Mason County's Permitting Actions Relative to the August 2009 Drainage Fix.

A final reason why the "failure to enforce" exception cannot give rise to County liability is that Wood has no standing to challenge Mason County's decision not to require a shoreline permit for the Dermond "tightline" drainage fix. The Washington Supreme Court has made clear that a party cannot challenge a local government's decision not to require a shoreline permit, unless the decision is timely appealed under the Land Use Petition Act, RCW 36.70C ("LUPA"). Samuel's Furniture v. Department of Ecology, 147 Wn.2d 440, 463, 54 P.3d 1194 (2002).

The same rule applies with regard to challenges to other land use permits and approvals. If a decision on a permit or approval is not challenged by timely appeal, the decision will be deemed valid, and cannot be attacked in a collateral action. This is true even if the approval was ministerial, without any hearing. Chelan County v. Nykreim, 146

Wn.2d 904, 925-26, 53 P.3d 1 (2002). A neighbor cannot challenge a local governmental approval unless a timely LUPA petition has been filed. Asche v. Bloomquist, 132 Wn. App. 784, 795-96, 133 P.3d 475 (2006), rev. denied, 159 Wn.2d 1005 (neighbor's challenge dismissed when approval was not appealed under LUPA); Habitat Watch v. Skagit County, 155 Wn.2d 397, 407-409, 120 P.3d 56 (2005).

Thus, based on settled Washington precedent, Wood has no standing to challenge Mason County's approval of Dermond's mid-2009 "tightline" drainage fix. This is yet another reason why the failure to enforce exception to the Public Duty Doctrine does not apply, and why dismissal was appropriate.

4. None of the Elements of the "Special Relationship" Exception is Present.

For the first time on appeal, Wood argues that the "special relationship" exception to the Public Duty Doctrine may apply. Because it was not raised in the trial court, the argument may not be raised on appeal. Sourakli v. Kyriakas, Inc., 144 Wn. App. 501, 509, 182 P.3d 985 (2008), rev. denied, 165 Wn.2d 1017. Moreover, Wood's reference to this exception reflects a misunderstanding of its narrow application. In order to fall within the "special relationship" exception, three strict conditions must be met:

A special relationship arises when (1) there is direct contact between the public official and the plaintiff, (2) the official, in response to a specific inquiry, provides express assurances that a building or structure is in compliance with

the building code, and (3) the plaintiff justifiably relies on the representations of the official.

Taylor v. Stevens County, *supra*, at 111 Wn.2d 171.

In this case, Wood cannot satisfy any of the required elements of the exception. Wood admits that he had no direct contact with the County relative to its June 2007 inspection of Dermond's land clearing or with respect to Dermond's 2009 tightline drainage fix. (CP 53-54, 58-59). Further, Wood does not even allege that he made a specific inquiry and requested an express assurance that Dermond's project was in compliance with code. Moreover, Wood did not reasonably rely on any representations of a County official. In short, none of the required elements of the exception apply.

For the "special relationship" exception to apply in this case, the County would have had to make an express assurance in response to a specific inquiry from Wood, that Dermond's actions were in compliance with code, and Wood would have had to detrimentally rely on that assurance. Meany v. Dodd, 111 Wn.2d 174, 180, 759 P.2d 455 (1998); Zimelman v. Chaussee Corp., 55 Wn. App. 278, 281, 777 P.2d 32 (1989). The courts have made clear that an "express assurance" must be detailed, and must arise in the context of a *specific inquiry* from the plaintiff. Williams v. Thurston County, 100 Wn. App. 330, 331, 997 P.2d 377 (2000). Here, it would have been impossible for the County official to have given any express assurances to Wood with respect to the

Dermond activity, as Wood admits he never even spoke to the County about Dermond's activities. (CP 52-53).

Furthermore, Wood did not rely to his detriment on any express assurance from Mason County. Reasonable reliance is another required element of the "special relationship" exception. Taylor, 111 Wn.2d at 171. Reliance requires a substantial change of position to the plaintiff's detriment. Corbitt v. J. I. Case Co., 70 Wn.2d 522, 539, 424 P.2d 290 (1967). Here, Wood did not change his position based on an express assurance from Mason County. Simply put, none of the essential elements of the special relationship exception is present.

B. The Waste Statute is Not Applicable to the Claim Against Mason County.

In addition to suing Mason County in negligence for its inspection and enforcement relative to Dermond's property activities, Wood also sought recovery against Mason County under the Washington "real property waste" statute, RCW 4.24.630. Yet there is no action by the County which could even arguably fall within the contours of the waste statute. RCW 4.24.630 provides a remedy only where the defendant has gone on to the land of the plaintiff and intentionally removed or damaged timber, personal property or improvements:

(1) Every person who goes on to the land of another and who removes timber, crops, minerals or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the

damages caused by the removal, waste, or injury. For purposes of this section, a person acts “wrongfully” if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. . . . (Emphasis added).

The statute is clearly inapplicable to the actions of Mason County, because Mason County neither went on to Wood’s property nor intentionally and unreasonably removed or damaged property or improvements owned by Wood. The Washington courts have explained that the defendant’s presence on the land, as well as deliberate removal or damaging of property, are required under 4.24.630. This was most recently made clear by the Court of Appeals in Clipse v. Michels Pipeline Construction, Inc., 154 Wn. App. 573, 225 P.3d 492 (2010):

The statute establishes liability for three types of conduct occurring upon the land of another: (1) removing valuable property from the land, (2) *wrongfully* causing waste or injury to the land, and (3) *wrongfully* injuring personal property or real estate improvements upon the land. By its express terms, the statute requires wrongfulness only with respect to the latter two alternatives. Presence on the land is required for all three.

Id. at 577-78. (Emphasis added). Because Mason County did not enter onto Wood’s property and remove or damage timber, fixtures or other property, the County cannot be liable under RCW 4.24.630.

Moreover, the statute allows recovery for damaging property only when the defendant’s misconduct has been intentional. Where there is no evidence that the defendant engaged in intentional misconduct, dismissal of a claim under RCW 4.24.630 is appropriate. Borden v. City of Tacoma,

113 Wn. App. 359, 374, 53 P.3d 1020 (2002); Colwell v. Ezzell, 119 Wn. App. 432, 441, 81 P.3d 895 (2003).

Recognizing that the elements of the waste statute are not present with respect to Mason County's inspections and enforcement vis-à-vis Dermond's activities, Wood now makes the strained argument that the statute should apply to Mason County's road culvert. Yet he cites no caselaw supporting his argument that statutory waste can be committed by a culvert installed on a public road many decades earlier. As explained in Section D, infra, the Bloomfield Road culvert has been discharging surface water in the same location along the boundary between the Wood and Dermond property for more than 30 years. (CP 350-51). Indeed, the drainage in that location has been uninterrupted since long before the waste statute was enacted by the Legislature in 1994.

Further, the drainage along the boundary of the Wood/Dermond property was not "wrongful," as surface water has flowed there in an open and obvious manner for more than 10 years, creating a flowage easement in favor of Mason County. (See, Section D herein). Because Mason County has had a prescriptive flowage easement in that location for decades, liability under the waste statute is foreclosed.

C. The Claims of Civil Conspiracy Are Entirely Groundless.

As noted above, Wood amended his Complaint to assert that the County may be liable for civil conspiracy. Wood first alleged that the County had entered into a conspiracy with Dermond to retaliate, by

requiring Mr. Wood to obtain an after-the-fact permit for a deck that he built some years earlier without permits. (CP 16). That claim was later abandoned, presumably because Wood recognized the County's right to inspect and require an after-the-fact permit when it is notified that a structure was built in defiance of permitting requirements. Moreover, depositions of the County employees established that they were not even aware that a lawsuit had been filed by Dermond against Mason County when they responded to Dermond's complaint about Wood's unpermitted deck.

In response to the County's summary judgment motion, Wood changed his focus once again, arguing that the County must have entered into a conspiracy with Dermond to approve his 2009 drainage fix. Wood offered no evidence whatsoever that a conspiracy existed. Indeed, Mr. and Mrs. Wood admitted in deposition that they had no evidence that the County had conspired with Mr. Dermond. (CP 54-57; CP 63-64). Further, Dermond flatly refuted any suggestion of conspiracy with Mason County. (CP 344).

Conspiracy is a combination of two or more persons who contrive to commit a criminal or unlawful act or to commit a lawful act for criminal or unlawful purposes. John Davis & Co. v. Cedar Glen #Four, Inc., 75 Wn.2d 214, 223, 450 P.2d 166 (1969). To establish a civil conspiracy, a plaintiff must prove by *clear, cogent and convincing evidence* that (1) two or more people combined to accomplish an unlawful purpose or combined

to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy. Allstar Gas, Inc. of Washington v. Bechard, 100 Wn. App. 732, 998 P.2d 367 (2000).

The test for sufficiency of evidence of a civil conspiracy is that the circumstances must be *inconsistent* with a lawful or honest purpose, and reasonably consistent *only* with the existence of the conspiracy. Couie v. Local Union No. 1849, 51 Wn.2d 108, 316 P.2d 473 (1957); Corbit v. J.I. Case Co., 70 Wn.2d 522, 531, 424 P.2d 290 (1967). Mere suspicion is insufficient to support a conspiracy claim. John Davis & Co. v. Cedar Glen #Four, Inc., *supra*, 75 Wn.2d at 224. Moreover, the claim of conspiracy must fail if the underlying act or claim is not actionable. Wilson v. State, 84 Wn. App. 332, 350-51, 929 P.2d 448 (1996).

In this case, plaintiffs have not even shown that any criminal or unlawful acts by the County were committed. Nor have they shown that the County entered into an agreement with Dermond to carry out an unlawful act. As noted above, a County cannot be liable for approving a private building or drainage project, even if that approval was negligent. Pepper v. J.J. Welcome Construction Co., *supra*. Moreover, Wood has no standing to challenge the drainage fix which the County approved, because he did not file a timely LUPA appeal or appeal to the Shoreline Hearings Board. Thus, he can pursue neither a negligence claim nor a conspiracy claim arising from the County's approval of the tightline

drainage fix. Samuel's Furniture v. Department of Ecology, *supra*, 147 Wn.2d at 463; Asche v. Bloomquist, 132 Wn. App. at 795-96.

In his brief, Wood repeatedly suggests that Dermond's 2009 tightline drainage project was in part a "County project." This is absolutely false. There is no evidence that the County participated in any way in the design or construction of that tightline fix, which occurred on private property. Wood also notes that the catch basin installed by Wood may have been at least partially over the boundary line onto Wood's property, and implies that the County somehow approved of this "trespass." This suggestion is misleading, to put it charitably. As Wood and his attorneys represented to the trial court, it was not until May, 2010 that Wood retained a surveyor who determined that the property line between the Dermond and Wood property was slightly different than the parties had previously known. (CP 455-459). That was long after the catch basin and tightline fix had been constructed by Dermond. There is not a shred of evidence that the County (or anyone else) knew that the catch basin Dermond was installing may have been slightly across the boundary line. Indeed, the allegation is spurious.

Evidence of a conspiracy is nonexistent. Mr. and Mrs. Wood have each admitted they have no knowledge of a conspiracy; the County merely approved a simple drainage fix by Dermond which did in fact make conditions better for all concerned. Indeed, Wood's own experts have acknowledged that the tightline drainage fix *reduced* the surface water

runoff and the risk of erosion in the area between the Wood and Dermond properties. (CP 244). The fact that Wood's expert believes he could have designed even a better system provides no support for Wood's conspiracy claims.

Wood cites no case -- in Washington or elsewhere -- which has found a civil conspiracy under similar circumstances. Indeed, based on the record in this case, the conspiracy claim is entirely frivolous.

D. The Trespass Claim is Barred by Prescription.

1. The Defense of Prescriptive Easement Was Timely Raised by Mason County.

Neither the Complaint nor the Amended Complaint filed by Wood included an express trespass claim against Mason County. But in response to the County's summary judgment motion, Wood argued that an implied claim for trespass was contained in the Complaint. The trial court later heard the County's Follow-Up Motion for Summary Judgment which was filed to specifically address the trespass claim. The Court properly dismissed that claim on January 14, 2011.

Wood argued that the Court should not consider Mason County's prescriptive easement argument because it was not specifically listed as an affirmative defense in Mason County's Answer. The Court properly rejected this argument. First, prescriptive easement is not one of the enumerated affirmative defenses which must be pled under CR 8(c). Plaintiffs have cited no case where it was held that prescription is waived if not expressly asserted in an Answer.

Secondly, Mason County did in fact raise as an affirmative defense in its Answer that “some or all of the claims asserted in the Complaint are barred by limitations.” (CP 11). And of course prescription is a species of limitations. “Prescription” is defined as “the effect of the lapse of time in creating and destroying rights.” Black’s Law Dictionary, 8<sup>th</sup> ed. p. 1220 (2004). In Washington, the period for a prescriptive easement is ten years, the same limitations period applicable to recovery or possession of real property. RCW 4.16.020; Dunbar v. Heinrich, 95 Wn.2d 20, 22, 622 P.2d 812 (1980). A party obtains a prescriptive easement by openly using another’s property for the statutory ten year limitations period set forth in RCW 4.16.020. Pedersen v. Department of Transportation, 43 Wn. App. 413, 422, 717 P.2d 773 (1986).

By asserting the statute of limitations as an affirmative defense in its Answer, Mason County gave notice that some of the plaintiffs’ claims were barred by the passage of statutory limitations periods. This is adequate notice of an affirmative defense under the rules of “notice pleading.” The usual rules regarding liberal construction of pleadings are applicable in this context. See, e.g., Petersen v. Bibioff, 64 Wn. App. 710, 721, 828 P.2d 1113 (1992).

Furthermore, to the extent there was any uncertainty in the County’s Answer regarding affirmative defenses, it was due to the lack of precision in the plaintiffs’ own Complaint. The Court will recall that the Complaint did not set forth a trespass claim. Instead, Wood first made

specific reference to a trespass claim in his response to Mason County's Motion for Summary Judgment. Wood cannot have it both ways. He cannot on the one hand fail to mention "trespass" in his Complaint or in his Supplemental Complaint, and then argue that the County should not be allowed to raise "prescriptive easement" as a defense when trespass is first specifically raised by Wood in response to the County's summary judgment motion. As the trial court properly held, the rules regarding liberal construction of pleadings apply to the County's Answer as well as to Wood's Complaint.

Finally, CR 8(c) is a flexible rule which will not be held to bar the assertion of an affirmative defense unless there is surprise and prejudice to the other party. Mahoney v. Tingley, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975). Thus, the Supreme Court and the Court of Appeals have held that if a delay in asserting a defense is not prejudicial, an amendment will be allowed to conform to the evidence. Bernsen v. Big Bend Electric, 68 Wn. App. 427, 434, 842 P.2d 1047 (1993). Mason County expressly asserted the prescriptive easement defense at least by the time of its reply brief in November, 2010, which was many months before the scheduled trial date, and six weeks before the court ruled on the dismissal of the trespass claim.

2. The Facts Establishing a Prescriptive Easement are Clear and Undisputed.

In essence, the trespass claim alleged that the County's cross-culvert under Bloomfield Road (which discharges water several hundred feet away from the shoreline bank) created a "trespass by water" because the discharge from the culvert flowed along the boundary line between the Wood and Dermond properties. The trial court properly dismissed the claim, based on the defense of prescriptive easement.

A prescriptive easement is established when a party shows his open and uninterrupted use of another's property for the 10 year prescriptive period. Anderson v. Secret Harbor Farms, 47 Wn.2d 490, 288 P.2d 252 (1955). In this case, the Bloomfield Road culvert was installed more than 30 years ago and has been draining surface water across the properties now owned by Dermond and Wood since long before those properties were cleared and developed. (CP 350-51; CP 406). Indeed, plaintiff Tammy Wood expressly admitted Mason County's prescriptive drainage easement in her declaration, where she stated:

The county culvert across Bloomfield Road has been dumping stormwater onto our property ever since it was installed.

(CP 232).

In his response to summary judgment and in his opening brief on appeal, Wood set up a straw man in the form of the Common Enemy Rule, and then sought to knock down that straw man by asserting that exceptions

to the Common Enemy Rule apply. But Mason County did not raise the Common Enemy Rule as a defense in its summary judgment motions. Mason County acknowledges that the Bloomfield Road culvert collects surface water and discharges it near the boundary of the Wood/Dermond properties. But it has been doing so for decades, and long before the Wood property was cleared and developed. (CP 350-351, 341, 344). Therefore, Mason County has a prescriptive easement which defeats Wood's trespass claim.

Because the County's culvert has been discharging water across Wood's property for decades prior to his ownership, any claim arising from "trespass by water" is barred by prescription. The Common Enemy Rule has no application.

Wood does not dispute that his trespass claim would be barred if a prescriptive flowage easement can be shown for the statutory 10 year period. Instead, he argues that the facts of the prescriptive easement in this case are not sufficiently established. Yet Wood offers no evidence to contradict the unambiguous testimony of Rick Blake that the culvert under Bloomfield Road has been discharging water above-ground at the corner of the Wood/Dermond property for at least 28 years, and probably longer than 40 years. (CP 350-51). Nor is there any evidence to contradict the sworn deposition testimony of Michael Dermond, that when he purchased his property in 1988, the culvert was discharging water in the same location above ground. (CP 341, 344).

We also know from the deposition testimony of Tammy Wood, as well as the deposition of Michael Dermond, that the prior owner of both properties cleared those properties in 1988 and the Dermond home and driveway was constructed in 1989. (CP 341-342; CP 417-418). By that time (at the latest) the servient estate was on notice of the adverse use by Mason County. The culvert discharges near the top of the joint Wood/Dermond driveway, in plain view. Indeed, Wood has acknowledged that the flow from the culvert onto his property has been open and obvious since the time he purchased the property in 2001. (CP 232, 406). Further, Mr. Wood stated in his declaration that in heavy rainfalls each year, water from the culvert has flowed over the top of the embankment. (CP 406).

Recognizing that open, notorious and continuous use by the County is undisputed, Wood attempts to argue that there is insufficient evidence that the use was “adverse.” Yet there is not a shred of evidence that the County’s use was “permissive” as opposed to adverse. It is not necessary to establishment of a prescriptive right that a party may make a declaration of adverse intent. Gray v. McDonald, 46 Wn.2d 574, 478, 283 P.2d 135 (1955). Nor does the term “adverse” connote personal animosity or adversarial intent. Rather, it connotes only that the claimant’s use has been that which would be consistent with ownership of the easement. Malnati v. Ramstead, 50 Wn.2d 105, 108, 309 P.2d 754 (1957).

Moreover, contrary to the suggestion in the Brief of Appellant, a *presumption* of adverse use arises from evidence of open and continuous use for the statutory period of time. Hovila v. Bartek, 48 Wn.2d 238, 241, 292 P.2d 877 (1956). If the use was open and continuous, the *burden of proof then shifts* to the servient estate to show that the use was permissive. Pedersen v. DOT, *supra* at 417; Gray v. McDonald, *supra*, 46 Wn.2d at 578. In this case, Wood has produced no evidence that the County has been discharging this water for 40 years pursuant to an agreement with the landowner. Absent any such evidence, the presumption controls and the use will be deemed to be adverse (i.e., contrary to the rights of the servient estate):

If the essential factual findings are not in dispute, whether use is adverse or permissive is purely a question of law.

Lingvall v. Bartness, 97 Wn. App. 245, 253, 982 P.2d 690 (1999).

Further, a prescriptive easement will be recognized even if there is imprecision as to when the use first began, so long as there has been adverse use for at least ten years. Smith v. Breen, 26 Wn App. 802, 614 P.2d 671 (1982) (the “road has existed since at least the 1930s . . .”). In this case, either the County’s adverse use was open and obvious when the culvert was first installed (and the ten year prescriptive period began to run against Wood’s predecessor at that time); or it became open and obvious in 1988 – 1989 when the prior owner of the lots now owned by Wood and Dermond cleared the property, constructed a house and built a

driveway next to the culvert outfall. In either case, the owner of the servient estate had actual and constructive notice of the adverse use, and was required to challenge that use within 10 years or be barred. Once the servient estate has actual or constructive knowledge of the adverse use, he must act within 10 years:

Because he failed to effectively assert his own ownership over the fields for more than 10 years after acquiring actual knowledge of the Kummers' adverse possession, Mr. Johnson lost his title.

Stokes v. Kummer, 85 Wn. App. 682, 690, 936 P.2d 4 (1997).

Since it has been at least 20 years since Mason County's adverse use became open and obvious, a prescriptive easement was established as a matter of law. Indeed, one can scarcely imagine a clearer case of prescriptive drainage easement than the one presented by Mason County here. Any suggestion that the County's use was not open and notorious is preposterous. There is no dispute that the water discharging from the culvert is above ground at the top of the Woods' driveway, at the very location where Wood and Dermond enter their properties every day. Nor is there any evidence that the culvert outfall has ever been underground or otherwise obscured. We know that the discharge from the County culvert was open and notorious in 1988 when Mr. Dermond purchased his property, and that it was still open and obvious when Wood purchased the adjoining lot in 2001. (CP 341-42; CP 344; CP 406).

The doctrine of prescription clearly applies in this case, just as it was held to apply in Pedersen v. Department of Transportation, *supra*, 43 Wn. App. 413 (1986). In Pedersen, certain property owners complained in 1988 that a pumping system and series of catch basins and culverts installed by the Washington State Dept. of Transportation (“DOT”) effected an illegal diversion of water onto and under their properties. The trial court dismissed their claims for damages against the state, and the Court of Appeals affirmed, holding that DOT acquired a prescriptive drainage easement by operating its drains and culverts across plaintiffs’ properties for a period of more than 10 years. The court confirmed that a prescriptive drainage easement continues despite the conveyance of the underlying fee to new purchasers:

We therefore agree with the trial court’s implicit finding that once the statutory 10-year period began to run against Albright in 1964, it was not tolled or extinguished upon the subsequent transfer of various parcels of the servient estate to the plaintiffs.

43 Wn. App. at 422.

Long after the Bloomfield Road culvert was in place, the properties now owned by Wood and Dermond were cleared and developed, creating impervious surfaces. (CP 341-42). If the private clearing and development changed the path or characteristics of surface water on their properties, the responsibility to deal with those changes rests with the private landowners, not with Mason County. Mason County’s prescriptive use defeats Wood’s trespass claim.

3. Wood Has Presented No Evidence of Misuse of the Easement.

Wood has also argued that, even if Mason County acquired a prescriptive drainage easement, that easement has been “negligently misused.” But there is no evidence in this case that the County has ever changed the size or the use of its culvert, the purpose of which is simply to collect stormwater from the ditch along Bloomfield Road and to discharge it at that same location near the corner of the Wood and Dermond property.

The cases cited by Wood are clearly inapposite. In Sanders v. City of Seattle, 160 Wn.2d 198, 156 P.3d 874 (2007) the parties entered into an express written easement agreement which provided for pedestrian access through a private mall to a monorail station. The Court held that the written easement could not be unilaterally expanded to require the mall owner to make its property available as a public gathering place for political protests. Nothing remotely similar to those circumstances exists here. And Lee v. Lozier, 88 Wn. App. 176, 945 P.2d 214 (1997), involved an easement for use of a community dock for recreational purposes. The Court of Appeals *rejected* Lozier’s argument that the essential use of the dock had gone beyond its original recreational purpose.

In this case, Mason County’s culvert has been in place, draining the same sub basin at the same location for at least 28 years. There is not a shred of evidence that the County altered or increased the capacity of the

culvert within the prior 10 years. Nor is it relevant that the culvert carries more water in rainstorms than it does in dry periods. In Lozier, the Court of Appeals rejected the plaintiff's argument that the dock had not been used in a "continuous and uninterrupted" manner, simply because the use was much greater during the summer than during the winter months. Similarly, a drainage culvert will of course carry more surface water flows during a rainstorm. But the Bloomfield Road culvert has been doing so in the same manner for at least 30 years. Wood has not shown that the culvert was misused in the January 2009 storm event.

4. Plaintiffs' Did Not Plead a Public Nuisance Claim and There is no Evidence to Support One.

Recognizing that a trespass claim against Mason County arising from the Bloomfield Road culvert is barred by prescription, plaintiffs argue that prescription should not bar their claim because one cannot acquire a prescriptive right to create a "public nuisance." There are at least two problems with this argument. First, neither the Complaint nor the Supplemental Complaint gives even a hint of a nuisance claim, much less a claim for public nuisance. Moreover, even if a public nuisance claim had been properly pled, there are no facts in the case which would support such a claim.

"Public nuisance" is a narrow and specialized claim defined in RCW 7.48.130 and 7.48.140. A necessary element of any such claim is that the alleged nuisance "affects equally the rights of an entire

community or neighborhood.” Thus, an activity or structure which affects only one or two landowners cannot be a public nuisance. In this case, the Bloomfield Road culvert has been in place for at least 30 years and its only potential impact is on Wood and Dermond. It does not equally affect the rights of an entire community and therefore cannot constitute a public nuisance.

Moreover, a cross-culvert which simply discharges stormwater has never been held to rise to the level of a public nuisance. Indeed, the categories of public nuisances are explicitly enumerated in RCW 7.48.140, which identifies such activities as disposing of animal carcasses and pollution in rivers, streets or other property; blocking public highways; manufacturing gun powder or nitroglycerin in developed areas and emitting air pollution which is offensive or dangerous to public health. The statute does not identify stormwater drainage culverts as a potential species of public nuisance.

Plaintiffs’ citation to Elves v. King County, 49 Wn.2d 201, 299 P.2d 206 (1956) is misplaced. In that case, it was not the discharge of stormwater that was determined to be a public nuisance. Rather, the trial court made findings that ditches maintained by the county collected and channeled “human and animal excreta” onto private property, creating a “menace to public health and safety.” Id. at 212. Needless to say, there is nothing approaching those facts in this case.

The fact that there was a slide on the Dermond property in January 2009 in no way gives rise to a claim for public nuisance. As expert geologist William Holbert testified, the slide occurred during a massive rainstorm which was in the nature of a 50 to 100 year event. (CP 348). There were similar slides throughout southern Puget Sound at that time which were entirely unrelated to the Bloomfield Road culvert next to Woods' property.

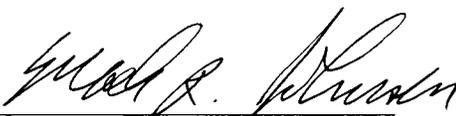
The Bloomfield Road cross-culvert does what thousands of similar culverts do throughout Washington state. Such drainage culverts are not public nuisances. Because the culvert has been discharging stormwater in the same location for decades, the general rules of prescriptive easement apply, and bar any claim for trespass against Mason County.

V. CONCLUSION

For all of the above reasons, Mason County respectfully asks this Court to affirm the summary judgment orders issued by the trial court, and to dismiss this appeal.

DATED this 20 day of September, 2011.

KARR TUTTLE CAMPBELL

By:   
Mark R. Johnsen, WSBA #11080  
Attorneys for Respondent Mason  
County

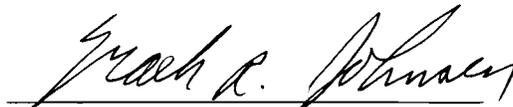
**DECLARATION OF SERVICE**

MARK R. JOHNSEN declares as follows:

I am a resident of the State of Washington, employed at Karr Tuttle Campbell, 1201 Third Avenue, Suite 2900, Seattle, WA 98101. I am over the age of 18 years and am not a party to this action. On the below date, a true copy of the Brief of Respondent Mason County was served to the following via first class mail, postage prepaid:

Jon E. Cushman  
Kevin Hochhalter  
Cushman Law Offices, P.S.  
924 Capitol Way South  
Olympia, WA 98501

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 20<sup>th</sup> day of September, 2011, at Seattle, Washington.

  
MARK R. JOHNSEN

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