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No. 23384-7-III

COURT OF APPEALS OF THE  
STATE OF WASHINGTON, DIVISION III

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MIKE G. VAN DINTER AND SHERYL ANN VAN DINTER,  
husband and wife,

Appellants,

v.

JOSEPH M. ORR AND LORI L. ORR, husband and wife, each  
individually and the martial community; FIRST AMERICAN  
TITLE COMPANY OF SPOKANE, a Washington corporation;  
FIRST AMERICAN TITLE INSURANCE COMPANY, a foreign  
corporation; FIRST AMERICAN CORPORATION,  
a foreign corporation,

Respondents.

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**APPELLANTS VAN DINTER'S REPLY BRIEF**

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## **I. INTRODUCTION**

Respondents First American Title Company of Spokane, First American Title Insurance Company, and the First American Corporation (collectively "First American") and Respondents Joseph and Lori Orr ("Orrs") responses are nothing more than attempts to divert this Court's focus from the real issue in this case. Namely, whether the Capital Facilities Rate ("C.F.R.") charged against the property prior to the date of sale should have been disclosed to the Van Dinters. This case is about whether the Orrs' and First American's failure to disclose an obligation against the property constituted a breach of the statutory warranty deed and the insurance policy First American provided. First American's and the Orrs' attempts to divert the Court's attention away from the relevant facts in this case should be ignored.

1. The Orrs advertised the property as having "Public Sewer". (C.P. 141).
2. The amount each property owner was required to pay was established in 1999. S.C.C. 8.03.8120(b)(4)<sup>1</sup>; C.P. 86.

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<sup>1</sup> Spokane County Code.

3. The C.F.R. attached to the property when the sewer was "made available" to the property. S.C.C. 8.03.8140.
4. The Sewer system was constructed prior to the Orrs selling the property to the Van Dinters in 2003. (C.P. 23, ¶ 5).
5. The Orrs never disclosed to the Van Dinters that any amount was owed to Spokane County for the construction of the sewer system. (C.P. 23).

The Van Dinters purchased a piece of property which they were told had sewer. (C.P. 141). Three months later, they were informed for the first time that they had to pay an additional \$10,775 for the costs of Spokane County's sewer construction completed prior to their purchase of the property. (C.P. 90). Amazingly, the Orrs never disclosed to the Van Dinters that this obligation was owed against the property. Yet, now they want this Court to hold that sellers who give a statutory warranty deed but withhold information with regard to amounts owed on the property may do so with impunity. In essence, they argue that unpaid obligations for real property do not constitute encumbrances.

However, this position simply is not supported by Washington law. An encumbrance is a right that subsists in a

third party to the diminution in the value of the property. Cowiche Basin Partnership v. Mayer, 40 Wn. App. 223, 228 (1985). The Orrs' and First American's stilted argument does not change the fact that the C.F.R. was a right that subsisted in Spokane County to the diminution of the property value. As explained below, after public notice, the C.F.R. was created by statute four years before the Orrs sold the property and by statute the C.F.R. attached to the property at the time construction of the sewer was completed. This obligation was owed, had to be paid, and could not be avoided.

Requiring the C.F.R. to be disclosed is a slight burden. There is no question that if this obligation were disclosed, a purchaser would not pay the same amount for the property as they would pay if the obligation did not exist. Consequently, the C.F.R. constitutes an encumbrance and the Orrs negligently misrepresented the property. Thus, the trial court's decision should be reversed.

## **II. ARGUMENT IN REPLY TO RESPONDENT ORR'S BRIEF**

### **A. The C.F.R. Is An Encumbrance.**

This case is not about "financing methods." This case is about whether there was money owed to a third party against the property prior to the Orrs selling it to the Van Dinters. The undisputed evidence and Washington law confirms that the C.F.R. was owed against the property, was not disclosed, and constituted an encumbrance. Consequently, the Orrs breached their statutory warranty deed as a matter of law.

In 1999, Spokane County, after a public hearing, adopted and established the C.F.R. rates for properties falling within the 2001 sewer construction program. (C.P. 90). The amount to be paid by property owners within the 2001 Annual Sewer Construction Program was also established. S.C.C. 8.03.8120(b)(4). The County provided that these amounts would become due as soon as construction of the sewer system was made *"available' to development parcels within such sewer project..."* S.C.C. 8.03.8140. In other words, when construction was completed bringing the public sewer within 200 feet of the property boundary. S.C.C. 8.03.3040.

It is undisputed that construction was completed prior to the Orrs selling the property to the Van Dinters and the sewer was "available". (C.P. 2); S.C.C. 8.03.3040(d); and see also Orrs Brief, p.13. As a result, after construction, Spokane County had a right in the property. S.C.C. 8.03.9040. Therefore, the property was diminished in value by the amount owed. Cowiche, 40 Wn. App. at 228.

Hence, the Orrs' assertion that the C.F.R. is merely like a monthly charge for water is without merit. Unlike a service charge for water, electricity or even the sewer service charge itself, the C.F.R. is a proportionate share of the actual construction costs of the sewer system. S.C.C. 8.03.1135; S.C.C. 8.03.8120; S.C.C. 8.03.8160; and S.C.C. 8.03.8340. Thus, the C.F.R. is an entirely different animal than a sewer service fee. See S.C.C. 8.03.8520.

Indeed, the Spokane County has stated a C.F.R. is a charge which will need to be disclosed by the owner when you are preparing to sell the property. (C.P. 94). Yet, the Orrs did not disclose this information to the Van Dinters.

Similarly, the Orrs' assertions that the specific C.F.R. amounts were only established in April, 2003 is likewise unsupported by the record. The amounts were established in 1999, after public notice. S.C.C. 8.03.8120; (C.P. 90). For the Orrs to now argue that as the property owners they had no knowledge of the C.F.R.'s is completely disingenuous and unsupported by the record.

Finally, the Orrs' position that property value is not diminished when a purchaser is blind sided by the fact the seller has not previously paid for something that the purchaser believed was part of the deal defies common sense. As the Orrs point out, having sewer increases the value of land. (See Orr's Brief, p. 11). Here, the Van Dinters paid the price for property represented to have sewer to it. (C.P. 141). However, after the purchase they discovered they had been misled and that in fact the amounts owed for the construction of the sewer system had not been paid. Id. As a result, the value of the land was diminished by the amount required to be paid for the cost of the sewer construction. Indeed, the fallacy of the argument that the amounts owed for the C.F.R. prior to

the sale do not constitute an encumbrance because there was no actual "lien" or the payments were not delinquent is readily apparent. The present dispute is over the construction of an improvement prior to the sale of property, the lack of payment concealed and then after the sale, the Van Dinters forced to foot the bill.

Orrs' argument falls apart when one considers what would happen in a case not involving the government. For example, assume that the Orrs hired a third-party to construct a sewer system for the property and after construction sold the property to the Van Dinters. However, despite representing that the property has sewer, they do not disclose the fact they have not paid the contractor. In that case, it is clear that the failure to pay for an improvement on the property constitutes an encumbrance. The sewer contractor would then have the right to lien the property. RCW 60.04 et seq. The mere fact the lien is not actually filed as of the date of sale does not mean the property was not encumbered or eliminate the Orrs culpability. Indeed, the right in the property exists by virtue of the work.

Likewise, here the County has a right in the property by virtue of the construction prior to the sale.

The primary response by the Orrs and First American on this issue is to point to two cases which are inapplicable to the facts at bar. However, the newfound reliance on Knowles v. Temple, 49 Wash. 595, 597-98 (1908) and Flajole v. Schulze, 80 Wash. 483, 485 (1914) is misplaced.

In Knowles, the Tacoma city counsel adopted a resolution to improve city streets and created an assessment district. Knowles, 49 Wash. at 595. The defendant conveyed the property during construction of the street improvement. Id. Construction was completed after the sale, and the district later liened the property through an assessment. Id. at 595-96. The court noted that *"no lien for general taxes or special assessments exists by virtue of common law"* Id. at 596. Thus, Tacoma's assessments were governed solely by the statutes creating them. Id. at 596-98. The Knowles court relied upon the language of the statute at issue to determine when the City had the right to obtain payment for the work benefiting the property. In the Knowles case, the statute provided that the

City's right to payment did not arise until the charge was "assessed and the assessment roll confirmed by the legislative body..." Id. at 597. In Knowles, that occurred after construction and after the sale of the property.

Unlike Knowles, the Spokane County Commissioners created the C.F.R. in 1999. S.C.C. 8.03.8120. Spokane County also provided that the right to seek payment would attach when the sewer was made "available" to the property. S.C.C. 8.03.8140. In other words, when construction was completed. S.C.C. 8.03.3040. Both of these events occurred prior to the sale of the property at issue. (C.P. 23). At the time of the sale, it is undisputed that the County had the right to payment of the C.F.R. Thus, this was not a mere "*inchoate right*" and the property was encumbered.

Similarly, Flajole is also inapplicable. In Flajole, the city levied an assessment for street improvements against benefited parcels. Flajole, 80 Wash. at 484. Like Knowles, the Flajole court pointed to the language of the statute for assessments which fixed the point at which payment was required. Id. at

485-486. It did not consider or interpret the C.F.R. statutes at issue in this case.

In this case, the Orrs breached the statutory warranty deed by delivering title to the property with an existing obligation remaining unpaid. Thus, the trial court erred as a matter of law by granting the Orrs cross-motion for summary judgment and denying Van Dinter's Motion for Summary Judgment. Therefore, its decision should be reversed.

**B. Genuine Issues Of Material Fact Exist With Regard To Van Dinters' Negligent Misrepresentation Claim.**

Summary judgment should only be granted "*if, from all the evidence, reasonable persons could reach but one conclusion*". Clements v. Travelers Indem. Co., 121 Wn.2d 243, 249 850 P.2d 1298 (1993). Even where the evidentiary facts are undisputed, if reasonable minds could draw different conclusions from those facts, then summary judgment is not proper. Preston v. Duncan, 55 Wn.2d 678, 681-682, 349 P.2d 605 (1960). On a motion for summary judgment, trial court must consider evidence and all reasonable inferences from it in the light most favorable to non-moving party. Magula v. Benton

Franklin Title Co., Inc., 131 Wn.2d 171, 182, 930 P.2d 307 (1997). Issues of negligence are questions of fact for the jury and are not usually susceptible to summary judgment. Ruff v. King County, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). See also Blumenshein v. Voelker, 124 Wn. App 129, 136, 100 P.3d 344 (2004).

The Van Dinters presented specific facts supporting their allegation of negligent misrepresentation. (C.P. 23; C.P. 141). The Orrs represented that no amounts were owed as to the property and that no encumbrances existed. (C.P. 29). The Orrs also represented the property had sewer - "*UTILITIES: public sewer, water & gas.*" (C.P. 141). Notably, the Orrs did not advertise that sewer was merely "available". Indeed, the very fact the Van Dinters purchased the property supports the conclusion and/or inference that they relied upon the Orrs' representations. As testified to by Mike Van Dinter, the property was advertised as having sewer and the Orrs did not disclose that any amounts were owed for the sewer. (C.P. 23).

It is undisputed these representations were false since the Orrs had failed to pay the C.F.R. (C.P. 23). The Orrs did

not even disclose the fact this would need to be paid. (C.P. 141). The Van Dinters are now wrongfully forced to shoulder that burden. (C.P. 23).

The only reasonable inference from the evidence is that the Van Dinters justifiably relied on the Property advertisement and the warranty deed when they purchased the Property. (C.P. 141; C.P. 122; C.P. 6). The Orrs' negligent misrepresentation that the Property had sewer is a question of fact for the jury. Ruff, 125 Wn.2d at 703. Genuine issues of material fact exist with regard to the negligent misrepresentation by the Orrs. The Orrs failed to present any admissible evidence supporting their motion for summary judgment. In fact, the Orrs conceded they were required to disclose the C.F.R. (C.P. 94 – *"This charge will need to be disclosed by the owner when you are preparing to sell the property"*). Thus, the trial court erred in granting the Orrs' cross-motion for summary judgment and denying Van Dinter's motion for summary judgment.

### **III. ARGUMENT IN REPLY TO FIRST AMERICAN'S BRIEF**

Despite its excuses, First American recognized before the lawsuit that its policy was implicated. *"While there is coverage under the lender's policy . . ."* (C.P. 96). *"While the statute forwarded may indeed be a basis for a claim of priority by Spokane County for amounts due under the subject Capital Facilities Rate (CFR) . . ."* (C.P. 140). Accordingly, its arguments otherwise now should be disregarded.

#### **A. First American Breached Its Policy Because The C.F.R. Was An Encumbrance.**

First American offers the same stilted and incorrect arguments as the Orrs with regard to whether the obligation constitutes an encumbrance. Accordingly, the Van Dinters incorporate by reference their argument on these issues as set forth above.

#### **B. The C.F.R. Is Also An Assessment For Street Improvements And First American Is Liable As A Matter of Law.**

The C.F.R. also constitutes an assessment for street improvements and First American is liable under its policy. First American completely failed to address the fact that coverage

also exists because under the policy, the C.F.R. constitutes an assessment for street improvements. As set forth in Van Dinters' opening brief, the term "assessments" is not defined in the policy. (C.P. 30-39). Both the dictionary and Washington law confirms that an assessment is not "*for the general good*" but instead is established according "*to the benefit received*". See Black's Law Dictionary, Fifth Edition, p. 106-107 ("*It is levied for a specific purpose and in an amount proportioned to the direct benefit of the property assessed*"). Unable to address an ambiguity to be construed against it, the only response by First American is to misrepresent the holding of Arborwood Idaho v. Kennewick, 151 Wn.2d 359 (2004). However, the Arborwood court simply did not define "assessment" and certainly did not make the sweeping distinction between "assessment" and "charges" offered by First American. Consequently, by the plain meaning of "assessment", the C.F.R. was an assessment against the property for street improvements and First American breached its policy as a matter of law.

**C. The C.F.R. Created A "Lien" For The County.**

First American's assertion that facts or the statute have been misstated is without merit. Indeed, a reading of the plain language of RCW 36.94.150 confirms that the County has a lien for charges for the availability of sewerage. The restriction of "delinquencies" only relates to "connection charges". See RCW 36.94.020 ("*delinquent connection charges*"). However, the C.F.R.'s are not "*connection charges*". The C.F.R.'s are for the construction to make sewer available. S.C.C. 8.03.8120; S.C.C. 8.03.8140. Thus, unlike "connection charges", a lien is automatically created for these amounts. RCW 36.94.020 ("*shall have a lien for . . . charges for the availability of sewerage . . .*"). Therefore, First American's response ignores the plain language of the statute and the trial court's decision should be reversed.

**D. First American's Contract Defenses Are Inapplicable.**

**1. The Van Dinters Met All Conditions Precedent in the Contract.**

First American's proof of loss argument is without merit. First American was provided with the proof of loss information

and First American was not prejudiced. The policy describes what is required by the proof of loss.

*The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against by its policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of loss or damage.*

(C.P. 37)(emphasis added). Here, this information was provided to First American on several occasions. C.P. 133 ("*total CFR owed to Spokane County for the property is \$10,938.80*"); C.P. 43; C.P. 136; and C.P. 137. Consequently, First American was provided the required proof of loss.

In addition, it is undisputed that First American did not suffer any prejudice. An insurer is not released from its obligations under a title policy because of alleged non-compliance with policy terms, unless the insurer can show actual prejudice. Universal Holdings II, L.P. v. Overlake Christian Church, 115 Wn. App. 59, 72, 60 P.3d 1254 (2003). Without making this requisite showing, First American cannot now attempt to rely on this defense where it was not prejudiced.

**2. The Encumbrance Which First American Failed to Disclose Constitutes a Damage.**

Defendant First American has taken the absurd position that the encumbrance has not "resulted in a loss". However, a fair review of the record indicates otherwise. Damages for a breach of contract should put the aggrieved party in as good as position as he would have been if the contract had been performed. WPI 303.01. Any doubts with regard to the certainty of damages are resolved against the breaching party. Northwest Land & Inv., Inc. v. New West Federal Sav. & Loan Ass'n, 57 Wn. App. 32, 786 P.2d 324 (1990).

There simply is no doubt that the Van Dinters and AmericanWest Bank suffered damages as a result of First American's failure to disclose an encumbrance. As previously recognized, an "encumbrance" is *"any right to or interest in land which may subsist in third persons, to the diminution of value of [the property]."* Cowiche Basin Partnership, 40 Wn. App. at 228 (emphasis added), quoting from Hebb v. Severson, 32 Wn.2d 159 (1948); Robinson v. Khan, 89 Wn. App. 418 (1998). In this case, the encumbrance is an unpaid sum owed

for the 2001 construction of the sewer system. Consequently, the damage is the amount the encumbrance diminishes the value of the property. Id. That amount of diminution of value is necessarily equal to the sums owed to remove the encumbrance.

A fact recognized by the Universal Holdings court, a case where a title insurer provided title insurance. Universal Holdings, 115 Wn. App. at 61. The Universal Holdings court reversed summary judgment against the title insurance company and directed the trial court to enter summary judgment for the purchaser on the issue of liability. Id. Like First American, the insurer argued that it should not be liable under the policy alleging the insured did not provide a "proof of loss" and did not suffer actual damage. Id. The Universal Holdings court, citing to Summonte v. First American Title Ins. Co., 436 A.2d 110, 116 (1981), stated the *"presence of undetected lien reduced the value of the insured's property and that was an actual loss; insured did not first have to first pay the lien or suffer foreclosure in order to sustain a loss under the policy."* Id. at 71; see also Williams v. Hewitt, 57 Wash. 62, 63-64, 106 P.

496 (1910)(*"The contention that the respondent's right of action did not accrue until there was an assertions of right under the clause is not tenable"*).

Similarly, AmericanWest Bank or the Van Dinters do not have to pay the C.F.R. in order to suffer an actual loss. Diminution in property value is enough. First American's argument is amazing since the policy itself specifically provides for payment. The policy states:

*(iii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.*

(C.P. 37 - Conditions And Stipulations, ¶ 7(a)(iii))(emphasis added).

Pursuant to Washington law, *"title insurance policies are more than a contract of indemnity."* Miebach v. Safeco Title Ins. Co., 49 Wn. App. 451, 453, 743 P.2d 845 (1987). The Miebach court explained that unless there is a provision limiting damages to "out of pocket" expenses that diminution in value and other damages are recoverable.

*Assuming the words "actual loss" may be reasonably interpreted to mean "out of pocket"*

*losses, it would seem equally reasonable to interpret "actual loss" as the "real" loss suffered by the insured, including the loss of any beneficial bargain the insured made in purchasing the property. See Hartman v. Shambaugh, 96 N.M. 359, 630 P.2d 758 (1981) ("actual loss" policy entitled insured to recover value of land up to amount of the policy); Fohn v. Title Ins., Corp. of St. Louis, 529 S.W.2d 1 (Mo. 1975) ("actual loss may include benefit of bargain obtained at purchase). Thus, it appears that the words "actual loss" are, in this context, susceptible of two meanings or constructions. Therefore, the words are ambiguous and the meaning most favorable to the insured must be employed.*

Id. at 454. Here, the issue is even clearer since both Washington law and the policy explicitly provides for payment equal to the diminution in value. (C.P. 37).

### **3. The Exclusions Do Not Apply in this Case.**

*The purpose of insurance is to give protection and it can be presumed that such was the intent of the parties. Exemptions are contrary to this basic intent, and thus should not be extended beyond their clear and unequivocal meaning . . .*

McDonald Indus., Inc. v. Rollins Leasing Corp., 95 Wn.2d 909, 914-915, 631 P.2d 947 (1981). See also Lynott v. National Union Fire Ins. Co., 123 Wn.2d 678, 694, 871, P.2d 146 (1994). An exclusion which would make coverage "illusory", that "devours" the policy, or that "swallows" the insurance

contract should not be enforced. Olympic S.S. Co. v. Centennial Ins. Co., 117 Wn.2d 37, 51, 811 P.2d 673 (1991); McDonald Indus., 95 Wn.2d at 915; and McMahan & Baker, Inc. v. Continental Cas. Co., 68 Wn. App. 573, 578, 843 P.2d 1133 (1993). Thus, "*exclusionary clauses are narrowly construed for the purpose of providing maximum coverage for the insured.*" George v. Farmers Ins. Co., 106 Wn. App. 430, 439, 23 P.3d 552 (2001).

Here, a "*law, ordinance or governmental regulation*" relating to the "*occupancy, use, or enjoyment of the land*"; "*the character, dimensions or location of any improvement now or hereafter erected on the land*"; "*a separation in ownership or a change in dimensions or area of the land*"; or relating to "*environmental protection*" is simply not a issue. (C.P. 36 – Exclusions from Coverage). Nor is a "*governmental police power*" at issue. (C.P. 36 – Exclusions from Coverage).

Indeed, the cases cited by and relied upon by First American relate to the provision of services by a government entity and the service charges which arise out of that. The cases relied upon do not relate to the costs of construction of

improvements or encumbrances for the construction of such improvements that diminish property value. See Arborwood Idaho v. Kennewick, 151 Wn.2d 359, 370-71 (2004). Here, the costs of the actual construction of street improvements benefiting the property is at issue. Indeed, notice of this encumbrance was recorded in the public record when the ordinance was passed and public notice provided. (C.P. 86).

First American's position ignores the fact that the exclusions which it points to would not, under any circumstances, apply to the express coverage which provides protection against encumbrances and assessments relating to street improvements for construction completed prior to the policy date. (C.P. 36 – Exclusions from coverage ¶ 3(d)). Consequently, the exclusions relied upon are inapplicable in this case.

#### **VI. THE VAN DINTERS' APPEAL IS NOT FRIVOLOUS**

The request by the Orrs and First American for attorney fees and costs describing this appeal as frivolous should be denied. As set forth above, the trial court ignored the facts of

this case and Washington law by granting summary judgment. Consequently, the Van Dinters' appeal is proper.

#### **V. CONCLUSION**

Pursuant to the foregoing, the trial court's granting of First American's Motion for Summary Judgment and the Orrs' Cross-Motion for Summary Judgment was error and should be reversed. Furthermore, trial court's denial of Van Dinter's motion for summary judgment against the Orrs and cross-motion for summary judgment against First American was also error. The Van Dinters respectfully request that the trial court's orders be reversed and the Van Dinters awarded their attorney fees and costs.

DATED this 23<sup>th</sup> day of February, 2005.

DUNN & BLACK, P.S.

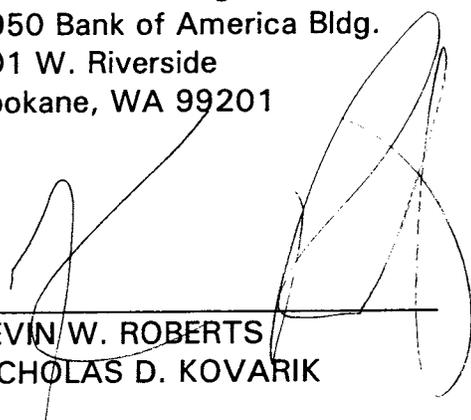
KEVIN W. ROBERTS, WSBA #29473  
NICHOLAS D. KOVARIK, WSBA #35462  
Attorneys for Appellants Van Dinter

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 23 day of February, 2005, I caused to be served a true and correct copy of the foregoing document to the following:

<input type="checkbox"/> HAND DELIVERY	Mr. Stephen F. Backman
<input checked="" type="checkbox"/> U.S. MAIL	Backman & Blumel, P.S.
<input type="checkbox"/> OVERNIGHT MAIL	4407 N. Division Street,
<input type="checkbox"/> FAX TRANSMISSION	Ste. 900
	Spokane, WA 99207

<input type="checkbox"/> HAND DELIVERY	John D. Munding
<input checked="" type="checkbox"/> U.S. MAIL	Crumb & Munding, P.S.
<input type="checkbox"/> OVERNIGHT MAIL	1950 Bank of America Bldg.
<input type="checkbox"/> FAX TRANSMISSION	601 W. Riverside
	Spokane, WA 99201



\_\_\_\_\_  
KEVIN W. ROBERTS  
NICHOLAS D. KOVARIK

Title 8 HEALTH AND SANITATIONChapter 8.03 SANITARY SEWER CODE**8.03.8120 CFRs assigned to each annual sewer construction program.**

(a) A constant monthly CFR will be established by the board for each annual sewer construction program on the basis of the ERUs allocated to the annual sewer construction program at the time the CFR is calculated. The CFR may be revised once final construction and/or financing costs are determined. The components of the CFR related to debt service may be based on estimates of the principal amount and interest costs of the bonds for such annual sewer construction program.

(b) The CFRs for each annual sewer construction program are as follows:

(1) The CFR for the 1997 annual sewer construction program is thirty-five dollars per month per-ERU, based on a "construction cost component" of three thousand two hundred twenty dollars (or thirteen dollars and forty-two cents per month), a "bond issuance cost component" of one hundred fifty-five dollars (or sixty-four cents per month), an "interest component" of three thousand nine hundred fifty dollars (or sixteen dollars and forty-six cents per month), a "GFC component" of one thousand seventy-five dollars (or four dollars and forty-eight cents per month), a total of one thousand eight hundred thirty-two ERUs and an estimated revenue bond maturity of two hundred forty months.

(2) The CFR for the 1998 annual sewer construction program is thirty-five dollars per month per-ERU, based on a "construction cost component" of three thousand twenty dollars (or twelve dollars and fifty-nine cents per month), a "bond issuance cost component" of one hundred fifty-five dollars (or sixty-four cents per month), an "interest component" of three thousand nine hundred fifty dollars (or sixteen dollars and forty-six cents per month), a "GFC component" of one thousand two hundred seventy-five dollars (or five dollars and thirty-one cents per month), a total of one thousand five hundred seventy-three ERUs and an estimated bond maturity of two hundred forty months.

(3) The CFR for the 1999 annual sewer construction program is thirty-five dollars per month per-ERU, based on a "construction cost component" of three thousand twenty dollars (or twelve dollars and fifty-nine cents per month), a "bond issuance cost component" of one hundred fifteen dollars (or forty-eight cents per month), an "interest component" of three thousand eight hundred sixty-five dollars (or sixteen dollars and ten cents per month), a "GFC component" of one thousand four hundred dollars (or five dollars and eighty-three cents per month), a total of one thousand five hundred twenty-nine ERUs, and an estimated bond maturity of two hundred forty months.

(4) The CFR for the 2000 and 2001 Annual Sewer Construction Program is thirty-five dollars per month per ERU, based on a "construction cost component" of three thousand twenty dollars (or twelve dollars and fifty-nine cents per month), a "bond issuance cost component" of seventy-one dollars (or thirty cents per month), an "interest component" of three thousand six hundred forty-four (or fifteen dollars and seventeen cents per month), a "GFC component" of one thousand six hundred sixty-five dollars (or six dollars and ninety-four cents per month), a total of four thousand four hundred sixty-four ERUs and an estimated revenue bond maturity of two hundred forty months.

(5) The CFR for the 2002 and 2003 Annual Sewer Construction Programs is thirty-six dollars per month per-ERU, based on a "construction cost component" of three thousand sixty-five dollars (or twelve dollars and seventy-seven cents per month), an "interest component" of three thousand six hundred ninety dollars (or fifteen dollars and thirty-eight cents per month), a "GFC component" of one thousand eight hundred eighty-five dollars (or seven dollars and eighty-five cents per month), a total three thousand four hundred twelve ERUs and a two hundred forty

month repayment period.

(6) The CFR for the 2004 annual sewer construction program is thirty-six dollars and sixty-five cents per month per-ERU, based on a "construction cost component" of three thousand one hundred and sixty-five dollars (or thirteen dollars and nineteen cents per month), a "bond issuance cost component" of sixty-six dollars (or twenty-seven cents per month), an "interest component" of three thousand six hundred and eighty-two dollars (or fifteen dollars and thirty-four cents per month), a "GFC component" of one thousand eight hundred eighty-five dollars (or seven dollars and eighty-five cents per month), a total of two thousand two hundred and twenty-nine ERUs and a two hundred and forty month repayment period. (Res. 03-1031 (part), 2003; Res. 03-0447 Attachment A (part), 2003; Res. 01-1225 (part), 2001; Res. 99-1039, 1999; Res. 99-0062, 1999; Res. 97-1134, 1997; Res. 97-0232 Attachment A (part), 1997)

Title 8 HEALTH AND SANITATION

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**8.03.8140 Billing of CFRs.**

(a) The county will commence monthly billing of the CFR within each sewer project after the system of sewerage becomes "available" to development parcels within such sewer project within the meaning of Section 8.03.3040.

(b) The CFR will be billed on a monthly basis through to the maturity date reflected on the property owner's monthly bill, unless the property owner elects to discharge such charges earlier through prepayment(s) executed pursuant to 8.03.8160 or 8.03.8180. (Res. 03-0447 Attachment A (part), 2003; Res. 97-0232 Attachment A (part), 1997)

**APPENDIX B**

Title 8 HEALTH AND SANITATIONChapter 8.03 SANITARY SEWER CODE**8.03.3040 On-site sewage disposal systems--Policy to limit.**

(a) It is the policy and intent of Spokane County, the city of Spokane, the Spokane County health district and various other agencies of the state and federal governments that on-site sewage disposal be limited and discouraged, and, except where specifically authorized by permit regulations, prohibited in all areas and that all sewage be discharged into the POTW.

(b) No on-site sewage disposal system requiring a permit from the Spokane County health district, Washington State Department of Ecology or Washington State Department of Health may be constructed, altered, used or maintained without a written permit from the cognizant health officer certifying that it meets the requirements of the cognizant agency. On-site sewage disposal systems to be operated and maintained by Spokane County must also meet the requirements of the director and this chapter.

(c) An on-site sewage disposal system is not permitted when:

- (1) Public sewer service is available, as defined in subsection (d) below;
- (2) For any premises occupied by a significant industrial user; or
- (3) The public health or safety would be adversely affected.

(d) For purposes of this section, public sewer service is deemed "available" when determined by the director and:

- (1) A street, highway, alley or easement in which a public sewer is located runs within any point two hundred feet or less from the boundaries of the premises concerned and the director determines that such connection is feasible; or
- (2) A street, highway, alley or easement in which a public sewer is located runs within a distance greater than two hundred feet from the boundaries of the premises, the anticipated sewage flow from the premises is greater than one thousand gallons per day and the director determines that such connection is feasible;

(e) Every owner, agent or occupant of any property constructing, using or maintaining an on-site sewage disposal system after public sewer service becomes available, shall discontinue use of the on-site facility and connect to the POTW, through the county's general sewerage system and in the manner specified in Section 8.03.3060, upon the earlier of:

- (1) The time the on-site system fails, or requires repair or replacement, as determined by the health officer; or
- (2) Within one-year after public sewer service became available. The director may extend the one year time frame for good cause. (Cross Reference: Section 8.03.3060(d))

(f) Upon the connection to the county's general sewerage system or within one year after public sewer service became available, whichever is earlier, the owner, agent, or occupant shall pay the applicable special connection charge and commence payment of monthly sewer service fees and applicable general facility charges. Special connection charges and/or monthly sewer service fees bills shall be subject to lien payable upon sale of the real property. (Cross Reference: Section 8.03.9040)

(g) Public sewer as used in this section means a sewer comprising part of the Spokane County general sewerage system and not an interim public sewer. (Res. 03-0447 Attachment A (part), 2003; Res. 96-0752 Attachment A (part), 1996)

**APPENDIX C**

Title 8 HEALTH AND SANITATIONChapter 8.03 SANITARY SEWER CODE

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**8.03.9040 Payment--Delinquency--Lien.**

(a) Spokane County shall have a lien for all delinquent rates, fees and/or charges due in accordance with this chapter, together with interest at eight percent per annum from the date due until paid. Penalties of ten percent of the amount due, shall be imposed in case of failure to pay the charges within thirty days after the date of billing.

(b) The lien shall be for all charges, interest and penalties and shall attach to the premises to which the services were furnished. The lien shall be superior to all other liens and encumbrances, except general taxes and local special assessments of the county. Said lien shall attach and foreclosed pursuant to RCW 36.94.150.

(c) This section shall not apply to GFCs assigned to properties as part of a ULID assessment, which GFCs shall be paid, become delinquent and accrue interest and penalties in accordance with statutory requirements applicable to the payment of ULID assessments.

(d) All additional lien and enforcement rights by statute and at common law are reserved by the county. (Res. 03-0447 Attachment A (part), 2003; Res. 97-0232 Attachment A (part), 1997; Res. 96-0752 Attachment A (part), 1996)

**APPENDIX D**

Title 8 HEALTH AND SANITATIONChapter 8.03 SANITARY SEWER CODE**8.03.1135 Capital facilities rate.**

The "capital facilities rate" or "CFR" is that portion of the monthly sewer charges for property within an individual sewer project that is attributable to the costs of acquiring, constructing and installing the system of sewerage. The CFR for each annual sewer construction program will be calculated without reference to other annual sewer construction programs. The CFR has four components: (i) a component equal to the respective annual sewer construction program's construction costs (including, but not limited to, the costs of designing, engineering, acquiring, constructing the improvements, any interim financing within each sewer project, the county's costs of administering the sewer projects, and any developer latecomer reimbursements due for sewer construction with each sewer project) that are to be financed; (ii) a component equal to all other costs of the respective annual sewer construction program and GFCs that are to be financed (including, but not limited to, bond issuance costs and debt service reserve account deposits); and (iii) a component representing the interest costs associated with financing the respective annual sewer construction program and GFCs; and, (iv) a GFC component. The CFR components described above will be computed on a "per-ERU" basis.

For so long as the county bills and collects sewer charges on a monthly basis, the monthly CFRs per-ERU for each annual sewer construction program will be calculated pursuant to the following formula:

$(A + B + C + D) \div E$ , where,

"A" represents the construction costs for the annual sewer construction program less any contribution to such costs made from available county funds, grant proceeds and other sources (as determined by the director) divided by the number of ERUs within the annual sewer construction program as of the date the CFR is initially calculated (the "construction cost component");

"B" represents all costs of the annual sewer construction program other than construction costs (as determined in the previous paragraph) that are to be financed divided by the number of ERUs within the annual sewer construction program as of the date the CFR is initially calculated (the "bond issuance cost component");

"C" represents the sum of all interest payable to finance the annual sewer construction program divided by the number of ERUs within the annual sewer construction program as of the date the CFR is initially calculated (the "interest component");

"D" represents the GFCs per ERU allocated within the annual sewer construction program as of the date the CFR is initially calculated (the "GFC component");

"E" represents the total number of months for the CFR financing period for the respective annual sewer construction program (240 months).

In determining the number of GFCs and/or ERUs within an annual sewer construction program, the county may make adjustments to account for potential parcel combinations (aggregations), pre-existing sewer connection/extension agreements future development of vacant parcels, and any other factor that impacts the equitable distribution of the costs of such annual sewer construction program. (Res. 03-0447 Attachment A (part), 2003; Res. 97-0232 Attachment A (part), 1997; Res. 96-0752 Attachment A (part), 1996)

Title 8 HEALTH AND SANITATIONChapter 8.03 SANITARY SEWER CODE**8.03.8160 Prepayment of the CFR during the 30-day prepayment period.**

(a) The county will provide a "Thirty-Day Prepayment Period" during which property owners may prepay all or a portion of "construction cost component" and GFC component" of the CFR (as such phrases are defined in 8.03.1135) applicable to such sewer project. Partial prepayments shall be in the amount of five hundred dollars or more. There is no requirement that an owner prepay any portion of the CFR.

(b) The county will mail a thirty-day prepayment period notice to the owner or reputed owner of each parcel within the sewer project advising that the owner may pay all or a portion (in amount of five hundred dollars or more) of the "construction cost component" and "GFC component" of the CFR applicable to his/her parcel(s) during the specified thirty-day prepayment period.

(c) If a property owner elects to prepay the total "construction cost component" and "GFC component" of the CFR during the thirty-day prepayment period, then the county will exclude the CFR when calculating the monthly sewer bills pertaining to such parcel.

(d) Any property owner electing to prepay the total "construction cost component" and "GFC component" of the CFR shall submit a properly executed prepayment agreement, on a form to be provided by the county, along with such total prepayment.

(e) If a property owner elects to make a partial prepayment of five hundred dollars or more of the "construction cost component" and "GFC component" of the CFR during the thirty-day prepayment period, then the county will deduct any such partial payment and recalculate the monthly CFR billing for inclusion on the monthly sewer bills pertaining to such parcel. The monthly CFR billing will be recalculated based upon the remaining balance of the "construction cost component" and "GFC component," using the standard capital recovery formula below:

$A = P i (1 + i)^n$  where; A = Monthly payment

$(1 + i)^n - 1 P =$  Remaining balance

i = Interest rate ÷ 12

n = 240 (number of monthly payments remaining)

(Res. 03-0447 Attachment A (part), 2003; Res. 97-0232 Attachment A (part), 1997)

**APPENDIX F**

Title 8 HEALTH AND SANITATION

Chapter 8.03 SANITARY SEWER CODE

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**8.03.8340 GFC established.**

There is established a charge, known as a general facilities charge or "GFC" which shall be imposed upon all property located within the PSSA of Spokane County as well as all property outside the PSSA which requests connection to the system of sewerage subsequent to the effective date of the ordinance codified in this chapter. Said GFC shall be calculated and imposed in accordance with this chapter. (Res. 03-0447 Attachment A (part), 2003; Res. 97-0232 Attachment A (part), 1997)

**APPENDIX G**

Title 8 HEALTH AND SANITATIONChapter 8.03 SANITARY SEWER CODE

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**8.03.8520 Sewer service fees.**

(a) Sewer service fees will be billed upon connection of the parcel to the system of sewerage (including parcels connected to interim sewage facilities) or in accordance with Section 8.03.3040 (e), whichever occurs earlier.

(b) The following schedule states the monthly sewer service fees:

(1) Single-Family Residence.

(A) Sewer service fee (excluding the WTPC):

Effective January 1, 2003: \$20.50 per ERU.

(B) Wastewater Treatment Plant Charge: \$4.00 per ERU

(2) Duplex (each dwelling unit being an ERU).

(A) Sewer service fee (excluding the WTPC): Effective January 1, 2003: \$20.50 per ERU.

(B) Wastewater Treatment Plant Charge: \$4.00 per ERU.

(3) Multi-family Dwellings.

(A) Sewer service fee (excluding the WTPC):

Effective January 1, 2003: \$2.20 fixed charge plus \$12.80 per dwelling unit.

(B) Wastewater treatment plan charge: \$4.00 per ERU.

(4) Manufactured Home Park.

(A) Sewer service fee (excluding the WTPC):

Effective January 1, 2003: \$20.50 for the first ERU and \$2.05 per each 100 cubic feet of water consumption over the first ERU.

(B) Wastewater Treatment Plant Charge: \$4.00 for the first ERU and \$0.44 per each 100 cubic feet of water consumption over the first ERU.

(i) Effective February 1, 1997: \$2.00 for the first

(5) Business and Commercial Parcels.

(A) Sewer service fee (excluding the WTPC):

Effective January 1, 2003: \$20.50 for the first ERU and \$2.05 per each one hundred cubic feet of water consumption over the first ERU; and

(B) Wastewater Treatment Plant Charge: \$4.00 for the first ERU and \$0.44 per each 100 cubic feet of water consumption over the first ERU. (Res. 03-0447 Attachment A (part), 2003; Res. 97-0831 Exh. A § 6, 1997; Res. 97-0232 Attachment A (part), 1997)

## APPENDIX H

**RCW 36.94.150**

**Lien for delinquent charges.**

All counties operating a system of sewerage and/or water shall have a lien for delinquent connection charges and charges for the availability of sewerage and/or water service, together with interest fixed by resolution at eight percent per annum from the date due until paid. Penalties of not more than ten percent of the amount due may be imposed in case of failure to pay the charges at times fixed by resolution. The lien shall be for all charges, interest, and penalties and shall attach to the premises to which the services were available. The lien shall be superior to all other liens and encumbrances, except general taxes and local and special assessments of the county.

The county department established in RCW 36.94.120 shall certify periodically the delinquencies to the auditor of the county at which time the lien shall attach.

Upon the expiration of sixty days after the attachment of the lien, the county may bring suit in foreclosure by civil action in the superior court of the county where the property is located. Costs associated with the foreclosure of the lien, including but not limited to advertising, title report, and personnel costs, shall be added to the lien upon filing of the foreclosure action. In addition to the costs and disbursements provided by statute, the court may allow the county a reasonable attorney's fee. The lien shall be foreclosed in the same manner as the foreclosure of real property tax liens.

[1997 c 393 § 9; 1975 1st ex.s. c 188 § 3; 1967 c 72 § 15.]

**RCW 36.94.020**

**Purpose -- Powers.**

The construction, operation, and maintenance of a system of sewerage and/or water is a county purpose. Subject to the provisions of this chapter, every county has the power, individually or in conjunction with another county or counties to adopt, provide for, accept, establish, condemn, purchase, construct, add to, operate, and maintain a system or systems of sanitary and storm sewers, including outfalls, interceptors, plans, and facilities and services necessary for sewerage treatment and disposal, and/or system or systems of water supply within all or a portion of the county. However, counties shall not have power to condemn sewerage and/or water systems of any municipal corporation or private utility.

Such county or counties shall have the authority to control, regulate, operate, and manage such system or systems and to provide funds therefor by general obligation bonds, revenue bonds, local improvement district bonds, utility local improvement district or local improvement district assessments, and in any other lawful fiscal manner. Rates or charges for on-site inspection and maintenance services may not be imposed under this chapter on the development, construction, or reconstruction of property.

Under this chapter, after July 1, 1998, any requirements for pumping the septic tank of an on-site sewage system should be based, among other things, on actual measurement of accumulation of sludge and scum by a trained inspector, trained owner's agent, or trained owner. Training must occur in a program approved by the state board of health or by a local health officer.

Before adopting on-site inspection and maintenance utility services, or incorporating residences into an on-site inspection and maintenance or sewer utility under this chapter, notification must be provided, prior to the applicable public hearing, to all residences within the proposed service area that have on-site systems permitted by the local health officer. The notice must clearly state that the residence is within the proposed service area and must provide information on estimated rates or charges that may be imposed for the service.

A county shall not provide on-site sewage system inspection, pumping services, or other maintenance or repair services under this section using county employees unless the on-site system is connected by a publicly owned collection system to the county's sewerage system, and the on-site system represents the first step in the sewage disposal process. Nothing in this section shall affect the authority of a state or local health officer to carry out their responsibilities under any other applicable law.

A county may, as part of a system of sewerage established under this chapter, provide for, finance, and operate any of the facilities and services and may exercise the powers expressly authorized for county storm water, flood control, pollution prevention, and drainage services and activities under chapters 36.89, 86.12, 86.13, and 86.15 RCW. A county also may provide for, finance, and operate the facilities and services and may exercise any of the powers authorized for aquifer protection areas under chapter 36.36 RCW; for lake management districts under chapter 36.61 RCW; for diking districts, and diking, drainage, and sewerage improvement districts under chapters 85.05, 85.08, 85.15, 85.16, and 85.18 RCW; and for shellfish protection districts under

chapter 90.72 RCW. However, if a county by reference to any of those statutes assumes as part of its system of sewerage any powers granted to such areas or districts and not otherwise available to a county under this chapter, then (1) the procedures and restrictions applicable to those areas or districts apply to the county's exercise of those powers, and (2) the county may not simultaneously impose rates and charges under this chapter and under the statutes authorizing such areas or districts for substantially the same facilities and services, but must instead impose uniform rates and charges consistent with RCW 36.94.140. By agreement with such an area or district that is not part of a county's system of sewerage, a county may operate that area's or district's services or facilities, but a county may not dissolve any existing area or district except in accordance with any applicable provisions of the statute under which that area or district was created.

[1997 c 447 § 11; 1981 c 313 § 1; 1967 c 72 § 2.]

