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SUPREME COURT
OF THE STATE OF WASHINGTON

CRYSTAL RIDGE HOMEOWNERS ASSOCIATION, a Washington
nonprofit corporation, etc., et al.

Plaintiffs/Respondents,

vs.

CITY OF BOTHELL, a municipal corporation,

Defendant/Appellant.

CITY'S ANSWER TO AMICUS BRIEF FILED BY THE
WASHINGTON STATE ASSOCIATION OF MUNICIPAL
ATTORNEYS

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I. INTRODUCTION

The City of Bothell, Appellant, respectfully submits this Answer to the brief filed by Amicus Washington State Association of Municipal Attorneys (WSAMA). The City recognizes there has already been substantial briefing submitted to the Court on this case and, thus, will attempt to keep this Answer concise. The main issue presented here is one of first impression: What is the scope of a drainage easement dedicated on the face of a plat? Does it include pipes and/or facilities that are not shown on the plat map, such as the pipe at issue in this case? Does it include facilities that are normally private, such as undersized pipes (as the interceptor pipe in this case); or pipes that collect ground water versus surface water (as does the pipe here); or pipes that benefit primarily private property and have only an incidental, if any, benefit to public property or public infrastructure (as does the pipe here)? The City believes that based upon a review of Washington case law and related legislative enactments, in addition to the consideration of how other jurisdictions have addressed similar situations, the lower courts were in error when they held that the City was responsible for maintenance and future operation of the undersized ground water pipe in Crystal Ridge. Because the lower courts were in error, the trial court's order and the Court of Appeal's decision in this case constitute an unlawful gift of public funds to a private party in violation of the gifting provisions of the Washington State Constitution, art. 8, Sec. 7.

The City notes that Amicus WSAMA appears to have made a careful review of the voluminous record, and fully supported its briefing with cites to the record. In an effort at brevity, the City will not respond to each argument raised by WSAMA, but will address three arguments it feels merit a bit more consideration: First, that local jurisdictions, such as the City of Bothell, should not be made the ultimate insurer of drainage facilities installed by developers in private residential subdivisions; second, that a full review of the codes in effect at the time of dedication shows that Snohomish County did not require the Developer to dedicate the interceptor pipe to the County, nor did the County and Developer take any required steps toward making such a dedication on their own; and third, that the lower courts appear to have based their decisions on inadmissible evidence or misapplication of the applicable burdens of proof, either or both of which have resulted in reversible error.

II. STATEMENT OF THE CASE

Both parties agree that the interceptor pipe is a 6-inch pipe that is buried approximately 12 feet down on Tract A of the Plat of Crystal Ridge, an open space tract owned in fee by Plaintiffs, the Homeowners' Association. The Parties also agree that the 6-inch pipe's primary function is to intercept and collect ground water from upland property before that ground water reaches the Crystal Ridge subdivision. The Parties further agree that the Plat was recorded on June 8,

1987, with certain easements dedicated to the City on its face, including a drainage easement “for the purpose of maintaining and operating stormwater facilities.” *CP 657* (emphasis added). Additionally, the Parties agree that although the Snohomish County Hearing Examiner did not require the Developer, Trimen Development, to dedicate the interceptor pipe to Snohomish County in his written Decision, he did require the Developer to record a Drainage Disclosure (although the Parties do not agree on the significance of this document), which was recorded in November 1987. Finally, the Parties agree there is no evidence in the record to support a finding that either the County or the City has ever inspected or maintained the interceptor pipe.

Based on these undisputed facts, the Court is presented with this issue of first impression: What is the scope of a drainage easement dedicated on the face of a residential plat? There are several levels of analysis that go into answering this issue. At each level, the City believes that the facts, law and equity come down on its side.

The first level of analysis is simply to define “stormwater facility.” The City’s position is that this language should be interpreted as the local governmental entity would have interpreted it (not as the Engineers hired by the Developer speculate, 27 years after-the-fact, that it should be interpreted). Local governments recognize a difference between “storm” and “ground” water facilities. This was set forth in the declarations filed by the City (*see CPs 342-*

346; 477-482; 254-255; 250; 245-246) and reinforced by the arguments submitted by WSAMA (not all of which are addressed in this Answer, although the City does join in and agree with WSAMA on all of the arguments in its *Amicus Brief*). If the interceptor pipe does not meet the definition of “stormwater facility” under the Snohomish County codes in effect at the time of dedication, as contended by the City, then it was plainly not included in the dedication and the analysis is complete. But if the pipe does meet the definition of “stormwater facility,” then the analysis continues.

The second level of analysis is whether or not the dedication of an access easement alone (which is the easement that was granted on the Plat of Crystal Ridge) was sufficient to transfer ownership and maintenance responsibility of the interceptor pipe itself to Snohomish County back in 1987. The answer is “no.” The interceptor pipe itself was not dedicated to Snohomish County via the access easement alone, because the County and the Developer did not take all the steps necessary to transfer responsibility for this buried ground water facility to the County as required by the then-effective codes. *CP 439; 687* The codes set out a 5-step process to transfer drainage facilities to the County, and the provision of an access easement to maintain the facilities (as was provided on the face of the Crystal Ridge Plat) was only one of these five steps; the other four were never taken. *CP 249* The lower courts brushed-off this uncontroverted evidence by relying solely on hearsay and speculation from the Engineer hired by the

Developer, who claimed that “The City’s citation to the Snohomish Code and [sic] at Section 24.28.040 and suggestion that it was a formal process and properly documented is incorrect. Paperwork was pretty poor back in those years.” *CP 291* This speculation – about random “paperwork” that has nothing to do with whether any actual paperwork regarding the requirements of SCC 24.28.040 was on file with the County in this case – when viewed in the light most favorable to the City as the non-moving party, is insufficient to support summary judgment for Plaintiffs. Especially when the Court considers all of the other undisputed evidence in the record showing that the County never “intended” to take over maintenance responsibility for this pipe, such as the recorded Drainage Disclosure (**App. 1** to *Amicus Brief*), the fact that the pipe is not depicted on the Plat drawings (*CP 654-663*), the fact that the County never inspected or maintained the interceptor pipe (*CP 251*), etc. The City is not aware of any evidence showing that the County intended to take over this pipe. The Hearing Examiner required the installation of the pipe to mitigate the adverse environmental effects of the development pursuant to the State Environmental Policy Act (SEPA), RCW Ch. 43.21C, and the State Subdivision Statute, RCW 58.17.110(2) (requiring all developers to provide mitigations of their projects so as to protect “the public health, safety and general welfare”); but the Examiner did not require that the interceptor pipe be dedicated to the City. *CP 719-728*

The lower courts both stopped at the first level of analysis set forth above. They both decided, for different reasons, that the interceptor pipe was a “stormwater facility”; thus, they said, it had been dedicated to the County on the face of the Plat. They ended their analysis there. But that does not end the analysis. A finding that the interceptor pipe meets the definition of stormwater facility means that the Court must go on to the second level of analysis; *i.e.*, is there any evidence in the record that the 5 steps necessary to transfer this facility to Snohomish County were taken? The answer is “no.” Not a single piece of evidence exists to support a finding that the remaining four steps were taken. Nor does it make sense for the County to have agreed to take over a ground water facility buried 12 feet down, which was not even tied into the public system, but drained to a private pond on private property, and which primarily benefitted private property. This was not a system that local governments were operating and maintaining at the time. *CP 245* Nor is it a system that local governments operate now. *CP 245; 250-252* To force the City of Bothell to assume ownership and maintenance responsibility for this facility would be tantamount, as WSAMA stated, to making local government the insurer of private drainage facilities for time immemorial. The City respectfully adopts the arguments submitted to the Court by WSAMA, in addition to the comments and argument made below.

III. ARGUMENT

A. The City Should Not Be Made The Insurer Of Private Drainage Facilities In Residential Plats

Amicus WSAMA makes a very good point regarding the age of this case, and why liability against the City violates all public policy reasons favoring the enactment of statutory limitations of action and periods of repose. Here, the Plat of Crystal Ridge Div. II was recorded on November 10, 1987. CP 654 Crystal Ridge Div. I was recorded June 8, 1987. CP 660 Plaintiffs' lawsuit was filed against the City on January 7, 2011. CP 823-839 Thus, 23 years and two months elapsed between the date of the dedication at issue here and Plaintiffs' lawsuit.

The state Legislature's enactment of the 6-year statute of repose protects the Developer – and any engineers hired by the Developer – from this lawsuit, and any lawsuit based upon “such person having constructed, altered or repaired any improvement upon real property, or having performed or furnished any design, planning, surveying, architectural or construction or engineering services, or supervision or observation of construction, . . . of any improvement upon real property.” RCW 4.16.300-.310. Such claims must be brought within 6 years of “substantial completion of construction,” or they are barred. *Id.* Here, despite the fact that the claim is over 23 years old, the City has no such protection.

WSAMA is correct in noting that local governments, such as the City of Bothell, should not automatically become responsible for ground water drainage

issues that were not adequately addressed during the development process, simply because 6 years and 1-day have elapsed since “substantial completion of construction.” Local governments should not be made the insurers of buried drainage facilities that they have never had an opportunity to inspect or maintain, and that do not directly benefit public property or public infrastructure. Not only should the Court to decline to impose such a rule generally, but especially not here, in this case, where each Plaintiff had notice of the recorded Drainage Disclosure before they purchased their properties; a disclosure that specifically advised them of the excessive ground water conditions of the properties in Crystal Ridge, and that it would be the property owners’ obligations to install special drainage features on their own private lots in the future due to the saturated condition of the site.¹

B. The Snohomish County Codes in Effect at the Time Of Dedication Did Not Require The County To Take Over Crystal Ridge’s Private Ground Water Facility; Nor Did the County and Developer Take Any Additional Required Steps Toward Making Such A Dedication

Amicus WSAMA correctly noted that the Snohomish County codes in effect at the time did not require the County to take over Plaintiffs’ private drainage facilities. On this issue, Amicus cited to and incorporated into their brief the

¹ At one point Plaintiffs’ argued the City had not “proved” that any homeowner had received a copy of the recorded Drainage Disclosure. They seem to have abandoned that argument. A recorded document is, of course, notice to all “from the date of recording”; there is no need to “prove” it was ever received. RCW 65.08.030. If anyone in Crystal Ridge did not receive a copy of the Disclosure prior to purchase, they might have a claim against their Title Insurance Company, but that fact is of no relevance in this action.

City's briefing to the Court of Appeals, *Brief of Appellant*, pp. 5-13. *Brief of Amicus*, p. 8. First, the City believes Amicus probably meant to cite to pages 15-23 of the *Brief of Appellant*. That being said, the City looked at the entirety of the relevant County Code provisions – not just one provision as did the Court of Appeals² – to reach the conclusion that the definition of public “stormwater facility” did not include private undersized ground water pipes.

But more importantly even if the definition of “stormwater facility” did, in fact, include ground water under the County codes in effect at the time, the City still demonstrated to the lower courts that the interceptor pipe had not been dedicated to the County merely by virtue of being included in the catch-all phrase “drainage easement” on the face of the Plat. Instead, it is undisputed that under the former Snohomish County codes the dedication of a drainage easement for access to facilities was only one of five steps necessary to convey a private drainage facility to the County. *See, e.g.*, SCC 24.28.040 and 1979 Drainage Procedures Manual:

SCC 24.28.040 - County Assumption of Operation and Maintenance.

Drainage Facilities shall be dedicated to the County where the Director determines that such facilities either are appropriately a part of a County maintained regional system or are unlikely to be adequately maintained privately.

² *See Crystal Ridge Homeowners' Association v. Bothell*, No. 68618-6-1, Slip Op. at 7, where Division I relied on Former SCC 25.02.080 in reaching its conclusion in this case.

The County shall assume the operation and maintenance responsibility of retention/detention or other drainage conveyance systems and drainage treatment/abatement facilities proposed for County maintenance in an approved detailed drainage plan after the expiration of the two (2) year maintenance period if:

- (1) All of the requirements of Chapter 24.20 have been fully complied with; and
- (2) The facilities have been inspected and approved by the Director after two (2) years of operation in accordance with the Procedures Manual; and
- (3) All necessary easements entitling the County to properly operate and maintain the facility have been conveyed to the County and recorded with the Snohomish County Auditor;
and
- (4) The applicant has supplied to the County an accounting of maintenance expenses for the permanent drainage facilities up to the end of the two (2) year period.
- (5) The applicant pays the County an Operation and Maintenance assessment based on a ten (10) year prorated cost to operate and maintain the permanent drainage facilities constructed by the applicant.

CP 687 (emphasis added)³ Pursuant to provision (3) above, the Developer had to convey an easement – such as the drainage easement that appears on the face of the Crystal Ridge Plat – to the County as part of the 5-step process to dedicate a drainage facility to the County. These provisions specifically clarify that the granting of an easement is only one of five requirements that must have been met before the County could take over a developer’s drainage facility (irrespective of whether it was a “ground” or “surface” water facility). In other words, the dedication of a drainage easement to the County did not automatically mean the County was required to maintain all drainage facilities located within the easement area, as Plaintiffs’ have boldly asserted at all levels of this proceeding. Instead, it was only one of five requirements that had to have occurred. Here, there is not a scintilla of evidence in the record to support a finding that even one, much less all four, of the remaining requirements listed in these two provisions was ever met.⁴ *CP 249*

The Court of Appeals issued a decision without addressing SCC 24.28.040 or the relevant provisions of the 1979 Manual at all, as if the City had not even made these irrefutable arguments. The trial court barely addressed these arguments, other than to dismiss them by blindly claiming the dedication (of the interceptor pipe, which was not depicted on the plat, nor of sufficient size to meet public pipe

³ The 1979 Manual, with almost identical provisions, is at *CP 439*.

⁴ The City’s briefing on this issue was presented to the trial court at *CP 326-331*; and the Court of Appeals in the *Reply Brief of Appellant*, at pp. 12-13.

standards, and which did not even drain to the public system but emptied into a private pond on adjacent private property) was complete upon the County's acceptance of the Plat, citing to the dedication statute, RCW 58.17. *CP 176-177* The trial court ignored the fact that the dedication statute applies, by its plain language, only to the dedication of "land," not private drainage systems. RCW 58.17.020.

WSAMA is correct that the applicable County Codes on this issue should not have been ignored by the lower courts. Furthermore, the City's arguments with regard to these Codes should not have been ignored either.⁵ In sum, as there is no evidence in the record to support a finding that all five requirements of former SCC 24.28.040 and/or the applicable provisions of the 1979 Manual were met, Plaintiffs have not met their burden of proof to show that the interceptor pipe was dedicated to Snohomish County in 1987 on the face of the Crystal Ridge Plat.

C. Evidentiary Issues

WSAMA points out, quite clearly, an obvious flaw in the lower courts' analyses' of the record – *i.e.*, the burden of proof on summary judgment is on the

⁵ In addition to not addressing this argument at all, the Court of Appeals grossly mischaracterized several of the City's other arguments. For instance, the Court of Appeals stated that the City had noted that the location of the easement for the interceptor pipe also includes the Sewer District's sanitary sewer main, then stated: "the implication apparently being that if the interceptor pipe was deeded to the County, so was the sanitary sewer, which is an absurd result." *Crystal Ridge*, Slip Op., p. 9. The City made no such implication to the Court of Appeals, and the court's sarcastic comment at the City's expense was wholly unmerited. See *Appellant's Opening Brief*, pp. 16, n. 33, where the City wrote: "It is obvious that the easement for stormwater facilities did not impose a duty on the County . . .to maintain the AWD's sanitary sewer main, even though the sewer main was buried within the exact same 25-foot easement area."

moving party. Here, to grant Plaintiffs' motion for summary judgment, the Court must find that the interceptor pipe was – without a doubt – dedicated to Snohomish County in 1987 on the face of the Crystal Ridge Plat. Based upon the undisputed evidence in the record, the Court must find that there is no question of fact on this issue at all. And in making this determination, the Court must view all of the evidence, and all reasonable inferences from the evidence, in favor of the City of Bothell as the non-moving party. WSAMA notes that Plaintiffs could not possibly have met this burden based on the record before this Court, and the City agrees.

WSAMA points out that a pivotal point for the lower courts was what weight they should assign to the fact that there is no evidence in the record to support a finding that 4 of the 5 requirements for transferring responsibility of a drainage facility to the County were ever met. Plaintiffs did not even say they looked for this documentation. Instead, all they submitted was one speculative statement by the Developer's Engineer, noted above, that generally "paperwork was pretty poor back in those years," and that explains why no documentation of the other 5 requirements exists. *CP 291* The City agrees with WSAMA that this general, non-case specific statement alone, without more, is not sufficient to support summary judgment against the City.

Although there is further testimony by the engineers for the Developer as to what they thought Snohomish County intended with regard to the interceptor pipe,

Plaintiffs did not submit to the trial court any direct testimony by a County employee from 25+ years ago on this issue. On the other hand there is a plethora of indirect testimony and evidence in the record, all of which indicates that the County did not intend to take over the pipe. (Such as, for example, the fact that the County's Hearing Examiner did not require the Developer to dedicate the interceptor pipe to the County, CP 719-728, and instead required the Developer to record the Drainage Disclosure, CP 727.)

The City further highlights one additional fact crystalized by WSAMA's briefing: the only testimony submitted by Plaintiffs as to what they thought the County and the Developer were "intending" to do with regard to the interceptor pipe was hearsay testimony by the Developer's Engineers; *i.e.*, independent contractors hired by the Developer. Plaintiffs did not, however, submit any testimony from the Developer itself.⁶ Nor, as noted above, did Plaintiffs submit any testimony from any County representative. Yet these two parties – the Developer and the County – are the only two parties with first-hand knowledge of what was ultimately "intended" between themselves 25+ years ago when the Plat⁷ and the Drainage Disclosure⁸ were recorded. Testimony from the engineers hired by the Developer, who clearly have no personal knowledge of what the Developer

⁶ Crystal Ridge was developed by Trimen Development Co. CP 654, 660, 662, 473.

⁷ See CP 654 (Ken Wolcoski, President of Trimen Development, signs Plat of Crystal Ridge II); CPs 660 & 662 (Ken Wolcoski, President of Trimen Development, signs Plat of Crystal Ridge I).

⁸ CP 473 & App. 1 to WSAMA Amicus Brief (Ken Wolcoski, President of Trimen Development, signs Drainage Disclosure and records it with the County Auditor)

and County ultimately decided, is nothing more than speculative, inadmissible hearsay. At most, when viewed in the light most favorable to the City, it does not support Plaintiffs' motion for summary judgment against the City.

IV. CONCLUSION

Based upon the entire record on review, the City respectfully requests that this Court reverse the decision of the lower courts granting summary judgment to Plaintiffs. Additionally, because the record is devoid of evidence supporting a finding that the private undersized interceptor pipe was ever dedicated to Snohomish County, the City of Bothell's predecessor in interest, the City respectfully requests that its motion for summary judgment be granted.

Respectfully submitted this 29th day of May, 2014.

KEATING, BUCKLIN &
MCCORMACK, INC., P.S.

CITY OF BOTHELL

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DECLARATION OF SERVICE

I declare that on May 29, 2014, a true and correct copy of the foregoing document was sent to the following parties of record via method indicated:

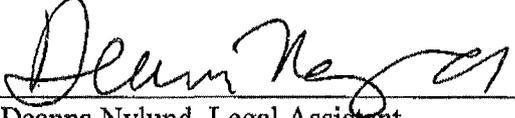
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The attached is being sent to you on behalf of Stephanie Croll.

Regards,

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