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Case No. 89533-3

**SUPREME COURT
OF THE STATE OF WASHINGTON**

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CRYSTAL RIDGE HOMEOWNERS ASSOCIATION, a Washington
nonprofit corporation; J. ABULTZ, et al.,

Respondents,

vs.

CITY OF BOTHELL, a municipal corporation,

Petitioner.

**RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEF OF
WASHINGTON STATE ASSOCIATION OF MUNICIPAL
ATTORNEYS IN SUPPORT OF CITY OF BOTHELL**

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I. ARGUMENT

A. **No Facts Have Been Produced to Show Harmful Effects to Municipalities as A Result of Deciding This Case**

The Washington State Association of Municipal Attorneys (“WSAMA” or “Amicus”) first argues that this case involves a groundwater facility, and therefore counties, cities and towns throughout Washington will be affected by any decision with regard to it. First, the rarity of the groundwater facility has been used by the Amicus and the City to bolster their argument that this case presents issues of first impression. No showing has ever been made that there is another such facility in Bothell or anywhere else in the state. The Hearings Examiner, dealing with the sizeable acreage of Snohomish County, noted how unique this particular land was. CP 725 (“this site is not your typical piece of property”). Given the arid conditions on the east side of the mountains, it is doubtful there are any cases there where excess regional groundwater is perching out onto the surface of a lower property.

The assertion that Snohomish County did not have “direct knowledge” and did not “expressly accept” the groundwater interceptor pipe is contradicted by the plat documents filed in 1987. The cover page of the plat of Division 2 of Crystal Ridge, where the interceptor pipe is, bears the signatures of the County’s Public Works Director, Director of Planning and Development and the Chairman of the County Council. CP 654. The plat was accepted and irrefutably filed by the County’s Auditor on November 10, 1987. *Id.*

Under the state statute, the dedication was complete and was akin to a quit claim deed in favor of the County. RCW 58.08.015. The County was therefore the “owner” of the easement in 1987. If anything went

wrong with the easement that year or for any following years, the County had to respond. It is therefore wholly irrelevant that the developer could avail himself of the six-year statute of repose pursuant to RCW 4.16.310 with regard to other portions of the development.

The plat clearly designates Tract 999 as having a “drainage easement.” CP 654-656. Engineer Trepanier, who created and filed the plat documents, testifies the only drainage feature in Tract 999 is the interceptor pipe. CP 291. The platting process in this case was unremarkable and the drainage easements were clearly conveyed to the County. CP 654-658; 660-663. Cities in the process of annexing county property should examine the plats filed of record and note drainage easements that are dedicated to the county which they will become the successors to. If the plat documents appear too burdensome, the annexation boundaries can be adjusted. There are no facts to support the assertion that this case will create untoward and surprising burdens for municipalities.¹

B. The Hearing Examiner’s Role Is Confused by WSAMA

Amicus asserts it has discerned the “intent” of the Hearing Examiner and that he did not require the dedication of the interceptor pipe to the County so therefore it was not dedicated. The Hearing Examiner’s job is to conduct a hearing and approve or disapprove preliminary plats, not decide issues of dedication. CP 719-728. There is no mention of dedicating public streets in the Hearing Examiner’s Decision but it is irrefutable that the streets were dedicated through the acceptance of the

¹ It appears the City and Amicus have both abandoned the “gift of public funds” theory which was the sole justification for jurisdiction in this Court. That argument was also made in violation of RAP 2.5(a)(3). The Amicus also makes new arguments on appeal which is prohibited. RAP 2.5(a); *Washington Fed. Sav. v. Klein*, 177 Wn. App. 22, 29, 311 P.3d 53 (2013) *review denied*, 179 Wn. 2d 1019, 318 P.3d 280 (2014).

plat for filing by the County's Auditor. RCW 58.17.010. The hearings before the Examiner were conducted in 1983. CP 719-728. The final plat document with dedication language and the "drainage easement" clearly marked on it was not prepared by Engineer Trepanier and filed of record until four years later. CP 654. As a practical matter, the exact location of the interceptor pipe was not established in 1983 because Dr. Denby had recommended that it be determined in the field. CP 715. WSAMA's reliance on the Hearing Examiner's Decision is misplaced.

C. The Drainage Disclosure Gave Notice to Future Home Buyers

The Hearing Examiner required that: "The initial construction activity on the subject property shall be the installation of the dewatering system along the western edge of the site." CP 727. On the very same page where this requirement was made, it states:

the applicant shall have filed and recorded with the county Auditor a document, satisfactory to the Prosecuting Attorney's Office,² which discloses the fact that substantial surface and subsurface drainage controls have been necessary in the development of the subject property and that special and/or extraordinary drainage controls may be necessary on individual lots. Said document shall be recorded in such a fashion as to be included in any title search conducted regarding any portion of the property.

Id.

The "substantial surface and subsurface drainage controls" had to include the interceptor pipe which had to be the first thing constructed.

The concern, as testified to by Dr. Denby, was that "families buying

² This same language is repeated in the three documents that were to be filed and "made satisfactory" to the Prosecutor's Office. The other two documents bound the homeowners to construct improvements to public roads outside of the plat.

properties” be given notice that more work might have to be done on their “private lots.” CP 297. Amicus attempts to write out of the disclosure the words “individual lots” and the fact that the Hearing Examiner linked the disclosure to a title search. By the time anyone had a need for a title report, Tract 999 would be irrefutably marked “Open Space” on the plat and it was unbuildable both legally and factually. The County Code also provided that: “No structures shall be erected within any drainage easement.” CP 683 (SCC 24.20.080 Mandatory Requirements). The easement is a long skinny parcel that is only twenty-five feet in width which abuts approximately sixteen lots. CP 654-656. No one would do a title search on Tract 999 because no one could buy it. There is no ambiguity: the notice was to warn of extra drainage measures that might be necessary on individual lots being purchased by families sometime in the future.

The interpretation the Amicus makes of the Disclosure Document is strained and ignores its context. Similar to the trial court and Division One, this Court should rejected WSAMA’s interpretation. CP 22; 26; *Crystal Ridge Homeowners Assn. v. City of Bothell*, No. 68618-6-1, WL 3872223 at *9-11 (Wash. Ct. App. July 22, 2013).

D. The County Code Had a Provision for Assuming Operation and Maintenance of the Pipe

Amicus is in error claiming that the County Code had no provision for assuming the operation and maintenance of the interceptor pipe. Snohomish County Code Chapter 24.28 entitled “Operation & Maintenance” is the controlling provision. It states that the County will

take over facilities if they are appropriately a part of a regional system or if they would be “unlikely to [be] adequately maintained privately.” SCC 24.28.040. At the trial level, the City argued that although an easement had been conveyed and recorded (section 3), there was no proof of the pipe being inspected and approved (section 2); no proof of an accounting (section 4) or proof of an assessment being levied (section 5). Engineer Trepanier testified that: “The City’s citation to the Snohomish Code 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. He testified that the most important provision was whether the easement was created and recorded. *Id.*

The trial court pointed out that the State statute had been complied with and to the extent that the County ordinance might have required additional provisions, it was pre-empted. CP 26-27. The trial court also pointed out to the City that using its theory, in order for maintenance to be taken over by the owners, there had to be compliance with all the provisions of SCC 24.28.080—which had not occurred. CP 27.

The provision of the Code that the Amicus relies on addresses the normal contents of “Detailed Drainage Plans” and it specifically includes provisions for groundwater flows. CP 679 (“with respect to surface and pertinent subsurface water flows entering, flowing within, and leaving he subject property” *citing* SCC 24.16.160). For a project’s description, one must identify the location of “springs or other subsurface water outlets.” *Id.* (SCC 24.16.160(1)(h)). Background computations for sizing retention detention ponds must include estimating the quantity of “subsurface flows.” CP 680 (SCC 24.16.160(2)(a)). The last provision states that one must have a proposed method to ensure long term maintenance but it does

not state that the maintenance will be taken over by the homeowners. *Id.* (SCC 24.16.160(3)(d)). These provisions demonstrate that groundwater was to be included in Detailed Drainage Plans.

Finally, WSAMA's argument again rests on its assumption that the interceptor pipe is solely private in nature. Without belaboring the point, the pipe is intercepting regional ground waters,³ protecting a regional sewer main and insuring that public streets both inside and outside of the plat are protected from surface water flows. CP 269.

E. The Interceptor Pipe Is In a Municipal Easement Surrounded by Public Streets; the Bothell Code Is Irrelevant

The arguments made in this section of the Amicus Brief will only be briefly addressed. Bothell's 1992 Code is irrelevant to the issues in this case. The other argument focused on the interceptor pipe as being surrounded by private property. The relevant factor is to ask if the pipe is performing a public function, which it is. CP 292; 296. Moreover, the drainage easement that the interceptor pipe is in and all of the other easements were dedicated to the County and are therefore public property, not private property. CP 654-658. The County, and the City as its successor, is the dominant landowner of all of these easements. *Kieley v. Granes*, 173 Wn.2d 926, 271 P. 3d 226 (2012). The roads inside and outside of the plat are all public and benefit from the existence of the interceptor pipe. CP 292; 296. Issues of public health and safety were addressed by the interceptor pipe. The Hearing Examiner, in requiring the

³ The flows included municipal storm drains and waterlines as was testified to by Dr. Denby. CP 296-297. No motion to strike the word "municipal" was ever entered at the trial court level.

pipe, stated that this was not typical property and that: “typical drainage standards would probably not adequately protect the public use and interest.” CP 725. The arguments made in this section of the Amicus brief are factually infirm and should be disregarded.

F. The Developer Dedicated an Easement Which Is the Dedication of “Land” and the Easement Is Valid and Need Not Specifically Depict the Pipe

The statutory dedication was of a section of land twenty-five feet wide that abuts approximately sixteen residential lots. CP 655-656. The only drainage feature in the easement, according to the engineer who designed the drainage, is the interceptor pipe. CP 291. Lines on plats are to be given validity. *Cummins v. King Cnty*, 72 Wn.2d 624, 626-627, 434 P.2d 588 (1967). Easements are interests in land. *McPhaden v. Scott*, 95 Wn. App. 431, 434, 975 P.2d 1033 (1999) (citing *Bakke v. Columbia Valley Lumber Co.*, 49 Wn.2d 165, 170, 298 P.2d 849 (1956)), *review denied*, 138 Wn.2d 1017, 989 P.2d 1141 (1999). A party can create an easement by including the donation of grant in a plat or short plat. *M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 653, 145 P.3d 411 (2006), *review denied*, 161 Wn.2d 1012, 166 P.3d 1217 (2007) *citing* RCW 58.17. The interceptor pipe, because it was the only drainage feature in the “drainage easement” when it was conveyed, had to have been conveyed to the County. Engineer Trepanier testifies that the only reason there was a drainage easement there was to convey the interceptor pipe. CP 291.

The argument that the plat documents had to have some sort of depiction of the interceptor pipe is without merit. If one goes to the plat documents (CP 654-658) the outline of the lateral drains between Lots 7 and 8 and Lots 9 and 10 do not have a depiction of those pipes. There is no sketch of a swale and no drawings of catch basins or cross culverts that are in the street drainage easements. *Id.* None of the retention detention ponds, with their invert pipes and outfall structures are depicted in detail. *Id.* There is no requirement to specifically depict the pipe in order to convey it through a properly filed and recorded easement in a plat.

Finally, WSAMA claims that the City has provided authority that an “un-depicted private drainage pipe is NOT part of the public easement” through citation to out of state cases which it claims were unchallenged. *See Amicus Brief*, p. 11. The cases were addressed in footnote 12 on page 18 of the Respondents’ Answer to Petition which stated:

In this section, [the City] also cites to cases from other jurisdictions where the platting statutes are different and the facts involve pipes that are entirely private. *See Petition* at 19-20 *citing Kaplan v. Sandy Springs*, 286 Ga. 599, 690 S.E.2d 395 (2010); *Lewis v. DeKalb Cnty.*, 251 Ga. 100, 303 S.E.2d 112 (1983); *Lawrenceville v. Macko*, 221 Ga. App. 312, 439 S.E.2d 95 (1993); *DiMartino v. Orinda*, 80 Cal. Rptr. 2d 16 (2000).

Again, the argument of the City and now the Amicus, rest upon their assumption that the interceptor pipe is entirely private, which it is not. The cases are off-point and do not support their arguments.

G. The Trial Court Applied the Law Correctly and Did Not Rely on Hearsay

Amicus concludes it is “clear” that the trial court did not weigh the evidence in a light most favorable to the City. *See Amicus Brief* p. 11. The basis offered is that the Hearing Examiner did not require the dedication of the pipe and neither did the County Code. *See Amicus Brief* p. 12. We have already clarified in Sections B and D of this brief that Amicus confuses the role of the Hearing Examiner and the County Code had a provision for taking over the operation and maintenance of the pipe. Again, there was a statutory dedication because the plats were clearly accepted through County signatures and filed of record by the County Auditor. CP 654-658; RCW 58.17.020. No basis exists for these assertions of the Amicus.

Next, the trial court is assailed for relying on hearsay testimony. *See Amicus Brief*, pp. 12-14. In his own handwriting, the trial judge clarified that the City’s motion to strike was only with regard to testimony of the County’s “intent” by Engineer Trepanier. CP 17. He wrote that Engineer Trepanier’s “observations and statements of the County’s activities remain intact.” *Id.* In his oral decision, the trial court referred to the Trepanier declaration and made this same distinction:

He [Trepanier] clearly testified it was common for the county to take over these sort of “private drainage facilities.” That’s not been rebutted by anybody for the county. As I said, he can’t testify as to the internal intent of the county, but he can certainly testify as to what was the observable policy and actions of the county. No one’s come in

and said, no, we never did that, et cetera,
and it stands un rebutted. ⁴

CP 25.

Further, the Amicus states that what the Developer might have intended when he was designing, building and filing the plat is “irrelevant.” *See Amicus Brief*, p. 14. Under the law, the Developer’s donative intent is paramount in filing a plat. *See Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 73 P.2d 369 (2012). The trial court analyzed the law correctly stating that it was “clear” from the declarations and documents submitted that it “certainly” was the intent of the developer, acting through its engineers, to give over the operation and maintenance of the pipe to the County. CP 23-24.

Contrary to Amicus’s assertions, the engineer was testifying as to this specific plat which the trial court noted: “As indicated, Mr. Trepanier clearly states that was his intent in drafting the various documents and going forward.” CP 24. Engineer Trepanier testified that he was very familiar with Snohomish County’s platting process. CP 809. He noted that his engineering stamp was on all of the pages of Division No. 2 and that he “prepared these plans for the plat to be accepted by Snohomish County and filed of record at the County Auditor’s office.” *Id.* The trial

⁴ Respondents do not believe it is relevant, but it appears Amicus is unaware that there are at least two employees still at the County that were involved with this plat. The plat signatories included Kirke Sievers, Treasurer, and Vicki Lubrin, Deputy County Auditor. After a stint on the County Council, Mr. Sievers is currently the County Treasurer. Ms. Lubrin is both in Facilities Management and the Auditor’s Office. *See* www.snohomishcountywa.gov.

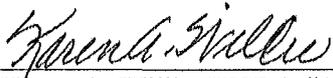
court's analysis was appropriate under the law and it did not rely upon inadmissible hearsay.

II. CONCLUSION

The pipe is not solely private in nature. It is the only "drainage feature" in the "drainage easement" which is called out on the plat of Division 2. The plat was filed of record by the County Auditor. A statutory dedication under RCW 58.07.020 was accomplished more than 25 years ago. This Court is respectfully asked to uphold the trial and appellate courts in this matter.

RESPECTFULLY SUBMITTED AND DATED this 29th day of May, 2014.

TERRELL MARSHALL DAUDT
& WILLIE PLLC

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CERTIFICATE OF SERVICE

I, Karen A. Willie, hereby certify that on the 29th day of May, 2014. I caused to be served, via hand delivery by messenger, and by electronic mail, a true and accurate copy of the foregoing upon the following parties:

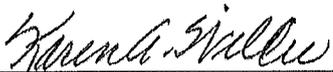
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29th day of May, 2014.



Karen A. Willie, WSBA No. 15902

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
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Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Christine Stanley [mailto:cstanley@tmdwlaw.com]
Sent: Thursday, May 29, 2014 2:55 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Karen Willie
Subject: Respondent's Answer to Amicus Curiae Brief (Crystal Ridge Homeowners Association, et al., v. City of Bothell, Case No. 89533-3)

Dear Clerk,

Attached please find Respondent's Answer to Amicus Curiae Brief of Washington State Association of Municipal Attorneys in Support of City of Bothell, Supreme Court of Washington Case No. 89533-3, to be filed in the above referenced case. It is filed by:

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Sincerely Yours,

Christine

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