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CASE NO. 63943-9-1

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

ROBERT B. STRUTHERS AND VITEZSLAVA OTRUBOVA

Appellant,

v.

CITY OF SEATTLE

Respondents.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Appellants Robert B. Struthers and Vitezslava Otrubova reside directly south of the Meadowbrook Outfall, a structure constructed in the early 1950s by the Lake City Sewer District. Maintenance and operation of this facility have been the responsibility of respondent City of Seattle since the annexation of Lake City in 1954. In March 1998, Seattle Public Utilities redeployed the Meadowbrook Outfall through the construction of the Meadowbrook Detention Pond. This project diverted storm water from Thornton Creek to the Meadowbrook Outfall at two points:

1. a high-flow diversion structure built on Thornton Creek, and
2. an overflow riser on a concrete pipeline which connects to the outfall structure.

This modification of the original design changed the public good provided by the system, from conveyance of treated sewage for Lake City residents to storm water detention and flood control for the Thornton Creek watershed. The first large storm to test this redesigned system resulted in failure, as storm water backed up and created a large sinkhole at 10515 Exeter Avenue, one block to the west of the outfall. Sunchasers, Inc. was retained to inspect the outfall site. A weir system within a control structure at Riviera Place NE prioritized flow between the 90" pipe and a 30", 42" and 48" pipe (CP 867). In their December 7, 1997 report, Sunchaser Inc's divers observed no signs of flow at the underwater lake end of the 42" and 48" pipe. Flow was only detected at the 30" pipe. In trial, supervising Engineer Glenn Hasegawa testified that the City responded by engaging a contractor to remove the weir built into the control structure at Riviera Place NE.

Deliberate actions over the years by Seattle Public Utilities engineers responsible for the design of the Meadowbrook Diversion Pond led to a three million dollar rehabilitation project. The resulting Meadowbrook Outfall still continues to damage the property of its neighbors to the south.

II. RELIEF REQUESTED

Appellants Robert B. Struthers and Vitezslava Otrubova move to supplement the record:

1. Whether inverse condemnation claims are properly dismissed where the damage was not contemplated by nor necessarily incident to a government project.
2. Whether an attorney's motion for leave to withdraw can properly be granted three weeks before trial while prohibiting further continuance.

III. STATEMENT OF THE CASE

In its brief, the City of Seattle provides a clear, concise description of the components of the complex system that brings water from Meadowbrook Pond to Lake Washington at the Meadowbrook Outfall. However, the City does not mention Thornton Creek, which drains more than eleven square miles of Seattle and Shoreline, and is the sole source of water feeding the Meadowbrook Diversion Pond. It is only in this larger perspective that the extent of the good provided to the public by the Meadowbrook Outfall can be understood, and the damaging power of the storm water diverted to this facility be realized.

The damage inflicted by the rehabilitated Meadowbrook Outfall is permanent. The City needs the bypass pipeline to address flooding on

Thornton Creek. Recent changes to Seattle Municipal Stormwater Code (SMC 22.800 – 22.808) are in response to more stringent Environmental Protection Agency regulations, and intended to provide long term, gradual improvements in water quality. City capital improvement projects have long lead times, with slow justification, engineering, permitting and construction cycles. Feasibility studies of the Meadowbrook Outfall Rehabilitation Project started in 1998 or earlier. Construction was not permitted until 2007. Environmental restrictions are even more stringent, as are constraints on the City budget. Demand for other capital investment project funding has increased as the City's infrastructure decays. Appellants may not live long enough to see any change in the existing structure, or reduction in the demand placed on this structure. To the Struthers, this damage is permanent.

A. Design of the Meadowbrook Outfall

The Meadowbrook Outfall Rehabilitation Project was designed to continue to divert storm water from Thornton Creek to Lake Washington. The beneficial uses of this project to the public were weighed every step of the way, from feasibility study to capital approval to construction and closeout. The rehabilitated structure, **as originally designed**, would not have damaged the bulkhead, yard and residence owned by Vitezslava Otrubova and Bruce Struthers. The project as first proposed would have replaced all pipes between Riviera Place and the outfall on Lake Washington, and replaced the bulkhead straddling the property line to the south of the outfall. The only aspect not addressed in the original project plan was a replacement of the weir within the Riviera Place control

structure, which determined the priority of flows to the 30”, 42” and 48” concrete pipes.

The structure that **was** constructed, after several design iterations, under increasing budget and permitting time pressure, is deficient and continues to damage the Appellants’ property. The rehabilitated structure has one less outfall pipe, unrepaired cracks in concrete pipes underground which are more likely to be surcharged, and no repair of the shared bulkhead. The cause of continuing damage to Ms. Otrubova and Mr. Struthers is clearly stated in the declarations of Bruce Blyton (CP 387-393), Jeffrey Laub (CP 430-458) and Richard Hagar (CP 1030-1056). New photographic evidence of the recurrence of sinkholes one day after a major rain on October 17, 2010 demonstrates that the Rehabilitation Project has not prevented damage that continues to be inflicted on the property to the immediate south.

B. Factual Background

The following timeline documents the history of the project through a series of project deliverables and correspondence between project staff. It is readily apparent that Seattle Public Utilities was aware of problems at the Meadowbrook Outfall since the Meadowbrook Pond was constructed, and considered projects to avoid damage from this facility.

June 24, 1998

Daniel Huang, a geotechnical engineer with the Seattle Public Utilities Materials Laboratory, describes soil conditions at the Meadowbrook Outfall in a memorandum to Chollada Yesuwan, senior

civil engineer. Mr. Huang begins with his statement of why his work was performed:

It is our understanding that you are designing for the replacement of the existing drainage pipelines between 10514 and 10544 Rivera Place NE. The scope includes placing three new concrete or metal pipes from the existing manhole just west of Riviera Place NE to Lake Washington and extending the pipes into the lake for about 40 feet.

December 7, 1998

Robert Peraino, Field Operations Manager for Sunchasers, Inc, described conditions at the outfall in a memorandum to Chollada Yesuwan (CP 292):

The concrete structure appears to have been poured over concrete pipes to anchor them. There is approximately 8" of concrete pipe visible on each outfall, extending out to that concrete structure and the CMP pipes are clamped over them. It is apparent that the concrete structure was poured in place. The lower half of the structure exhibits signs of concrete being poured underwater without being properly tremied in place to prevent air and water entrainment. There are numerous voids and loose aggregate visible.

February 5, 2004

Herrera Environmental Consultants prepared a report (CP 42-75) for Seattle Public Utilities in response to conditions observed by Vitezslava Otrubova during a storm on October 20, 2003. The report (CP 52) describes conditions within the control structure at Riviera Place NE:

The structure appears to be in good shape with no visible deterioration or cracking of the exterior concrete, however the structure was not entered nor examined on the inside. Those areas of the structure that are visible from the manhole appear to be in good condition. From the view down the manhole it appears that a weir was removed from the structure. A mastic or Epoxy type coating/sealing was seen in the bottom of the structure suggesting that the weir was jack hammered out and the flow channel was modified.

Conditions at the outfall at that time show deterioration of the concrete outfall structure:

The stormdrain pipes exit the City of Seattle property and pass through a mass-poured concrete seawall prior to entering Lake Washington (Figures 4, 5, and 9). The seawall is a concrete structure with four steps down to the east and a concrete masonry unit (CMU) retaining wall to the west of the top step. The structure drops approximately 9 feet 6 inches from street level elevation and is 35 feet 2 inches wide.

...

Measurable scour is present under the bottom step in the vicinity of the three pipes. The scour extends greater than 24 inches under the structure. At the connection to the concrete stubouts, the corrugated metal pipes are suspended 3 to 6 inches above the lake bottom sediment.

Herrera engineers noted the rapid pace of development of sinkholes in the Otrubova-Struthers yard, directly south of the 48" pipe:

Evidence of scour and sinkholes were observed at the residence directly south of the City Easement (10514 Riviera Place NE) during the inspection on December 8, 2003. On December 18, 2003, a sinkhole was observed in the yard approximately 10' northeast of the foundation of the residence (Figures 26a and b). This sinkhole was not visible 10 days earlier during the initial diving inspection. The sinkhole is approximately 10 inches in diameter on the surface and is approximately 4 feet deep. The subsurface dimensions are irregular but volume of the void is estimated at 1.5 to 2 cu yards.

Engineers at Herrera Environmental Consultants concluded their report (CP 72) with this warning:

The December 2003 inspection has identified significant issues with the outfall pipes that are deleteriously affecting the substrate underlying the pipes and nearby seawall. The damage resulting from these newly identified holes is not contained and is likely to increase in magnitude if not arrested.

In addition to finding new damage to the pipes, there is evidence suggesting ongoing damage to the seawall, CMU wall and *adjacent properties* is not related to the underwater portion of the outfalls. This damage includes cracking of both the seawall and CMU wall, settling of the seawall, scour/undermining of the seawall and several sinkholes that have appeared in the fall of 2003. The newly identified damage is localized to both the zone between the upgradient structure and the seawall and the first 30 feet of outfall pipe in Lake Washington. Due to the unknown source of this continuing damage further inspection of the pipes and structures was recommended.

July 2, 2004

Ms. Otrubova retained the services of Geotechnical Engineers HWA Geosciences, Inc. in the summer of 2004. Thomas C. Kinney and Steven E. Green prepared a report on July 2, 2004 and categorically stated:

From this it is obvious that the breaks in the outfall have caused undermining of your seawall and loss of ground in your yard. The hole is obviously still there and one can expect the condition to get worse with time and further rain unless remedial measures are taken. It is difficult to see where the hole goes but it is entirely possible that it will grow and cause failure of your seawall, fence, and perhaps the house itself.

...

In our opinion you need to stop the erosion of your yard by the sinkhole before it does serious damage to your deck, house, seawall and fence. It is obvious that the broken City outfalls are the direct cause of this damage and you should be able to get relief from them on this issue.

The credentials of these two experts are beyond reproach. They were technical reviewers of the August 16, 2007 *Best Available Science Report for Peat Settlement-prone Geological Hazard Areas*, which was included by reference into Seattle City Ordinance 122738.

May 11, 2005

Correspondence (CP 314) between Robyn Kelly and Lilin Li, Project Manager, acknowledges that the City is exposed to litigation as a result of the damages resulting from the Meadowbrook Outfall and recommend. The liability of Seattle Public Utilities is clearly acknowledged in a project background statement (CP 372-375) that called out project objectives. Edits (CP 324) to the June 2005 Project Development Plan (PDP) made by Glenn Hasegawa, supervising engineer responsible for the Meadowbrook Detention Pond, attempted to soften and diffuse clear statements of liability contained within this document.

June 8, 2005

Project Development Plan 1 was presented to the Asset Management Committee on June 8, 2005 (CP 343). The statement of the problem to be solved with a potential Capital Investment Project was:

The primary objective of this PDP was to determine the most effective approach (based on triple bottom line analysis) to maintain the existing system function (i.e. to divert and convey flows during the 6-month storm event and above from the creek and pond to Lake Washington to prevent flood and habitat damage). The outfalls serve the majority of the Thomson Creek Basin. Avoiding failure of the outfall pipes and seawall will prevent or reduce potential risks associated with damages to both private and public properties.

The secondary objective of the PDP was to investigate the feasibility to increase the size of the outfalls and, thereby, increase the service level of this particular element of the bypass system. The upgrade of the outfall system would allow for a diversion of creek flows above and beyond what could already be accomplished given the available system capacity. (As noted above, the three outfalls as well as the 90-inch tunnel and outlet control structure have about 100 cfs of additional capacity based on previous modeling efforts. The "bottleneck" of the existing bypass system that prevents the diversion of additional creek flows is the 72-inch bypass pipe that transitions to the 90-inch tunnel.)

November 9, 2005

In response to the questions raised by the Asset Management Committee, Project Development Plan 2 (CP 329-344) was prepared and provided a detailed analysis of options available to Seattle Public Utilities. The discussion of schedule emphasized a concern for moving forward quickly to avoid possible permitting issues (CP 343).

November 15, 2005

Lilin Li had assumed the role of project manager and Ed Mirabella was project specifier at this time. In the Cost and Schedule Presentation Form required as a prerequisite to a meeting with the Asset Management Committee, the project scope was described as:

Replace/repair sections of 3 large stormwater outfall pipes located at 105th Ave and Riviera Place NE at north Lake Washington. The outfall pipes convey via a 90-inch tunnel stormwater overflow from Meadowbrook pond to Lake Washington. The 3 pipes are located in a SPU's property adjoined by private properties. The work includes relining portions of the concrete pipes upland and replace approximately 50 ft of CMP pipes in the Lake. A concrete seawall where the pipes run under will also be repaired by injecting grout in the foundation. A new bulkhead will be built along neighbor's existing bulkhead to protect neighbor's property. Most of the work will be carried out in water.

November 6, 2006

Jeff Fowler, SPU Materials Lab geotechnical engineer, wrote a memorandum to Chollada Yesuwan that emphasized the need for a permanent bulkhead to avoid damaging the property to the south:

We understand that during the design phase of this project, it was determined that a retaining structure would be needed to protect the private property to the south during the replacement of the outfall pipelines. A decision was made to design and construct a *permanent* bulkhead just north of the property line in City property.

In a description of the site condition, Mr. Fowler observes:

The backyard has experienced several sinkholes over the years, which is likely the result of subsurface soils being eroded away by the lake beneath and around the bulkhead.

Mr. Fowler further cautioned that care be taken in excavating for the retaining wall:

The site reconnaissance noted concrete debris around the outside of the private bulkhead at the ground surface below the water. The Contractor should be aware of the concrete at ground level where the wall will be positioned. The concrete will have to be broken and removed prior to the installation of the wall. We recommend not trying to remove the concrete slabs if they are buried beneath the existing private seawall. This could cause undermining of the seawall. Instead, the concrete should be broken off or cut to provide enough space for the wall. Since soldier piles will be installed in Lake Washington, the contractor should be prepared to drill soldier piles such that caving is prevented.

November 29, 2006

Project Development Plan 2b was presented at the November 29, 2006 meeting of the Seattle Public Utilities Asset Management Committee. Ray Hoffman asked project specifier Edward Mirabella:

Ray: If you installed a support wall on SPU property (Alternative 3b) would the rock act as a bracing for the neighbor's wall and eliminate future liability?

Ed: Yes it would act as a brace.

The resulting decisions were listed in the meeting summary:

- Approved additional funding of \$530k.
- Approved Alternative 3b (repair 2 pipes and build a concrete wall on SPU property).
- Approve design completion delay to January 15, 2007.

February 1, 2007

Joe Starstead of the Environmental Science and Technology Section of Seattle Public Utilities published a Biological Evaluation of the Meadowbrook Outfall Rehabilitation Project that was submitted to the Washington Department of Ecology as part of the permit approval process. In page 59 of this report, he described the flows of Thornton Creek and the benefit derived by the public from the Meadowbrook Outfall:

Meadowbrook Pond - Predicted Stormflows and Bypass Performance

Predicted flows for Thornton creek were calculated using the Hydrologic Simulation Program-Fortran (HSPF) model and presented in the Thornton Creek Basinwide Flow Control Plan (April 2001). Predicted flows and the percentage of stormflow bypassed is presented in Table 5 for stream baseflow, 2 year, 25 year and 100 year storm events.

Table 5. Meadowbrook Pond Predicted Flows (HSPF Modeling)

Recurrence Interval	Upstream Flow above Meadowbrook Pond (CFS)	Downstream Flow below Meadowbrook Pond (CFS)	Flow to bypass (CFS)	Percentage of flow entering bypass (%)
Baseflow	15	15	0	0
2-year	327	55	286	87
25-year	657	253	377	57
100-year	924	601	406	44

Significant flows are diverted through the bypass pipe to the Lake Washington outfall. Analysis of the effects of bypassed flows was investigated. In 2004, Northwest Hydraulic Consultants (NHC) reviewed available flow data from Seattle Public Utilities (SPU) to characterize stream flows for Seattle's salmon bearing streams including Fauntleroy, Longfellow, Pipers, Taylor and Thornton creeks (NHC, 2004). NHC assessed SPU's hydrologic data and provided recommendations to improve monitoring for management of Seattle's fish bearing streams. SPU Flow data was found to be of insufficient quality, consistency and duration to properly characterize the hydrologic regime of Seattle's fish bearing streams, except for Thornton creek. Data from the US Geological Survey (USGS) gauge

located near the mouth of Thomson creek provided information to calculate basic flow statistics. Where SPU data was adequate, calculations of mean monthly flow, minimum base flow, and peak annual flow frequencies were conducted.

In analyses for flood magnitudes and flood frequencies for the five major streams, NHC found that flood magnitudes had typically increased 2 to 5 times within all basins except for Thomson creek. NHC also found that flood frequencies have increased such that "the pristine condition 100-year floods are now as common as, or more common than the median annual flood (the flood level exceeded every other year on average)". The increase in flood frequencies was found generally for all five stream systems, except for a number of locations in Thomson creek where the "frequency of large floods is a bit less dramatic". NHC noted lower Thomson creek as the most dramatic example where flood frequencies were *notably lower*. This beneficial effect in lower Thomson was attributed to "the bypass pipe that redirects a significant portion of flood flow from the mainstem at Meadowbrook pond".

This biological evaluation submitted with the Joint Aquatic Resources Permit Application clearly shows that the Meadowbrook Outfall was designed to divert 44% (100 year storm) to 87% (two year storm) of storm water flows in Thomson Creek away from downstream properties. The benefit to the public from this project was flood control.

July 30, 2007

In an electronic mail labeled CITY 2256, Edward Mirabella requested that Drew Osborne provide historical files on the Meadowbrook Outfall Rehabilitation Project to calculate a business case for lining the concrete pipes. Mr. Osborne's response (CITY 2257) included an unedited analysis of why the underground pipes needed to be lined, and liability issues that might arise:

They took out the lining on the upper portion but all of the water work is still being done. So they're replacing 2 lines, pulling out a broken section of pipe and plugging off that

line, refurbishing the bulkhead, and what they've deleted is an upstream line that goes up across the street up to another bulkhead, where the mainline comes down. They were supposed to line that section of pipe, just to mitigate any problems with joint leakage, but they deleted that because nobody would touch it.

Go back to the original PDP and look at how much risk they associated with the lining, because they're not doing that now. They're also investigating other lining methods, but the one he's been looking at, there are some problems that they have to work out, so they don't know if it's going to work or not. They're going to do an investigation. They need to figure out if they really want to go back and line it or not. So they might monitor it.

So now the cost has gone up. Does this change the overall NPV so that they wouldn't consider doing it anymore. He's not sure how much dollar value they assigned to the lining portion.

The main benefit is still there. This is just some additional work that they wanted to do because a neighbor had some geysers shooting up in the backyard. She hired a geotech, we hired one, and it was inconclusive what was causing it. It could have been groundwater since she's at the bottom. We denied their claim.

The lining was to put in added protection so that she couldn't come back and say that the pipe joints are leaking and causing the problem. Ed views it in a different way; if we put the lining in and she never gets any more geysering, then they've just proven that that's the cause of the problem. On the other hand, if they don't do the work and things get worse, they've got a bad problem. Another option is to go in and dig up the pipe. Part of the problem is that this section of line is partially submerged because of the lake level, so they can't get in that last little section and keep it dry. That's why everybody shied away from it.

Contractors are also worried that it's unreinforced concrete pipe. They were also having trouble getting a bond. They didn't like the idea of having people in that pipe if there was a sudden storm event.

This electronic mail, as raw as it may be, clearly shows the deliberate decision made by the project team to design a facility that did not address known risks of damage.

July 7, 2007

Contractor Richard Phillips is given a notice to proceed and begins construction on the site of the Meadowbrook Outfall. Several “unanticipated conditions”, such as concrete underwater on site, voids over joints in the concrete pipes (CP 450-459), and asbestos in the corrugated metal pipes, are discovered during construction.

October 24, 2007

Meadowbrook Outfall Rehabilitation Change PDP#2d was presented the Seattle Public Utilities Asset Management Committee, requesting another \$815,000. In Project Development Plan 2c, dated May 30, 2007, the project engineering team decided to plug the 30” pipe, thus increasing the flow that would be diverted to the 42” and 48” pipe. This increased the likelihood that the remaining pipes would be surcharged.

The history of project plans is found in change PDP 2d:

PDP#1 (June 8, 2005) presented 5 options & recommended 3 for further development (\$130K). AMC preferred the option with the lowest life cycle cost and requested an expedited PE to be done on this basis (repair concrete portion of outfall pipe, replace damaged corrugated metal pipes, repair sea wall and asphalt paved road).

PDP #2 (November 9, 2005) presented 4 options to rehabilitate three broken drainage outfall pipes at Lake Washington. AMC approved Option #1, which included the repair of damaged portions of 48, 42 and 30-inch outfall pipes plus repair of the seawall and adjoining asphalt pavement. Total funding approved was \$1,890,000 with construction taking place in 2007.

Change PDP #2a presented to AMC March 2006. (Option #1 not economical due to DNR State Owned Aquatic Land requirement). Approved Option #1 plugging and diversion of flow from the 30-inch line and rehabilitation of the 42 and 48-inch outfall lines. Funding was decreased to \$1,520,000.

Change PDP#2b presented to AMC on November 29, 2006. Modified protection wall near neighbors seawall from sheet piles to wall supported by auger-cast piles due to vibration concerns related to the installation of the sheet piles. Funding increased to \$2,050,000.

April 25, 2007 AMC update. Informed AMC of a "no-bid" situation on the construction bid package. No bids were received due to risk concerns related to lining the upstream sections of the outfall line. The construction package was re-issued for bid, eliminating lining of two upstream outfall lines.

May 30, 2007 Change PDP#2c. Approve Alternative 3b - Plugging and diversion of flow from the 30-inch line and rehabilitation of the 42 and 48-inch outfall lines plus construction of a temporary support wall to isolate the construction area. Eliminate re-lining of the two upstream outfall lines and analyze feasibility of future relining as a separate project

The discussion that followed the presentation of PDP 2d shows that project overruns and reductions in scope were the result of insufficient site research by project engineers, coupled with a deadline to complete construction before expiration of permits from other governing agencies.

Ray: What lessons were learned? What field conditions were different than we expected? How much of what was unanticipated might we have anticipated?

Ed: We could have done more site investigation. We could have sent the divers out to look at how bad the situation was underwater (concrete and other debris, testing of pipe coating for asbestos, etc.) to get a better idea of the overall scope of work. This investigation could have helped reduce the number of changes that occurred on this project, although it probably would not have reduced costs appreciably.

Ray: If we do more outfall work in the future, we should have a checklist of questions we ask and things we look for based on things that needed to be addressed in this project and things that may need to be addressed on future projects.

Decision/Outcome:

- Approved increased costs of \$815k.
- Eliminate further analysis / investigation of lining upstream pipes.

By this decision, the Asset Management Committee of Seattle Public Utilities knowingly subjected the neighbors of the Meadowbrook Outfall to continued risk of damage from leaks in the underground concrete pipes.

December 2-3, 2007

A large rainstorm caused flooding in several areas bordering Thornton Creek around Meadowbrook Pond. Nathan Hale High School was flooded and closed for a week. Mr. Struthers called Seattle Public Utilities on the afternoon of December 2, 2007, when bubbles and geysers of water were observed along the replaced outfall pipes. Associate Director Trish Rhay returned the call and promised to send engineers to the site the next day. By the time the engineers, and contractor Richard Phillips returned to the site, the bubbles had stopped.

July 16, 2008

Contractor Richard Phillips was retained to complete the project and returns to the site. A steel "I" beam from the temporary retaining wall, which was sticking out of the lake bottom, is removed. The concrete on the sea wall steps, originally poured in 2007, is jack hammered and removed. Grout is installed in the voids located underneath the removed concrete, and new concrete is poured. Fish mix gravel, which had not

been adequately installed on the lake bottom, is transported by barge and spread over the replaced ductile iron pipes.

July 22, 2008

Northwest Hydrological Consultants found that the hydrological models used to design the rehabilitated structure were “inadequate for evaluation of high flow conditions”. (City 1852, memorandum, July 22, 2008, Pat Flanagan/David Hartley/Larry Karpack to Gary Schimek) after the project had been constructed. The authors concluded that:

“Existing model should be recalibrated”.

September 17, 2008

New asphalt is laid on Riviera Place NE and stripes are put on resurfaced roadway. Prime contractor Richard Phillips leaves the site.

February 23, 2009

Following the advice of engineer Bruce Blyton, Bruce Struthers excavated a trench, two feet wide by over three feet deep, along the south side of the bulkhead where the sinkholes have appeared in the past. Two large cedar logs, running north and south in line with the outfall’s concrete gravity bulkhead (CP 364, 366), are uncovered. Directly north to the end of these cedar logs is the “wing wall” component of the Meadowbrook Outfall. It is apparent that the uncovered cedar logs are the remains of a timber bulkhead constraining the original shoreline, which was removed on the City’s property and replaced by the concrete gravity bulkhead.

April 5, 2009

Bruce Struthers fills in the trench with five cubic yards of crushed rock. The crushed rock is compacted as it is filled in, and covered with six inches of dirt. The dirt is seeded, and grass grows back over the trench.

October 17, 2009

The first heavy rain of the season results in geysers and bubbles above the pipes in the same locations as were observed in the December 2-3, 2007 storm. Mr. Struthers goes to Meadowbrook Pond and observes water flowing from Thornton Creek into the diversion structure, and from Meadowbrook Pond into the overflow structure. Seattle Public Utilities workers are observed at Meadowbrook Pond, removing wood debris from various input structures.

October 18, 2009

Sinkholes re-appear in the Otrubova-Struthers yard. These sinkholes gradually increase in size with each rain heavy enough to cause water to flow through the Meadowbrook Outfall.

Seattle Public Utilities has known about problems with the Meadowbrook Outfall at least since June 1998 when Daniel Huang of the SPU Materials Laboratory was asked by Senior Engineer Chollada Yesuwan to perform a geotechnical study of the Meadowbrook Outfall site. Over a period of ten years, various engineering solutions were designed and proposed to the SPU Asset Management Committee for approval as a Capital Improvement Project. The broken concrete pipes that leak under pressure were considered for replacement, or lining with carbon fiber. Seattle Public Utilities engineers performed a detailed analysis of the risk of implementing any solution, including doing nothing. The results of these analyses were presented time and time again to senior management of Seattle Public Utilities, including former director Chuck Clarke, and current director Ray Hoffman. While Seattle Public Utilities deliberated for ten years over what to do about the Meadowbrook Outfall, the property directly to the south continued to sustain damage. The

project that was eventually approved and constructed, for the public good, did not replace or line the broken concrete pipes underground, and did not erect a permanent bulkhead to protect the Otrubova-Struthers property.

Seattle Public Utilities needs the Meadowbrook Outfall to continue to divert the majority of storm water flows from Thornton Creek to Lake Washington. Consultants such as Entranco in 2001, and Taylor Associates (Meadowbrook Pond: Assessment of Maintenance and Performance and Proposed Action Plan) in 2008, have recommended the diversion of even more storm water through the Sand Point Tunnel and Meadowbrook Outfall to control flooding in Thornton Creek.

IV. ARGUMENT

The City of Seattle does not see that Washington case law holds it liable for inverse condemnation. The argument presented before Judge Gonzalez is laid out in CP 1057-1069 and the Appellants' brief. Recent case law in California supports the assertion that the conduct of Seattle Public Utilities in the execution of the Meadowbrook Outfall Rehabilitation Project results in liability for inverse condemnation.

The decision from *Arreola v. County of Monterey*, 99 Cal.4th 722 (2001) is invocative of the performance of Seattle Public Utilities in rehabilitation of the Meadowbrook Outfall:

We conclude that in order to prove the type of governmental conduct that will support liability in inverse condemnation it is enough to show that the entity was aware of the risk posed by its public improvement and deliberately chose a course of action - or inaction - in the face of that known risk

Knowing that failure to properly maintain the Project channel posed a significant risk of flooding, Counties nevertheless permitted the channel to deteriorate over a long period of years by failing to take effective action to

overcome the fiscal, regulatory, and environmental impediments to keeping the Project channel clear. This is sufficient evidence to support the trial court's finding of a deliberate and unreasonable plan of maintenance.

State diversion or obstruction of surface water onto land "not historically subject to flooding" is not protected by reasonableness rule, but results in strict liability. The Meadowbrook Outfall is thousands of feet away from Thornton Creek and separated from the Creek by the Sand Point Ridge. Seattle Public Utilities chose to divert a majority of storm water flows from Thornton Creek to Lake Washington at the Meadowbrook Outfall. In rehabilitating this facility, the City evaluated design options that included replaced or lined concrete pipe, and a permanent wall to protect the property to south. The project team proposed, and the Asset Management Committed approved, construction plans that did not afford the same level of protection to Vitezslava Otrubova and Bruce Struthers. As a result, the Otrubova-Struthers residence continues to be subjected to flooding, so that residents adjacent to Thornton Creek, and downstream from Meadowbrook Pond, do not. The City of Seattle should be held liable for inverse condemnation.

The City's deliberate actions are similar to those in a more recent case, *California State Auto Assn. Inter-Insurance Bureau v. City of Palo Alto* (2006) 138 Cal. App. 4th 474.

Inverse condemnation lies where damages are caused by the deliberate design or construction of the public work; but the cause of action is distinguished from, and cannot be predicated on, general tort liability or a claim of negligence in the maintenance of a public improvement. (Citations.) But damage caused by the public improvement as deliberately conceived, altered or maintained may be recovered.

While the trial court found that neither tree roots nor inadequate slope caused the sewage backup into the McKennas' home, and that the City had a regular program of maintenance for the sewer, it also found that the *blockage occurred in the main owned and operated by the City*. The purpose of the sanitary sewer is to carry wastewater *away* from the residence. The City's sanitary sewer failed to carry wastewater away from the McKennas' residence *because* of a blockage in the City's main, and therefore, failed to function as intended.

We believe that where, as here, there were three substantial factors in causing the sewage backup, namely, tree roots invading the porous clay pipe of the sewer main, inadequate slope, and standing water in the main, the burden should shift to the public entity to produced evidence that would show other forces alone produced the injury.

The same argument carries through to this case. The purpose of the rehabilitated Meadowbrook Outfall was to carry storm water away from Thornton Creek. By removing the weir in the control structure on Riviera Place, and not replacing it, Seattle Public Utilities caused all three concrete pipes to carry water that was originally designed to be carried by the 30" pipe. By plugging the 30" pipe, Seattle Public Utilities ensured that proportionally more water would be flow through the 42" pipe, and the 48" pipe closest to the Otrubova-Struthers residence. By not lining or replacing the 48" pipe, after being presented with the videotaped evidence of breaks in this pipe and large "unanticipated" voids at the joint closest to the neighbor's residence, Seattle Public Utilities designed a system that was guaranteed to continue to damage that residence. The burden shifts to Seattle Public Utilities to show what other forces could produce the sinkholes that continue to appear after each winter's heavy rains.

In their brief, the Respondents have characterized the use of the Meadowbrook Outfall as “Open, notorious and hostile” in defense of their continuous damage of the Otrubova-Struthers property. This is incorrect.

Open: This use is not open. The City’s experts responding to claims filed by Ms. Otrubova denied any correlation between the broken pipes and the sinkholes. This, despite acknowledgement of the possible cause in preliminary project proposals and analysis.

Notorious: Merriam-Webster Dictionary defines notorious as:

“Generally known and talked of; especially: widely and unfavorably known”.

The Meadowbrook Outfall is not generally known. It is only visible to the two homes that border it. Until construction on the Meadowbrook Outfall Rehabilitation Project began, the shoreline was obscured from Riviera Place by a wooden fence constructed by neighbor Steven Marvich before Ms. Otrubova moved in her home. The broken corrugated metal underwater pipes were only visible to the two neighboring homeowners and Seattle Public Utilities, who chose to ignore ratepayer telephone calls, letters and claims.

Hostile: It is clear that Seattle Public Utilities has been hostile to acceptance of any liability throughout these proceedings (CP 313). The original project manager for the Meadowbrook Pond, Pamela Miller, clearly expressed her personal hostility by categorizing Ms. Otrubova as a “snake” (CP 304-305), and by trying to interfere with a remodel of the residence (CP 882-883). The Court should not reward this treatment of private citizens by a public entity by dismissing inverse condemnation claims.

V. CONCLUSION

The claim of inverse condemnation against the City of Seattle should stand. The court also erred in granting the plaintiffs' attorney's motion for leave to withdraw, while prohibiting a continuance of trial. Robert B. Struthers and Vitezslava Otrubova respectfully request that:

- i) the inverse condemnation claim be restored,
- ii) summary judgment on inverse condemnation be awarded to Bruce Struthers and Vitezslava Otrubova,
- iii) compensation for damages resulting from diminution of value be awarded to the appellants, and
- iv) attorney and expert fees be awarded to the appellants.

If this Court does not agree, the appellants respectfully request that this case be remanded back to trial.

DATED this 7th day of February, 2010.

By: *Robert B. Struthers*
Robert B. Struthers, pro se