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NO. 65201-0-I

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**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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ROBERT B. STRUTHERS and VITEZSLAVA OTRUBOVA,  
husband and wife and the marital community thereof,

Appellants,

v.

CITY OF SEATTLE, a Washington municipal corporation,

Respondent.

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FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2010 JUL -2 PM 4: 12

**BRIEF OF APPELLANTS**

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## **I. ASSIGNMENTS OF ERROR**

The trial court erred in entering the order for summary judgment of October 2, 2009, dismissing the case with prejudice.

The trial court erred in entering the order for summary judgment of March 3, 2010, denying Robert Struthers' motions for reconsideration filed October 12, 2009 and October 19, 2009.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Appellants Robert B. Struthers and Vitezslava Otrubova believe that the issues pertaining to the assignments of error may best be stated as:

Whether inverse condemnation claims are properly dismissed, with prejudice, where the damage from a government project occurs without payment of just compensation.

## **III. STATEMENT OF THE CASE**

### **A. Factual Background**

Appellants Vitezslava Otrubova and Robert Struthers own a home on Riviera Place NE in Seattle. CP 4. Ms. Otrubova purchased this home in 1992. CP 5. The City of Seattle owns the property directly adjacent, to the north. CP 87, 92, 119-120, 419. A bulkhead, running east and west, straddles the property line. CP 73, 41, 43. On the City's property is the Meadowbrook Outfall, a municipal storm water conveyance system that diverts water from Thornton Creek and the Meadowbrook Diversion Pond. CP 4, 35, 36, 86, 420. The public benefits from the bypass system that

terminates with the Meadowbrook Outfall through flood protection for sixty homes along Thornton Creek. CP 36. This flood protection is limited; subsequent to this matter, two lawsuits<sup>1</sup> have been filed by homeowners in the Thornton Creek basin against the City of Seattle for flood damages incurred during a December 3, 2007 storm. CP 210.

Robert B. Struthers and Vitezslava Otrubova attempted several times to make Seattle Public Utilities aware of problems with the Meadowbrook Outfall, and damage to their property, since 1997. CP 365-376. Eight years later, Seattle Public Utilities (SPU) engineering staff acknowledged Meadowbrook Outfall “is reaching the end of functional life” in a presentation to their Asset Management Committee on June 8, 2005. CP 38. Problems with the Outfall known to the City since 1998 included separation in a 30” corrugated metal pipe in Lake Washington, corrosion and holes in all outfall pipes, sinkholes on City property and the appellants’ property and settling in Riviera Place NE. CP 38-40, 44-45. Various options for rehabilitation of the Outfall were presented to Seattle Public Utilities’ Asset Management Committee. CP 49-50. Presentation of the alternatives included an analysis of the risk to adjacent private property. CP 51, 52, 54, 56, 58, 62, 63. A proposed option of doing nothing, with the attendant high risk of failure of the outfall and resulting flooding, was discarded. CP 67. The recommendation put forth to the

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<sup>1</sup> King County Superior Court cases 09-42593-1 and 10-2-05089-2. Savitt, Bruce and Willey, LLP represent the City of Seattle in both cases.

Asset Management Committee was to authorize \$135,000 to fund the preliminary engineering (PE) study of three alternatives. CP 69.

A description of the components of this bypass system is helpful to understanding the alternatives considered by Seattle Public Utilities engineers. A diversion structure takes storm water directly from Thornton Creek to Lake Washington through a 72" pipe, which connects to a 90" pipe. CP 33, 34, 118. The 90" concrete pipe, the Sand Point Tunnel, was constructed in the 1950s as part of the Lake City Sewage Treatment Plant. CP 35. Sand Point Tunnel terminates at Riviera Place NE, where a concrete outlet control structure connects the 90" pipe to three smaller concrete pipes (36", 42" and 48" in diameter). CP 35, 87, 92, 237, 420. The smaller pipes allow flow to continue under Riviera Place NE. CP 92. The control structure was built with two concrete weirs of differing heights, which prioritized the sequence of flow to each downstream pipe. CP 45, 238. The 30" pipe is lowest and the first to carry flow until surcharged. CP 237. The 42" pipe was the next to carry flows, and when it was surcharged, the 48" pipe would carry remaining flows. CP 237. The 48" pipe is closest to the Otrubova-Struthers property. CP 87, 238. All three concrete pipes were coupled to corrugated metal pipes at the shore of Lake Washington. CP 119. The corrugated metal pipes conveyed flows offshore into the lake. CP 49-50.

The Meadowbrook Diversion Pond is a storm water management facility built by Seattle Public Utilities on the grounds of the abandoned Lake City Sewage Treatment Plant that became operational in March

1998. CP 27. The design and operation of this facility is described at length in a report prepared for Seattle Public Utilities by Richard Horner and William Taylor. CP 474-492. The first bypass inlet that diverts flows from Thornton Creek to Lake Washington was constructed in 1952 as part of the Lake City Sewage Treatment Plant. CP 236-237. A second diversion structure was constructed in 1998 with the Meadowbrook Diversion Pond to promote deposition of sediment in Thornton Creek. CP 478, 480, 492. Increased flows of storm water from this second diversion structure in 1998 were coincident with the appearance of structural damages around the Meadowbrook Outfall.

In October 1998, a ten-foot by ten-foot sinkhole appeared in the front yard at 10515 Exeter Avenue, one block due west of the concrete control structure at Riviera Place NE . CP 207, 238. In response to this event, Seattle Public Utilities contractors removed concrete weirs within the control structure. CP 208, 238. As a result, the 30", 42" and 48" concrete pipes now had equal priority in receiving flows from the Sand Point Tunnel.

The 30" corrugated metal pipe was broken at the western shore of Lake Washington. CP 38, 40. This break was visible from shore when the lake was calm. During storm events, geysers of water bubbled from the break, and from holes in all three corrugated metal pipes. CP 41.

Vitezslava Otrubova reported the broken pipes to Seattle Public Utilities as early as winter, 1993. CP 372. A large storm event on October 21, 2003 produced large geysers of water from the concrete structure at

the lakeshore, where concrete and corrugated metal pipes are coupled. CP 43, 372. Sinkholes appeared a few days later in the City's property and the Otrubova-Struthers yard. The homeowners retained the services of a geotechnical firm to study the damage. CP 373. In their report, HWA Geosciences stated that damage to the residence and yard was caused by leaks in the storm water pipes. CP 374. Ms. Otrubova and Mr. Struthers filed a claim for damages in November 2004, which was denied by the City. CP 371-375, 38.

Seattle Public Utilities responded to the claim by sending experts to the site, such as geotechnical engineer Jeff Fowler, hydrologist David Hartley and Court Harris of Herrera Associates, whose declarations and testimony were presented in the trial of related matter 07-2-21844-1 SEA, heard before Judge Steven Gonzalez. CP 39. Opposing opinions were offered through the declarations and testimony of professional engineer Steven Thomas, geologist Bruce Blyton, geotechnical engineer Jeff Laub, structural engineer Dan Say and property appraiser Richard Hagar.

Through communications with the Risk Management section of Seattle Public Utilities, Robert Struthers and Vitezslava Otrubova became aware of the capital investment project that became the Meadowbrook Outfall Rehabilitation Project. CP 373-374. When it became apparent that the City of Seattle, while acknowledging risk, would not accept responsibility for the damage caused to Robert Struthers' and Vitezslava Otrubova's residence by the Meadowbrook Outfall, and would not repair the shared bulkhead as part of the Meadowbrook Outfall Rehabilitation

Project, Robert Struthers and Vitezslava filed a complaint for damages. CP 47, 51-52, 54, 56, 58, 61-63, 67, 69, 391-403. This matter became King County Superior Court Cause Number 07-2-21844-1. CP 391.

Over the lifetime of the Meadowbrook Outfall Rehabilitation Project, five Project Development Plans were presented to the Asset Management Committee, from June 8, 2005 to October 24, 2007. CP 30-71, 89-113. Options presented to the Asset Management Committee ranged in cost from \$1,520K to \$3,310K. CP 107. A Notice to Proceed with construction was issued on July 9, 2007. CP 95. As the project progressed, the number of infrastructure components to be replaced decreased, yet completion costs increased. CP 107. The solution proposed after the preliminary engineering phase involved repair of three corrugated metal pipes in the water, lining of the three connecting concrete pipes underground, and installation of a new sheet pile wall protecting the Otrubova-Struthers property from the City's infrastructure. CP 107. The lining of the underground concrete pipes was eliminated when no contractor would bid on this portion of the job and the protective sheet pile wall was scaled back to a temporary protection wall. CP 92, 94. The visibly damaged corrugated metal pipes under water were replaced with ductile iron pipes. CP 95, 116, 420. Seattle Public Utilities engineers touted these pipes as the path to "Reduce your NPV<sup>2</sup> in 10 Easy Steps" in a presentation to their Asset Management Committee. CP 93. The City

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<sup>2</sup> Net Present Value

chose to “observe performance of the two upstream lines” and defer lining of underground concrete pipes to a “potential stand-alone lining project”. CP 54.

The Meadowbrook Outfall Rehabilitation Project began its first construction phase in June 2007, with the goal of replacing two of the corrugated metal pipes in Lake Washington with ductile iron pipes. CP 95, 420. The 30” pipeline was abandoned and plugged at the concrete control structure. CP 87. Additional infrastructure problems not discovered during preliminary engineering appeared during construction. CP 6, 109. The corrugated metal pipes were found to contain asbestos, requiring abatement procedures. CP 100. Videotaping during construction showed that there were breaks in joints of the reinforced concrete pipes, approximately six feet from the northeast corner of the Otrubova-Struthers residence. CP 6, 105, 110. More importantly, excavation showed that the size and range of the voids under the concrete seawall where the two disparate pipe materials joined was found to be larger than originally estimated. CP 103, 109. The project team went back to the Asset Management Committee on October 24, 2007 and requested another \$815K in project funding, to accommodate “unforeseen site conditions”. CP 95-96, 109.

Further problems and damage presented themselves during construction in the summer of 2007. CP 155-156, 239. Sinkholes appeared in the Otrubova-Struthers yard during excavation. CP 239. The shared bulkhead began to sag at its eastern corner. CP 239. The full extent

of the damage inflicted upon the subject property during construction is found in the Plaintiff's Opposition to Defendant's Motion for Summary Judgment. CP 127-152.

Actual performance of the rehabilitated Meadowbrook Outfall indicates that problems still exist during rainy conditions. The winter storm on December 3, 2007 demonstrated that the replacement ductile iron pipes still leaked. CP 326, 336-338. Contractor Richard Phillips returned to the site and made some repairs late summer 2008. CP 326, 420. During first heavy rain of summer chunks of epoxy foam, with the profile of a pipe joint, floated out of the outfall into Lake Washington. CP 326. A severe storm on October 17, 2009, produced a familiar pattern of geysers and bubbling from the replaced outfall pipes. CP 325-349. More disturbingly, sinkholes reappeared at the same locations as in the past the day after this storm event. CP 327. Professional real estate appraiser Richard Hagar has stated these problems experienced from long-standing and recurring issues has caused a diminution in value of the Otrubova-Struthers property. CP 130, 247.

The Seattle Public Utilities acknowledged that the City's drainage infrastructure is inadequate, and that storm events will cause flooding and property damage on a recurring basis, when it established the Storm Observer program in October 2008 (Declaration of Gary Schimek, attached as Exhibit A). The Storm Observers were deployed to observe and report during the storm of October 17, 2009 (Exhibit B). Storm Observers Michelle Koehler and Kevin Buckley were dispatched to the

area of Thornton Creek, Meadowbrook Pond, Riviera Place and Nathan Hale High School, but did not make their presence known to Robert Struthers and Vitezslava Otrubova. (Activity log of Storm Observer activation October 17<sup>th</sup>, pages 10-11 of Declaration of Gary T. Smith, Exhibit B). SPU work crews did follow up after 10:30 PM that evening and videotaped the inside of the Meadowbrook Outfall. (Video from Seattle Public Utilities work order 2081361-1, Exhibit C).

### **B. Procedural Background**

On May 27, 2008, Ms. Otrubova and Mr. Struthers sued the City of Seattle in this matter, alleging that defendants were liable for diminution in the fair market value of their residence. CP 1-10. On November 7, 2008 the City of Seattle filed a motion for Summary Judgment. CP 11-24. On January 22, 2009, Judge Douglas McBroom issued an order denying this first motion for summary judgment, specifically citing the case of *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998). CP 164-167, 235. On December 5, 2008, an order was entered appointing Judge Laura Inveen to replace retiring Judge Douglas McBroom. CP 162-163. Plaintiffs' attorney Karen A. Willie filed a notice of withdrawal on March 30, 2009. CP 467-468. On July 17, 2009, the City of Seattle filed a motion to dismiss the case for failure to join real party. CP 168-173. On July 29, 2009 Judge Inveen struck down the City's motion to dismiss. CP 176-177.

On September 4, 2009 the City filed a second motion for summary judgment. CP 178-205. This motion was granted, with prejudice, on September 20, 2009. CP 231-232. Plaintiffs Struthers and Otrubova filed a motion for reconsideration on October 12, 2009. CP 233-244. Plaintiffs filed a supplementary motion for reconsideration on October 19, 2009, accompanied by a declaration and photographs of damage that resulted on October 17, 2009 from the only large rainstorm of that winter. CP 350-353, 325-349. Judge Inveen did not rule on this motion until March 8, 2010, when she denied the motions for reconsideration. CP 354-355.

#### **IV. SUMMARY OF ARGUMENT**

Summary judgment is appropriate when there are no genuine issues of material fact and when, viewing the evidence in a light most favorable to the non-moving party, no reasonable trier of fact could disagree as to the outcome of the case. See *Nabisco, Inc. v. Warner-Lambert Co.*, 220 F.3d 43, 45 (2d Cir. 2000). In 1998, the City of Seattle engineers decided to redeploy an abandoned sewer line at the site of the decommissioned Lake City Sewage Treatment Plant. The Meadowbrook Detention Pond was built to divert storm water from Thornton Creek to reduce sedimentation, erosion and flooding downstream. Seattle Public Utilities engineers knew of structural problems with the outfall directly north of the Otrubova-Struthers residence, but did not address these problems until 2007. In fact, the City of Seattle designed a project

reducing the carrying capacity of the Meadowbrook Outfall, ensuring that the remaining two pipes would be more likely to surcharge.

The City chose to “observe performance of the two upstream lines” and defer lining of the original underground concrete pipes to a “potential stand-alone lining project”. CP 54. In doing so, the City transferred all the risk of a design failure to the neighboring property owners, to reduce up-front costs and increase the net present value (NPV) of the Meadowbrook Outfall Rehabilitation Project. The City of Seattle’s plodding, defensive response to reported infrastructure problems, and calculated risk analysis, are public record and must be reported to any potential purchasers of the Otrubova-Struthers residence. This situation led to appraiser Richard Hagar’s unambiguous statement (CP 247):

To be very clear, and very concise, my professional opinion on this matter is:

- a. Based upon our analysis, the problems experienced from the longstanding and recurring issues with the Meadowbrook Outfall and its proximity to the subject property, *has* caused a diminution in value of the plaintiffs’ property.
- b. Even after completion of the repairs, to the Meadowbrook Outfall and the subject property, the subject property will *still* experience a diminution in market value.

The elements set out in *Phillips v. King County* to establish inverse condemnation are:

- (1) a taking or damaging (2) of private property (3) for public use (4) without compensation being paid (5) by a

government agency that has not instituted formal proceedings.

The City of Seattle is the governmental agency that, through its diversion of Thornton Creek for the benefit of homeowners downstream of Meadowbrook Pond, instituted a taking, in the diminution in value of Otrubova-Struthers residence. The City of Seattle has denied all past claims for damages. The City has not instituted formal proceedings to condemn the affected residence. The Meadowbrook Outfall cannot be eliminated or restricted without damaging residences downstream of the diversion structure on Thornton Creek and Meadowbrook Pond by increasing flooding during two-year storm events. The City is currently defending itself in at least two lawsuits filed by homeowners in the Thornton Creek basin (King County Superior Court causes 09-42593-1 and 10-2-05089-2).

Projects to mitigate flashy flows, or divert storm water from Thornton Creek by another route, such as the Thornton Creek Confluence Project, have been proposed and not approved. Capital project funding has been directed to resolve problems in other areas, such as to meet compliance orders from the Environmental Protection Agency requiring replacement of combined sewage overflows. A City strapped for funds, under a federal mandate to address other priorities, cannot abate continuing trespass of storm water upon the Otrubova-Struthers property. Instead, the Storm Observer program dispatches crews to observe and report flooding damage across the City during storm events. The takings

by the City of Seattle are permanent and the claim of inverse condemnation should be restored.

## V. ARGUMENT

### A. The Claim of Inverse Condemnation

The City has argued that the damage on Robert B. Struthers' and Vitezslava Otrubova's property must be a "necessary incident" of and be "contemplated" by the City's Meadowbrook Outfall Rehabilitation Project. CP 202. In support of this position, the City relies on the following phrase from *Olson v. King County*, 71 Wn.2d 279, 284, 428 P.2d 562 (1967):

Every trespass upon, or tortious damaging of real property does not become a constitutional taking or damaging simply because the trespasser or tort-feasor is the state or one of its subdivisions, such as a county or a city.

Seemingly, this phrasing has its genesis in the overruled case of *Jorgunson v. Seattle*, which states:

In each of these three cases, the taking or damaging was an indispensable and intentional part of the improvement, necessarily anticipated by the plan, and intended in the performance, of the work.

*See Jorgunson v. Seattle*, 80 Wash. 126; 141 P. 334 (1914), *overruling sub rosa Wong Kee Jun v. Seattle*, 143 Wash. 479, 255 P. 645 (1927). Although the *Olson* court recites the oft-used "not every tort is a taking" phrase, in making its decision, the court applies the proper inverse condemnation claim analysis as announced in *Wong Kee Jun*—which is

“any permanent invasion of private property, must be held to come within the constitutional inhibition.” See *Won Kee Jun* at 505.

The following section provides a chronological overview of inverse condemnation cases and the analysis employed by Washington Courts in evaluating these claims. This overview shows the facts still establish an inverse condemnation of the Struthers-Otrubova property, as the City knew that excess storm water from Thornton Creek would cause damages downstream, the City proceeded with the Meadowbrook Diversion Pond Project, and the predicted damages came to fruition.

**1. Conger v. Pierce County—1921 Supreme Court.**

In *Conger v. Pierce County*, 116 Wash. 27, 198 Pac. 377 (1921), adjoining counties straightened and deepened the Puyallup River so it would not overflow its banks and damage bridges and roads. See *Conger*, at 29. The work eliminated a bend in the river and acted to “throw the current of the stream against the river bank at the point of plaintiff’s location.” See *Conger* at 30. As a result of the change in the river, plaintiff’s buildings lost their foundations and floated out into Commencement Bay. However, Conger sued only for the damage done by erosion on his lands. *Id.*

In its takings analysis, the *Conger* Court cited to cases that hold a private riparian owner cannot so change a stream that it floods or erodes the property of someone else. See *Conger* at 33.<sup>3</sup> The Court then noted

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<sup>3</sup> *Judson v. Tidewater Lumber Co.*, 51 Wash. 164, 98 P. 377 (1908); *Johnson v. Irvine Lumber Co.*, 75 Wash. 539, 135 P. 217 (1913); *Valley Ry. Co. v. Franz*, 43 Ohio St. 623,

that Washington's constitution added the element that property cannot be taken or "damaged" for the public use without compensation first being made. See *Conger* at 34 (*citing* Const. Article 1, §16). The Court next discussed the police power doctrine and whether it was applicable to the case making payment unnecessary. See *Conger* at 35-37. Finally, an analysis was made of the county's activities and the Court stated:

The counties were protecting themselves and their roads and bridges. May they do this in such a way as to injure private property without becoming liable therefore? Certainly not.

See *Conger* at 41.

The municipalities argued the damage was not a direct result of the improvements but "indirect," or consequential damages, for which there can be no liability. See *Conger* at 42. The Court found an inverse condemnation stating:

The alleged erosion of its land and thereby the destruction of its property would be the direct result of the act of the respondents in straightening the channels of the river and thereby changing the currents of the stream. *There was testimony to show that respondents' engineers must of necessity have known that the improvements which they were making would cause the appellant's property to be eroded and probably wash away.*

See *Conger* at 42 (emphasis added).

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4 N.E. 88 (1885); *Crawford v. Rambo*, 44 Ohio St. 279, 7 N.E. 429 (1886); *Freeland v. Pennsylvania R. Co.*, 197 Pa. 529, 47 A. 745, 80 Am. St. 850, 58 L.R.A. 206 (1901); *Gerrish v. Clough*, 36 N.H. 519 (1858); *Bowers v. Mississippi & R.R. Boom Co.*, 78 Minn. 398, 81 N.W. 208, 79 Am. St. 395 (1899); *Morton v. Oregon Short Line Ry. Co.*, 48 Ore. 444, 87 P. 151, 120 Am. St. Rep. 827, 7 L.R.A. (N.S.) 344 (1906), and note; *Town of Jefferson v. Hicks*, 23 Okla. 684, 102 P. 79, 24 L.R.A. (N.S.) 214 (1909), and note.

In this case, the evidence before the Court showed that the City diverted natural flows from Thornton Creek to the Meadowbrook Outfall. Erosion of the bulkhead straddling the City's and Struthers-Otrubova property line, and sinkholes in the City and plaintiffs yard, resulted from these diverted flows, and subsequently, from excavation work performed during the Meadowbrook Rehabilitation Project.

Under the jurisprudence of 1921, the evidence before the Court establishes that the City is liable for inverse condemnation of the Struthers-Otrubova property.

2. **Wong Kee Jun v. Seattle—1927 Supreme Court.**

Six years after *Conger*, in a sweeping opinion by Judge Tollman, the question is asked whether “property has been taken and damaged in contravention of constitutional rights, or whether the city’s acts were of a tortious nature only. . . .” See *Wong Kee Jun v. Seattle*, 143 Wash. 479, 255 Pac. 645 (1927). The case involved landsliding caused by the City of Seattle’s grading of streets. Judge Tollman reviewed 29 cases with 19 of them being against the City of Seattle.<sup>4</sup> He noted that there is “a condition

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<sup>4</sup> *Peterson v. Smith*, 6 Wash. 163, 32 P. 1050 (1893); *Askam v. King County*, 9 Wash. 1, 36 P. 1097 (1894); *Snohomish County v. Hayward*, 11 Wash. 429, 39 P. 652 (1895); *Seanor v. Board of County Comm'rs*, 13 Wash. 48, 42 P. 552 (1895); *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 P. 385 (1901); *Postel v. Seattle*, 41 Wash. 432, 83 P. 1025 (1906); *Scurry v. Seattle*, 8 Wash. 278, 36 P. 145 (1894); *Born v. Spokane*, 27 Wash. 719, 68 P. 386 (1902); *Ehrhardt v. Seattle*, 40 Wash. 221, 82 P. 296 (1905); *Farnandis v. Great Northern Ry. Co.*, 41 Wash. 486, 84 P. 18 (1906); *Smith v. Spokane*, 54 Wash. 276, 102 P. 1036 (1909); *Hummel v. Peterson*, 69 Wash. 143, 124 P. 400 (1912); *Donofrio v. Seattle*, 72 Wash. 178, 129 P. 1094 (1913); *Kincaid v. Seattle*, 74 Wash. 617, 134 P. 504, 135 P. 820 (1913); *Provident Trust Co. v. Spokane*, 75 Wash. 217, 134 P. 927 (1913); *Casassa v. Seattle*, 75 Wash. 367, 134 P. 1080 (1913); *Jorguson v. Seattle*, 80 Wash. 126, 141 P. 334 (1914); *Johanson v. Seattle*, 80 Wash. 527, 141 P.

of confusion” in this area of law and he hoped to give “a rule by which litigants and trial courts may in the future determine into which class a given case may fall.” See *Wong Kee Jun* at 480-481. Liability is the same with or without negligence because the State “goes not as a trespasser, inspired by selfish or unlawful motive, but as one taking *without malice or intent to do wrong* and presumptively for the public good. It cannot put on the cloak of a tort[feasor].” See *Wong Kee Jun* at 485-486 (*quoting Kincaid v. Seattle*, 74 Wash. 617, 620, 135 P. 820 (1913) (emphasis added)).

The inquiry for a court is no longer to revolve around an analysis of the municipality’s actions or inactions:

[T]he courts must look only to the taking, and not to the manner in which the taking was consummated. A mere temporary interference with a private property right in the progress of work, especially such as might have been avoided by due care, would probably be tortious only. Improper blasting, causing debris to be cast upon adjacent property, would seem to be tortious and not a taking or damaging under the constitution; but the removal of lateral support causing slides or any permanent invasion of private property, must be held to come within the constitutional inhibition.

See *Wong Kee Jun* at 505.

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1032 (1914); *Marks v. Seattle*, 88 Wash. 61, 152 P. 706 (1915); *Hollenback v. Seattle*, 88 Wash. 322, 153 P. 18 (1915); *Egbers v. Seattle*, 90 Wash. 172, 155 P. 751 (1916); *Jacobs v. Seattle*, 93 Wash. 171, 160 P. 299 (1916); *Willett v. Seattle*, 96 Wash. 632, 165 P. 876 (1917); *Aylmore v. Seattle*, 100 Wash. 515, 171 P. 659 (1918); *Jacobs v. Seattle*, 100 Wash. 524, 171 P. 662 (1918); *Great Northern Ry. Co. v. State*, 102 Wash. 348 (1918); *Neely v. Seattle*, 109 Wash. 266, 186 P. 880 (1920); *Pratt v. Seattle*, 111 Wash. 104, 189 P. 565 (1920); *Conger v. Pierce County*, 116 Wash. 27, 198 P. 377 (1921); *Knapp v. Siegley*, 120 Wash. 478, 208 P. 13 (1922); *Island Lime Co. v. Seattle*, 122 Wash. 632, 211 P. 285 (1922); *Davis v. Seattle*, 134 Wash. 1, 235 P. 4, 44 A. L. R. 1490 (1925); *Hamm v. Seattle*, 140 Wash. 427, 249 P. 778 (1926).

The courts, henceforth, are to judge whether the facts before it present a “temporary interference” or a “permanent invasion.”

In this case, the City admits that the damages at the Otrubova Struthers’ property will remain permanent because of their continued assertions that the \$3.3 million spent on the Meadowbrook Outfall Rehabilitation Project constitutes a fix. The City of Seattle **must** continue to divert water from Thornton Creek to the Meadowbrook Outfall to alleviate flooding around and down stream from Meadowbrook Pond.

Robert Struthers and Vitezslava Otrubova have submitted an appraiser’s opinion concerning diminution of value of their residence caused by the Meadowbrook Outfall. CP 245-248. The facts presented irrefutably establish a constitutional taking under *Wong Kee Jun*. Finally, it is important to note that *Wong Kee Jun* directly overruled *Postel v. Seattle* and limited *Casassa v. Seattle*, 75 Wash. 367, 134 P. 1080 (1913), and *Jorgunson v. Seattle*, 80 Wash. 126, 141 P. 334 (1914), to the extent that they were not in harmony with the opinion. See *Wong Kee Jun* at 505.

*Jorgunson* involved the same landslide as in *Casassa*, which was caused by Seattle’s grading activities. See *Jorgunson* at 127. The landsliding was deemed only tortious because the “constitution was never intended to apply to consequential or resultant damages not anticipated in, nor a part of, the plan of public work.” See *Jorgunson* at 131. This reasoning is supplanted by the rule set out in *Wong Kee Jun*. However,

municipalities continued to advance that reasoning to the courts. See *Boitano v. Snohomish County*, 11 Wn.2d 664, 120 P.2d 490 (1941).

3. ***Boitano v. Snohomish County—1941 Supreme Court.***

In *Boitano v. Snohomish County*, 11 Wn.2d 664 (1941), the county had a gravel pit from which it took materials to build roads. In excavating the pit, it uncovered a large spring. See *Boitano* at 665-666. The county directed the flow to a channel it dug underneath a highway to the plaintiff's land covering about two and a half acres of it. *Id.* Because the plaintiff had not filed a tort claim, the trial court dismissed the case.

The Supreme Court first analyzed, as required by *Wong Kee Jun*, the nature of the invasion. In constructing the channel to convey the water it was "effecting a direct and permanent invasion of appellant's premises and inflicting upon them a lasting damage of substantial proportions." See *Boitano* at 671. It noted that the County's "principal contention" is that the damages are "consequential or resultant damages" because the flooding was not "an indispensable and *intentional* part of any improvement project which necessarily anticipated such flooding or contemplated that it should be done." See *Boitano* at 673 (emphasis added). The court points out this contention is based on *Jorgunson v. Seattle*. *Id.* It states: "Just how far the *Jorgunson* case is still authoritative is a debatable question. In *Hamm v. Seattle*, 143 Wash. 700, 255 Pac. 655, this court referred to the *Wong Kee Jun* case, *supra*, as one 'where we have adopted a rule different from that enunciated in *Jorgunson v. Seattle.*'" See *Boitano* at 675.

The *Boitano* court then quotes the *Wong Kee Jun* case at length and states: “The opinion in the *Wong Kee Jun* case concludes with a statement to the effect that the *Casassa* and *Jorgunson* cases are overruled in so far as they are out of harmony with the rules announced in the overruling opinion.” See *Boitano* at 676. The Court finds the property has been inversely condemned stating that if it even “assumed the *Jorgunson* case still had an authoritative force” this case was a “perfect illustrator of the rule of the *Wong Kee Jun* case” because the “taking or damaging is in consequence of a permanent invasion of private property.” See *Boitano* at 677. Again, the evidence in this case establishes that the damage to the Struthers’ property is irrefutably permanent.

**4. The Airport Cases—1960 Supreme Court:**

The Airport cases were decided by the Supreme Court due to the location of the SeaTac airport and the eventual development of prop planes into ones with jet propulsion. See *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 348 P.2d 664 (1960); *Martin v. Port of Seattle*, 64 Wn.2d 309, 341 P.2d 540 (1964) cert. denied 379 U.S. 989, 13 L.Ed.2d 610, 85 S.Ct. 701 (1965); *Highline School District 401 v. Port of Seattle*, 87 Wn.2d 6, 548 P.2d 1085 (1976); *Peterson v. Port of Seattle*, 94 Wn.2d 479, 618 P.3d 67 (1980). In *Ackerman*, the Supreme Court addressed, *inter alia*, whether a taking had occurred on vacant land impacted by increased airport takeoffs and landings, and if the Port, which owned no planes, could be liable. See *Ackerman* at 403-406. As to the vacant land, the court stated: “The actual monetary damage to the developed land may

well be greater than to vacant land. “But it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether there is a taking.” See *Ackerman* at 405 citing *United States v. Cress*, 243 U.S. 316, 328, 61 L.Ed. 746, 37 S.Ct. 380 (1916); *United States v. Causby*, 328 U.S. 256, 90 L.Ed. 1206, 61 S.Ct. 1062 (1946). The court then held that indeed, there could be a taking where the Port, which operated none of the planes at issue, is the municipal entity responsible for maintaining an approach to the airport. It was held liable because it had the power of eminent domain, and “failed to provide such an approach through the powers of eminent domain and instead took the airspace over plaintiffs’ properties for the approach.” See *Ackerman* at 412-13.<sup>5</sup>

Likewise, in this case, the City failed to utilize its powers of eminent domain with respect to the Struthers-Otrubova property. Therefore, the City has inversely condemned the property.

**5. *Olson v. King County—1967 Supreme Court.***

The City relies on *Olson v. King County*, 71 Wn.2d 279, 428 P.2d 562 (1967), as supportive of its position that only tort law applies in this case. CP 202. The facts and analysis in the case belie this position. In *Olson*, three homes had a one time flooding event in 1962 because an ancient cross-culvert was placed at the top of a 35-foot fill embankment

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<sup>5</sup> It is notable that the *Ackerman* Court cites to *Conger*, a water law case, to support its holding.

without any splash block or armoring to protect the fill. *See Olson* at 281.

The *Olson* Court specifically refers to the cases previously analyzed:

Concededly the distinction between a constitutional taking and a damages and tortious conduct by the state or one of its subdivisions is not always clear. But subsequent to the comprehensive analysis of our cases by Judge Tollman in *Wong Kee Jun* supplemented by Judge Steinert's scholarly discussion in *Boitano v. Snohomish Cty.*, we have adhered fairly closely to the principles enunciated in those cases.

*See Olson* at 284. (citations omitted).

The Court goes on to say: "The present case falls into the category referred to in *Wong Kee Jun, supra*, as a 'mere temporary interference with a private property right' . . . ." *See Olson* at 285. The *Olson* case does not support the City's position given the permanent nature of the damages to the Struthers-Otrubova property.

**6. Wilber v. Rowland—1974 Supreme Court.**

Absent from the City's analysis is any reference to the Supreme Court's inverse condemnation law in the context of water law. Municipalities did not fare well in these cases. *See Wilber Development v. Rowland Construction*, 83 Wn.2d 871, 523 P.2d 186 (1974); *DiBlasi v. Seattle*, 136 Wn.2d 865, 969 P.2d 10 (1998); *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998); *Dickgieser v. State*, 153 Wn.2d 530, 105 P.3d 26 (2005).

In *Wilber*, the Town of Steilacoom maintained the flow of water in a stream so a wetlands on the plaintiff's property remained at a certain level and held the storm flows from surrounding newly platted lands. The

plaintiff contended his property was being used as a holding basin by the surrounding private plats. *See Wilber* at 873. A real estate appraiser, via affidavit, testified that the market value of the land had been “adversely affected.” *See Wilber* at 874. The Supreme Court reversed the dismissal of the homeowner’s inverse condemnation claim finding that if the water was being “delivered more swiftly and in large amounts” liability would attach. *See Wilber* at 876. However, the landowner would have to show a certain level of damage. Using the same analysis from *Wong Kee Jun* the court stated: “Whether it is regarded as a trespass, temporary in nature, or an appropriation of easements across plaintiff’s lands” would be determinative of whether a taking had occurred. No inquiry was made as to “intent” or whether the use of private property was “incident to” a public purpose because no public project was built or created. Again, the proper analysis is temporary versus permanent and in this case, the damages are permanent.

7. **Northern Pacific Railway Co. v. Sunnyside Valley—1975**  
**Supreme Court.**

The City’s reliance on *Northern Pacific Railway Co. v. Sunnyside Valley Irrigation District*, 85 Wn. 2d 920, 540 P.2d 1387 (1975), is misguided because the facts of that case do not in any way mirror those before this Court. In *Northern Pac.*, the defendant’s irrigation canal broke and washed out the roadbed of the railroad. The stipulated facts revealed that the embankment was replaced and the tracks were repaired. *See Northern Pac.* at 924. The court stated that the plaintiff railroad cited

cases that “almost uniformly involve permanent or recurring damage.” *Id.* After citing to *Wong Kee Jun v. Seattle*, *Boitano v. Snohomish County* and *Olson v. King County*, the court stated: “Temporary interference with a private property right, which is not continuous nor likely to be reoccurring, does not constitute condemnation without compensation.” *Id.* The railroad’s damages were temporary and fixed by the time of trial. The damages at the Struthers-Otrubova property are permanent, as excess storm water will be diverted from Thornton Creek with every big storm.

8. ***B & W Construction v. Lacey - 1978 Division Two.***

The holding in *B&W Construction v. Lacey*, 19 Wn. App. 220, 577 P.2d 583 (1978), does not support the City of Seattle’s position either. The City of Lacey was found by a jury to have inversely condemned commercial property by sending surface water flows to it. See *B&W Construction* at 22. The City of Lacey argued that the damages were not substantial enough to support the inverse condemnation claim. The appeals court upheld the claim stating:

The plaintiff need not prove “substantial injury” he need only show a “measurable or provable” declining in market value. *Highline School Dist. 401 v. Port of Seattle*, 87 Wn.2d 6, 13, 548 P.2d 1085 (1976); accord, *Martin v. Port of Seattle*, 64 Wn.2d 309, 391 P.2d 540 (1964), cert. denied, 379 U.S. 989, 13 L. Ed. 2d 610, 85 S. Ct. 701 (1965).

See *B&W Construction* at 223.

John Boucher was the expert appraiser in *B&W Construction* and his testimony was upheld. In this case, Richard Hagar has provided an expert opinion on the diminution of value of the Otrubova-Struthers

residence, based upon the appraisal of Michael Dilio. CP 245-249. This complies with Standard 4 in the *Uniform Standards of Professional Appraisal Practice* (USPAP) and was used to support the September 10, 2009 published opinion<sup>6</sup> (pages 47-52) of the Washington State Court of Appeals in *Deep Water Brewing, LLC v. Fairway Resources, LTD*, 27014-9-III, 27024-6-III.

*B&W Construction* supports a finding of inverse condemnation of the properties and does not support the City's position. Similar to the *Lambier* case, the court in *B&W Construction* also discusses the Supreme Court's analysis of takings law in the cases involving the SeaTac airport. See *B&W Construction* at 223 (citing to *Martin v. Port of Seattle*, 64 Wn.2d 309 (1964)).

9. ***Seal v. Naches-Selah—1988 Court of Appeals, Division Three.***

In *Seal v. Naches-Selah Irrigation District*, 51 Wn. App. 1, 751 P.2d 873 (1988), the plaintiffs alleged seepage from an irrigation ditch damaged their cherry orchard. The jury found the Seals 95% contributorily negligent. See *Seal* at 2. The trial court refused to give inverse condemnation instructions and Division Three upheld that decision. See *Seal* at 9-10 (citing *Jorgunson v. Seattle, supra*; *Songstad v. Metropolitan Seattle, supra*; and *Olson v. King County, supra*.) The court noted that the "damage here was obviously not contemplated by the plan

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<sup>6</sup> *Deep Water Brewing, LLC v. Fairway Resources, Ltd*, 27014-9-III, 27024-6-III published opinion, (September 10, 2009).

of construction, as the orchard was planted several years after the canal was built.” *See Seal* at 10.

The facts of *Seal* are not at all similar to the facts of this case. The Otrubova-Struthers residence was in place before the Meadowbrook Outfall Rehabilitation Project, and the Meadowbrook Diversion Pond. The City knew of the flooding, sinkholes and damage to Robert Struthers and Vitezslava’s residence. However, more importantly, Division Three disavowed its own reasoning in *Seal* one year later in *Lambier v. Kennewick*, 56 Wn.App. 275, 783 P.2d 596 (1989).<sup>7</sup>

**10. Lambier v. Kennewick - 1989 Court of Appeals, Division Three.**

In *Lambier*, the City built a road with a curve that automobiles had difficulty negotiating. By the time of trial, 11 vehicles had landed on the Lambiers’ front lawn, their homeowner’s insurance had been cancelled and their home was “not salable at any price.” *See Lambier* at 278. Kennewick pointed out that the Lambiers’ damages were “neither contemplated by the plan of work nor a necessary incident to the building or maintenance of the road” citing to *Seal*. *See Lambier* at 279. Division Three stated its earlier decision in *Seal* was based on *Songstad* and that both cases relied on *Jorgunson v. Seattle* which had been overruled by *Wong Kee Jun*. Division Three clearly stated that “the Supreme Court abandoned the *Jorgunson* rule in *Wong Kee Jun*.” *See Lambier* at 281.

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<sup>7</sup> One of the concurring judges from the *Seals* decision, Judge Green, was still on the panel.

The City relies on a case that Division Three admits is flawed and which relied upon an overruled case.

The *Lambier* case stands for the proposition that: “The unintended results of a governmental act may constitute a ‘taking.’” See *Lambier* at 281-82. This case is ignored by the City of Seattle. The relevant Supreme Court cases on takings law that are cited in *Lambier* are also ignored. See *Lambier* at 281-82 (citing *Highline Sch. Dist. 401 v. Port of Seattle*, 87 Wn.2d 6, 548 P.2d 1085 (1976); *Martin v. Port of Seattle*, *supra*; see also *Ulery v. Kitsap Cy.*, 188 Wash. 519, 523, 63 P.2d 352 (1936)).

**11. *DiBlasi v. Seattle and Phillips v. King County - 1998 Supreme Court.***

In December 1998, the Court decided *DiBlasi v. Seattle*, 136 Wn.2d 865, 969 P.2d 10 (1998) and *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998). In *DiBlasi*, a city street was channeling water such that a set down or slump opened up in the street and radiated onto private property. The City was notified about its street flows but refused to do anything. In the next large storm, a landslide developed taking out a portion of the yard up to the edge of the house. See *DiBlasi* at 870. The City argued the developer who graded the street and filled a small ravine should be liable—i.e., there was no public project. The Supreme Court did not accept the argument and held that if the street concentrated the flows, then an action for inverse condemnation would lie. See *DiBlasi* at 880. Absent is any discussion of whether the City intended the flows to reach DiBlasi. Because DiBlasi had fixed the property, the City argued

the damages were not “permanent” under takings law. This stance emphasizes that at that time, the City was aware of the proper inquiry for an inverse condemnation case based on water law.

*Phillips* involved a private developer who was vested under old drainage laws that allowed him to build a severely undersized retention detention pond for a large housing development. His engineers warned him that the pond needed to be enlarged “three or four fold” but that would cause the loss of several buildable lots. See *Phillips* at 952. The developer did not upsize the pond so there were more flows to deal with. The County was unaware of the engineer’s warning letter to the developer. *Id.* Because of the additional flows, the developer’s engineers designed a flow spreader and the County allowed it to be built on its right of way. Eventually, the County took over maintenance of the pond.

The Court of Appeals decision found the County liable for permitting the development, taking over the pond’s maintenance involving itself in a private project. The decision meant the protections of the Public Duty Doctrine were abrogated. See *Phillips*, 87 Wn.App. 468, 943 P. 306 (1997). Municipalities in the state were alarmed. As is apparent in the decision, the municipalities argued that the County should not be liable for the developer’s “design defect.” See *Phillips* at 966. To have a taking, one needed “government activity.” *Id.* The County had no choice but to allow the smaller pond and the facts were irrefutable that the flow spreaders were not a public project but a private one. The Supreme Court found that the County’s conduct in donating its right of way “satisfies the

public element of an inverse condemnation cause of action,” and it stated that: “If it is proven at trial that the County participated in creation of the problem, it may participate in the solution.” *See Phillips* at 967-968. There was no governmental project in *Phillips*; so there could be no inquiry into “intent” or whether the project was “incident to” or “contemplated by” the County’s engineers. The only part the County’s engineers had in the project was to permit it under the old regulations. The City ignores this case but it is the controlling authority, along with *Dickgieser v. State, infra*.

**12. Dickgieser v. State—2005 Supreme Court.**

In *Dickgieser v. State*, 153 Wn.2d 530, 105 P.3d 26 (2005), the Department of Resources logged and allowed others to log its land above the Dickgiesers’ property. Prior to the logging, the Dickgiesers warned the department that the logging would cause a stream to flood and damage their property. *See Dickgieser* at 533. The first winter after the logging, the stream overflowed damaging three houses, a septic system and the water supply. Experts testified that there would be repeated, permanent and chronic flooding. *Id.* The Supreme Court analyzed whether logging was a “public use” requiring compensation under the takings clause.

The department made the same arguments and similarly relied on *Olson v. King County*:

[T]he Department argues that every trespass or tortious damaging of real property does not become a constitutional taking or damaging merely because the government is involved. Rather, a

taking occurs only if the state's interference with another's property is a "necessary incident" to the public use of the State's land.

See *Dickgieser* at 541.

The court deemed the argument “not persuasive” and it relied upon the Boitano and Phillips cases in reinstating the inverse condemnation claim. See *Dickgieser* at 538-43.

As *Dickgieser* demonstrates, despite the repeated arguments of municipalities, the Washington Supreme Court has continually rejected the argument that an inverse condemnation claim requires an element of intentionality or that the alleged damage is “necessarily incident” to the government’s actions or project.

Based on evidence and argument, there is no other reasonable conclusion but that the claim of inverse condemnation should survive.

## VI. CONCLUSION

The claim of inverse condemnation against the City of Seattle should stand. 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 are awarded to the appellants.

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

DATED this 1<sup>st</sup> day of July, 2010.

Respectfully submitted,

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

# Exhibit A

FILED

The Honorable Ronald Kessler

2010 JUN 11 PM 3:42

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

MELENIE BLOCH, a single person, et al.,

Plaintiffs,

vs.

THE CITY OF SEATTLE, a municipal  
corporation; and SEATTLE PUBLIC  
UTILITIES a proprietary concern,

Defendants.

No. 09-2-44915-5SEA

Consolidated with

No. 10-2-01920-1SEA

DECLARATION OF GARY SCHIMEK

VALERIE WALTON, a single person, et al.,

Plaintiffs,

vs.

THE CITY OF SEATTLE, a municipal  
corporation; and SEATTLE PUBLIC  
UTILITIES a proprietary concern,

Defendants.

I, GARY SCHIMEK, declare under penalty of perjury under the laws of the State of  
Washington as follows:

DECLARATION OF GARY SCHIMEK - 1

Peter S. Holmes  
Seattle City Attorney  
600 Fourth Avenue, 4th Floor  
P.O. Box 94769  
Seattle, WA 98124-4769  
(206) 684-8200

ORIGINAL

1           1.     I am employed as Manager with Seattle Public Utilities ("SPU"). I am over the  
2 age of eighteen and have personal knowledge of the facts contained in this Declaration. I am  
3 competent to testify as to the facts provided below.

4           2.     The Storm Observer program within SPU was created in October 2008 and  
5 consists of SPU employees deployed in the field City-wide during storm events to provide real  
6 time observations of areas prone to flooding and monitor drainage infrastructure to ensure that it  
7 is functioning adequately, and to assist in the determination of where to deploy field crews and  
8 other resources when necessary. Storm Observers are issued City cell phones for the purpose of  
9 providing these real time observations to an SPU employee designated as point of contact or  
10 liaison.

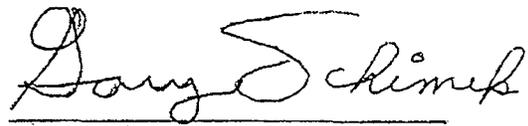
11          3.     For the storm event in the Seattle area beginning on October 17, 2009, Storm  
12 Observers were deployed City-wide, and I was designated as the liaison for the purpose of  
13 receiving Storm Observer updates. I compiled brief updates in an activity log during that event  
14 from the Observers deployed City-wide.

15          4.     Storm Observers are not intended to generate a typical SPU work order or  
16 inspection report, but are intended to provide real time communication in support of SPU field  
17 operations. The Storm Observer program is an evolving element of the SPU business model, and  
18 the deployment during the October 17, 2009 storm event was one of the first times that the  
19 program was activated in 2009. At that time, there was no developed or standard practice of  
20 creating or transmitting activity logs.

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Signed at Seattle, King County, Washington this 4<sup>th</sup> day of June 2010.

  
GARY SCHIMEK

DECLARATION OF GARY SCHIMEK - 3

Peter S. Holmes  
Seattle City Attorney  
600 Fourth Avenue, 4th Floor  
P.O. Box 94769  
Seattle, WA 98124-4769  
(206) 684-8200

# Exhibit B

2010 JUN 11 PM 3:42  
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SEATTLE, WA.

The Honorable Ronald Kessler

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

MELENIE BLOCH, a single person, et al.,	)	
	)	
Plaintiffs,	)	No. 09-2-44915-5SEA
	)	Consolidated with
vs.	)	No. 10-2-01920-1SEA
	)	
THE CITY OF SEATTLE, a municipal	)	DECLARATION OF GARY T. SMITH
corporation; and SEATTLE PUBLIC	)	
UTILITIES a proprietary concern,	)	
	)	
Defendants.	)	
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VALERIE WALTON, a single person, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
THE CITY OF SEATTLE, a municipal	)	
corporation; and SEATTLE PUBLIC	)	
UTILITIES a proprietary concern,	)	
	)	
Defendants.	)	

I, GARY T. SMITH, declare under penalty of perjury under the laws of the State of Washington as follows:

DECLARATION OF GARY T. SMITH - 1

Peter S. Holmes  
Seattle City Attorney  
600 Fourth Avenue, 4th Floor  
P.O. Box 94769  
Seattle, WA 98124-4769  
(206) 684-8200

ORIGINAL

1           1. I am employed with the City of Seattle Law department as an Assistant City Attorney  
2 in the Government Affairs section assigned to defend the City in the above captioned matter.

3           2. On December 10, 2009, the Law department received a letter from Richard Maloney  
4 describing public disclosure requests he submitted to Seattle Public Utilities ("SPU") and the  
5 Department of Executive Administration ("DEA") and expressing concern with responses  
6 received. Attached hereto as **Exhibit A** is a true and correct copy of the letter described in this  
7 paragraph.

8           3. On December 14, 2009, I attempted to contact Mr. Maloney by telephone and left a  
9 message with Mr. Maloney's office requesting to discuss his December 10, 2009 letter to the  
10 Law department. On December 18, 2009 I sent an email to Mr. Maloney stating that I was  
11 reviewing the records of both SPU and DEA responses to his request, and that I would be in  
12 further contact with him on or about December 23, 2009 with the status of my review. Attached  
13 hereto as **Exhibit B** is a true and correct copy of the email described in this paragraph.

14           4. On December 23, 2009, in an attempt to clear up any confusion regarding  
15 departmental responses to his requests, I sent a letter to Mr. Maloney describing in detail the  
16 timeline of both SPU and DEA's response to his requests and the documents provided. As a  
17 courtesy, my letter also identified a claims investigation report dated December 22, 2009 from  
18 SPU to DEA and the Law department related to the address of Mr. Maloney's client. Attached  
19 hereto as **Exhibit C** is a true and correct copy of the email described in this paragraph.

20           5. My December 23, 2009 letter also transmitted a CCTV video of a sewer line related  
21 to the October 17, 2009 storm, and an activity log of SPU Storm Observers related to their  
22 October 17, 2009 activation and explained that the record was not specific to the Madison Valley  
23 area, and was not collected as responsive to his original request, but was provided as a courtesy.

DECLARATION OF GARY T. SMITH - 2

Peter S. Holmes  
Seattle City Attorney  
600 Fourth Avenue, 4th Floor  
P.O. Box 94769  
Seattle, WA 98124-4769  
(206) 684-8200

1 Attached hereto as **Exhibit D** is a true and correct copy of the activity log described in this  
2 paragraph.

3 6. The letter also noted his reference to “documents which set forth the legal basis for  
4 payments by the City of Seattle to persons damaged by flooding during the Hanukkah Eve Storm  
5 of 2006” and explained that the Public Records Act (“PRA”) does not obligate an agency to  
6 perform legal research in response to a request. Even so, my letter noted that SPU had cited  
7 SMC Chapter 5.24 as the relevant section of the SMC which sets forth the procedure and  
8 authority for DEA’s payment to claimants, and again requested that Mr. Maloney clarify what  
9 records he was seeking in this portion of his request.

10 7. On January 27, 2010, the Law department received a forwarded email from Mr.  
11 Maloney originally sent to DEA stating that the City had “totally stonewalled” on responses to  
12 his October 23, 2009 public disclosure request, and also expressing disappointment with the  
13 City’s response to additional public disclosure requests he submitted on January 4, 2010. On  
14 January 29, 2010 I responded to Mr. Maloney by email referencing my December 23, 2009  
15 letter, again describing SPU and DEA’s response, and again requesting that he clarify what  
16 documents he believed were requested but not provided or identified in response to his request.  
17 On February 1, 2010 Mr. Maloney responded by email stating that the request was “clear” and  
18 sought records “which set forth the legal basis for payments” to claimants in Madison Valley  
19 related to the December 14, 2006 flooding.

20 8. On February 5, 2010, I responded to Mr. Maloney by email again citing SMC  
21 Chapter 5.24, and asking that he clarify or elaborate on what other identifiable documents he was  
22 requesting. My email also mentioned a letter from Mr. Maloney sent to the Law department  
23 referencing his December 30, 2009 request, attached an email from DEA stating that they

DECLARATION OF GARY T. SMITH - 3

**Peter S. Holmes**  
Seattle City Attorney  
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1 anticipated completing their response to that request on today's date, and stated that DEA should  
2 be in contact with him on that day. On that same day, Mr. Maloney responded with a lengthy  
3 email stating that he suspected "many records [exist] which fit this request," again referencing  
4 documents which set forth the legal basis for payments to claimants, and listing "memos, reports,  
5 analyses..." I responded via email noting that, if he was requesting documents dealing with the  
6 general basis for payments to individual claimants, those records are maintained in the claims  
7 files which often reflect an analysis of the claim, and which could be provided for additional  
8 review. Finally, my email asked that Mr. Maloney clarify how he would like to proceed. Mr.  
9 Maloney responded by stating "nice try at mischaracterizing our request" but otherwise not  
10 providing any clarification. Attached hereto as **Exhibit E** is a true and correct copy of the email  
11 string reflecting the communication described in paragraphs 6 and 7.

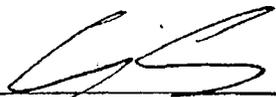
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DECLARATION OF GARY T. SMITH - 4

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Signed at Seattle, King County, Washington this 10<sup>th</sup> day of June 2010.

  
GARY T. SMITH

DECLARATION OF GARY T. SMITH - 5

**Peter S. Holmes**  
Seattle City Attorney  
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Activity log for Storm Observer activation October 17<sup>th</sup>. Author: OCC Liaison-Gary Schimek.

- Here are the messages I sent as storm observer lead. Note that I'd conducted the mad valley route before we activated the storm observer program because a large burst took us by surprise. Sarah Miller took over for me at 1:30 as I was not feeling well.

8:58 AM

I am on-site at Madison Valley. No problem by pond. No problem at 500 Block. There was a big pond at MLK and Judkins that I called in. Water was close to homes.

9:02

Ponding at Lake wash and Madison. And in front of City people's.

9:13

I just cleared out the drains along the sag. They are flowing fine for the moment.

9:32

The drains along 23rd and Cherry are plugged. Water almost over sidewalk and into homes.

9:52

I just cleared the drains at James and 23rd with the help of Parks and a citizen. Flooding came down. Backyards got wet. Maybe basements. I have photos.

10:52

Your judgment is much better than mine in terms of whether having Kevin and Michelle go out at noon is value added based on DWW staffing. I'd say if we have enough DWW coverage we cancel. But if there is any question that DWW may be light we should keep it going.

11:00

All sites are going to be called out soon - I think. Also - I did two rounds at Madison Valley and 500 Block this morning during the 1st blast. Lots of leave problems. I helped out with reducing some flooding at various places. You'll need a rake for the route if you do get called.

11:26

Both Thornton folks (Michelle and Kevin) on-site. They called in.

11:36

I will call Michelle with the Riviera request now...

12:06

There is ponding in the street at 51 NE and NE 49th now in this location. Michelle called it in. The problem is due to debris in a pond just south of the main channel.

EXHIBIT D

Crews were out this morning but did not clear debris from the area south of the main channel, Michelle thinks.

More rain would increase street ponding and could impact homes.

Michelle can meet crews on-site if needed.

12:17

Brian just reported that it looks like showers will miss us...

12:23

Michelle called in flooding at 9223 Matthews Ave. Water that should be in ditch is in road and driveways. May be coming from Burke Gilman.

This is near Matthews Ave and Sandpoint Intersection.

12:32

Citizen taking video in Lower Thornton at 11 this morning. Told Michelle that Meadowbrook pond was a mess

Kevin found plywood staged at Meadowbrook pond. He is moving it. There is also a 55 gallon drum and more plywood near the trash rack by pedestrian bridge.

12:40

Craig called in ponding at 526 22nd Ave. Water is sheet flowing over this drain to the next downstream.

12:42

Michelle was just told by resident at 9223 Matthews Ave that crews were by earlier in the day and said they could bring sandbags by. But they have not.

12:42

I will call Kevin and let him know just to report what he sees and not move it.

12:52

May I get a DWW contact (phone) for our observers starting at 1:30? The observers are finding lots today, so they will keep someone very busy as it stands.

12:54

Kevin took pictures and is now going to Nathan Hale. All things are left as is by pedestrian bridge trash rack. He did move 1 piece of plywood before I got to him. His number is 510-7568 if you need info on what he moved to where.

1:09

Call Sarah Miller at 255-2529 as your prime contact with any info from field.

1:20

Resident approached Craig and said that contactor is supposed to be cleaning drain sock on grate at 30th and John each day - but they are not. Craig is clearing with rack as he can.

1:30

All systems go through Densmore. From Julie. Some ponding at Ashworth and Stone - no spillover or clogging.

2:57 (From Sarah Miller)

Julie Hall called in from Densmore. It hasn't rained there in quite awhile. All her check points are good -

107th & Midvale - no ponding

Stone Pond - minor debris around the drain, but not blocking flow at all. Standing puddles on the trail she saw first time through are all drained away at this time.

Ashworth Pond - level was at about 18" first time through, but is draining fine and level is at about 12"

North Park & 128th St - water was 2"-3" deep on first circuit, now is at 1" deep or less.

Craig Chatburn in Madison Valley/500 Blk 22nd circuit reports everything is clear, other than the three items already reported. (526 22nd Ave plugged inlet, MLK & E Union SWC plugged inlet, and construction sock at 30th & John St)

Kevin Buckley (Upper Thornton) reports all is good except there is some debris in a ditch west of 2827 NE 110th. I'll report that to ORC for a work order.

Michelle Koehler (Lower Thornton) reports that we have debris left on the roadway near Sand Point Way and Matthews Ave, which, if it gets washed downstream with future flooding, could cause a problem. Also, there is debris in a tributary near 49th & 51st (near Matthews Beach) that appears to be from beaver dams that we broke up earlier in the week. This is contributing to on-property flooding upstream.

I released the storm observers between 2:30 and 3 PM and asked them to leave their pagers on through the weekend.

I haven't heard anything from Kevin Buckley on Upper Thornton, or from Michelle Koehler on Lower Thornton. I will try to contact them via cell phone #'s that I have for the storm observers.

Looking at the radar image, it appears things will be dry for the next several hours.

3:25 (From Sarah Miller)

Oops my comment about not hearing from the Thornton creek observers should have been deleted as I replaced it with Michelle's and Kevin's report. Kevin called in an additional report of a 'v-notch fish structure' in the creek at 10538 35th Ave NE. Neighbor reports we installed it cabled-in-place a few years ago. The cable has come loose on one end and neighbor reports it was 'flailing in the high flows' last night and this morning. Gary Lockwood, Chris May, and Deb Heiden

probably need to scope out the repair on this one. I'm not sending to ORC to create a work order.

Kevin's staying a bit longer as it has started raining again.

---

# Exhibit C

RECEIVED  
COURT OF APPEALS  
DIVISION ONE  
JUL 02 2010

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the following documents:

BRIEF OF APPELLANTS

CERTIFICATE OF SERVICE

were served in person on the following party:

Counsel for Respondent  
David N. Bruce  
Savitt, Bruce & Willey, LLP  
Puget Sound Plaza  
1324 4<sup>th</sup> Avenue, Suite 1410  
Seattle, Washington 98101-2509

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

DATED this July 2<sup>nd</sup>, 2010, at Seattle, Washington

FILED  
COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON  
2010 JUL -2 PM 4:12

Robert B. Struthers, pro se  
10514 Riviera Place NE  
Seattle, WA 98125