No. 68618-6-I

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

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

Plaintiffs/Respondents,

v.

CITY OF BOTHELL, a Washington municipal corporation,

Defendant/Appellant.

AMICUS CURIAE BRIEF OF WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS IN SUPPORT OF DEFENDANT/APPELLANT, CITY OF BOTHELL

Daniel B. Heid, WSBA #8217
City Attorney, City of Auburn
Attorney for Amicus Curiae Washington State Association of Municipal Attorneys
25 West Main Street
Auburn, Washington 98001-4998
Tel: 253-931-3030

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Statutes

Other Authorities

A. IDENTITY OF AMICUS CURIAE

Amicus is the Washington State Association of Municipal Attorneys, the organization of municipal attorneys representing the cities and towns across the State, (hereinafter referred to as "WSAMA").

B. STATEMENT OF CASE

WSAMA adopts the Introductory Statement and Statement of the Case submitted by the Defendant/Appellant, City of Bothell, (hereinafter "Bothell").

C. ARGUMENT

Bothell has done a good job of addressing the legal issues, and as such it is not necessary for WSAMA to repeat all the good legal arguments, however, as the issues do impact multiple cities and towns, the impacts are appropriate for the court to appreciate.

1. EXPRESS DEDICATION IS REQUIRED

Municipalities require developers to "dedicate" parts of their plats for various purposes. Some benefit the general public; others just benefit those properties within the development. For instance, Section 13.40.040 of Auburn's City Code requires some utilities to be dedicated to the City, but it specifically provides that, in some cases, those utilities may **not** be dedicated to the City.

Plaintiff's argument that the interceptor pipe does not solely benefit private property, but also the roads within the subdivision as well, which have been dedicated to the City compares apples to oranges. Streets are not just used by the residents of a subdivision. They are used by visitors, police, fire, garbage service, and commercial vehicles. On the other hand, while utilities serving a subdivision may provide some "through-put" benefit outside that subdivision, the primary purpose is to get services (electricity and water) in to the subdivision, and remove waste (storm, sewer) from the subdivision. The key is that the developer, in conjunction with the municipality, must be free to decide to whom the responsibility and the risk for provision of these primarily internal services should be allocated.

a. Facilities Owned by Other Entities

Municipalities, in permitting subdivision, frequently require the developer to reserve tracts or easements for utilities such as power and telecommunications. This requirement does not mean that the municipality has placed upon itself a duty to maintain those easements for the benefit of other service providers such as Comcast or Puget Sound Energy. In the case of water services, for example, service areas cross over jurisdictional boundaries. Again, using Auburn as an example, water service is provided within Auburn by Water District 111, Lakehaven Water District, and the

City of Bonney Lake. The dedication on a plat for utilities to be provided by one of those separate municipalities cannot reasonably be interpreted to require the City to be responsible for the maintenance, inspection, and repair of those facilities that are owned by the ratepayers of those other municipalities. To so require could allow a developer, by including language in a plat, to vitiate or change the terms and conditions of a franchise agreement between the utilities and the City.

b. Private Drainage Facilities

Second, it does not create a duty for the City to inspect and/or maintain *private facilities*. Municipalities frequently require developers to guarantee that facilities with the development will be properly maintained, inspected, and repaired.

Even if those private utilities are located within a public easement, location alone, without the consent of the municipality, cannot convert a private utility to a public one. For example, it is possible that homeowners will have their downspouts connected to the City's stormwater pipe via a side sewer connection, and these privately owned side sewers will enter the easement area. Just because they are located within the easement area does not create a duty on the City to inspect and/or maintain those side sewers or downspouts.

c. Local Government Can and Does Reserve Drainage Easements Even When No Drainage Facilities Are Yet In Existence Within the Easement Area

As Defendant/Appellant Bothell argues, many municipalities require the dedication of easements or tracts for future utility use. Doing so is not only good planning, it is required under Washington's Growth Management Act. *See* RCW 36.70A.020(12), which requires counties and cities who plan under GMA to "[e]nsure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards."

d. Conclusion. Therefore, absent an express dedication of utility facilities to a specific municipality, a general plat dedication for "utilities" cannot be said to place an duty on a specific municipality.

2. WHERE MULTIPLE JURISDICTIONS PROVIDE SERVICE, THE INTENT OF THOSE JURISDICTIONS, AND THE DEVELOPER, SHOULD CONTROL.

This case is a perfect example of where different entities have different, and in some cases, complementary responsibilities for provision of services. When the plat was developed, Snohomish County was partially responsible for stormwater. Alderwood Water & Sewer were responsible for water and sewer services. The Crystal Ridge Homeowner's

Association, and the individual homeowners, by the drainage disclosure requirements on the plat, were also partially responsible for **all** drainage on their plats.

In this case, the risk and responsibility for these functions was allocated to those best situated to manage them. The County could see and manage surface water and storm drainage. The District, since it installed water and sewer lines, could manage them. The homeowners, who would have first hand and daily knowledge of other drainage issues (including groundwater), could collectively or individually manage those issues.

3. ALL FACILITIES THAT DRAIN ARE NOT DRAINAGE FACILITIES.

According to the argument seemingly made by the Respondents, they argued in connection with their Motion for Summary Judgment that:

> "Drainage treatment/abatement facilities" as "any facilities installed or constructed in conjunction with a drainage plan for the purpose of treatment or abatement of stormwater runoff."

Plaintiff's Motion for Summary Judgment, pp 11-12, CP 642-43.

That cannot mean that facilities that are developed and designed to be private systems, or any facility that might happen to be located in an easement, whether it was accepted by a municipality, counts as a facility that falls under the municipality's control and responsibility. Otherwise, the broad brush of the Respondent's description includes roof rain gutters

and for that matter roofs as well, as these (also) have as a critical purpose "the abatement of stormwater runoff."

As noted by Bothell, Snohomish County required the Developer to record a Drainage Disclosure applicable to all property located within the plats; giving notice to future homeowners that the site has substantial drainage problems, and that "special and/or extraordinary drainage controls may be necessary on individual lots" in the future, and that "compliance and/or knowledge are the obligation of the owner of the subject property." CP 472-73, Bothell's Reply Brief, pp 4-5.

Also as Bothell points out, the drainage easement on the face of the plat **did not** include the interceptor pipe - a groundwater pipe buried twelve feet underground, and is pipe is intended to collect groundwater, not surface water. CP 245-46; 345-46; 477-82. This it does not fit within the definitions of "stormwater facilities. CP 343-46. Appellant's Reply Brief, pg. 4. Moreover, the interceptor pipe is shown only on the plans of the Sanitary Sewer District, which has its sanitary sewer line in the same trench as (on top of the interceptor pipe (CP 475; App. A). Appellant's Reply Brief, pg. 4.

But more specifically, the drainage easements designated on this plat are hereby reserved for and granted to Snohomish County for the right of ingress and egress for the purpose of maintaining and operating

stormwater facilities. CP 655; 661. Appellant's Reply Brief, pg. 1. A "groundwater" interceptor located twelve feed below the surface and underneath a sewer main, was not intended to be part of the stormwater facilities.

D. CONCLUSION

While the trial court's decision may seem attractive, the unintended consequences of letting it stand have state-wide implications for municipalities, quasi-municipal municipalities, and public and private utilities.

For all the reasons stated by Bothell, and by WSAMA, it is respectfully requested that the Court reverse the grant of Summary judgment against Bothell

Respectfully submitted this 6th day of May, 2013.

Daniel B. Heid, WSBA #8217
Auburn City Attorney
Attorney for Amicus, Washington State Association of Municipal Attorneys
25 West Main Street
Auburn, Washington 98001-4998
Tel: 253-931-3030