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No. 68618-6-I

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I

Crystal Ridge Homeowners Association, et al.,

Respondents,

vs.

City of Bothell,

Appellant.

RESPONDENTS' BRIEF

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I. INTRODUCTION

The Respondents are a homeowners association and all of the private homeowners of two plats referred to as Division 1 and Division 2 of Crystal Ridge ("Crystal Ridge") in Bothell, Washington. Snohomish County recorded and accepted these plats in 1987 and the area was annexed by the City of Bothell ("City") in 1992.

Division 2 contains an interceptor trench twelve feet underground which captures groundwater from uphill properties as far away as a half mile. The trench was required by the County's Hearing Examiner to address groundwater problems on the site stemming from the uphill properties, failing septic systems in an adjacent development, Brentwood Heights, and from leaking municipal water and storm drains.

Respondents were fortunate enough to locate both the original geotechnical engineer, Dr. Gordon Denby, and the civil engineer, Theodore Trepanier, who worked on this site. Dr. Denby testified before the Hearing Examiner who required the interceptor trench. Engineer Trepanier prepared the plat of Division 2, which specifically refers to the interceptor trench in open space delineated as "Tract 999."

The Division 2 plat shows a twenty-five foot "drainage easement" on Tract 999 and other "drainage easements" are indicated throughout both of the plats. The Developer of the plats clearly indicated his

dedication of these drainage easements on the cover page of the plats. The City addresses only the drainage easement on Tract 999 and it focuses on the two words "stormwater facility" that describe the easement arguing that the drainage easement does not exist because of these words. It has focused on the wrong words, and even considering its arguments, its analysis is wrong. Engineer Trepanier has testified that the entire system is a "stormwater facility" and that the interceptor trench is a component part of the facility. Further, the water in the interceptor trench originates as rainfall or "stormwater" and it is still handling leakage from municipal storm drains, which is also "stormwater." Plaintiffs also presented irrefutable evidence below that the County's practice was to accept drainage easements such as this to ensure their repair and maintenance over time. The City did not address any of the winning arguments below and instead ignored this testimony.

On appeal, the City first offers a new theory that there has been no "common law" acceptance of the plat. The argument is without merit. This case is controlled by the State platting statute, RCW 58.17.020, which sets out the method for statutory acceptance of plats. The platting statute was fully satisfied twenty-five years ago. The inquiry should end there since State statutes are controlling over County ordinances.

Next, the City makes various arguments based on its own ordinances and those in place at the County during 1983 and 1987. Bothell's ordinances are irrelevant and the Court need not address the City's arguments based on the County's ordinances because they were not provided to the Court in violation of RAP 10.4. If the arguments are considered, contrary to the City's assertions, there is ample support in the County's Code to establish that the drainage easement was accepted by the County for repair and maintenance.

The City's final argument is that a Disclosure Notice signed by the Developer somehow thrusts the repair and maintenance responsibility for the interceptor trench onto the homeowners. The City asserts that the Disclosure Notice was filed not only on individual lots but also on Tract 999. There is no evidence to support this theory, such as a title report. More fatal to this argument is the fact that the Disclosure Notice has no legal description so it cannot provide record notice as to any property.

All of the City's arguments fail. The Court is respectfully asked to uphold the trial court's decision in granting summary judgment to Crystal Ridge.

II. COUNTER STATEMENT OF THE CASE

The City's rendition of the facts fails to recognize the testimony of the Respondents' experts. We placed into evidence the unrefuted

testimony of the geotechnical engineer that worked for the developer of Crystal Ridge Divisions 1 and 2, Dr. Gordon Denby,[1] who is the current President of Geo-Engineers, Inc. CP 293-304. Dr. Denby testified before the Hearing Examiner with regard to these plats. CP 294. Testimony was taken on August 21, 1984 and the hearing was continued to September 13, 1984, specifically "for further discussion regarding on-site soil and geologic conditions." CP 719. Dr. Denby authored a preliminary report for the development dated the same day as the first hearing, August 21, 1984. CP 692-704. He authored a supplemental report dated September 13, 1984, which was the day of the continued hearing. CP 706-717. In the Hearing Examiner Decision, it is noted that Dr. Denby testified and that his two reports were entered into evidence as exhibits 26 and 28. CP 720. The purpose of the second report was to provide additional information on "the groundwater regime at the site and to provide more specific information relative to the design of *site drainage facilities*." CP 707 (*emphasis added).* It is noted in the report that Title XXIV of the Snohomish County Drainage Ordinance was specifically used to evaluate whether the project could obtain plat approval. CP 707-708. The County had made the decision that an Environmental Impact Statement ("EIS")

[1] Dr. Denby has been licensed as a civil engineer in the state of Washington since 1979. His B.S. is in civil engineering obtained in Cape Town, South Africa. He has an M.S. in Geotechnical Engineering from Duke University and a Doctorate in the same area from Stanford University. CP 300.

was not needed for the plats, which decision was not challenged. CP 719, 724. The City of Bothell, as a neighboring municipality, reviewed and gave comments on this development. *Id.* It did not address any of the drainage issues—only internal sidewalks, buffering of adjacent properties and upgrading the exterior roads. *Id.*

The City fails to provide the Court with the basic geologic conditions that were on the site. Dr. Denby testifies (CP 293-304) that when he originally walked the site, he saw numerous places where shallow groundwater was seeping out of the hillside as seeps and springs between Crystal Ridge and the development upslope and to the west called Brentwood Heights.[2] CP 294. The groundwater originates as rainfall that falls on the areas upslope of Crystal Ridge and Brentwood Heights and some of it becomes groundwater. *Id.* Dr. Denby provided illustrative sketches of the onsite conditions of the northern and southern parts of the Division 2 which we believe the City has not understood. CP 303, 304. The illustrations show the undulating nature of the soils, the steepness of the lands beyond Crystal Ridge and Brentwood Heights, and that there is till or "hardpan" throughout the area at a depth of about eleven or twelve

[2] If one goes to the plat map at CP 47, "Brentwood Heights" is called out as the development at the top of the page. The words are above and to the left of the words "Centerline of 5th Avenue SE (vacated)." Tract 999 which is highlighted in yellow is the area where the interceptor trench is located and it is in a 25 foot easement that runs along almost the entire length of the plat. A fifteen foot easement is directly below the 25 foot easement.

feet. Area groundwater infiltrates to this layer and then moves horizontally along it because it is impermeable. CP 294-296.[3] The interceptor trench had to be at least 11 feet deep in order to catch the shallow groundwater flows.[4] The flows are coming from property as far away as a half mile (which is beyond Brentwood Heights) and the infiltration is continuous and occurring today. *Id.*

The City incorrectly asserts that the parties have not physically located the interceptor trench.[5] Dr. Denby personally observed the construction of the interceptor trench and it is "physically located in the ground in the 'drainage easement' called out on the plat between Crystal Ridge and Brentwood Heights [Tract 999]." CP 296. The interceptor trench has a six-inch diameter pipe in its bottom which runs almost the entire length of the western boundary of Division 2. *Id.* The pipe is referred to as a perforated pipe because it has holes in it to capture the groundwater seepage. *Id.* The captured seepage is conveyed to lateral pipes that are not perforated and the flows are eventually conveyed to a

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[3] It might be helpful to think of the ground as similar to a layered cake with the top layer being soil and sand for two or three feet, the next layer being denser gravel and light mud for eight or nine feet and the last being very dense, impermeable brick-like mud at twelve feet. Water can percolate down into the first layers but it will "run" horizontally along the final layer and perches out of the hillside that exists between Brentwood Height and Crystal Ridge in the form of seeps and springs.

[4] The City earlier had a theory that the flows were from a deep aquifer which it has abandoned on appeal.

[5] *See Brief of Appellant City of Bothell ("Appellant's Brief")*, n. 19.

rectangular retention pond in the plat and a circular retention pond offsite on a neighbor's property. *Id.*

The City correctly cites to the record below and asserts that there were groundwater problems on the site. CP 713.[6] However, it is important to note that there were three potential off-site sources for the groundwater and one of them was municipal in nature. Subsurface water existed from a catchment area of one half of a mile uphill, there were failing septic systems in the adjacent, immediately uphill development, Brentwood Heights, and there were leaking municipal storm drains and waterlines. *Id.*; CP 296-297. The Hearing Examiner noted these three sources in his decision in this matter. CP 721 (finding 8). It is important to note that the City fails to acknowledge the interceptor trench solved uphill, off-site problems and specifically, a municipal problem. These are irrefutable facts.

In this same finding, the Examiner laid out Dr. Denby's opinion that a "surface drain and an interceptor trench or trenches along the west property line would be necessary" in order to develop the site. *Id.* He notes that the interceptor trench would have to be placed in the ground to a depth of "twelve feet in order to accomplish the desired result." *Id.*

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[6] The statement and citation are at page 6, footnote 4 of *Appellant's Brief.* No one would try to physically locate the pipe because it is a story underneath the ground. It appears that the City eventually concedes that the pipe is in the easement in Tract 999.

Infiltration trenches were noted as an option which would return the groundwater back into the ground. If that did not occur (which it did not), the Hearing Examiner noted that a "point discharge" would have to be found for the captured flows. *Id.* At this point in time, there was no detailed drainage plan for the plats. However, the Hearing Examiner noted that the Department of Public Works was requiring one pursuant to Title XXIV. *Id.*

The Hearing Examiner also stated that: "The portion of the said plan pertaining to discharge of intercepted *subsurface* water and discharge of surface drainage shall consider the preferences, if any, of downslope landowners and shall meet the requirements of county law." CP 727 (*emphasis added*). The City repeatedly states that there were no off site benefits to building the interceptor trench but the Hearing Examiner was worried about the obvious downstream impacts in its absence and even if it was built. He also found specifically in the Conclusion section of his opinion that his willingness to accept the County's decision not to require an EIS was "predicated upon an assumption that adequate *ground* and surface water control can be incorporated within the proposed development to prevent adverse off-site impacts." CP 724 (Conclusion 1, *emphasis added*). Conclusion 6, stated that the most "critical issue" was "subsurface and surface drainage." *Id.* The Examiner stated that Dr.

Denby's advice was to be sought and followed in developing the plats.[7] He noted that if things went awry, the "adjoining property owners" would likely find everyone to be "bad guys" and he was worried about the off site, downstream impacts. *Id.* He stated that it would be a challenge to find a way to dispose of the "drainage waters which are *intercepted* and/or generated by the development." *Id. (emphasis added).*

Dr. Denby testifies that it is not true that the interceptor trench only benefits and protects private property. CP 296. It also was a benefit to the County because it reduced the amount of surface water runoff flowing on and emanating from the site. *Id.* It currently protects public roads and public facilities in the plat. *Id.* He states that without the interceptor trench, it is likely that the catch basins would overflow and in freezing conditions, create ice which is a nuisance and hazard on the public roads. *Id.* Dr. Denby clearly testified that without the interceptor trench and the pipe at the bottom of it, the seepage would have exited on the slope and ultimately flowed offsite down to 9th Avenue along the eastern property line. CP 296. Despite this testimony, the City states that only the roads within the plats benefit from the interceptor trench. It states that the roads

[7] At the trial court level, the City attempted to show that Dr. Denby's involvement as the special inspector of the plat proved the interceptor trench was solely private and served only private concerns. Dr. Denby testified about the Examiner's requirements and that it is standard practice even today to have special inspectors. CP 297. This argument has been withdrawn on appeal.

only "aid the residents and their guests,"[8] and somehow tries to downgrade their public nature. Obviously, the roads were dedicated to the public by the Developer (CP 45, 50) and they are used by the traveling public including the mailman, UPS drivers, the police, fire trucks and ambulances.

Moving back to the hearing, the other municipal issue addressed was bringing sanitary sewer to the area rather than using septic systems in Crystal Ridge. CP 721 (finding 9). The upslope Brentwood Heights development, which had failing septic systems adding to the groundwater problems, had expressed an interest in extending the sewer system for its use. *Id.* The City ignores that the interceptor trench dealt with off-site regional groundwater flows including municipal discharges. It also supported—and still supports—a sewage pipe that serves the region, not just Crystal Ridge. The Hearing Examiner did not make the developer of Crystal Ridge pay for the extension of sewer pipes to Brentwood Heights, as it was not the fault or responsibility of the Developer to address a regional problem. CP 725 (Conclusion 5). The interceptor trench supports the sewage pipe and so it therefore has a public purpose and promotes the health and safety of the entire community. (This issue will be further explored below).

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[8] *See Appellant's Brief,* p. 28.

In the last section of the Hearing Examiner's opinion, various conditions were stated for the approval including compliance with a drainage plan under Snohomish County Code Chapter 24.12 and that "The initial construction activity on the subject property shall be the installation of the dewatering system along the western edge of the site." CP 727. Again, this dewatering was of offsite groundwater that Dr. Denby, who was there at the time, states was in part from "municipal storm drains and waterlines throughout the area." CP 296.

Prior to recording the plat, the Examiner required that a document be filed on "individual lots" to give notice that "substantial surface and subsurface drainage controls" were used on the site and that additional "special or extraordinary drainage controls may be necessary on individual lots." CP 727. This provision obviously addressed new drainage controls that might be necessary in the future on lots that could be sold to future owners—individual lots. The City argues that the now non-functioning interceptor trench in a lot owned in common by the homeowners' association is covered by the Disclosure Notice. The interceptor trench was built before the plats were accepted and so it was part of the contemporaneous "substantial surface and subsurface drainage controls" that were required on site. It cannot now qualify as a new "special and extraordinary drainage control" under the Disclosure Notice. What was

contemplated at the time was that "special" types of drainage controls might be necessary on individual lots in the future despite the work that was done to address drainage. In Dr. Denby's second report, he describes the interceptor trench along the western boundary and then notes that: "Even with the comprehensive drainage plan outlined above, it may be necessary to install footing drains for specific lots that do not respond." CP 714.

It is important to note that the land the interceptor trench is in is designated on the plat as: "TRACT 999 OPEN SPACE." CP 47. It cannot be owned by an individual or sold to an individual because it is owned in fee simple by the entire homeowner's association.[9] More fatal to the City's argument is that there is absolutely no fact to support that the Disclosure Notice[10] was ever filed of record on TRACT 999. In fact, the City did not put in a title report on <u>any</u> of the lots that are owned by individuals to show that the Disclosure Notice was ever filed on any individual lot. The City's citations to the Disclosure Notice are to CP 727

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[9] An argument is advanced that because this property is owned in fee simple, the interceptor trench must be the private property of the HOA. However, the dominant land owner of the property is the City because it holds the "drainage easement" that the interceptor trench is in. Responsibility for the maintenance and repair of an easement to keep it in proper condition lies with the owner of the easement. *Dreger v. Sullivan,* 46 Wn.2d 36, 278 P.2d 647 (1955).

[10] Despite asking for all pertinent documents in the City's possession in Discovery, we first saw this document in the City's Response to the Plaintiffs' Summary Judgment Motion and Counter Motion. It became the City's primary defense document.

and CP 472-473. The first citation is to the Hearing Examiner's decision where the notice requirement was set out as a recommendation. The second citation is to a two page disclosure that has no legal description and does not reference any lot, let alone Tract 999. It appears that the Disclosure Notice was filed with the County Auditor, however, for it to be a valid filing on any individual lot; one needs the legal description of the land to which the Disclosure Notice supposedly is attached.

At the trial court level, Dr. Denby testified about the Disclosure Notice. He stated that the Hearing Examiner and everyone else on the Developer's project team, including himself, was concerned that families buying property in Crystal Ridge have notice that it was a very wet site and that in the future, it was possible that they might have to do additional drainage work on their private lots. CP 297 *(emphasis in original)*.

After the construction of Division 1, the engineering firm that was employed by the Developer was replaced by another civil engineer, Theodore Trepanier,[11] who completed the platting for Division 2. CP 806-814; 290-292. We retained Engineer Trepanier in this matter and he,

[11] Mr. Trepanier has been a licensed engineer in Washington since 1976. He received his Bachelor of Science in Civil Engineering and Masters of Science in Civil Engineering from the University of Washington. CP 814.

along with Dr. Denby, provided first-hand knowledge of the facts which the City ignores claiming its facts were unrefuted at the trial court level.[12]

Engineer Trepanier's professional stamp is on all of the pages of the plat for Division 2, which is where the interceptor trench exists within Tract 999 along nearly its entire western boundary. CP 45-49; 809. He prepared the plat for Ken Wolcoski of Trimen Development, which entity irrefutably, along with Seafirst Mortgage Company, dedicated all easements on the face of the plat to the public "forever." CP 45. The dedication language that is used is very broad:

> Know all men by these present that Trimen Development Co. Inc., hereby declare[s] this plat and dedicate[s] to the use of the public forever all streets, avenues, places and sewer easements or whatever public property there is shown on the plat and the use for any and all public purposes not inconsistent with the use thereof for public highway purposes.

CP 45.

The legend that the City focuses on appears on the plat just to the left of Tract 999 on the northerly portion of Division 2 (CP 46) and states:

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[12] Throughout the City's brief, it claims it put "unrefuted" or "undisputed" evidence before the trial Court. The assertions are not true. *See Appellant's Brief*, p. 11 ("undisputed...de-watering system not part of County's drainage system); p. 17 ("Based on the undisputed facts...interceptor pipe does not meet the definition of "stormwater facility"); p. 19 ("based on uncontested facts, the trial court committed reversible error"); p. 26 ("It is undisputed...draining the site...[was] not to benefit any public property"); p. 28 ("uncontested...interceptor pipe does not directly benefit the public roads"); ("undisputed...Tract 999...is an individual lot"); p. 34 ("uncontested evidence...interceptor pipe does not meet...definition of "stormwater facility").

> 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.

The southerly section of the plat (CP 47) has the exact same legend on the bottom of the page to the left.[13] The highlighted portions of the plats show all of the various "drainage easements" that are called out on both of the plats. CP 45-53. These easements were placed on the plats by Engineer Trepanier and he reviewed the highlights on these plats for correctness before they were submitted to the trial court. CP 809. He testifies that the only "drainage" feature in the 25 foot easement on Tract 999 is the interceptor trench. CP 291. Further, he states that the words "DRAINAGE EASEMENT," absent the interceptor trench, would "not be on the plat in that location at all." *Id.*

The City re-interprets the words "drainage easement" as to Tract 999, however, it does not challenge the words "drainage easement" as they repeatedly exist on the rest of the plats. The City tries to pick and choose what "drainage easement" it believes it inherited from Snohomish County.

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[13] These legends were not on the copies of the plats provided by the City's Surface/Storm Water Coordinator, Andy Loch, to Mr. Nick Fix, a resident of Crystal Ridge who asked for information on the site. Mr. Loch therefore states in his letter to Mr. Fix that his "records" show Tract 999 only as open space owned by the homeowners. CP 763. In Discovery, copies of the plats in the City's possession were produced that had the legends on them.

Moreover, the irrefutable facts demonstrate that the interceptor trench was conveyed by the Developer and it was an integral part of the surface and sub-surface drainage system on the site.

Engineer Trepanier explains:

> The County accepted, via the easements on the plat, all of the "stormwater facilities" in the plat -- both the groundwater and the surface water systems. The facilities included the sub-drain/interceptor drain [trench] on the westerly boundary of the plat. I am certain of this because the larger of the two retention/detention ponds on the site, which is rectangular, is where the groundwater was directed in order for it to 'daylight' and become surface water. The system is designed so that the groundwater is collected, passes through large lateral drains and arrives at the rectangular retention/detention pond where it becomes surface water that eventually drains to a natural stream. I calculated the size of the rectangular retention/detention pond in order to accommodate the groundwater flows that would be intercepted by the subdrain/interceptor drain [trench]. The groundwater flows also were directed into a neighbor's pond just beyond Lot 7 in Division 2, where they would also "daylight" and eventually enter a stream.

CP 811.

Engineer Trepanier was required to make a reproducible Mylar of the final and approved drainage system for the plat and submit it to the County. CP 291. He states that the Mylar was submitted so that the County would know the location of the facilities it was to maintain.[14] *Id.* During those years, Trepanier observed that it was the custom of the

[14] Apparently, the City only has the "as-builts" from the water district, which also show the pipe. It is irrelevant that it does not have the Mylars and "as-builts" submitted by Engineer Trepanier to the County.

County to take control of retention/detention facilities and "their accompanying drainage structures such as ... the interceptor drain [trench]. The easements were required by the County so it had the unquestionable ability to perform maintenance and repairs on these types of facilities." CP 811. As to the City's theory that the words "stormwater facility" do not include the interceptor trench, Engineer Trepanier, who was there at the time, unequivocally states that the "entire system is a 'stormwater facility' and the pipes in the subdrain [interceptor trench] are component parts of the system." CP 292. This is consistent with Dr. Denby's observation that groundwater is, in part, rainwater that has fallen to the earth. CP 294.

Engineer Trepanier also testifies that the swale, which the City has oddly focused on, is in the 15 foot easement that is just beyond the twenty-five foot easement in Tract 999 that contains the interceptor trench. CP 292. In Dr. Denby's second report, he states that the "swale drain may be located independently of the location of the interceptor trench." CP 715. By the time Division 2 was built, Engineer Trepanier testifies that the swale became an "afterthought" due to the porous soils that were on that part of the property.[15] *Id.* Without any citations to the record, the City

[15] It should be noted that the swale in Division 2 was built in 1987, which was three years after the proceedings before the Hearing Examiner and the reports submitted by Dr. Denby.

simply asserts that the swale was "upslope" of the interceptor trench and it no longer exists because the Plaintiffs have installed fences and landscaping where the City says the upslope swale used to be.[16] This is all fabrication.

It is also unclear why the City believes a perforated pipe in an interceptor trench twelve feet (a full story) under the ground could somehow become "overwhelm[ed]" by surface water flows in a swale high above it. [17] As Dr. Denby testified, the sub-surface flows that the perforated pipe in the interceptor trench captures are partly from rainwater that "[o]ver time" reaches Crystal Ridge. CP 294. In his report, he states that, assuming reasonable parameters, the groundwater from a half mile beyond Crystal Ridge takes "many years to seep to the site." CP 713.

The City also makes arguments based on the existence of the Alderwood Water District's ("AWD") sewage pipe being in the interceptor trench, which were addressed at the trial level by Engineer Trepanier. Before turning to those facts, it should be noted that if there were sewage waters emanating from Tract 999, then. The Respondents would have brought AWD into this case as a Defendant. If the City believes AWD is responsible for the entire trench, not just its own septic pipe in the trench, it could have brought in AWD as a third party

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[16] *See Appellant's Brief,* p. 7.
[17] *See Appellant's Brief,* p. 20.

defendant in its Answer. It did not do so. CP 815-822. Engineer Trepanier observes that the interceptor trench stabilizes the sewer pipe and, in part, handles the municipal leakage in the area. CP 292. The purpose of the interceptor trench was to "make sure that lands in and below Crystal Ridge, including its municipal streets and those outside the plat, were not inundated." *Id.* He testifies that given the interceptor trench's function in protecting the sanitary sewer and the depth of it, "private property owners would never be allowed to make decisions regarding its maintenance and repair." *Id.* Engineer Trepanier, whose practice has focused on surface and groundwater systems, (CP 809) states that this is the "type of facility" that is "unlikely to be adequately maintained or repaired by private property owners." CP 292. The City's briefing indicates that it does not really oppose this view. It states that "had the interceptor trench not been installed, it is extremely likely that the sanitary sewer system would have failed."[18] We find it puzzling how the sanitary sewer system is not recognized by the City to be public infrastructure that is being benefitted by the interceptor trench. Later in its brief,[19] the City states that it is "clear" that the interceptor trench is benefitting the AWD's sanitary sewer line but then states it provides no "benefit to public property."

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[18] *See Appellant's Brief*, p. 22.
[19] *See Appellant's Brief*, p. 26.

Finally, the City makes some arguments assuming "facts" that are not in existence. There are no private four-inch pipes in the drainage easement in Tract 999. [20] There are no facts that demonstrate that the County accepted the drainage easement for some future purpose.[21] The absence of any maintenance records over the years is explained by the City's own Surface/Storm Water Coordinator as is set out in the City's brief.[22] Incidentally, the City's Coordinator describes the flows in the interceptor trench as including ground and surface water flows. CP 763. He states that maintenance is now required because "given its [the pipe in the interceptor trench] age now of 23 years," it may be failing. *Id.* He says that it may "no longer be intercepting *ground and surface* water flows at the same efficiency it did when newly constructed." *Id.* (*emphasis added).* The City's arguments that have no factual basis should be disregarded. [23]

It is an irrefutable fact that, by their signatures on the plat, Snohomish County's Public Works Director, the Director of the Department of Planning and Community Development and the Snohomish County Council accepted, on behalf of Snohomish County, the plat of Crystal Ridge Division 1 in April of 1987. CP 62. The same County

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[20] *See Appellant's Brief,* p. 30.
[21] *See Appellant's Brief,* p. 21.
[22] *See Appellant's Brief,* p. 25.
[23] The case law on this point will be provided in the Argument section.

officials accepted, on behalf of the County, Crystal Ridge Division 2 in November of 1987. CP 57. On appeal, the City argues that its own codes, both during that era and presently, should be considered in the analysis here.[24]

On April 30, 1992, the City annexed the Crystal Ridge area of unincorporated Snohomish County which was part of the Canyon Park area. CP 730 (Interlocal Agreement). It is an irrefutable fact, which has not been challenged, that the City became the successor in interest to the County. The Interlocal Agreement between the two municipalities states that the annexed area was then producing $231,500 in surface water fees to the County. CP 736. Three drainage projects were described in the agreement which were to be addressed in the coming year. CP 759. There were no new definitions or any exceptions made with regard to drainage issues addressed in the agreement. CP 730-761. The agreement bound the City to applying the "Legislative Measures and Contractual Agreements" which were set out in Exhibit C to the document. CP 748. The City was bound to the County's Subdivision Code, and there is a specific citation to

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[24] *See Appellant's Brief,* pps. 17-19; 27-29. In answering Admissions, the City stated that the present version of the Department of Ecology's Stormwater Manual should be used to analyze the issues in this case. CP 784. It also argued at the trial level that Snohomish County's Ordinance 24.28.040 had not been strictly complied with. CP 327-328. Mr. Trepanier testified that the current DOE Manual did not apply and that paperwork was "pretty poor" back in those days. CP 291. The City has abandoned these arguments on appeal.

the state statute dealing with plats, RCW 58.17. *Id.* The Crystal Ridge plats had been irrefutably accepted, with no limitations, five years before this annexation. Through Admissions, the City acknowledges that it has taken no action, legislative or otherwise, to alienate itself from the easements. CP 795.

The Honorable Judge Castleberry reviewed the evidence and referred to the declarations of Dr. Denby and Engineer Trepanier stating that two things were "clear:" that the Developer intended to convey the drainage easement (CP77) and that all of the public agencies involved were aware of the "design, the plan, the problem" and therefore under the State statute, the County had accepted the drainage easements once the plats were filed of record. CP 78-79. He noted that there were no contradicting facts placed into evidence—which facts would have to have been from County employees. *Id.* On the City's Disclosure Notice argument he noted that this particular "drainage facility" is not on an individual lot but on property owned by the entire homeowner's association. CP 80. The Disclosure Notice did not refer to the homeowners association "and/ or the individuals" so it did not apply.[25] *Id.* This Court is respectfully asked to uphold the trial court's decision to

[25] We did not recognize that the Notice Disclosure did not have a legal description until we reviewed the evidence again in response to the City's appeal.

grant summary judgment to Crystal Ridge establishing that the City owns the drainage easements on the plats including the one in Tract 999.

III. ARGUMENT

A. The Developer Of Crystal Ridge Made A Statutory Dedication Which is Controlled By State Statute And Is Valid.

The proper analysis in this case is to enquire, as the trial court did, into what occurred between the Developer and Snohomish County and whether there was a proper dedication of the drainage easements in the plats. CP 169-170. The State statute, RCW 58.17.020, is the controlling law here. "An ordinance must yield to a statute on the same subject on either of two grounds: if the statute preempts the field, leaving no room for concurrent jurisdiction, or if a conflict exists between the two that cannot be harmonized." *King County v. Taxpayers of King County*, 133 Wn.2d 584, 612, 949 P.2d 1260 (1997). RCW 58.17.020 states in pertinent part:

> As used in this chapter, unless the context or subject matter clearly requires otherwise, the words or phrases defined in this section shall have the indicated meanings.
>
> (3) "Dedication" is the deliberate appropriation of land by an owner for any general and public uses, reserving to himself or herself no other rights than such as are compatible with the full exercise and enjoyment of the public uses to which the property has been devoted. The intention to dedicate shall be evidenced by the owner by the presentment for filing of a final plat or short plat showing the dedication thereon; and, the acceptance by the public

> shall be evidenced by the approval of such plat for filing by the appropriate governmental unit.

The effect of such a donation is set forth in RCW Section 58.08.015 and it results in the property being transferred as if by quitclaim deed:

> Every donation or grant to the public, or to any individual or individuals, religious society or societies, or to any corporation or body politic, marked or noted as such on the plat of the town, or wherein such donation or grant may have been made, shall be considered, to all intents and purposes, *as a quitclaim deed* to the said donee or donees, grantee or grantees, for his, her or their use, for the purposes intended by the donor or donors, grantor or grantors, as aforesaid.

(*Emphasis added*).

The transfer of the drainage easements was completed twenty-five years ago, is effective under the operative State statute, and is binding on the City.

The City's arguments, however, rest on a fundamental misunderstanding of the legal basis for the County's acceptance of the "drainage easement." The City begins its legal argument by asserting, without analysis, that the drainage easement, which is set forth in the recorded plat of Division 2, should be analyzed as a "common law dedication."[26] The City's argument completely ignores the fact that the easement was included in a recorded plat (CP 45-53), and therefore a

[26] *See Appellant's Brief,* p. 15. It is also worth noting that the City never raised any arguments with respect to common law dedication at the trial court level.

statutory dedication has occurred pursuant to the State statute set out above and property was as if quitclaimed to Snohomish County.

There are critical differences between a statutory dedication and a common law dedication. *See Kiely v. Graves*, 173 Wn.2d 926, 931-32, 271 P.3d 926 (2012) ("Common law dedications are controlled by common law principles while statutory dedications are governed by specific statutes."); 11A McQuillin Mun. Corp. § 33:4 (3d ed.) ("Statutory dedications are those made pursuant to the provisions of a statute. . . . Statutory dedication is commonly accomplished through the filing of a map or plat designating the areas to be dedicated and are controlled wholly by the terms of the authorizing statute."). The intent of the parties, both the grantor and the grantee, are controlled by the plat. *Kiely v. Graves*, 173 Wn.2d 926, 933 ("Intent must be adduced from the plat itself.") Statutory dedications do not require any extrinsic evidence showing acceptance—acceptance of a statutory dedication is evidenced by the municipality's signatures approving the plat for filing. RCW 58.17.020 (Defining "Dedication" and showing that "*acceptance by the public shall be evidenced by the approval of such plat for filing by the appropriate governmental unit.*") (*emphasis added*)). Here, the County approved the plats and dedication at issue by the signatures on the face of each plat. CP

45, 50. The City's arguments, which are based upon principles of common law dedication, have no application to the issues at hand.

For the same reason, the City's citation to *Knudsen v. Patton*, 26 Wn. App. 134, 141, 611 P.2d 1354 (1980) is unavailing.[27] In *Knudsen*, the party seeking to establish a dedication of land for a public park failed to assert any theory other than common law dedication at trial. *Knudsen v. Patton*, 26 Wn. App. 134, 142 n. 11 ("Plaintiff's sole theory, at trial and on appeal, is based on a common law dedication.") There is no restriction in RCW Chapter 58.17 against dedications in plats that are limited in scope to benefit only certain members of the public. The only requirement is for the municipality to determine that "the public use and interest will be served" by the dedication. RCW 58.17.110(2). A municipality's determination under RCW 58.17.110 is administrative or quasi-judicial in nature, and, therefore, "[a]ppellate review is limited to determining whether the decision satisfies constitutional requirements and is not arbitrary and capricious." *Lechelt v. City of Seattle*, 32 Wn. App. 831, 835, 650 P.2d 240 (1982).

The City has not challenged, and twenty-five years later, has no way to challenge, the County's decision as "arbitrary and capricious." The County's determination that the plats and their dedications served the

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[27] *See Appellant's Brief*, p. 16.

public use and interest is irrefutably established. Accordingly, the County's original decision to approve the dedication of the drainage easement is dispositive of this issue. From a legal point of view, whether the drainage easement benefits the public at large or only a small subset living at Crystal Ridge makes no difference. The dedication of the drainage easements on the face of the recorded plats is a valid, binding, statutory dedication. RCW 58.17.010.

1. Even Considering the City's Infirm Theory, It Fails to Refer to The Proper Dedication Language Which Is Broad and Includes All Drainage Easements on The Plats

The City is looking at the wrong language on the plats in order to make a strained argument based on descriptive words at the end of a legend. It turns to the words of the legends in Division 2, (CP 46, 47) which both state:

> 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.

The City uses the words "stormwater facilities" and argues that the County did not accept the "drainage easement" for Tract 999 because a stormwater facility was not in Tract 999. These are the wrong words to focus upon. The Developer's dedication language is not on the pages with

the legends, but it can be found on the first page of the plat for Division 2. The dedication is very broad and states that the dedication is "to the use of the public forever all streets, avenues, *places* and sewer easements or *whatever public property there is shown on the plat and the use for any and all public purposes*...." CP 45 (*emphasis added).* The words "drainage easement" are irrefutably on the northern and southern sections of Tract 999 and the land is either a "place" or "whatever public property" that is shown on the plat. The uses of ingress and egress and to have the duty to maintain and operate "stormwater facilities" all fall under the rubric of "any and all public purposes" that the Developer transferred the "drainage easement" to the County for. The intent of the plat applicant determines whether there has been an easement granted. *M.K.K.I., Inc. v. Krueger*, 135 Wn. App. 647, 654, 145 P.3d 411 (2006) *rev. denied,* 161 Wn. 2d 1012 (2007) *citing Selby v. Knudson,* 77 Wn. App. 189,194, 890 P.2d 514 (1995).

In *M.K.K.I.,* the applicants had used the County's short plat ordinance to divide property into several lots. An easement was identified on the plat for the use of all the properties for "access, utility ease, [and] well access ease." *M.K.K.I.* at 651. The applicants later attempted to extinguish the easement through quitclaim deeds. The quitclaims were found to be invalid because the dedication on the plat was itself considered

a "quitclaim deed" under the short plat statute, RCW 58.17.166. The short plat statute was set out in the opinion and it has language identical to the State statute referenced above and used in the dedication of the easements of Crystal Ridge. *M.K.K.I.* at 653. The applicants could not extinguish the easement unless they had gone through a plat amendment to do so. *M.K.K.I.* at 657. Here, the City admits that there has been no action, legislative or otherwise, that extinguishes the easement on Tract 999. CP 795.

It also makes no sense that the successor in interest to the County could "pick and choose" what drainage easements it will accept twenty five years after the plats were accepted by County officials and filed of record by the County Auditor. It should be noted that on the northern part of Division 2, there is a fifteen foot "drainage easement" below Tract 999,[28] another called out for the lateral drains between lots 7 and 8 and another that wraps around the front of lots 9, 10, 11 and 12. CP 46. On the southern part of Division 2, there are "drainage easements" between lots 18 and 19, 21 and 22, 29 and 30, 30 and 31 and another that wraps around the front lots of 17, 18, 19, 20, 21 and 22. It is telling that the "drainage easement" on Tract 999, with the interceptor trench in it, is the

[28] This is the easement that Engineer Trepanier notes has the swale in it. CP 291-292.

only "drainage easement" that the City has placed under attack in response to Crystal Ridge's summary judgment motion.

2. The Definition of "Drain" and the Presence of "Stormwater" in the Interceptor Trench Defeats the City's Tortured Attempt to Create an Ambiguity Here

The City's self-serving analysis narrowly focuses on the words "stormwater facility" in the legend rather than on the words that are on the plat itself. The perforated pipe in the interceptor trench is a "drainage" feature. Engineer Trepanier notes that it is the only drainage feature in that twenty-five foot wide "drainage easement." CP 291. Black's Law Dictionary defines a "drain" as a "conduit for draining liquid, as a ditch or a pipe." DRAIN, Black's Law Dictionary (9th ed. 2009). McQuillin's Law of Municipal Corporations states that the word "drain" means "an artificial channel or trench through which water or sewage passes from one point to another." 11 McQuillin Mun. Corp. § 31:2 (3d ed.). The pipe is surely acting as a "drain" and pipes and trenches are solidly within the above definitions of the word "drain." The City's characterization of the easement as limited to a "stormwater facilities" easement ignores both the plain language of the plat dedication and the ordinary meaning of the word "drainage."

However, even considering the City's use of the word "stormwater," its definition ignores the type of flows that are in the

perforated pipe in the interceptor trench. Stormwater is obviously water emanating from storms and would be in the form of rain. Dr. Denby testified that "rainfall infiltrates vertically into the ridge surface soils and then flows laterally...." CP 294. The ground waters in the western edge of the plat are there because of storms and rainfall. The interceptor trench was originally to capture municipal waters in the area, both from waterlines and from "storm drains." CP 295-296. The flows in the interceptor trench are "stormwater."

3. The Entire System of the Interceptor Trench, Lateral Pipes and Retention/Detention Ponds are Component Parts of the "Stormwater Facilities" which are on Division 2 of Crystal Ridge

Both divisions have "drainage easements" on them and both have systems or "facilities" to deal with stormwater. CP 45-53. Division 2 has a system that carries stormwaters to two retention detention systems to store the flows as surface waters and release them slowly into area streams. CP 811. Engineer Trepanier designed the system at issue here and prepared the plat that was eventually accepted and recorded by the County for Division 2. CP 809. He explained that "some of the groundwater is collected, passes through large lateral drains and arrives at the rectangular retention/detention pond where it becomes surface water that eventually drains to a natural stream." CP 811. There is also an off-

site circular pond on neighboring property where some of these flows are directed. *Id.* Engineer Trepanier did the hydrologic calculations to "size" the onsite rectangular pond. *Id.* In doing so, he calculated it in order to "accommodate the groundwater flows that would be intercepted by the sub-drain/interceptor drain [interceptor trench]." *Id.* The County demanded that all subsurface piping be included in the as-built plans for the plats. *Id.* When the City brought up its theory that "stormwater facilities" somehow limited the "drainage easements" called out in Division 2, Trepanier, again the engineer who designed the system, testified that:

> [T]he City's argument that the sub-drain [interceptor trench] itself has to be a "stormwater facility" for the County's easement obligations to be triggered is wrong.
> ....
> The entire system is a "stormwater facility" and the pipes in the sub-drain [interceptor trench] are component parts of the system.

CP 292.

The City's theory, based on the words "stormwater facility" when more closely examined, makes little sense.

Finally, if the Court considers the language of the easement as ambiguous in any manner, it considers the "surrounding circumstances" for its analysis which would include the Hearing Examiner's Decision. *Rainier View Court Homeowner's Ass'n. v. Zucker,* 157 Wn. App. 710,

238 P.3d 1217 (2010). We found no cases where a court was provided the testimony of the contemporaneous geotechnical engineer and the civil engineer who helped establish the plats, but we assert that their testimony surely provides insight into the "surrounding circumstances."

In *Rainier View Court,* a homeowner's association for phase I of a three phased plat argued that the residents in phases II and III could not use a park designated on the face of the plat for phase I. *Rainier View Court* at 716. In the final plat, the park was designated only on phase I and no references were made to it on phase II and phase III. *Id.* The owners of phase I also each had a 1/86th undivided interest in the park tract and had to pay taxes on it accordingly. *Id.* The phase I owners argued that the plat was not ambiguous and that it was improper for the trial court to look at surrounding circumstances. The appellate court disagreed and took the next step in its analysis. It examined the Hearing Examiner's decision, the location of the park and the fact that the private roads in the development lead to the park and everyone had a right to use the roads. The court therefore found that the park was dedicated to all phases of the development despite no specific reference to it in phases II and III. *Rainier View Court* at 723. Here, we do not believe, if one looks to the correct language in the plat, that it is ambiguous. However, under a

"surrounding circumstances" analysis, the interceptor trench was conveyed to the County twenty-five years ago.

4. The City's Other Theories Lack Any Foundation

The other theories that the City has advanced are not supportive to its position. The fact that AWD's sewer pipe is in the same easement on Tract 999 establishes that the interceptor trench is being used for a public purpose. The words on the easement make it clear it is dedicated for two purposes, it states, "25' SANITARY SEWER (A.W.D.) AND DRAINAGE EASEMENT." CP 46, 47. It is clear that all "drainage easements" were dedicated to the County for its maintenance and repair. Contrary to the City's assertions, there is no evidence that suggests that AWD has the maintenance responsibility for the drainage component that is in the trench.[29] Bothell's present day practices or its Code concerning the connection of private downspouts to the City's public drainage system have no relevance to this case at all.[30] The hypothetical the City offers involving four inch private downspouts and a public twelve foot lateral line in a fifteen foot City easement is flawed. The easement on Tract 999 was dedicated to two municipal entities and no private structures are within it. The more proper hypothetical would be to consider two municipal dedications in the same easement. If a road is dedicated to a

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[29] *See Appellant's Brief,* p. 10, n. 20, p.16, n. 33; p. 23.
[30] *See Appellant's Brief,* pp. 29-30 *citing* BMC 18.04.050.

county and it has an electrical line within it dedicated to a utility, it is clear that the maintenance responsibilities would not somehow "merge" as is suggested by the City. The road maintenance would be the duty of the county and the repair and maintenance of the line would be performed by the utility.

The City argues that the swale is somehow relevant, it had to have been located somewhere "upslope" of the interceptor trench (not within the fifteen-foot easement physically located just below the interceptor trench where Engineer Trepanier testifies [CP 292] he placed it) and that it has disappeared.[31] The City correctly states that the second geotechnical report, authored three years before Engineer Trepanier decided where to put the swale, stated that the swale could be located independently of the interceptor trench. Because the swale was "to intercept surface run-off from the upslope properties," the City argues it also must be "upslope" of the interceptor trench and therefore, the twenty-five foot drainage easement might have been dedicated for the vanished swale. Aside from not being supported by any facts, this makes no sense.

The topography of the surrounding area is described by Dr. Denby. He states that from Crystal Ridge, the ground surface slopes to the west by 20%. CP 295. This means that the Brentwood Development was

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[31] *See Appellant's Brief,* pp. 20-21.

originally "20 feet higher than a point 100 downslope" in Crystal Ridge. *Id.* These facts are more easily understood if one looks at his sketches of the northern and southern parts of Division 2. CP 303, 304. He indicates, in cross sections, the highest part of the catchment area sending flows to Crystal Ridge. The area is considerably further to the west than Brentwood Heights. Brentwood Heights is the property immediately adjacent to Crystal Ridge, and it is considerably higher than Crystal Ridge. The interceptor trench is indicated in the sketches and it is on the western edge of the Crystal Ridge property and it is marked with the words "sub drain." *Id.* The upslope properties would drain to the swale whether it was placed "uphill" or "downhill" of the interceptor trench so the City's arguments ignore gravity.

Dr. Denby states that he observed the construction of the interceptor trench and it is in the twenty-five foot easement on Tract 999. CP 296. Despite this irrefutable fact, the City makes the argument that the easement could be empty and reserved for some sort of future purposes.[32] This argument, similar to most of the others, depends on the supposed "expert" testimony of its present-day employees.

The City cites the declarations of three of its employees for the proposition that the interceptor trench "is not the type of drainage facility

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[32] *See Appellant's Brief,* p. 21.

the City would normally agree to take over from a private developer." The City's current policies and practices concerning its willingness to take over a system like this are entirely irrelevant—this case turns on the County's acceptance, in the mid-1980s, of the easement and interceptor trench. The declarations of the City's employees lack any foundation to establish that the County would not "normally" take over this system. None of the City's employees ever worked for Snohomish County in any capacity, and it appears that none of them worked in any public works capacity for any municipality prior to the 1990s. Expert opinions, such as those relied upon by the City here, are inadmissible when lacking in any foundation and the experts are opining upon matters outside their demonstrated area of expertise. *See* CR 56 (e); *Queen City Farms, Inc. v. Central Natl. Ins. Co. of Omaha*, 126 Wn.2d 50, 102-04, 882 P.2d 703 (1994) (holding that trial court erred in failing to exclude trial testimony of insurance industry expert who lacked specific background in underwriting for waste disposal sites). The City's reliance upon their Environmental Engineer for the assertion that "it would be unheard of for the County and then the City to require an easement for potential future needs" is likewise unavailing, because there is no foundation for that opinion.

In summary, the evidence submitted by Crystal Ridge on the statutory acceptance of the plat of Division 2 establishes the unambiguous

intent of the original parties to the dedication to transfer the entirety of the drainage easements from the Developer to the County. RCW 58.17.020. As recently stated by the court in *Sunnyside Valley Irrigation District v. Dickie,* 149 Wn.2d 873, 880, 73 P.3d 369 (2012): "The intent of the *original parties* to an easement is determined from the deed as a whole. If the plain language is unambiguous, extrinsic evidence will not be considered. *City of Seattle v. Nazarenus,* 60 Wash.2d 657, 665, 374 P.2d 1014 (1962) *(emphasis added).*" Here, the plain language of the dedication does not allow for the City's "exception" for undesired parts of one of the drainage easements on the plat of Division 2. *Sunnyside Valley Irrigation* at 880.

B. <u>The City Did Not Preserve Its Statutory Arguments Based upon the Snohomish County Code and Drainage Manual, Its Opinion is Not To Be Considered And Even Assuming It Did Preserve the Statutory Arguments, the County's Code and Drainage Manual Contemplate Addressing Groundwaters in Drainage Site Plans.</u>

First, the only Code that might be relevant to the inquiry here (given the State statute is satisfied) is the one that was used by the County at the time the plats were developed and accepted by it. *Phillips v. King County,* 136 Wn.2d 946, 963, 968 P.2d 871 (1998). However, the Snohomish County Code has not been placed before the Appellate Court. The City has a single citation to an ordinance and it is to its own,

irrelevant, Bothell Code.[33] It cites to its own arguments concerning the Snohomish Code[34] which were before the trial court but the Appellate Court has no duty to search out and consider these arguments. In fact, the text of the ordinances must either be within the City's appellate brief or attached as an appendix. RAP 10.4 (c).

In the event that the Appellate Court considers the arguments, they are baseless. The Snohomish County Code ("SCC") in effect at the time of the development of Crystal Ridge was embodied in Title XXIV which is found at CP 665-690. Contrary to the City's assertions, the Code and the Drainage Manual are replete with references to ground waters and sub-surface problems within its jurisdiction.

In the legislative findings of the introductory section of the Code, it states that "inadequate surface and sub-surface drainage planning practices lead to erosion and property damage, and risk to life...." SCC 24.04.040 (d) at CP 667. The declaration of purpose states that the County wants to:

> maintain and protect valuable groundwater resources; to minimize adverse effects of alterations in groundwater quantities, locations, and flow patterns; to ensure the safety of county roads and rights of way; and to decrease drainage related damage to public and private property.

SCC 24.04.080 at CP 667-668.

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[33] *See Appellant's Brief, Index* at p. iii. We will not be addressing the Bothell Code because it is irrelevant to this case either as it existed at the time the County accepted the plats, when the City annexed the plats, or today.

[34] *See Appellant's Brief,* p. 20, n. 21 *citing* CP 324-333; 349-454; 665-691.

In the definitional section a "drainage plan" is a "plan for collection, transport, treatment and discharge or recycling of water within the subject property." SCC 24. 08.110 at CP 669. This definition is not limited to surface water and includes groundwater. The definition for "drainage treatment/abatement facilities" is "any facilities installed or constructed in conjunction with a drainage plan for the purpose of treatment or abatement of stormwater." SCC 24.08.120 at *Id.* This definition is broad and includes "any facilities" so it surely would encompass the pipe in the interceptor trench. It applies to the drainage plan that Engineer Trepanier prepared for Division 2 of Crystal Ridge which included the interceptor trench. CP 809. As set out more fully above, Engineer Trepanier's calculations included making enough room in the rectangular retention detention pond to account for the groundwater flows that were being directed to it from the perforated pipe in the interceptor trench to the lateral drains. CP 811. Dr. Denby's testimony that the ground waters on site were from rainfall cannot be refuted. CP 294. All these waters are "stormwaters." The City's argument that the words in the legend "stormwater facilities" is not contemplated by the Snohomish Code is simply wrong. The words are neither magical nor limiting.

In the City's argument below, (CP 329-330) it also relied upon the County's "Drainage Ordinance Procedures Manual ("Manual"), which is attached to Mr. Feine's declaration at CP 350-439. This reliance is particularly disingenuous because the Manual states that it is only written with the intent of saving design costs for applicants on proven designs and that the examples given are "not intended to represent the only methods acceptable" to the County. CP 356. It also requires the location of springs and "subsurface water outlets." CP 368. For subsurface flows entering the property, one was to "indicate method of estimating quantity for design purposes." CP 370. Without any factual basis, the City deemed the facilities on the plats to be "closed" and stated that water could enter the system only by way of "catch basins." CP 329. This plat had a detailed drainage plan, which was designed by Engineer Trepanier and accepted by the County. The drainage plan included the mechanism for addressing ground waters—which are "stormwaters." If the Appellate Court reaches the City's arguments based upon the Code and the Manual, they are unavailing.

1. The County's Hearing Examiner Correctly Applied Its Codes and Required the Building of the Interceptor Trench for the Public Health and Welfare

First, the City's opinions and interpretations of the County's Code are not dispositive here. Appellate courts, similar to trial courts, give

deference to a county's Hearing Examiner as the one who is charged with not only knowing the county's ordinances, but applying them correctly in land use matters. In *Wenatchee Sportsmen Ass'n v. Chelan County,* 141 Wash.2d 169, 176, 4 P.3d 123 (2000), the appellate court stated that it had to give substantial deference to both the legal and factual determinations of the hearing examiner as the local authority with expertise in land use regulations. In *Rainier,* the homeowner's association attempted to characterize the trial court's consideration of the Hearing Examiner's Decision as improper on the basis that it was treated as binding legal authority. *Rainier View Court* at 723. The appellate court disagreed and found the trial court had properly used the opinion as evidence of the intent and in determining what had occurred at the time. *Id.* The Hearing Examiner's Decision in this case was made twenty-eight years ago and he is presumed to know what is and is not acceptable and contemplated within the County's Code at that time.

The County's Examiner approved the Crystal Ridge plat subject to the groundwater conditions being addressed through the Developer's geotechnical engineer, Dr. Denby. CP 726 (condition C). A detailed drainage plan was required and was to include "the discharge of intercepted sub-surface water" that was not to interfere with "downslope landowners." CP 727 (condition E.ii.) The first construction activity on

the land was to be the installation of the "dewatering system along the western edge of the site." *Id.* (condition G). Sanitary sewers were mandatory for the site. CP 728 (condition M). The Hearing Examiner listened to the testimony of Dr. Denby and in many instances reiterated what was in his two reports. The interceptor trench was not a private project built only for private use,[35] which was outside of the County Code. It was an integral part of the permitting process under the County's Code upon which matters the Hearing Examiner is undeniably the expert.

2. The County's Code, Its Manual And Caselaw Support That The County took over The Maintenance and Operation of the Drainage Easement

The Code contemplates the County taking over the operation and maintenance of facilities like those in Tract 999. It states that: "Drainage facilities shall be dedicated to the County where the Director determines that such facilities either are appropriately a part of a county maintained regional system or are unlikely to be adequately maintained privately." SCC 24.28.040 at CP 687. Engineer Trepanier testifies that the interceptor trench was to help stabilize the septic sewer. CP 292. Because of this protective and public function, he testified that in his experience "private property owners would never be allowed to make decisions regarding its maintenance and repair." *Id.* It is also the type of facility that is unlikely

[35] In the City's 34-page brief, it states 38 times that the interceptor trench is private.

to be adequately maintained or repaired by private parties. *Id.* Members of a Homeowners Association have no experience with these types of facilities. The pipe is 12 feet below the ground where a community septic pipe is. As a practical matter, homeowners faced with this type of problem will often vote to spend as little money as possible to address the problem. Similar to the ordinance, the Manual also had an operations and maintenance section that stated that the County would take over facilities regional in nature and that were "unlikely to be adequately maintained privately." CP 439.

The motivations for a municipality to take over the operation and maintenance of retention detention ponds and facilities of a regional nature was set out in *Phillips v. King County,* 136 Wn.2d 946, 965. In *Phillips*, the court considered whether King County could be found liable to an adjacent property owner who had been damaged by a drainage system constructed by a developer and accepted for ownership and maintenance by the County. The court found that liability could not attach on this basis alone, but set out the rationale for public entities taking over drainage facilities:

> . . . King County routinely accepts ownership of residential drainage systems, along with the roads, in all residential subdivisions. This is done to ensure that roads and residential drainage systems are properly maintained. Amici, Cities of Tacoma, Everett, and Anacortes, and

> Washington Association of Municipal Attorneys and Association of Washington Cities, explain that many municipalities in Washington accept private storm water facilities for maintenance or ownership after they are constructed in connection with a new development. This occurs because homeowner associations or other private owners do not have the funds or motivation to do necessary maintenance to keep the drainage facilities operating at their maximum efficiency. If storm water facilities become clogged or overgrown, their efficiency is affected and flooding would occur in smaller storms. During flood emergencies, municipal funds were often spent to clean ponds on private property and ameliorate the flooding because streets and public safety were involved. Amici explain that many municipalities took a proactive position and elected to take over the maintenance of the privately constructed facilities rather than pay for the emergency response when the facilities failed.

See Phillips, 136 Wn.2d at 965-66.

Finally, the City's defense is that to date, there has been no maintenance of the interceptor trench. First, it is telling that there has been no evidence produced by the City of the type of routine "maintenance" one might do to a perforated pipe that is twelve feet underground. The absence of any activity within this area is explained by the City's own Surface/Stormwater Coordinator. He explains that the "deep interceptor trench....given its age of now of 23-years, maybe failing." CP 763. The interceptor trench needs to be repaired. No one repairs something until it starts to fail.

C. The Drainage Disclosure Notice has No Legal Description so All of the City's Arguments with Regard To It Fail.

The City makes numerous factual claims based on the Disclosure Notice which are not supported by the record.[36] Before moving to the primary legal argument that the Disclosure Notice could not be filed of record or provide any notice to anyone, additional reasons why the City's theory is not sound are provided.

It is clear from the record that the City did not submit any proof by way of a title report or any other instrument that the Disclosure Notice was ever filed on any individual lot owned by a family in Crystal Ridge. Without any proof, the City not only asserts record notice to individual lot owners but it boldly asserts that the Disclosure Notice was filed of record on Tract 999 which is not an "individual lot," but a lot that is open space and would not be sold to an individual. As one can see from the plat, Tract 999 is twenty-five feet wide and runs along the back of almost all the lots in Division 2, a length of hundreds of feet. CP 46, 47. No individual would ever want to buy this long, skinny piece of land and no one would or could list it for sale. Moreover, the County's Hearing Examiner, as is always the case, prohibited any construction of any type whatsoever in the open space of this plat. CP 727 (condition I). So, as a practical matter, the City's theory makes no sense that a Disclosure Notice

[36] *See Appellant's Brief,* pp. 12-14; 30-34.

would be necessary for Tract 999. Dr. Denby testified that the reason for the Disclosure was that the Hearing Examiner, and everyone else on the development team, including him, was concerned that families buying property in Crystal Ridge be given notice that it was a very wet site, "and in the future, it was possible that they might have to do additional drainage work on their private lots." CP 297.

The Disclosure Notice states that "substantial surface and subsurface drainage controls have been necessary in the development" and that "special and/or extraordinary drainage controls" may be necessary on individual lots." CP 472. The Hearing Examiner demanded that the "initial construction activity" on the property be the installation of "the dewatering system along the western edge of the site." CP 727. The interceptor trench was in place before Engineer Trepanier did his design on Division 2 in 1987 for the rectangular pond to receive its stormwater flows. CP 809. 811. The interceptor trench was irrefutably the first part of the "substantial...subsurface controls" that were necessary at the time the plats were built. It defies logic that the interceptor trench would also be a new and "special and/or extraordinary drainage control" that was needed on an individual lot more than twenty years later.

The Disclosure Notice is a two-page document on the letterhead of Trimen Development Co., which is dated October 29, 1987. CP 472-473.

The second page of the document is a notarization of the signature of the Developer. Unlike both plats, it does not contain an official signature from Seafirst Mortgage Company. It does not have any legal descriptions but only a reference to Tax Account Numbers. *Id.*

This Disclosure Notice cannot absolve the City from responsibility for maintenance of the drainage easement in Tract 999 and the other easements on the face of the plats. Although not properly analyzed by the City as such, the Disclosure Notice should be construed as a real covenant or equitable servitude. However, the words actually used in the Disclosure Notice do not in any way purport to release or limit the liability of the County, or anyone else, for drainage problems. Rather, the language highlighted by the City might conceivably deprive subsequent owners of the ability to claim fraud against the Developer for nondisclosure of drainage issues. Restrictions in covenants are in derogation of common law and will ordinarily not be extended by implication beyond those restrictions that are clearly expressed. *Burton v. Douglas County*, 65 Wn.2d 619, 621-22, 399 P.2d 68 (1965) (covenant restricting operation of "noxious or offensive or business trade" within a residential subdivision did not prohibit improvement of one of the lots as a parking lot by country club, which improved the lot to serve its members, and was a "social club" and not a "business").

The Disclosure Notice fails to bind any properties as a real covenant or equitable servitude because it does not contain a correct legal description of the purportedly burdened properties. The case of *Dickson v. Kates*, 132 Wn. App. 724, 133 P.3d 498 (2006), is on point. *Dickson* involved a view covenant in a grant deed. The deed purported to restrict the seller from building view-blocking structures or growing trees on the seller's adjacent parcel that he retained after the sale. However, the deed contained a correct legal description only for the land sold, not the burdened land that the seller retained. The court noted that for a covenant to be enforceable against successors in interest of the burdened property, the covenant must "satisfy the statute of frauds." *Dickson*, 132 Wn. App. at 732. Furthermore, the court held that RCW 64.04.010, which establishes Washington's requirements for deeds to real property, also applies to covenants: "To comply with the statute of frauds, the description of the land must be 'sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a sufficient description.'" *Dickson*, 132 Wn. App. at 733-34 (quoting *Howell v. Inland Empire Paper Co.*, 28 Wn.App. 494, 495, 624 P.2d 739 (1981)). The statute of frauds requirement is not satisfied with descriptions containing only tax parcel numbers, street addresses and the like. *See Martin v. Seigel*, 35 Wn.2d

223, 229, 212 P.2d 107 (1949). All of the City's arguments with regard to the Disclosure Notice fail as a matter of law.

IV. CONCLUSION

The County accepted, through appropriate official signatures and filing of the plats, all the drainage easements in Crystal Ridge. The interceptor trench in Tract 999 was part of the area "drainage" which was known to the County at the time it accepted the plat for Division 2. The City, as the successor in interest to the County, has the repair and maintenance responsibility for the interceptor trench. This Court is respectfully asked to uphold the trial court's decision in this matter.

DATED this 22nd day of October, 2012.

TERRELL MARSHALL DAUDT & WILLIE, *PLLC*

Karen A. Willie

By: _____
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Bradley E. Neunzig, WSBA No. 22365
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STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I

Crystal Ridge Homeowners Association, et al.,

Respondents,

vs.

City of Bothell,

Appellant.

CERTIFICATE OF SERVICE

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I, RACHEL E. HOOVER, declare the following to be true and correct under penalty of perjury under the laws of the State of Washington:

That I am now and at all times herein mentioned was a citizen of the United States and a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action and am competent to be a witness herein.

That on the 22nd day of October, 2012, I cause to be served via electronic service and U.S. Mail a copy of the following documents:

1. Respondents' Brief; and

2. Certificate of Service

to the following parties:

Counsel for Appellant
Joseph N. Beck
City of Bothell
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Bothell, WA 98011-3499

Stephanie Croll
Keating Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104

Additionally, I am filing, via Pacific Coast Attorney Services, the

above referenced documents with the Clerk of the above-entitled court.

DATED this 22nd day of October, 2012, at Seattle, Washington.

Rachel H

RACHEL E. HOOVER