

CR 10-1 PL

No. 64752-1-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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King County, Respondent,

v.

Jerry and Diana Jennings, Appellant,

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APPELLANT'S REPLY BRIEF

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Respectfully submitted,

Jerry Jennings, Plaintiff in Pro Se

Diana Jennings, Plaintiff in Pro Se

for Appellant

30310 38<sup>th</sup> PL S

Auburn, WA 98001

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COURT OF APPEALS  
DIVISION I  
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APPELLANT’S REPLY BRIEF

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A. INTRODUCTION

King County has taken the Jennings property by directing, storing, and diverting storm water from the surrounding drainage basin onto the Jennings property. King County has created and sustains a large Class 2 wetland on the Jennings property, which is approximately 4.7 acres in size. Because of this wetland, and the ensuing regulatory restrictions, the Jennings property is not able to be developed, and is essentially completely unusable beyond its current use as a residence for the Jennings, placed 10 feet from the streets in the extreme northwest corner of the property. King County has presented arguments in their reply brief that are attempts to “skew” the real facts of the case. The attempts by King County to obfuscate the facts and data in this case should be rejected.

B. ARGUMENT

1. King County has created and is sustaining a large class 2 wetland on the Jennings property.
  - a. King County has created a “man-made” wetland on the Jennings property by gathering storm water from the 186 acres Fountain Isle Lake Drainage Basin onto an adjacent King County property and

then allowing it to flow from that property onto the Jennings property. (Cp36-39). Prior to a wetland on the Jennings property, the property was farmed for agriculture. King County's Response to Plaintiff's Request for Admissions, Admission No. 1. (Cp12 & Cp131) & (Cp16).

- b. After the Jennings purchased the property, King County granted a variance to the County Surface Water Design Manual (SWDM), and allowed developers to fill upstream wetlands and divert storm water that would normally flow in a different direction to the Jennings property. (Cp44-53).
- c. King County was negligent in granting this variance to the King County Surface Water Design Manual (SWDM). Additional storm water is being diverted to a 12 inch culvert located on a King County owned property immediately east of the Appellant's property. King County granted this variance even though, in their words; "The 12 inch culvert on County owned property immediately east of Appellants' property is not part of an engineered drainage system designed, constructed, controlled or maintained by the County. The County has a formal process for accepting drainage facilities and structures into the County program for maintenance and repair. That process has not been

utilized for any drainage features on the County owned property immediately to the east of Appellants' property." Brief of Respondent at pg. 13. This 12 inch culvert has been in place prior to 1977. Brief of Respondent at pg. 4. It was built for much less storm water runoff from much less surrounding development than exists at the present time.

- d. The County rationalizes this diversion of additional storm water to the Jennings property by stating; "The approval of the SWDM variance occurred two months after B-twelve Associates concluded that almost the entirety of Appellants Property was a Class 2 wetland according to King County's Sensitive Area Ordinance." Brief of Respondent at pg. 5. This statement clearly demonstrates the County's thinking that all of their actions to direct and store additional storm water on the Jennings property are acceptable since the Jennings property has already been categorized as a Class 2 wetland according to King County's Sensitive Area Ordinance.
- e. The following statement, made by King County, does not accurately portray what is occurring at the 12 inch culvert; "Similarly, while there is evidence that stream water occasionally enters their property if the upstream 12 inch culvert is plugged with debris". Brief of Respondent at pg. 19. A better description

of when and how the storm water flows around the 12 inch culvert is in the King County response to Admission No. 8 (Cp132);  
“During periods of high water flow in the stream that runs through parcel 0321049185 water runs through the 12-inch pipe and is also dammed up by the elevated pathway. King County admits that in these high water flow events, some water also flows over the pathway onto the Jennings property.” The reality is that enough storm water is flowing onto the Jennings property and being retained there to turn the entire property into a Class 2 wetland.

- f. The County wants to characterize the storm water as flowing in a stream, instead of a drainage system. Plainly and simply, it is storm water that is channeled through a drainage system that is being maintained by the County until it gets to the County property immediately to the east of the Jennings property. The stream does not “begin near Fountain Isle Lake located approximately ½ mile from the Appellants’ property”, as stated by the Respondent pg 3. The storm water drainage system begins at the Green Wood Lane subdivision, east of 51<sup>st</sup> Avenue, where the variance to the SWDM was granted to divert storm water towards the Jennings property. The variance allowed the storm water to be directed through an existing 24-inch concrete culvert outfall pipe under 51<sup>st</sup> Avenue,

and flow to the west. (Cp174) & (Cp44-53). The storm water then flows through Fountain Isle Lake, through a 24-inch storm water sewer pipe under the streets, through several King County parcels, that are maintained, and then to the King County property immediately east of the Jennings that is not maintained. (Cp239-240) & (Cp244).. At this point, on the King County property that is not maintained, this storm water from the east is combined with the storm water flowing from the north that comes in through a 27-inch storm water pipe, designated CB-28. (Cp64-66). Then according to the County, suddenly there is no maintenance, and a wetland exists, and the storm water fed by 24-inch and 27-inch storm water sewer pipes flows through a 12-inch culvert, pipe as a stream.

- g. The “official maintenance” stops on this King County parcel because it has not gone through the King County formal process for accepting drainage facilities and structures into the County program for maintenance and repair. The “official maintenance” appears to resume soon after the storm water passes through the 12-inch culvert as King County replaced a storm water sewer pipe a few houses down from the 12 inch culvert that abuts the unopened 304<sup>th</sup> Street right of way. Request for Admissions,

Admission No. 6. (Cp12 & Cp132). King County has also occasionally been maintaining the 12-inch culvert by clearing debris and placing a debris guard on the opening of the culvert. (Cp27). King County owns the whole drainage system from the upstream point where it enters Fountain Isle Lake to the downstream point where it exits into Lake Doloff. To claim that they are not maintaining the King County property immediately adjacent to the Jennings, and the 12-inch culvert, is ludicrous.

- h. In 2005, the County raised 38<sup>th</sup> Avenue South, a road that is downstream of the Jennings property, to prevent the storm water from flowing over the top of the road. This obstructed the downstream flow of storm water and created more ponding of water on the Jennings' and other properties north of 38<sup>th</sup> Avenue South. (Cp97-99) & (Cp88-90). Potential drainage of the wetland on the Jennings property, seen as a negative impact by the County, was raised as an issue while designing and constructing the improvements to 38<sup>th</sup> Avenue South. (Cp206). Reassurances were made that the wetland would not exhibit additional drainage, and furthermore that water from Lake Doloff would be allowed to back up to the north side of 38<sup>th</sup> Avenue South through the placement of

a 60 inch box culvert, and the removal of a restrictor from the previous culvert. (Cp90-93).

2. The Jennings' have been damaged by King County's usage of their property for a large Class 2 wetland.
  - a. Before the Jennings purchased the property, the Jennings checked with King County Department of Development and Environmental Services, and there were not any known wetlands located on or near the property. (Cp74) & (Cp186). King County failed to identify wetlands on the Jennings property and on the neighboring King County property, east of the Jennings, as required by Washington State growth management comprehensive plan. RCW 36.70A.040 (3)(b). There is so much storm water flowing onto the Jennings property from the neighboring King County property that the entire property has been declared a wetland, and the development potential, beyond its current use as mostly a wetland and a small section for the Jennings residence, is practically nonexistent. Brief of Respondent at pg. 1.
  - b. When the Jennings purchased their property, it was zoned for four houses per acre. It was through the building permit process that

the property was categorized as a class 2 wetland. Brief of Respondent at pg. 3.

- c. The damage to the Jennings is not flood damage. Rather, it is damage caused by the long-term development of wetlands from impounded direct rainfall and storm water run-off from the surrounding, developed, drainage basin.

3. Liability for Inverse Condemnation - Federal Takings

- a. Under the Fifth Amendment of the United States Constitution, which provides as follows:

"\* \* \* nor shall private property be taken for public use without just compensation."

The Takings Clause is applicable to the States through the Fourteenth Amendment. *Dolan v City of Tigard*, 512 US 374, 383 (1994). The Takings Clause "is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transp Co v City of New York*, 438 US 104, 123 (1978) (quoting *Armstrong v United States*, 364 US 40, 49 (1960)). It is not necessary that the City actually take physical possession of the Property to find a Fifth Amendment taking.

“A taking can occur simply when the Government by its action deprives the owner of all or most of his interest in his property. \* \*

It is the loss to the owner of the property and not the accretion to the Government which is controlling in fifth amendment cases.”

Aris Gloves, Inc v United States, 420 F2d 1386, 1391 (Ct Cl 1970) (citing United States v Causby, 328 US 256, 261 (1946)).

- b. Lynah arose after the United States government built a dam across the Savannah River, causing water to back up and flood adjacent property that had been used to grow rice. The flooding turned what had been a valuable rice field into “an irreclaimable bog.” Lynah at 469. The Supreme Court found a taking, stating:

Where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the 5th Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession, and the fee; and when the

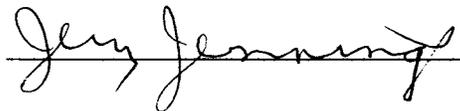
The Court of Federal Claim rejected plaintiff's claim because there was not "permanent and exclusive occupation" of the property. Ridge Line, 346 F3d at 1352. The Federal Circuit reversed finding that permanent and continuous physical occupation was not required to establish a taking.

C. CONCLUSION

For the foregoing reasons, the decision of the Superior Court should be reversed, and the Court should render judgment for the Plaintiff / Appellant for negligence, nuisance, trespass, and inverse condemnation.

August 8, 2010

Respectfully submitted,



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