

No. 67755-1-I

(Consolidated With Case No. 67756-0-1)

COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION I

DIKING DISTRICT NO. 1 OF ISLAND COUNTY, an  
Island County diking district,  
Appellant / Cross Respondent,

vs.

CITIZENS IN SUPPORT OF USELESS BAY COMMUNITY, a  
Washington nonprofit corporation, and ROBERT and JUDITH  
WINQUIST, husband and wife and their marital community,  
Respondents / Cross Appellants,

vs.

ISLAND COUNTY, a Washington State Municipal Corporation;  
MARY WILSON ENGLE in her capacity as Island County Assessor;  
ANNA MARIA d NUNES in her capacity as Island County Treasurer;  
SHEILA CRIDER, in her capacity as Island County Auditor; and  
USELESS BAY GOLF and COUNTRY CLUB, Inc., a Washington  
nonprofit corporation,  
Respondents and Respondents on Cross Appeal.

**RESPONSE AND OPENING BRIEFS OF RESPONDENTS /  
CROSS APPELLANTS CITIZENS IN SUPPORT OF USELESS  
BAY COMMUNITY and ROBERT & JUDITH WINQUIST**

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## **RESPONSE TO APPELLANT’S OPENING BRIEF**

### **I. INTRODUCTION**

#### **A. CONCESSIONS OF APPELLANT DIKING DISTRICT NO. 1:**

The Opening Brief of Appellant Diking District No.1 [“DD-1” hereafter] does not dispute the fact that it failed to provide to its property owners notices and/or hearings prior to assessing “special benefits” against their properties. It does not challenge the trial court's ruling that notices and hearings were required prior to levying special benefit assessments. Instead, DD-1 argues only that:

1. DD-1 illegal acts / omissions in levying special benefit assessments are not judicially reviewable; and
2. If the special benefit assessments are judicially reviewable, judicial invalidation of current assessments resurrects prior special benefits assessments made twenty five (25) years earlier, but long abandoned.

Appellant DD-1's failure to assign error to or argue the “notice and hearing” decisions of the trial court concedes those points.

#### **B. DD-1 IGNORES APPLICABLE STATUTES:**

Appellant DD-1 is a purely statutory creature, but the Table of Authorities contained in DD-1's Brief does not identify . . . and the brief’s argument does not include . . . a single citation to any statutory provision. All of a diking district’s functions and powers are authorized, defined, and limited, and all of an affected property owner’s procedural rights [including appeal rights] are preserved in Title 85 RCW, Chapters 85.05, 85.18,

or 85.38 RCW. One cannot apply common law principles while ignoring statutory requirements, as Appellant DD-1 attempts in its Brief.

**C. BRIEFING PROTOCOLS:**

This Brief will use the following abbreviations and protocols:

1. Diking District No. 1 of Island County will be referred to in this brief as “**DD-1.**”
2. Respondents / Cross Appellants Citizens In Support of Useless Bay Community and Robert and Judith Winqvist will be referred to collectively as “**CSUBC,**” unless the context requires otherwise.
3. Respondents ISLAND COUNTY, MARY WILSON ENGLE, ANNA MARIA d NUNES and SHEILA CRIDER will be referred to collectively as “**Island County**” unless the context requires otherwise.<sup>1</sup>
4. Respondent USELESS BAY GOLF and COUNTRY CLUB will be referred to herein as “**Golf Club.**”
5. Diking District Resolutions will be identified as “DD-1 Resolution \_\_\_\_” with the appropriate numerical identifier added. The numerical identifier usually, but not always, consists of the year of adoption followed by a number designating the sequence of DD-1 resolutions. When a “resolution” number was not assigned by DD-1, those resolutions will be referenced by date of adoption.

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<sup>1</sup> The party designation on Appellant DD-1’s Brief Face-sheet is not accurate. The trial court entered an Order Substituting Parties below. [09-2-00845 CP 68, page 80-82] That Order was required because the offices of Assessor and Treasurer were changed as a result of the County’s November 2010 election. The newly elected County Officers took office in early 2011. The face sheet for this Respondents’ / Cross Appellants’ Brief and that used in the Island County Clerk’s “INDEX TO APPELLANT’S CLERK’S PAPERS” is accurate.

**D. CITATIONS TO THE RECORD:**

Neither party has relied upon transcripts of trial court proceedings, because there was no trial or oral testimony below. Neither party relies upon transcripts of proceedings before DD-1 because its “certified records” did not include any transcripts. The appeal below challenges DD-1’s lack of required process. DD-1’s decisions on the merits — though erroneous — are not reached because DD-1 failed to make any appealable findings -of-fact or conclusions-of-law.

On November 17, 2011, the trial court clerk filed Clerk’s Papers / Index for Island County Superior Court Case No. 09-2-00845-5, and a separate Clerk’s Papers / Index for Island County Superior Court Case No. 10-2-00754-1 [both cases on appeal herein]. The Court can see that the two sets of Clerk’s Papers differ in terms of numbers, dates and location of documents. Island County Cause No. 09-2-00845-5 had a much longer duration than Island County Cause No. 10-2-00754-1, and contains more items. The instruments listed on the two sets of Clerk’s Papers do not correspond with the other. Thus, unless proper references to the record are maintained in the parties’ appellate briefs using the two different Clerk’s Indexes, the Court and parties will be hopelessly lost.

CSUBC will adopt and utilize a shorthand method of referencing the two trial court records, while maintaining the distinction between the two records, as follows:

1. Citations to the record in Island Co. Case No. 09-2-00845-5 will read — for example for the Petition/Complaint **[09-2 CP-69, page 192]**;

2. Citations to the record in Island Co. Case No. 10-2-00754-1 will read — for example for the Amended Petition/Complaint, [10-2 CP-4, page 446].

**II. OBJECTIONS TO AND MOTION TO DISMISS  
DD-1'S IMPROPER OPENING BRIEF**

CSUBC objects to the improper Opening Brief submitted by DD-1. DD-1's Opening Brief includes no Assignments of Error. Additionally, DD-1's references to the record do not identify which of the two trial court records it references, or even which part of either of those two court records it references.

CSUBC has filed a separate RAP 10.7 motion asking that Appellant DD-1's Opening Brief be returned for correction, replacement or be stricken. Depending upon DD-1's response to CSUBC's motion, and this Court's ruling on that motion, the motion may preclude hearing the Appellant DD-1's case on the merits. Accordingly, CSUBC moves in this brief . . . pursuant to RAP 10.4(d) . . . that the DD-1 Opening Brief be stricken and DD-1's appeal dismissed.

**A. The Record Relied Upon:**

This motion is based upon the Opening Brief filed by DD-1, which includes no Assignment of Errors and which does not include required citations to the record, all in violation of RAP 10.3(a) (4) and (5) and RAP 10.4(f).

This motion also relies upon the November 17, 2011 “Appellant’s Clerk’s Papers” [including the “Index to Appellant’s Clerk’s Papers”]

filed in this Court by Debra Van Pelt, Island County Superior Court Clerk. Ms. Van Pelt filed “Appellants Clerk’s Papers” for each of two trial court proceedings now on appeal: Island County Cause No. 09-2-00845-5 and Island County Cause No. 10-2-00754-1.

This motion will also rely upon subsequent portions of this Court’s record yet to be developed, which will include the requested court ruling on CSUBC's RAP 10.7 motion and DD-1’s compliance or noncompliance. If appropriate, this motion will be withdrawn.

**B. Grounds for Relief Requested and Argument:**

**1. No Assignments of Error:**

RAP 10.3(a)(4) requires the Opening Brief to include Assignments of Error. *King Aircraft Sales, Inc., v. Lane*, 68 Wash.App 706, 846 P.2d 550, 22 U.C.C. Rep. Serv. 2d 515 (Div. 1 1993). Appellant’s Opening Brief contained no Assignments of Error, it therefor submitted an improper brief and it should be corrected or stricken pursuant to RAP 10.7

**2. Improper Citations to the Record:**

Appellant DD-1's Opening Brief cites to the record as though a single trial court record existed. Throughout its “Statement of the Case” [see Brief of Appellant — pages 2-5], DD-1 makes multiple citations to the record by referencing only a single “CP,” and then only by page number. DD-1 includes no information from which the other parties or the Court can ascertain where in the actual trial court records support is found for the statements alleged in DD-1’s Statement of the Case.

RAP 10.4(f) requires references to the record to be both by “part” and “page.” DD-1 gives only a page number, providing no reference to which of the two records it refers to, or which part of either record it refers to. DD-1 leaves respondents and the Court “guessing” about the supposed support for DD-1’s factual and procedural contentions. This is an especially serious flaw considering that DD-1 asks the Court to review this case *de novo* and must demonstrate not only what its factual allegations are, but that they are supported in the record, are uncontested, are material, and entitle DD-1 to a judgment as a matter of law. If these improprieties are not eliminated prior to setting this case for oral argument, this Court should strike DD-1’s Opening Brief and dismiss its appeal.

### **III. RESPONDENTS’ STATEMENT OF ISSUES**

**Issue No. 1:** Do controlling statutes contemplate review of benefit assessment process and decisions by writ of review? Yes, they do.

**Issue No. 2:** Did DD-1 proceed illegally when it failed to provide affected property owners notice or hearing as it was statutorily and constitutionally required to do prior to making its project and benefit assessment decisions? Yes, it did.

**Issue No. 3:** Is the decision of Diking District No. 1 to deprive property owners of required notice or hearing an act / omission reviewable by statutory writ? Yes, it is.

**Issue No. 4:** If a Diking District adopts special benefit assessments against property in the District without first providing notice and

hearing, are the benefit assessments null and void? Yes, they are.

**Issue No. 5:** If illegal action by DD-1 is not subject to review by statutory writ, are its illegal acts/omissions reviewable pursuant to the court's inherent constitutional power as requested in the Petitions? Yes, they are.

**Issue No. 6:** Does "invalidation" of challenged DD-1 resolutions result in a revival of prior DD-1 benefit assessments? No, it does not, at least not those urged by DD-1.

**Issue No. 7:** Does DD-1 improperly seek an advisory ruling regarding a resolution not challenged in the Petition filed in this case and not supported by pleadings or record? Yes, it does.

#### **IV. RESPONDENTS' STATEMENT OF THE CASE**

##### **A. HISTORICAL FACTS:**

##### **1. Judicial Formation and Original Assessment:**

DD-1 is located in southwest Whidbey Island and includes property, including that owned by CSUBC members, fronting on Deer Lagoon and Useless Bay, parts of Puget Sound [09-2 CP-11 , page 195-240 ]; [10-2 CP-10 , page 112-158 ].

Formation of DD-1 occurred in 1914 pursuant to Chapter 117, laws of 1895 [now codified in RCW 85.05]. A Petition was filed with the Island County Board of Commissioners, and that Board issued its ORDER approving formation of DD-1 on March 16, 1914. CSUBC asks the Court to judicially notice that Island County Order, a copy of which is attached to this brief at Appendix ("A"). Thereafter, voters approved formation of

the district. That Order describes boundaries for DD-1 encompassing 743.64 acres, of which 460 acres were considered benefitted by construction of the dike. [09-2 CP-19, page 241-258 ]; [10-2 CP- 13, page 159-176].

Subsequently, pursuant to Chapter 117, laws of 1895 [now codified at RCW 85.05.090 – 85.05.120, copy attached hereto at Appendix (“B”)], the DD-1 petitioned Island County Superior Court to approve its proposed improvements and to establish special benefits for DD-1 property owners. The enabling laws also provided for a judicial proceeding to make subsequent amendments as needed. RCW 85.05.130

In 1915, the legislature enacted RCW 85.05.070 — RCW 85.05.079 [laws 1915, ch. 153 §§ 2-10], creating limited authority to *diking districts* seeking to undertake construction of any drainage system. The statutory drainage system approval process requires notice and a hearing to simultaneously determine:

- to commit the diking district to any drainage system construction; and
- to determine how to finance and pay the costs of the system, including special benefit assessments for each parcel.

The 1915 enactment also provided for separate benefit assessment and fund-segregation between monies intended for drainage functions and diking functions. RCW 85.05.077

From 1914 until several decades later, the statutory process described above was the only process governing diking district creation, its

authority and its establishment of benefit assessments.

In 1951 [Laws 1951, ch. 45] the legislature enacted an optional method for assessing properties if those properties were at risk of inundation by tidal or flood waters [codified at RCW 85.18.010-85.18.900]. Chapter 85.18 RCW includes its own notice, hearing and judicial appeal provisions.

In 1985 the legislature enacted Ch. 85.38 RCW [Laws 1985, ch 396], an additional method for various special districts, including diking districts, to organize and operate. This latter enactment repealed certain provisions of RCW 85.05, but did not repeal RCW 85.05.070-85.05.079 governing the process for approving construction and financing of drainage systems. The interplay of these sometimes confusing statutory provisions will be described in more detail in the Cross Appeal portion of this brief.

CSUBC members live along Sunlight Beach, a neighborhood situated on a large spit of land that juts out from the Whidbey Island main shoreline, and which extends westerly between Deer Lagoon [on the North] and Useless Bay [on the South]. The plats, road, spit, Deer Lagoon and Useless Bay are described and depicted in the Petitions / Complaints filed in the two actions below. [09-2 CP-69, page 716 ]; [10-2 CP-4, page 446] These plats existed when DD-1 was created. Sunlight Beach Road traverses the approximate center of the spit, with residential lots on both the North [Deer Lagoon] and the South [Useless Bay] sides of the road. DD-1 includes some, but not all, of the residences along Sunlight Beach

Road, excluding the western-most parcels. [09-2 CP-92, page 83-91 ]; [10-2 CP- 45, page 73-81].

After its formation, DD-1 constructed a dike northward from the Sunlight Beach spit and across Deer Lagoon, which prevented tidal inundation of the lowland property behind (Easterly) of the new dike. The pending appeals do not include issues relating to dike construction or dike maintenance assessments. [09-2 CP-69, page 716-771]; [10-2 CP-4, page 446-416, and 10-2 CP 46, page 73-81]

## **2. Past Drainage Systems in Deer Lagoon:**

In 1931, DD-1 constructed a gravity flow drainage system under the dike [near its Northern terminus] so that fresh surface water from the East side of the dike could discharge westerly under the dike directly into Deer Lagoon, and from there to surface flow across Deer Lagoon into Useless Bay. [09-2 CP-69, page 716-771]; [10-2 CP- 4, page 446-451] The 1931 DD-1 resolution to authorize construction of the 1931 drainage system and to make benefit assessments was adopted pursuant to RCW 85.05.070-85.05-079. A copy of that 1931 Resolution is attached at Appendix (“C”). The Court can see that the Resolution does not classify the platted lots in Sunlight Beach or Sunlight Beach Addition as "benefited properties."

In 1944, DD-1 constructed a different gravity flow drainage system which included tidal gates to drain fresh water from the East (landlocked) portion of Deer Lagoon directly under Sunlight Beach Road [near the 1914 dike’s Southern terminus] with its outfall directly into

Useless Bay. This latter system is still in place and has adequately drained the landlocked portion of Deer Lagoon East of the dike and continues to do so. [09-2 CP-11, page 195-240]; [10-2 CP- 10, page 112-158 ]

The pending appeals do not involve the 1914 dike and original drainage system, nor the 1931 or 1944 drainage systems. In fact, at least as early as 1994-1995, DD-1 was levying no benefit assessments related to any drainage system. [09-2 CP-11, page 195-240 and CP 50]; [10-2 CP-10, page 112-158] A copy of DD-1's 1994 and 1995 levy requests to Island County are attached at Appendix ("D").

The Useless Bay Golf Club borders Deer Lagoon to the North. Much of its land is lowland, and in the 1960's it installed and operated its own drainage system to pump surface water from the East side of the 1914 dike into Deer Lagoon west of that dike. That system included a drainage ditch that ended in a small pond where the Golf Club collected surface drain water and then pumped it over the dike. DD-1 continued to use its own separate and pre-existing gravity flow drainage system under Sunlight Beach Road to the South. The DD-1 gravity flow drainage systems have always adequately drained surface water from behind (Easterly) of the 1914 dike. [09-2 CP-11, page 195-240]; [10-2 CP-10, page 112-158] Approximately 5,000 acres of upland property contribute surface drainage from four (4) basins. Those drainage basins include approximately 744 acres of territory within DD-1, which itself includes the approximate 460 acres benefitted by the dike according to the 1914 formation documents. [see Appendix ("A")]

**3. The Current Drainage System:**

DD-1 never constructed, owned nor operated a pumping system to drain fresh surface waters until it committed by contract to construct, maintain and operate such a system in 2004 when it entered into a contract with the Respondent Golf Club and Respondent Island County. [09-2 CP-11, page 195-240]; [10-2 CP-10, page 112-158] This 2004 contract and 2006 Amendment are attached hereto at Appendix (“E”). The contract speaks for itself, but generally committed DD-1 to the construction, maintenance, and cost of providing a pumping drainage system designed to resolve present and future surface drainage problems of the Golf Club and the larger drainage basins within Island County. A July 2010 DD-1 chronology includes historical information and describes the nature and cause of drainage increases in the basin, and historical negotiations to resolve differences between DD-1, the Golf Club and Island County. [09-2 CP-11, page 195-240]; [10-2 CP-10, page 112-158] For the Court’s convenience, a copy of that chronology is attached at Appendix (“F”).

**B. PROCEDURAL FACTS:**

**1. No Notice and No Hearings Provided to Property Owners:**

DD-1 financed its \$414,000 drainage system venture by securing a short-term loan from Whidbey Bank [see Appendix (“E”)]. There followed over the next four years what can only be fairly described as a flurry of confusing, inconsistent and contradictory DD-1 resolutions regarding benefit assessments in order to pay for the construction, the financing and the operating costs for this drainage pumping system. DD-

I provided no notice or hearings to property owners of its decision to construct, of its decision to finance construction with Whidbey Bank, or of its many subsequent decisions to assess special benefits against citizens' properties.

**2. Writs and Declaratory Judgments Requested:**

The Petitions in both cases below [CSUBC et al.] requested either or both review by statutory writ or by constitutional writ. In both cases, the Petitioners alleged that DD-1 had failed to provide statutorily and constitutionally mandated notice and hearing prior to levying special benefit assessments, which statutory notice and hearing are required prior to committing to constructing a drainage system. RCW 85.05.071

In addition, CSUBC requested declaratory relief that the 2004 contract [amended in 2006] with the Golf Club and Island County exceeded the jurisdiction of DD-1 and was an *ultra vires* act. In addition, CSUBC sought a declaratory judgment that, as applied by DD-1, RCW 85.18 "benefit assessments" that were levied solely based on appraised value were not "special benefit" assessments but rather were unconstitutional *ad valorem* property taxes, a claim the trial court did not reach.

**3. The Agency "Record"**

DD-1 did not relinquish its record below willingly. CSUBC's Complaint in Island County Superior Court Case No. 09-2-00845-5 requested either or both a statutory or constitutional writ of review. CSUBC's proposed writ of review in that case specifically would have required DD-1 to provide its record relating to the challenged 2004

drainage project decision and all of its record relating to its 2008 resolutions, benefit determinations, benefit rolls, notice, minutes, transcripts, evidence considered and objections lodged. [09-2 CP-84, page 653-662] DD-1 however had other ideas.

On January 13, 2010 legal counsel for DD-1 filed an attorney's declaration, attaching a copy of a "1986" Resolution that was not authenticated and was not complete. [09-2 CP-21, page 565-581] DD-1 also presented its own proposed Order and Writ of Review [redefining the scope of the requested writ against itself] and the trial judge signed preliminary show cause orders [09-2 CP-61, page 469] and writs [09-2 CP-94, page 467] as proposed by DD-1 in that case. CSUBC objected, of course, to the entry of any preliminary order that purported to adjudicate the merits of any issues not before the court for decision at that time, especially considering that at that time the purpose of the orders was to obtain the DD-1 record so that review on the merits might be obtained. [09-2 CP-79 , page 557; 09-2 CP-80, page 498; 09-2 CP-55 , page 443] Eventually, the trial court came to understand that the "1995" DD-1 resolutions and the "1986" DD-1 "resolutions were not challenged in either case below; it was only those resolutions levying special benefit assessments to be collected in years 2009, 2010 and 2011 that were under review, and those are the resolutions invalidated by the trial court's final judgments. [09-2 CP-41, page 20-23]; [10-2 CP- 21, page 20-22].

DD-1 "Certification" of its record in Island County Superior Court Case No. 09-2-00845-5 consisted of only seventeen (17) pages of "record."

This DD-1 record included portions of some 1995 resolutions, several single page resolutions adopted by DD-1 in 2007 and 2008, two pieces of correspondence and some published notice of “meetings.” [09-2 CP-50 and CP 53] The DD-1 record submittal was notable for what it did not include:

- No notices of 2008 hearings;
- No minutes or transcripts of 2008 hearings;
- No “1986” resolution and no later resolution referring to a “1986” resolution;
- No benefit rolls;
- No levy or benefit certifications to Island County; and
- No working papers to evidence how “benefits” were established.

The “record” submitted by DD-1 in Island County Superior Court Case No. 10-2-00754-1 was essentially the same, though it included for the first time, and without explanation, a copy of a “1986” incomplete resolution with a new “benefit roll” for 2011 based upon current assessed values. [10-2 CP-5, page 253-298] Again, it included portions of some 1995 resolutions but was again notable for what it did not include:

- No notices of 2010 hearings;
- No minutes or transcripts of 2010 hearings;
- No documents to complete the “1986” resolution;
- No 2010 levy certifications to Island County; and
- No working papers to evidence how “benefits” were established.

The DD-1 record submittal was woefully inadequate and incom-

plete. An especially glaring omission from DD-1's "record" submittals was its failure to include its June 8, 2006 minutes and its June 8, 2006 Resolution electing to finance its future operations pursuant to RCW 85.38.140 through RCW 85.38.170, which CSUBC itself did provide. [09-2 CP-19, page 241-258]; [10-2 CP-13, page 159-176] A copy of the DD-1 June 8, 2006 minutes and resolution are attached at App. ("G").

All of the relevant DD-1 resolutions were attached as exhibits to the Petitions/Complaints filed below and/or were included in DD-1's "certified record" and/or attached to supporting affidavits filed in Island County Superior Court Case No. 09-2-00845-5 and Island County Superior Court Case No. 10-2-00754-1. DD-1 filed no answers to the Complaint below and did not otherwise subsequently contest the authenticity of those attachments to CSUBC's Petitions, which were provided from DD-1 records in any event. [09-2 CP- 69, page 716-776]; [10-2 CP-34, page 471-476, CP 4, and page 446-451]

For the Court's convenience, the following resolutions are attached in these Appendices:

- "1995" DD-1 resolution is attached hereto at Appendix ("H");
- The 2007-2008 DD-1 Resolutions are attached collectively at Appendix ("I");
- DD-1 resolutions 2010-1 and 2010-2 are attached hereto at Appendix ("J"); and
- A copy of the abandoned "1986" resolution relied upon by DD-1 is attached hereto at Appendix ("K").

**4. Untrue / Unsupported Statements in Appellant's Brief**

**(a) Appellant Misrepresents the Pleadings**

It is not often that a statement in a brief is simply false, but that is the case with two claims made in Appellant DD-1's "Statement of the Case.

The first untrue statement in the DD-1 Opening Brief is its characterization of CSUBC's claims. That procedural mischaracterization is made on page 4 of DD-1's Brief that stated as follows:

"In that action [Island County Superior Court Case No. 09-2-00845-5] CSUBC sought judicial review of various decisions made by the District many years before . . . the 1986 decision to assess certain properties for drainage system improvements; and the 1986 determination that the base benefits conferred on the same properties for diking and drainage improvements were equal to the properties' true and fair value."

CSUBC did not challenge the 1986 resolution. CSUBC challenged the assessment decisions made in 2008 purportedly supporting the 2009 benefit collections. [09-2 CP-69, page 71]

It was DD-1 that attempted to insert issues regarding a 1986 resolution, using a declaration of legal counsel as the vehicle for doing so. [09-2 CP-21, page 565-581] In fact, as noted above, CSUBC objected when DD-1's legal counsel attached a copy of the 1986 resolution to his January 19, 2010 declaration. CSUBC objected to the language that DD-1 included in its proposed "Order on Show Cause" and CSUBC asked the trial court to reconsider inclusion of language regarding that 1986 resolution. [see record references in part "3. Agency Record" above]

In addition, CSUBC opposed DD-1's own Motions for Partial Summary Judgment motion in both cases below, which DD-1 based primarily on the supposed "continuing validity" of the 1986 resolution. [09-2 CP-31, page 299-311]; [10-2 CP-16, page 242-252]. CSUBC resisted those Reconsideration Motions. [09-2 CP74-, page 178-189]; [10-2 CP-39 , page 101-111]

**(b) Appellant DD-1 Misrepresents Facts**

The second untrue statement in DD-1's Opening Brief is a factual claim made on page 3 of Appellant's Brief that: "The District therefore, has used the RCW 85.18 assessment method for drainage assessments since 1986." This is simply a false statement, as is readily apparent from a review of the record — Appendices ("D") and ("G") through ("J") — to this Response Brief. The truth, as disclosed in the record, is as follows:

- DD-1 made no drainage assessments for some years, at least in 1994 - 1996 [see Appendix ("D")];
- It is also apparent that the DD-1's "1995 formula" was not, and did not purport to be, based on RCW 85.18. DD-1 was free-lancing in 1995, complying with none of its statutory options [see Appendix ("H")];
- The June 8, 2006 resolution constituted an express DD-1 election to operate exclusively under RCW 85.38.140, not RCW 85.18 [see Appendix "G"];
- None of the 2007 through 2008 DD-1 resolutions refer to any part of the so-called "1986 resolution." Resolution 2007-4 attempted

- to levy against “all parties within the district,” whereas RCW 85.18 is exclusive to inundated properties [see Appendix (“I”)];
- Next, DD-1 Resolution 2008-4 rescinded DD-1’s prior June 8, 2006 RCW 85.38 “election.” DD-1 Resolution 2008-4 expressly attempted to re-establish what DD-1 called its “historic method,” including the self-serving — and nonsensical — statement that the “1995 formula” complied with requirements of RCW 85.15, RCW 85.16, and RCW 85.18 [see Appendix “I”];
  - Ten days later, on October 2, 2008, DD-1 adopted DD-1 Resolution 2008-5 “rescinding” both its June 8, 2006 RCW 85.38.140 election and rescinding DD-1 Resolution 2008-4. Resolution 2008-5 referred to “the “1995 Resolution” but did not adopt that “formula.” [see Appendix (“I”)]; and
  - On the same day — October 2, 2008 — DD-1 adopted DD-1 Resolution 2008-6 purporting to adopt a “benefited area” and assess according to the “method adopted in 1995.” It incorrectly asserted that the “1995 method” complied with RCW 85.18. It included the statement that the “1995 method of assessment was last employed by the District in 2001,” without clarifying what “assessment method,” if any, was “employed” by DD-1 after 2001 [see Appendix (“I”)].

Similarly, the Petition / Complaint filed by CSUBC in Island County Cause No. 10-2-00754-1 challenged DD-1 Resolution 2010-1 and Resolution 2010-2. No “challenge” to a 1986 resolution was made. In

fact, DD-1 Resolution 2010-1 is the first time the DD-1 commissioners even mentioned a “1986 resolution” in any of the confusing 2007 through 2010 DD-1 levy resolutions.

The Court should be aware of two realities concerning that DD-1 resolution 2010-1: First, DD-1 borrowed by reference a “formula” from the 1986 resolution, but did not otherwise recognize any ongoing validity of the 1986 Resolution. Second, DD-1 amended Resolution 2008-6, which had itself adopted by reference a “1995” formula, but did not mention a “1986 resolution.”

The balance of DD-1 Resolution 2010-1 confuses matters further by mentioning, but not deciding, a convoluted system of “credits” and adjustments to compensate property owners for over-assessments collected in 2009 and 2010 (pursuant to DD-1 Resolution 2008-6). Finally, DD-1’s Resolution 2010-2 imposed a second 2010 request of

“\$24,820.00 . . . for maintenance, administrative, and operation expenses, assessing the roll of benefitted properties at 100% of the true and fair value as approved by the Board in the Resolution of the Board adopted on July 10, 1986.”

The DD-1 Commissioners did not consider the “1986 resolution” to have continuing validity; they considered it as a source from which they might currently borrow some, but not all, content.

It is simply untrue that DD-1 operated under the authority of RCW 85.18 from 1986 to the present. In fact, the actual “arguments” now made in this Court were first made by DD-1 in its Motion for Partial Summary Judgment in the proceedings below. [09-2 CP- 31, page 299-311]; [10-2

CP-16, page 242-252]

DD-1 seeks salvation in the “1986 resolution,” and makes that resolution central to the argument it makes in its Opening Brief. But, the record regarding that “1986 resolution” is incomplete and inadequate for any purpose. The “1986 resolution:”

- refers to 1986 benefit rolls that are not provided;
- refers to a “benefitted area” without providing the map;
- applies only to the gravity flow tidal gate drainage system, not to the costly new pumping drainage system;
- adopts 1986 assessed property values, not 2008 – 2010 assessed property values actually being certified by DD-1 in current DD-1 Resolutions 2008-6, 2010-1 and 2010-2;
- does not demonstrate that DD-1 ever “certified the “1986 resolution” as state statutes require; and
- does not demonstrate that Island County ever levied any benefit assessments based upon a “1986 resolution.”

#### **V. SUMMARY OF CSUBC's ARGUMENT**

1. Review by either statutory or constitutional Writ of Review is proper in this case. Benefit assessments were made. RCW 85.05 and RCW 85.18 provide for broad *de novo* judicial review by writ;
2. A diking district’s decision to ignore statutory and constitutional process is not a “legislative” decision. If it were, it is an illegal decision reviewable by constitutional writ;
3. 2008 through 2010 assessed values cannot be employed in a “1986

resolution” without first providing new notice and hearing to amend the “base benefit” adopted in 1986;

4. “Invalidation” of DD-1 2008 and 2010 benefit assessment Resolutions does not revive prior benefit assessment resolutions. If a prior valid “legislative act” is revived, it is DD-1's June 8, 2006 Resolution electing to finance pursuant to RCW 85.38; and
5. DD-1's argument does not defend its invalidated 2008 and 2010 Resolutions; it seeks an improper “advisory” opinion that a 1986 resolution is effective prospectively.

## **VI. ARGUMENT**

### **A. Standard of Review**

CSUBC agrees that the standard of review from a trial court summary judgment ruling is *de novo* and that facts are viewed most favorably to the non-moving party. *Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Const., Inc.*, 119 Wash.2d 334, 341, 831 P.2d 724 (1992). With respect to its appeal of the trial court's denial of its own motion for partial summary judgment, DD-1 is the moving party [with respect to CSUBC’s summary judgment motion, CSUBC is the moving party, but there are no material disputes of fact: notice and hearing were admittedly denied by DD-1 to property owners].

Appellant DD-1’s misrepresentation of the record below does not count to create disputed factual issues or to support DD-1’s arguments. CR 56(e) requires that factual assertions be supported by competent evidence admissible as part of the record. There is no record to support

DD-1's factual misstatements in its Statement of the Case, and the record that does exist clearly contradicts those misstatements.

Unfortunately, as indicated above, DD-1 failed to provide an adequate record to support its arguments for applicability of a "1986 resolution." Moreover, DD-1 seeks an advisory ruling in this Court. Its arguments fail due to both factual inadequacy and legal defects.

**B. REVIEW BY WRIT OF REVIEW  
IS / WAS APPROPRIATE**

**1. Applicable Statutes Contemplate a Writ of Review Process**

DD-1 has conceded that it "intended" at all times to adopt benefit assessment resolutions pursuant to RCW 85.18. DD-1 should have argued the statute, rather than the common law.

RCW 85.18.100 reads in pertinent part:

**"RCW 85.18.100 Review to Superior Court—How taken**

The decision of the board of commissioners upon any objection made within the time and in the manner prescribed may be reviewed by the superior court of the county wherein the property in question is located, upon appeal thereto taken in the following manner: Any person aggrieved must file his **petition for writ of review. . .**" [emphasis added]

This statutory section goes on to say that the court "shall forthwith grant such petition if correct as to form and content." DD-1 raises only the single question of whether a statutory writ of review is appropriate to review the District's RCW 85.18 assessment decisions, and raises no other issues. The statute could not be more explicit. The writ of review process is not only appropriate, it is the only way to bring an appeal of a

benefit decision made pursuant to that statute. RCW 85.05 is in accord.  
RCW 85.05.076.

2. **De novo Review Mandated By Statute Is Inconsistent with Appellant’s “legislative” arguments.**

**“RCW 85.076. Resolution to construct drainage system—  
Appeal to supreme court—trial de novo**

... The hearing in said superior court shall be *de novo* and the superior court shall have power and authority to reverse or modify the determination of the commissioners and to certify the result of its determination to the county auditor and *shall have full power and authority to do anything in the premises necessary to adjust the assessment upon the lots or parcels of land involved in the appeal in accordance with the benefits.*” [emphasis by italics added]

**“RCW 85.18.100 Review by superior court — How taken.**

The decision of the board of commissioners upon any objection made within the time and in the manner prescribed may be reviewed by the superior court of the county wherein the property in question is located, upon appeal thereto taken in the following manner: Any person aggrieved must *file his petition for writ of review* with the clerk of the superior court.....” (emphasis by italics added)

**“RCW 85.18.130. Review by superior court—scope—  
judgment**

At the *trial* the *court shall determine whether the board has acted within its discretion and has correctly construed and applied the law.* If it finds that it has, the finding of the board shall be affirmed; otherwise it shall be reversed or modified. The *judgment of the court may change, confirm, correct, or modify the values* of the property in question as shown upon the roll, and a certified copy thereof shall be filed with the county auditor, who shall change, modify or correct as and if required.” (emphasis by italics added)

**“RCW 85.18.140. Appellate review**

Appellate review may be sought as in other civil cases: *Provided however*, That review must be sought within fifteen days after the date of entry of the judgment of the superior court. The *Supreme court or the court of appeals, on such appeal, may change, confirm, correct or modify the values of the property in question as shown upon the roll*. A certified copy of any judgment of the supreme court or the court of appeals shall be filed with the county auditor.....” (emphasis by italics added)

The legislature could not have been more explicit: diking district commissioners “construe and apply” the law when making benefit assessments, review by writ of that decision is appropriate, and review is *de novo*. These decisions are quasi-judicial, not legislative.

The construction and interpretation of statutes and the provisions of the constitution is a judicial function. *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 415, 63 P.2d 397 (1936)

The legislature did not—and could not—deprive the court of its obligation to review the statutory or constitutional validity of a special assessment. *Scott Paper Co. v. Anacortes*, 90 Wn.2d 19, 33, 578 P.2d 1292 (1978).

**3. Courts Historically Made Assessment Decisions**

Washington courts have always had jurisdiction to establish special benefit assessments within diking districts. RCW 85.05.090-.120 Though the power is not used as much as it historically was, that power still exists. The same statutes provide for robust judicial involvement in reviewing diking district assessment decisions at both the superior court and appellate court levels. The DD-1 decision clearly satisfies the four-

part test laid out in *Williams v. Seattle School District*, 97 Wn.2d 215, 218-19, 643 P.2d 426, 429 (1982), to wit:

- (1) Whether a court could have been charged in the first instance with making the agency’s decision — it was;
- (2) Whether the decision is one which historically has been performed by courts — it has;
- (3) Whether the decision involves the application of existing law to past or present facts — it does; and
- (4) Whether the decision resembles those that are the ordinary business of courts as opposed to those of legislators or administrators — it does.

Even DD-1 admits [at page 8 of DD-1’s Opening Brief] that the process of *applying* a ‘law’ to particular property is “quasi-judicial.” Of course, that is exactly what DD-1 does when it determines benefits, and a statutory writ was appropriate to review that decision.

**4. DD-1 Unreasonably Splits Hairs Between “legislative” and “quasi-judicial” where functions are commingled**

The applicable statutes require a single notice and a unified single hearing to decide all assessment issues. Selection of RCW 85.18 as the “method” cannot be divorced from the “assessment,” as the statute contemplates a single unified and mutually dependent decision on both points following a hearing. RCW 85.18.030

Similarly, RCW 85.05.074 requires that a decision to construct a drainage system be combined with the decision on how to finance — how to assess benefits. Just as applicable statutes contemplate a single quasi-

judicial hearing to decide all issues, RCW 85.18.100 contemplates a single review by writ of review. The same is true of the decision to construct and assess benefits for a drainage system. RCW 85.05.074.

Even where notice and hearing are provided, all applicable statutes contemplate a single review proceeding by writ on the merits. RCW 85.18.100.

**5. DD-1 Decision To Ignore The Law Was Judicial, Not “Legislative.”**

When one understands that the request for review by writ was triggered because DD-1 had deprived CSUBC of notice and hearings . . . and statutory appeal rights as well. . . DD-1’s effort to hide behind a “legislative” shield crumbles. Choosing to ignore statutory and constitutional procedural mandates does not constitute a “legislative” decision. The trial court held — as this Court must — that DD-1 cannot levy assessments without complying with statutory notice and hearing requirements. Questions pertaining to constitutional limitations and statutory authority are issues of law to be determined *de novo* by the courts. *Okeson v. City of Seattle*, 150 Wn.2d 540, 548-49, 78 P.3d 1279 (2003)

Deprivation of notice and an opportunity to be heard prior to assessing a burden against property violates fundamental due process rights protected by the Washington State Constitution. *Pratt v. Water Dist. No. 79*, 58 Wn.2d 420, 363 P.2d 816 (1961). *Heavens v. King County*, 66 Wn.2d 558, 404 P.2d 453 (1965), The same rights are guaranteed by the United States Constitution. *Londoner v. Denver*, 210 U.S. 373, 28 S.Ct. 708, 52 L.Ed. 1103 (1908). In fact, until notice and an

opportunity to be heard is provided to property owners, no assessment can be considered levied, and cannot be collected. *Cowlitz County v. Johnson*, 2 Wn.2d 497, 503, 98 P.2d 644 (1940).

Even if DD-1's decisions were "legislative," the courts still retain power to review it if the action was illegal or arbitrary and capricious. Legislative action is arbitrary and capricious if it is a willful and unreasonable action, without consideration and regard for facts or circumstances. *Palermo at Lakeland, LLC v. City of Bonney Lake*, 147 Wn.App. 64, 76, 193 P.3d 168 (2008)

The record in this case shows that DD-1 willfully and capriciously deprived its property owners of statutory and constitutional notice and hearing rights. The primary usefulness of DD-1's "1986 resolution" [at Appendix ("K") hereto] is to demonstrate in spades that DD-1 was aware of the requirements for notice and hearing, and that it was aware of the need to consider evidence and enter findings-of-fact supported by evidence. The record also shows that DD-1 was aware from its 1931 resolution [at Appendix ("C") hereto] of the parallel requirements due property owners prior to entering upon construction of any system of drainage or assessing for its cost. The 2008 through 2010 DD-1 Resolutions [at Appendices ("I") and ("J")] challenged and invalidated in this case are obviously the result of arbitrary and capricious conduct by DD-1, and must be reviewed whether or not they are considered "legislative."

6. **A Writ is Also Appropriate Pursuant to the Court's Inherent Jurisdiction**

This is also an appropriate case for exercise by the trial court and

this Court of inherent power contained in Washington Constitution Article Four to review arbitrary and capricious or illegal action by writ. Even if the “decision” below were considered a “legislative” decision, it would still be subject to inherent judicial review jurisdiction.

Even if no statutory right of appeal is created by the legislature, the courts still possess inherent jurisdiction to review either administrative or “legislative” decisions that are illegal. *Williams v. Seattle School District*, supra at page 220; *Ker-Belmark Constructin Company v. City of Marysville*, 36 Wash.App. 370, 674 P.2d 684 (1984). While a showing that a deprivation of a “fundamental” right is not necessary, the courts should be more likely to utilize its inherent review power where such important rights are implicated. *Williams v. Seattle School District*, supra at page 221-223.

As indicated in paragraph 5 above, the decisions appealed do deprive CSUBC (and its members) of fundamental due process rights, in addition to the fundamental statutory rights included in RCW 85.18 and RCW 85.05.

Constitutional writs should be issued to review illegal agency decisions. *Clark County Public Utility District No. 1 v. Wilkinson*, 139 Wn.2d 840. 991 P.2d 1161 (2001). In the unlikely event that the Court determines that review is not available by statutory writ, it should review the decisions of DD-1 pursuant to its inherent constitutional power.

**C. COMMON LAW GENERALITIES RELIED UPON  
BY APPELLANT DD-1 DO NOT CONTROL OVER  
SPECIFIC STATUTES AND CASE LAW**

The common law cases, especially the out of state cases cited in DD-1's Opening Brief cannot control the specific statutory requirements and the applicable Washington and Federal cases cited in Parts "B" above. Relying upon generalities [such as citing to cases and treatises concerning the limits of initiative/referendum power] while ignoring applicable statutory and case law does not get DD-1 where it seeks to be, i.e., to be shielded from the power of the Courts to protect the property owners against illegal government agency action.

**D. APPELLANT'S "INVALIDATION" ARGUMENTS FAIL**

**1. Diking District Seeks Relief Beyond the Pleadings and Beyond the Record**

DD-1 does not explain in its Opening Brief . . . as it also did not explain in its Partial Summary Judgment Motion below . . . exactly what relief it expects the Court to give regarding DD-1's "1986 Resolution." DD-1 appears to be seeking a declaratory judgment not sought in any pleadings as required by RCW 7.24, and without meeting the many RCW 7.24 requirements. What DD-1 seeks is an improper "advisory" opinion. *Seattle First Nat. Bank v. Crosby*, 42 Wn.2d 234, 254 P.2d 403 (1953); *Walker v. Monroe*, 124 Wn.2d 402, 879 P.2d 920 (1994).

Contrary to DD-1's "Statement of The Case," CSUBC did not file pleadings putting a "1986 resolution" at issue, and neither did DD-1. For that matter, DD-1 did not file any pleadings, except to make and respond

to motions, at which time it “slipped” the 1986 Resolution in attached to a declaration of legal counsel [over CSUBC’s objections].

In its Opening Brief, DD-1 cites a number of cases for the proposition that “repealing” legislation, if found to be invalid, does not repeal the earlier legislation, which survives. *Palermo v. City of Bonney Lake*, supra; *Bank of Fairfield v. Spokane County*, 173 Wash. 145, 22 P.2d 646 (1933); *Texas Co. v. Cohn*, 8 Wn.2d 360, 112 P.2d 522 (1941); *Boeing Co. v. State of Washington*, 74 Wn.2d 82, 442 P.2d 970 (1968).

A number of differences — other than the obvious legislative nature of the “repeals” in those cases — exist. In each case:

- the governing body behaved as though its prior enactments survived;
- the legislative body had taken steps to enforce its prior enactments;
- the validity of the prior enactment was at issue in the case on the merits and was established;
- the prior enactment was complete and whole;
- the actual litigation over the question of enforcing the prior enactment was involved; and
- clear relief was requested.

2. **The “1986 Resolution” is Not Complete and Is Not “Legislation”**

DD-1’s record does not supply basic requirements:

(a) **The “1986 roll” Is Not “Legislation”**

As argued in Part "B" above, the benefit assessment cannot be considered “legislation” in the State of Washington. DD-1 admits as much

at page 8 of its Opening Brief where it acknowledges that the application of the assessment to particular property is quasi-judicial. That is exactly what the 2008 and 2010 DD-1 resolutions do, by their terms. They apply a statutory assessment alternative to properties owned by CSUBC members and other property owners included within the “benefit area.”

(b) **Validity of the “1986 Resolution” Is Not Established By The Record:**

The version of DD-1’s “1986 resolution” included in the record is not complete. DD-1 provides no record to establish the critical missing parts — the benefit roll allegedly identified and adopted in that resolution, the benefitted area map, and copies of the certification — all of which are required, but are missing parts before an RCW 85.18 resolution is complete. Without the benefit roll, for example, it is impossible to determine what properties are ostensibly subject to DD-1’s 1986 “resolution.” That is, of course, a statutory requirement. RCW 85.18.020-030. The missing 1986 roll was required to have been certified to the Island County Auditor. If, and only if, the certification occurs, the adopted roll can serve as the “base of benefits” for future purposes. RCW 85.18.080.

The “1986 Resolution” is, on its face, applicable only to the gravity flow / tidal gate drainage system. DD-1 has never amended the “1986 resolution” to broaden it to include the pumping drainage system subsequently constructed. [See Appendix (“K”)]

In fact, DD-1’s Opening Brief does not even argue for validity of the “1986 resolution” so much as show that the trial court first “bought” the argument [CP 09-2 CP 60, page 472-473] before rejecting that

argument in the Final Judgments the trial court entered in both cases. [09-2 CP-41, page 20-23]; [10-2 CP-21, page 20-22]

(c) **The “1986 Resolution” Cannot Adopt 2008 Or Later Assessed Values:**

DD-1 has produced a record in Island County Superior Court Case No. 10-2-00754-1, that shows that it is levying benefit assessments measured by current year’s assessed values, not according to the “1986” base benefit. [Compare Appendices (“I”) and (“J”) with Appendix (“K”)] See also the Declaration of Robert Winqvist [at 09-2 CP- 19, and CP-11]; [10-2 CP-10 and CP 13].

RCW 85.18.060 prohibits DD-1 from changing its base benefits without first providing notice and a new hearing prior to adopting an amended, changed or supplemental roll affecting such improved properties. DD-1’s 1986 resolution cannot support its actual levy assessments, and the Court cannot allow it to avoid the required statutory amendment process by providing an advisory opinion that sanctifies DD-1’s 1986 resolution.

(d) **DD-1 Is Not Entitled To An Order On this Issue:**

DD-1’s Opening Brief does not describe the relief it expects and provides no authority for such advisory relief as its brief implies. What’s worse, DD-1 needs no “order.” Just as the government entities in *Palermo v. City of Bonney Lake*, *supra*; *Bank of Fairfield v. Spokane County*, *supra*; *Texas Co. v. Cohn*, *supra*; and *Boeing Co. v. State*, *supra*, moved on to utilize their “revived” authority, DD-1 must be required to do the same.

If its “1986 resolution” actually controls present assessments, DD-1 needs no court order. The issue may or may not arise, but if it does, all property owners — including those not parties to this dispute — should be able to argue based on then existing facts, uncluttered by an advisory opinion.

A dispute over a present application of the “1986 resolution,” or some modified form of it, will not be justiciable until such time as DD-1 acts to impose it. Until then, a dispute over some form of the “1986 resolution” cannot be considered justiciable because it cannot meet the 4-part test for justiciability, to wit: there must be (1) an existing dispute; (2) parties with genuine opposing interests, (3) involving direct and substantial interest, and (4) a decision that will be final and conclusive. *Walker v. Munro*, supra. (1994)

**(e) The “Invalidity Revival” Stops in 2006, Not 1986**

The doctrine asserted by DD-1 does not deliver it back to the perceived safety of the “1986 resolution.” It would get them back to the law as it existed at the time of invalidation. That is the DD-1’s June 8, 2006 resolution to operate under RCW 85.38.140-170. [see Appendix (“G”)]

Moreover, the doctrine applies only to legislation that has been “invalidated.” There are numerous DD-1 special benefit assessment resolutions between 1986 and 2008, none of which were ever invalidated. [see Appendices (“D”), (“H”), (“I”), and (“J”)]

**VII. CONCLUSION TO CSUBC's RESPONSE**

DD-1 has not provided the Court with adequate authority or an

adequate record to establish that its partial summary judgment motion should have been, or should be, granted. It has not provided the Court with adequate authority or record to establish that the trial court's granting of CSUBC's summary judgment motion should have been, or should be, reversed. Appellant DD-1's Appeal should be dismissed. It has provided no record nor authority from which the Court can enter an advisory opinion. DD-1's appeal should be dismissed.

**RESPONDENT / CROSS APPELLANT CSUBC'S  
OPENING BRIEF**

**I. INTRODUCTION**

Respondents / Cross Appellants CSUBC and Winquists will utilize in their Opening Brief the same protocols and comments contained in the Introduction to their Responding Brief above.

**II. ASSIGNMENTS OF ERROR**

**Assignment of Error No. 1:** The trial Court erred by denying CSUBC's request for a statutory or constitutional writ of review to review DD-1's contract decision to undertake construction of a drainage system.

**Assignment of Error No. 2:** The trial court erred in dismissing by summary judgment CSUBC's declaratory judgment claim that the Diking District contract to construct a drainage system was *ultra vires* and void.

**III. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

**Issue No. 1:** Does RCW 85.05.070-85.05.079 limit the power of a diking district to construct any drainage system?

**Issue No. 2: Does a contract committing a diking district to construct a drainage system constitute an RCW 85.05.071 “Entering Upon Construction of Any System of Drainage?”**

**Issue No. 3: Was DD-1 statutorily required to give property owners notice and a hearing prior to entering into a construction contract or constructing a drainage improvement?**

**Issue No. 4: Was DD-1’s contract committing to construct and operate a drainage system a void *ultra vires* act?**

**Issue No. 5: Should the courts review such acts by Writ of Review or Declaratory Judgment when requested by property owners who have been deprived of statutory and constitutional rights?**

#### **IV. STATEMENT OF THE CASE**

CSUBC relies upon the STATEMENT OF THE CASE included in its Responding Brief above and makes the following additions applicable solely to this Cross Appeal but supplements it herein.

CSUBC’s petitions below asked the trial court to issue a statutory or constitutional writ of certiorari to review a 2004 contract [amended in 2006] between DD-1, Respondent Island County, and the Respondent Golf Club to construct a drainage system.

CSUBC also asked the trial court to issue a declaratory judgment declaring that contract *ultra vires*. [09-2 CP-69, page 716]; [10-2 CP-4 , page 446] The trial court declined to issue a writ to review that action. [09-2 CP-, page 716]; [10-2 CP-4 , page 446]

It is not disputed that DD-1 did not provide RCW 85.05.071 or RCW 85.18.030 notice or hearing.

## V. ARGUMENT

### A. STANDARD OF REVIEW

The standard of review from a trial court summary judgment ruling is *de novo* and facts are viewed most favorably to the non-moving party. *Touchet Valley Grain Growers, Inc. v. Opp & Seibold General Const., Inc.*, supra. ( 1992).

Issues of constitutional limitations and statutory authority are issues of law to be determined *de novo* on appeal. *Williams v. Seattle School District*, supra. (2003)

### B. THE 2004 CONTRACT IS ULTRA VIRES and VOID

The statutory and constitutional requirements of notice and hearing due a property owner prior to levying special benefit assessments against him or his property have been argued extensively above. The issue argued here, though similar, is distinct — going to the power, or lack of power, of a diking district to enter into a contract requiring the construction of a drainage system. Like almost all of the issues involved in this appeal, this issue is statutory in nature.

**“RCW 85.05.071 Resolution to construct drainage system.**

***Before entering upon the construction of any system of drainage*** for the land situated within such diking district, the commissioners thereof shall adopt a resolution which shall contain a brief and general description of the proposed improvement, a statement that the costs thereof shall be paid by warrants drawn and payable in like manner as for the original

construction of the dikes of such district, and fixing a time and place within such district for hearing objections to such proposed improvement or for the proposed method of paying the costs thereof. The time so fixed shall be not less than thirty days or more than sixty days from the date said resolution shall be adopted. Such resolution may be adopted by the commissioners upon their own motion and it shall be their duty to adopt such resolution at any time when a petition signed by the owners of sixty percent or more of the acreage within such diking district is presented, requesting them to do so.” (emphasis by italics added)

**“RCW 85.05.072 Resolution to construct drainage system — Notice of hearing.**

*Notice of the hearing shall be given by posting in three public places* within the district a true copy of the resolution signed by the commissioners of the diking district and attested with the seal thereof, which notice shall be posted for at least ten days prior to the day fixed in the resolution for the hearing. *Notice shall also be published at least once in a newspaper of general circulation in the district at least ten days before the date of the hearing.*” (emphasis by italics added)

It should be noted at this point that the legislature created an optional method of levying assessments against inundated properties. Chapter 85.18 RCW The many requirements of that statute have been thoroughly discussed above. Also, several other notice and hearing requirements of Chapter 85.18 RCW, Chapter 85.38 RCW and of both the Washington State and U.S. Constitutions have been discussed above. This argument focuses narrowly on the single issue of the *drainage system* authority imposed by the state legislature on *diking districts*.

It should also be noted that, although the adoption of Chapter 85.38 RCW [Laws 1985, ch. 396] affected the repeal or amendment of several

sections of RCW 85.05, it did not repeal these sections limiting the authority of diking districts to enter into construction of any drainage system. Those provisions still stand as continuing limitations on the power of diking districts, where drainage systems are being considered. Even where a diking district chooses to assess benefits pursuant to RCW 85.18 or RCW 85.38, RCW 85.05.071 continues to operate as a limitation on the diking district's drainage system authority.

Repeals by implication are not favored, and a general statute does not repeal a special statute, unless plain legislative intent to repeal is expressed. *Bank of Fairfield v. Spokane Co.*, supra. (1933)

Obviously, the fact that Laws 1985, ch. 396 expressly repealed and amended some provisions of RCW 85.05, while leaving those applicable to this issue unaffected, constitutes persuasive — if not conclusive — evidence of legislative intent: the legislature intended that RCW 85.05.070 through RCW 85.05.079 would continue to limit the power of diking districts to construct any drainage system.

A local government's power to levy special assessments or taxes depends upon the existence of statutory delegation of that power. Troutman, *Assessments in Washington*, 40 WL Rev. 100 (1965)

That rule necessarily includes statutorily-imposed limitations on the power delegated by the legislature. In the case of the delegation to a diking district to construct a drainage system, the diking district has no authority to construct that which is not preceded by the statutorily-required hearing. RCW 85.05.071.

It is not entirely clear what the trial court's reasoning was in denying CSUBC's request for review by writ of DD-1's failure to provide the hearing, because the statute both requires the hearing and contemplates judicial review of RCW 85.05.070-.079 decisions of diking districts. Moreover, the combined hearing to decide to construct and how to pay for the drainage system is a very serious right.

When hearing rights are denied, important citizen rights fall. When a property owner is provided the right to challenge a benefit assessment together with the drainage system, in this instance he raises a question of fact by providing expert testimony. *Bellevue Associates v. Bellevue*, 108 Wn.2d 671, 741 P.2d 993 (1987) The same expert can be utilized to challenge both the project and the proposed assessment in the combined hearing.

Until challenged at the hearing, a "presumption" exists that the assessment is valid, but once it is challenged, the burden of proof switches to the local government to prove the existence of a benefit by competent evidence to establish an increase in the fair market value of the owner's property after creation of the benefit, as opposed to its value before creation of the benefit. *Bellevue Plaza v. Bellevue*, 121 Wn.2d 397, 403 P.2d 662 (1993).

This is why conducting the RCW 85.05.071 hearing is so important, and why the legislature made it a pre-condition to the exercise by a diking district of the power to construct any drainage system.

But, whether or not review occurs by statutory or constitutional

writ, the issue should still be determined pursuant to the requested declaratory judgment challenging the *ultra vires* contract. [09-2 CP-69, page 716]; [10-2 CP-4 , page 446]

One who is specially affected by an act or omission of a local government in levying a special assessment or tax has standing to bring a declaratory judgment challenge. *Heavens v. King Co. Library District*, supra. (1965)

To the extent that the trial court’s “writ” decision affected the declaratory judgment claim at all, it establishes that CSUBC had exhausted any potential remedies but that none existed, and that they have satisfied both standing and exhaustion requirements. *Reeder v. King County*, 57 Wn.2d 563, 358 P.2d 810 (1961)

Relief declaring the 2004 contract void as an *ultra vires* act is required by the failure of DD-1 to meet statutory obligations imposed upon the exercise of that power. It matters little whether the remedy is imposed pursuant to statutory writ, a constitutional writ, or a declaratory judgment. What matters is that DD-1, Island County and the Golf Club not be allowed the benefits of a contract that DD-1 had no authority to make.

## **VI. CONCLUSION**

Appellant / Cross Respondent Diking District No. 1 of Island County, Respondent / Cross Respondent Island County, and Respondent / Cross Respondent Useless Bay Golf and Country Club, Inc. made the 2004 contract to pass drainage system costs over to DD-1 and a handful

of its property owners without satisfying state law requiring DD-1 to first hold public hearings to approve and pay for the drainage system.

These parties knew and/or should have known of the limits on diking district power to construct such a system. In fact, DD-1 produced a “1986 resolution” [at Appendix (“K”)] and a “1931 resolution” [at Appendix (“C”)] that show that it was well aware of the statutory constraints on its drainage powers.

The contract exceeded DD-1’s delegated power. An Order should be entered quashing that contract.

DATED this 24th day of February 2012.

ROWLEY & KLAUSER, LLP

  
Robert C. Rowley, WSBA #4765 / James J. Klauser, WSBA #27530  
Co-counsel to Respondents / Cross Appellants  
Citizens in Support of Useless Bay Community and Winquists

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## **APPENDIX "A"**

1914 Order creating Diking District-1

**APPENDIX "A"**

.....  
In the matter of the Petition \*  
\*  
of \*  
\*  
HERBERT WEEDIN, at al., for the \*  
formation of a diking district, \*  
in Island County, Washington. \*  
.....

O R D E R .

Now on this 16th day of March, A.D. 1914, the petition of Herbert Weedin and others for the formation and establishment of a diking district out of that portion of Island County, State of Washington, hereinafter described, coming on regularly for hearing before the Board of County Commissioners of Island County, State of Washington, and after considering all the evidence adduced upon such hearing said Board of County Commissioners do find the following facts:-

I.

That said petition, together with the notice of the time and place of the hearing thereon, was published for two weeks in two successive issues of The Langley Islander, a weekly newspaper printed, published and of general circulation in Island County, State of Washington, and in all respects in accordance with the requirements of the statute in such case made and provided.

II.

That the portion of Island County, State of Washington, hereinafter described, contains 5 or more inhabitants, and that 28 freeholders reside within the boundaries of said proposed district, and that ~~more than~~ the owners of a majority of the acreage of said portion of said Island County desire that the same be organized into a diking district under the laws of the State of Washington and that the land included within the boundaries of said proposed district, <sup>is</sup> low marsh land and subject to overflow from and to be covered by sea-water, and that, if a proper dike is constructed about the same, said land will not be subject to overflow and will

come highly productive and the value thereof will be very materially increased.

III.

That the boundaries of said Diking District, which the petitioners herein desire to have established and formed, are hereby established and defined as follows, to-wit:-

Commencing at the Northeast corner of Section 18, in Township North of Range 3 East W.M., in Island County, State of Washington, running thence South to the Northeast corner of the Southeast quarter of the Southeast quarter of said section 18; Thence West to Northwest corner of the Southeast quarter of the Southeast quarter of said Section 18; Thence South to the Northwest corner of Lot 4, Section 19, township and Range aforesaid; Thence East to the East boundary line of said Section 19; Thence South to the Southeast corner of said Lot 4; Thence West to the meander line of said Lot 4; Thence in a Northwesterly direction, following the meander line, to extreme westerly point of Lot 1, in Section 19, aforesaid; Thence in a northerly direction to the meander corner of Lot 4 in said Section 18, on the West boundary thereof; Thence North, along the West boundary line of said Section 18, to the Southwest corner of the North half of the Northwest quarter of the Northwest quarter of Section 18 aforesaid; Thence East to the Southeast corner of the North half of the Northwest quarter of the Northwest quarter of said Section 18; Thence North to the North boundary line of said section 18; Thence East to the Northeast corner of the Northwest quarter of said Section 18; Thence East 50 rods; Thence North 30 rods; thence East 50 rods; thence South 30 rods, and thence East to the point of commencement, containing about 743.64 acres of land.

IV.

That the number of acres of land that will be benefited by the proposed system of dikes, as ascertained and determined by the Board of County Commissioners, are 460 acres.

V.

That the names of all the freeholders, residing in the ~~limits~~ proposed diking district and within the boundaries as hereinbefore described are as follows, to-wit:-

Ohlwee and Mary Kohlwee, his wife; T. E. Blankenburg; Emil Gabelin  
Emilie Gabelein, his wife; Arthur Gabelein and Minnie Gabelein,  
wife; Thomas Johns; A. F. Birkenholz; C. E. Ackerman and Mary Acker-  
his wife; Richard Schumacher and Dora Schumacher, his wife;  
Schumacher and Julia Schumacher, his wife; W. J. Weedin and Mae  
in, his wife; Rhoda B. Cram and Bernie Uram, her husband; Herbert  
in; Ella May Melinday and C. G. Melinday, her husband, and Adolph  
r, and *Jul Pinnarera, Martin Pinnarera, Ernest Miller  
a Meier and J. E. Hofer*

That said system of diking shall consist of a dike of sufficient  
dimensions to protect the land included therein from overflow and  
the route over which said dike shall be constructed and the termini  
thereof shall be as near as practicable as follows, to-wit:-

Commencing at the point of intersection of the South boundary  
line of the Southeast quarter of the Northeast quarter of Section  
18, Township 29 North, of Range 3 East W.M., with the meander line  
along the waters of Useless Bay; Thence in a Northwesterly direction  
along the sand spit for a distance of approximately four thousand  
feet; Thence North across said sand spit to the shore of Deer lagoon;  
Thence in a northerly direction across the channel of Deer Lagoon  
to a point not more than three hundred feet West from the point of  
the bluff on Lot 4, Section 18, Township 29 North, Range 3 East.

#### VII.

That said proposed system of diking, and the formation and esta-  
blishment of such diking district, will be conducive to the public  
health, welfare and convenience, increase the public revenue, and be  
of special benefit to the majority of the land included within the  
said boundaries of said proposed district hereby established.

#### VIII.

That the petitioners who signed said petition are the owners  
of at least a majority of the acreage of the land included within  
the said proposed diking district.

IT IS THEREFORE ORDERED by the Board of County Commissioners  
of Island County, State of Washington, in regular meeting assembled  
that these findings be entered on the records of said Board.

IT IS FURTHER ORDERED that the boundaries of said proposed  
Diking District be and the same are hereby established and defined  
as in paragraph III of said findings described; and that the name  
of said proposed Diking District be, and the said district shall  
hereafter be known and designated as, Diking District No. 1 of the  
County of Island of the State of Washington.

VI.

That said system of diking shall consist of a dike of sufficient dimensions to protect the land included therein from overflow and the route over which said dike shall be constructed and the termini thereof shall be as near as practicable as follows, to-wit:-

Commencing at the point of intersection of the South boundary line of the Southeast quarter of the Northeast quarter of Section 19, Township 29 North, of Range 3 East W.M., with the meander line along the waters of Useless Bay; Thence in a Northwesterly direction along the sand spit for a distance of approximately four thousand feet; Thence North across said sand spit to the shore of Deer Lagoon; thence in a northerly direction across the channel of Deer Lagoon to a point not more than three hundred feet West from the point of the bluff on Lot 4, Section 18, Township 29, Range North, Range 3 East.

VII.

That said proposed system of diking, and the formation and establishment of such diking district, will be conducive to the public health, welfare and convenience, increase the public revenue, and be of special benefit to the majority of the land included within the said boundaries of said proposed district hereby established.

VIII.

That the petitioners who signed said petition are the owners of at least a majority of the acreage of the land included within the said proposed diking district.

IT IS THEREFORE ORDERED by the Board of County Commissioners of Island County, State of Washington, in regular meeting assembled that these findings be entered on the records of said Board.

IT IS FURTHER ORDERED that the boundaries of said proposed Diking District be and the same are hereby established and defined as in paragraph III of said findings described; and that the name of said proposed Diking District be, and the said district shall hereafter be known and designated as, Diking District No. 1 of the County of Island of the State of Washington.

IT IS FURTHER ORDERED by said Board of County Commissioners that an election be held in said proposed dike district for the purpose of determining whether the same shall be organized as a dike district under the provisions of Chapter CXVII of the Session laws of the year 1895, of the laws of the State of Washington, and the acts and parts of acts amendatory thereof and supplemental thereto, and for the further purpose of choosing at such election three commissioners who shall be known and designated as "Dike Commissioners" for said district proposed to be organized. That said election be held on the 4<sup>th</sup> day of April, A.D. 1914, at T. E. Hoyer, Residence within the limits of said proposed dike district, and that at said election the polls be open from 9 o'clock A.M. to 7 o'clock P.M., and that the voters at said election shall cast ballots which shall contain the words "Diking District, yes" or "Diking District, no" and also the names of the persons voted for for commissioners of said Diking District.

IT IS FURTHER ORDERED that Thomas Johns and Wm. Hollen be, and they hereby are, appointed judges for said election, and that Ernest Thomas be, and he hereby is, appointed inspector for said election, and that Janfer W. W. W. W. and T. E. Hoyer be, and they hereby are, appointed Clerks for said election.

It is Further Ordered that notice of said election be given in the manner required by law.

BOARD OF COUNTY COMMISSIONERS  
ISLAND COUNTY, WASHINGTON:

W. F. Braucher  
Chairman.  
E. Power  
S. J. Barron

Test:

A. H. Barron  
County Auditor and Clerk of  
the Board.

## **APPENDIX "B"**

RCW 85.09.090, RCW 85.05.100, RCW 85.05.110, and  
RCW 85.05.120

**APPENDIX "B"**

### **RCW 85.05.090 Petition for improvement -- Contents.**

Whenever it is desired to prosecute the construction of a system of dikes within said district, said district, by and through its board of commissioners, shall file a petition in the superior court of the county in which said district is located, setting forth therein the route over which the same is to be constructed, with a complete description thereof, together with specifications for its construction, with all necessary plats and plans thereof, together with the estimated cost of such proposed improvement, showing therein the names of the landowners whose lands are to be benefited by such proposed improvement; the number of acres owned by each landowner, and the maximum amount of benefits per acre to be derived by each landowner set forth therein from the construction of said proposed improvement, and that the same will be conducive to the public health, convenience and welfare, and increase the value of all of said property for purposes of public revenue. Said petition shall further set forth the names of the landowners through whose land the right-of-way is desired for the construction of said dikes; the amount of land necessary to be taken therefor, and an estimate of the value of said lands so sought to be taken for such right-of-way, and the damages sustained by any person or corporation interested therein, if any, by reason of such appropriation, irrespective of the benefits to be derived by such landowners by reason of the construction of said system. Such estimate shall be made, respectively, to each person through whose land said right-of-way is sought to be appropriated. Said petition shall set forth as defendants therein all the persons or corporations to be benefited by said improvement, and all persons or corporations through whose land the right-of-way is sought to be appropriated, and all persons or corporations having any interest therein, as mortgagee or otherwise, appearing of record, and shall set forth that said proposed system of dikes is necessary for the protection of all the lands from overflow described in said petition, and that all lands sought to be appropriated for said right-of-way are necessary to be used as a right-of-way in the construction and maintenance of said improvements; and when the proposed improvement will protect or benefit the whole or any part of any public or corporate road or railroad, so that the traveled track or roadbed thereof will be improved by the construction of said dikes, such fact shall be set forth in said petition, and such public or private corporations owning said road or railroad shall be made parties defendant therein, and the maximum amount of benefits to be derived from such proposed improvement shall be estimated in said petition against said road or railroad.

[1895 c 117 § 9; RRS § 4258. Formerly RCW 85.04.050, part.]

### **RCW 85.05.100**

#### **Petition for improvement -- Employment of assistants -- Compensation as costs in suits.**

In the preparation of the facts and data to be inserted in said petition and filed therewith for the purpose of presenting the matter to the said superior court, the board of commissioners of said diking district may employ one or more good and competent surveyors and draughtsmen to assist them in compiling data required to be presented to the court with said petition as hereinbefore provided, and such legal assistance as may be necessary, with full power to bind said district for the compensation of such assistants or employees employed by them, and such services shall be taxed as costs in the suit.

[1895 c 117 § 10; RRS § 4259. Formerly RCW 85.04.055, part.]

## **RCW 85.05.110**

### **Summons -- Contents -- Service.**

A summons stating briefly the objects of the petition and containing a description of the land, real estate, premises or property sought to be appropriated, and those which it is claimed will be benefited by the improvement, and stating the court wherein the petition is filed, the date of the filing thereof and when the defendants are required to appear (which shall be ten days, exclusive of the day of service, if served within the county in which the petition is pending, and if in any other county, then twenty days after such service, and if served by publication, then within thirty days from the date of the first publication), shall be served on each and every person named therein as owner, encumbrancer, tenant or otherwise interested therein. The summons must be subscribed by the commissioners, or their attorney, running in the name of the state of Washington and directed to the defendants; and service thereof shall be made by delivering a copy of such summons to each of the persons or parties so named therein, if a resident of the state, or in case of the absence of such person or party from his or her usual place of abode, by leaving a copy of the notice at his or her usual place of abode; or in case of a foreign corporation, at its principal place of business in this state with some person of more than sixteen years of age; in case of domestic corporations service shall be made upon the president, secretary or other director or trustee of the corporation; in case of persons under eighteen years of age, on their guardians, or in case no guardian shall have been appointed, then on the person who has the care and custody of the person; in case of idiots, lunatics or insane persons, on their guardian, or in case no guardian shall have been appointed, then on the person in whose care or charge they are found. \*In case the land, real estate, premises or other property sought to be appropriated, or which it is claimed will be benefited by the improvement, is state, tide, school or county land, the summons shall be served on the auditor of the county in which the land, real estate, premises or other property sought to be appropriated, or which it is claimed will be benefited, is situated. In all cases where the owner or person claiming an interest in the real or other property is a nonresident of this state, or where the residence of the owner or person is unknown, and an affidavit of one or more of the commissioners of the district shall be filed that owner or person is a nonresident of this state, or that after diligent inquiry his residence is unknown or cannot be ascertained by such deponent, service may be made by publication thereof in a newspaper of general circulation in the county where such lands are situated once a week for three successive weeks. The publication shall be deemed service upon each nonresident person or persons whose residence is unknown. The summons may be served by any competent person eighteen years of age or over. Due proof of service of the summons by affidavit of the person serving the same, or by the printer's affidavit of publication, shall be filed with the clerk of the court before the court shall proceed to hear the matter. Want of service of the notice shall render the subsequent proceedings void as to the person not served; but all persons or parties having been served with summons as herein provided, either by publication or otherwise, shall be bound by the subsequent proceedings. In all cases not otherwise provided for, service of notice, order and other papers in the proceeding authorized by this chapter may be made as the superior court, or the judge thereof, may direct: PROVIDED, That personal service upon any party outside of this state shall be of like effect as service by publication.

[1985 c 469 § 68; 1971 ex.s. c 292 § 56; 1895 c 117 § 11; RRS § 4260. Formerly RCW 85.04.060, part.]

## **RCW 85.05.120**

### **Appearance of defendants -- Jury -- Verdict -- Decree.**

Any or all of said defendants may appear jointly or separately, and admit or deny the allegations of said petition, and plead any affirmative matter in defense thereof, at the time and place appointed for hearing said petition, or to which the same may have been adjourned. If the court or judge thereof shall have satisfactory proof that all of the defendants in said action have been duly served with said summons, as above provided, and shall be further satisfied by competent proof that said improvement is practicable, and conducive to the public health, welfare and convenience, and will increase the value of said lands for the purpose of public revenue, and that the contemplated use for which the land, real estate, premises or other property sought to be appropriated is really a public use, and that the land, real estate, premises or other property sought to be appropriated are required and necessary for the establishment of said improvement, the court or judge thereof shall cause a jury of twelve qualified persons to be impaneled to assess the damages and benefits as herein provided, if in attendance upon his court; and if not, he may, if satisfied that the public interests require the immediate construction of said improvement, direct the sheriff of his county to summon from the citizens of the county in which said petition is filed as many qualified persons as may be necessary in order to form a jury of twelve persons, unless the parties to the proceedings consent to a less number, such number to be not less than three, and such consent shall be entered by the clerk in the minutes of the trial. If necessary to complete the jury in any case, the sheriff, under direction of the court or judge thereof, shall summon as many qualified persons as may be required to complete the jury from the citizens of the county in which the petition is filed. In case a special jury is summoned, the cost thereof shall be taxed as part of the costs in the proceeding, and paid by the district seeking to appropriate said land, the same as other costs in the case; and no person shall be competent as a juror who is a resident of, or landowner in, the district seeking to appropriate said land. The jurors at such trial shall make in each case a separate assessment of damages which shall result to any person, corporation or company, or to the state, by reason of the appropriation and use of such land, real estate, premises or other property for said improvement, and shall ascertain, determine and award the amount of damages to be paid to said owner or owners, respectively, and to all tenants, incumbrancers and others interested, for the taking or injuriously affecting such land, real estate, premises or other property for the establishment of said improvement; and shall further find the maximum amount of benefits, per acre, to be derived by each of the landowners from the construction of said improvement. And upon a return of the verdict into court, the same shall be recorded as in other cases; whereupon a decree shall be entered in accordance with the verdict so rendered, setting forth all the facts found by the jury, and decreeing that said right-of-way be appropriated, and directing the commissioners of said diking district to draw their warrant on the county treasurer for the amount awarded by the jury to each person, for damages sustained by reason of the establishment of said improvement, payable out of the funds of said diking district.

[1895 c 117 § 12; RRS § 4261. Formerly RCW [85.04.065](#), part.]

## **APPENDIX "C"**

1931 RCW 85.05.07-85.05.076 drainage system  
resolution of Diking District-1

**APPENDIX "C"**

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ASSESSMENTS OF BENEFITS

-0-

The commissioners of Diking District no. 1, of Island County, State of Washington, having heretofore determined that it is necessary and advisable to provide an efficient system of drainage for the land situated in said Diking District; and having, on the 5<sup>th</sup> day of May, A.D. 1931, on their own motion duly made and adopted a Resolution which contains a brief and general description of the proposed improvement, a statement that the cost thereof shall be paid by warrant drawn and payable in like manner for the construction of the dike of said district, and fixing a time and place within said district for hearing objection ~~to~~ said proposed improvements or for the proposed method of paying the costs thereof; and said hearing coming on pursuant to notice thereof heretofore given as required by law, this 18<sup>th</sup> day of June A.D. 1931, at the hour of 10 o'clock A.M. of said day, at Weedin residence, the time and place fixed in and by the aforesaid resolution and set forth in the notice given as aforesaid; and said commissioners having heard and considered all objections to said proposed improvements and the commissioners of said Diking District no. 1, having directed the construction of said improvement; and that the cost thereof shall be paid by assessments on the property benefited by the construction of the dike of said district; and the said commissioners having found and determined that the benefits accruing to each lot or parcel of land in said district from the construction of said drainage system is less than the amount heretofore fixed in the original proceeding for the construction of said dike; they do hereby find and determine that the benefits accruing to each lot or parcel of land in said Diking District no. 1, are as hereinafter set forth; and we do hereby certify the same to the county clerk ( auditor) of Island County, State of Washington, and he is hereby requested to

APPENDIX

"C"

(Page 1 of 13)

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note the same on the transcript of the judgment in cause number 1184 in the office of the clerk of the Superior Court of the State of Washington, for Island County, as required by section 4240 of Remington's Compiled Statutes of the State of Washington; the benefits determined for each lot or parcel of land being as follows,

to wit:-

✓ Tax Lot No. 3, owned by R.C. Mercereau, containing 3.06 acres, described as follows:- beginning at a point 517 feet West and 404 feet South of the NE corner of the NW $\frac{1}{4}$  of the NE $\frac{1}{4}$  of Section 18 and running thence South 388 feet; thence West 660 feet; thence North 342 feet; thence South 21 deg. 9' East 163 feet; thence South 39 deg. 50' East 187 feet; thence North 70 deg. 30' East 166.6 feet; thence North 36 deg. 7' East 222.7 feet and thence North 63 deg. 41' East 218 feet to point of beginning, maximum benefits per acre \$ 6.40.

✓ Tax Lot No. 5, owned by RHODA B. CHASE and E. O. CHASE, her husband, containing 23.44 acres, described as follows:- Beginning 610.5 feet North and 143 feet East of the center of Section 18 and running thence North 3 deg. 34' East 595.5 feet; thence East 1852 feet; thence South 6 deg. 4' East 78.6 feet; thence South 36 deg. West 435.6 feet; thence South 29 deg. 27' West 177 feet; thence West 1555 feet to point of beginning; maximum benefits per acre \$ 6.40.

✓ And also of 2.23 acres described as follows:- Beginning at a point 149 feet South of the W corner of the SW $\frac{1}{4}$  of NE $\frac{1}{4}$  of Sec. 18 and running thence East 185 feet; thence South 3 deg. 34' West 595.5 feet; thence West 143 feet and thence North 5.4 feet to point of beginning, Maximum benefits per acre \$ 6.40.

✓ Tax Lot No. 6, owned by LUTHER NEEDIN and ATHALINA NEEDIN, his wife, containing 24.52 acres described as follows:- Beginning at a point 149 feet South and 185 feet East of the NW corner of the SW $\frac{1}{4}$  of NE $\frac{1}{4}$  of

COPY

Sec. 18 and running thence North 4 deg. 6' East 595.5 feet; thence East 1746 feet; thence South 6 deg. 4' East 600 feet; and thence West 1852 feet to point of beginning; Maximum benefits per acre 6.40

✓ Also of 2.82 acres described as follows;- Beginning at the SW corner of the NW $\frac{1}{4}$  of the NE $\frac{1}{4}$  of Sec. 18 and running thence South 149 feet; thence East 185 feet; thence North 4 deg. 6' East 595.5 feet; thence West 230 feet and thence South 445 feet to point of beginning; Maximum benefits per acre 6.40.

✓ Tax Lot No. 8, owned by ~~E.B. AGLERMAN and LARRY AGLERMAN~~ <sup>J.R. Schumacher</sup>, his wife, containing 5.69 acres described as follows:- Beginning at a point 241 feet South and 1290 feet East of the center of Section 18 and running thence East 984 feet; thence South 2 deg. 45' West 56.9 feet; thence South 15 deg. 26' East 197 feet; thence West 1005 feet; thence North 6 deg. 14' West 262.5 feet to point of beginning, maximum benefits per acre 6.40.

✓ Also of .86 acre described as follows:- Beginning at a point 241 feet South of center of Section 18 and running thence East 129 feet; thence South 6 deg. 14' East 262.5 feet; thence West 156 feet; and thence North 261 feet to point of beginning, maximum benefits per acre 6.40.

✓ Tax Lot No. 10 & 11 owned by THOMAS J. JOHNS containing 13.12 acres, described as follows:- Beginning 187 feet East of the NW corner of the SW $\frac{1}{4}$  of the SE $\frac{1}{4}$  of Sec. 18 and running thence North 3°41' West 311 feet; thence East 983 feet; thence South 31°8' West 164.3 feet; thence South 6°25' West 297.8 feet; thence South 9°33' East 209.4 feet; thence West 856 feet and thence North 3°41' West 357.5 feet to point of beginning. Maximum benefits per acre 6.40.

✓ also owner of 2.90 acres described as follows:- Beginning at the Southwest corner of the NW $\frac{1}{4}$  of the SE $\frac{1}{4}$  of Section 18 and running thence North 310 feet; thence East 168 feet; thence South 3°41' East 668.6 feet; thence West 208 feet and thence North 358 feet to

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point of beginning. Maximum benefits per acre \$6.40.

Tax Lot No. 12, owned by EMIL GABELEIN and EMILIE GABELEIN, his wife, containing 8.80 acres, described as follows:- Beginning at a point 207 feet East of the  $\frac{1}{4}$  section corner between sections 18 and 19 and running thence North  $3^{\circ} 26'$  East 452.8 feet; thence East 811 feet; thence South  $13^{\circ} 48'$  West 67 feet; thence South  $6^{\circ} 26'$  West 427.9 feet; thence West 776 feet; thence North 39.2 feet to point of beginning. Maximum benefits per acre \$6.40.

also owners of 3.48 acres described as follows:- Beginning at the  $\frac{1}{4}$  section corner between sections 18 and 19 and running thence North 449 feet; thence East 239 feet; thence South  $3^{\circ} 26'$  West 492 feet; thence West 207 feet; thence North 41 feet to point of beginning. Maximum benefits per acre \$6.40.

Tax Lot No. 33, owned by ARTHUR GABELEIN and MINNIE GABELEIN, his wife, containing 6.45 acres described as follows:- Beginning 490 feet North and 239 feet East of the  $\frac{1}{4}$  section corner between sections 18 and 19 running thence North  $3^{\circ} 41'$  West 328.8 feet; thence East 889 feet; thence South  $9^{\circ} 56'$  West 339 feet; thence West 811 feet to point of beginning. Maximum benefits per acre \$6.40.

also owners of 1.71 acres described as follows:- Beginning at a point 523 feet South of the NW corner of the SW  $\frac{1}{4}$  of SE  $\frac{1}{4}$  of Section 18 and running thence East 219 feet; thence South  $3^{\circ} 41'$  East 328.8 feet; thence West 239 feet; and thence North 328 feet to point of beginning. Maximum benefits per acre \$6.40.

Tax Lot No. 14, owned by ~~EMIL GABELEIN and EMILIE GABELEIN, his wife,~~ <sup>Island County</sup> and ~~ARTHUR GABELEIN and MINNIE GABELEIN, his wife,~~ containing 17.35 acres described as follows:- Beginning at the Southeast corner of the NE  $\frac{1}{4}$  of the NW  $\frac{1}{4}$  of Section 18 and running thence North 676 feet; thence West 439 feet; thence North 142 feet; thence South  $41^{\circ} 37'$  West 179.9 feet; thence South  $33^{\circ} 58'$  West 152.6 feet; thence South  $43^{\circ} 59'$  West 143.9 feet;

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thence South 68° West 145.5 feet; thence South 87°36' West 577 feet;  
thence South 360 feet and thence East 1449.6 feet to point of beginning.

Maximum benefits per acre \$ 6.40.

✓ Tax Lot No. 16, owned by G.E. Steiner, containing  
~~also owners of 31.43 acres~~ described as follows:- Beginning at the  
NE corner of Lot 2 in Section 18 and running thence West 710 feet; thence  
South 14°39' West 210.3 feet; thence South 19°59' East 320.8 feet; thence  
South 16°27' West 291.7 feet; thence South 70°2' West 127.4 feet; thence  
South 77°53' West 224.8 feet; thence North 46°21' West 697 feet; thence  
South 368 feet; thence South 38°18' East 268 feet; thence South 15°26' East  
326.6 feet; thence East 1335 feet and thence North 1330 feet;

Maximum benefits per acre \$ 6.40.

✓ Tax Lot No. 17 owned by Island County, containing  
~~also owners of 44.25 acres~~ described as follows:- the Southeast  
quarter of the North east quarter of Section 18. Maximum benefits per  
acre \$ \_\_\_\_\_.

✓ Tax Lot No. 19, owned by G.E. Steiner, containing  
~~Also owners of 17.95 acres~~ described as follows:- Beginning at  
the NE corner of Lot 3 in Section 18 and running thence South 1312 feet;  
thence West 109 feet; thence North 1°17' East 138 feet; thence North  
24°42' West 618.6 feet; thence North 62°19' West 319.4 feet; thence  
North 86°12' West 446.3 feet; thence North 29°6' West 542.06 feet; thence  
East 1335 feet to point of beginning. Maximum benefits per acre 6.40.

also owners of 10.27 acres <sup>Tax Lot 20,</sup> described as follows:- Beginning at  
the NE corner of Lot 4 in Section 18 and running thence South 1312  
feet; thence West 335 feet; thence North 3°26' West 1164 feet; thence  
North 78°42' East 168.6 feet; thence North 46°56' East 154 feet; thence  
North 1°17' East 8.5 feet; and thence East 109 feet to point of  
beginning. Maximum benefits per acre \$ 5.15, being Tax Lot No. 20.

✓ Tax Lot No. 15, owned by ~~Martha E. Lenz and Goldie M. Lenz, his~~  
wife  
husband, containing 3.77 acres described as follows:- Beginning at the  
Southeast corner of Lot 1 in Section 18 and running thence North 360  
feet; thence South 87°36' West 62.5 feet; thence South 71°25' West  
365.4 feet; thence South 55°59' West 340.1 feet; thence South 14°39'

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West 42 feet; and thence East 710 feet to point of beginning. Maximum benefits per acre \$ 6.40.

Tax Lot No. 21, owned by C.T. BERNHOLM and JANE WERNER, his wife, containing <sup>42.17</sup>~~34.74~~ acres described as follows:- the East-half of the SE $\frac{1}{4}$  of the Southwest quarter of Section 18. Maximum benefits per acre \$ 6.00.

Tax Lot No. 23, owned by W.F. BIRKENHOLE, containing 7.80 acres described as follows:- beginning at a point 310 feet North and 168 feet East of the SW corner of the NW  $\frac{1}{4}$  of the SE $\frac{1}{4}$  of Sec. 18 and running thence North 3 deg. 41' West 223 feet; thence North 57°9' East 33.2 feet; thence North 6°14' West 88 feet; thence East 1032 feet; thence South 15°26' East 7.9 feet; thence South 2°44' East 210.4 feet; thence South 31°8' West 129 feet; and thence West 983 feet to point of beginning. Maximum benefits per acre 6.40.

also owner of 1.25 acres described as follows:- beginning at a point 310 feet North of the SW corner of the NW  $\frac{1}{4}$  of the SE $\frac{1}{4}$  of Section 18 and running thence North 327 feet; thence East 173 feet; thence South 6°14' East 88 feet; thence South 57°9' West 33.2 feet; thence South 3°41' East 223 feet; and thence East 168 feet to point of beginning. Maximum benefits per acre \$ 6.40.

Tax Lot No. 24, owned by EDNA MAY MELANDY and E.G. MELANDY, her husband, containing 3 acres described as follows:- beginning at the SW corner of the NE $\frac{1}{4}$  of the NE $\frac{1}{4}$  of the NW $\frac{1}{4}$  of Section 18 and running thence East 642 feet; thence North 265 feet; thence South 79°34' West 655.1 feet; thence South 142 feet to point of beginning; Maximum benefits per acre \$ 6.40.

Tax Lot No. 25, owned by FRED TIERNEY and FLORENCE TIERNEY, his wife, containing 3.28 acres described as follows:- beginning at a point 358 feet south and 208 feet East of the NW corner of the SW $\frac{1}{4}$  of the SE $\frac{1}{4}$  of Section 18 and running thence East 856 feet; thence South 15°9' East 172 feet; thence West 889 feet; and thence North 3°41' West 165.4

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feet to point of beginning; maximum benefits per acre \$ 6.40.

also owners of .81 acres described as follows:- Beginning at a point 358 feet South of the NW corner of the SW $\frac{1}{4}$  of the SE $\frac{1}{4}$  of Section 18 and running thence East 208 feet; thence South 3°41' East 165.4 feet; thence West 219 feet; thence North 165 feet to point of beginning; Maximum benefits per acre \$ 6.40.

✓ Tax Lot No. 26, owned by ~~HENRY MERIER~~ <sup>R.C. Mercereau</sup> and ~~DORA MERIER~~, containing .36 acres described as follows:- beginning at a point 675 feet North and 265 feet East of the SE corner of the NE $\frac{1}{4}$  of the NW $\frac{1}{4}$  of Section 18 and running thence North 207.2 feet; thence North 79°34' East 59.5 feet; thence South 278 feet; thence West 57.8 feet to point of beginning; Maximum benefits per acre \$ 6.40.

✓ Tax Lot No 28, owned by RICHARD SCHUMACHER and DORATHEY SCHUMACHER, his wife, containing 5.63 acres described as follows:- beginning at a point 105 feet East of the center of Section 18 and running thence East 1022 feet; thence South 2°45' West 248.3 feet; thence West 984 feet; thence North 6°14' West 242.8 feet to point of beginning; Maximum benefits per acre \$ 6.40.

✓ also owners of .64 acres described as follows:- Beginning at the center of Section 18 and running thence East 105 feet; thence South 6°14' East 242.8 feet; thence West 129 feet and thence North 241 feet to the point of beginning; maximum benefits per acre \$ 6.40.

✓ Tax Lot No. 29, owned by THEO. STEINKE, containing 3.70 acres described as follows:- beginning at a point 502 feet South and 156 feet East of the center of Section 18 and running thence East 1005 feet; thence South 15°26' East 171.4 feet; thence West 1032 feet; thence North 6°14' West 166 feet; maximum benefits per acre \$ 6.40.

✓ also owner of .64 acres described as follows:- beginning at a point 502 feet South of the center of Section 18 and running thence East 156 feet; thence South 6°14' East 166 feet; thence West 173 feet;

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thence North 165 feet to point of beginning; maximum benefits per acre \$ 6.40.

✓ Tax Lot No. 31, owned by W.J. WENDIN and MRS WENDIN, his wife, containing 11.59 acres, described as follows:- beginning at a point 247.5 feet North and 120 feet East of the center of Section 18 and running thence North 3°34' East 363.8 feet; thence East 1555 feet; thence South 29°27' West 152.8 feet; thence South 57°36' West 386 feet; thence South 32°57' West 13 feet; thence West 1166 feet to point of beginning; maximum benefits per acre \$ 6.40.

✓ also owners of 1.10 acres described as follows:- beginning 247.5 feet North of the center of Section 18 and running thence East 120 feet; thence North 3°34' East 363.8 feet; thence West 143 feet; thence South 363 feet to point of beginning; maximum benefits per acre \$ 6.40.

✓ Tax Lot No. 32, owned by J.R. SCHUMACHER and JULIA SCHUMACHER, his wife, containing 6.21 acres described as follows:- beginning at a point 105 feet East of the center of Section 18 and running thence North 3°34' East 248 feet; thence East 1166 feet; thence South 32°57' West 292.2 feet; thence West 1022 feet to point of beginning; maximum benefits per acre \$ 6.40.

✓ also owners of .54 acres of land described as follows:- beginning at the center of Section 18 and running thence East 105 feet; thence North 3°34' East 248 feet; thence West 120 feet; thence South 247.5 feet to the point of beginning; maximum benefits per acre \$ 6.40.

✓ Tax Lot No. 13, owned by B.F. JEVETT and ALICE L. JEVETT, his wife, containing 2.62 acres described as follows:- beginning at a point 1320 feet West and 15 feet North of the NE corner of Section 18 and running thence West 482 feet; thence North 47°38' East 411 feet; thence North 26°21' East 174.1 feet; thence South 68°25' East 108 feet; thence South 399 feet to the point of beginning; maximum benefits per acre \$ 6.40.

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✓ Tax Lot No. 12, owned by B. O. LUND and JANE DOE LUND, his wife, containing .92 acres described as follows:- beginning at a point 1320 feet West and 15 feet North of the NE corner of Section 18 and running thence North 399 feet; thence South 68°25' East 57 feet; thence South 15°25' East 393.5 feet; thence West 155 feet to the point of beginning. Maximum benefits per acre \$ 6.40.

✓ Tax Lots 2-3-4&7, owned by WILLIAM KOHLWES and Mary KOHLWES, his wife, containing 46.31 acres described as follows:-beginning at a point 41 feet South of the  $\frac{1}{4}$  section corner between Sections 18 and 19 and running thence East 145.7 feet; thence South 994 feet; thence East 998.5 feet; thence South 6°2' East 336.3 feet; thence South 18°40' East 408.5 feet; thence South 7°36' East 825.5 feet; thence North 79°24' West 93 feet; thence North 18°37' West 245.6 feet; thence North 32°27' West 250 feet; thence North 48°53' West 379.8 feet; thence North 146 feet; thence North 64°55' West 500 feet; thence North 72°30' West 1600 feet; thence North 258 feet; thence North 52°31' East 1080 feet; thence North 76°14' East 330 feet to the point of beginning; maximum benefits per acre \$ 5.70 . 5.70

✓ also owners of 9.52 acres described as follows;- beginning at the  $\frac{1}{4}$  corner between sections 18 and 19 and running thence South 41 feet; thence South 76.14' West 330 feet; thence South 52.31' West 1680 feet; thence North 795 feet; thence East 1155.5 feet to point of beginning; maximum benefits per acre \$ 3.03 .

✓ The North 4 acres of Lot No. 68, of Sunlight Beach, owned by C.T. WERNEKE and JANE WERNECKE, his wife, and T.E. HOFER, containing 4 acres and being the North 4 acres of a tract of land described as follows:- Beginning at the N.W. corner of Lot 2 in Section 19 and running thence East 245 feet; thence South 795 feet; thence Westerly along the North boundary of Lots 67, 63, 62, 61, 60, 59, 58 and East half of 57, plat of Sunlight Beach Addition; thence North 3°26' West along dike 740 feet; thence East 335 feet to point of beginning; Maximum benefits per acre, \$6.40 .

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also owners of Lot 1 to 41, inclusive, of Sunlight Beach, in Section 19; maximum benefits per lot, None.

also owners of Lot 58 to 67, inclusive, of Sunlight Beach Addition, in Section 19; maximum benefits per lot None.

✓ Tax Lot No. 11, owned by LOUISA LEMM, containing 6.93 acres described as follows:- beginning at the NW corner of the  $S\frac{1}{2}$  of the  $N\frac{1}{2}$  of the  $NW\frac{1}{2}$  of the  $NE\frac{1}{2}$  of Section 19 and running thence East 901 feet; thence South  $8^{\circ}56'$  East 332.5 feet; thence West 950 feet; thence North 326 feet to point of beginning; maximum benefits per acre  $\$6.40$ .

✓ Tax Lot No. 12, owned by THEO. E. BLANKENBERG, containing 7.41 acres described as follows:- beginning at the N corner of the  $S\frac{1}{2}$  of the  $NW\frac{1}{2}$  of the  $NE\frac{1}{2}$  of Section 19 and running thence East 950 feet; thence South  $8^{\circ}56'$  East 335.1 feet; thence West 998.5 feet; thence North 332 feet to point of beginning; maximum benefits per acre  $\$6.40$ .

✓ Tax Lot No. 13, owned by ~~JULIUS SCHUMACHER and MINNA SCHUMACHER, his wife,~~ WILL SCHUMACHER and MINNA SCHUMACHER, containing 6.78 acres described as follows:- beginning at the NW corner of the  $NW\frac{1}{2}$  of the  $NE\frac{1}{2}$  of Section 19 and running thence East 856 feet; thence South  $6^{\circ}28'$  West 234 feet; thence South  $8^{\circ}56'$  East 317 feet; thence West 901 feet; thence North 336 feet to point of beginning; maximum benefits per acre  $\$6.40$ .

Tax Lot No. 42, owned by ~~GEORGE SCOTT, HEINER and LINDA D. HEINER, his wife,~~ GEORGE SCOTT, containing Lot 42 of the Plat of Sunlight Beach, in Section 19; maximum benefit per lot None.

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✓ In Tax Lot Nos. 1 and 2 owned by WILLIAM J. WEEDIN, LUTHER WEEDIN, HERBERT E. WEEDIN and RHODA BELL GRAM, containing 20.63 acres, described as follows:- Beginning at a point 445 feet North and 230 feet East of the Southwest corner of the NW $\frac{1}{4}$  of the NE $\frac{1}{4}$  of Section 18, and running thence North 160 feet; thence East 680 feet; thence North 388 feet; thence North 63 deg. 41' East 80 feet; thence North 37 deg. 33' East 98.6 feet; thence North 5 deg. 49' West 110.3 feet; thence North 18 deg. 45' East 172 feet; thence East 658 feet; thence South 21 deg. 55' East 296 feet; thence South 4 deg. 20' East 369.2 feet; thence South 14 deg. 2' East 239.8 feet; thence South 6 deg. 4' East 96 feet and thence West 1746 feet to point of beginning, in N $\frac{1}{2}$  of NW $\frac{1}{4}$  of Sec. 18; Maximum benefits per acre \$ 6.40.

✓ In Tax Lot Nos. 1 and 2 owned by Frank Melindy containing 1.32 acres, described as follows:- beginning at the SE corner of the NE $\frac{1}{4}$  of NW $\frac{1}{4}$  of Sec. 18 and running thence East 265 feet; thence South 75 feet; thence West 20 feet; thence South 4 deg. 6' West 160 feet; thence West 230 feet and thence North 230 feet to point of beginning; in NW $\frac{1}{4}$  of NE $\frac{1}{4}$  sec. 18; Maximum benefits per acre \$ 6.40.

✓ Tax Lot No. 18, owned by Edw. Cunningham containing 33.23 acres, described as follows:- That part of the NE $\frac{1}{4}$  of the SW $\frac{1}{4}$  of Sec. 18, North of the County road. Maximum benefits per acre \$ 5.82. <sup>5.8</sup>

✓ In Tax Lot No. 18a, owned by C.T. Wernecke, containing 9.34 acres described as follows:- That part of the NE $\frac{1}{4}$  of the SW $\frac{1}{4}$  of Sec. 18, lying South of the County road. Maximum benefits per acre \$ 4.34.

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ISLAND COUNTY, owner of a county road 40 feet wide lying 20 feet on each side of a line described as follows:- beginning at a point 40 feet South and 20 feet East of the Northwest corner of lot 2 in Section 18 and running thence South 365 feet, containing .33 acres. Maximum benefit for the whole of said road, *None* being Tax Lot No. 14

Also owner of a county road 30 feet wide lying 15 feet on each side of a line described as follows:- beginning at a point 1160 feet West of the NE corner of Section 18 and running thence West 649 feet, containing .43 acres. Maximum benefit for the whole of said road, *None* Being Tax Lot No 15

Also owner of a county road 30 feet wide, lying 15 feet on each side of a line described as follows:- beginning at a point 914.4 feet North and 1973.9 feet West of the  $\frac{1}{4}$  section corner between sections 19 and 20, Tp. 29 N.R. 3 E.W.M. and running thence North 647.55' West 609.3 feet; thence North 72.30' West 2205 feet; maximum benefit for the whole length of said road *None* being Tax Lot No. 16

Also the owner of a 30 foot county road 10 feet long between Lot 5 and 6 of Sunlight Beach Addition. Maximum benefit for the length of said road *None* being Tax Lot No. 17

Also the owner of a county road 30 feet wide and 280 feet long between Lot 63 and 64 and through Lot 67 of Sunlight Beach Addition. Total benefit for the whole length of said road, containing 2.1 acres *None* being Tax Lot No. 18

Said proposed improvement will protect and benefit the whole of each of the above described County Roads so that the traveled road bed thereof will be improved by the construction of said <sup>drainage system</sup> ~~side~~ and the maximum amount of benefits to be derived by the County of Island is estimated to be the amounts set opposite the respective descriptions of said roads.

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The maximum benefits for the construction of the proposed drainage system for the land situated in Diking District No. 1 of Island County, State of Washington, accruing to the land benefited by the construction of the dike in aforesaid district, were found and determined by the Commissioners of said Diking District as hereinbefore set forth and indicated, on this 18<sup>th</sup> day of June A.D. 1931, and after said Diking Commissioners had this day made an order directing the construction of such drainage system as proposed.

Found and determined this 18<sup>th</sup> day of June A.D. 1931.

Herbert Weedie  
Oscar J. Thompson  
Helis E. Labelin

Commissioners of Diking District  
No. 1 of Island County, State of  
Washington.

State of Washington )  
                          )SS.  
County of Island     )

CERTIFICATE

THIS CERTIFIES that the foregoing is a full and true copy of the original assessment of benefits found and determined by the Commissioners of Diking District No. 1 of Island County, State of Washington, on the 18<sup>th</sup> day of June A.D. 1931.

Dated this 18<sup>th</sup> day of June A.D. 1931.

Herbert Weedie  
Oscar J. Thompson  
Helis E. Labelin

Commissioners of Diking District  
No. 1 of Island County, State of  
Washington.

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## **APPENDIX "D"**

1994-1995 Diking District levy requests—no drainage

**APPENDIX "D"**

To the Assessor of Island County:

★ We, the undersigned Diking and Drain Commissioners of Diking District No. 1, hereby request that a levy of \$40,000.00 be made for the maintenance of said dike, and that a levy of none be made for the maintenance of said drain, to be collected in the year of 1995.

Signed this 17th day of October, 1994

RECEIVED

OCT 18 1994

ISLAND COUNTY CLERK

Diking and Drainage Commissioners:

Arthur Gabelein

321-4577

*Arthur Gabelein*

Loren Wills

321-6935

*Loren Wills*

Raymond Gabelein

321-4575

*Raymond Gabelein*

To the Assessor of Island County, Washington:

We, the undersigned, Supervisors of Diking District No. 1 and of Diking District No. 1 Drain, hereby request that a levy of \$20,000. be made for the maintenance of said dike, and that a levy of — be made for the maintenance of said drain, to be collected in the year of 199½.

signed this 18 day of OCTOBER 1975

Arthur Gabelin  
Supervisor

Raymond Gabelin  
Supervisor

Harold  
Supervisor

## **APPENDIX "E"**

2004 – 2006 drainage system contract,  
Diking District-1, Island Co. and Golf Club

**APPENDIX "E"**

AGREEMENT FOR CONSTRUCTION AND MAINTENANCE OF DRAINAGE  
FACILITIES

This Agreement for Construction and Maintenance of Drainage Facilities is entered into this 20 day of DECEMBER, 2004, by and between Island County, hereinafter referred to as the "COUNTY," Diking District No. 1 of the County of Island, State of Washington, hereinafter referred to as the "DISTRICT," and Useless Bay Golf and Country Club, Inc., a Washington nonprofit corporation, hereinafter referred to as the "COUNTRY CLUB."

WHEREAS, a drainage problem presently exists in the DISTRICT and the COUNTRY CLUB in Island County, Washington that is exceeding the capacity of the existing COUNTRY CLUB and DISTRICT drainage systems to protect residential and agricultural land uses and county roads; and

WHEREAS, the parties hereto are desirous of solving the present drainage problem within the Useless Bay Drainage Basin by increasing capacity to existing drainage pumping facilities to the existing COUNTRY CLUB drainage pumping facilities, connecting the DISTRICT'S drainage ditch to the pond with the pumping station, and enlarging the pond; and

WHEREAS, increased surface water flows within the contributing watersheds are exceeding the capacity of the existing drainage control facilities (tidal control gravity outfall system & augmenting pumping station) to maintain the agricultural land and open spaces historical uses, the protection of residential units, and the protection of county roads; and

WHEREAS, the COUNTY has established the Bayview Rural Center and Useless Bay Residential Area of More Intense Development (RAIDS) within the contributing watershed, and continuing development within said RAIDS will further exacerbate the drainage problem; and

WHEREAS, the DISTRICT gravity tide gate drainage system is presently at its maximum capacity and requires continuous maintenance to keep the outfall pipes clear of beach sediment; and

WHEREAS, the COUNTRY CLUB golf course has a drainage ditch network that leads to the northeasterly DISTRICT dike where surface water runoff is collected in a pond and pumped through said dike; and

WHEREAS, the parties hereto are desirous to promote marine water quality within Useless Bay and Deer Lagoon and understand the values of the unfarmed wetland system; and

WHEREAS, the parties hereto are desirous in cooperatively managing the drainage problems on an ongoing basis; and

WHEREAS, the improved pumping system that will be installed pursuant to this agreement will serve the public health, safety and welfare by preventing the existence of standing water in the area; and

WHEREAS, the improved drainage pumping system will provide additional stormwater control facilities which are of general benefit to all the residents of the COUNTY in that the drainage pumping system will provide protection from stormwater damage to life and property, provide for a unified drainage system over the drainage basin, and further the health and welfare of the residents of the COUNTY; and

WHEREAS, pursuant to RCW 82.46.035, the use of COUNTY'S REET 2 funds for the purpose of public works projects for storm sewer systems within the COUNTY is declared to be a county purpose; and

WHEREAS, in consideration of the mutual and valuable benefits to be derived by the parties pursuant to this agreement;

WITNESSETH: It is hereby agreed by and among the parties, the DISTRICT, the COUNTRY CLUB, and the COUNTY, as follows:

1. The project involved in this agreement is:
  - a. Construction and installation of a new pump handling approximately 12,000 gallons per minute, pump house, and drainage pipe and outfall to discharge water from the pond located on the COUNTRY CLUB'S land described on Exhibit A;
  - b. Connection of the DISTRICT'S existing ditch to the pond;
  - c. Enlargement of the pond;
  - d. Transfer of the ownership of the existing pump, pump house, drainage pipes and outfall from the COUNTRY CLUB to the DISTRICT; and
  - e. Maintenance of the DISTRICT'S ditch and the pond and pump system.
2. The DISTRICT agrees to:
  - a. Cooperate with the COUNTY by providing information for the completion of all permit applications necessary for the project. This shall include establishing the maximum water level in the discharge pond to be equal to or less than presently maintained by the COUNTRY CLUB. Further, this level is defined to be 70" below the top surface of the existing platform that now supports the COUNTRY CLUB's pump. The DISTRICT will make every effort and take whatever action possible,

- including increasing the pumping capacity of the newly installed system, to maintain the agreed upon water level
- b. Following receipt of all necessary permits, using a bid package including specifications and engineered plans prepared by the COUNTY, advertise and obtain competitive bids for the installation of the new pump, pump house drainage pipes and outfall in accordance with required public works procurement procedures of Chapter 39.04 RCW.
- c. Award the bid and enter into the contract for the construction of said facilities to the lowest responsible bidder, unless all bids are rejected for good and sufficient cause.
- d. Bill the COUNTRY CLUB and the COUNTY for payments toward the construction contract, as provided below, as the payments come due.
- e. Pay all amounts due on the construction contract above the amounts payable by the COUNTRY CLUB and the COUNTY as provided below.
- f. Pay all costs of maintenance and operation of the new drainage pump station pump, drainage pipes, the existing pump station and accessories.
- g. Connect the existing drainage ditch to the pond on the land described on Exhibit A.
- h. Enlarge the pond on the land described on Exhibit A, as allowed in the state-approved permit.

3. The COUNTRY CLUB agrees to:

- a. Following issuance of the necessary permits to the DISTRICT, survey the property ownership and necessary easements for access, grant an easement to the DISTRICT over the COUNTRY CLUB'S property described on Exhibit A for access, connection of the DISTRICT'S drainage ditch to the pond, enlargement of the pond and for installation and use of the new pump, pump house, electrical line, drainage pipes and outfall, and also the existing pump, pump house and drainage facilities, ownership of which are hereby transferred by the COUNTRY CLUB to the DISTRICT.
- b. Record the easement with the County Auditor and furnish the DISTRICT and the COUNTY with a copy of the easement.
- c. Within 30 days after billing from the DISTRICT, for the contracted costs of construction of the new pump, pump house, drainage pipes and outfall, pay the DISTRICT up to a maximum total amount of ten thousand dollars (\$10,000.00).
- d. Monitor pump operations and notify the DISTRICT of any malfunctions immediately.
- e. Within 45 days after billing from the DISTRICT, pay one-half of the costs of electricity to operate the two pumping facilities. This is limited to a maximum annual amount of reimbursement to the DISTRICT of three thousand six hundred dollars (\$3,600.00), except that maximum annual amount is automatically increased by the same percentage increase as the rate of increase of the unit costs of electricity provided as compared to the

unit costs of electricity at the time of execution of this agreement. The unit costs shall be compared annually at the anniversary date of the execution of this agreement.

f. Pay its share of **DISTRICT** assessments.

4. The **COUNTY** agrees to:

- a. Provide, at no cost to the **DISTRICT**, plans and specifications and a competitive bid package, prepared under the supervision of a professional engineer, that are of sufficient quality and completeness for permitting, cost estimating, bidding and construction purposes for construction and installation of the new pump, pump house, drainage pipes and outfall.
- b. Prepare and submit the necessary permit applications for the **DISTRICT** at no cost to the **DISTRICT**.
- c. Draft the easement documents pursuant to the **COUNTRY CLUB**'s survey per Item 3.a..
- d. Within 30 days after billing from the **DISTRICT**, for the contracted costs of construction of the new pump, pump house, drainage pipes and outfall, pay the **DISTRICT** up to a maximum total amount of eighty thousand dollars (\$80,000.00).

5. If the terms and conditions of the permits issued authorizing the construction and installation of the improvements covered by this agreement are not acceptable to all three parties to this agreement, the obligations of the parties hereto, other than the obligations of the **DISTRICT** under 2(a), above, and the **COUNTY** under 4(a) and (b), are null and void.

6. - Except for any actions, claims, demand, liabilities, loss or damage arising out of negligent acts or omissions of the **COUNTY**, its officials, agents, employees, and contractors, the **DISTRICT** and the **COUNTRY CLUB**, for themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, do hereby release the **COUNTY**, its officials, agents, employees, and contractors, and do hereby remise and relinquish to them all actions or causes of action, claims, demands, liabilities, loss, damage or expense of whatsoever kind or nature including attorney's fees, which said **DISTRICT** and **COUNTRY CLUB** have sustained or shall at any time sustain or incur by reason or in consequence of any work done or which should be done pursuant to this agreement.

Except for any actions, claims, demand, liabilities, loss or damage arising out of negligent acts or omissions of the **DISTRICT**, its officials, agents, employees, and contractors, the **COUNTY** and the **COUNTRY CLUB**, for themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, do hereby release the **DISTRICT**, its officials, agents, employees, and contractors, and do hereby remise and relinquish to them all actions or causes of action, claims, demands, liabilities, loss, damage or expense of whatsoever kind or nature including attorney's

fees, which said COUNTY and COUNTRY CLUB have sustained or shall at any time sustain or incur by reason or in consequence of any work done or which should be done pursuant to this agreement.

Except for any actions, claims, demand, liabilities, loss or damage arising out of negligent acts or omissions of the COUNTRY CLUB, its officials, agents, employees, and contractors, the DISTRICT and the COUNTY, for themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, do hereby release the COUNTRY CLUB, its officials, agents, employees, and contractors, and do hereby remise and relinquish to them all actions or causes of action, claims, demands, liabilities, loss, damage or expense of whatsoever kind or nature including attorney's fees, which said DISTRICT and COUNTY have sustained or shall at any time sustain or incur by reason or in consequence of any work done or which should be done pursuant to this agreement.

7. It is agreed that the COUNTY will have no responsibility whatsoever for the maintenance and operation of the drainage facilities to be installed pursuant to this agreement. The system will be maintained and operated solely by the DISTRICT and their agents and contractors.
8. In the future, if a county-wide drainage utility is established, the COUNTY assessments and charges on properties served by the drainage facilities provided under this agreement shall be provided, less any applicable county administrative expenses, pursuant to future agreement, to the DISTRICT to continue to provide and maintain drainage facilities serving those properties.
9. The parties mutually agree hereto that any amendments, modifications, or changes to this agreement must be in writing.

This agreement is made and entered into this 20 day of DECEMBER, 2004.

IN WITNESS WHEREOF, the parties have caused this agreement to be executed this 20 day of DECEMBER, 2004

DIKING DISTRICT NO. 1  
OF THE COUNTY OF  
ISLAND OF THE STATE OF  
WASHINGTON

BOARD OF COUNTY COMMISSIONERS  
ISLAND COUNTY, WASHINGTON

Ray E. Gehl  
Commissioner  
Sally Benson  
Commissioner  
Steve Arnold  
Commissioner

William J. Byrd  
WILLIAM J. BYRD, Chairman  
Mike Shelton  
MIKE SHELTON, Member  
Wm. L. McDowell  
WM. L. McDOWELL, Member

ATTEST:  
Elaine Marlow  
ELAINE MARLOW  
Clerk of the Board

USELESS BAY GOLF AND COUNTRY CLUB, INC.

BY: Michael Ross Davenny 12/3/2004  
MICHAEL ROSS DAVENNY, President  
(Corporate acknowledgement attached)

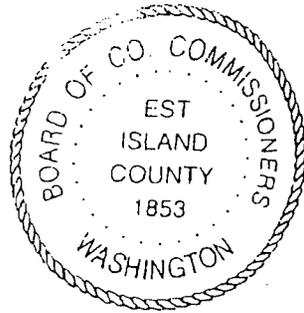


EXHIBIT A

Parcel F-2  
Tax Parcel R32918-135-1600

That portion of Government Lot 3, Section 18, Township 29 North, Range 3 E. W.M. lying Southerly of Sound View Drive and Easterly of Lot 10, Plat of Useless Bay Beach and Country Club Division No. 4, as per plat recorded in volume 9 of Plats, Page 4, records of Island County, Washington.

Situate in the County of Island, State of Washington

AMENDMENT NO. 1

AGREEMENT FOR CONSTRUCTION AND MAINTENANCE OF DRAINAGE FACILITIES

This Amendment amends the AGREEMENT, dated December 20, 2004, entered into between Island County, Washington, hereinafter referred to as "COUNTY," Diking District No. 1 of the County of Island, State of Washington, hereinafter referred to as the "DISTRICT," and Useless Bay Golf and Country Club, Inc., a Washington nonprofit corporation, hereinafter referred to as the "COUNTRY CLUB."

The changes to the AGREEMENT are the result of meetings between the COUNTY, DISTRICT and COUNTRY CLUB and KPG, INC., a Washington corporation retained by the COUNTY to provide engineering design of the desired drainage improvement. Because certain design goals were specified in the original AGREEMENT, and that the meetings and additional engineering design details provided by KPG, INC., determined that several items of the AGREEMENT should be amended to recognize the changes sought to several of the design goals, the AGREEMENT is amended as follows:

Section 1(a) is amended to read:

Construction and installation of a new, additional pump handling approximately 6,000 gallons per minute, pump house, drainage pipe and outfall protection to discharge water from the pond via existing outfall pipes located on the COUNTRY CLUB'S land described on Exhibit A.

Section 1(c) is amended to read:

Installation of an adjustable weir between the DIKING DISTRICT'S channel and COUNTRY CLUB'S pond to allow water to flow into the pond. The elevation of 0.75 feet 1988 National Geodetic Vertical Datum (NGVD) shall be the maximum drawdown elevation of the pumps, and designed as described in the KPG memorandum dated 11/15/05, Subject: Useless Bay Pump Station (WO 234) Design Summary. The maximum flow rate through the weir at it's highest point will not exceed the new pump's capacity (approximately 6,000 gpm) under normal conditions.

Section 2(a) is amended to read:

Cooperate with the COUNTY by providing information for the completion of all permit applications necessary for the project. This shall include establishing the maximum water level in the discharge pond at 2.1 feet 1988 NGVD datum during normal storm weather conditions. The DISTRICT will make every effort, including increasing the pumping duration of the newly installed system, to maintain the agreed upon water level, and agrees that should the new, larger pump fail and the pond level cannot be maintained by the existing, smaller pump, to close the weir until the pump is fixed.

APPENDIX

E 8/9

Section 2(h) is amended to read:

Install an adjustable weir in the existing ditch near the pond to which it is being connected.

All other terms of the original AGREEMENT not amended above remain in full force and effect.

In witness whereof, COUNTY, DISTRICT and COUNTRY CLUB have executed this Amendment No. 1 and agree to the changes as stated above.

Dated this 3 day of APRIL, 2006.

Approved:

DIKING DISTRICT No. 1  
OF THE COUNTY OF  
ISLAND OF THE STATE OF  
WASHINGTON

BOARD OF COUNTY COMMISSIONERS  
ISLAND COUNTY, WASHINGTON

Ray E. Gabelein  
RAY E. GABELEIN, Commissioner

Wm. L. McDowell  
WM. L. McDOWELL, Chairman

Steve Arnold  
STEVE ARNOLD, Commissioner

William J. Byrd  
WILLIAM J. BYRD, Member

Robert Kohlwes  
SALLY BERRY, Commissioner  
Robert Kohlwes,

Mike Shelton  
MIKE SHELTON, Member

ATTEST:

Elaine Marlow  
ELAINE MARLOW  
CLERK OF THE BOARD

USELESS BAY GOLF AND COUNTRY CLUB, INC.

BY: John Ferguson  
JOHN FERGUSON, President



(Corporate Acknowledgment Attached)

APPENDIX E 9/9

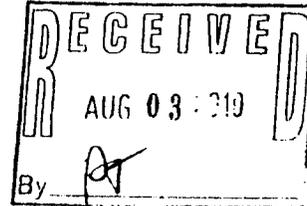
## **APPENDIX "F"**

2010 Diking District letter  
to US Army Corps of Engineers  
with historical chronology

**APPENDIX "F"**

July 30, 2010

Ms. Siri Nelson  
U.S. Army Corps of Engineers  
P. O. Box 3755  
Seattle, WA 98124-2255



Re: NWS-2007-279-NO  
Island County Diking District #1

Dear Ms. Nelson:

I am writing to you with additional information to be considered by the Corps regarding the Island County Diking District #1 Useless Bay Pump Project. As indicated in my previous correspondence, I can demonstrate that the Corps was arbitrary and capricious in its revocation of nationwide permit authorization to the Diking District for this project and that the District has been economically damaged by the Corps' actions. Rather than seeking immediate relief in federal court, we have been working in good faith with staff from the Corps and Ecology to provide requested information in order to resolve this dispute without the need for litigation. The Commissioners adopted an Operations Plan with the specific language requested by Ecology, providing assurances regarding long-term operation of the pumps and weirs.

After review of the additional information provided below, we trust that the Corps will reissue nationwide permit approval for this project. If such reissuance is not forthcoming, the District will have no choice but to initiate litigation.

I have asked Commissioner Gabelein, who has been assigned by the District as the lead on this project, to produce a chronology of events and to locate any historic documents he could find to address some of the issues raised by the Corps. This chronology is attached to this letter as Exhibit A.

The chronology shows that the District was formed in 1914 to construct and maintain a system of dikes and drainage ways to provide flood protection to farms and other properties within its boundaries. Since that time, the District has diligently maintained its dikes and drainage systems to manage flooding and drainage.

The drainage system established by the District was a gravity system. When formed in 1914, the gravity outfall was located in Deer Lagoon. In 1944, the gravity outfall was relocated

to the front beach at Useless Bay, as Deer Lagoon was silting in and started to decrease the capacity of that outfall.

The capacity at the new outfall and in the main ditch has been maintained by the District through its regular cleaning of the gravity tide gates, by replacing the tide gates as needed, and by dredging the main ditches as necessary. Farmers and landowners installed and maintained the side ditches that flowed in the main ditch. These side ditches were installed and have been maintained at invert elevations below 2 feet, as shown on the surveys previously provided. Over time, some of the older wooden side ditches were replaced with newer pipe and gravel side ditches at the same locations and elevations as the original side ditches.

In the 1960's, the Useless Bay Golf Course ("Golf Course") was constructed. The Golf Course installed culverts that allowed stormwater from the Golf Course to flow into the north pond, which it constructed, and out to Deer Lagoon. The Golf Course installed a small 1400-gpm pump to handle drainage of the Golf Course property. At that time, a culvert was installed that connected the north pond to a pre-existing leg of the District's main ditch. Little is known about the reason for this connection between the District's existing ditch and the Golf Course's new stormwater management system. It is known that the Golf Course developer had concerns about impacts to the Golf Course from the District's drainage system. This would suggest that the purpose of the installed culvert was not to provide an additional outlet for water from the Drainage District. A more plausible explanation is that the culvert was installed to provide a secondary path for water from the Golf Course to flow into the District's main channel and out the District's gravity tide gates to Useless Bay. As Mr. Nelson has described, the overall drainage system in this area is very flat with little slope. We have found no record indicating that the culvert was installed to provide any drainage benefit to the District. The records found, as described below, regarding maintaining the District's drainage system, make no mention of the culvert.

Years after the Golf Course was constructed in the 1960's, the culvert connecting the District's main ditch to the north pond was apparently crushed. No information has been found indicating when this occurred, how much flow if any was blocked, or whether the crushed culvert had any impact on drainage from the Golf Course or from the District. There is no evidence that the crushed culvert caused any drainage problems for the District. Indeed, if the culvert was installed to allow drainage from the Golf Course to flow into the main ditch, limiting the capacity of this culvert would have assisted the District in managing its drainage.

Between the 1960's and the 1980's there was a significant increase in residential and commercial development in the watershed surrounding the District. This development caused concern for the District as additional pervious surfaces increased drainage into the District's systems. We have found no specific data relative to specific development inside the boundaries of the District, but from the County's Comprehensive Plan we have the following statistics on housing built in the South Whidbey Planning Area during this period:

Number of Housing Units Built in South Whidbey Planning Area of Island County				
Before 1949	1950-1969	1970-1979	1980-1990	Total
874	1314	1598	1532	5318

As you can see, the number of homes increased nearly five fold in this period. Additionally, some 7,500 houses were expected to be built County-wide through the 1990's.

The first reported response we found from the District regarding this growth and its impact on the District's drainage system was a March 1980 letter written by the three District Commissioners to the Island County Commissioners, expressing concern about a specific development that was proposed at that time. See Exhibit B. This letter notes that the District's system may have to be reengineered to handle the extra load that would occur from that new development. The letter suggests that all new development in the area should be responsible for upgrading the present system to handle any additional runoff. The specific proposed development of concern was never built.

In 1987, counsel for the District wrote to the Island County Commissioners asking for their consideration of a county-wide solution to drainage problems (Exhibit C). The letter expresses the District's concern about drainage impacts from new development, but does not report on any failure of the District's existing drainage system. Implied in this letter is the gradual diminution of the effectiveness of drainage controls through increased runoff and increased siltation. The focus of the letter is on better mechanisms to control drainage from new development, not on any changes to the District's engineered drainage system.

By the 1990's, the District had to increase its maintenance and cleaning as a result of new development. Some of the side ditches were reported to have begun showing signs of not draining to their original capacity.

On May 26, 1999 the District met with the Island County Commissions and the owners of Useless Bay Golf and Country Club to begin discussions regarding an engineering solution that would address the increased runoff and the increased siltation problems at the gravity outfall. These parties worked diligently as shown by the attached letter dated June 30, 2003 (Exhibit D). An initial agreement was drafted in 2000 and an updated draft was circulated in 2003. In 2004, a formal agreement was finally executed. See attached Exhibit E. As described in the recitals, the agreement was reached because "a drainage problem presently exists in the District." The Agreement notes that "increased surface water flows within the contributing watersheds are exceeding the capacity of the existing drainage control facilities . . .to maintain the agricultural land and open spaces historical uses, the protection of residential units, and the protection of county roads."

After the Agreement was executed in 2004, KPG, Inc. was retained to evaluate the existing system and develop a design solution. KPG found that the design capacity of the existing gravity tide gates, with invert elevations of 0.3 feet, was 10,000 gpm. Given power constraints, a new pump with a capacity of 6,000 gpm, 60% of the gravity system, was selected. This solution would allow flows to continue through the gravity system, but allow the pumps to control high-water levels through the District's drainage system.

As noted in the Corps' record from prior responses from the District, the design was based on allowing the existing system to keep up with increased stormwater flows coming from increased upstream development and the increased sedimentation at the gravity flow outlets.

Without these measures, the farmers in the District would have had to start planting later each year, jeopardizing the viability of these farms, and septic systems would be expected to flood more frequently, risking water quality degradation.

Permits were issued for this project in 2007 by the U.S. Army Corps of Engineers, Washington Department of Ecology (Ecology), Washington Department of Fish & Wildlife (DFW) and Island County. A \$300,000 bank loan was secured for the project and a five-year Benefit Assessment was approved to repay the bank loan and to fund operation of the District. The project was completed in 2008. It was inspected by the Corps, Ecology and DFW and all inspections concluded that the project was constructed as designed.

Some of the assessed landowners filed suit against the District, objecting to the assessment. Some of these landowners began a smear campaign. Based upon false accusations from these disgruntled owners, the Corps suspended, then revoked, its prior permit approvals for this project without ever visiting the site again, without taking into account the economic impact from the Corps' decision, and without any evidence to support the allegations of these landowners.

The truth is that the District's project was designed and built to maintain the District flooding and drainage control system in the face of increased stormwater from upstream development and increased siltation of Useless Bay. The capacity of the pump system installed is less than the capacity of the gravity outfall system. The Operations Plan adopted by the District will maintain baseline ditch water surface elevations as the District has historically operated and maintained the system until the cumulative effect of upland development and sedimentation forced the District to this engineer solution. The project has had no demonstrable impact on wetlands in the District. The wetlands identified by Ecology, west of the main ditch, as areas of concern, continue to be well hydrated, as demonstrated by the prior memo and photographic evidence from Ray Gabelein, showing saturated conditions late into June.

During our recent meeting with the Corps, attention was given by Corps staff on two data points reported by KPG. KPG had reported water surface elevations in the channel were surveyed at 3.75 ft. on April 13, 2005 and at 2.11 ft. on July 20<sup>th</sup>, 2005. As has been described previously by Ray Gabelein, the water surface in the ditch system can stay quite high during periods of continuous rainfall. That is precisely what occurred in April 2005.

I have downloaded the precipitation records from the closest reporting NOAA weather station at Coupeville, Washington. The tables March and April 2005 are attached as Exhibit F. This data shows that there were heavy rains at the end of March, continued rainfall in early April, heavy rains on April 7<sup>th</sup> and 8<sup>th</sup> and again on April 11<sup>th</sup>. Given the cumulative reported rainfall of more than 2.5 inches of rain in the 2+ weeks prior to the survey, it is not surprising to find the water elevation surveyed on April 13<sup>th</sup> was at 3.75 feet.

We were also able to locate monthly reported precipitation data collected at the maintenance facility for the Golf Course. These records are attached as Exhibit G. According to Ray Gabelein, who has lived in this area all his life, the Coupeville area receives approximately 10% less rainfall per year that falls in the District, so the rainfall data collected at the Golf Course would more accurately reflect rainfall here.

The Golf Course rain data for March and April 2005 shows monthly total precipitation of 2.86" and 3.39" respectively, or 6.25" for these two months. This compares with the precipitation reported at Coupeville for each of these same months as 1.90." This significant rainfall would have contributed to higher surface water elevations in the ditch when surveyed on April 13, 2005.

The 3.75-foot water surface elevation represents a very high surface elevation, not a baseline. Recall that the main ditch is overtopped and floods the farm fields at approximately 4.0-foot elevation. The fact that the side ditches were historically installed and maintained below 2.0 feet demonstrates that the system was designed to be maintained during the spring and summer farming season at or near that elevation. The Operations Plan that was recently adopted by the District will achieve these levels.

I appreciate your attention to this matter. If you have any questions, please let me know.

Very truly yours,



Brent Carson

BC:bc  
Enclosures  
cc: Client

# EXHIBIT A

## Timeline of Drainage for Island County Diking and Drainage District #1

**1914** - Diking District Formed and a system of Dikes is constructed creating approx. 460 acres of farmland from former Deer Lagoon

**1914 to Present** - Gravity tide gates: cleaned, maintained and replaced as necessary. Main drainage ditch dredged as needed, farmers and landowners install and maintain side ditches. Over time some old wooden "punching ditches" are replaced with newer pipe and gravel side ditches at same locations and elevations as original ditches.

**1931** - Drainage officially added as a function of the Diking District, gravity outlet is into Deer Lagoon. Boundary for the area of Drainage is the same 460 acres created in 1914.

**1944** - Gravity outfall is moved to front beach of Useless Bay as Deer Lagoon is filling in and starting to decrease the capacity of the outfall.

**1960's** - Useless Bay Golf Course constructed. Pump pond dredged, pump is installed, culvert connecting to main ditch is installed.

**1960's to 1970's** - Boeing boom and the beginning of much upland development and platting of open land surrounding the Diking District.

**1977** - Diking District Commissioners meet with Island County Commissioners about enlargement of Drainage District to help with increased runoff water.

**1980's & 1990's** - Increased residential and commercial building in the watershed surrounding the Diking and Drainage District as well as increased residential building in the drainage basin itself along Sunlight Beach Road resulting in increased water runoff from impervious areas.

**1980's** - Diking District Commissioners object to proposed Industrial Park on Thompson Road upland from the Diking and Drainage District because of increased runoff and the potential impact to District.

**1986** - Waterfront property and houses on the south side of Sunlight Beach Road are brought into the assessment area for drainage after public hearings are held by the Diking Commissioners.

**1990's** - Gravity Outfall is sanding in and is not draining to it's original capacity even with increased maintenance and cleaning. Side ditches begin showing signs of not draining to their original capacity.

**May 26, 1999** - Meeting with County Commissioners, Useless Bay Golf and Country Club, and Diking District #1 to come up with agreement and plan to install larger pump. Diking Commissioners vote to go forward with proposal and work on agreement.

**1999** - Main drainage ditch is dredged and cleaned as has been done approximately every ten years.

**1999 - 2004** - Three parties work on agreement that eventually all three parties can agree to. Agreement is signed in 2004

**2005-2006** - Island County hires KPG as engineers to design system. KPG designs system

**2007** - Permits are applied for by Island County on behalf of Diking District #1. Permits for project approved by all agencies.

**2008** - Bank Loan secured for project.

**2008** - Bids received for project. Low bid of \$414,000.00 is accepted

**2008** - 5 Year Benefit Assessment is approved for repayment of \$300,000 Bank Loan and funds to operate District.

**2008** - Project Constructed.

**March 2009** - Vicky Didenhover from Army Corp. visits site and concludes project was built according to permits and plans submitted.

**March 2009** - Washington Department of Fish and Wildlife visits project site and finds no problem with project.

**March 2009** - Washington Department of Ecology visits project site and finds no problem with project.

**2008 - 2009 & 2010** - Army Corp. receives numerous complaints about project from parties unhappy with benefit assessment and also some letters of support from other landowners.

**2009** - A group of Waterfront landowners file suit against the District over the benefit assessment

**December 2009** - Army Corp suspends permit without ever visiting site again since March 2009 visit.

**2010** - Diking District adopts operation plan as requested by Army Corp and Ecology.

## **APPENDIX "G"**

2006 Diking District-1 RCW 85.38.140 Election

**APPENDIX "G"**

Diking District #1 Meeting  
June 8<sup>th</sup> 2006

Chairman, Steve Arnold, called the meeting to order at 6:10pm.

The minutes from the previous meeting were read. Ray Gabelein made a motion to approve the minutes and Bob Kohlwes seconded the motion. Vote was called to approve the minutes, motion carried.

General Ledger from Island County was presented for approval.

Warrant for commissioners Bonds from Washington Governmental Entity Pool for \$51.00 was presented for signatures. It was accepted and approved.

**New Business**

Army Corp of Engineers sent a letter to the Diking District informing them we no longer needed to pay for aerial photos. This was concerning a permit authorizing the retention of riprap placed at Sunlight Beach. Special Condition "C" of our permit.

Ray brought up the need for an easement to access the new pump installation for maintenance and repair. After discussion and looking at our three-way agreement, this was to be prepared by Useless Bay Golf & Country Club.

Ray also brought to our attention that there is a beaver dam near the golf course diesel pump station.

The Diking District received a letter from the Island County Treasurer. They are requesting that we adopt a resolution indicating our intentions to conform to RCW 85.38.140 – 85.38.170. This would allow the delinquent Diking accounts to be included in the 2007 Tax Foreclosure Sale.

Ray made a motion that we adopt a resolution to conform to the requested RCW's. Motion was seconded by Bob K.

Discussion took place to explain the requirements of the RCW's to be adopted. A vote was taken, all commissioners voted to approve the motion to adopt resolution.

**Old Business**

There was discussion concerning the lengthy time it is taking to get all parties to agree on the pump installation.

Meeting adjourned at 7:20 pm.

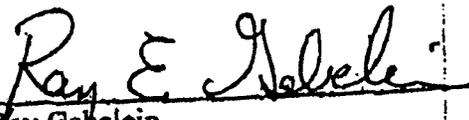
**Diking District #1  
2684 E. Gabelein Rd.  
Clinton, WA 98236**

**Resolution  
June 8, 2006**

We, the Island County Diking District #1 Commissioners agree to conform with RCW  
85.38140 through 85.38.170.

  
\_\_\_\_\_

Steve Arnold

  
\_\_\_\_\_

Ray Gabelein

  
\_\_\_\_\_

Bob Kohlwees

## **APPENDIX "H"**

1995 Diking District-1 Resolution

**APPENDIX "H"**

COPY

After Recording, Please Return To:  
Raymond A. Gabelein  
2691 E. Gabelein Rd.  
Clinton, WA 98236

895 000000 TYPE: MIN \$0.00  
100 000 00 1995 3/30/95 2:42:40 PM  
Island County Auditor  
DEPUTY: CS REQUESTED BY:  
RAYMOND A GABELEIN

BEFORE THE BOARD OF COMMISSIONERS OF DIKING DISTRICT NO. 1  
ISLAND COUNTY, WASHINGTON  
MINUTES OF SPECIAL MEETING

A Special Meeting of the Board of Commissioners of Diking District No. 1, Island County, Washington, was held at 7:00 o'clock, P.M., on March 29, 1995, at 2691 E. Gabelein Rd. Clinton, WA 98236. The meeting was called by a majority of the members of the board of dike commissioners and was attended by commissioners Raymond A. Gabelein (chairman), Arthur P. Gabelein and Loren B. Wills, and by Eva Mae Gabelein, who acted as secretary of the meeting. Written notice of the meeting date, time and place, and the business to be transacted, was personally delivered to each of the above-named commissioners more than twenty-four hours prior to the meeting time.

Raymond A. Gabelein called the meeting to order and announced that the meeting agenda would consist of review and any necessary revision of the existing roll of protected/benefited properties to be assessed and taxed pursuant to the \$40,000. levy request for dike maintenance, which request the commissioners had signed on October 17, 1994, and delivered to Island County for processing.

After review by the commissioners of the existing roll of protected/benefited properties; miscellaneous, 1995, Island County, real property tax statements; the existing diking district map; and, other documents, and after related discussion, the following resolutions were offered, seconded and unanimously adopted:

RESOLVED: That only those portions of Island County, Washington, real property situated within the "benefited area" of Island County, Washington Diking District No. 1 shall be assessed and taxed pursuant to the October 17, 1994, levy request; that "benefited area" consists of approximately 460 acres and is depicted as lying within a dotted line (extreme high tide line) on the diking district map which was originally prepared by Burwell Bantz, Civ. Eng., of Coupeville, Washington, in May, 1914, and most recently updated on September 13, 1989.

RESOLVED: That in the event the benefited area of the diking district includes part, but not all, of a particular tax parcel, the value of any land, improvements or special features situated on such tax parcel and outside of the benefited area shall in no manner be taken into account in determining the assessed and taxable value of the portion of such tax parcel situated within the benefited area.

COPY

RESOLVED: That for purposes of the October 17, 1994, \$40,000. levy request, the land (unimproved) portion of all unplatted real property situated within the benefited area shall be assessed at a fixed rate of One Thousand One Hundred and no/100's Dollars (\$1,100.00) per acre; and, all other real property and improvements situated within the benefited area shall be assessed at their current, fair market value. Provided, however, in the event that part, but less than fifty percent (50%), of any platted tax parcel is situated within the benefited area, no portion of such tax parcel shall be subject to the requested dike maintenance levy.

There being no further business to be considered at the meeting, the meeting was adjourned at 8:00 o'clock P.M.

Dated: March 29, 1995.

BOARD OF COMMISSIONERS  
ISLAND COUNTY DIKING DISTRICT NO. 1

Raymond A. Gabelein  
RAYMOND A. GABELEIN

Arthur P. Gabelein  
ARTHUR P. GABELEIN

Loren B. Wills  
LOREN B. WILLS

By Eva Mae Gabelein POA

Minutes Prepared By: Eva Mae Gabelein  
EVA MAE GABELEIN

# **APPENDIX "I"**

2007 – 2008 Diking District assessment requests

Diking & Drainage District #1  
2684 Gabelein Rd.  
Clinton, WA 98236

Commissioners:

Steve Arnold

Ray Gabelein

Robert Kohlwes

**RESOLUTION 2007-4**

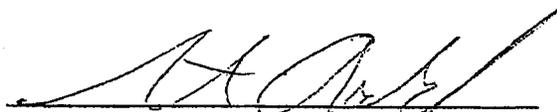
October 23, 2007

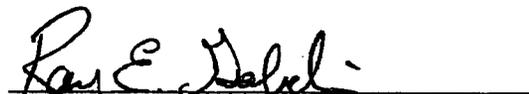
Island County Assessor  
P.O. Box 5000  
Coupeville, WA 98239

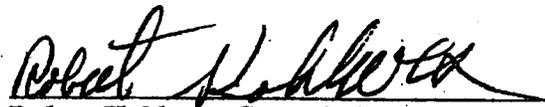
To the Assessor of Island County,

We, the undersigned, Commissioners of Diking & Drainage District #1, hereby request that a Levy of \$ 300,000<sup>00</sup> Dollars be made, to all parties inside said district, for the installation of a pump and related appurtenance, to be collected in the year of 2008.

Signed this 23 day of October 2007.

  
Steve Arnold, Commissioner

  
Ray Gabelein, Commissioner

  
Robert Kohlwes, Commissioner

APPENDIX I 1/5

Diking Dist. #1  
C/O STEVE ARNOLD  
2684 E. Gabelein RD.  
Clinton WA. 98236



**6**  
RESOLUTION 2008-XXXX OF THE BOARD OF COMMISSIONERS  
OF DIKING DISTRICT NO. 1  
ISLAND COUNTY, WASHINGTON

WHEREAS, the Board of Commissioners of Diking District No. 1, Island County, Washington, deems it to be beneficial to the lands within the "benefited area" of Diking District No. 1 as fully described in the resolution of the Board adopted on March 29, 1995 (the "1995 Resolution"), a copy of which is attached as Exhibit A, to generate and provide funds for the District's general maintenance, operation, improvements, and administrative costs, AND

WHEREAS, the District deems it beneficial to continue with a procedure for assessments consistent with the method adopted in the 1995 Resolution, as provided in RCW 85.18 *et seq.*, which method of assessment was last employed by the District in 2001, NOW, THEREFORE, it is hereby

RESOLVED, that those portions of the real property situated within the "benefited area" of Diking District No. 1, as fully described in the 1995 Resolution, shall be assessed in the amount necessary to generate \$90,000 per year for five years based on the method for assessment of each parcel within the "benefited area" as established in the 1995 Resolution.

EXECUTED by the undersigned as the members of the Board of Commissioners.

DATED this 2ND day of October, 2008.

BOARD OF COMMISSIONERS  
ISLAND COUNTY DIKING DISTRICT NO. 1

By Raymond E. Gabelein  
Raymond E. Gabelein

By Steve Arnold  
Steve Arnold

By Robert Kohlwes  
Robert Kohlwes

Diking Dist. #1  
C/O STEVE ARNOLD  
2684 E. Gabelein RD.  
CLINTON WA. 98236



5  
RESOLUTION 2008-[REDACTED] OF THE BOARD OF COMMISSIONERS  
OF DIKING DISTRICT NO. 1  
ISLAND COUNTY, WASHINGTON

WHEREAS, the Board of Commissioners of Diking District No. 1, Island County, Washington, deems it to be beneficial to the lands within the "benefited area" of Diking District No. 1 as fully described in the resolution of the Board adopted on March 29, 1995 (the "1995 Resolution"), to generate and provide funds for the District's general maintenance, operation, improvements, and administrative costs, AND

WHEREAS, the District inadvertently approved Resolution dated June 8, 2006, that adopted RCW 85.38 *et seq.* as the procedure for assessments and which was inconsistent with the District's previous method of special benefits assessments, and Resolution 2008-4 (no assessments were levied pursuant to those statutes), copies of which are attached as Exhibits A & B, NOW, THEREFORE, it is hereby

RESOLVED, that the Resolution dated June 8, 2006, and Resolution 2008-4, adopting procedures for assessment pursuant to RCW 85.38 *et seq.* are hereby rescinded.

EXECUTED by the undersigned as the members of the Board of Commissioners.

DATED this 2<sup>ND</sup> day of October, 2008.

BOARD OF COMMISSIONERS  
ISLAND COUNTY DIKING DISTRICT NO. 1

By Raymond E. Gabelein  
Raymond E. Gabelein

By Steve Arnold  
Steve Arnold

By Robert Kohlwes  
Robert Kohlwes

APPENDIX I 315

RESOLUTION 2008-4 OF THE BOARD OF COMMISSIONERS  
OF DIKING DISTRICT NO. 1  
ISLAND COUNTY, WASHINGTON

WHEREAS, the Board of Commissioners of Diking District No. 1, Island County, Washington, deems it to be beneficial to the lands within the "benefited area" of Diking District No. 1 as fully described in the resolution of the Board adopted on March 29, 1995 (the "1995 Resolution"), to generate and provide funds for the the District's general maintenance, operation, improvements, and administrative costs, AND

WHEREAS, the District inadvertently approved a resolution that adopted RCW 85.38 *et seq.* as the procedure for assessments, which was inconsistent with the District's previous method of special benefits assessments, and no assessments were levied pursuant to that section, AND

WHEREAS, the District deems it beneficial to continue with a procedure for assessments consistent with the historical method based on the assessed value of each parcel within the "benefited area" of Diking District No. 1, as allowed by RCW 85.15 *et seq.*, RCW 85.16 *et seq.*, and RCW 85.18 *et seq.*, NOW, THEREFORE, it is hereby

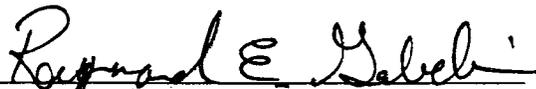
RESOLVED, that those portions of the real property situated within the "benefited area" of Diking District No. 1, as fully described in the 1995 Resolution, shall be assessed in the amount necessary to generate \$90,000<sup>00</sup> per year for 5 years based on the assessed value of each parcel within the "benefited area," and the resolution adopting procedures for assessment pursuant to RCW 85.38 *et seq.* is hereby rescinded.

EXECUTED by the undersigned as the members of the Board of Commissioners.

DATED this 22 day of September, 2008.

BOARD OF COMMISSIONERS  
ISLAND COUNTY DIKING DISTRICT NO. 1

By   
Steve Arnold, Chairman

By   
Raymond E. Gabelein

By   
Robert Kohlwes

APPENDIX I 4/5

RESOLUTION 2008-3 OF THE BOARD OF COMMISSIONERS  
OF DIKING DISTRICT NO. 1  
ISLAND COUNTY, WASHINGTON

WHEREAS, the Board of Commissioners of Diking District No. 1, Island County, Washington, deems it to be beneficial to the lands within the "benefited area" of Diking District No. 1 as fully described in the resolution of the Board adopted on March 29, 1995, to generate and provide funds for the purpose of financing the District's participation in the 3-way contract for construction and installation of a new pump on parcel R32918-135-1600 previously approved by the District, and for general maintenance, operation, and administrative costs, NOW, THEREFORE, it is hereby

RESOLVED, that the Commissioners are authorized to execute loan documents on behalf of the District necessary to borrow \$300,000.00 to be used for financing the District's participation in the 3-way contract for construction and installation of a new pump on parcel R32918-135-1600 previously approved by the District, and for general maintenance, operation, and administrative costs.

EXECUTED by the undersigned as the members of the Board of Commissioners.

DATED this 3<sup>rd</sup> day of June, 2008.

BOARD OF COMMISSIONERS  
ISLAND COUNTY DIKING DISTRICT NO. 1

By Raymond E Gabelein  
Raymond E Gabelein

By Steve Arnold  
Steve Arnold

By Robert Kohlwes  
Robert Kohlwes

APPENDIX I 5/5

## **APPENDIX "J"**

2010 Diking District assessment resolutions

**RESOLUTION 2010 - 1**  
**OF THE BOARD OF COMMISSIONERS**  
**OF DIKING DISTRICT NO. 1**  
**ISLAND COUNTY, WASHINGTON**

WHEREAS, the Board of Commissioners of Diking District No. 1, Island County, Washington, deems it to be beneficial to the lands within the "benefited area" of Diking District No. 1 as determined in the Resolution of the Board adopted on July 10, 1986 (the "1986 Resolution"), to generate and provide funds for the District's general maintenance, operation, improvements, and administrative costs, AND

WHEREAS, the District approved Resolution 2008-6 assessing real property situated within the "benefited area" of Diking District No. 1 pursuant to the method described in the Resolution of the Board adopted on March 29, 1995 (the "1995 Resolution"), AND

WHEREAS, the Board has determined that, due to legal issues having arisen concerning the adoption of the 1995 Resolution, and the necessity of proceeding with an assessment consistent with the lawfully adopted method of assessment as provided in the 1986 Resolution, NOW, THEREFORE, it is hereby

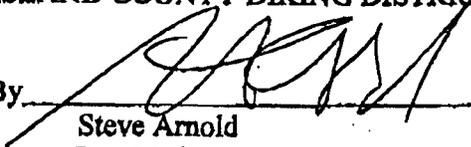
RESOLVED, that the assessment approved in Resolution 2008-6 be modified to make the assessment method consistent with the method of assessment in the 1986 Resolution, and that those portions of the real property situated within the "benefited area" of Diking District No. 1, as fully described in the 1986 Resolution, shall be assessed in the amount necessary to generate \$90,000 per year for five years based on the method of assessment for each parcel as established in the 1986 Resolution, AND

BE IT FURTHER RESOLVED, that the assessment approved in Resolution 2008-6, the first installment of which was collected in 2009, shall be modified pursuant to the method of assessment of each parcel within the "benefited area" as established in the 1986 Resolution, and that credits shall be issued to those parcel owners whose 2009 and 2010 assessments exceeded that which would have been due pursuant to the 1986 Resolution method of assessment, and that those parcel owners whose assessment in 2009 and 2010 was less than that which would have been due pursuant to the 1986 Resolution method of assessment shall be assessed the adjusted amount, which credits and adjustments shall be made to each parcel for payments due in 2011.

APPROVED by majority of the members of the Board of Commissioners on September 2, 2010.

DATED this 2<sup>ND</sup> day of September, 2010.

BOARD OF COMMISSIONERS  
ISLAND COUNTY DIKING DISTRICT NO. 1

By   
Steve Arnold  
Its: Chairman

RESOLUTION OF THE BOARD OF COMMISSIONERS  
OF DIKING DISTRICT NO. 1  
ISLAND COUNTY, WASHINGTON  
~~RESOLUTION 2010- 2~~

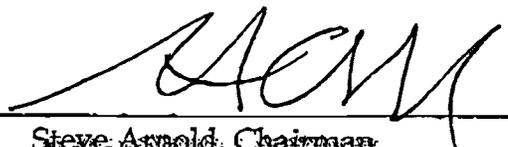
Island County Assessor  
~~P. O. Box 5000~~  
~~Coupeville, WA 98239~~

~~To the Assessor of Island County:~~

We, the undersigned Commissioners of Diking District No. 1 of Island County, Washington, hereby request that a Levy of \$ 24,820<sup>00</sup> be made for maintenance, administrative, and operation expenses, assessing the roll of benefitted properties at 100% of the true and fair value as approved by the Board in the Resolution of the Board adopted on July 10, 1986.

APPROVED by a majority of the members of the Board of Commissioners on ~~October 7, 2010.~~

BOARD OF COMMISSIONERS  
DIKING DISTRICT NO. 1 OF ISLAND COUNTY

By   
Steve Arnold, Chairman

## **APPENDIX "K"**

“1986 DD-1 resolution” attached to Ellerby declaration

**APPENDIX "K"**

BEFORE THE BOARD OF COMMISSIONERS OF DIKING DISTRICT NO. 1,  
ISLAND COUNTY, WASHINGTON

In the Matter of Determining	)	
Benefits to District Properties	)	FINDINGS OF FACT,
From Drainage Improvements Pursuant	)	CONCLUSIONS OF LAW AND
to Chapter 85.18 RCW.	)	RESOLUTION
	)	

THIS MATTER, having come on regularly to be heard by the Board of Commissioners of Diking District No. 1 of Island County, Washington, pursuant to a Notice of Public Hearing dated May 20, 1986, and the Board of Commissioners having held a public hearing on this matter on June 15, 1986, and a motion having been made, seconded and carried providing that properties within the benefited area of the diking district, including Lots 1-42 of the Plat of Sunlight Beach and Lots 1-11 and 58-67 of the Plat of Sunlight Beach Addition, receive benefits from the drainage facilities of the district in proportion to the true and fair value of such properties, NOW, THEREFORE, the board enters the following:

FINDINGS OF FACT

I.

Diking District No. 1 of Island County, Washington, was established by order of the Board of Commissioners of Island County on April 6, 1914.

II.

Following the formation of the diking district, the Board of Diking Commissioners proceeded to build a dike and related improvements for the protection of land and buildings within the district.

APPENDIX K 1/10

**COPY**

## III.

Pursuant to a judgment entered in Island County Superior Court on June 26, 1914, it was established that approximately 460 acres of land within the district would be benefited by the system of dikes and related facilities. Special benefits received by such benefited lands were also established pursuant to said judgment. Said benefits were allocated according to the acreage of benefited parcels of property, rather than according to the true and fair value of such parcels.

## IV.

On May 18, 1931, the Board of Diking Commissioners ordered that a system of drainage be constructed pursuant to its authority under RCW 85.05.071 et seq. The board further ordered that assessments for the construction and maintenance of the drainage system be levied in accordance with benefits received per acre.

## V.

On May 10, 1944, the Board of Diking Commissioners ordered the construction of a drainage outfall/tide gate structure to serve as part of the district's drainage system. Assessments for the construction and maintenance of the drainage/tide gate structure and the drainage ditches were levied in proportion to the acreage of the parcels of property within the benefited area to be assessed for drainage. Such parcels did not include Lots 1-42 of the Plat of Sunlight Beach and Lots 1-11 and 58-67 of the Plat of Sunlight Beach Addition. At this time, these latter properties were almost entirely vacant.

## VI.

Over the years, the properties within the Plats of Sunlight Beach and Sunlight Beach Addition developed into a beach-front residential community with very high property valuations.

## VII.

Following the construction of the drainage facilities, separate assessment rolls for diking improvements and drainage improvements were maintained by the district.

## VIII.

On October 28, 1960, the Board of Diking Commissioners undertook the necessary procedures under Chapter 85.18 RCW to change the basis for benefits received from diking improvements from the acreage of benefited parcels to the true and fair value of benefited parcels, such that thereafter, levies for diking assessments were spread over benefited properties within the district in proportion to the true and fair value of such properties as shown on the tax rolls of the Island County Treasurer. Drainage assessments continued to be levied in proportion to the acreage, rather than the true and fair value, of the subject parcels.

## IX.

The Board of Diking Commissioners has caused to be prepared and filed with it a roll containing descriptions of the land and buildings thereon within the district to which its improvements furnish protection. The roll shows descriptions of the land and the name of its owner, or reputed owner, and such owner's address, as shown upon the tax roll of the Island County Treasurer, and the determined value of such land and any buildings thereon as assessed and equalized by the Island County Treasurer and the Board of Equalization of Island County.

## X.

The Board of Diking Commissioners gave due notice pursuant to RCW 85.18.030 of the time, place, and purpose of a public hearing to be held to determine whether the facts and conditions set forth in RCW 85.18.005 and .010 as a prerequisite to the application of Chapter 85.18 RCW ~~do~~ or do not exist. The board's Notice of Public Hearing is dated May 20, 1986.

## XI.

Pursuant to RCW 85.18.040, the notice of the time and place of hearing was given to every owner, or reputed owner, of property listed on the roll by mailing a copy thereof at least 30 days before the date fixed for the hearing (June 28, 1986) to the owner or owners at his or their address as shown on the tax rolls of the Island County Treasurer for the property described. In addition, the notice was published once a week for three consecutive weeks in the South Whidbey Record, a newspaper of general circulation in the district. At least 15 days elapsed between the last date of publication thereof and the date fixed for the hearing.

## XII.

Diking District No. 1, through its improvements, including its drainage improvements (outfall/tide gate structure and drainage ditches) has reclaimed land, protected it from overflow, enabled erection of improvements thereon, and furnishes such land and buildings protection against flood water. Such protected and benefited land consists of the original 460 acres of land established by the Board of Commissioners of Island County, Washington, in 1914. Such land, together with buildings constructed thereon, is protected and benefited by the drainage improvements of the district, as well as the diking improvements of the district.

## XIII.

The level of the land and of the foundational structures of buildings thereon within the 460-acre benefited area (which includes Lots 1-42 of the Plat of Sunlight Beach and Lots 1-11 and 56-67 of the Plat of Sunlight Beach Addition) is below the water level at flood or high tide stages of the waters, fresh and salt, against which the drainage improvements of the district furnish protection.

## XIV.

But for the drainage improvements of the district, fresh water from precipitation, springs, upland drainage and other sources would collect behind the dike, eventually causing flooding of Sunlight Beach Road and thereby denying access to Lots 1-42 of the Plat of Sunlight Beach and Lots 1-11 and 58-67 of the Plat of Sunlight Beach Addition, among other properties. In addition, on-site septic systems and the foundational structures of some houses and other buildings would become flooded.

## XV.

Precipitation far exceeds evaporation in the district, which has a marine West Coast climate. There is ever-increasing upland development in the vicinity of the district, causing ever-increasing water runoff into the district, which is drained by means of the drainage improvements of the district.

## XVI.

Breaches of the dike, such as occurred in December of 1982, as well as potential overtopping of the dike at times of extreme high tides, low atmospheric pressure, and high South to Southwesterly winds, require that the drainage improvements of the district continue to be maintained for the protection and benefit of the benefited area, including the Sunlight Beach and Sunlight Beach Addition lots. The outfall/tide gate structure is the only means by which the sea water collecting behind the dike because of overtopping or a breach of the dike may be drained from behind the dike.

## XVII.

The continued functioning of the drainage improvements is essential to the continued lawful functioning of on-site septic systems serving the Sunlight Beach and Sunlight Beach Addition lots. As such, the drainage improvements prevent the necessity for an area-wide sewer system.

## XVIII.

The continued functioning of the drainage improvements prevents flooding of water wells serving the Sunlight Beach and Sunlight Beach Addition lots. But for the continued functioning of the drainage improvements, such properties could be deprived of their source or sources of potable water.

## XIX.

Heavy clayey impermeable soils underlie the land behind the dike within the benefited area. Accordingly, the drainage improvements are essential for the purpose of draining fresh water collecting behind the dike.

## XX.

The Board of Diking Commissioners has received and is in possession of adequate information upon which to determine benefits to properties within the benefited area from the drainage improvements. No further studies are necessary.

## XXI.

The continuous base benefits which each of the properties (including land and buildings) within the benefited area of the district are receiving and will receive from the continued operation and functioning of the drainage improvements of the district are equal to 100% of the true and fair value of such property in money, as evidenced by the determined value of such land and buildings as assessed and equalized by the Island County Treasurer and the Island County Board of Equalization and shown upon the tax roll of the Island County Treasurer on file with the district, as it now exists or may hereafter be revised.

## XXII.

The only letter or other writing which could be construed as a written objection to the adoption of the roll on file with the district is a letter dated June 23, 1986, from J.

C. Kraft to Alan R. Hancock, attorney for the district. Such objection is overruled. All other oral or written statements which could be construed as objections to the adoption of the roll by the Board of Diking Commissioners are overruled.

From the foregoing Findings of Fact, the board makes the following:

#### CONCLUSIONS OF LAW

##### I.

The Board of Diking Commissioners has undertaken all of the necessary procedures pursuant to Chapter 85.18 RCW to adopt a roll of property within the diking district protected and benefited by the drainage improvements of the district.

##### II.

The drainage improvements of the district protect the benefited area of the district (including Lots 1-42 of the Plat of Sunlight Beach and Lots 1-11 and 58-67 of the Plat of Sunlight Beach Addition) from overflow, have enabled erection of improvements thereon, and have furnished land and buildings within the benefited area protection against flood water. There is a direct relationship, where such conditions exist, between the continuous functioning of the district and the fair value of the lands and buildings thereon, or to be erected thereon, thus afforded protection.

##### III.

The cost of continued functioning of the district should be paid through levies of dollar rates made and collected according to Chapter 85.18 RCW against the land and buildings protected by the district's drainage improvements, based upon the determined base benefits received by such land and buildings as set forth above.

## IV.

Any and all objections to the adoption of the roll of protected property have properly been overruled based on the record of this proceeding.

## V.

The board has properly determined that the continuous base benefits which each of the properties on the roll of the district are receiving and will receive from the continued operation and functioning of the drainage improvements of the district are equal to 100% of the true and fair value of such property in money.

From the foregoing Findings of Fact and Conclusions of Law, the board makes the following:

RESOLUTION

BE IT RESOLVED by the Board of Commissioners of Diking District No. 1 of Island County, Washington, that the drainage improvements of the district, including the outfall/tide gate structure and drainage ditches, afford protection to land and buildings within the benefited area of the district of approximately 460 acres as established by order of the County Commissioners of Island County, Washington, such protection being afforded against damage or destruction from overflow waters in that the level of the land and of the foundational structures of buildings thereon is below the water level at flood or high tide stages of the waters, fresh and salt, against which such district improvements furnish protection.

BE IT FURTHER RESOLVED that the cost of continued functioning of the drainage improvements of the district shall be paid through levies of dollar rates made and collected according to Chapter 85.18 RCW against the land and buildings thus

protected, based upon the determined base benefits received by such land and buildings.

BE IT FURTHER RESOLVED that the continuous base benefits which each of the properties on the roll of protected property on file with the district are receiving and will receive from the continued operation and functioning of the district's drainage improvements are equal to 100% of the true and fair value of such properties in money.

BE IT FURTHER RESOLVED that all objections to said roll are overruled.

BE IT FURTHER RESOLVED that the roll of protected property on file with the district is hereby adopted as establishing the continuous base benefit to said protected lands and buildings against which will be levied and collected dollar rates to provide funds for the continuous functioning of the drainage improvements of the district. Said roll shall include all of the property within the benefited area of the district, including Lots 1-42 of the Plat of Sunlight Beach and Lots 1-11 and 58-67 of the Plat of Sunlight Beach Addition, Records of Island County, Washington.

BE IT FURTHER RESOLVED that said roll shall be certified to, and filed with, the Island County Auditor.

BE IT FURTHER RESOLVED that said roll shall serve as the base of benefits to the land and buildings protected by the drainage improvement system of the district against which dollar rate is levied and collected from time to time for the continued functioning of the district.

DATED this 10th day of July, 1986.

BOARD OF COMMISSIONERS  
DIKING DISTRICT NO. 1

*Raymond A. Gabelein*  
RAYMOND A. GABELEIN, Chairman

*Arthur P. Gabelein*  
ARTHUR P. GABELEIN

\_\_\_\_\_  
G. KENDALL SARGENT

APPROX K 10/10