

No. 735454-~~I~~-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

ALBERT and MARGARET FIGARO, husband and wife,

Appellants,

v.

CITY OF BELLINGHAM, a Washington municipal corporation,

Respondents.

APPELLANTS' OPENING BRIEF

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FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2016 SEP 21 PM 2:09

TABLE OF CONTENTS

Table of Authorities ii

I. Introduction 1

II. Assignments of Error 2

III. Issues Pertaining to Assignments of Error..... 2

IV. Statement of the Case 3

A. Factual Background 3

B. Procedural Background..... 6

V. Standard of Review..... 7

VI. Argument..... 8

A. The City Has a Duty to Provide Water and Sewer to the Figaros 8

B. Statute of Limitations Does Not Bar the Figaros’ Claims 14

C. The City Waived any Right it Had to Deny Service..... 20

D. Trial Court Award of Costs Should be Reversed and Costs Awarded to Figaros as Prevailing Party 22

VII. Conclusion..... 23

TABLE OF AUTHORITIES

Cases

Benyaminov v. City of Bellevue, 144 Wn. App. 755, 760, 183 P.3d 1127 (2008).....17, 18

Bowman v. Webster, 44 Wn.2d 667, 669-70, 269 P.2d 960, 961-62 (1954)21

Brookens v. City of Yakima, 15 Wn. App. 464, 465. 550 P.2d 30 (1976) ..8, 9

Harberd v. City of Kettle Falls, 120 Wn. App. 498, 513, 84 P.3d 1241 (2004).....8, 9, 12

Kloss v. Honeywell, Inc, 77 Wn. App. 294, 299, 890 P.2d 480 (1995).... 15

Lybbert v. Grant Cnty., State of Wash., 141 Wn.2d 29, 34, 1 P.3d 1124 (2000)..... 7

Scott Paper Co. v. City of Anacortes, 90 Wn.2d 19, 33-38, 578 P.2d 1292 (1978).....13

Wallace v. Kuehner, 111 Wn. App. 809, 817, 46 P.3d 823 (2002) 15, 16

Young Soo Kim v. Choong-Hyun Lee, 174 Wn. App. 319, 323, 300 P.3d 431 (2013)..... 14

Statutes

RCW 4.16.040(1)16

RCW 4.16.270 17

RCW 36.70C *et seq* 1, 6

Rules

CR 56(c).....7

RAP 14.4.....23

Other

Bellingham Municipal Code 15.04.080.....22

Bellingham Municipal Code 15.08.060 E12

Bellingham Municipal Code 15.12.040 H.....	14
Bellingham Municipal Code 15.36.010 B	5
Bellingham Municipal Code 15.36.030.....	6
City of Bellingham Ordinance 8728.....	4
City of Bellingham Ordinance 2000-12-087	4
City of Bellingham Ordinance 2006-08-081	12

I. INTRODUCTION

Albert and Margaret Figaro, both in their mid-80's, own two lots of land just outside the City limits of the City of Bellingham in unincorporated Whatcom County. The City of Bellingham and Whatcom County installed sewer and water service stubs on Figaros' vacant lot, located just south of the City Limits, on Yew Street Road. The stubs were installed outside the municipal right-of-way on (under) the Figaros' private property. In September of 2000, the Figaros paid the City \$480 for a permit to have the water service stub installed on their property. Years later, the Figaros asked to connect to the City water and sewer service, but were denied.

The Figaros filed a lawsuit for breach of contract and declaratory judgment along with a Land Use Appeal petition under RCW Chapter 36.70C *et seq.* The City of Bellingham successfully moved dismiss the LUPA petition, arguing the denial of water and sewer were not land use decisions.

The parties then moved for summary judgment in the breach of contract/declaratory action. The Figaros asserted that that facts on the record establish that the City of Bellingham was either contractually obligated to serve the Figaros, or that it held itself out as the exclusive provider of water and sewer services to the Figaros' property, and as such

was compelled to serve the Figaros' property. The City opposed. The trial court ruled in favor of the City denying water and sewer.

The Figaros now appeal the trial court's ruling on the Breach of Contract/Declaratory Actions only.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it entered the "Order Granting City of Bellingham's Motion for Summary Judgment" dismissing Plaintiff's breach of contract and declaratory action claims requesting the trial court compel the City of Bellingham to serve Plaintiff's property with municipal water and sewer.
2. The trial court erred in awarding costs to the City of Bellingham as prevailing party.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Must the City of Bellingham provide the Figaros' property with municipal water and sewer service under theories of express or implied contract?
2. Must the City of Bellingham provide the Figaro's property with municipal water and sewer service under the "exclusive provider" or "sole provider" doctrine?
3. If the City of Bellingham had a right to deny municipal water and sewer service, did it waive that right under the facts and circumstances of this case?
4. Does the statute of limitations bar the Figaros' contract claim for water?

IV. STATEMENT OF THE CASE

A. Factual Background.

Petitioners Albert and Margaret Figaro (the “Figaros”), both in their 80’s, own two lots of real property just south of the City Limits of the City of Bellingham (“City”) on Yew Street Road.¹ Their house is on one lot and the other is vacant, with the Figaros owning their home lot since 1975.² This case involves only the vacant lot (the “Property”), because the lot with the Figaros’ house is already served by City water and sewer.

The Property is located in the City’s Urban Growth Area (“UGA”)³ and abuts Yew Street Road. Running through the middle of Yew Street Road are City of Bellingham sewer and water mains.⁴ The majority of properties abutting Yew Street Road from just outside the City limits all the way to Wade King Elementary School are hooked up to City water and sewer service, with water being provided to 240 parcels and sewer being provided to 200 parcels.⁵

Sewer and water service stubs are physically located on the Figaro’s Property.⁶ This is not a situation where the sewer or water main abuts the

¹ CP 159-160.

² CP 159.

³ CP 422 (Declaration of Bradley D. Swanson (“Swanson Decl.”) at Exhibit A.

⁴ CP 468.

⁵ CP 468.

⁶ CP 193.

street, or is merely nearby. Here, Whatcom County and the City of Bellingham physically dug ditches and installed sewer and water lines onto/under the Figaros' private property that connect to the City's mains under the street. This was all done with the Figaros' permission.⁷

The history of water service outside the city limits in this area is described in declarations provided by the City.⁸ The Figaros' property was in a water service and sewer service extension zone, created in 1979, by Ordinance 8728⁹ and in 2000 by Ordinance 2000-12-087.¹⁰ In approximately 2004, after the Figaros connections were on their property, the City began adopting ordinances and policies which restricted, reduced, and eventually virtually limited connections to sewer and water outside the city's corporate limits. During this period of time, and even after the restrictions began, the City connected hundreds of the Figaros' neighbors to City sewer and water.¹¹

The Figaros believed they had done everything they needed to do to obtain water and sewer service. They had no idea that because they had not put a meter on the vacant property, the City would ultimately consider their

⁷ CP 159-160.

⁸ CP 36-157 and CP 222-364.

⁹ CP 37.

¹⁰ CP 36-37; CP 67-74.

¹¹ CP 466-500.

property not hooked up.¹² Back in September of 2000, the Figaros had paid \$480 to the City for a permit that said:

**INSTALL 3/4" WATER SERVICE FOR FUTURE USE.
WATER IS BEING INSTALLED DURING YEW ST ROAD
CONSTRUCTION.**

13

Around the same time, Albert Figaro spoke with a City employee at City hall about service, and that employee told him that the City had opened an account, even giving him an account number.¹⁴

In 2008, the Figaros applied to the City of Bellingham for water service only, not sewer. That request was denied.¹⁵

In July 2014, the Figaros re-applied to the City Public Works Director to connect the existing service on the Property.¹⁶ That application went into great detail as to the potential land use issues the City was concerned with, and the justification for providing service under those policies.¹⁷ In September of 2014, the City denied the application pursuant to Bellingham Municipal Code ("BMC") 15.36.010 B.¹⁸ The Figaros

¹² CP159-160.

¹³ CP 159; CP163-165.

¹⁴ CP 159-160; CP 167-168 (Mr. Figaro's handwritten notes of the account information are found at CP 165).

¹⁵ CP 446-454.

¹⁶ CP 415-438.

¹⁷ CP 415-438.

¹⁸ CP 28.

appealed this denial to the City Council, pursuant to BMC 15.36.030. The City Council affirmed the denial by the Public Works Director.¹⁹

B. Procedural Background.

On November 17, 2014, the Figaros filed a “Land Use Petition and Complaint for Breach of Contract, Declaratory Judgment and Injunctive Relief” against the City of Bellingham, arising out of the City Council’s decision in October 2014.²⁰ The City filed a motion to dismiss the LUPA on the grounds the decision appealed was not a land use decision under RCW 36.70C *et seq.*, and the trial court agreed, entering an order dismissing the LUPA only (“LUPA Dismissal”).²¹

Once the LUPA was dismissed, the Figaros and the City agreed that the case was ripe for summary judgment. The Figaros filed their motion and briefing, supported by several affidavits,²² as did the City.²³ At a hearing on April 24, 2015, the trial court issued an oral ruling denying the Figaros’ claims, granting the City’s motion, and dismissing the Figaros’ case with prejudice.²⁴ A formal order reflecting this ruling was entered on

¹⁹ CP19-27.

²⁰ CP 7-28.

²¹ CP 209-210 (order); CP 208 (clerks notes).

²² CP 158-170 (Decl. of Albert Figaro); CP 192-207 (Decl. of Ron Reimer); CP 171-188 and CP 413-465 (Decls. of Bradley Swanson); CP 189-191 (Decl. of Heather Calloway).

²³ CP 222-364 (Decl. of Linda Anderson); CP 543-545 (Decl. of Mike Kim); CP 546-550 (Decl. of Moshe Quinn); CP 36-157 (Decl. of Brent Baldwin).

²⁴ CP 551.

May 11, 2015 (“Summary Judgment Ruling”).²⁵ On that same day, the trial court also entered an agreed Judgment on Award of Costs, in favor of the City.²⁶

On June 10, 2015, the Figaros timely filed a notice of appeal of only the Summary Judgment Ruling. They did not appeal the LUPA Dismissal and do not here assign error to the trial court’s ruling dismissing the LUPA or intend in any way to challenge that order.

V. STANDARD OF REVIEW

An appeal of a summary judgment is reviewed *de novo*, and this Court performs the same inquiry as the trial court did. *Lybbert v. Grant Cnty., State of Wash.*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Summary judgment is appropriate only when the pleadings, affidavits, and depositions on file establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*, citing, CR 56(c).

²⁵ CP 552-555.

²⁶ CP 556-558. This judgment was immediately satisfied by the Figaros. CP 559-560

VI. ARGUMENT

A. The City Has a Duty to Provide Water and Sewer to the Figaros.

Cities may extend their water and sewer utilities beyond their corporate limits. *Harberd v. City of Kettle Falls*, 120 Wn. App. 498, 513, 84 P.3d 1241 (2004), citing *Brookens v. City of Yakima*, 15 Wn. App. 464, 465, 550 P.2d 30 (1976). Cities that choose to extend services outside their corporate limits generally cannot be compelled to provide water or sewer service to residents outside the city. *Harberd v. City of Kettle Falls*, 120 Wn. App. at 516. However, in at least two circumstances a city will have an affirmative duty to provide water and/or sewer.

Implied Contract. A city is required to provide a resident outside its corporate limits with water and/or sewer if an implied contract exists. Implied contracts come about “when through a course of dealing and common understanding, the parties show a mutual intent to contract with each other.” *Harberd*, 120 Wn. App. at 516. “A contract to supply [water and/or sewer] may also be found by implication, as where a municipality holds itself out as a public utility willing to supply all those who request service in a general area. *Id.*”

Exclusive Supplier. A city may also be obligated to provide sewer and water service to the Figaros and others “where it is the exclusive

supplier of sewer or water service in a region extending beyond the borders of the city.” *Herberd*, 120 Wn. App. 498. If this duty exists, the city can deny service only by establishing its system has insufficient capacity for the new connections.²⁷ *Id.*

The facts here are quite straightforward. The City’s sewer and water mains run through Yew Street Road right in front of the Figaros’ property. Further, the City installed service stubs from that main, onto the Figaros’ private property. Moreover, the Figaros paid the City for a permit for this, at least for water service. This case differs from every other utility service case of this nature because of this latter fact. This is not a case like *Brookens v. City of Yakima*, 15 Wn. App. 464, 550 P.2d 30 (1976) where the facts establish that only a main runs through the street, with no connection to the properties at issue.

Here, the City has connected to its sewer and water system, hundreds of lots outside of its limits along Yew Street Road, which the Figaros’ property is literally in the middle of.²⁸ The vast majority of properties along the sewer and water mains are connected. However, the City did not install a sewer and/or water service stub from the main onto every property along

²⁷ There is no evidence or argument in the record to date that the City is claiming the system has insufficient capacity for the Figaros’ connections. The 2008 staff report admits that the system has capacity for the request.

²⁸ CP 468.

the main.²⁹ As is evident from the City's maps,³⁰ only four lots along Yew Street Road exist where sewer service stubs were constructed but are not yet connected to a residence or have an existing "customer."

This distinction is critically important to the analysis here. The City engaged in a course of dealing with the Figaros which manifested an intent to provide them service. The fact that the City constructed service stubs on the Figaros' vacant property (and a few others) but not on all vacant properties abutting the sewer and water mains shows that intent. That intent is further bolstered by the fact that when those stubs were installed, the Figaros were located in an area the City regularly provided service to.

The fact that the City serves a majority of properties abutting the main is also strong evidence of the City holding itself out as the exclusive provider of service in this area. The City serves literally hundreds of homes, including the Figaros' own residence. In fact, the City recorded a "Statement of Intent to Collect Connection Fee" to recoup the costs of installing the sewer main, including assessing the Figaros' vacant lot.³¹ The

²⁹ CP 468.

³⁰ CP 470-487. This map and legend show the main, individual "Water Service Lines" that extend from the main onto some parcels along the main. It also shows which of those are connected to a "customer."

³¹ CP 433-435 The Figaros vacant parcel No. is 370304 030498 0000).

City has collected these fees for years, including from the Figaros, and as recently as 2011 and 2013.³²

The facts of this case are distinguishable from the cases where courts have found that no implied contract or intent to generally serve the area exists. In none of those cases had the municipality or utility district at issue actually installed a service line from the abutting main on to the property of the property owner seeking water and/or sewer service. In none of those cases did the property owner seeking service obtain a permit from the City and pay for the installation of that service stub. Here, by its own actions, the City has committed itself to serving the Figaros' property with water and sewer.

While semantics should not decide this case alone, they can be persuasive. The City will likely argue that the stubs on the Figaros' property showed no intent to serve, and that there is no service until they are hooked up. However, from the late 1980's up until 2012, the City of Bellingham's code described what a "water service" was:

The Public Works Department will install a service pipe from the main to the property line, and will include such equipment as determined by the Public Works Department, such as, by way of example, a curbstop placed within the

³² Whatcom County Auditor's Office public records show the City "releases" of these charges in 2011 (Auditors' File No. 2110402150) and 2013 (2130403834) indicating the City is still connecting parcels along the Yew Street mains.

street right-of-way, a meter box and a meter assembly. This equipment is part of the “water service” and shall thereafter be maintained by and kept within the exclusive control of the City. . . .”³³

This language was changed in 2012 to the form it appears as today. Even today, the City’s code still defines a “water service” as the specific installation that currently exists on the Figaros’ property:

“Water service shall consist of the connection to the main, the corporation stop at the main, pipe from the water main to the meter, meter box, setter, meter and corporation stops. Water services shall be owned and maintained by the City from the main to the meter box, including all appurtenances therein.”³⁴

Thus, under any applicable version the Bellingham Municipal code, the City installed—and maintains—a water service on the Figaros’ property.

This fact is important, in that it can be inferred that when the City installed the water and sewer services on the Figaros’ property, it considered them services to connect their property to the utility, and not just the installation of a main in the street in front of them. It shows that the City in fact entered into a course of dealing where the Figaros rightfully expected they would be able to hook up. Moreover, it is evidence that City has held and does hold itself out as the sole provider, at least for those parcels where

³³ See CP 532, containing the strikethrough language that Ordinance 2006-08-081 added.

³⁴ BMC 15.08.060 E (current).

it installed or consented to the installation of service stubs on private property, which stubs are connected to the mains.

The City tries to avoid this contractual obligation by relying on changes in its ordinances and internal political policies. It is unconstitutional for a municipality to ordain around contractual obligations, unless the municipality can justify such impairment of those obligations as a justifiable exercise of its police powers. *Scott Paper Co. v. City of Anacortes*, 90 Wn.2d 19, 33-38, 578 P.2d 1292 (1978). In *Scott Paper v. Anacortes*, the Supreme Court held that an ordinance increasing utility prices charged to Scott Paper was unconstitutional as it violated the agreed upon price terms of a contract between the City of Anacortes and Scott Paper. The Court went on to hold that only upon evidence of great need—such as a formally declared public economic emergency—can a municipality pass an ordinance in violation of a contract. *Id.* at 36.

Here, the City of Bellingham can provide no such justification. The only authority the City relies on for denying the Figaros' application for water and sewer service is related to policy adopted via ordinance—policies related to urban growth and the Growth Management Act. As a result, the City cannot rely on ordinances adopted after it installed water and sewer service stubs on the Figaros Property to avoid the obligation to provide water and sewer service without running afoul of the constitution.

B. Statute of Limitations Does Not Bar the Figaros' Claims.

The City argued below that because the Figaros applied for water in 2007 and were denied in 2008, their breach of contract cause of action accrued upon the denial, and has since expired. One critical part of the analysis on the statute of limitations issue raised by the City is what it *does not* apply to. The City's limitations argument only applies to the Figaros' claim that the City breached an express or implied contract to serve them with municipal *water* service. This defense does not apply to the Figaros' contract claim (implied or express) for sewer service, because they were not denied such service until 2014.³⁵ Nor does this defense apply to the Figaros' claim for water and sewer under the "exclusive provider" doctrine, which is separate and apart from the contract claim. As an affirmative defense, the City has the burden of proving that the Figaros' claim is outside any applicable statute of limitation. *Young Soo Kim v. Choong-Hyun Lee*, 174 Wn. App. 319, 323, 300 P.3d 431 (2013).

The City fails to meet its burden of proof. The City issued the Figaros a written permit and accepted money from them to construct the

³⁵ The 2008 application only requested water and thus there was no denial of sewer service upon which the action would accrue until the 2014 denial. This is significant because if this Court compels the City to provide the Figaros sewer service, the Bellingham Municipal Code arguably requires the Figaros hook up to city water as well. BMC 15.12.040 H "As a condition of service all new sewer customers after January 1, 2013 shall be connected to the city of Bellingham water system and shall have a water meter installed."

water service on their property. The City even gave the Figaros an account number for the water service. These undisputed facts establish a “writing” sufficient to invoke the six year statute of limitations on written contracts. *See, Kloss v. Honeywell, Inc*, 77 Wn. App. 294, 299, 890 P.2d 480 (1995) (RCW 4.16.040(1) permits contract elements to be implied in an instrument considered as a “writing” for statute of limitations purposes).

In 2008, the City denied a water connection to the Figaros based on several reasons, including alleged inconsistencies with Comprehensive Plan policies as well as other code provisions, and that the Figaros included no “specific proposal” for the property.³⁶ The City argues that when this decision was finalized in March 2008, the breach of contract cause of action accrued, and thus the six year statute of limitations ran in March 2014, before this suit was filed in November 2014.

The 2008 decision was equivocal in many respects and is insufficient to constitute an accrual of the cause of action.³⁷ Accrual happens only on breach. An anticipatory repudiation of a contract “must be a positive statement or action indicating distinctly and unequivocally that a party cannot or will not perform its obligations.” *Wallace v. Kuehner*, 111

³⁶ CP 136 (Decl. of Brent Baldwin at Ex. J, pg 5.

³⁷ An anticipatory repudiation of a contract “must be a positive statement or action indicating distinctly and unequivocally that a party cannot or will not perform its obligations.” *Wallace v. Kuehner*, 111 Wn. App. 809, 817, 46 P.3d 823 (2002).

Wn. App. 809, 817, 46 P.3d 823 (2002). Here, while the City denied water service, the grounds for that denial were subject to change—policies, comprehensive plan goals, and the fact that no site plan or proposal was submitted. Thus, it was quite reasonable for the Figaros to think they could submit a new application later on, after correcting some of the deficiencies of their earlier application. After all, a party is permitted to revoke a repudiation, which the City arguably did when it accepted the 2014 application. *Id.* Regardless though, the 2008 decision did not unequivocally repudiate the contract requiring it to hook up the services to the Figaros property. The breach of contract cause of action did not reasonably accrue in March of 2008 in light of all the circumstances.

In July 2014, the Figaros reapplied for water service and submitted their first application for sewer service, based on changed circumstances.³⁸ Those changes in circumstances were: (1) the Figaros learned from the County they could not install both a well and septic on their property; (2) the Figaros had submitted a specific proposal for the Property demonstrating septic and well would not work; (3) the City's policy for increasing density in the UGA's has changed, favoring more density in the area of the Figaros' property; and, (4) in 2011 the City changed some of its

³⁸ CP 182 (Decl. of Brad Swanson, Exhibit A, pg. 9 of 24).

evaluation criteria for retail water and sewer requests.³⁹ All of these changes lead the Figaros to reasonably believe they had established the criteria required to meet the City's code requirements to obtain water and sewer service and as a result, they should re-apply.

The City accepted the application and processed it, depositing the Figaros' \$500 application fee. This act by the City alone is sufficient to extend the statute of limitations. It is akin to revoking the repudiation, or a creditor accepting a payment—an act which tolls the statute of limitations. *See* RCW 4.16.270 (statute of limitations re-set if partial payments made). If in fact the City had believed its collective “mind” was made up back in 2008, then it should have never accepted the 2014 application, the fee tendered with it, nor issued a substantive decision on it.

Even if the City does meet its burden on this affirmative defense, the Figaros' case is ripe for the exercise of equity by this Court. Equitable tolling “permits a court to allow an action to proceed when justice requires it, even though the statutory time period has nominally elapsed.” *Benyaminov v. City of Bellevue*, 144 Wn. App. 755, 760, 183 P.3d 1127 (2008). Here, the statute allegedly ran about four months before the Figaros

³⁹ *Id.*

re-applied for service, and eight months before they filed suit, as they were awaiting a final decision by the City.

“Appropriate circumstances” for invoking the doctrine of equitable tolling generally include “bad faith, deception, or false assurances by the defendant, and the exercise of diligence by the plaintiff.” *Benyaminov v. City of Bellevue*, 144 Wn. App. at 760-761. Courts do not allow equitable tolling to be used in “garden variety cases of excusable neglect.” *Id.* Factors this Court should review are the policies underlying the particular cause of action as well as those underlying the statute of limitations. *Id.*

One of the issues our courts have looked to in equitable tolling cases is the prejudice to the defendants – for example, the passage of time making witnesses’ memories weak, or difficulty in finding other evidence. Here, no such issue is present. The case is framed on the affidavits alone, and there is no need for testimony or witness recollection beyond what is in the record already. The City is not prejudiced in presenting a defense in any way by the at-most 8 months delay from running of the statute to lawsuit filing. The Figaros, on the other hand, are massively impacted.

If in fact this Court finds the statute of limitations accrued in 2008, it should equitably toll that statute in favor of the Figaros filing on November 17, 2014. In its reasoning for denying service in 2008, the City gave false assurances to the Figaros that they could re-apply when

circumstances changed.⁴⁰ The Staff Report recommending denial of Figaro's 2008 water request concluded with the comment "Staff does not find a compelling reason to recommend Council set aside City policy and grant approval of this request."⁴¹ The Council voted 7-0 to deny the motion on those grounds.⁴²

This closing statement by the City implies that a compelling reason to set aside City policy could be found in the future. This left the Figaros with the now-obviously false hope that their future application would be considered on the merits. In 2014, the Figaros in fact did re-apply for water, under changed circumstances: they had information from the County that they could not obtain water and sewer for the site.⁴³ The statute of limitations argument was never raised or mentioned until this action was filed. The City Council summarily denied the Figaros' application again in 2014.

The Figaros are not lawyers; they are retired blue collar folks in their 80's, knew the existence of sewer and water stubs on their property, and had no idea they needed to sue the City by March 2014 to preserve their rights.

⁴⁰ *See*, CP 136-140

⁴¹ CP 140.

⁴² CP 135.

⁴³ CP 175-182 and CP 186-88 (substantive portions of 2014 application for water and sewer addressed to staff and then city council. Specifically, *see* CP 182 for an outline of the changed circumstances from 2008).

The record here demonstrates that they consistently desired to assert their rights and did so diligently, applying twice for service and filing suit only 8 months after the technical statute of limitations could have run.

Lastly, worth considering in the equities here and as further evidence of false assurances, are the City's actions towards others. The City has time and again acted in a manner consistent with affording the Figaros the benefit of equitable tolling, by granting others in the area water and/or sewer as recently as 2011 and 2013.⁴⁴ The equities involved: while this lawsuit was pending, Mr. and Mrs. Figaro could literally look across the street from their home and see a new subdivision under construction outside the City limits, where over 20 houses will be served by City water and sewer.⁴⁵ The City has held itself out as the sole provider, it has impliedly—and arguably explicitly – assured the Figaros they can obtain municipal water and sewer by continually extending the same service to individuals and developments of multiple houses within a stone's throw of the Figaros.

C. The City Waived its Right to Deny Service.

If this Court finds that the Figaros have not established as a matter of law that the City is required to serve the Figaros, the facts on the record

⁴⁴ Whatcom County Auditor's Office public records show the City "releases" of these charges in 2011 (Auditors' File No. 2110402150) and 2013 (2130403834) indicating the City is still connecting parcels along the Yew Street mains.

⁴⁵ CP 422.

establish that the City has waived the ability to assert the right to refuse service.

A waiver is “the intentional and voluntary relinquishment of a known right.” *Bowman v. Webster*, 44 Wn.2d 667, 669-70, 269 P.2d 960, 961-62 (1954). An implied waiver can be “inferred from circumstances indicating an intent to waive.” *Id.* While an express waiver requires direct evidence of intent to waive, an implied waiver is inferred:

An implied waiver may arise where one party has pursued such a course of conduct as to evidence an intention to waive a right, or where his conduct is inconsistent with any other intention than to waive it. An estoppel is a preclusion by act or conduct from asserting a right which might otherwise have existed, to the detriment and prejudice of another who, in reliance on such act or conduct, has acted upon it. A *waiver is unilateral* and arises by the intentional relinquishment of a right, or by a neglect to insist upon it....

Once a party has relinquished a known right or advantage, he cannot reclaim it without the consent of his adversary. Whether there has been a waiver is a question for the trier of the facts.

Bowman v. Webster, 44 Wn.2d 667, 670, 269 P.2d 960, 961-62 (1954)
(italics in original).

Here, the City installed a sewer and water main in the street abutting the Figaros’ property. The City then went further, authorizing the installation of service stubs from that main onto the Figaros’ property—

something it did not do to all surrounding vacant parcels. The City maintains ownership of the mains, even if they are under county roads⁴⁶ and as demonstrated above, technically identifies what is on the Figaro's property as a "service." The City required the Figaros to obtain a permit for the work, and pay a fee. The City even issued the Figaros an account number for water charges.

These facts establish that the City waived its right to assert it had no duty to serve the Figaros' property. The City undertook specific acts regarding water and sewer that it did not take with other properties abutting the mains. The Figaros relied on those actions, now to their obvious detriment. These facts demonstrate the City's express and/or implied waiver of the right to assert it has no duty to serve the Figaros. As a result, even if this Court finds insufficient evidence of a contract, the court can declare that by its actions and omissions to date, the City waived its right to refuse the Figaros' application for water and sewer service.

D. Trial Court Award of Costs Should be Reversed and Costs Awarded to Figaros as Prevailing Party.

The trial court awarded a judgment against the Figaros for costs, as the City was deemed the prevailing party below.⁴⁷ If this Court finds in

⁴⁶ BMC 15.04.080.

⁴⁷ CP 556-558.

favor of the Figaros on appeal, it should reverse that cost award and award costs to the Figaros from below as well as on appeal, so long as the Figaros comply with RAP 14.4.

VII. CONCLUSION

For the reasons stated herein, this Court should reverse the trial court, dismiss the City's Motion for Summary Judgment, and Grant Plaintiffs' Motion for Summary Judgment, entering an order that the City of Bellingham must serve the Figaros' property with municipal water and sewer service.

RESPECTFULLY submitted this 18th day of February 2015.

BELCHER SWANSON LAW FIRM, PLLC

A handwritten signature in black ink, appearing to read "Peter R. Dworkin", written over a horizontal line.

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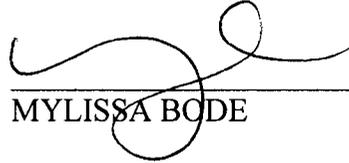
DECLARATION OF SERVICE

On said day below, I hand delivered a true and accurate copy of Appellants' Opening Brief in Court of Appeals Cause No. 735454-4-I to the following parties:

James Erb
Assistant City Attorney
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Bellingham, WA 98225
jeerb@cob.org

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED September 18, 2015 at Bellingham, Washington.


MYLISSA BODE

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