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No. 89533-3

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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

Plaintiffs/Respondents,

vs.

CITY OF BOTHELL, a municipal corporation,

Defendant/Appellant.

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CITY OF BOTHELL'S MOTION TO STRIKE PORTIONS OF  
RESPONDENTS' SUPPLEMENTAL BRIEF AND NEW DOCUMENT  
ATTACHED AS AN EXHIBIT TO RESPONDENTS'  
SUPPLEMENTAL BRIEF

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## I. IDENTITY OF MOVING PARTY

The City of Bothell respectfully moves to strike limited portions of Plaintiff Crystal Ridge Homeowners Associations' Supplemental Brief and the new document attached thereto as Exhibit A.

## II. STATEMENT OF RELIEF SOUGHT

### A. The Court Should Strike The New Document Proposed By Plaintiffs That Was Neither Submitted To, Nor Considered By, The Courts Below

The City of Bothell respectfully requests that the Court strike **Exhibit A to the Supplemental Brief** filed by Plaintiffs, an alleged 2014 Real Estate Property Tax bill for a Bothell residential property, as well as the following references in their Supplemental Brief to this improper exhibit, and other inadmissible evidence and argument based on this exhibit:

1. At page 2: Statement that "Crystal Ridge would eventually contain more than eighty houses which currently pay property taxes and surface water fees to the City."

Reason: No citation to the record. RAP 10.3(a)(5).

2. At page 10: Statement that "Finally, the Court is asked to take judicial notice, pursuant to ER 201, of the attached 2014 Real Estate Property Tax bill for one of the properties in Crystal Ridge [*proposed Exhibit A*]. The Surface Water Management fee is \$149 a year. If one rounds that up to \$150, the 80 plus houses in Crystal Ridge pay \$12,000 on a

yearly basis to the City. If one assumes a twenty-seven year interval, \$324,000 would be collected from this community in fees. Municipalities are not without resources to address drainage easements that they have a duty to maintain.”

Reasons: No citation to any admissible evidence in the record / RAP 10.3(a)(5); Improper attempt to supplement the record and raise a new argument before the Supreme Court / RAP 9.11; 9.12.

**B. The Court Should Strike Factual Assertions That Are Not Supported By Any Citation To The Record**

The City of Bothell also respectfully requests that the Court strike the following unsupported assertions in the Plaintiffs’ Supplemental Brief, as these assertions are not supported by the record and appear, in several instances, to be nothing more than the improper opinion(s) of Plaintiffs’ counsel:

1. At pages 2-3: Statement that “the Developer and the County embarked together in solving a regional subsurface water problem . . .”
2. At page 3: Statement that “The partnering of the Developer and the County makes economic sense as does entrusting the maintenance of the interceptor pipe in the future to the County rather than to a homeowner’s association. [footnote 3]”

n.3 – “Oftentimes, homeowner associations are very cost conscious in decision making.”

3. At page 4: Statement that “The other easements contain lateral pipes, surface water catch basins, surface water ditches and there are three retention detention ponds that hold surface waters. [footnote 5]”

“n.5 The details of the interceptor pipe, lateral pipes, catch basins, ditches and retention detention ponds are not included on the plat for lack of room to do so.”

4. At page 8: Statement that “the interceptor pipe controls groundwater flows that emanate from a half a mile away which includes leaking municipal storm drains, leaking municipal waterlines . . . from upland development. CP 296; 791 (Hearing Examiner finding no. 8)” (Emphasis added.)
5. At page 8: Statement that “it is clear that the size of the rectangular pond is greater because it contains not only the flows from the development of the site itself but also the subsurface regional flows coming into it.”
6. At pages 9-10: “There have been large storm events since 1990, most notably during the holiday season of 1996. . . . Municipalities narrowed the conditions under which they would accept stormwater facilities for operation and maintenance in response to these storms.”

### III. FACTS RELEVANT TO MOTION

The issue in this case is the scope of a drainage easement dedicated on the face of a plat. At the trial court level the parties filed cross-motions for summary judgment on the legal issue of who actually owns the interceptor pipe. Plaintiffs claim the City owns the pipe because it was allegedly included in a drainage easement dedicated to Snohomish County, the City’s predecessor in interest, on the face of a plat in 1987. The City claims that the pipe, which is not shown on the plat, and which Snohomish County indisputably never maintained, was not included in the

drainage easement – which only applied to surface and storm water facilities, not a buried groundwater pipe.

The Supreme Court accepted review to answer the questions raised in this case, and advised the parties that they could file supplemental briefs. But in their supplemental brief, Plaintiffs attempt to submit a new hearsay document to the Supreme Court that was not considered by the lower courts; and in addition, assert new arguments to this Court that were never made below; and finally, make certain “factual” statements that are not supported by any citation to the record. Accordingly, the City has filed this motion to strike.

#### **IV. GROUNDS FOR RELIEF AND ARGUMENT**

**A. The Court Should Strike the Tax Record Submitted as Exhibit A and All References to the Tax Record**

Plaintiffs’ improperly attempt to rely on materials outside of the record on appeal. Specifically, Plaintiffs attached Exhibit A to their Supplemental Brief, an unsworn copy of a 2014 Real Estate Property Tax bill that is *alleged* to be for one of the properties in the subdivision at issue in this case (no parcel number or address was provided so as to confirm this allegation). Even if we assume this tax bill is related to one of the properties at issue in this case, this document was not presented to the trial court below and is not a part of the record before this Court on

appeal. Plaintiffs do not identify any grounds on which the Court should supplement the record to consider this material, nor do any such grounds exist.<sup>1</sup>

1. **The new evidence is barred under RAP 9.11**

Supplementation of the record on appeal is appropriate only in an "extraordinary case." *See East Fork Hills Rural Ass 'n v. Clark County*, 92 Wn. App. 838, 845, 965 P.2d 650 (1998). Supplementation of the record on appeal is only allowed pursuant to the strict requirements of RAP 9.11. Plaintiffs fail to provide any argument or make any showing under RAP 9.11 that the Court should supplement the record with this new evidence. Plaintiffs do not even address RAP 9.11. Because of this alone, the City's Motion to Strike should be granted.

Even if Plaintiffs had complied with RAP 9.11, their Motion to Supplement should be denied. RAP 9.11(a) sets forth six required elements that must be satisfied before this Court may consider new facts outside the record. All six conditions of RAP 9.11 must be met. *In re Recall Charges Against Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003). The tax bill attached to Plaintiffs' Supplemental Brief does not

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<sup>1</sup> Plaintiffs state that the Court can take judicial notice of this document pursuant to ER 201. But even if the Court could take judicial notice of this document, the Plaintiffs would still need to identify grounds on which the Court should consider this document. Plaintiffs are required to comply with the conditions of RAP 9.11 to supplement of the record. Plaintiffs did not even address RAP 9.11.

satisfy these six conditions because, among other reasons, the new facts are not "needed to fairly resolve the issues on review," the new facts would not "probably change the decision being reviewed," and there is no excuse for the Plaintiffs' "failure to present the evidence to the trial court." See RAP 9.11 (a)(1), (2) and (3).

Here, Plaintiffs seem to rely on the tax bill solely to support a new argument that the City supposedly has sufficient money to maintain private drainage facilities that are in failure. See *Pls' Suppl. Brief*, at 10. First, the information provided in Exhibit A does not support this assertion. The exhibit indicates only that one residence somewhere in Bothell was assessed a "Surface Water Management" fee of \$149 for the year 2014. Clearly, this fee is for "*surface water*" management, not *ground water*. It is called "surface water" management for a reason. As testified to by the City's Utility Manager, Don Fiene, P.E., and the City's Environmental Engineer, Kristin Terpstra, P.E., and the City's Superintendent of Public Works, Nik Stroup, the Surface Water Management system does not generally include municipal operation and/or ownership of *ground water* facilities such as the interceptor pipe at issue in this case. CP 343, 345-346; 481-482; 787; 245-246; 254-255; 250; 252.

Second, Plaintiffs' attempt to convince the Court that the City has a pile of money (available, presumably, to maintain their failing private interceptor pipe) by multiplying the yearly *surface water* management fee for 2014 by 27 years is without merit; it does not even make sense. Again, *see Pls' Suppl. Brief*, p. 10. The City annexed this property in April 1992, 22 years ago. CP 730-761 (Interlocal Agreement dated April 15, 1992).<sup>2</sup> 22 years ago the surface water management fees were undoubtedly less than \$149/per residential lot annually. Thus, this calculation is demonstrably false speculation. Furthermore, any funds collected by the City more than a couple years ago – *much less 22 to 27 years ago* – have long been spent.<sup>3</sup>

Third, even if the Court were to accept and consider Exhibit A, there is no explanation as to how this 2014 tax bill actually sheds any light on the specific issue before this Court, which is the ownership of the underground interceptor/ground water pipe. This information could not possibly change the decision on review, *because it is unrelated to the issue of ownership*.

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<sup>2</sup> It is a mystery why Plaintiffs chose a 27 year interval.

<sup>3</sup> There is no indication in Plaintiffs' supplemental briefing of how much it has cost the City annually to pay for surface water management expenses over the past 22 to 27 years. Although such information is (or would have been at one time) publicly available, Plaintiffs have chosen to attempt only a one-sided supplementation of the record.

Finally, the City is forced to point out that Plaintiffs are now trying to supplement the record with information they themselves affirmatively and aggressively tried – via motion – to keep out of the record on review. Exhibit A and Plaintiffs’ new arguments are directly in conflict with Plaintiffs’ prior Motion to Strike against the City. See Motion attached hereto as **Appendix No. 4**.<sup>4</sup> A brief recitation of the procedural history of this case is in order here. After the trial court entered an order granting Plaintiffs’ cross-motion for summary judgment, which effectively held that the City owned the buried interceptor pipe (*CP 97-100*), the City filed a motion with the trial court to certify the case for an immediate appeal pursuant to CR 54(b). *CP 153-157/Appendix No. 1*. The City filed several declarations with their CR 54(b) motion: the Declaration of Don Fiene, P.E., the City’s Utility Manager (*CP 119-125/Appendix No. 2*); and the Declaration of Nik Stroup, the City’s Superintendent of Public Works (*CP 126-131/Appendix No. 3*). Included in the CR 54(b) motion and declarations was a summary of the activities and expenses the City would incur if the trial court’s unexpected decision were left to stand.

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<sup>4</sup> This *Motion to Strike Certain Documents in the City of Bothell’s Designation of Clerk’s Papers* was filed with the trial court after the City filed its Request for Discretionary Review and Designation of Clerk’s Papers.

In its Order granting the City's request for an appeal, the trial court acknowledged that the City had submitted evidence that "the Court's ruling has the potential of financial impact [on the City] . . ." CP 69.

In its Designation of Clerk's papers, the City designated its CR 54(b) motion and the supporting declarations of Don Fiene and Nik Stroup referenced above. This designation was made to support the City's request for immediate review by the Court of Appeals. Simply because the trial court certifies a case for an immediate appeal does not mean that the Court of Appeals will accept review under RAP 2.3; so the briefing and declarations were necessary to support the City's request for review per RAP 2.3. Soon after the City's CR 54(b) motion and supporting declarations were designated for review, Plaintiffs' filed a motion with the trial court to strike them from the record. *See, Appendix Nos. 4, 5, 6, & 7.* They went so far as to ask for sanctions and attorney's fees against the City, alleging unethical behavior. *Appendix No. 4, pp. 6-9.* Plaintiffs' motion was denied; and their request for sanctions and fees was similarly denied. *Appendix No. 8.*<sup>5</sup> Despite the fact that Plaintiffs claimed it was

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<sup>5</sup> In its Memorandum Decision denying Plaintiffs' Motion to Strike, the trial judge properly noted that the case is governed by RAP 9.12, and that the original order on summary judgment set forth the documents and evidence that had been called to the attention of the trial court. *Appendix No. 8/Memorandum Decision, p. 2.* The trial judge further noted that the CR 54(b) motion and declarations had only been designated as related to the City's CR 54(b) motion, *not* the summary judgment motions. *Id.* Finally, the trial court wrote "If the City relies on these documents for an improper argument or in an improper manner, it is for the Court of Appeals to determine." *Id.* at 3. The City has

unethical for the City to designate its CR 54(b) pleadings on appeal – although the City only designated them to support its request for CR 54(b) review – Plaintiffs have now indisputably tried to insert new evidence into the summary judgment record on the *exact* issue they accused the City of supposedly “improperly” designating on appeal. Plaintiffs have opened the door they themselves asked the Court to slam shut; a door they claimed it was unethical to open pursuant to CR 11.<sup>6</sup>

At a minimum, if Plaintiffs new evidence is considered by the Court for any reason in determining the cross-motions for summary judgment, then the City asks the Court to also consider the declarations of Don Fiene and Nik Stroup at *CP 119-131*, which address the same issue. For example, Mr. Don Fiene testified that:

3. Unfortunately, the trial court’s decision in this case puts a

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*not* relied on these documents during this entire appeal; until this moment. At this time, however, it feels compelled to bring this information to the Court’s attention only because of Plaintiffs’ improper attempt to supplement the record and open the door with regard to the very issue contained in these documents.

<sup>6</sup> In their prior motion to strike against the City, Plaintiffs’ counsel accused, “We have never been involved in a case where opposing attorneys [the City’s attorneys] have acted in this manner. . . . the City sought to place inappropriate evidence before the appellate court.” **Appendix No. 4, p. 6.** The trial court, in its Memorandum Decision, was easily able to determine that Plaintiffs’ inflammatory accusations were not true. **Appendix 8.** But what *is* true is that Plaintiffs have now brazenly attempted to place inappropriate evidence before the Supreme Court on the very issue they were supposedly incensed about keeping out of the record at the lower court levels. The hypocrisy is evident. **Cases should be won on the law and the merits; not on gamesmanship.** The City respectfully repeats its request for the Court to carefully review the actual record on review, and Washington law, when deciding this case; and not to be persuaded by unsubstantiated argument in Plaintiffs’ briefing, or Plaintiffs’ attempts to sway the Court’s opinion with irrelevant, hearsay documents that are not part of the record on review; and arguments that are not supported by citations to the record and are not reasonable “inferences” from the record.

new and tremendous burden on the City and its surface water utility rate payers. (*Emphasis added.*) The City established a Surface Water Utility system many years ago to maintain the City's *surface* water system. But the ruling in this case - for the first time, to the best of my knowledge - requires the City to maintain a *ground* water system, not a *surface* water system. Ground water systems are not typically the domain of a City utility and this ruling sets a precedent that could cause significant financial hardship not only to City of Bothell citizens, but for other local government entities as well. (*Emphasis added.*) Ground water systems are typically and almost exclusively private systems and, to the best of my knowledge, are only constructed and maintained by Cities for the express purpose of protecting public infrastructure.

\* \* \*

4. Plaintiffs are looking for the City to maintain this ground water system specifically to protect their *personal* property, such as their real property, private buildings, private infrastructure and perhaps the District's Sanitary Sewer system. If this ruling stands it will not only require significant manpower to maintain, it could set a precedent for the City's Surface Water Utility to maintain other ground water systems intended to protect private infrastructure. This will result in a significant and unwarranted financial burden on City Surface Water Utility rate payers, as set forth more specifically in the Declaration of Nik Stroup, filed herewith.

CP 120-122 (emphasis added). Mr. Nik Stroup testified more specifically as follows:

5. As the Superintendent in charge of the City of Bothell's Public Works Operations Division, [I] can say that the trial court's decision places an enormous financial burden on the City's limited resources and its surface water utility rate payers.

\* \* \*

6. Ground water systems are not typically the domain of a City utility and this ruling sets a precedent that could cause

significant financial hardship not only to City of Bothell citizens, but for other municipalities as well. Ground water systems are almost exclusively private systems and are only constructed and maintained by Cities for the express purpose of protecting public infrastructure. As set forth in the Declaration of Donald Fiene, filed herewith, the system at Crystal Ridge does not benefit the City's infrastructure.

7. Here, Plaintiffs are looking for the City to maintain a ground water system designed and built to protect their private properties. If this ruling is to stand it will not only require significant manpower to maintain, it could set a precedent for the City's Surface Water Utility to maintain other ground water systems intended to protect only private properties. This will result in a significant and unwarranted financial burden on the City's Surface Water Utility rate payers.
8. The following list of issues is demonstrative of the enormous impact this decision has on the City. For the Public Works Operations to take over maintenance of the ground water pipe buried behind the Crystal Ridge subdivision, the following issues would first need to be addressed:
  - City does not have legal access to the outfall of the interceptor pipe, which is located on neighboring private property. City would need to gain legal access through some sort of easement agreement with a non-party to this action.
  - City cannot even physically access the ground water system with necessary heavy equipment for maintenance at this time, even if it had an access easement. City would need to consider purchasing 1 or 2 of the existing houses and removing the said houses. At a minimum, significant private structures on private property would need to be removed. City would then construct roads to access the ground water system (likely asphalt roads to convey heavy equipment).
  - Current City owned cleaning equipment is not capable of cleaning the approximate 1,100 LF of interceptor pipe (standard max length of rodder hoses is 350-500 ft). City

would need to purchase expensive equipment to access and maintain this large section of interceptor pipe.

- **City would need to obtain a Hydraulic Permit Approval (HPA) permit from the Department of Ecology (DOE) every time it performed maintenance on the ground water system,** due to outfall of that system being a private pond that feeds a wetland and stream.

\* \* \*

- **Large upfront costs for specialized equipment and additional staffing and personnel costs would need to be considered** to take on new responsibilities while still meeting our Federal obligations regarding the City's NPDES phase 2 permit.

9. Again, as the Superintendent in charge of the City of Bothell's Public Works Operations Division, I believe **the trial court's decision places a new – and more importantly, an unrealistic and unattainable – burden on the City's limited maintenance resources and the City taxpayers. If the decision is upheld, all citizens of Bothell will feel the impact through significant increases in storm utility rates** to cover the new court ordered responsibilities for maintaining this system – and, very possibly, other ground water systems.

CP 127-130 (emphasis added).<sup>7</sup>

## 2. **The new evidence is barred under RAP 9.12**

As this is an appeal of a summary judgment order, RAP 9.12 applies. RAP 9.12 strictly precludes consideration of issues and facts not raised before the trial court: ("On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court."). Thus, RAP

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<sup>7</sup> Again, the City only asks that this information be considered if the Court deems it appropriate to consider the new evidence and testimony submitted with Plaintiffs' Supplemental Brief.

9.12 specifically precludes the Court from considering the hearsay tax report proposed by Plaintiffs. Moreover, the tax report is not admissible evidence regarding ownership of a private drainage system, especially a *private groundwater* drainage system. The tax report is not authenticated, and Plaintiffs fail to lay any foundation as to who prepared the report. *See* ER 602; ER 901. Additionally, the tax report constitutes inadmissible hearsay. ER 802. For these reasons, the tax report should be stricken.

**B. The Court Should Strike References to Facts Not Supported By Citations to the Record and All Other Inadmissible Evidence**

Plaintiffs' Supplemental Brief is replete with factual assertions that do not include any citation to the record. *See, supra*, Section II.B., and the various factual assertions made by Plaintiffs at pgs 2-10 of their Supplemental Brief. Inclusion of factual statements in a legal brief without citations to the record violates RAP 10.3(a)(5), which provides that a "[r]eference to the record must be included for each factual statement." In their Supplemental Brief, Plaintiffs wrongly assert as follows:

1. At pages 2-3: Statement that "the Developer and the County embarked together in solving a regional subsurface water problem . . ."

There is no citation to the Record upon which to base this statement. Nor does the Record support any inference that the Developer

and the County “embarked together” to solve a regional subsurface water problem. All evidence in the record indicates that the private developer of Crystal Ridge needed permits from the County to develop its property. In order to get those permits, it needed to mitigate for the adverse effects of its development on the groundwater regime. The County and the developer did not build anything together. The only thing Snohomish County did was issue permits and approve the developer’s private project. Plaintiffs’ factual misrepresentations to the contrary should be stricken.

2. At page 3: Statement that “The partnering of the Developer and the County makes economic sense as does entrusting the maintenance of the interceptor pipe in the future to the County rather than to a homeowner’s association. [footnote 3]”

n.3 – “Oftentimes, homeowner associations are very cost conscious in decision making.”

There is no citation to the Record upon which to base these statements. Nor does the Record support any inference, first, that the Developer and the County “partnered” in any way with regard to the Developer’s private residential development at Crystal Ridge. Once again, all evidence in the record indicates that the only thing Snohomish County did was issue permits and approve the developer’s private project. Plaintiffs’ factual misrepresentations to the contrary should be stricken. Second, there is no citation to the Record to support Plaintiffs’ statement

that HOAs are “cost conscious” in decision making. To the extent the Court even considers this statement, it should also note that Counties and Cities are also extremely cost conscious in decision making, even more so than HOAs. In sum, Plaintiffs’ unsupported inference that the HOA would not have assumed ownership of the private interceptor pipe because HOAs are generally “cost conscious” is not supported by the record, is mere speculation by Plaintiffs’ counsel, and should be stricken and/or disregarded.

3. At page 4: Statement that “The other easements contain lateral pipes, surface water catch basins, surface water ditches and there are three retention detention ponds that hold surface waters. [footnote 5]”

“n.5 **The details of the interceptor pipe, lateral pipes, catch basins, ditches and retention detention ponds are not included on the plat for lack of room to do so.**” (*Emphasis added.*)

There is no citation to the Record upon which to base Plaintiffs’ statement that the “details of the interceptor pipe . . . are not included on the plat for lack of room to do so.” Nor does the Record support any inference that this is the case. Again, this is merely speculation and misdirection by Plaintiffs’ counsel that should be stricken and disregarded.

In fact, there is plenty of room on the plat map to have included the interceptor pipe if the developer had wanted to have included it and/or if

the County or Hearing Examiner would have ordered that it be included on the plat map.<sup>8</sup> CP 655. For instance, the interceptor pipe is easily depicted on the plat drawing for the Alderwood Water and Sewer District. CP 475. The Court can reasonably make several inferences based upon the presence of the interceptor pipe on the District's plans and its absence on the plans for the Plat of Crystal Ridge: first, the interceptor pipe is intended to protect the District's sanitary sewer line (which is confirmed by other evidence in the record, *see, e.g.*, 467); second, the District may be partially responsible for maintaining the interceptor pipe; third, the HOA is responsible for maintaining the interceptor pipe because it fits the definition of a private ground water drainage facility; and fourth, the County (and subsequently the City) is not responsible for maintaining the interceptor pipe because it is not depicted on the plat map and does not directly benefit any County/City infrastructure. In sum, Plaintiffs' blatantly unsupported statement that the interceptor pipe was not included on the plat map because there wasn't room to do so should be stricken as unsupported by citation to the Record, and because it is demonstrably false, as there was room to depict the interceptor pipe on the plat (if, presumably, the Hearing Examiner had ordered the developer to do so).

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<sup>8</sup> The Record is clear that the Hearing Examiner did not order the County to take over maintenance of the interceptor pipe. CP 718-728. The Record is also clear that the County never did, in fact, take over maintenance of the interceptor pipe. CP 245-246; 249; 251-252; 344.

4. At page 8: Statement that “the interceptor pipe controls groundwater flows that emanate from a half a mile away which includes leaking municipal storm drains, leaking municipal waterlines . . . from upland development. CP 296; 791 (Hearing Examiner finding no. 8).” (Emphasis added.)
5. At page 8: Statement that “it is clear that the size of the rectangular pond is greater because it contains not only the flows from the development of the site itself but also the subsurface regional flows coming into it.” (Emphasis added.)

With regard to the inaccurate statements made at both numbers 4 and 5 above, the City draws the Court’s attention to *The City’s Supplemental Brief*, pages 11-13 (incorporated herein by reference), where the City scrutinized the Record and demonstrated that there is no actual support for Plaintiffs’ claim that the interceptor pipe was designed to catch leaking “municipal” flows or “regional” flows.

Earlier in this motion the City chastised Plaintiffs for failing to provide any citations to the Record in support of their statements; but here the situation is worse. Here, Plaintiffs’ mis-cite to the Record. Plaintiffs cite to Finding No. 8 of the Hearing Examiner’s Decision, at CP 296. But when the Court looks Finding No. 8 it is evident that, in fact, the Hearing Examiner never once says that any of the flows are “municipal.” Plaintiffs’ simply made that “fact” up to suit their own purposes. Enough

is enough. The City moves to strike these misrepresentations from the Plaintiffs' Supplemental Brief.

6. At pages 9-10: "There have been large storm events since 1990, most notably during the holiday season of 1996. . . . Municipalities narrowed the conditions under which they would accept stormwater facilities for operation and maintenance in response to these storms."

There are no citations to the Record for any of the statements in these sentences. They are blatant hearsay under ER 802. They are irrelevant on their face, as this case deals with conditions in Snohomish County in 1987 and Bothell in 1992 – making a storm “during the holiday season of 1996,” and whatever might have happened afterwards, irrelevant. This is a classic example of Plaintiffs' counsel attempting to inject herself into the proceedings as both a fact and expert witness. It is improper in every respect. All of the statements above should be stricken.

## V. CONCLUSION

For the foregoing reasons, the City respectfully requests that the Court strike the evidence outside the record appended to Plaintiffs' Supplemental Brief and also requests that the Court strike all references to this and other inadmissible evidence in Plaintiffs' Supplemental Brief.

Respectfully submitted this 23<sup>rd</sup> day of April, 2014.

KEATING, BUCKLIN &  
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CITY OF BOTHELL

By: Joe Beck <sup>all</sup> ~~email~~ approval  
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City of Bothell

## OFFICE RECEPTIONIST, CLERK

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**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Wednesday, April 23, 2014 4:04 PM  
**To:** 'Deanna Nylund'  
**Cc:** kwillie@tmdwlaw.com; dheid@auburnwa.gov; Stephanie E. Croll  
**Subject:** RE: Crystal Ridge Homeowners Association v. City of Bothell - Supreme Court Cause No.: 89533-3

Rec'd 4-23-14. The appendix is too large to send via email. You will need to mail the appendix to the Court. The brief is printed out and we will match up the appendix once we receive it.

**From:** Deanna Nylund [mailto:DNylund@kbmlawyers.com]  
**Sent:** Wednesday, April 23, 2014 3:59 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** kwillie@tmdwlaw.com; dheid@auburnwa.gov; Stephanie E. Croll  
**Subject:** Crystal Ridge Homeowners Association v. City of Bothell - Supreme Court Cause No.: 89533-3

Dear Supreme Court Clerk:

Attached please find the City of Bothell's Motion to Strike Portions of Respondents' Supplemental Brief and New Document Attached as An Exhibit to Respondents' Supplemental Brief. If you have any questions regarding the above, please contact me directly.

Thank you.

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**Subject:** RE: Crystal Ridge Homeowners Association v. City of Bothell - Supreme Court Cause No.: 89533-3

Thank you for letting me know. I will send it out in today's mail.

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Rec'd 4-23-14. The appendix is too large to send via email. You will need to mail the appendix to the Court. The brief is printed out and we will match up the appendix once we receive it.

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**Subject:** Crystal Ridge Homeowners Association v. City of Bothell - Supreme Court Cause No.: 89533-3

Dear Supreme Court Clerk:

Attached please find the City of Bothell's Motion to Strike Portions of Respondents' Supplemental Brief and New Document Attached as An Exhibit to Respondents' Supplemental Brief. If you have any questions regarding the above, please contact me directly.

Thank you.

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**APPENDIX TO CITY'S MOTION TO STRIKE**

- Appendix No. 1:** Motion of City Under CR 54(b) For Entry of Final Judgment and to Enter Written Findings; **CP 153-157**
- Appendix No. 2:** Declaration of Donald Fiene in Support of the City of Bothell's Motion Under CR 54(b) for Entry of Final Judgment and to Enter Written Findings; **CP 119-125**
- Appendix No. 3:** Declaration of Nik Stroup in Support of the City of Bothell's Motion Under CR 54(b) for Entry of Final Judgment and to Enter Written Findings; **CP 126-131**
- Appendix No. 4:** Plaintiffs' Motion to Strike Certain Documents In the City of Bothell's Designation of Clerk's Papers which Violate Rap 9.12 and It's Request For Attorneys' Fees and Costs
- Appendix No. 5:** Declaration of Karen A. Willie in Support of Motion to Strike
- Appendix No. 6:** City's Opposition and Motion to Strike Plaintiffs' Motion to Strike
- Appendix No. 7:** Declaration of Stephanie E. Croll in Support of the City's Opposition, Motion to Strike, and Request for Sanctions
- Appendix No. 8:** Memorandum Decision Re: Plaintiff's Motion to Strike Certain Documents

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DECLARATION OF SERVICE

I declare that on April 23, 2014, a true and correct copy of the foregoing document was sent to the following parties of record via method indicated:

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DATED this 23<sup>rd</sup> day of April, 2014.

  
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Deanna Nylund, Legal Assistant

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The Honorable Ronald L. Castleberry  
Hearing Date: April 5, 2012  
Hearing Time: 1:00 p.m.  
Moving Party: Defendant  
Location: To Be Determined



CL15551801

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

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

NO. 10-2-10147-9

Plaintiffs,

MOTION OF CITY UNDER CR 54(b)  
FOR ENTRY OF FINAL JUDGMENT  
AND TO ENTER WRITTEN  
FINDINGS

v.

CITY OF BOTHELL, a municipal  
corporation,

Defendant.

I. RELIEF REQUESTED

The City of Bothell respectfully requests the Court designate as a final judgment its  
*Order Granting Plaintiffs' Motion For Summary Judgment And Denying Defendant City Of  
Bothell's Cross Motion For Summary Judgment* dated April 5, 2012 (the "Summary  
Judgment Order") pursuant to CR 54(b) and allow the City to file an immediate appeal of  
this order to the Court of Appeals, Division I. The Summary Judgment Order denied the  
City's cross-motion to dismiss on summary judgment filed on November 7, 2011; and

MOTION OF CITY UNDER CR 54(b) FOR ENTRY OF  
FINAL JUDGMENT AND TO ENTER WRITTEN  
FINDINGS- 1

ORIGINAL

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1 granted Plaintiff's partial motion for summary judgment filed on October 19, 2011.  
2 Finally, the City requests entry of written findings as required by CR 54(b).

3 **II. STATEMENT OF GROUNDS**

4 The Summary Judgment Order has decided the main legal issue in this case, i.e.,  
5 that the City has a duty to maintain the Plaintiffs' buried interceptor pipe, leaving for trial  
6 only proximate cause and questions regarding the scope and amount of Plaintiffs' damages.  
7 As set forth below, this is a complicated legal action presenting several issues of first  
8 impression. The City believes it is in the best interests of the parties and the Court to have  
9 the appellate court clarify this first impression case before lengthy and expensive discovery  
10 occurs, in addition to a wasteful trial. A trial date has not yet been set.

12 The City's main desire at this time is to resolve this case as quickly and efficiently  
13 as possible. If the City has a duty to maintain a ground water pipe buried on private  
14 property in the same trench as a separate utility's (the Alderwood Water and Sanitary Sewer  
15 District's) sanitary sewer line – and within the District's maintenance easement – as was  
16 held by the trial court, the repercussions on all local governmental authorities will be  
17 tremendous. If there is no liability, then the *status quo* will be maintained.

19 This case presents several issues of first impression that are ripe for immediate  
20 appellate review, including, *but not limited to*, the following:

21 **First: What is the scope of an easement dedicated for "stormwater facilities"**  
22 **pursuant to RCW 58.17.020(3)?** The City has not been able to locate any case that  
23 defines the *scope* of a drainage easement dedicated under this statute at all, much less an  
24 easement specifically restricted to "stormwater facilities." Specifically, does it include a  
25

26 MOTION OF CITY UNDER CR 54(b) FOR ENTRY OF  
27 FINAL JUDGMENT AND TO ENTER WRITTEN  
FINDINGS- 2

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1 groundwater system buried 12 feet underground, when none of the codes, rules, and/or  
2 regulations adopted by the local jurisdiction define "stormwater facilities" as including  
3 groundwater systems?

4 **Second:** What is the scope of a recorded "Drainage Disclosure"? The City has  
5 not been able to locate any Washington case addressing recorded drainage disclosures and  
6 their effect on subsequent purchasers.

7 **Third:** What is the legal meaning of the term "individual" as used in a  
8 recorded Drainage Disclosure when identifying lots? Here, the trial court held that the  
9 meaning of the term was restricted to lots owned by "individuals," not to identify *separate*  
10 *individual lots* themselves where, as here, those separate individual lots are owned by the  
11 Homeowner's Association. The City has not been able to locate any Washington case  
12 supporting the trial court's legal interpretation of the word "individual," nor does it seem to  
13 make sense as most of the residential lots in Crystal Ridge are owned by couples anyway,  
14 not "individuals."  
15

16 Additionally, the City has not been able to locate any case where the court held that  
17 a municipality was required to maintain a subterranean drainage system installed on private  
18 property in 1988, over 23 years ago (while under the County's jurisdiction), and over 19  
19 years since it had been annexed by the City, in 1992; especially where, as here, there is *no*  
20 *evidence* that the private system was ever maintained by the County or the City, and it *does*  
21 *not* benefit public infrastructure (but only private property and a separate utilities' – the  
22 District's – sanitary sewer line).  
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27 MOTION OF CITY UNDER CR 54(b) FOR ENTRY OF  
FINAL JUDGMENT AND TO ENTER WRITTEN  
FINDINGS- 3

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1 Furthermore, factual errors occurred that will likely affect the decision made by the  
2 Court of Appeals. For instance, Plaintiffs asserted that "the only drainage feature" within  
3 the easement for "stormwater facilities" was the interceptor pipe. The trial court made a  
4 finding that this was factually correct. This finding is in error, as it is undisputed that the  
5 original surface drainage swale was also within the easement area - and the surface  
6 drainage swale (which has since been lost based upon the homeowners' occupation and  
7 uses of the easement area) was clearly a "stormwater facility."<sup>1</sup>

8  
9 Finally, it is uncontested that the trial court's decision has an enormous financial  
10 impact upon the City of Bothell. See the declarations of the City's Utility Manager (Mr.  
11 Donald Fiene) and the City's Superintendent of Public Works (Nik Stroup), filed herewith.  
12 The Utility Manager testifies as follows:

13 3. Unfortunately, the trial court's decision in this case puts a  
14 new and tremendous burden on the City and its surface water  
15 utility rate payers. The City established a Surface Water  
16 Utility system many years ago to maintain the City's surface  
17 water system. But the ruling in this case - for the first time, to  
18 the best of my knowledge - requires the City to maintain a

19 <sup>1</sup> Plaintiffs' expert, Mr. Trepanier, made the bald assertion in his second declaration that the "only  
20 'drainage' feature on the west properties in the drainage easement is the sub-drain or infiltration trench."  
21 *Second Trepanier Decl.*, p. 2, ll. 19-20. This statement is absolutely contradicted by the project's  
22 geotechnical reports, which were prepared contemporaneously with the design and construction of the  
23 system. Specifically, Mr. Trepanier's statement runs contrary to the second geotechnical report from  
24 September 1984:

25 "The swale drain should be located immediately upslope of the interceptor drain and  
26 should be designed to intercept surface runoff from the upslope properties." (Emphasis  
27 added.)

28 If the swale drain had been located upslope of the interceptor drain (as contemplated by the geotech  
29 report), then it would be within the easement for "stormwater facilities" and the same 25 foot easement  
30 granted to the Sewer District, which makes total sense. Trepanier's Second Declaration, where he suddenly  
31 claims that the swale drain was "downslope" of the interceptor trench - in the separate 15 foot drainage  
32 easement - is not supported by the evidence or logic. This afterthought statement is contrary to the geotech  
33 report and contrary to what the Sewer District would have required to protect its sanitary sewer line.

34 MOTION OF CITY UNDER CR 54(b) FOR ENTRY OF  
35 FINAL JUDGMENT AND TO ENTER WRITTEN  
36 FINDINGS- 4

37 C:\Users\FGuebler\AppData\Local\Microsoft\Windows\Temporary Internet  
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ground water system, not a surface water system. Ground water systems are not typically the domain of a City utility and this ruling sets a precedent that could cause significant financial hardship not only to City of Bothell citizens, but for other local government entities as well. Ground water systems are typically and almost exclusively private systems and, to the best of my knowledge, are only constructed and maintained by Cities for the express purpose of protecting public infrastructure.

4. This ground water system at issue here does not benefit the City's infrastructure. As can be seen on the attached drawings (Exhibit A), the ground water system was originally constructed for Alderwood Water and Sewer District (the "District"). The system was built in the trench of the District's Sanitary Sewer line and lies within the District's easement for maintenance. The system was clearly constructed to protect the District's Sanitary Sewer line. The Sanitary Sewer line is a totally separate utility, which is not part of the City of Bothell.

5. The City's only "public" infrastructure in this area is the road system within the Crystal Ridge subdivision itself, which clearly benefits only the neighborhood residents. (This residential road system was designed and built by the developer of Crystal Ridge, then merely dedicated to the City). The ground water system at issue here was clearly not designed and built to protect the City's roads. A ground water system actually intended to protect the City's roads would not be constructed in the manner of the systems in the Crystal Ridge Plat. Instead, the plat's ground water systems are clearly built in a manner to protect the District's Sewer System and the private houses in the Crystal Ridge plat.

*Declaration of Donald Fiene, paragraphs 3-5.*

The Superintendent of Public Works testifies as follows:

5. The Storm Section of the Public Works Operations Division is currently responsible for maintaining the City's systems for collection, detention, and diversion of surface water. The Storm Section of Operations is responsible for City-owned storm water facilities (approximately 106 miles of main pipe, 6,300 catch basins

MOTION OF CITY UNDER CR 54(b) FOR ENTRY OF FINAL JUDGMENT AND TO ENTER WRITTEN FINDINGS- 5

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1 and manholes), retention/detention facilities, rehabilitation and  
2 replacement of sub-standard conveyance components (catch basins,  
3 manholes, retention/detention systems), and maintenance of storm  
4 water ditches, and for responding to such things as emergency spills  
5 and preventing pollution from entering public waters.

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7. Here, Plaintiffs are looking for the City to maintain a ground water  
system designed and built to protect their private property. If this  
ruling is to stand it will not only require significant manpower to  
maintain, it could set a precedent for the City's Surface Water  
Utility to maintain other ground water systems intended to protect  
private infrastructure. This will result in a significant and  
unwarranted financial burden on the City's Surface Water Utility  
rate payers. For the Public Works Operations to take these tasks  
on, the following issues would need to be addressed:

- City does not have legal access to the outfall of the interceptor pipe, which is located on neighboring private property. City would need to gain legal access through some sort of easement agreement.
- City cannot physically access the ground water system with necessary heavy equipment for maintenance. City would need to consider purchasing 1 or 2 of the existing houses and removing the said houses. City would then construct asphalt roads to access the ground water system.
- Current City owned cleaning equipment is not capable of cleaning the approx. 1,100 LF of interceptor pipe (standard max length of rodder hoses is 350-500 ft). City would need to purchase expensive equipment to access and maintain this large section of interceptor pipe.
- City is uncertain if interceptor pipe material will hold up to cleaning due to the high pressures of cleaning equipment. City would potentially need to remove the ground water system entirely and install something in its place that could hold up to high pressure pipe cleaning equipment. In taking this action, the City would open itself up to liability for damage to the existing sanitary sewer line owned and maintained by the Alderwood Water and Sewer District (the "District".)
- City would need to obtain a Hydraulic Permit Approval Plan (HPA) permit from the Department of Ecology (DOE) every time it performed a maintenance on the ground water system, due to outfall of that system being a private pond that feeds a wetland and stream.

MOTION OF CITY UNDER CR 54(b) FOR ENTRY OF  
FINAL JUDGMENT AND TO ENTER WRITTEN  
FINDINGS- 6

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- 1 • With limited knowledge of interceptor pipe material or  
2 condition, cleaning or repair activities on this pipe could  
3 potentially cause damage to the District's sanitary sewer  
4 mainline that lies in same trench. Maintenance activities could  
5 result in costly repairs and liability for the City and its rate  
6 payers for damages to another utilities (the District's)  
7 infrastructure.
- 8 • Large upfront costs for specialized equipment and additional  
9 staffing and personnel costs would need to be considered to  
10 take on new responsibilities while still meeting our Federal  
11 obligations of the City's NPDES phase 2 permit.
- 12 • A comprehensive inventory analysis of other like ground water  
13 systems would need to be undertaken by the City. This effort  
14 would identify other like systems within the corporate city  
15 limits and would provide a basis for budget justifications and  
16 utility rate hikes.

17 8. Again, as the Superintendent in charge of the City of Bothell's  
18 Public Works Operations Division, I believe the judge's decision  
19 places an unrealistic and unattainable burden on the City's limited  
20 maintenance resources and taxpayers. If the decision is upheld, all  
21 citizens of Bothell will feel the impact through significant  
22 increases in storm utility rates to cover the new court ordered  
23 responsibilities for maintaining this system – and possibly other  
24 ground water systems.

25 *Declaration of Nik Stroup, paragraphs 5-8.*

26 In sum, the City respectfully requests that this Court enter findings and make the  
27 Court's Summary Judgment Order a final, immediately appealable order pursuant to CR  
54(b)

### III. STATEMENT OF ISSUES

Whether the Court should designate the Summary Judgment Order as final and enter  
findings to that effect pursuant to CR 54(b), thus allowing the City to seek an immediate  
appeal to the Court of Appeals, Division I.

MOTION OF CITY UNDER CR 54(b) FOR ENTRY OF  
FINAL JUDGMENT AND TO ENTER WRITTEN  
FINDINGS- 7

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IV. EVIDENCE RELIED UPON

This Motion is based upon the records and files herein, and the following certified declarations:

- A. The Declaration of Nik Stroup, dated March 22, 2012; and
- B. The Declaration of Donald Fiene dated March 21, 2012 and attached exhibits.

V. LEGAL AUTHORITY

A. Standard of Law

CR 54(b) permits an immediate appeal in situations where it would be unjust to prevent an appeal until the entire case has been fully and finally adjudicated. *Nelbro Packing v. Baypack Fisheries*, 101 Wn. App. 517, 522, 6 P.3d 22 (2000), citing *Doerflinger v. New York Life Ins. Co.*, 88 Wn.2d 878, 567 P.2d 230 (1977). CR 54(b) provides, in part, as follows (emphasis added):

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon an express determination in the judgment, **supported by written findings, that there is no just reason for delay** and upon an express direction for the entry of judgment.

Additionally, RAP 2.2(d) provides, in part, as follows (emphasis added):

In any case . . . with multiple claims for relief . . . an appeal may be taken from a final judgment which does not dispose of all claims . . ., but only after an express direction by the trial court for entry of judgment and an express determination in the judgment, **supported by written findings, that there is no just reason for delay. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party.** The time for filing notice of appeal begins to run from the entry of the required findings.

MOTION OF CITY UNDER CR 54(b) FOR ENTRY OF FINAL JUDGMENT AND TO ENTER WRITTEN FINDINGS- 8

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1 Four elements are required for the Court of Appeals to accept entry of a final  
2 judgment under CR 54(b):

3 There must be: (1) more than one claim for relief . . . ; (2) an express  
4 determination that there is no just reason for delay; (3) written findings  
5 supporting determination that there is no reason for delay; and (4) an  
6 express direction for entry of the judgment.

7 In *Fox v. Sunmaster Products, Inc.*, 115 Wn.2d 498, 503, 798 P.2d 808 (1990), the  
8 Washington Supreme Court held that the "no just reason for delay" finding alone is  
9 insufficient to satisfy CR 54(b) and RAP 2.2(d) unless the record "affirmatively show[s]  
10 there is in fact some danger of hardship or injustice that will be alleviated by an immediate  
11 appeal." See, also, *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 300, 840 P.2d 860  
12 (1992).

13 Given the facts of this case, and the important issues of first impression that it  
14 presents, CR 54(b) certification is appropriate and the City respectfully requests the Court to  
15 enter findings approving an immediate appeal.

16 **B. This Case Presents More Than One Claim For Relief.**

17 The first requirement for certification under CR 54(b) is that the case present more  
18 than one claim for relief. That requirement has been met here. Plaintiffs asserted various  
19 claims against the City, including claims for declaratory relief, injunctive relief, and  
20 damages. Here, the Plaintiffs have obtained the declaratory relief they sought, *i.e.*, the trial  
21 court has issued an order stating that the City has a duty to maintain their buried interceptor  
22 pipe. Their claim for damages, however, has not been addressed at the trial court level in  
23 any manner, and is clearly distinct from their claims for declaratory and injunctive relief.  
24  
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26

27 MOTION OF CITY UNDER CR 54(b) FOR ENTRY OF  
FINAL JUDGMENT AND TO ENTER WRITTEN  
FINDINGS- 9  
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1 The United States Supreme Court has indicated that a claim need not be entirely  
2 distinct from all other claims in the action and arise from a different occurrence or  
3 transaction to be considered a separate claim for CR 54(b) purposes. *Nelbro Packing*, 101  
4 Wn. App. At 523, citing *Cold Metal Process Co. v. Untied Eng'g & Foundry Co.*, 351 U.S.  
5 445, 451-52, 76 S. Ct. 904, 100 L.Ed. 1311 (1956). Here, the claims for which the City  
6 seeks CR 54(b) certification are separate and distinct. The facts and evidence necessary to  
7 determine the City's alleged "duty" under these circumstances, and the facts and evidence  
8 necessary to prove the actual scope and amount of Plaintiffs' alleged damages, are  
9 completely separate. Thus, the first element of CR 54(b) has been met.

11 Plaintiffs may cite to a case like *Bowing v. Board of Trustees*, 85 Wn.2d. 300, 534  
12 P.2d 1365 (1975), for the proposition that where a determination of "liability" has been  
13 made, but the issue of damages has not been decided, the multiple claims test of CR 54(b)  
14 has not generally been met. But here, we do not have a standard case of "liability" and  
15 "damages," such as a personal injury case (or a wrongful discharge case, such as was  
16 presented in *Bowing*). Instead, the trial court here has held that the City has a duty to  
17 maintain a buried ground water system that it has never before maintained. The Summary  
18 Judgment Order is similar to the issuance of a writ of mandate. The Order has far-reaching  
19 financial consequences for local government and is not confined to this case.

21 Furthermore, CR 54(b) certification is even more warranted here, where the case and  
22 issues in it are ones of first impression. It is appropriate to resolve these first impression  
23 questions now, rather than after lengthy and expensive discovery, and a lengthy and possibly  
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27 MOTION OF CITY UNDER CR 54(b) FOR ENTRY OF  
FINAL JUDGMENT AND TO ENTER WRITTEN  
FINDINGS- 10

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1 futile jury trial. Under the unique facts presented here, CR 54(b) certification is proper and  
2 necessary to resolve the complicated issues presented.

3 **C. There Is No Just Reason For Delay And The Court's Orders Should Be**  
4 **Denominated Final**

5 The factors relevant to the determination of the second CR 54(b) requirement -  
6 whether there is no just reason for delay - are as follows:

- 7 (1) [T]he relationship between the adjudicated and unadjudicated claims,  
8 (2) whether questions which would be reviewed on appeal are still before the  
9 trial court for determination in the unadjudicated portion of the case, (3)  
10 whether it is likely that the need for review may be mooted by future  
11 developments in the trial court, (4) whether an immediate appeal will delay the  
12 trial of the unadjudicated matters without gaining any offsetting advantage in  
13 terms of the simplification and facilitation of that trial, and (5) the practical  
14 effects of allowing an immediate appeal.

15 *Nelbro Packing*, 101 Wn. App. at 525, citing *Schiffman v. Hanson Ex. Co.*, 82 Wn.2d 681,  
16 687, 513 P.2d 29 (1973). We address these five elements in the next several subsections.

17 **1. Relationship between adjudicated and unadjudicated claims.**

18 When adjudicated and pending claims are closely related and stem from essentially  
19 the same factual allegations, the courts have found that judicial economy generally is best  
20 served by denying CR 54(b) certification until all the issues can be considered by the  
21 appellate court in a unified package. *Nelbro Packing*, 101 Wn. App. at 526. Here,  
22 however, the adjudicated and pending claims are based on *completely different* factual  
23 allegations. The facts that establish the City's alleged duty to maintain the buried  
24 interceptor pipe are completely separate and distinct from the facts and evidence regarding  
25 the amount and scope of plaintiffs' alleged damages.

26 MOTION OF CITY UNDER CR 54(b) FOR ENTRY OF  
27 FINAL JUDGMENT AND TO ENTER WRITTEN  
FINDINGS- 11

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Proof of the amount and scope of Plaintiffs' alleged damages will be based on several boxes of documentation, such as real estate appraisals and various other papers, including correspondence, for numerous Plaintiffs. It will also involve the testimony of numerous lay and expert witnesses. None of this evidence regarding the amount of Plaintiffs' alleged damages is relevant to the claims for which the City requests CR 54(b) certification. See, *Miller v. Port Angeles, supra*. Thus, the relationship (or better put, the lack of relationship) between the adjudicated and unadjudicated claims supports granting a determination of finality and the entry of written findings pursuant to CR 54(b).

Significantly, the matters for which the City seeks CR 54(b) certification are pure questions of law. These purely legal questions are now ripe for appellate review.

2. Questions which would be reviewed on appeal are not still before the trial court for determination.

There are no questions which the City will seek to have reviewed that will remain before the trial court in the unadjudicated portion of this case. Damages and causation will remain before the trial court. The City will pursue review of the duty issue only.

3. The need for review will not be mooted by future developments in the trial court.

In general, a finality designation under CR 54(b) should be denied if there is a possibility that future determinations in the trial court may moot a claim and make an appeal unnecessary. *Nelbro Packing*, 101 Wn.App. at 528. Here, there remain no presently known legal issues which could moot further proceedings in the trial court. As with all of the other issues discussed before, this factor too supports the entry of a "no just reason for delay" finding.

MOTION OF CITY UNDER CR 54(b) FOR ENTRY OF FINAL JUDGMENT AND TO ENTER WRITTEN FINDINGS- 12  
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1           4.     Granting CR 54(b) certification will not delay trial without any  
2                     offsetting advantage.

3           The next factor to consider is whether an immediate appeal will delay the trial of the  
4     unadjudicated matters without gaining any offsetting advantage in terms of the  
5     simplification and facilitation of that trial. *Nelbro Packing*, 101 Wn. App. at 528-29. Here,  
6     granting an immediate appeal will definitely facilitate any potential future trial in this  
7     matter. That is the primary basis for the City's pursuit of this motion.

8           First, the City believes reversible error has occurred and will ask the Court of  
9     Appeals to dismiss Plaintiffs' lawsuit *in its entirety* on any number of bases, as set forth in  
10    the City's Cross-Motion for Summary Judgment. This is precisely the basis upon which the  
11    Court of Appeals itself accepts cases for interlocutory review pursuant to RAP 2.2(d) and  
12    RAP 2.3(b)(1) & (b)(2).<sup>2</sup> Where, as here, the facts are uncontested and the case can be  
13    decided in its entirety as a matter of law, an immediate appeal of the a trial court order  
14    denying summary judgment is often granted under RAP 2.3(b). *See, e.g., Sea-Pac Co. v.*  
15    *United Food Workers*, 103 Wn.2d 800, 699 P.2d 217 (1985)(holding discretionary review  
16    of trial court's order denying motion for summary judgment was properly granted and  
17    entire lawsuit dismissed on appeal as a matter of law); *Hartley v. State*, 103 Wn.2d 768,  
18    773-74, 698 P.2d 77 (1985)(same); *Long v. Dugan*, 57 Wn. App. 309, 788 P.2d 1  
19    (1990)(same); *Right-Price v. Connells*, 146 Wn.2d 370, 377-80, 46 P.3d 789 (2002)(same);  
20    *Bartusch v. Bd. Of Higher Educ.*, 131 Wn. App. 298, 126 P.3d 840 (2006)(same); *Macias v.*

21  
22  
23    <sup>2</sup> Under RAP 2.3(b), certain decisions of the trial court may be reviewed by the Court of Appeals when:  
24    (1) The Superior Court has committed an obvious error which would render further proceedings  
25    useless; or  
26    (2) The Superior Court has committed probable error and the decision of the Superior Court  
27    substantially alters the status quo or substantially limits the freedom of a party to act[.]

MOTION OF CITY UNDER CR 54(b) FOR ENTRY OF  
FINAL JUDGMENT AND TO ENTER WRITTEN  
FINDINGS- 13

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1 *Mine Safety Appliances*, 158 Wn. App. 931, 244 P.3d 978 (2010) (same).

2 Division I has even granted discretionary review twice in the same case to correct an  
3 obvious error. *See, Stokes v. Bally's Pacwest*, 113 Wn. App. 442, 54 P.3d 161 (2002),  
4 where the trial court denied defendant's motion to dismiss based on a signed release.  
5 Division I granted review and remanded the matter to the trial court with orders to  
6 reconsider its decision in light of a recently published appellate opinion. The trial court  
7 denied dismissal a second time. Division I again accepted discretionary review, reversed  
8 both orders, and directed entry of summary judgment in favor of the defendant on remand.

9 *Stokes*, 113 Wn. App. at 443.

10  
11 Finally, granting CR 54(b) certification will not unduly prejudice Plaintiffs. An  
12 appeal can proceed promptly, and indeed the City would be happy to join in with any  
13 request by Plaintiffs to expedite the appeal. In any event, the appeal could be concluded in  
14 roughly the same time as scheduling a jury trial, at a fraction of the cost. Most of the work  
15 necessary for the appeal (research and drafting the appellate briefs) is already done through  
16 the research and briefing on the motions and cross-motions for summary judgment. The  
17 cost to Plaintiffs for pursuit of an appeal now is likely less than the cost of just a fraction of  
18 the depositions that will need to be taken before trial.

19  
20 **5. The practical effects of allowing an immediate appeal.**

21 CR 54(b) certification should be granted where an immediate appeal will streamline  
22 the litigation and avoid piecemeal, multiple appeals. *Nelbro Packing*, 101 Wn. App. at 531.  
23 Here, an immediate appeal will most certainly streamline the litigation. If the trial court's  
24 order is reversed on appeal, then the lawsuit will be dismissed in its entirety. One thing is  
25

26  
27 MOTION OF CITY UNDER CR 54(b) FOR ENTRY OF  
FINAL JUDGMENT AND TO ENTER WRITTEN  
FINDINGS- 14

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The Honorable Ronald L. Castleberry  
Hearing Date: April 5, 2012  
Hearing Time: 1:00 p.m.  
Moving Party: Defendant  
Location: To Be Determined



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SNOHOMISH

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

Plaintiffs,

v.

CITY OF BOTHELL, a municipal  
corporation,

Defendant.

NO. 10-2-10147-9

DECLARATION OF DONALD FIENE  
IN SUPPORT OF THE CITY OF  
BOTHELL'S MOTION UNDER  
CR 54(b) FOR ENTRY OF FINAL  
JUDGMENT AND TO ENTER  
WRITTEN FINDINGS

I, Donald Fiene, declare:

1. I am over the age of eighteen, have personal knowledge of the facts in this Declaration, and am otherwise competent to testify.

2. I am currently the Utility Manager for the City of Bothell and have been a licensed Professional Engineer (P.E.) for over 20 years. My main duties include managing the City's stormwater management program. I have been employed by the City of Bothell since July, 2010. Previously, I worked for the City of Edmonds as their Hydraulics

DECL. OF DONALD FIENE RE: BOTHELL'S CR 54(b)  
MOTION- 1  
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1 3. Unfortunately, the trial court's decision in this case puts a new and  
2 tremendous burden on the City and its surface water utility rate payers. The City  
3 established a Surface Water Utility system many years ago to maintain the City's *surface*  
4 water system. But the ruling in this case - for the first time, to the best of my knowledge -  
5 requires the City to maintain a *ground* water system, not a *surface* water system. Ground  
6 water systems are not typically the domain of a City utility and this ruling sets a precedent  
7 that could cause significant financial hardship not only to City of Bothell citizens, but for  
8 other local government entities as well. Ground water systems are typically and almost  
9 exclusively private systems and, to the best of my knowledge, are only constructed and  
10 maintained by Cities for the express purpose of protecting public infrastructure.

12 4. This ground water system at issue here does not benefit the City's  
13 infrastructure. As can be seen on the attached drawings (Exhibit A), the ground water  
14 system was originally constructed for Alderwood Water and Sewer District (the "District").  
15 The system was built in the trench of the District's Sanitary Sewer line and lies within the  
16 District's easement for maintenance. The system was clearly constructed to protect the  
17 District's Sanitary Sewer line. The Sanitary Sewer line is a totally separate utility, which is  
18 not part of the City of Bothell.

20 5. The City's only "public" infrastructure in this area is the road system within  
21 the Crystal Ridge subdivision itself, which clearly benefits only the neighborhood residents.  
22 (This residential road system was designed and built by the developer of Crystal Ridge,  
23 then merely dedicated to the City). The ground water system at issue here was clearly not  
24 designed and built to protect the City's roads. A ground water system actually intended to  
25 protect the City's roads would not be constructed in the manner of the systems in the  
26

27 DECL. OF DONALD FIENE RE: BOTHELL'S CR 34(b)  
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1 Crystal Ridge Plat. Instead, the plat's ground water systems are clearly built in a manner to  
2 protect the District's Sewer System and the private houses in the Crystal Ridge plat.

3 6. Furthermore, I researched this issue for the City's Cross-Motion for  
4 Summary Judgment, and I could not locate any evidence to indicate that these systems were  
5 ever historically maintained by Snohomish County (prior to Bothell Annexation) or  
6 thereafter by the City. Plaintiffs presented no evidence to show that Snohomish County or  
7 the City has ever maintained these ground water systems. Instead, the documentation  
8 indicates that easements were reserved during development of the plat primarily as a result  
9 of right of way vacations (which is a typical procedure), and in some locations of these  
10 reserved easements no systems of any kind were ever built. Easements were specifically  
11 reserved for "Storm Drainage" (and generally not used), but were never intended for  
12 *ground water* systems. Based upon my education, and years of experience as a Professional  
13 Engineer with expertise in maintenance and operations of municipal stormwater systems,  
14 reserving an easement specifically for Storm Drainage does not require the County or City  
15 to maintain any other system or structure that might exist in that same easement area: such  
16 as a sanitary sewer line; or power lines; or phone cables, *etc.*

17  
18  
19 7. Plaintiffs are looking for the City to maintain this ground water system  
20 specifically to protect their *personal* property, such as their real property, private buildings,  
21 private infrastructure and perhaps the District's Sanitary Sewer system. If this ruling stands  
22 it will not only require significant manpower to maintain, it could set a precedent for the  
23 City's Surface Water Utility to maintain other ground water systems intended to protect  
24 private infrastructure. This will result in a significant and unwarranted financial burden on  
25 City Surface Water Utility rate payers, as set forth more specifically in the Declaration of  
26

27 DECL. OF DONALD FIENE RE: BOTHELL'S CR 54(b)  
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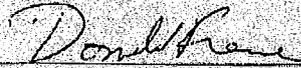
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Nik Stroup, filed herewith.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED at 4:20 pm, Washington, this 21st day of March, 2012:

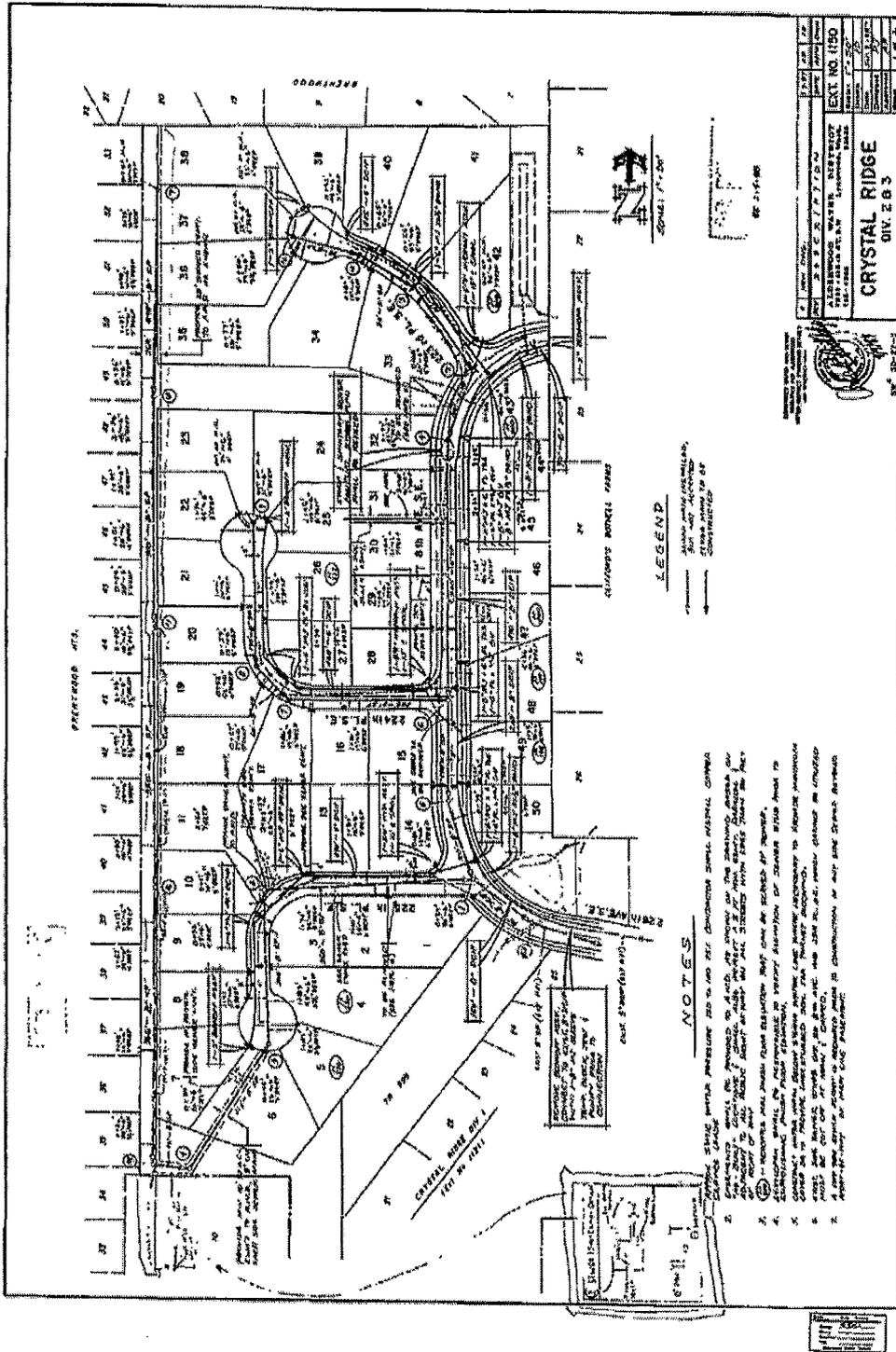
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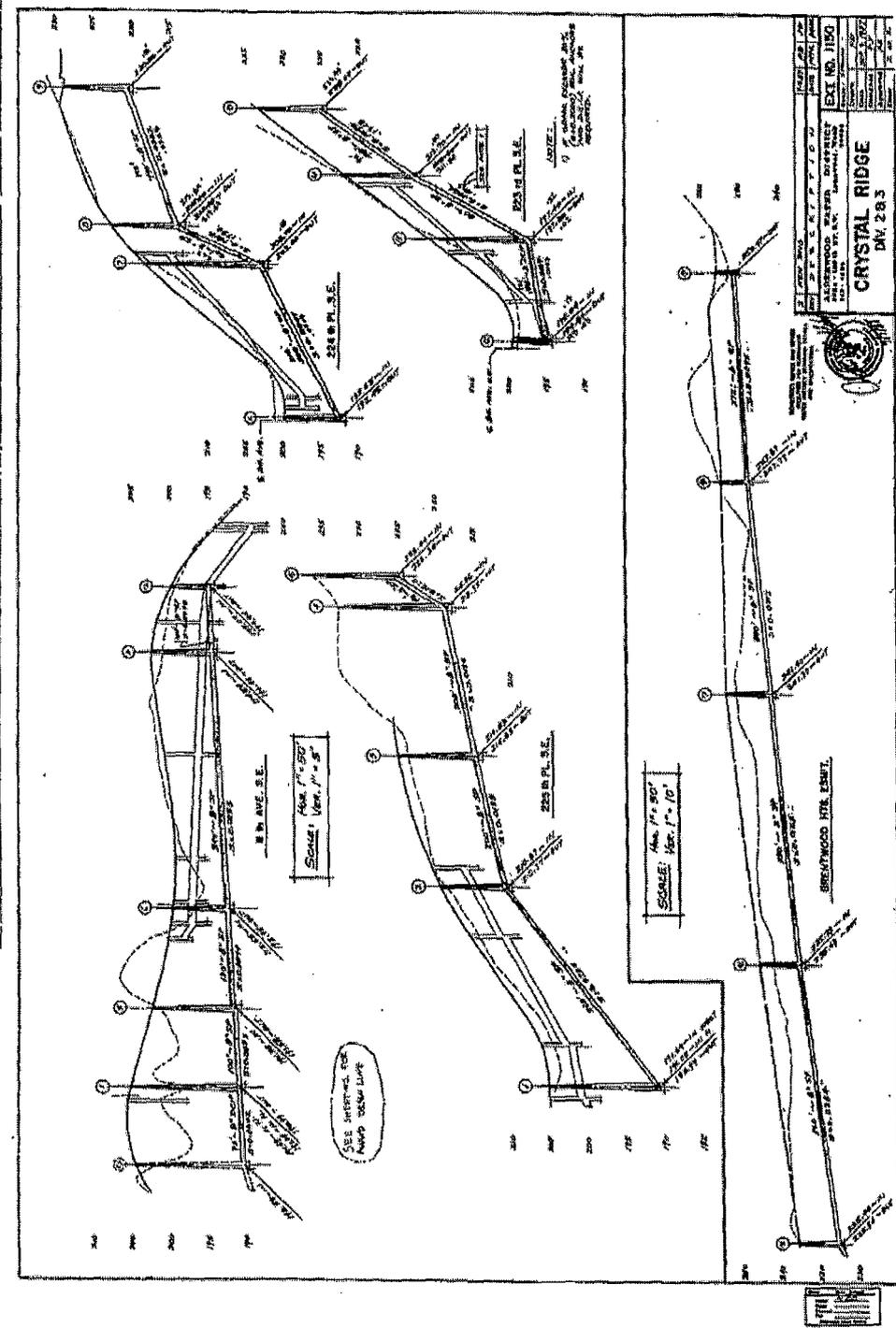
  
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DECL. OF DONALD FIENE RE: BOTHELL'S CR 54(b)  
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**EXHIBIT A**





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The Honorable Ronald L. Castleberry  
Hearing Date: April 5, 2012  
Hearing Time: 1:00 p.m.  
Moving Party: Defendant  
Location: To Be Determined



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

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

NO. 10-2-10147-9

Plaintiffs,

DECLARATION OF NIK STROUP IN  
SUPPORT OF THE CITY OF  
BOTHELL'S MOTION UNDER  
CR 54(b) FOR ENTRY OF FINAL  
JUDGMENT AND TO ENTER  
WIRTTEN FINDINGS

v.

CITY OF BOTHELL, a municipal  
corporation,

Defendant.

I, Nik Stroup, declare:

1. I am over the age of eighteen, have personal knowledge of the facts in this Declaration, and am otherwise competent to testify.

2. I am the Superintendent of Public Works for the City of Bothell. My main duties include managing the Public Works Operations Division which includes all programs, resources, and staff associated with the maintenance and operations of Bothell's parks, streets, water, sewer, and storm systems. I have been employed by the City for the

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HS

1 past fifteen years, since November 4, 1996. I am familiar with the lawsuit filed by Crystal  
2 Ridge against the City.

3 3. Before working for Bothell, I attended Western Washington University.  
4 While attending the university from 1990 to 1995, I worked at the City of Bellingham  
5 during the summer. At the City of Bellingham, I worked on as a seasonal Maintenance  
6 Aide in the Traffic Communications Division of Public Works. In 1995, I graduated from  
7 Western Washington University with a Bachelor of Arts degree. Shortly after graduating, I  
8 took a seasonal Parks Ranger position in the City of Bellingham's Parks Department. Upon  
9 completion of that 6 month seasonal assignment, I applied for, tested for, and was hired as a  
10 Maintenance Worker at the City of Bothell. From that initial position, I have worked  
11 myself up to be the Superintendent of maintenance, including stormwater facilities.  
12 maintenance.  
13

14 4. As the Superintendent in charge of the City of Bothell's Public Works  
15 Operations Division, can say that the trial court's decision places an enormous financial  
16 burden on the City's limited resources and its surface water utility rate payers.  
17

18 5. The Storm Section of the Public Works Operations Division is currently  
19 responsible for maintaining the City's systems for collection, detention, and diversion of  
20 surface water. The Storm Section is responsible for City-owned storm water facilities  
21 (approximately 106 miles of main pipe, 6,300 catch basins and manholes),  
22 retention/detention facilities, rehabilitation and replacement of sub-standard conveyance  
23 components (catch basins, manholes, retention/detention systems), and maintenance of  
24 storm water ditches, and for responding to such things as emergency spills and preventing  
25 pollution from entering public waters.  
26

27 DECL. OF NIK STROUP RE: BOTHELL'S CR 54(b)  
MOTION- 2

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1 6. Ground water systems are not typically the domain of a City utility and this  
2 ruling sets a precedent that could cause significant financial hardship not only to City of  
3 Bothell citizens, but for other municipalities as well. Ground water systems are almost  
4 exclusively private systems and are only constructed and maintained by Cities for the  
5 express purpose of protecting public infrastructure. As set forth in the Declaration of  
6 Donald Fiene, filed herewith, the system at Crystal Ridge does not benefit the City's  
7 infrastructure.

8  
9 7. Here, Plaintiffs are looking for the City to maintain a ground water system  
10 designed and built to protect their private properties. If this ruling is to stand it will not  
11 only require significant manpower to maintain, it could set a precedent for the City's  
12 Surface Water Utility to maintain other ground water systems intended to protect only  
13 private properties. This will result in a significant and unwarranted financial burden on the  
14 City's Surface Water Utility rate payers.

15 8. The following list of issues is demonstrative of the enormous impact this  
16 decision has on the City. For the Public Works Operations to take over maintenance of the  
17 ground water pipe buried behind the Crystal Ridge subdivision, the following issues would  
18 first need to be addressed:

- 19
- 20 • City does not have legal access to the outfall of the interceptor pipe, which is  
21 located on neighboring private property. City would need to gain legal  
22 access through some sort of easement agreement with a non-party to this  
23 action.
  - 24 • City cannot even physically access the ground water system with necessary  
25 heavy equipment for maintenance at this time, even if it had an access  
26

27 DECL. OF NIK STROUP RE: BOTHELL'S CR 54(b)  
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easement. City would need to consider purchasing 1 or 2 of the existing houses and removing the said houses. At a minimum, significant private structures on private property would need to be removed. City would then construct roads to access the ground water system (likely asphalt roads to convey heavy equipment).

- Current City owned cleaning equipment is not capable of cleaning the approximate 1,100 LF of interceptor pipe (standard max length of rodder hoses is 350-500 ft). City would need to purchase expensive equipment to access and maintain this large section of interceptor pipe.
- City would need to obtain a Hydraulic Permit Approval (HPA) permit from the Department of Ecology (DOE) every time it performed maintenance on the ground water system, due to outfall of that system being a private pond that feeds a wetland and stream.
- City is uncertain if interceptor pipe material will hold up to cleaning due to the high pressures of cleaning equipment. City would potentially need to remove the ground water system entirely and install something in its place that could hold up to high pressure pipe cleaning equipment.
- With limited knowledge of interceptor pipe material or condition, cleaning or repair activities on this pipe could potentially cause damage to the existing sanitary sewer line owned and maintained by the Alderwood Water and Sewer District (the "District"), which lies in same trench. Maintenance

DECL. OF NIK STROUP RE: BOTHELL'S CR 54(b)  
MOTION- 4  
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CR 54(b) Motion v2.doc

KEATING, BUCKLIN & MCCORMACK, INC., P.S.  
ATTORNEYS AT LAW  
800 FIFTH AVENUE, SUITE 4141  
SEATTLE, WASHINGTON 98104-3176  
PHONE: (206) 423-4581  
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activities could result in costly repairs and liability for the City and its rate payers for damages to another utilities' (the District's) infrastructure.

- Large upfront costs for specialized equipment and additional staffing and personnel costs would need to be considered to take on new responsibilities while still meeting our Federal obligations regarding the City's NPDES phase 2 permit.
- A comprehensive inventory of other like ground water systems would need to be undertaken by the City. This effort would identify other like systems within the corporate City limits and would provide a basis for budget justifications and utility rate hikes.

9. Again, as the Superintendent in charge of the City of Bothell's Public Works Operations Division, I believe the trial court's decision places a new – and more importantly, an unrealistic and unattainable – burden on the City's limited maintenance resources and the City taxpayers. If the decision is upheld, all citizens of Bothell will feel the impact through significant increases in storm utility rates to cover the new court ordered responsibilities for maintaining this system – and, very possibly, other ground water systems.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DECL. OF NIK STROUP RE: BOTHELL'S CR 54(b)  
MOTION- 5  
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CR 54(b) Motion v2.doc

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PHONE: (206) 429-5261  
FAX: (206) 220-9423

SIGNED at Bothell, Washington, this 22<sup>nd</sup> day of March, 2012.

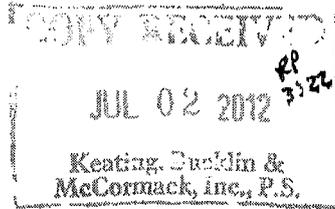


Nik Stroup

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DECL. OF NIK STROUP RE: BOTHELL'S CR 54(b)  
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CR 54(b) Motion v2.doc

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Judge Michael T. Downes  
Hearing Date: July 13, 2012  
Hearing Time: 9:00 a.m.  
Moving Party: Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF SNOHOMISH

CRYSTAL RIDGE HOMEOWNERS  
ASSOCIATION, a Washington nonprofit  
corporation; J. ABULTZ, *et al.*

Plaintiffs,

vs.

CITY OF BOTHELL, a municipal corporation,

Defendant.

No. 10-2-10147-9

PLAINTIFFS' MOTION TO STRIKE  
CERTAIN DOCUMENTS IN THE CITY  
OF BOTHELL'S DESIGNATION OF  
CLERK'S PAPERS WHICH VIOLATE  
RAP 9.12 AND ITS REQUEST FOR  
ATTORNEYS' FEES AND COSTS

I. RELEVANT FACTS

This case involves a deep French Drain in an easement dedicated to Snohomish County, the City of Bothell's predecessor in interest, which needs maintenance and repair. The Plaintiffs' filed a summary judgment to establish the City's ownership and maintenance duties for the deep French Drain. The City filed a cross-motion attempting to disavow its ownership and maintenance. Retired Judge Ronald Castleberry heard arguments on the motions and granted the Plaintiffs' motion and denied the City's motion. The City took the matter up on appeal and the appeal has been accepted, pursuant to RAP 2.2(d), for review by

PLAINTIFFS' MOTION TO STRIKE CERTAIN DOCUMENTS IN  
THE CITY OF BOTHELL'S DESIGNATION OF CLERK'S  
PAPERS WHICH VIOLATE RAP 9.12 AND ITS REQUEST FOR  
ATTORNEYS' FEES AND COSTS - 1

CASE NO. 10-2-10147-9

APPENDIX NO. 4

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www.tmdvlaw.com

1 Division One under Court of Appeals Number 68618-6-1. *See Declaration of Karen A.*  
2 *Willie in Support of Motion to Strike ("Willie Decl. ")*, **Exhibit A** (Ruling on Appealability  
3 dated May 23, 2012). This Court has jurisdiction for this motion pursuant to RAP 7.2(b)  
4 despite the case having been accepted for review. The appellate rule states that the "trial  
5 court has authority to settle the record as provided in Title 9 of these rules." RAP 7.2(b).  
6 Title 9 of the Rules of Appellate Procedure addresses the Record on Review.

7 The only decisions the appellate court is reviewing stem from the summary judgment  
8 motions heard by Retired Judge Castleberry on November 28, 2011. The appellate court has  
9 declined the City's request to hear any evidentiary matters. *See Willie Decl., Exhibit A.* The  
10 only documents that are permissible to advance to the appellate court are those listed in the  
11 Order with regard to the summary judgment motions. *See Willie Decl., Exhibit B* (Summary  
12 Judgment Order hereinafter "SJM Order"). The appellate rule that is operative for summary  
13 judgments is RAP 9.12 which states:

14 On review of an order granting or denying a motion for summary judgment  
15 the appellate court will consider only evidence and issues called to the  
16 attention of the trial court. The order granting or denying the motion for  
17 summary judgment shall designate the documents and other evidence called to  
18 the attention of the trial court but not designated in the order shall be made a  
19 part of the record by supplemental order of the trial court or by stipulation of  
20 counsel.

18 An Order of Supplementation was entered to allow two highlighted plats to be added to the  
19 record. No stipulation by counsel has occurred to enter any other documents. *See Willie*  
20 *Decl., ¶ 12.*

21 On April 5, 2012, a hearing on the presentation of orders occurred. The Defendant  
22 City of Bothell prepared a combined order that enumerated not only the declarations and  
23 documents that were before Judge Castleberry on the summary judgment motions in  
24 November, but it also included the City's briefing on the request for appellate review under  
25 CR 54(b) and a third Declaration of Donald Fiene, numbered 26 and a second Declaration of  
26

1 Nick Stroup, numbered 27 filed for the CR 54(b) motion held on that day. *See Willie Decl.*,  
2 **Exhibit C** (Order Granting Plaintiffs' Motion for Summary Judgment and Order Denying  
3 Defendant City of Bothell's Cross Motion for Summary Judgment and Order granting  
4 immediate Appeal Pursuant to CR 54(b)).

5 The Plaintiffs strenuously objected to these declarations because they set out how  
6 financially desperate the City of Bothell was and made dire predictions about its future,  
7 should it be required to maintain the French Drain in its easement. None of these arguments  
8 were before Retired Judge Castleberry in the November hearing on the summary judgment  
9 motions. The Plaintiffs pointed out that the City had acted in a "most disingenuous" manner  
10 in that it "added the new declarations to its list of documents considered in its summary  
11 judgment order so that it appears the declarations were before the Court in the prior  
12 proceeding." *See Willie Decl.*, **Exhibit D** (Plaintiffs' Response To Defendant City of  
13 Bothell's Motion Pursuant to CR 54(b) and Request to Bar Inappropriate Evidence on  
14 Appeal), p. 2, ll. 13-16. An Order was provided to the Court by the Plaintiffs which stated  
15 that "the two declarations and a brief filed in this matter on March 21, 2012...were not part  
16 of the record for the summary judgment that it heard on November 28, 2011...and, should an  
17 appeal be taken in this case, these documents shall not be deemed part of that record." *See*  
18 *Willie Decl.*, **Exhibit E** (Proposed Order Barring Inappropriate Evidence on Appeal), p. 1, ll.  
19 18-26.

20 The City responded in its brief:

21 The City does, however, wish to briefly respond to the unwarranted assertions  
22 Plaintiffs' Response brief. Plaintiffs have accused the City of the following  
23 (1) inappropriately submitting "new arguments" and "two new declarations"  
24 with its Motion for CR 54(b) certification, and the (2) attempting to add the  
25 two new declaration filed in support of its request for CR54(b) certification to  
26 its list of documents considered in the cross-motions for summary judgment.  
This is absolutely untrue. While the City did submit legal arguments and  
supporting declarations with its CR 54(b) motion – as required by the civil

1 rules – it did not attempt to slip them into the documents to be considered on  
2 appeal in the summary judgment proceedings

3 *See Willie Decl., Exhibit F* (City’s Reply In Support of Entry of Orders and CR 54(B)  
4 Certification (hereinafter “City’s Reply”)), p. 2, ll. 17-26; p. 3, l.1.

5 The City then separated out the combined Order and submitted two separate orders-  
6 one for the summary judgment motions and one for the CR 54(b) motion. *See Willie Decl.,*  
7 *Exhibit B.* (SJM Order). The SJM Order does not have any of the CR 54(b) filings listed  
8 including the two declarations. At the hearing, counsel for the Plaintiffs’ recalls that there  
9 were verbal assurances made to Judge Castleberry that the two “financial” declarations which  
10 were part of the CR 54(b) filings were not intended for appellate review. *See Willie Decl., ¶*  
11 10.

12 [The Plaintiffs have not been able to have the transcript produced because the court  
13 reporter, William Meek, is on vacation and will not be able to get to it until after this filing.  
14 *See Willie Decl., ¶ 11.* We will supplement this motion with the transcript as soon as it is  
15 available. *Id.*].

16 Based on the City’s written representations in its brief and its verbal assurances,  
17 Judge Castleberry did not sign the Plaintiffs’ Proposed Order Barring Inappropriate Evidence  
18 on Appeal. The SJM Order which was signed by Judge Castleberry does not list any of the  
19 documents from the CR 54(b) motion. It clearly does not list the CR 54(b) declarations of  
20 Messrs. Fiene and Stroup. *Id.*

21 On Friday, June 22, 2012, counsel for the Plaintiffs’ received the City’s Designation  
22 of Clerk’s Papers. *See Willie Decl., Exhibit G.* Among other things,<sup>1</sup> the City advanced to  
23 the appellate court the CR 54(b) declarations of Messrs. Stroup and Fiene (nos. 54 and 55);

24 \_\_\_\_\_  
25 <sup>1</sup> It also fails to list three of the Plaintiffs’ documents (numbers 2, 12 and 13) that were enumerated in the SJM  
26 Order—the Appendix of Washington cases (docket no. 15); Plaintiffs’ Objection to Evidence (docket no. 28)  
and Plaintiffs’ Response to City’s Objection and Motion to Strike Inadmissible Evidence (docket no. 29).

1 all the other motion papers from the CR 54(b) (nos. 50, 53,57) and the Orders on evidentiary  
2 matters (61, 62). The CR 54(b) matters were not part of the summary judgment motions.  
3 Neither were the evidentiary orders and the appellate court has indicated to the City that it  
4 will not entertain its evidentiary issues on appeal. *See Willie Decl., Exhibit A.*

5 Friday afternoon on June 22, 2012, counsel for the Plaintiffs emailed both counsel for  
6 the City pointing out that the two declarations from the CR 54(b) hearing had been advanced  
7 and reiterated that the Plaintiffs had requested an order to bar these from appellate review  
8 and that assurances had been made to Retired Judge Castleberry in writing and orally that the  
9 declarations would not be included in the appeal process. *See Willie Decl., Exhibit H* (email  
10 transmissions). We asked for the two declarations to be struck from the record and noted that  
11 if we had to apply to this Court to have them struck, that we would ask for costs and  
12 attorneys' fees in this matter. *Id.* On Sunday morning, in response, we were told that the  
13 "declarations are part of the City's appeal" but that they were not designated as part of the  
14 cross motions and that "[y]our implication otherwise is unethical and I request that all further  
15 such accusations cease." *Id.* We do not believe it is unethical to protect our clients' interests  
16 and require that the City comply with the appellate rules and its written and oral assurances  
17 to the trial court.

## 18 II. ARGUMENT

19 The appellate rule is clear that "the appellate court will consider only evidence and  
20 issues called to the attention of the trial court." RAP 9.12. The Order signed by Retired  
21 Judge Castleberry designates the documents that are to be considered. *See Willie Decl.,*  
22 **Exhibit A.** The rule is also clear that "the documents and other evidence called to the  
23 attention of the trial court but not designated in the order shall be made a part of the record  
24 by supplemental order of the trial court or by stipulation of counsel." RAP 9.12. Obviously,  
25  
26

1 neither or these methods were employed with regard to the CR 54(c) declarations of Fiene  
2 and Stroup, the other CR 54(b) filings and the evidentiary orders. *See Willie Decl.*, ¶ 12.

3 The Plaintiffs believe the irrefutable facts before the Court are rare. We have never  
4 been involved in a case where opposing attorneys have acted in this manner. Plaintiffs'  
5 counsel raised the probability that the City sought to place inappropriate evidence before the  
6 appellate court. The City, chastising, denied any such intent to the trial court. It then  
7 submitted the very same inappropriate evidence on appeal and again chastised when the  
8 Plaintiffs objected to it. Our clients paid for the earlier briefing and the Proposed Order  
9 Barring Inappropriate Evidence on Appeal. *See Willie Decl.*, ¶ 12, **Exhibit E**. In retrospect,  
10 we do not think it was fair to have them pay for that motion and believe that they should not  
11 have to pay for this motion.

12 Several civil rules have been violated by the City. Briefly, CR 1 is an overarching  
13 rule that states: "These rules govern the procedure in the superior court in all suits of a civil  
14 nature whether cognizable as cases at law or in equity.... They shall be construed and  
15 administered to secure the just, speedy, and inexpensive determination of every action." The  
16 City's actions are not "just" and it is causing additional fees and costs for our clients. Civil  
17 Rule 1 governs this case and it has been violated by the City and its attorneys.

18 Stephanie Croll and Joseph Beck both signed the City's Reply brief that stated the  
19 City was not attempting "to slip them [the CR 54(b) declarations] into the documents to be  
20 considered on appeal in the summary judgment proceedings." *See Willie Decl.*, **Exhibit F**,  
21 pg.3, ln.1. Both counsel signed the City's Designation of Papers which placed the CR 54 (b)  
22 declarations and other briefing before the appellate court. *See Willie Decl.*, **Exhibit G**. The  
23 signatures on the City's Designation of Papers are in violation of CR 11 which states:

24 The signature of...an attorney constitutes a certificate by the party or attorney  
25 that the party or attorney has read the pleading, motion or legal memorandum,  
26 and that to the best of the party's or attorney's knowledge, information, and  
belief, formed after an inquiry reasonable under the circumstances: (1) it is

1 well grounded in fact; (2) it is warranted by existing law....(3) it is not  
2 interposed for any improper purpose such as to harass or to cause unnecessary  
3 delay or needless increase in the cost of litigation.

4 ....

5 If a pleading, motion or legal memorandum is signed in violation of this rule,  
6 the court, upon motion or upon its own initiative, may impose upon the person  
7 who signed it, a represented party or both, an appropriate sanction which may  
8 include an order to pay to the other party ...the amount of the reasonable  
9 expenses incurred because of the filing of the pleading, motion or legal  
10 memorandum, including a reasonable attorney fee.

11 We expect this Court is familiar with the cases involving CR 11 sanctions. Pursuant to  
12 *Bryant v. Joseph Tree Inc.*, 119 Wn.2d 210, 224 (1992), Plaintiffs gave notice to the City that  
13 they would ask for sanctions in this matter and set out that to avoid same, the City should  
14 strike the CR 54(b) declarations from the designation of papers sent to the appellate court.  
15 *See Willie Decl., Exhibit G* (email transmissions). None of the CR 11 cases have fact  
16 patterns as egregious as those before this Court. Based on their Reply Brief, Attorneys Beck  
17 and Croll knew that advancing the CR 54(b) declarations and CR 54(b) briefing violated  
18 RAP 9.12.

19 At the appellate level, Division One has addressed the issue of advancing and  
20 using declarations that were not listed in a summary judgment order in violation of CR 9.12.  
21 *See Green v. Normandy Park*, 137 Wash. App. 665, 677, 151 P.3d 1038, 1044 (2007). The  
22 Court explained that the provisions of RAP 9.12 are “simple, easy to comply with and  
23 mandatory.” *See Green* at 679. The appellate court stated that it was clear that there are  
24 “three ways—and only three ways—for a document or evidentiary item” to be designated as  
25 part of the record. *Id.*

26 The *Green* case is the most factually similar case that we could find to this one.  
There, the appellants asked the trial court to allow them to supplement the summary  
judgment order with the two declarations. The trial judge reviewed his notes and had no

1 independent memory of the declarations being brought to his attention in the summary  
2 judgment motion. The trial court denied the motion for a supplementary order including the  
3 declarations. *See Green* at 680. Nonetheless, the appellants, knowing the stance of the trial  
4 judge, advanced and used the declarations on appeal. The appellate court stated that: “in  
5 complete defiance of the Rules of Appellate Procedure [w]ithout the permission of either this  
6 court or of the superior court, the [appellate] designated the two items for inclusion in the  
7 Clerk’s Papers.” *Id.* The motion to strike was granted and because the moving party had  
8 “incurred expense in bringing this matter to our attention” the request for “the imposition of  
9 monetary terms’ was granted. *See Green* at p. 701, n. 9.

10 Again, appellate review is limited to the “issues and evidence called to the attention  
11 of the trial court.” *See* RAP 9.12. The Washington Supreme Court has explained that the  
12 “purpose of this limitation is to effectuate the rule that the appellate court engages in the  
13 same inquiry as the trial court.” *See Washington Fed’n of State Employees, Council 28, AFL-*  
14 *CIO v. Office of Fin. Mgmt.*, 121 Wash. 2d 152, 157 (1993). Moreover, RAP 9.12 helps to  
15 clarify to a reviewing court the “exact composition of the record before the superior court  
16 judge” at the time of ruling. *See Green* at pg. 678-79. Here, the City has attempted to  
17 supplement the record for appellate review after having promised the trial court it would not  
18 do so. *See Willie Decl., Exhibit F (City’s Reply)*, p. 3, 1.

19  
20 CR 11 was intended to “help curb abuses of the judicial system.” *See Bryant*, 119  
21 Wn.2d at 219. It provides that “the signature of a party or of an attorney constitutes a  
22 certificate by him that he has read the pleading, motion, or legal memorandum. . . . and that it  
23 is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or  
24 needless increase in the cost of litigation.” *See Delany v. Canning*, 84 Wash. App. 498, 510  
25 (1997). In addition, the rule permits courts “to award sanctions, including expenses and  
26

1 attorney fees, to a litigant whose opponent acts in bad faith in instituting or conducting  
2 litigation." *Delany*, 84 Wash. App. at 510. Here, the City has acted in bad faith in its  
3 attempt to defy the Rules of Appellate Procedure and misguide this court as to the proper  
4 record for appellate review. As a result, the City has needlessly created additional litigation  
5 and expense therefore it should be ordered to pay Plaintiffs' attorneys' fees associated with  
6 its improper conduct.

7 Research had to be accomplished on the issues presented in this motion because they  
8 were unfamiliar. A junior associate spent 6 hours working on this case whose hourly rate is  
9 \$120 so his total in fees is \$720. *See Willie Decl.*, ¶ 13. Counsel for the Plaintiffs spent ten  
10 hours on the emails, the motion, her declaration, the order and reviewing research from the  
11 junior associate. Her hourly rate is \$295 or \$2,950. *Id.* She estimates that another 5 hours  
12 will be spent on the Reply brief or \$1,475. Messenger services for two rounds of briefing  
13 will cost \$225. It is expected that the transcript will cost about \$50. *Id.* Travel time and  
14 attendance at the oral argument in this case will be approximately three more hours for the  
15 attorneys or an additional \$1,245. *Id.* Therefore, the total estimated cost of this motion for  
16 the Plaintiffs' will be \$6,665. Counsel for the Plaintiffs estimates that her clients have  
17 already paid approximately \$1,500 for the portion of the prior work that was dedicated to the  
18 issue of the City attempting to put inappropriate evidence before the appellate court. *Id.*

### 19 III. CONCLUSION

20 The Plaintiffs respectfully request that the Court strike from the Designation of  
21 Clerk's Papers numbers 50, 53, 54, 55, 57, 61 and 62. We ask that the Court have added to  
22 the Clerk's Papers Docket numbers 15, 28 and 29. We additionally ask that the Plaintiffs be  
23 awarded their costs and fees in this matter pursuant to CR 1, CR 11 and RAP 9.12 in the  
24 estimated amount of \$6,665. *See Willie Decl.*, ¶ 13.

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DATED this 2<sup>nd</sup> day of July, 2012.

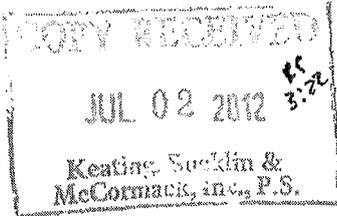
TERRELL MARSHALL DAUDT & WILLIE



By: \_\_\_\_\_  
Karen A. Willie, WSBA No. 15902  
Bradley E. Neunzig, WSBA No. 22365  
Attorneys for Plaintiffs

PLAINTIFFS' MOTION TO STRIKE CERTAIN DOCUMENTS IN  
THE CITY OF BOTHELL'S DESIGNATION OF CLERK'S  
PAPERS WHICH VIOLATE RAP 9.12 AND ITS REQUEST FOR  
ATTORNEYS' FEES AND COSTS - 10  
CASE No. 10-2-10147-9

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Judge Michael T. Downes  
Hearing Date: July 13, 2012  
Hearing Time: 9:00 a.m.  
Moving Party: Plaintiffs

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF SNOHOMISH

CRYSTAL RIDGE HOMEOWNERS  
ASSOCIATION, a Washington nonprofit  
corporation; J. ABULTZ, *et al.*

Plaintiffs,

vs.

CITY OF BOTHELL, a municipal  
corporation,

Defendant.

No. 10-2-10147-9

DECLARATION OF KAREN A.  
WILLIE IN SUPPORT OF MOTION TO  
STRIKE

I, KAREN A. WILLIE, declare the following to be true and correct under penalty of perjury under the laws of the State of Washington:

1. I make this declaration based upon my own personal knowledge. I am over the age of eighteen and competent to testify to the matters contained herein. I am one of the attorneys of record in this case.

2. Attached to my declaration as **Exhibit A** is a true and correct copy of the Commissioner Mary S. Neel's Ruling on Appealability dated May 23, 2012.

DECLARATION OF KAREN A. WILLIE IN SUPPORT OF  
MOTION TO STRIKE - I  
Case No. 10-2-10147-9

APPENDIX NO. 5

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Seattle, Washington 98103-8869  
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www.tmdwlaw.com

1           3.       Attached to my declaration as **Exhibit B** is a true and correct copy of the  
2 Order Granting Plaintiffs' Motion for Summary Judgment and Order Denying Defendant  
3 City of Bothell's Cross Motion for Summary Judgment dated April 5, 2012.

4           4.       Attached to my declaration as **Exhibit C** is a true and correct copy of  
5 Defendant's Proposed Order Granting Plaintiffs' Motion for Summary Judgment and Order  
6 Denying Defendant City of Bothell's Cross Motion for Summary Judgment and Order  
7 Granting Immediate Appeal Pursuant to CR 54(b).

8           5.       Attached to my declaration as **Exhibit D** is a true and correct copy of  
9 Plaintiffs' Response to Defendant City of Bothell's Motion Pursuant to CR 54(b) and  
10 Request to Bar Inappropriate Evidence on Appeal dated March 23, 2012.

11          6.       Attached to my declaration as **Exhibit E** is a true and correct copy of  
12 Plaintiffs' Proposed Order Barring Inappropriate Evidence on Appeal.

13          7.       Attached to my declaration as **Exhibit F** is a true and correct copy of the  
14 City's Reply in Support of Entry of Orders and CR 54(b) Certification dated April 2, 2012.

15          8.       Attached to my declaration as **Exhibit G** is a true and correct copy of the  
16 Designation of Clerk's Papers dated June 22, 2012.

17          9.       Attached to my declaration as **Exhibit H** are a true and correct copies of  
18 emails with counsel for the City of Bothell dated Friday, June 22, 2012 and Sunday, June 24,  
19 2012.

20          10.       During the oral argument on the presentation of orders, the City Attorney for  
21 Bothell, Joseph Beck, was in telephonic attendance. Stephanie Croll gave the argument for  
22 the City and I recall that she made specific assurances that the City did not seek to put the CR  
23 54(b) declarations before the appellate court. Based on those assurances, Retired Judge  
24 Ronald Castleberry found that the Plaintiffs' Order specifically instructing the Snohomish  
25 Court Clerk to bar this evidence on appeal, was not necessary.  
26

1           11.     As I indicated to the City's attorneys in my email, we attempted to obtain the  
2 transcript of the record for the April 5, 2012 arguments on oral presentation. The court  
3 reporter, William Meek, was on vacation and could not provide me with a transcript before  
4 our deadline for filing this motion. He will return to work on July 2, 2012 and will provide  
5 the transcript as soon as possible. We will advance that to the Court upon receipt of it and  
6 will highlight the relevant parts of the transcript for the Court's convenience.

7           12.     Obviously, I did not stipulate to allowing the CR 54(b) declarations of Messrs.  
8 Feine and Stroup to be advanced to the Court of Appeals. They contain new "financial  
9 distress" arguments not presented in the summary judgment motions before Retired Judge  
10 Ronald Castleberry.

11           13.     We had to do research on the issues presented in this motion because they  
12 were unfamiliar to us. Sam Strauss spent 6 hours working on this case. His hourly rate is  
13 \$120 so his fees are \$720. I spent ten hours on the emails, the motion, my declaration, the  
14 order and reviewing research from Mr. Strauss. My hourly rate is \$295 so my fees are  
15 currently at \$2,950. I anticipate spending 5 hours on Plaintiffs' reply, which amounts to  
16 \$1,475. Messenger services for two rounds of briefing will cost \$225. I expect that the  
17 transcript will cost about \$50. Our travel time and attendance at the oral argument in this  
18 case will be approximately three hours each for myself and Mr. Strauss for an additional  
19 \$1,245. The total estimated cost of this motion for our clients will be \$6,665. The clients  
20 already paid approximately \$1,500 for the portion of the prior work we did dedicated to the  
21 issue of the inappropriate evidence that it promised it would not try to "slip" to the appellate  
22 court. We ask that at least our current legal bill be paid by the City of Bothell and its  
23 attorneys.

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DATED this 2<sup>nd</sup> day of June, 2012 in Seattle, Washington.

TERRELL MARSHALL DAUDT & WILLIE



By: \_\_\_\_\_  
Karen A. Willie  
WSBA No. 15902  
Attorney for Plaintiffs

The Honorable Ronald L. Castleberry  
Moving Party: Plaintiffs  
SET WITHOUT ORAL ARGUMENT

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

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

Plaintiffs,

v.

CITY OF BOTHELL, a municipal  
corporation,

Defendant.

NO. 10-2-10147-9

**CITY'S OPPOSITION AND MOTION TO  
STRIKE PLAINTIFFS' MOTION TO  
STRIKE**

**AND**

**CITY'S REQUEST FOR REASONABLE  
ATTORNEY'S FEES**

**I. INTRODUCTION AND RELIEF REQUESTED**

As an initial matter, the City respectfully requests that the trial court strike  
*Plaintiffs' Motion to Strike Certain Documents In the City of Bothell's Designation of  
Clerk's Papers Which Violate RAP 9.12 And Its Request For Attorneys' Fees and Costs*  
(hereinafter "*Plaintiffs' Motion to Strike*"), as it is improperly filed in the trial court. This  
case has been accepted for review by the Court of Appeals, Division I, and this motion must  
be directed to the Court of Appeals. See Title 9 of the Rules of Appellate Procedure and  
RAP 7.2(a) ("after review is accepted by the appellate court, the trial court has authority to  
act in a case only to the extent provided in this rule[.]"). The trial court does not have  
jurisdiction to hear this motion and has no authority to do anything other than dismiss it.

**CITY'S OPPOSITION AND MOTION TO  
STRIKE-1**

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**APPENDIX NO. 6**

1 Because this matter has been improperly filed in the trial court, the City requests an award  
2 of reasonable attorney's fees incurred in being forced to file this motion to strike. Attached  
3 hereto is a declaration of the City's counsel, Stephanie E. Croll, proving that the City  
4 repeatedly asked Plaintiffs to strike this improperly filed motion and file it with the Court of  
5 Appeals. Not only did Plaintiffs refuse, but when the Snohomish County Clerk's office  
6 struck the motion on its own, Plaintiffs had the opportunity to file it properly with the Court  
7 of Appeals. Instead, with full knowledge that it is in violation of Title 9 of the Rules of  
8 Appellate Procedure, they have re-filed it again with the trial court. This is a waste of the  
9 trial judge's time and resources, in addition to being a waste of the City's time and  
10 resources. Based on their willful disregard of the Snohomish County court rules and the  
11 Rules of Appellate procedure, the City respectfully requests an award of fees against  
12 Plaintiffs and their counsel.

13 In addition, Plaintiffs' counsel Karen Willie, when originally filing this motion,  
14 made knowing and material misrepresentations of fact in her signed and sworn declaration.  
15 When the parties received a transcript proving the falsity of Ms. Willie's statements, she  
16 continued to make these misrepresentations in emails that were copied to her clients. (*See*  
17 *attached Croll Decl., Exhibit 4.*) Based upon those material misrepresentations – which  
18 falsely accused counsel for the City of wrongdoing – imposition of sanctions against  
19 Plaintiffs' counsel is merited and should be imposed. Unfortunately, the City sees no other  
20 way to halt such behaviors by Plaintiffs' counsel, which are continuing, other than by the  
21 imposition of monetary sanctions.

22 Finally, as set forth below, this motion should also be denied on the merits, as the  
23 City's designation of the disputed declarations does not violate any court rule.

## 24 II. FACTS

### 25 A. Procedural Facts.

26 Plaintiffs filed this lawsuit against the City on January 7, 2011. In the fall of 2011,  
27

CITY'S OPPOSITION AND MOTION TO  
STRIKE-2

KASEC\Bohell adv Crystal Ridge (woia21098)\PLEADINGS\p-072312-  
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1 the parties filed cross-motions for summary judgment. These motions were heard by the  
2 Snohomish County trial court, by the Honorable Ronald L. Castleberry, on November 28,  
3 2011. The judge took the matter under advisement and on December 9, 2011, issued an  
4 oral opinion granting the Plaintiffs' motion and denying the City's cross-motion. A written  
5 order (the Summary Judgment Order) was entered at a hearing held on April 5, 2012. On  
6 that same day, the trial court also granted the City's motion for an immediate appeal to the  
7 Court of Appeals. Although Plaintiffs ultimately agreed to an immediate appeal (after they  
8 forced the City to file a motion for CR 54(b) certification), they continued to contest the  
9 scope of the issues on appeal.<sup>1</sup> The issues on appeal, however, are left to the sound  
10 discretion of the Court of Appeals.

11 Plaintiffs' refusal to stipulate to an immediate appeal required the City to expend  
12 considerable time preparing a motion for CR 54(b) certification with supporting  
13 declarations. Ironically, it is those very declarations – which were only prepared because of  
14 Plaintiffs' unreasonable demands – that Plaintiffs are complaining of today.

15 One of the Plaintiffs' proposed orders that the trial court refused to enter at the April  
16 5th hearing was a proposed *Order Barring Inappropriate Evidence on Appeal*. Plaintiffs'  
17 counsel wanted the trial court to enter an order barring the City from designating the CR  
18 54(b) declarations on appeal for any and all reasons, claiming that the City would try to use  
19 them as support for the summary judgment motions. The City objected, stating that the  
20 declarations were clearly labeled in support of the CR 54(b) motion (and not the summary  
21

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22  
23 <sup>1</sup> Although Plaintiffs agreed to an immediate appeal once the parties were in front of the judge at the City's  
24 CR 54(b) hearing, they had refused the City's many requests to stipulate to an immediate appeal, thus forcing  
25 the City to file an unnecessary and time-consuming motion. Their stated reason for refusing to stipulate was  
26 because the City would not agree, *inter alia*, to attach improper findings-of-fact to the Summary Judgment  
27 Order. In fact, Plaintiffs had issued a litany of unreasonable demands, none of which the City would  
concede to. In support of the fact that their demands were unreasonable, the trial judge may recall that at the  
CR 54(b) hearing Plaintiffs presented five (5) proposed orders to the court, all of which the court declined to  
enter. The only order of Plaintiffs that was entered by the trial court was an order drawn up in court that day,  
allowing supplementation of the MSJ record with several "illustrative" exhibits.

**CITY'S OPPOSITION AND MOTION TO  
STRIKE-3**

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1 judgment motions), and, in addition, might be necessary for other appellate issues. The trial  
2 court agreed with the City and did not enter Plaintiffs' proposed order.

3 **B. Facts Regarding Designation of Clerk's Papers.**

4 The Court of Appeals, Division I, accepted immediate review of this appeal  
5 pursuant to RAP 2.2(d) on May 23, 2012. (*Croll Declaration, Ex. 8.*) The City's  
6 designation of clerk's papers was due on June 22, 2012. The City filed its designation of  
7 clerk's papers on that date. The City designated everything that was before the trial court  
8 (including all of the Plaintiffs' pleadings and declarations, even though it had no obligation  
9 to designate Plaintiffs' evidence).

10 The City also included the CR 54(b) pleadings, including the disputed declarations.  
11 Again, these declarations are clearly labeled as being in support of the CR 54(b)  
12 proceedings, and they are NOT listed as evidence relied upon by the trial court at the  
13 summary judgment hearing. The City did not attempt to mislead Division I by claiming  
14 these declarations were considered by the trial court at the summary judgment hearing.

15 **III. LEGAL DISCUSSION**

16 **A. The Trial Court Should Dismiss Or Strike Plaintiffs' Motion Based On**  
17 **Lack Of Jurisdiction.**

18 RAP 7.2(a) provides that "after review is accepted by the appellate court, the trial  
19 court has authority to act in a case only to the extent provided in this rule[.]" RAP 7.2(b)  
20 provides that "the trial court has authority to settle the record as provided in Title 9 of these  
21 rules." A look at Title 9 demonstrates that this motion should be heard only by the Court of  
22 Appeals. RAP 9.6 addresses the designation of clerk's papers and exhibits. It requires the  
23 party seeking review to file a designation with the trial court clerk (and the appellate court  
24 clerk). This designation is the blue print the trial court clerk must follow in determining  
25 what documents to forward to the appellate court. RAP 9.7 tells the trial court clerk how to  
26 prepare these papers; and RAP 9.8 tells the trial court clerk how to transmit these papers to

27 **CITY'S OPPOSITION AND MOTION TO  
STRIKE-4**

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1 the appellate court. Nothing within RAPs 9.6, 9.7, or 9.8 authorize the trial court to strike  
2 documents from a party's designation of clerk's papers.

3 With regard to the "report of proceedings," RAP 9.9 indicates that the trial court  
4 may correct or supplement the report at any time prior to transmission to the appellate  
5 court. But this provision only applies to the report of proceedings, and only if the report  
6 has not yet been transmitted to the appellate court. Once the report has been transmitted to  
7 the appellate court, then only the appellate court (not the trial court) has authority to "(1)  
8 direct the transmittal of additional clerk's papers and exhibits . . . , or (2) correct, or direct  
9 the supplementation or correction of, the report of proceedings." RAP 9.10.

10 There is no provision of Title 9 that gives the trial court authority to strike a  
11 declaration from the designation of clerk's papers. Barring any such specific authority, the  
12 court and parties must rely on the general statement in RAP 7.2(a), which states that "after  
13 review is accepted by the appellate court, the trial court has authority to act in a case only to  
14 the extent provided in this rule[.]" Because the trial court was not granted authority to  
15 strike clerk's papers, any motion to strike clerk's papers must be directed to the Court of  
16 Appeals. Thus, as the trial court does not have jurisdiction to entertain this motion, it  
17 should be dismissed.

18 **B. In The Alternative, Plaintiffs' Motion Should Be Denied.**

19 Even if the trial court had jurisdiction to consider this motion, it should be denied.  
20 Plaintiffs argue that the City is not allowed to designate the disputed declarations on appeal  
21 for any reason. This argument has no merit.

22 First, the City has not designated the declarations as evidence in support of the  
23 summary judgment motions, which would, admittedly, be improper. Second, the City has  
24 legitimate reasons for needing the declarations to support its Statements of Errors,  
25 especially if Plaintiffs again attempt to limit the scope of the City's appeal (as they did at  
26 the trial court level in response to the City's CR 54(b) motion). *See Croll Dec., Ex. 1.*

27 **CITY'S OPPOSITION AND MOTION TO  
STRIKE-5**

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1 Third, the Rules of Appellate Procedure do not prohibit a party from designating  
2 anything they want on appeal. *See, for instance*, RAP 9.6(a) which simply says that parties  
3 are “encouraged” to designate only documents needed to review the issues presented to the  
4 appellate court. Thus, even if the City were incorrect in designating these declarations, the  
5 Plaintiffs’ motion to strike should be denied because the declarations are not “prohibited”  
6 on appeal.

7 Plaintiffs’ citation to the *Green v. Normandy Park Community Club* case is not  
8 helpful here at all. In *Green*, the Community Club failed to list in its *Order On Summary*  
9 *Judgment* several declarations that it had (supposedly) relied upon in support of its motion.  
10 Subsequently, the Club attempted to have the trial court enter a new summary judgment  
11 order listing these declarations, but the trial court declined to do so based upon lack of  
12 recollection. Instead of seeking review of this order, the Community Club simply went  
13 ahead and designated the declarations for review as part of their summary judgment  
14 evidence and then cited to them in support of their summary judgment appeal. Not  
15 surprisingly, the Court of Appeals frowned on this “defiance” of the rules of procedure.  
16 *Green*, 137 Wn. App. at 680-81. Here, in contrast, the City is not claiming the disputed  
17 declarations were part of the summary judgment motion. Nor has the City cited to these  
18 declarations in support of its summary judgment argument (which highlights the  
19 prematurity of this motion also, as the City’s opening brief has not even been filed yet).

20 In sum, a party is free to designate any papers and exhibits on appeal that it thinks  
21 may be necessary to support or defend its position on appeal. Plaintiffs have cited no  
22 evidence to the contrary. To the extent the City may be prohibited from relying on the  
23 disputed declarations in support of their summary judgment appeal, that is an issue for  
24 another day . . . which will only become ripe if the City actually cites to these declarations  
25 in an improper manner for an improper means (which the City, frankly, does not intend to  
26 do).

27 **CITY’S OPPOSITION AND MOTION TO STRIKE-6**

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1           C.     The City's Motion For Sanctions In The Form Of Reasonable  
2                     Attorney's Fees And Costs Should Be Granted.

3           First, Plaintiffs' motion is filed in the wrong court. The trial court does not have  
4 jurisdiction to hear this matter. Based on the plain language of RAP 7.2(a) and Title 9 of  
5 the Rules of Appellate Procedure, this motion can only have been filed in the Court of  
6 Appeals. The City gave Plaintiffs the opportunity to file this motion in the correct court.  
7 Plaintiffs refused to do so. It has cost the City unnecessary time and expense to respond to  
8 this motion in the trial court and the City should be compensated therefore. Thus, the City  
9 respectfully requests an award of reasonable attorneys fees in the amount of \$2,450. *See*  
10 *Croll Decl.*, para. 9.

11           Second, Plaintiffs' motion is completely without merit. There is no support for a  
12 motion to strike declarations from a party's designation of clerk's papers – a party has the  
13 right to designate anything for review that it believes may be necessary to support its case.  
14 Furthermore, there is no merit to Plaintiffs' argument here that the City is trying to tie the  
15 disputed declarations to its cross-motion for summary judgment. In fact, the evidence is to  
16 the contrary, as the declarations are clearly labeled in support of the CR 54(b) motion below  
17 – not the cross-motions for summary judgment; and the declarations are not listed as  
18 evidence in the Summary Judgment Order.

19           Finally, the City has every right to designate these declarations for any lawful  
20 purpose on appeal, such as to support its Assignments of Error.<sup>2</sup> The fact that review has  
21 been accepted is irrelevant; the declarations may still be necessary to define and clarify the  
22 scope of review. These arguments were made clear to Plaintiffs' counsel, yet were ignored.

23  
24           <sup>2</sup> Plaintiffs played games with the City by refusing to agree to an immediate appeal until the parties were in  
25 front of the trial judge on April 5, 2012, for the City's CR 54(b) motion. Plaintiffs' game-playing resulted  
26 in the creation of the very declarations to which they are now objecting. Furthermore, Plaintiffs then  
27 objected to the scope of the appeal, attempting to limit the issues subject to the trial court's CR 54(b)  
certification. While the Court of Appeals has sole discretion to determine the scope on review, to the extent  
Plaintiffs again attempt to limit the issues on appeal, the City may find it necessary to refer to and rely upon  
the disputed declarations. It would not be improper in the least to cite to the declarations for this purpose.

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Given these circumstances, and the numerous opportunities the City gave Plaintiffs and their attorney to strike this motion, the City is entitled to an award of reasonable attorney's fees.

DATED this 23<sup>rd</sup> day of July, 2012.

KEATING, BUCKLIN & McCORMACK, INC., P.S.

By: Stephanie Croll  
Stephanie E. Croll, WSBA #18005  
Attorney for Defendant City of Bothell

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**DECLARATION OF SERVICE**

I declare that on July 23, 2012, I caused to be served a true and correct copy of the foregoing document on the following parties of record via electronic transmission and U.S. First-Class Mail, postage prepaid:

*Attorneys for Plaintiffs:*

Karen A. Willie  
Law Offices of Karen A. Willie, PLLC  
936 North 34<sup>th</sup> Street, Suite 400  
Seattle, WA 98103  
Fax: (206) 350-3528  
kwillie@willielaw.com

DATED this 23<sup>rd</sup> day of July, 2012.

  
Cathy Hendrickson, Legal Assistant

The Honorable Ronald L. Castleberry  
Moving Party: Plaintiffs  
SET WITHOUT ORAL ARGUMENT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

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

Plaintiffs,

v.

CITY OF BOTHELL, a municipal  
corporation,

Defendant.

NO. 10-2-10147-9

DECLARATION OF STEPHANIE E.  
CROLL IN SUPPORT OF THE CITY'S  
OPPOSITION, MOTION TO STRIKE,  
AND REQUEST FOR SANCTIONS

I, Stephanie E. Croll, hereby declare as follows:

1. I am the attorney for the City of Bothell in this matter and have personal knowledge of the facts contained in this declaration. I file this declaration in response and opposition to *Plaintiffs' Motion to Strike Certain Documents In the City of Bothell's Designation of Clerk's Papers Which Violate RAP 9.12 and Its Requests for Attorneys' Fees and Costs*, and in support of the City's Motion to Strike and Request for Fees.

2. On behalf of the City, I have tried hard to work with Plaintiffs' counsel, Ms. Karen Willie, in a professional manner. Unfortunately, the situation has escalated and we find ourselves back before the trial court on a frivolous and unnecessary motion filed by Plaintiffs. Attached to this declaration are emails between me and Karen Willie

1 substantiating my efforts to keep this issue out of court. These emails also support my  
2 request for an award of sanctions (in the form of reasonable attorney's fees and costs)  
3 against Plaintiffs and Plaintiffs' counsel, Karen Willie, for being forced to respond to this  
4 motion.

5 3. Attached hereto are true and correct copies of the following documents:

6 **Exhibit 2** – Email from Karen Willie to Stephanie Croll dated June 22, 2012. In this email,  
7 Karen Willie specifically misrepresents my colloquy with Judge Castleberry at the trial  
8 court hearing held April 5, 2012. She also threatens to seek attorneys' fees and costs  
9 against me if I do not agree to strike two declarations from the City's Designation of  
10 Clerk's Papers. Specifically, the email from Ms. Willie reads as follows:

11 You [Stephanie Croll] have designated the declarations of Nik  
12 Stroup and Donald Fiene dated March 22, 2012 (##'s 54 and 55) as  
13 having been involved in the summary judgment motions before  
14 Judge Castleberry a month prior. We requested an order from  
15 Judge Castleberry specifically barring these declarations from  
16 being considered part of the appellate record. Upon Ms. Croll's  
17 assurances to the Judge that the City would not designate them as  
18 part of the record, the Judge declined to enter our Order.  
(Emphasis added.)

17 First, I did not designate these declarations as part of the "summary judgment  
18 motions." That is Ms. Willie's first misrepresentation. (As she sent this email to her  
19 clients, this misrepresentation was obviously disseminated by Ms. Willie in an effort to  
20 make me, as counsel for the City, look unethical.) Second, Ms. Willie indicates that I  
21 assured the trial judge that the City would not designate these declarations as "part of the  
22 appellate record." Again, that representation is not true. While I indicated that they would  
23 not be designated as part of the summary judgment motions (which they have not been), I  
24 made clear to the court that the City wanted the right to designate them for any other lawful  
25 purpose on appeal. (See transcript of the April 5, 2012 hearing, pp.19-20; attached hereto  
26 as **Exhibit 1**.)

1 Exhibit 2 also contains my email to Karen Willie dated June 24, 2012, where I state as  
2 follows:

3 The declarations are part of the City's appeal. They have not been  
4 designated as part of the Cross Motions for Summary Judgment.  
5 Your implication otherwise is unethical and I request that all  
6 further such accusations cease. (Emphasis added.)

6 Exhibit 3 – Karen Willie filed a motion to strike and request for fees with the trial court,  
7 attempting to strike the disputed declarations from the City's Designation of Clerk's Papers.  
8 I responded by email dated July 5, 2012:

9 The City is in receipt of *Plaintiffs' Motion to Strike, etc.*, which has  
10 been improperly filed in the Snohomish County Superior Court.  
11 By this email, I am asking plaintiffs to immediately strike their  
12 motion with the trial court. Your motion has nothing to do with  
13 "Settling the Record" and there is nothing within Title 9 [of the  
14 Rules of Appellate Procedure] that provides the trial court with the  
15 authority to grant or deny your motion. ... If you do not agree to  
16 strike the motion with the trial court, then the City will seek an  
17 award of reasonable attorneys' fees and costs incurred in being  
18 required to file its own motion to strike.

15 Exhibit 4 – In response to my email, Karen Willie claimed that she was not going to strike  
16 Plaintiffs' motion unless I provided her with "cases" to support the City's position. In fact,  
17 there are no cases in the annotations to the Rules of Appellate Procedure on this issue  
18 because, to the best of my knowledge, no one has ever filed such a motion with the trial  
19 court before. Instead, motions to strike declarations from cases before the Court of Appeals  
20 have always been filed with the Court of Appeals.

21 Exhibit 5 – I pointed out to Karen Willie that the transcript of the April 5, 2012 hearing  
22 indisputably demonstrated that she had made misrepresentations about me in a sworn  
23 declaration filed with the Court. I advised:

24 ... the misrepresentation made by you, under oath, in paragraph 10  
25 of the declaration you filed with Plaintiffs' motion, that I "made  
26 specific assurances [to the trial court] that the City did not seek to  
27 put the CR 54(b) declarations before the appellate court." I never  
made such a statement to the parties or the trial court. We have

1 received a copy of the transcript... In the transcript, I agreed not to  
2 designate the "objectionable" declarations in support of the  
3 summary judgment motions. But I also clearly stated that I wanted  
4 to have the ability to rely upon those declarations for purposes of  
5 discretionary review. ... To the extent Plaintiffs intend to try to  
6 limit the issues on review before the Court of Appeals, the City is  
7 entitled to rely on all evidence of such issues that were before the  
8 trial court. This is a case (unlike *Green*), [that] is before the Court  
9 of Appeals on discretionary review, and the issues on review may  
10 require clarification based upon the alleged "objectionable"  
11 declarations – especially if Plaintiffs try to improperly limit those  
12 issues as they did at the trial court level.

13 The fact that you, on behalf of Plaintiffs, have asked for sanctions  
14 given these circumstances – with no legal authority whatsoever  
15 and based upon misrepresentations of the actual transcript  
16 from the trial court – is unconscionable and will not be condoned  
17 or tolerated by the City. (Emphasis added.)

18 In Exhibit 5, Karen responded by continuing to accuse me of designating the declarations  
19 in support of the summary judgment motion. This is absolutely untrue; and she undeniably  
20 knew it at this time because she had a copy of the transcript. Again, she continued to cc  
21 these misrepresentations to her client in an effort to impugn my credibility before them.

22 4. In its request for CR 54(b) certification, the City asked the trial court to  
23 certify various issues for an immediate appeal. Plaintiffs objected to all of these issues  
24 going up on appeal. The trial court wrote its own CR 54(b) order and indicated that it felt  
25 not all of the issues listed by the City were necessary for immediate review. However, it is  
26 the *Court of Appeals* that will determine the scope of its review now that an immediate  
27 appeal has been accepted. In its opening brief, the City will identify all of the assignments  
of errors it wishes to have addressed. If the Plaintiffs attempt to claim that all of those  
issues are not properly before the Court of Appeals, then the City may need to rely upon the  
pleadings in support of its CR 54(b) motion, including the disputed declarations, to support  
what it believes to be a full and comprehensive review. On the other hand, the City has not,  
and will not, be attempting to rely upon the disputed declarations for purposes of the

1 summary judgment decision itself. The summary judgment order does not list these  
2 disputed declarations. The declarations themselves indicate that they were submitted solely  
3 in support of the City's request for an immediate appeal. There is no conceivable chance  
4 the Court of Appeals, a sophisticated appellate court, could be mistaken or tricked into  
5 thinking these declarations were before the trial court during the summary judgment  
6 proceedings.<sup>1</sup>

7 5. **Exhibit 6** – Based upon the fact that Karen Willie continued to misrepresent  
8 my statements and position in her email of July 5, 2012, which she again forwarded to her  
9 clients, I stated as follows:

10 You continue to misrepresent me and my comments and the City's  
11 position. For what purpose, I do not know. And you signed a  
12 declaration with those misrepresentations. Email communication  
13 is not helping resolve this situation, so I will simply file the City's  
14 motion to strike and request for sanctions.

14 **Exhibit 6** – Ms. Willie responded that she did not agree and that if I filed such a motion,  
15 she thought it would be “in violation of CR 11.” **Exhibit 6** – At that point, I indicated that  
16 she had not supported any of her arguments with legal authority and that I would not  
17 respond to another email from her that did not contain legal support.

18 6. **Exhibit 7** – I then received a strange email from Karen Willie at almost  
19 10:00 p.m. She concluded this email with the statement, “I think I have represented  
20 municipalities longer than you have.” I am not sure of the relevance of that statement.

21 7. In any event, on behalf of Plaintiffs, Karen Willie is proceeding forward  
22 with filing this motion (again) with the trial court instead of the Court of Appeals. In  
23 addition to the fact that her motion to strike the City's declarations from the Designation of  
24

25 <sup>1</sup> In fact, Plaintiffs are merely drawing more attention to these declarations than they would ever receive. If  
26 no objection is made to the assignments of error in the City's Opening Brief, then these declarations will  
27 never be cited to the Court of Appeals and would have escaped unnoticed by the Court of Appeals.  
Unfortunately, all of this motions practice has drawn more attention to these declarations than they likely  
ever would have received otherwise.

1 Clerk's Papers has no merit, it most certainly should not be filed with the trial court, but  
2 with the Court of Appeals.

3 8. Attached hereto as Exhibit 8 is a true and correct copy of the letter from the  
4 Court of Appeals dated May 23, 2012, accepting immediate review of this appeal pursuant  
5 to RAP 2.2(d).

6 9. My billing rate is \$245 per hour. I have spent in excess of ten (10) hours  
7 working on this opposition. As a reasonable fee, I request compensation in the amount of  
8 \$2,450.00.

9 I hereby declare, under penalty of perjury of the laws of the state of Washington,  
10 that the foregoing is true and correct.

11 DATED this 23<sup>rd</sup> day of July, 2012.

12 

13 \_\_\_\_\_  
14 Stephanie E. Croll, WSBA #18005  
15 Attorney for Defendant City of Bothell

JUL 27 2012

FILED

JUL 26 2012

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COUNTY CLERK  
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SNOHOMISH

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

Plaintiffs,

vs.

CITY OF BOTHELL, a municipal  
corporation,

Defendant.

NO. 10-2-10147-9

MEMORANDUM DECISION RE:  
PLAINTIFFS' MOTION TO STRIKE  
CERTAIN DOCUMENTS

This Court previously entered Summary Judgment Order which granted the Plaintiffs' Motion for Summary Judgment and denied Defendant City's Cross Motion to Dismiss.

An appropriate order reflecting the above was entered on April 5, 2012. The order designated all those documents and other evidence which were called to the attention of the Court for their respective summary judgment motions.

Both parties made objections to certain evidence and the Court made rulings on these motions [designated as Clerk's Papers 61 and 62].

COPY

1           The Defendant City filed a 54(b) motion pursuant to RAP 2.2(d) and 2.3(b)  
2 seeking immediate appellate review; and, the City filed a motion, memorandum,  
3 and declaration in support of the 54(b) motion, and the Plaintiff filed a responsive  
4 memorandum.  
5

6           The Court of Appeals has granted review of the summary judgment  
7 decision. It denied the request to review the challenged evidentiary rulings.  
8

9           The City has filed a Designation of Clerk's Papers which includes a  
10 designation of the evidentiary rulings and the materials that were used in the  
11 54(b) motion.

12           The Plaintiff seeks to strike these designated materials. Defendant City  
13 opposes the motion and asserts that this court is not the proper forum for such a  
14 request.  
15

16           Both counsel have submitted rather strident briefs in support of their  
17 position.  
18

19           This case is governed by RAP 9.12. It is clear that the original order of this  
20 court set forth those documents and evidence that were called to the attention of  
21 the court. Obviously, the items in support of the 54(b) motion were not before the  
22 court as it relates to the summary judgment motion. They did not come into  
23 existence until after the Court's ruling. And, the Court made it clear that any  
24 consideration of them was limited to the 54(b) motion.  
25

1           Therefore to the extent that such an effort to supplement those items that  
2 were before the court for purposes of the Summary Judgment Motion that request  
3 will be denied. This is as to items 50, 53, 54, 55, 57, 61 and 62.  
4

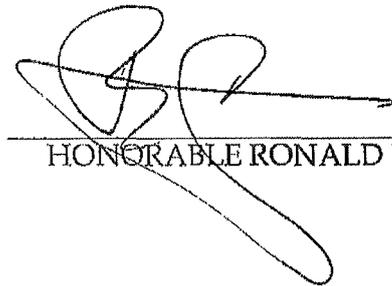
5           However, to the extent that Plaintiff request this court to strike the  
6 Designation of Clerk's Papers, that is a matter within the exclusive providence of  
7 the Appellate Court and that Motion will be denied. The City at p. 6 of its  
8 responsive memorandum states:  
9

10                   ". . . the City is not claiming the disputed declarations were  
11                   part of the summary judgment motion. Nor has the City  
12                   cited to these declarations in support of its summary  
13                   judgment argument . . ."

14           If the City relies on these documents for an improper argument or in an  
15 improper manner, it is for the Court of Appeals to determine. The motion to  
16 strike will be denied. At this time there will be no award of attorney fees or  
17 costs.

18           DONE IN OPEN COURT this 26 day of July, 2012.

19  
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HONORABLE RONALD L. CASTLEBERRY, Ret.