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SUPREME COURT
OF THE STATE OF WASHINGTON

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

Plaintiffs/Respondents,

vs.

CITY OF BOTHELL, a municipal corporation,

Defendant/Appellant.

CITY'S REPLY IN SUPPORT OF [FIRST] MOTION TO STRIKE
PORTIONS OF RESPONDENTS' SUPPLEMENTAL BRIEF AND
NEW DOCUMENT ATTACHED THERETO

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I. INTRODUCTION

Plaintiffs failed to present evidence sufficient to defeat the City's [First] Motion to Strike. Thus, the City's motion should be granted and the inadmissible evidence identified therein should be stricken.

II. LEGAL DISCUSSION

A. The Tax Bill Attached as Exhibit A Should be Stricken

This case comes to the Supreme Court on appeal of the parties' cross-motions for summary judgment. Thus, the scope of the record on review is governed by RAP 9.12. On review of an order on a motion for summary judgment the appellate court may only consider evidence and issues called to the attention of the trial court. *RAP 9.12*. In their supplemental brief, Plaintiffs tried to add new evidence to the summary judgment record, a 2014 Tax Bill, attached as **Ex. A**.

First, the City pointed out that Plaintiffs had failed to bring a motion per RAP 9.11 to supplement the record. Plaintiffs had an opportunity in their Answer to the City's motion to cure their defect and address the six factors required to supplement the record under RAP 9.11. Inexplicably, however, they failed to do so. Plaintiffs did not mention RAP 9.11 in their Answer at all. Thus, the City respectfully requests that its motion to strike **Ex. A** be granted.

Second, Plaintiffs seem to think that if **Ex. A** is admissible under ER 201 then it is also, *ipso facto*, admissible under RAP 9.11. This is not true. Even if the Court could take judicial notice of this document under ER 201 (which it cannot

do)¹, it would not be appropriate to supplement the record without first showing that all six requirements of RAP 9.11 have been met. As that has not been done, the City again requests that its motion to strike Ex. A be granted.

Finally, Plaintiffs argue that Ex. A is “proper rebuttal” to the City’s constitutional gifting argument, which it claims is being made for the first time on appeal. Plaintiffs’ are not correct. *CP 343-344; 317; 320; Brief of Appellant to Div. I, Court of Appeals, p. 27*. But even if the City’s constitutional argument were being raised for the first time on appeal, that would be entirely permissible pursuant to RAP 2.5(a)(3) (parties are allowed to raise for the first time on appeal any manifest error affecting a constitutional right). Interestingly, in literally the same paragraph, Plaintiffs accuse the City of not raising this argument below, then turn around and claim that it was, indeed, raised below – and that their “rebuttal” argument (*i.e.*, that Cities can collect taxes) was also raised below (at CP 102). Plaintiffs go on to argue that because their rebuttal argument was raised below, their new Ex. A should be admitted. *Pls’ Ans., p. 3*. This argument does not even make sense. Plus, Plaintiffs cannot have it both ways. If the City’s argument was raised below, Plaintiffs could have submitted this evidence below. They did not. They have no excuse for not doing so. At a minimum, they cannot meet RAP 9.11(a)(3)(the appellate court may consider new evidence only if “it is

¹ Again, the document does not identify what parcel of property it is related to, by address, tax parcel number, or real property description. It is simply inadmissible.

equitable to excuse a party's failure to present the evidence to the trial court").

The City requests that its motion to strike Ex. A be granted.

B. Inadmissible Statements Should be Stricken

1. Plaintiffs' statement that the Developer and Snohomish County "embarked together" in solving a regional subsurface water problem should be stricken

Plaintiffs did not provide the Court with any citation to the record showing that the *County* and the Developer of Crystal Ridge "embarked together" to solve a regional subsurface water problem back in the 1980s. The only citations Plaintiffs identified were CP's 273 & 282, both referencing that the sub-drain was a benefit to the *Sewer District's* sanitary sewer line. The District is a completely separate entity from the County. If Plaintiffs want to contend that the District and the Developer "embarked together" on a drainage project, then that statement is sustainable. But there is no support in the record to say that the County and the Developer were working together on any drainage project. The City respectfully requests that any references to such a fictional collaboration be stricken.

2. Plaintiffs' statements 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"; "Oftentimes, homeowner associations are very cost conscious in decision making" should be stricken

Again, as set forth above, there is no evidence in the record to support Plaintiffs' statement that the Developer and *Snohomish County* "partnered" together on any drainage project back in the 1980s. This statement is fiction.

Furthermore, there is also no factual evidence in the record (no declaration testimony, deposition testimony, or discovery answers) identified by Plaintiffs to support their statement that it made “economic sense” for Snohomish County to take over maintenance of the interceptor pipe in 1987, because HOAs – such as the yet-to-be-formed Crystal Ridge HOA – were “very cost conscious in decision making.”² The most Plaintiffs can do is cite to (1) a case decided over a decade later in 1998, *Phillips v. King County*, regarding a later-enacted code, from a different county, based on vastly different facts; and (2) a phrase from a Snohomish County drainage code that has nothing to do with HOAs. *Pls' Ans.*, p. 5. Plaintiffs failed to provide the Court with a citation to **any evidence** in the record to support their alleged “factual” statements. Thus, the City respectfully requests that its motion to strike these statements be granted. Finally, at a minimum, if there is any inferences that can be made from the evidence in the record with regard to the not-yet-in-existence HOA for Crystal Ridge in 1987, then those inferences should be viewed in the light most favorable to the City as the non-moving party.

3. Plaintiffs’ statement that “The details of the interceptor pipe . . . are not included on the plat for lack of room to do so” should be stricken

Again, Plaintiffs have failed to provide the Court with any citation to evidence in the record to support this assertion. The only citation they provide is to CP

² How can there possibly be any evidence in the record about the financial workings of a non-existent entity?

291, but this reference does not support their claim that the interceptor pipe was left off of the plat “because there was no room for it.” Instead, at CP 291, Plaintiffs’ engineer testifies that when working on residential plats for Snohomish County in the 1980s, engineers “were required to make a reproducible mylar of the final and approved [drainage] system [an as-built] and submit that to the County. . . . so that it could be filed of record . . .”. BUT – *interestingly* – PLAINTIFFS’ ENGINEER DOES NOT SAY THAT HE DID SO IN THIS CASE, *i.e.*, he does not say that he actually prepared a storm water drainage plan for Crystal Ridge and filed it with Snohomish County at CP 291. Also, it is undisputed that no as-built of the drainage system for Crystal Ridge was ever submitted to the trial court by Plaintiffs. As a matter of fact, no as-built of the drainage system for Crystal Ridge is contained in the record at all.

It is also undisputed that the interceptor pipe is not shown on the plat (it is only shown on the plans for the Sewer District, as it lies in the same trench as the District’s sanitary sewer main). CP 475; 655

Finally, the record is devoid of any testimony that the interceptor pipe was not included on the plat “for lack of room to do so.” This is pure fiction. Plus, it is undisputed that there is indeed room on the plat map for the interceptor pipe; just as there was room for this pipe on the District’s plans. CP 475; 655 The City requests that its motion to strike this unsupported statement be granted.

4. **Plaintiffs' statement that "the interceptor pipe controls groundwater flows . . . which includes leaking municipal storm drains, [and] leaking municipal water lines," should be stricken**

Plaintiffs did not provide the Court with any citation to evidence in the record to support their claim that the interceptor pipe controls leaking "municipal" flows. As set forth in the *City's Suppl. Brief*, pp. 11-13, incorporated herein by reference, Plaintiffs' contention that the interceptor pipe collects "municipal" flows is just another false claim that has unfairly influenced the decisions of the lower courts. The City is compelled to file this motion to strike to set the record straight.

In their response to the City's motion to strike, Plaintiffs – unbelievably – try to support their "municipal flow" theory by submitting a footnote full of additional new hearsay that is not supported by the record and should also be stricken.³ See *Pls' Ans.*, note 5, where Plaintiffs' state: "There is no evidence in the record that area stormlines and maintenance were anything but municipal." Nor is there any evidence in the record that area stormlines (upslope of Crystal Ridge in 1987) were anything other than private lines or county lines, versus municipal lines. The record is silent in this regard. Plaintiffs' comments to the contrary are pure speculation and should be stricken. Footnote 5 goes on to state: "Waterlines are under pressure and almost never privately owned." *Id.* This seems to be a blatant attempt by Plaintiffs' counsel to testify in the briefing, as an expert witness, to facts that are not in the record. There is no evidence in the

³ See THE CITY'S SECOND MOTION TO STRIKE, filed herewith.

record with regard to waterlines at all, much less whether or not they are under pressure, and/or whether or not they are privately owned. There is certainly no evidence in the record to suggest that waterlines upslope of Crystal Ridge in 1987 were owned by the City of Bothell. If anything, they were likely owned by the Water District. Plaintiffs have also attempted to submit to this Court a copy of their brief to Division I of the Court of Appeals in support of their failed Motion to Publish (proposed **Exhibit B** to *Pls' Ans.*), which is blatant and flagrant hearsay and should be ignored and disregarded in its entirety by this Court.⁴

In any event, Plaintiffs did not submit any citations to support their claim that the interceptor pipe, in 1987, intercepted leaking “municipal” flows. Thus, the City requests that its motion to strike Plaintiffs’ unsupported statement with regard to “municipal” flows be granted. The City asks the Court to carefully review the actual record on this issue, not Plaintiffs’ characterization of the record. As noted above, Plaintiffs’ mischaracterization of this fact unfairly influenced both the trial court (CP 36) and the Court of Appeals (*Crystal Ridge Homeowners Association, et al., v. City of Bothell*, No. 68618-6-1 (July 22, 2013) Slip Op. at 8)). Finally, at a minimum, on summary judgment, the inferences from the record with regard to this evidence should have been viewed in the light most favorable to the City of Bothell as the non-moving party, not the Plaintiffs.

⁴ Again, see CITY’S SECOND MOTION TO STRIKE, filed herewith.

5. Plaintiffs' 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" should be stricken

Here, the City concedes that Plaintiffs' citation to CP 811, and the inferences they can draw from CP 811, will probably pass muster. The veracity of the statements made at CP 811, however, another matter and, the City challenges them as highly questionable. For instance, Plaintiffs' engineer claims that the side lateral drains in Crystal Ridge "collect" some of the ground water *from the interceptor pipe* and direct it to the on-site retention pond. CP 811 (He also admits, however, as he must, that most of the ground water is directed off-site onto private property and into a neighbor's pond, just beyond lot 7 of Division 2, as shown on the Alderwood Sewer District's Plans. *See, CP's 475; 811; 655.*⁵ The District's plans, as the Court may recall, are the only plans that show the existence of the interceptor pipe.) Although Plaintiffs' engineer claims that some of the water from the interceptor pipe goes into the side lateral drains, he never produced a drawing of the storm drainage plans for Crystal Ridge to prove it. And a review of the plat drawing shows that the side lateral drainage easements do NOT extend into the 25-foot easement area where the interceptor

⁵ The only actual physical evidence in the record of the interceptor pipe is at CP 475, where it is clearly depicted on the Sewer District plans. The District's plans show the interceptor pipe fully draining off-site to the west into the private pond on the neighbor's private property. The District's plans do not show that the 12-foot buried interceptor pipe is connected in any way to the side lateral drains in Crystal Ridge (CP 475). Furthermore, those side lateral drainage easements do not even extend into the 25-foot easement area (Tract 999) where the interceptor pipe is buried (CP 655).

drain is located. CP 655. Additionally, there is no evidence in the record to indicate that the laterals are buried 12 feet underground like the interceptor pipe. How then, exactly, do they “collect” water from the interceptor pipe?

So, while Plaintiffs have shown that there is some support for the challenged statement in the record (if certain inferences are made) the City still asks the Court to question the candor of the declarant (at CP 811) in light of other undisputed evidence in the record (such as the plat drawing, showing that the laterals do not extend into the 25-foot easement; and the fact that the interceptor drain is buried 12-feet underground while the laterals are not); and the missing evidence (such as the absent storm drainage plans for Crystal Ridge). At a minimum, on summary judgment, the inference from this evidence should have been viewed in the light most favorable to the City as the non-moving party.

6. **Plaintiffs’ statement that “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” should be stricken**

Plaintiffs admit that these statements are not supported by any evidence in the record. Plaintiffs contend, however, that they are raising a new argument for the first time on appeal, and that they can cite to these “facts” in support of that argument because these facts are found in other published cases. Plaintiffs misunderstand how to properly cite to published case law. A party cannot insert facts from another case into their own, even if the other case is published.

Furthermore, neither case cited by Plaintiffs even referred to Snohomish County, nor the Snohomish County drainage code, so even if the Court could insert the facts of a published case into a case pending on appeal, the published cases proffered by Plaintiffs here are completely inapplicable and should be rejected.

The City requests that the Court grant its motion to strike Plaintiffs' statement relating to storm events since 1990, and their statements as to what municipalities are supposedly doing *now* with regard to acceptance of residential stormwater facilities (versus what Snohomish County did with regard to Crystal Ridge's specially designed ground water facility back in 1987). There is no evidence of these "facts" in this summary judgment record and they are not relevant to the issues presented to this Court.

III. CONCLUSION

Based upon the arguments set forth above, the City respectfully requests that its (first) motion to strike be granted.

Respectfully submitted this 9th day of May, 2014.

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

CITY OF BOTHELL

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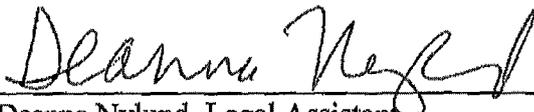
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The attached is being sent to you on behalf of Stephanie Croll. Hard copies will follow to counsel via U.S. Mail.

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*Here is the
appendix (& copy
of Motion for
reference)*

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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