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**SUPREME COURT
OF THE STATE OF WASHINGTON**

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

Respondents,

vs.

CITY OF BOTHELL, a municipal corporation,

Petitioner.

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

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 ORIGINAL

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Bothell Code 15.16.010 H 8

I. INTRODUCTION

The City of Bothell's ("City's") Motion to Strike is a vehicle to place before this Court two of its declarations which were admittedly not before the trial court. *See* Appendix 2, 3 (declarations). The impropriety of using the declarations on appeal was undeniably established in prior motion practice. *See* Appendix 8 (Order). Because of the timing of the City's motion, we are fearful that the Amicus, the Washington Association of Municipal Attorneys ("WSAMA"), may refer to the declarations in its supplemental briefing, which would be improper.

The submission of the 2014 Real Estate Tax Bill from the Snohomish County Assessor's office is proper under ER 201. *See Exhibit A*. Its submission was in rebuttal to the City's and WSAMA's new argument, made in support of the Petition to this Court that an unconstitutional gifting of public funds is at issue in this case.

The City seeks to strike various other phrases or sentences as not supported by citations or by the record below. All but one of the challenged phrases or sentences had citations in the Supplemental Brief itself. All the phrases and sentences were quoted in the briefs before the trial court. To expedite matters, a chart has been attached to this brief with the citations in the Supplemental brief and the citations to the trial briefs.

II. ARGUMENT

A. **The 2014 Real Estate Tax Bill is Admissible under ER 201 and There are 80 Plus Homes in Crystal Ridge That Pay Taxes.**

The City first challenges Crystal Ridge's request that the Supreme Court take judicial notice of the tax bill as if it is improper at this stage of the proceedings.¹ Evidence Rule 201 allows a court to take judicial notice at any stage of the proceeding. ER 201 (f).

In evaluating the propriety of applying judicial notice, the fact must be (1) generally known within the territorial jurisdiction of the court and (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ER 201 (b).

It is generally known within this state that property owners, including attorneys and judges, pay a surface water management fee via their property tax bills. The subject tax bill is indisputably from the Snohomish County Treasurer's Office. *See Exhibit A.* The first line of the legal description is noted as: "Crystal Ridge Division." *Id.* The property address is: "Bothell, WA." *Id.* The accuracy of this tax bill cannot reasonably be questioned and it is therefore admissible under ER 201. The City's collection of surface water fees over a long term of years was noted, without objection, at the trial court level. CP 102.

Next, the City argues reliance upon the tax bill is in support of a new argument never brought forth at the trial level. The City's

¹ The City used ER 201 in its Reply at the appellate level to submit an entirely different Drainage Disclosure than what was before the trial court. The one at the trial court level lacked any legal description. *See Reply Brief of Appellant City of Bothell*, p. 17, n.12.

unconstitutional gifting of public funds argument was raised for the first time in its Petition to this Court. Because this argument was never at the trial court level, no argument against it could have been made there. The City has made a policy argument that to maintain the interceptor pipe will place an enormous economic burden on municipalities. *See* Petition for Review, pp. 11-12. Municipalities have a mechanism via tax bills to collect funds. This fact is in response to the City and WSAMA's new constitutional argument; it is proper rebuttal and was made before. CP 102. Taking judicial notice of the tax bill does not in any way justify the City's submittal of the two declarations that were never before the trial court. We assert that the City's argument is baseless and only pursued to create a vehicle for it to improperly inject the two declarations at the Supreme Court level.²

Finally, the City challenges the sentence that states that eventually more than 80 houses will be built in Crystal Ridge whose owners will pay taxes and surface water fees. Again, it is an indisputable fact that property owners pay taxes and fees. The plat documents at CP 654-658 and CP 660-663 show 83 houses in the two divisions of Crystal Ridge. Citation to the plats was not provided as an oversight and also because it did not appear to be a "fact" that could possibly be in controversy. The Complaint

² Based on one of our client's experience as a long time high level employee at the City, we do not believe the declarations are accurate. However, we did not depose the declarants since the declarations were not part of the summary judgment motion. It is telling that the City elected to quote the two declarations extensively in the body of its Motion to Strike.

in this matter stated that 83 homes were involved and it has never been challenged. CP 768. The Court is respectfully asked not to strike the sentence.

B. The City Has No Basis to Strike the Six Phrases or Sentences That It Designates In Its Motion

The first phrase (B.1) designated as infirm by the City is on page two of Crystal Ridge's Supplemental Brief ("Supp. Brief"): "...the Developer and the County embarked together in solving a regional subsurface water problem..." This phrase is taken out of context and it had citations in the Supplemental Brief. The paragraph starts with noting the Developer paid for the interceptor pipe citing to CP 727, which is the Examiner's Decision. The fact that the sanitary sewer main was in the same trench was then established by citation to CP 292. The next sentence has the phrase in it that is challenged by the City. The beginning and ending words in the sentence are important. The full sentence states: **"From the record, it is apparent that the Developer and the County embarked together in solving a regional subsurface water problem which also enabled a regional sanitary sewer system to be built not only for the benefit of Crystal Ridge but also for all of its uphill neighbors."** (omitted words in bold). These facts are unrefuted and they were noted in the briefing at the trial level as well. CP 273 ("sub-drain was to help stabilize the sanitary sewer"); CP 282 ("sub-drain functions in protecting the sanitary sewer"). The City's assertion that there is no citation to the

record and no inference of cooperation is without merit. *See* Motion to Strike, pp. 14-15.

The City challenges another sentence and a footnote on page two (B.2) which state that it makes economic sense to entrust the maintenance of the pipe to the County because homeowner associations make cost conscious decisions. This is the last sentence in the paragraph which follows the one discussed above. The citations to CP 727 and 929, which are to the engineers' declarations, apply to this sentence as well.

Next, the City deems these sentences as "unsupported inference" and "mere speculation." *See* Motion to Strike, p. 16. In the briefing at the trial level, language in *Phillips v. King County*, 136 Wn.2d 946, 965-966, 968 P.2d 871 (1998) was specifically provided to the court on the issue of homeowner associations having a lack of funds or motivation to do maintenance.³ CP 647. That the City ignored the argument was also noted in the Reply brief below. CP 270. The trial court was also directed to the Snohomish County Drainage Code where it was stated that it would take over maintenance of a system where it was: "unlikely to be adequately maintained privately." CP 635.⁴ The City has no basis upon which to strike these sentences.

³ The quotation in *Phillips* was: "homeowner associations or other private owners do not have the funds or motivation to do necessary maintenance to keep drainage facilities operating at their maximum efficiency." 136 Wn.2d at 965.

⁴ The County's Drainage Code was submitted to the trial court as exhibit 3 to the Declaration of Karen Willie. CP 665-690.

The next challenged sentence and footnote (B.3) relate to other easements in the plat containing lateral pipes, surface water catch basins, ditches, three detention ponds, and that they are not included on the plats for lack of space to do so. *See* Supp. Brief, p. 4 and n. 5. First, at the beginning of this paragraph there is a citation to the plats (CP 655-659; 661-662) and throughout the rest of the paragraph and at its end there is a citation back to the plats using “*Id.*” If one goes to the plats, it is obvious that the details for the pipes, catch basins, ponds and the like are not there and would not fit. The plats were at the trial court level and in the Respondent’s briefing it was noted that Engineer Trepanier put those details on “as built” that he prepared for the County. CP 284, 635. Obviously, his declaration and the details on the “as built” were before the trial court. CP 290-292.

The next two challenged sentences (B. 4 and 5) relate to indicating that the interceptor pipe conveys “municipal” flows that emanate from a half mile away and that the rectangular pond has these regional flows entering it from the interceptor pipe. *See* Motion to Strike, pp. 18-19. The City claims there is no support in the record for these assertions. The citation in the Supplemental Brief is to CP 296 which is the declaration of Dr. Denby and to the Examiner’s Decision.⁵ He testified that the third

⁵ The Examiner’s Decision does not use the word “municipal” but the information in the Decision was gleaned from Dr. Denby’s testimony before the Examiner and he describes the source as municipal. There is no evidence in the record that area stormlines and maintenance were anything but municipal. Waterlines are under pressure and almost never privately owned.

source of flows was “leakage from municipal storm drains and waterlines throughout the area.” *Id.* This same testimony was cited to at the trial level. CP 272 (“municipal storm drains and waterlines”); CP 277 (“municipal drainage”). Dr. Denby submitted drawings of the uphill area where the groundwater flows originated, which included municipal flows. CP 303, 304. The City’s assertions have no support.

As to the rectangular pond containing subsurface regional flows, again, Dr. Denby’s drawings support this fact. *Id.* The citation in the Supplemental Brief was to CP 811 which is the declaration of Engineer Trepanier. *See* Motion to Strike, p. 8. The testimony was that Engineer Trepanier “calculated the size of the rectangular retention detention pond in order to accommodate the groundwater flows that would be intercepted by the subdrain/interceptor drain.” CP 811. A citation was also made to the plat documents (CP 655-659; 661-663) which show the interceptor pipe and the lateral pipes that bring the flows from the outer western edge of the plat to the pond. Common sense establishes that the very name of the pipe indicates its function --“interceptor pipe.” The City’s motion to strike these two sentences has no basis.

For the final two sentences (B.6) it objects to, the City removes with ellipses the case it cited to that establishes the large storm event in 1996. *See* Motion to Strike, pp. 9-10 *citing to Citizens Protecting Resources v. Yakima County*, 152 Wn. App. 914, 219, P.3d 730 (2009). Contrary to the City’s assertion that these facts are irrelevant, they are offered in rebuttal to the City and WSAMA’s new constitutional gifting

argument wherein they claim municipalities will be broadly and negatively impacted if the trial and appellate court's decisions are upheld in this case. The *Phillips* case, which set out the rationale for taking over the maintenance for stormwater facilities, was filed in 1993 before the 1996 storm event. *See Phillips* at 954. Things changed after the 1996 storm. This very same argument was never challenged at the appellate level when the Respondents' moved for publication of Division 1's opinion. *See Exhibit B*, pp. 2-3 *citing* Bothell Code 15.16.010 H (example of this trend). The City provides no valid basis to strike these two sentences. By way of a summary, the Respondents offer an attached chart to the relevant citations.

III. CONCLUSION

The City's Motion to Strike is without any merit. It has needlessly taken up this Court's time and resources. The motion was a vehicle to improperly place the two declarations before this Court. The motion should be denied in its entirety and the declarations should not be considered in these proceedings.

DATED this 2nd day of May, 2014.

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CERTIFICATE OF SERVICE

I, Karen A. Willie, hereby certify that on this 2nd day of May, 2014, I caused to be served via hand delivery via messenger, a true and accurate copy of the foregoing upon the following parties:

Joseph N. Beck
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd day of May, 2014.



Karen A. Willie, WSBA No. 15902

Challenged Statement and location in City's Brief	Citation in Supplemental Brief for Statement	Page in Trial Record Where Challenged Statement is Cited
A.1 The existence of the fees on a tax bill.		
A.2 Crystal Ridge would eventually contain more than eighty houses which currently pay property taxes and surface water fees to the City.	*oversight 654-658; 660-663 (plats); 768 (complaint)	
B.1 ...the Developer and the County embarked together in solving a regional subsurface water problem....	727; 292	273; 282
B.2 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 the homeowner's association. n.3 Oftentimes, homeowner associations are very cost conscious in decision making.	727; 292	273; 647; 635; 665-690
B.3 The other easements contain lateral pipes, surface water catch basins, surface water ditches and there are three retention detention	655-659; 661-663	284; 290-292

<p>ponds that hold surface waters. 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.</p>		
<p>B.4 & B.5 ...the interceptor pipe controls groundwater flows that emanate from a half a mile away which includes leaking municipal storm drains, leaking municipal water lines...from upland development CP 696, 791 (Hearing Examiner finding no. 8) ...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</p>	<p>296; 791; 811; 655-659; 661-663</p>	<p>272; 277; 303; 304</p>
<p>B.6 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.</p>	<p><i>Protecting Resources Citation to Citizens</i></p>	<p>Motion to Publish p. 2 – 3</p>

— **EXHIBIT B** —

No. 68618-6-I

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I

CRYSTAL RIDGE HOMEOWNERS' ASSOCIATION, et al.,

Respondents,

vs.

CITY OF BOTHELL,

Appellant.

**RESPONDENTS' MOTION FOR PUBLICATION OF DECISION
PURSUANT TO RAP 12.3(e)**

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136 Wn. 2d 945, 968 P.2d 871 (1998) 2

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MUNICIPAL STATUTES

Bothell Municipal Code, Chapter 15.16.010 H 3

I. IDENTITY OF MOVING PARTY

The Moving Party is the Respondents, Crystal Ridge Homeowners' Association and the individual members of the association. ("Crystal Ridge").

II. STATEMENT OF THE RELIEF SOUGHT

Crystal Ridge moves the Court to publish its decision in this matter pursuant to RAP 12.3(e). The decision is attached to this motion for the Court's convenience.

III. FACTS RELEVANT TO THE MOTION

The Court's decision in this matter should be published because the decision will provide guidance to Washington State trial and appellate courts in cases with similar fact patterns and, especially, in any cases that involve ground waters where municipalities advance arguments similar to those advanced by the City of Bothell ("Bothell") and *amicus curiae* the Washington State Association of Municipal Attorneys ("WSAMA") in this case.

On appeal, Bothell and WSAMA claimed there was no express dedication, a position which completely ignored the statutory dedication that had been accomplished pursuant to RCW 58.17. Brief of Appellant City of Bothell ("City Brief"), 4, 6-23; *Amicus Curiae* Brief of WSAMA In Support of Defendant/Appellant, City of Bothell ("*Amicus* Brief"), 1-2. Both Bothell and WSAMA argued that the facilities at issue in this case were "private." See City Brief, *passim* (; Reply Brief of Appellant City of Bothell ("Reply Brief") at 2, 3, 8, 15, 19; *Amicus* Brief at 3. WSAMA

made an argument concerning multiple jurisdictions having various duties with regard to the interceptor pipe involved in this case. Alderwood Sewer District has a sewer main in the same interceptor trench that the interceptor pipe is in. It argued that the District likely had responsibility for the maintenance and repair of the interceptor trench. *Amicus* Brief, 4-5. The City and WSAMA, without any supporting facts or law, repeatedly claimed that municipalities simply never have any responsibility for ground water flows. City Brief at 11, 18-19, 21, 25, 27, 34; Reply Brief at 2, 4, 9-12; *Amicus* Brief at 5-7.

IV. GROUNDS FOR RELIEF AND ARGUMENT

Crystal Ridge moves the Court for publication of its decision pursuant to RAP 12.3 (e) (2) and (4).

A. Pursuant to RAP 12.3(e)(2), Publication Is Appropriate Because the Court's Decision Will Provide Guidance To Trial Courts in Cases Involving Similarly Situated Plaintiffs

Under RAP 12.3(e)(2), a party moving this Court to publish must set out the “reasons for believing that publication is necessary.” As was set out in the Respondent’s briefing, in the years when the plat was dedicated here, counties often took over the maintenance and repair of stormwater facilities because private owners did not have the funds, necessary motivation or expertise to maintain and repair such facilities.

Respondent’s Brief at 44 (citing *Phillips v. King County*, 136 Wn. 2d 945, 965-966, 968 P.2d 871 (1998)); Declaration of Karen A. Willie In Support of Respondent Crystal Ridge’s Motion to Publish (“Willie Decl.”) ¶ 3. In the last decade, probably due to the number of large storm events,

municipalities have begun to limit their responsibility for stormwater facilities in plats. *See* Willie Decl., ¶ 2. A good example of this is Bothell's current code which requires developers to form homeowners associations which must take over all responsibility for these facilities. *See* Willie Decl., Ex. A (Bothell Municipal Code, Chapter 15.16.010 H (Ord. 1815§ 1, 2000; Ord. 1632 §1, 1996)). Despite the differences between the old codes and the new, municipalities will ignore statutory dedications where the responsibility for stormwater facilities has been relegated to a predecessor entity. Willie Decl., ¶ 5. Here, even at the appellate level, Bothell argued that its current code should control this case. City Brief at 9, n.12; 17 n.34; 20 n.37 (citing BMC 18.04.050); Reply Brief at 7 n.7. When such arguments are reiterated repeatedly, trial courts can become muddled about what codes are applicable.

There can be no doubt that the facts here will reoccur in other cases. For example, there is another homeowners' association in Bothell where a drainage easement was dedicated to a predecessor entity under RCW 58.17. Willie Decl. ¶ 5. As it did in this case, Bothell has refused to accept the maintenance and repair for that drainage easement. *Id.* The issues resolved by this Court will be revisited over and over again by Bothell unless the Court's opinion is published and thus has precedential value.

WSAMA's participation here emphasizes the fact that all the other municipalities in Washington are in alignment with Bothell. WSAMA's argument about multiple jurisdictions was deftly dealt with by this Court,

when it explained its opinion did not require municipalities to take on the repair and maintenance responsibilities of other service providers such as Comcast or Puget Sound Energy. , *See Crystal Ridge Homeowners' Ass'n v. City of Bothell*, No. 68618-6, slip. op. at 4, (Wash. Ct. App. July 22, 2013). This same argument will no doubt be repeated by Bothell and other municipalities in other cases, and could lead to confusion at the trial court level. Most municipalities have financial resources superior to homeowner associations, particularly associations with fewer members.. It is a waste of judicial resources to have lawsuits filed and expensive motion practice engaged in at the trial court level in this Division and other divisions concerning issues already resolved by this Court's unpublished opinion. The Court is respectfully requested to publish its decision pursuant to RAP 12.3 (e)(2).

B. This Court's Decision Clarifies That Liability Exists for Groundwater and Publication Is Thus Appropriate Under RAP 12.3(e)(4)

Rule of Appellate Procedure 12.3(e)(4) sets out in relevant part that an application for publication is appropriate where “the decision...clarifies...an established principle of law.” Bothell and WSAMA are both adamant that municipalities can almost never be liable for groundwater. City Brief at 11, 18-19, 21, 25, 27, 34; Reply Brief at 2, 4, 9-12; *Amicus* Brief at 5-7. As was pointed out in this Court's unpublished decision, the City takes this position without providing any authority for the proposition that “groundwater” is excluded from the definition of “stormwater.” *See Crystal Ridge Homeowners Ass'n v. City*

of *Bothell*, No. 68618-6, slip. op. at 6. The principle that municipal liability can exist for groundwater has been established in two Division Two cases. See *McCoy v. Kent Nursery Inc.*, 163 Wn. App. 744, 260 P.3d 967 (2011); *Borden v. City of Olympia*, 113 Wn. App. 359, 53 P.3d 1020 (2002).¹

In *McCoy*, the primary issue on appeal was whether the trial court had erred in granting a new trial on the basis of jury misconduct after a defense verdict. *McCoy*, 163 Wn. App. at 748. The plaintiff charged that the defendants, including Pierce County, caused flooding on his property due to groundwater flows. *McCoy*, 163 Wn. App. at 748-749. Extensive testimony was taken from a number of experts with regard to these groundwater flows. *McCoy*, 163 Wn. App. at 751-753. Ultimately, after considering municipal liability for groundwater flows, the jury exonerated Pierce County, finding the plaintiff had caused his own damages. *McCoy*, 163 Wn. App. at 753.

In *Borden*, the City of Olympia had prevailed in cross-summary judgment motions and the plaintiffs' case was dismissed. *Borden*, 113 Wn. App. at 362. On appeal, the dismissal was reversed with regard to the plaintiffs' negligence cause of action because a duty and sufficient cause

¹ There are two unpublished cases in Division One concerning groundwater which Respondent respectfully recognizes have no precedential value pursuant to GR 14.1. *Rabie v. City of Federal Way*, Case No. 467681-9-I, 2002 WL 455019, at *2 (Wash. App. Div. I Mar. 25, 2002) (discussing ground waters and French drain); *Yeldwyk v. City of Seattle*, Case No. 57340-3-I, 2007 WL 1537023, at *2-4 (Wash. App. Div. I May 29, 2007) (dismissal reversed because groundwater from City's utility lines could be causative).

were established to take the issue to a jury. *Borden*, 113 Wn. App. at 372. Olympia had helped to finance a project that directed surface waters from three developments into a large wetland. *Borden*, 113 Wn. App. at 363. The flows “supercharged” the wetland and caused a higher groundwater table leading to flooding on the plaintiffs’ property. *Borden*, 113 Wn. App. at 365. Even with these somewhat attenuated groundwater facts, Division Two remanded the case to the trial court. *Borden*, 113 Wn. App. 359, 374. Contrary to the City of Bothell’s and WSAMA’s arguments, municipal liability does exist in this state for groundwater flows. This Court is respectfully requested to publish its groundwater opinion in this matter since it clarifies the law pursuant to RAP 12.3 (e)(4).

V. CONCLUSION

For the foregoing reasons, Respondents respectfully request the Court grant their motion to publish.

RESPECTFULLY SUBMITTED AND DATED this 12th day of
August, 2013.

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Attorneys for Respondents Crystal Ridge

DECLARATION OF SERVICE

I, Karen A. Willie, declare:

1. I am now and at all times herein mentioned was a citizen of the United States and a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action and am competent to be a witness herein.

2. On August 12, 2013, I caused to be served via electronic and first class mail a copy of the foregoing document entitled Respondents' Motion for Publication of Decision Pursuant to RAP 12.3(e) to the following parties of record:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.
Executed at Seattle, Washington, this 12th day of August, 2013.



Karen A. Willie, WSBA #15902

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, May 02, 2014 11:49 AM
To: 'Christine Stanley'
Cc: Karen Willie
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Rec'd 5-2-14

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From: Christine Stanley [mailto:cstanley@tmdwlaw.com]
Sent: Friday, May 02, 2014 11:46 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Karen Willie
Subject: Crystal Ridge Homeowners Association v. City of Bothell (Case No. 89533-3)

Attached please find for filing in the above referenced case Respondents' Answer to City of Bothell's Motion to Strike Portions of Respondents' Supplemental Brief and New Document Attached as an Exhibit to Respondents' Brief, filed on behalf of:

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Sincerely Yours,

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