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No. 64752-1-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

King County, Respondent,

v.

Jerry and Diana Jennings, Appellant,

BRIEF OF APPELLANT

Jerry Jennings, Plaintiff in Pro Se
Diana Jennings, Plaintiff in Pro Se
for Appellant

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Auburn, WA 98001
253-839-3638

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STEFANIE W. JONES

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 1. ERROR IN THE FINDING THAT KING COUNTY 9

 WAS NOT CAUSING THE CREATION AND

 SUSTAINMENT OF WETLANDS ON THE

 JENNINGS PROPERTY

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20		

A. Assignments of error

Assignments of Error

“1. The trial court erred in entering the order of December 11, 2009, granting King County’s motion for summary judgment.”

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“2. The trial court erred in not protecting the Jennings’ private property rights under the fifth amendment to the Constitution of the United States, and under article I, section 3 and section 16 of the Constitution of the United State of Washington, and RCW 36.70A.020.”

Issues Pertaining to Assignments of Error

1. Summary Judgment should not have been granted because a disputed material of fact existed as to whether King County channels and directs large quantities of storm water from the surrounding drainage basin onto the Jennings property to create and sustain a wetland on that property. (Assignment of Error 1.)

2. A disputed material of fact existed as to whether the wetland and the ensuing regulatory restrictions placed on the Jennings property was damaging to the Jennings. (Assignment of Error 1.)

3. Is the King County usage of the Jennings property for a wetland, and storm water retention, while at the same time denying the Jennings usage through regulatory restrictions, a taking of the Jennings property, and a denial of the Jennings property rights under the fifth

1 amendment to the Constitution of the United States, and under article I,
2 section 3 and section 16 of the Constitution of the United State of
3 Washington, and RCW 36.70A.020? (Assignment of Error 2.)
4

5
6 B. Statement of the Case

7 The Jennings purchased their property, approximately 4.7 acres in
8 size, in December of 1997. When the Jennings purchased the property,
9 there were not any known wetlands on or near the property. The Jennings
10 applied for a building permit in April of 1998, and as part of the building
11 permit process, they were required to hire an ecologist to identify wetlands
12 on the property. The entire property was classified as a class-2 wetland
13 during the permit process. After obtaining a land use variance for a
14 wetland buffer reduction, the Jennings' were allowed to place a mobile
15 home on the extreme northwest corner of the property. The Jennings
16 moved onto this site in August of 1999.
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19
20 In January of 1999, King County granted a variance to the Surface
21 Water Design Manual Requirements Standards for the Green Wood Lane
22 development that allowed them to fill wetlands, and divert storm water
23 that normally flowed to the north, to the west, and onto the Jennings
24 property. The Jennings filed a claim with King County Risk Management
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1 in December of 1999, specifying damages from the additional water being
2 directed onto their property. The claim was denied by King County in
3 April, 2000.
4

5
6 In 2005, King County raised the 38th Avenue South road to prevent
7 storm water from flowing over the top of the road during heavy rains. The
8 raised road blocked the storm water from its natural downstream flow into
9 Lake Doloff, and dammed the water on the north side of 38th Avenue
10 South, and onto the Jennings property. All of the northern property
11 owners, adjacent to 38th Avenue South were impacted by this flooding,
12 and Mr. Jennings, Mr. Lund, and Mr. Carrigan filed individual claims with
13 King County risk management. The Jennings filed their claim in
14 December, 2007, and it was denied in January, 2009. Mr. Lund and the
15 Jennings, filed individual lawsuits against King County after their claims
16 were denied.
17
18

19
20 Around the same time that the downstream storm water flows from
21 the Jennings property were being blocked by the raising of 38th Avenue
22 South road, problems were occurring with the upstream storm water flows
23 from the King County parcel immediately to the east of the Jennings
24 property. The 12-inch culvert outflow from that parcel, placed in a
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1 concrete embankment walkway across the 304th Street unopened right of
2 way, was getting clogged with debris, and causing storm water to flow
3 around the concrete embankment and sheet flow onto the Jennings
4 property. The Jennings filed a drainage complaint with King County
5 Water and Land Resources (WLR) Division in March of 2008. King
6 County (WLR) said that it could not work with the clogged 12-inch
7 culvert during the wet season, and removed the debris from the culvert, the
8 following August. When the rainy season started again in September, the
9 12-inch culvert immediately became re-clogged. In May 2008, August
10 2008, and January 2009, the Jennings' sent letters to King County (WLR)
11 requesting that analysis be performed on the 12-inch culvert to see if it is
12 adequate for the amount of drainage that it was expected to handle. King
13 County (WLR) stopped responding to the Jennings requests for something
14 to be done about the 12-inch culvert.
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19 The Jennings filed their complaint in this action on May 1, 2009,
20 alleging that King County has taken their property by diverting natural
21 drainage flows from other areas onto their property, failing to provide and
22 maintain adequate upstream drainage with the result being that drainage
23 sheet flows onto the Jennings property instead of following the natural
24 drainage courses, and blocking downstream natural drainage flows with
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1 the result being that storm water is backed up and retained on the Jennings
2 property.

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5 C. Summary of Argument (Not Used)

6 D. Argument

7
8 **1. THE SUPERIOR COURT ERRED IN FINDING THAT KING**
9 **COUNTY WAS NOT CAUSING THE CREATION AND**
10 **SUSTAINMENT OF WETLANDS ON THE JENNINGS**
11 **PROPERTY.**

12
13 **A. King County is directing storm water from an adjacent King**
14 **County parcel / retention pond onto the Jennings property**

15
16 Landowners who propose to impede or obstruct the flow of water
17 through a natural drainway have a duty to provide adequate drainage to
18 accommodate the flow within the drainway during times of ordinary high
19 water. Wilber v. Western Properties, 14 Wn. App. 169, 173, 540 P.2d
20 470 (1975); Island County v. Mackie, 36 Wn. App. 385, 388, 675 P.2d
21 607 (1984); Currens v. Sleek, 138 Wn. 2d 858, 862 983 P2d 626 (1999).
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1 King County has created and is sustaining a wetland on the
2 Jennings property by directing storm water from the Fountain Lake
3 Drainage Basin through King County storm water facilities to a King
4 County parcel that is immediately adjacent to the Jennings property, and
5 then from that parcel, onto the Jennings property. King County has
6 obstructed the natural drainage flows, and dammed the storm water at a
7 12-inch culvert that is located on the King County parcel and embedded in
8 a concrete walkway. During heavy rains the storm water flows around the
9 concrete walkway embankment and sheet flows onto the Jennings
10 property. King County's Response to Plaintiff's Request for
11 Admissions, Admission No. 8. (Rp132). (Tr17).

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16 Where a municipality does assume the maintenance duties and
17 control over drainage systems, it has a duty to exercise reasonable care in
18 the repair and maintenance of the system. Sigurdson v. City of Seattle, 48
19 Wn.2d 155, 159 292 P.2d 214 (1956); Pruitt v. Douglas County, 116 Wn.
20 App. 547, 558, 66 P.3d 1111 (2003).

21
22
23 It is further documented that the upstream supply of storm water
24 intended to flow through the 12-inch culvert comes from at least two
25 major storm water sewer flows that flow into the adjacent King County
26
27

1 parcel. A 27-inch diameter sewer pipe, designated CB-28, supplies water
2 from the Serenidad South #5 development, that is immediately north of the
3 King County parcel. Declaration of Jerry Jennings, Ex No. 28. (Rp64).

4 A 24-inch diameter sewer pipe outflow from manhole No. 1 supplies
5 water from the Fountain Isle Lake development, that is immediately east
6 of the King County parcel. Declaration of Jerry Jennings, Exs No. 25, and
7 No. 26. (Rp58 & Rp59). Based on pipe area calculations using $A=\pi r^2$, the
8 inflow capacity to the King County parcel exceeds the outflow capacity by
9 more than nine times.
10
11

12
13 The Fountain Isle Lake Drainage Basin that supplies the storm
14 water runoff to the adjacent King County parcel, and then through the 12-
15 inch culvert and onto the Jennings property is 186 acres in size.
16
17 Declaration of Jerry Jennings, Ex No. 20. (Rp37).

18
19 The Jennings's have filed two risk management claims and at least
20 3 drainage complaints, and King County has failed to correct this problem.
21
22 King County's Response to Plaintiff's Request for Admissions, Admission
23 No. 9. (Rp132). King County did on one occasion, in August 2008, clear
24 debris from the 12-inch culvert and place a debris guard grill on the inflow
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1 of the culvert. King County's Response to Plaintiff's Request for
2 Admissions, Admission No. 10. (Rp110 & RP132).

3
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5 Trespass can be accomplished by the discharge of water onto
6 another's property. Hedlund v. White, 67 Wn. App. 409, 418 n. 12, 836
7 P.2d 250 (1992).

8
9
10 King County granted a variance to the Green Wood Lane
11 development, to fill wetlands and divert storm water that normally flowed
12 to the north, to the west. Declaration of Jerry Jennings, Ex No. 23.
13 (Rp46). The storm water would then flow through the Fountain Isle Lake
14 drainage system reaching the adjacent King County parcel and flow onto
15 the Jennings property. Declaration of Jerry Jennings, Ex No. 31. (Rp71).

16
17
18 **B. King County has obstructed the downstream flow by raising 38th**
19 **Avenue South road and allowed water to back-flow from Lake Doloff**
20 **by removing restrictor.**

21
22 Where, as here, alleged damage to private property results from a
23 "continuous process of physical events," rather than a single event, the law
24 provides that a claim accrues when the taking has "stabilized." The

1 stabilization approach derives from United States v Dickinson, 331 US
2 745, 749 (1947).

3
4
5 In 2005, King County has obstructed the downstream storm water
6 flow from the Jennings property by raising the 38th Avenue South road.
7 The storm water used to flow over, and across the road, and into Lake
8 Doloff. The road was raised to prevent the storm water from flowing over
9 the road. King County's Response to Plaintiff's Request for Admissions,
10 Admission No. 5. (Rp132). In so doing, the water is dammed at that point
11 and backs up onto the Jennings property.
12

13
14 In May of 2006, King County attributed the upstream flooding of
15 properties north of 38th Avenue South to; "The flooding occurs because
16 the level of Lake Doloff rises during extended periods of heavy rains such
17 as have been experienced this past fall and winter and the lake crosses 38th
18 Ave. S." Declaration of Jerry Jennings, Ex No. 32. (Rp72). In 2008, after
19 the road was raised, King County installed a new 60 inch box culvert
20 under 38th Avenue South, and removed a restrictor that was in place in the
21 old culvert. According to King County emails, the restrictor prevented
22 Lake Doloff from back flowing across 38th Avenue South and flooding
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properties upstream of Lake Doloff. Plaintiffs Witness and Exhibit List
For Trial, Ex No. 42. (Rp90).

The flooding on the north side of 38th Avenue South where the
Jennings property is located, is shown in photographs taken by the King
County Department of Transportation. Plaintiffs Witness and Exhibit List
For Trial, Ex No. 44. (Rp99). The Jennings property starts at the tree line
in Ex 3 of 3.

**2. THE SUPERIOR COURT ERRED IN FINDING THAT THE
CREATION AND SUSTAINMENT OF A LARGE CLASS-2
WETLAND ON THE JENNINGS PROPERTY IS NOT
DAMAGING.**

**A. The entire Jennings property is a class-2 wetland and cannot be
developed.**

Nuisance is an obstruction to the free use of property, so as to
essentially interfere with the comfortable enjoyment of the life and
property. RCW 7.48.010; Tiegs v. Boise Cascade Corp., 83 Wn. App.
411, 415, 922 P.2d 115 (1996), *aff'd*, 135 Wn.2d 1, 954 P.2d 877 (1998).

1 The County further acknowledges that the entire Jennings property
2 is a Class-2 wetland, a sensitive area regulated by King County, and
3 cannot be used by the Jennings other than what has already been done
4 with the placement of their mobile home on the far northwest corner of the
5 property. King County's Response to Plaintiff's Request for Admissions,
6 Admission No. 2. (Rp109 & Rp131). The Jennings property was not
7 identified as a critical area prior to its purchase by the Jennings even
8 though RCW 36.70A.040 (3)(b) required that critical areas be identified as
9 part of a growth management comprehensive plan.
10
11

12
13 The Jennings have been allowed to utilize a 56 by 89 foot building
14 site of their 4.7 acre property, 10 feet from the corner streets to reduce any
15 impacts to the wetlands, an area less than 3% of their property and as close
16 to the streets as possible. Plaintiffs Witness and Exhibit List For Trial, Ex
17 No. 47. (Rp102). The Jennings are literally living on the street, and are
18 not afforded the privacy, safety, and security that homeowners with far
19 less property are able to enjoy.
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23 The term inverse condemnation is used to describe "an action
24 alleging a governmental taking or damaging that is brought to recover the
25 value of property which has been appropriated in fact, but with no formal
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1 exercise of the power of eminent domain". Dickgeiser v. State of
2 Washington, 153 Wn.2d 530, 535, 105 P.3d 26 (2005); Phillips v. King
3 County, 136 Wn.2d 946, 957, 968 P.2d 871, (1998).
4

5
6 The County believes that it is okay to restrict the Jennings from
7 using the majority of their property, and at the same time, direct storm
8 water onto the Jennings property to create and sustain wetlands. They do
9 this under the pretense that they are not doing any damage. The
10 incremental damage from a single occurrence of storm water flowing onto
11 the Jennings property is insignificant, but the accumulated damages taken
12 over a longer period of time have resulted in the Jennings being denied all
13 practical use of their property.
14

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17 The Jennings are unable to develop their property, even though it is
18 zoned R-4, four houses per acre, and there were no known wetlands on or
19 near the property when the Jennings purchased it or when they applied for
20 their building permit. The Jennings have suffered a substantial decrease in
21 market value of their property.
22

23
24 Inverse condemnation, nuisance, and trespass has been granted in a
25 previous case where a public project constructed by a government agency
26

1 caused wetlands to develop on private property. Joyce Yamagiwa V. City
2 Of Half Moon Bay, Coastside County Water District, United States
3 District Court For the Northern District of California Case 3:05-cv-04149-
4 VRW Document 211 (11/28/2007).

7 E. Conclusion

9 For the foregoing reasons, the decision of the Superior Court
10 should be reversed, and the Court should render judgment for the Plaintiff
11 / Appellant for negligence, nuisance, trespass, and inverse condemnation.

13 May 27, 2010

14 Respectfully submitted,

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20 Jerry Jennings, Plaintiff in Pro Se

21 Diana Jennings, Plaintiff in Pro Se

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23 Auburn, WA 98001

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

Jerry and Diana Jennings,
Appellant,

vs.

KING COUNTY,
Respondent,

)
) No. 64752-1-1
) No. 09-2-17310-9KNT
)
) CERTIFICATE OF SERVICE
)
)
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)

I, Rebecca Myers, hereby certify and declare under penalty of perjury under the laws of the state of Washington as follows:

1. I am over the age of 18, am not a party to this action and am competent to testify herein.

On May 28, 2010, I did cause to be delivered by U.S. mail a true copy of the "BRIEF OF APPELLANT", and this Certificate of Service to:

Ian Taylor and/or John Briggs
516 Third Avenue, W400
Seattle, WA 98104

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SUPERIOR COURT
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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 28th day of May, 2010 at Auburn, Washington.

Jerry and Diana Jennings
Plaintiffs in Pro Se

By: Rebecca Myers 5/28/10
Rebecca Myers