IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

COUNTY OF SAN DIEGO Defendant and Appellant, v. SONIA AND HECTOR RUIZ, Plaintiffs and Respondents.	4th Civil No. D074654 (San Diego Superior Court Case No. 37-2016-00004183-CU-EI-CTL)

Appeal From a Judgment of
The Superior Court, County of San Diego
Hon. Eddie C. Sturgeon, Judge

CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND APPELLAENT COUNTY OF SAN DIEGO

Laura E. Hirahara (SBN 314767)
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814-3941
Tel: (916) 327-7534 Fax: (916) 443-8867
lhirahara@counties.org

Attorney for Amici Curiae California State Association of Counties and League of California Cities

Table of Contents

Table of Authorities

Cases

Statutes

State Constitutional Provisions

Assembly Bills

Publications

INTRODUCTION

The development of water and drainage law in California has long been informed by public policy considerations that serve competing but intertwined interests: that individuals are protected from bearing the full cost of damages from public works and that municipalities are not stifled in pursuit of progress and growth for the public benefit. These motivations are no less pressing today than they have been over the decades this line of case law has developed. For example, recent discussions at the state Legislature regarding inverse condemnation drew vehement debate.[1] Moreover, recent legislation seeks to hold cities and counties accountable as the State's housing needs grow with its population. (Assem. Bill No. 72 (2017-2018 Reg. Sess.).)

Though the trial court emphasized its decision was unique to the facts in this case, it could have a much broader impact as these facts are not unique within California. A history of varied and creative flood control measures has resulted in a patchwork of pipes, culverts, dams, easements, and ditches.[2] The installation of some of these dates back decades and the records are not

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[1] Wilson, *As Wildfires Rage California Frets Over a Future At Greater Perils and Higher Costs* (Aug. 4, 2018) The Washington Post <https://www.washingtonpost.com/national/as-wildfires-rage-california-frets-over-a-future-of-greater-perils-and-higher-costs/2018/08/04/c2663022-96a4-11e8-810c-5fa705927d54_story.html?noredirect=on&utm_term=.67f8bfbf09d3> (as of Jul. 15, 2019).

[2] See generally Assem. Joint Com. On Flood Risks and Liability, *Risks and Liability: Who is Responsible and Who Will Pay If We Do Not?* (Oct. 25, 2005).

always as clear as in this case, where the County explicitly rejected the easement to maintain the pipe. (Appellant's Opening Brief at p. 6 ("AOB").) However, if a county may be held liable even when it has affirmatively denied an offer for an easement, the threat of increased liability is more than illusory. As municipalities push to meet demands, we cannot afford to attach such liability to new developments that will by necessity connect to older drainage systems.

Water and drainage law already provide sufficient remedies for property owners to recover damages. But recovery through inverse condemnation for flood damage must be justified. The trial court, and respondents' brief, have either misinterpreted the applicable case law or failed to take it into account, resulting in an incorrect assignment of liability to the County. The trial court holding that use alone creates an implied acceptance of an easement amounts to a reorganization of the law of inverse condemnation, producing expansive liability for local jurisdictions while chilling municipal development. For these reasons the holding must be reversed.

ARGUMENT

I. The concerns that gave rise to this area of case law highlight modern public policy considerations in drainage law.

The desire to control the flow of natural watercourses has been a defining feature of development in California that continues today.

As evidenced by the facts in this case and others, neighborhoods have been built on top of drainage basins that can cover an entire valley. (AOB at pp. 19-20.) Consequently, early water cases in California identified a need for definitions, tests, rules, and factors to assess liability when damages occur.

Initially, surface water was a "common enemy" against which each landowner had to fight, and the common law gave these landowners nearly unlimited latitude to augment the flow of waters on their property.[3] But the common law had to evolve as new development encroached on previously wild spaces with varied surface water drainage conditions. In *Archer v. City of Los Angeles* (1941) 19 Cal.2d 19 (hereafter "*Archer*"), which established a new civil law rule, a residential neighborhood was built over a drainage area with no defined 'stream', but that nonetheless served to drain a wide area into a lagoon, then into the Pacific Ocean.

The civil law rule from *Archer*'s holding stated "If the surface waters are gathered and discharged into the stream which is their natural means of drainage, so that they come to the land below only as a part of the stream, it is held that no action lies because of their being added." (*Archer, supra,* 19 Cal.2d at p. 27.)

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[3] Lenain, *Toward a Universal Rule for the Reasonable Disposition of Surface Waters in California* (Spring 1995) 32 San Diego L.Rev. 637, 641-642.

Static principles of property and tort law are at play in the civil law rule, which proved too inflexible as the California Supreme Court moved towards a new standard incorporating constitutional law elements related to takings and just compensation in *Albers v. County of Los Angeles* (1965) 62 Cal. 2d 250 (hereafter "*Albers*").

Respondents' argue *Albers* ushered in an inverse condemnation rule based on a strict liability standard softened by later case law discussions on reasonableness. This is overly simplistic. Rather, the *Albers* court departed from statutory or common law and looked to the constitutional basis found in Cal. Const. art. I, section 14 "to distribute throughout the community the loss inflicted upon the individual by the making of public improvements." (*Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 364 (hereafter "*Locklin*").) Indeed, as the Court later clarified:

> *In announcing our holding in Albers [. . .]* ***we did not overlook the competing considerations which caution against an open-ended, 'absolute liability' rule of inverse condemnation.*** *Recognizing that 'fears have been expressed that compensation, allowed too liberally, will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost' [. . .] we limited our holding of inverse condemnation liability, absent fault, to 'physical injuries of real property' that were 'proximately caused' by the improvement as deliberately constructed and planned.* [Emphasis added.] (*Holtz v. Superior Court* (1970) 3 Cal.3d 296, 303-04, quoting *Bacich v. Board of Control* (1943) 23 Cal.2d 343, 350.)

Respondents have chosen to focus on just one element of the various concerns that inform this area of the law, that individuals not bear damages greater than their proportionate share in the community in specified circumstances. Courts have not taken such a narrow view, understanding that improvements that benefit the public are threatened when run-away liability makes those improvements cost-prohibitive.

a. *Locklin* and related case law provide workable standards and definitions.

In failing to take the relevant case law into consideration, the trial court overlooked instructive authority that discusses the questions of law at issue here. For example, Respondents' assertion that a pipe cannot be construed as part of a natural watercourse where it has replaced a portion of the watercourse creates a difference without distinction that is wholly unsupported in the case law. As the County has clearly articulated in its briefing on this issue, the case law concedes artificial structures that replace natural watercourses do not so fundamentally alter the watercourse's characteristics that they cease to exist. (AOB at p. 11-12.) Additionally, the trial court did not follow the established definition of what acts of 'control' over a pipe would make it a 'public work'. (*Locklin, supra*, 7 Cal.4th at p. 370.) Or what level of 'use' constitutes an implied easement. (*Marin v. City of San Rafael* (1980) 80 Cal.App.3rd 591.)

The result is confusion. If the trial court ruling is not reversed, there will be no principled basis for the acceptance or denial of easements over private drainage systems. At a basic level this is a fundamental reorganization of the law. Giving the flow of ordinary rainwater, or discharge from an overwatered lawn, the power to turn a private pipe public would affect how local agencies conduct a myriad of functions including residential planning and upgrades to the parts of drainage systems they in fact do exert control over. The courts have provided the needed standards, which have been vetted over decades of litigation. Failing to take the case authority into account could leave many local agencies vulnerable to uncertainty as to the scope of their obligations.

II. The trial court and Respondents misinterpreted or failed to consider the relevant case law, which would hamper local agencies ability to adapt to the new environment and its demands.

This reading of established drainage case law would have far reaching consequences at a time when local jurisdictions are battling unprecedented climate challenges and a housing crisis that strains resources. Fueling this is a growing population; California, already the most populous state in the country with over 39 million residents, is expected to top 50 million by 2050.[4]

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[4] Johnson, *California's Population* (March 2017) Public Policy Institute of California <https://www.ppic.org/publication/californias-population/> (as of Jul. 15, 2019).

One in every eight Americans call the state home, but when housing costs are factored in, California also has one of the highest poverty rates in the country.[5] California's climate, which saw worsening drought conditions between 2012-2018, also brought in the wettest rainy season; 18 trillion gallons of rain fell on the State in February of 2019 alone.[6] It is estimated as much as 80% of rainwater that falls in Southern California is diverted from urban environments into the Pacific.[7]

The case law provides a steady framework to match these daunting scenarios and address harm and liability. California courts following *Locklin* have noted the opinion for its "thoughtful discussion of the complex nature of water law and the archaic rules that traditionally governed liability questions." (*Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal. 4th 432.) These cases have clarified the tests for determining control and liability meant to promote principles of fairness. (*Id*. at 435-3 and *Gutierrez v. County of San Bernardino* (2011) 198 Cal. App. 4th 831, 837.)

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[5] Johnson & Mejia, *California's Housing Challenges Continue* (January 2019) Public Policy Institute of California <https://www.ppic.org/wp-content/uploads/californias-future-housing-january-2019.pdf> (as of Jul. 15, 2019).
[6] Fry, *18 Trillion Gallons of Rain in California in February- And More on the Way*, Los Angeles Times (Feb. 19, 2019) <https://www.latimes.com/local/lanow/la-me-ln-california-rain-cold-20190219-story.html> (as of Jul. 15, 2019).
[7] Fry, *California Wastes Most of Its Rainwater, Which Simply Goes Down the Drain*, Los Angeles Times, (Feb. 20, 2019) <https://www.latimes.com/local/lanow/la-me-rainwater-lost-wet-winter-california-20190220-story.html> (as of Jul. 15, 2019).

However, the trial court's holding offers little discussion of its reasoning and Respondents gloss over this omission by insisting that *Locklin* and other persuasive case authority is inapplicable. Without duplicating the County's arguments on this point, Amici adds that the trial court holding creates confusion for local agencies and adopting Respondents' analysis would chill local activities at a critical time when counties and cities need to develop to accommodate the state's housing demands. (AOB at p. 25-26.)

a. The trial court's holding and Respondents' incorrect theory of liability creates an unworkable bright line standard for property owners and local agencies.

Under the trial court's holding and Respondents' theory, private drainage pipes are converted to a public work so long as water from County streets flows through the pipe. Here, because the pipe under Respondents' home lies under the property line in a 20-foot-wide easement between their home and the home of their next door neighbor, this would mean the County would gain easements over ten feet of each property for public access to inspect and maintain a pipe they did not construct, install, or otherwise assume responsibility for under *Locklin* and its ilk. This result is not supported in the case law, and we do not have to imagine the controversy such a result would create. Recent legislative action regarding wildfire safety in the state gives us a preview of how property owners might react.

Property owners want discretion to grant access to their property, as evidenced by the reactions to tree trimming established by Assembly Bill 2911 in 2018. The bill:

> *[a]uthorize[d] owners of any electrical transmission or distribution line to traverse land as necessary,* ***regardless of land ownership or permission from the owner****, after providing notice and an opportunity to be heard to the land owner, to prune trees to maintain and to abate, by pruning or removal, any hazardous, dead, rotten, diseased, or structurally defective live trees.* [Emphasis added.][8]

This authority to enter private land drew criticism, with some residents claiming the utilities were actively trying to kill trees in residential neighborhoods.[9]

While the Legislature saw fit to encroach property owners' rights in order to combat the expanding threat from wildfires, the courts cannot act as the Legislature and redefine drainage law for the entire state based on the injury to a single property owner. Where the trial court here said its holding was specific to the facts of this case, the fact is the court ignored the County's express denial of the easement when the pipe was installed by the developer. (AOB at p. 16-17.)

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[8] League of California Cities, Legislative Report; A Compilation of 2018 Statutes (2018) Section II: Environmental Quality, p. 51-52

[9] McNary, *SoCal Edison is Cutting Your Trees and There's Not Much You Can Do About It* (March 18, 2019) LAist <https://laist.com/2019/03/18/socal_edison_tree_trimming_altadena.php> (as of Jul. 15, 2019).

If the recorded acceptances or denials of easements for private pipes are irrelevant, counties and cities will need to evaluate entire drainage systems to determine the extent of their liability.

More importantly, *Locklin* already provides a framework for a case-by-case analysis. Conducting a case specific analysis outside of this framework is at best confusing. What authority does a local agency turn to in determining its liability risk in this context if it cannot rely on precedent in an area the Legislature has largely deferred to the courts? Must it prospectively track down each similarly situated pipe, negotiating easements, repairs or maintenance with property owners? Or should it wait until a complaint is filed? There is no specified need to adopt a new standard or analysis when the *Locklin* and associated cases have provided sound and balanced guidance for decades.

b. This dismissive interpretation of *Locklin* and related cases will have a chilling effect on municipalities working hard to meet growing demands.

If the court affirms the trial court's decision, local agencies will be required to divert local resources from the tasks of growth and development to the task of assessing liability. This is no small feat when viewed in the environment of the growing demands discussed above.

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Ignoring the applicability of *Locklin* and this line of cases removes certainty for local agencies in denying easements in this context, something cities and counties cannot afford as they face pressure from a deepening housing crisis and intensifying climate variances.

Adding to this pressure is a legal landscape forcing cities and counties to implement solutions. In 2017, the Legislature passed a package of bills intended to combat the housing crisis by amending the Housing Accountability Act (1982) in an effort to hold jurisdictions accountable for the lack of affordable housing construction in their communities.[10] Along with this package of housing bills, Assembly Bill 72 authorized the Department of Housing and Community Development to investigate cities whose housing plans are out of compliance with state law, and refer cases to the Attorney General for prosecution.[11] Governor Newsom has stated: "[Those] refusing to do their part to address this crisis and willfully stand in violation of California law[. . .] will be held to account."[12]

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[10] Housing Accountability Act (1982) Government Code sections 65580-65589.8 (hereafter "HAA"); amended by Assem. Bill No. 167 (2017-2018 Reg. Sess.), Assem. Bill No. 678 (2017-2018 Reg. Sess.), and Assem. Bill No. 1515 (2017-2018 Reg. Sess.).
[11] HAA, amended by Assem. Bill No. 72 (2017-2018 Reg. Sess.).
[12] Office of Governor Gavin Newsom, *In the Face of Unprecedented Housing Crisis, California Takes Action to Hold Cities Accountable for Standing in the Way of New Housing* (Jan. 25, 2019) <https://www.gov.ca.gov/2019/01/25/housing-accountability/> (as of Jul. 15, 2019).

Infill projects are one solution available to cities and counties. Infill, according to the Governor's Office of Planning and Research, means new development "within unused and under-utilized lands within existing development patterns[. . . and] is critical to accommodating growth and redesigning our cities to be environmentally- and socially-sustainable."[13] These projects will by necessity connect to existing drainage systems, and local agencies need stability in water and drainage law. The unworkable theory of liability advanced by the Respondents contravenes the established case law, dismissing the framework that would otherwise ensure local agencies and property owners know their rights and responsibilities.

CONCLUSION

For the foregoing reasons, Amici respectfully requests that this Court reverse the trials court's ruling that private portions of drainage systems become a 'public work' by the ordinary drainage of surface water from public streets into a natural watercourse, even when the local agency has expressly denied an easement over that portion.

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[13] Governor's Office of Planning and Research, *Infill Development* (2019) <*http://opr.ca.gov/planning/land-use/infill-development/*> (as of Jul. 15, 2019).

WORD COUNT CERTIFICATION

I certify that this brief and accompanying application contain a total of 3,351 words as indicated by the word count feature of the Microsoft Word computer program used to prepare them.

Dated: July 15, 2019

Respectfully submitted,

By: /s/

LAURA E. HIRAHARA Attorney on Behalf of Amici Curiae California State Association of Counties and League of California Cities