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A COMMON ENEMY DOCTRINE UPDATE

In the late 1990s, the Washington Supreme Court issued a series of decisions reaffirming and clarifying application of the Common Enemy Doctrine in Washington State. *See Currens v. Sleek*, 138 Wn.2d 858 (1999); *DiBlasi v. City of Seattle*, 136 Wn.2d 865 (1998); *Halverson v. Skagit County*, 139 Wn.2d 1 (1999). In its strictest form, the Common Enemy Doctrine authorizes a landowner to dispose of unwanted surface water in any way he or she sees fit, without liability for resulting damage to one's neighbor. *Currens,* 138 at 858. In *Currens*, however, the Court took steps to clarify and, to some degree, soften the otherwise harsh consequences of this rule by identifying the following exceptions:

1. Although a landowner may block the flow of diffuse surface water onto its land, it may not inhibit the flow of a watercourse or natural drainway. Natural drainways must be kept open to allow water to flow along its natural course into low-lying streams and lakes.

2. A landowner cannot collect and channel surface water onto its neighbor's property in quantities that are greater than or in a manner that is different from the natural flow. This exception prohibits a landowner from creating an artificial conduit, but allows the direction of surface water into pre-existing natural waterways and drainways.

3. The doctrine only applies when the right to protect property against surface water is exercised with due care by acting in good faith and by avoiding unnecessary damage to others' property.

Over the past six years, the Court of Appeals has had several occasions to apply the doctrine and its exceptions.

Channeling and/or collection must be "artificial."

In *Price v. City of Seattle*, 106 Wn. App. 647 (2001), owners of homes located on Perkins Lane in Seattle's Magnolia neighborhood sued the City for damage caused by a landslide that originated on a City owned green belt. The property owners claimed that, once the City learned that the hillside was failing, it owed the downhill landowners a duty to take reasonable actions to stabilize the hillside. The landowners based this negligence claim upon *Sprecher v. Adamson*, 636 P.2d 1121 (1981), a California Court of Appeals case holding that uphill landowners owe downhill landowners a duty of reasonable care to prevent naturally occurring landslides (as opposed to landslides caused by affirmative human intervention) from damaging the downhill property. The trial court dismissed all of the plaintiffs' claims on summary judgment.

The Court of Appeals rejected the *Sprecher* negligence theory, citing distinctions between California and Washington common law. *Price*, 106 Wn.2d at 653. Having distinguished *Sprecher*, the Court concluded that, in Washington, an uphill landowner owed no duty to downhill property owners for naturally occurring instability. The Court of Appeals based its decision in part upon the Common Enemy Doctrine, citing the *Currens* case for the proposition that "[a] landowner is liable for damage caused by errant surface water flows only where the landowner has engaged in activities that alter the flow of water." *Price*, 106 Wn.2d at 658. Because there was no credible evidence that the City caused the damage by artificially channeling water onto the bluff, the Court upheld the trial court's summary dismissal of the landowners' negligence claim.

Reasonableness inapplicable to first two exceptions.

The year 2001 also saw another round of appeals in the landmark case, *DiBlasi v. Safeco*, 136 Wn.2d 865 (1999). In the initial appeal, the Supreme Court concluded that a municipality could be held liable for landslide damage caused by the artificial channeling of surface water down a roadway. On remand to the trial court, the City asserted its right to raise several defenses, including presentation of evidence showing that its artificial direction of surface water onto the DiBlasi property had been reasonable. The trial court rejected the City's assertions and the City appealed. *DiBlasi v. Safeco,* 2001 Wash. App. LEXIS 1854 (2001).

On appeal, Division One rejected the City's claim that the common enemy doctrine exception prohibiting the artificial collection or casting of surface water onto another's property should be subject to a reasonableness standard. Citing *Currens*, the court held that "the due care theory of liability stands alongside a set of other recognized exceptions to the common enemy doctrine, including the theory on which the Supreme Court remanded – that the landowners may not collect and channel water onto their neighbors' land in a manner different from the natural flow." Accordingly, Division

One concluded that the first two exceptions to the common enemy doctrine are not subject to a reasonableness analysis.

Unnecessary damage.

In early 2001, Division One issued an unpublished opinion applying the common enemy doctrine and its exceptions, *Tovah Corp. v. City of Issaquah*, 2001 Wash. App. LEXIS 316 (2001). This case arose from road construction that reconfigured highway passes and drainage surrounding the local Holiday Inn in Issaquah. In February 1996, the Holiday Inn suffered substantial flood damage. Tovah, the owner of the Holiday Inn, sued, among others, the City of Issaquah, alleging that the road improvements had prevented surface water from draining off the Holiday Inn property. The City successfully moved for summary judgment based on the common enemy doctrine.

On appeal, Tovah asserted that all three exceptions to the common enemy doctrine applied. The Court concluded that the first two exceptions were inapplicable, finding (1) no evidence that the City had blocked a watercourse or natural drainway and (2) the heightened roadway did not artificially collect or discharge surface water but merely repelled surface water from the Holiday Inn back to its original source.

After rejecting the first two exceptions, the Court reversed on the third. Citing *Currens*, Division One set out the due care exception as follows:

> A landowner exercises due care by acting in good faith and by avoiding unnecessary damage to the property of others. The due care exception requires the court to examine only whether the landowner has employed methods to minimize any unnecessary impacts upon adjacent land and does not require any inquiry into the utility of the particular project. A landowner may improve his or her land in any way allowed by law, but must limit any harm caused by changes in surface water flow to that which is reasonably necessary.

Although the Court found insufficient evidence of bad faith, it concluded that there was a triable issue of fact regarding whether the City minimized unnecessary impacts to the hotel property.

Common enemy doctrine inapplicable to seawater.

In 2005, the Supreme Court limited the application of the common enemy doctrine to surface water runoff in *Grundy v. Thurston County*, 155 Wn.2d 1 (2005). In *Grundy*, a homeowner sued for private nuisance alleging that seawater damaged her property because her neighbors raised the height of their seawall. Both the Superior Court and the Court of Appeals entered summary judgment in favor of the defendants holding that the defendants were entitled to prevent water damage to their property under the common enemy doctrine. The Supreme Court reversed and held that the common enemy doctrine does not apply to seawater. The Court cited the *Halverson* definition of surface water in support of its opinion:

> The chief characteristic of surface water is its inability to maintain its identity and existence as a body of water. It is thus distinguished from water flowing in its natural course or collected into and forming a definite and identifiable body of water, such as a lake or pond.

Halverson, 139 Wn.2d at 15. Thus, while *Grundy* held that the common enemy doctrine does not apply specifically to seawater, it presumably opened the door to similar holdings regarding flooding or runoff from other bodies of water.

Lessons for design professionals.

Based on this limited number of cases, it appears that Washington courts readily understand and apply the exceptions to the common enemy doctrine set forth in *Currens*. Moreover, contrary to some critics' expectations, the common enemy doctrine has not been swallowed by its exceptions.

It is clear from the case law that design professionals should pay close attention to surface water issues and take measures to preserve the protection afforded by the common enemy doctrine. Such measures include careful scrutiny of surface water impacts on downhill properties and ***documentation*** of this scrutiny.

Before taking any actions that will impact the flow or disposal of surface water, one should answer the following questions:

- What are the natural drainage patterns on the subject and adjoining properties? How do they interrelate with one another?
- How will new development affect the natural drainage patterns? Will the new development create new (artificial) drainage patterns? How will these new drainage patterns affect adjoining/downhill properties?
- Does the project design incorporate surface water mitigation measures? What local, state and/or federal regulations govern surface water disposal? Are NPDES or other permits necessary? What mitigation measures have been incorporated into the design? Are there any budgetary or site specific constraints that might interfere with implementation of these mitigation measures?

- What are the off-site consequences of surface water disposal? How might these consequences be mitigated to avoid "unnecessary" damage?

In light of the decision in *Grundy,* it is now also clear that design professionals must take into account the effect development could have on water surge or flooding from nearby bodies of water.

- Consider whether the new development will affect the water surge from any nearby bodies of water, whether mitigation measures have been incorporated into the design to prevent a negative impact, and whether there will be any off-site consequences.

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