IN THE SUPERIOR COURT OF WASHINGTON FOR SKAGIT COUNTY

**KEITH WELCH**, an individual, and **PREMIER LAND DEVELOPMENT, INC.,** a Washington Corporation,

Plaintiffs,

v.

**PROPERTY INVESTORS, LLC,** a Washington Limited Liability Company; *et. al.*

Defendants.

**No: 08-2-02096-0**

**MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT ON NUISANCE CLAIM, PRESENTED BY PROPERTY INVESTORS, LLC, DEFENDANT**

## I. INTRODUCTION

The Summary Judgment Motion of the Plaintiff is limited to claims of liability under the theory of *Public Nuisance*. Plaintiff was an owner of a lot within a subdivision developed by Defendant, Property Investors, LLC. Plaintiff claims damages resulting from alleged road closures occurring as a result of repairs initiated by the City of Burlington after the roads had been dedicated for public use. Property Investors, as the developer, participated in the repair of the roadways, at the request of the City of Burlington, and Plaintiff asserts that this is a basis for liability. As will be shown by the facts and legal analysis, the actions complained of by the Plaintiff were carried out by the City of Burlington through proper exercise of its police power.





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## II. ISSUES

1. Did the disruption or limitations in the Plaintiff's access to their property rise to the level of a public nuisance within the meaning of applicable law?

2. Does the settling of a roadway, repair of that roadway, and closure of access to portions of the road during period of repair, when carried out by a contractor working for a municipal entity, constitute a public nuisance within the meaning of applicable law?

## III. FACTUAL BACKGROUND

1. In the late 1990s, Defendant, Property Investors, LLC, began logging an area of property known as the *Burlington Hill* in Skagit County, Washington. This hill affords substantial views in all directions, depending upon the location. The development was known as *Tinas Coma* and covered the northerly and easterly portions of the hill. The property was annexed into the City of Burlington in 1998 and the plat was finalized and accepted by the City of Burlington on or about August 10, 2000 (all foregoing in Declaration of Daniel Madlung, p. 2, lines 1-16). The plat was recorded with the Skagit County Auditor on August 11, 2000 (*Exhibit A* to Declaration of Daniel Madlung). As part of construction of improvements in the plat, roadways were installed to design specifications, as required by the City of Burlington. The plans and specifications were approved by the City (Declaration of Daniel Madlung, p. 2, lines 9-16). The developer, Property Investors, paid for a full-time inspector to observe construction of the roadway and utilities. Construction was completed in accordance with the specifications and accepted by the City upon completion (Declaration of Daniel Madlung, p. 2, line 12). A one-year warranty was given by the general contractor, Trico Construction, which warranty was issued to the City of Burlington in addition to the developer (Declaration of Daniel Madlung, p. 2, lines 17-19 and *Exhibit B*). Shortly after the one-year warranty period had



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expired, slight settlement was observed in the outer edges of the roadway in various sections. This settling occurred after the Nisqually earthquake of February 28, 2001. This earthquake measured 6.8 on the Richter Scale and lasted 45 seconds (Declaration of Daniel Madlung, p. 2, lines 20-25).

2. The City of Burlington made demand for Property Investors to contribute to the repair and implied that residential building within the development would be halted (Declaration of Daniel Madlung, p. 3, lines 3-5). Thereafter, Property Investors made application for approval of a condominium project within the development and the City advised that no construction permits would be issued until the roads were repaired. The City was concerned that the presence of construction vehicles traveling up and down the hillside would lead to further damage to the roadway (Declaration of Daniel Madlung, p. 3, lines 5-9).

3. Property Investors, finding itself unable to proceed with construction within its project, made an economic decision to make contribution toward the repairs without admitting any liability for the settlement of the roadway (Declaration of Daniel Madlung, p. 5, lines 1-5). A Cost-Sharing Agreement was entered into between the City of Burlington and Property Investors which required Property Investors to contribute 51% of the cost, with the City bearing the other 49%. In addition, Property Investors agreed that it would coordinate the project on behalf of the City (Declaration of Daniel Madlung, p. 3, lines 10-15 and *Exhibit C*). The City Council made the decision to proceed with the road repairs and the road remained a dedicated public road within the City of Burlington at all times applicable (Declaration of Daniel Madlung, p. 3, lines 16-20).

4. Two separate repairs were carried out in respect to the entrances to the plat: one on the north entrance and one on the south entrance. The north entrance repair was carried out first and was completed prior to commencement of the repair of the south



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entrance. The repair of the south entrance was delayed in completion, due to the discovery of unforeseen geologic conditions, despite studies having been prepared prior to commencement of construction (Declaration of Daniel Madlung, p. 5, lines 9-14).

5. The Plaintiff complains of being blocked or limited in their access to their properties within the development, primarily in respect to Lot 85.

6. A map showing the location of Lot 85 in relationship to the access and the road repair for the south entrance is attached to the Declaration of Dan Madlung as *Exhibit D.*

7. The Declaration of Daniel Madlung shows that the Plaintiff had access to their properties at all times during the course of the various road repairs (Declaration of Daniel Madlung, p. 4, lines 7-10).

8. As part of the Cost-Sharing Agreement between the Defendant, Property Investors, and the City of Burlington, Property Investors elected to reacquire Lots 83 and 84 in order to allow relocation of the roadway when it became apparent that the road in its existing location could not be repaired in a safe and cost-effective manner. Property Investors then contributed a portion of this land to the City of Burlington as an additional dedication for relocation of the roadway (Declaration of Daniel Madlung, p. 5, lines 12-18).

9. Daniel Madlung's Declaration shows that the work performed by Property Investors was accomplished at the direction of the City of Burlington and that the work was carried out in respect to the repair of a dedicated street within the City of Burlington (Declaration of Daniel Madlung, p. 3, lines 20-24).

## IV. LEGAL ANALYSIS

### A. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BASED ON *PUBLIC NUISANCE* MUST FAIL, SINCE THE REPAIR OF THE ROADWAY WAS A PROPER EXERCISE OF POLICE POWER BY THE CITY OF BURLINGTON AND, THUS, NOT AN ACTIONABLE NUISANCE.



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The Plaintiff must show there is no issue of material fact prevail in a Summary Judgment Motion. If the nonmoving party presents evidence that demonstrates that material facts are in dispute then Summary Judgment must be denied. ***Calhoun v. State***, 146 Wn. App. 877, 193 P.3d 188, 192 (2008).

The closures of the roads into the plat by the City of Burlington was a proper exercise of police power, which prevents a finding of an actionable nuisance. The Plaintiff bases their claim for *public nuisance* on the fact that the road known as *Hillcrest Drive*, which accessed the southerly entrance to the plat of Tinas Coma, settled, requiring repairs which were paid for, in part, and which work was coordinated by the Defendant, Property Investors, LLC. It is unquestioned that Hillcrest Drive is a dedicated public street within the City of Burlington, by virtue of the plat which was approved and accepted by the City in August of 2000. At all times material to this proceeding, Hillcrest Drive was a public street under the jurisdiction of the City of Burlington.

The right to close a public road and engage in repairs is a proper exercise of police power for the health, safety and welfare of the general public. *[Conger v. Pierce County, 116 Wn. 27 at 36-37, 198 P. 377 (1921); Phillips v. King County, 87 Wn.App. 468, 486, 943 P.2d 306 (1997), Burg v. City of Seattle, 32 Wn.App. 286, 647 P.2d 517 (1982)].*

While Plaintiff cites the nuisance statutes under RCW 7.48, Plaintiff fails to note the provisions of RCW 7.48.160, which provide as follows: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance".

The City of Burlington is a Non-Charter Code City (see Burlington Municipal Code §1.08.010 and .030). As such, it has all the rights and powers of a municipal entity, as provided under RCW 35A.11.020. It has the right to repair and maintain City streets. Since Hillcrest Drive is a City street, and since the settlement of the road occurred following public dedication of the road, the City has the responsibility and the discretion to



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deal with such repairs *[(Burg v. City of Seattle, 32 Wn.App. 286, 647 P.2d 517 (1982)].* Under the holding in *Burg*, it was stated that a City must have complete latitude and freedom in deciding how to accomplish the repair of a street. "It must be free to do it at the proper time. To shore up a sliding hillside in the wintertime poses hazards and risks and costs that might not be encountered in the summer", *(Burg* at p. 292). Thus, the City of Burlington had the discretion to close the roadway at the appropriate time and effectuate repairs in accordance with its internal decisions about the process. Since such acts are within the ambit of RCW 7.48.160, the repair of the roadway cannot be deemed a nuisance. The City Attorney negotiated a settlement with Property Investors which was approved by the Mayor and the Council, which required Property Investors to participate in a cost-sharing arrangement. As part of this cost-sharing arrangement, Property Investors provided project supervision. The City made the decision to close the road in order to protect health and safety during the course of repair of the roadway. This is a proper exercise of police power. Closure of the road and execution of the repair is specifically authorized by RCW 47.48.010.

**B. PROPERTY INVESTORS DID NOT *BUILD* A PUBLIC NUISANCE.**

The Plaintiff presents no proof that Property Investors caused the road to settle by any action or inaction attributable to it during the original construction process. Therefore, lacking proof of causation, there can be no liability in Property Investors for "building" a nuisance, as contended in Plaintiff's Brief (Plaintiff's Brief, p. 21, line 7). The Plaintiff seems to argue, based on a simplistic approach, that Property Investors is guilty of creating a nuisance solely by virtue of having constructed the road. The argument is couched in terms of the fact that Property Investors built the road, the road settled, therefore, Property Investors "must be responsible" for the settlement of the road. This argument fails to take into account intervening circumstances like possible natural causes of the road settlement.



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The forces of underground water or the Nisqually earthquake, which took place months before the settlement became apparent, were likely causes of the settlement (Declaration of Madlung, p. 4, lines 18-24).

The Plaintiff cites as evidence of design errors, a letter from the Mayor to Property Investors, from August of 2002. However, this letter simply contains conclusory statements which are unsupported by any expert. As stated in the Mayor's letter, the real problem for the City is a lack of budget to cover the road repairs (Plaintiff's Brief, p. 3, line 11). Next, the Plaintiff points to the letter from the geo-technical firm, Zipper-Zeman Associates (ZZA), as purported evidence of design errors. However, the first paragraph cited by the Plaintiff shows that the compaction of structural fill was "completed in general accordance with the project specifications" (Plaintiff's brief at p. 4, line 7-9). Nothing in the ZZA report points to any negligence or misfeasance by Property Investors, or its contractors or design professionals. ZZA complains of a lack of documentation but gives no opinion on causation. Reference to the letter from the City Engineer, Rod Garrett, dated May 13, 2004, shows only the Director of Public Works' concern for the status of the road, as well as the cost, but nothing therein points to errors on the part of Property Investors (Plaintiff's Brief, p. 5, lines 10-16). Citation is then made to a letter from Robert Boudinot, the professional engineer employed by Property Investors, however, this letter only warns the City of the risk of further damage and possible danger to the public. No admission is made of a design error or any causation of the road settling (Plaintiff's Brief, p. 6, lines 11-12).

In short, then, none of the evidence cited by the Plaintiff establishes in any way proof or an opinion of causation through Property Investors' acts. In fact, if there was some actual misfeasance or malfeasance on the part of Property Investors or its contractors, then the City, undoubtedly, would have pressed the issue more fully instead of paying for half



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the cost of a million dollar project. The City's best leverage and tool to compel contribution by Property Investors was withholding permits, because there was no actual proof of design error or failure attributable to Property Investors.

**C. PROPERTY INVESTORS' SUBSEQUENT OWNERSHIP OF LOTS 83 AND 84 DID NOT CAUSE SETTLING OF THE ROADWAY RESULTING IN THE NEED FOR REPAIR; THEREFORE, IT CANNOT BE HELD LIABLE FOR NUISANCE.**

The Plaintiff seems to imply in its argument and conclusion that, in some way, Property Investors' later acquisition of Lots 83 and 84 contributed to the Plaintiff's loss. However, Plaintiff points to no specific activity by Property Investors on Lots 83 and 84, following its reacquisition of those Lots, which in some way contributed to the prior settlement of the roadway which, then, resulted in the need for repair and the closing of a portion of the roadway. If Property Investors had engaged in some wrongful conduct as part of their ownership of Lots 83 and 84, which then resulted in damage to the roadway and led to repairs and closure, the Plaintiff might have an argument. However, similar facts have been held not to meet the level of a nuisance. For example, in *Kelly v. Gifford, 63 Wn.2d. 221, 386 P.2d. 415 (1963),* property owners developed property adjacent to Old Pacific Highway and the Sleater-Kinney Road which resulted in the collection of surface water on the public road. The Plaintiff was injured as the result of an accident resulting from flooding of the roadway. The improvement of the developer's property had been performed in accordance with applicable building codes and approved by the appropriate agency. The improvements resulted in increased surface water. King County was alleged to have failed to adequately provide for the necessary drainage to deal with the increased water flow. The court found that responsibility for dealing with the water flow onto the highway was the County's responsibility. The court concluded that the developer could not



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be charged with creating a nuisance by constructing a highway, since the drainage onto the County road was not within the developer's control. (See *Kelly v. Gifford* at p. 223). There is nothing about the activities of Property Investors on Lots 83 and 84 which led to the settling of the road. Rather, the activity of Property Investors, in excavating and blasting on Lots 83 and 84 was required by the terms of the Settlement Agreement with the City of Burlington (see Declaration of Daniel Madlung, *Exhibit C,* Cost-Sharing Agreement, p. 2, paragraph I-D), wherein it was contemplated that the relocated roadway would be conveyed to the City by Property Investors as a dedication. All of this was consistent with the City of Burlington's exercise of its police power in effecting a repair of a public road. Lacking evidence that Property Investors' ownership of Lots 83 and 84 contributed to prior settling of the road, Plaintiff's claim must fail.

**D. THE AGREEMENT TO SHARE COST OF ROAD REPAIRS DOES NOT CREATE A PARTNERSHIP.**

The Plaintiff assumes its way into the concept of a *partnership* between the City and Property Investors without legal analysis. Plaintiff further implies that if Property Investors is found to be a *partner* that this somehow creates an independent responsibility for closure of the road to effect the repairs.

The Cost-Sharing Agreement calls for supervision of repairs and contribution, with the Burlington and Property Investors sharing responsibilities for the project. A Cost-Sharing Agreement does not a partnership make. The agreement between the City and Property Investors is a Settlement Agreement. Neither party admits any liability to the other and both are trying to reduce the cost of the road repair from in excess of four million dollars to something less than one million dollars (Declaration of Daniel Madlung, *Exhibit C*, Cost-Sharing Agreement, p. 1). The City wants its public road repaired and the



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developer wants its permits to complete construction of the condominium and residential lots within its development. It is well settled law that a *partnership* is, "A contract of two or more competent persons, to place their money, effects, labor and skill of some or all of them, in lawful commerce or business, and to divide the profit and bear the loss, in certain proportions." [*Nicholson v. Kilbury*, 83 Wash. 196, 201, 145 P. 189 (1915)]. The City is not involved in the business purposes of the developer and the developer is not involved in the City's purposes of repairing and maintaining a public street (which is not even a business purpose). The City shares no common goal of profit with Property Investors. Instead, we have a developer faced with a refusal by a municipal entity to issue permits, which thwarts the developer's project. Protracted litigation over the refusal to issue permits, or over the legal liability for the settlement of the road, would simply delay the purposes of the developer. As a result, Property Investors made a business decision, based on economic issues which had nothing to do with what was just or right. On the other hand, the City was faced with the prospect of hiring an outside firm to complete the road repairs at an estimated cost in excess of four million dollars, when it had the possibility of obtaining a suitable road repair for less than a half-million dollars out of its pocket.

Further, the Agreement between the City and Property Investors vested in the City the right to supervise and inspect the project, which would be in furtherance of its police powers (Declaration of Daniel Madlung, *Exhibit C*, p. 2, paragraph C). The contract also states that Property Investors functions as an independent contractor under the Agreement, and not as an employee of the City (Declaration of Daniel Madlung, Exhibit C, p. 6, paragraph V(A). Plaintiff concedes in its brief that Property Investors acted as a *general contractor* under the Cost Sharing Agreement (Plaintiff's Brief, p. 21, lines 16-17). The status of Property Investors is one of *Agent* on behalf of the City, because it was hired to carry out the repairs. Plaintiff cites no authority to establish that Property Investors, acting



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as contractor for the City, has any independent responsibility for closure of the road by the City. Nor does Plaintiff cite any authority for its conclusion that Property Investors, acting as general contractor exceeded the scope of police powers vested in the City of Burlington.

### E. NO CLOSURE OF THE ROAD FOR CONSTRUCTION ON THE SOUTH ENTRANCE RESULTED IN OBSTRUCTION OF ACCESS TO PLAINTIFF'S LOT 85; THEREFORE, NO NUISANCE AROSE.

In order for the Plaintiff to establish that Property Investors is guilty of creating a public nuisance, it must show among other things, that Property Investors blocked the access to Plaintiff's Lot 85. The testimony of Daniel Madlung shows that the access to Lot 85 was never obstructed. His declaration makes reference to the aerial photo of the south entrance to the subdivision. Here, the court will note that Lot 85 is depicted as being below the area of construction and the construction gate (Declaration of Daniel Madlung, *Exhibit D*). While there were road closure signs at the main entrance at the bottom of the hill, the entrance was open for construction traffic everyday during the course of construction on the south hill road repair. Therefore, the Plaintiff would be able at all times to access Lot 85 for the purpose of construction and marketing of its property. While it would be necessary for the Plaintiff to drive around the road closure signs, construction vehicles did this everyday. Absent a true obstruction, there can be no finding of nuisance. If the Plaintiff disputes the scope of their access to the premises, then this is a question of fact to be tried before a judge or jury, but summary judgment is inappropriate.

## V. CONCLUSION

The Plaintiff's Motion for Summary Judgment must fail because there are genuine issues of material fact, at best, and at worst, no nuisance actually occurred, as a matter of law. When ruling on a Motion for Summary Judgment, this court should view the evidence



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and all reasonable inferences from the evidence in a light most favorable to the non-moving party [*Roger Crane and Associates v. Felice, 74 Wn.App. 769, 875 P.2d 705 (1994)*]. In the instant case, the City of Burlington properly exercised its police power in closing and carrying out road repairs under a contract with Property Investors. No nuisance can be established under the statute when the actions which purport to have caused the nuisance are authorized. In this case, the City's authority is clear. The means and agencies of carrying out that authority through Property Investors do not make Property Investors an independent actor with liability separate from the City. Since there is no proof of causation of the road settlement by any action or inaction by Property Investors or its contractors, Property Investors cannot be held to have *caused* the circumstances leading to the repair and closure of the road. Based on the facts and the analysis, the Motion of the Plaintiff for Summary Judgment should be denied.

DATED this 30th day of September, 2011.

Respectfully submitted,

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