DID THE CITY OF BURLINGTON, WHO "PERMITTED" THE OVERALL APPROVAL OF THE SUBDIVISION INCREASE THE RISK OF HARM?

In order to find a duty, the Court must find that the alteration to the land made it more dangerous than if it had remained in its natural condition. ***Price***, supra, at 655.

05/16/2005

Scott G. Thomas, City Attorney: Tinas Coma Opinion Letter; Excerpts as Follows:

Adequacy of Repairs. It is not clear to me how a decision will be made as to the adequacy of repairs. My understanding is that the City has, or shortly will, engage Zipper Zeman to conduct Phase II of their analysis. This analysis will most likely include recommendations as to how the road should be stabilized and reconstructed. It would appear to be in the City's interests to establish a standard for the repairs, and utilize that standard to select from the various options presented by Zipper Zeman.

I note also that the developer has previously offered to have its engineers review the report prepared by Zipper Zeman.

Timing of Repairs. I think it likely that the developer will want to have repairs completed no later than the time that site preparation work is also completed, assuming that the developer can start on site work prior to receiving a building permit. I have been informed by Shannon & Wilson's engineer that investigation will take approximately six (6) months, to allow for monitoring of the site. This may result in pressure on the City to allow work to go forward without having the geotech report completed by Zipper Zeman. If that were to occur, and the geotech report contains recommendations that differ from the work that has already been performed by the developer, then there would be a natural incentive to seek to have the work already performed accepted by the City.

Inspections of the Construction. The Council did not address this matter during their discussions. The geotech reports that was prepared by Zipper Zeman (i.e., the 2002 Phase I report) strongly suggests that the developer failed to have a geotechnical engineer review the progress of construction, and that failure contributed significantly to the failure of the roadways. Who will pay for these inspections, and who the inspector will report to, has not been resolved.

Scott Thomas Experience. Widely recognized for possessing an in-depth understanding of the entire spectrum of land use and zoning issues, from traditional planning, zoning and building permit cases to complex development review and approval processes that require creative strategies and solutions. Provide counsel to developers, builders, governmental entities, non-profit institutions, and neighborhood groups and associations on development projects from inception through completion. Problems are identified and resolutions sought early in the process. With over 20 years of experience serving as a city attorney and as a hearing examiner, my ability to work effectively with officials in the public sector and with local communities to develop efficient and cost effective responses is unmatched. Understanding Washington land use law, and I thoughtfully guide our clients through the Washington land use, planning and zoning processes.

10/02/2002

Zipper Zeman Associates, Inc. (ZZA) Pavement Distress Evaluation; Excerpts as Follows:

It appears that AGRA was not involved with the project after submitting their Preliminary Report. We recommend that AGRA (now known as AMEC) be contacted to determine what their involvement was after submittal of their report.

10/02/2002

Excerpts of Zipper Zeman Associates, Inc. (ZZA) Preliminary Pavement Distress Evaluation; Excerpts as Follows:

The laboratory testing and construction inspection records provided to us indicated that compaction of the structural fill in the road embankments was completed in general accordance with the project specifications.

The report by AGRA Earth & Environmental was titled as "Preliminary". However, there were no specific recommendations for further study relative to completing a "final" design report. They also stated that their recommendations were based on a preliminary plan and verbal information provided to them, and as such, they might need to modify their conclusions recommendations if any changes were made to the proposed project. We did not observe any

records that AGRA was provided the opportunity to review the project design prior to it going to construction.

Advanced Soil Mechanics (ASM) appeared to provide limited construction inspection in the form of density testing and laboratory testing. Only once (May 24, 1999) did ASM note any observation of the subgrade preparation, and then it was only to note that an area had been grubbed. Unless the inspection of the subgrade preparation was the responsibility of another firm, this critical aspect of the project was probably never reported. We did not observe such reports from other firms in the information provided to us. Throughout this project, as well as the repair to Hillcrest Drive, it appears that a geotechnical engineer of record was not involved and it is unclear what company, if any, provided the geotechnical engineering oversight.

06/15/2006

ZZA Final Road Failure Conclusion Report; Excerpts as Follows:

We did not observe any field reports that indicated the exposed subgrade was prepared in accordance with this specification. We also did not observe any records that AGRA was provided the opportunity to observe the exposed subgrades prior to placing structural fill.

Construction Inspection Reports by Advanced Soil Mechanics

Advanced Soil Mechanics (ASM) appeared to provide limited construction inspection in the form of density testing and laboratory testing. Only once (May 24, 1999) did ASM note any observation of the subgrade preparation, and then it was only to note that an area had been grubbed. Unless the inspection of the subgrade preparation was the responsibility of another firm, this critical aspect of the project may never have been reported. We did not observe such reports from other firms in the information provided to us. Throughout this project, as well as the repair to Hillcrest Drive, it appears that AGRA was not involved and it is unclear what company, if any, provided the geotechnical engineering oversight.

Letters by Geo Engineers Regarding Pavements

Although GeoEngineers was involved later in the project, it appears that their involvement was limited to those services provided by Trico during the pavement construction period of the project. However, Trico was reportedly involved with a slide repair within the northwestern area of current road distress that was originally constructed by C&C. It is apparent that the area repaired by Trico has moved since those repairs were completed. There was no documentation provided to ZZA related to the repair work. Given the extent of the repair, we would have expected that a geotechnical engineer would have become involved in order to address the cause of the failure and to develop repair recommendations, which likely would have included a stability analysis. It is unclear if GeoEngineers provided any consulting services relative to this repair.

09/03/2011

Michael A. Winslow Attorney Memo of Opposition to SJM Nuisance Claim; Excerpts as Follows:

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.

10/14/2011

Michael A. Winslow Letter to the Honorable Anita Farris Snohomish County Superior Court; Excerpts as Follows:

The Zipper-Zeman report was prepared in October of 2002, and is one of the earliest reports in regard to the status of the road. As noted in the Declaration of Dan Madlung, Zipper-Zeman's report states ***"Laboratory testing and construction inspection records provided to us indicate that compaction of the structural fill in the road embankment was completed in general accordance with the project specifications."(Emphasis added.) Zipper-Zeman***

concluded that proper compaction of the fill occurred, despite resulting settlement. This report recites, at page 8, that AGRA Earth and Environmental prepared documentation regarding the road construction design. The lower half of page 8 contains three paragraphs which discuss the approved cuts and fills as part of the design of the roadway. At page 9, the report goes on to discuss the WSDOT standards which would have applied, describing the use of cuts and fills in the construction of this type of road. Fills were part of the geotechnical expert's approved design.

There is nothing in the report which states that the use of fill caused settlement. Only that the areas of settlement contained fill. The cause and result should not be confused, as has been submitted by the Plaintiffs.

In the end of Mr. Seguine's rebuttal on behalf of the Plaintiff, he began using a tort analysis in speaking to the issue of causation. During his comments, he assumed that the claimed Nuisance was caused by a tort. In order for a tort to have occurred, the defendant must be found to have had a duty to another party, a breach of that duty, causation by the defendant and, finally, that the damages suffered by the Plaintiff were proximally caused by the Defendant. No such analysis has been presented by the Plaintiff, while the only cases cited by the Plaintiff in respect to private nuisance involve intentional acts which created a resulting nuisance. In the instant case, we have no evidence of intentional acts. When the Court speaks of whether the Defendant "created" the nuisance, the Court speaks of action leading to a result. ***The mere building of a road cannot be a per se nuisance, nor can the failure of the road be a per se nuisance. Some causal connection between the failure and the actions of the Defendant must, at minimum, be shown. Otherwise, the Court simply implies a per se violation.***

06/15/2006

ZZA Final Road Failure Conclusion Report:

The Defendants had retained several scientific opinions in the years of 2002, 2004, 2005, and 2006. The final and most conclusive report came from Zipper Zeman Associates, Inc. (ZZA). Defendant's experts from (ZZA) Thomas A. Jones, P.E. Associate Principal and John E. Zipper, P .E. Principal clearly state their ***opinion*** that the majority of road distress is likely a result of slope movement with a minor component associated with settlement of the structural fill, all of which is associated with an over-steepened slope fill condition that is not internally

stable. The report by AGRA does not sufficiently address the geotechnical issues relative to this project and the construction of steep fill on equally steep hillsides. However, this report was titled as preliminary and therefore AGRA should have been given the opportunity to provide additional design and construction recommendations as necessary for final design and construction.

There is no indication in the geotechnical report or the drawings provided to us that benching of the original slopes was recommended or required. However, Road Cross Section Note 4 on Sheet 24 of 34 of the civil plans indicates that the road subgrade was to have been prepared conforming to Section 2- 03.6(1) of the 1998 Standard Specifications and be approved by the soils engineer prior to placement of the structural fill material. Section 2-03.6(1) states that the exposed subgrade is to be compacted to 95 percent of the maximum density. This compaction requirement was also stated in Note 4 of Sheet 24. We did not observe any field reports that indicated the exposed subgrade was prepared in accordance with this specification. We also did not observe any records that AGRA was provided the opportunity to observe the exposed subgrades prior to placing structural fill.

We reviewed a limited set of design drawings, photographs, aerial photographs and construction observation information provided to us by the City of Burlington and Leonard Boudinot and Skodje. The following drawings were reviewed:

1. Sheet 6 of 13 for LB&S Job Number 96039, dated November 6, 1996, Sheets 1 and 3 of 7 for LB&S Job Number 96039-A, dated December 24,1996, and Sheets 14, 19, and 24 of 34 for LB&S Job Number 96039-D, dated August 6 or 12, 1999.

2. Construction inspection and laboratory testing results prepared by Advanced Soil Mechanics and Materials Testing & Consulting, Inc. (MTC) were also reviewed. We understand that Advanced Soil Mechanics provided inspection and testing services to C&C Construction during the road construction phase of the project while MTC provided inspection and testing services to Trico Construction during utility construction and construction of the pavement section that included the base and sub base courses.

3. A report titled Preliminary Geotechnical Engineering Evaluation, Burlington Hill Road Alignment, by AGRA Earth & Environmental, dated June 11, 1996.

4. Two letters by GeoEngineers, Inc. titled Alternative Pavement Section and Cul-de-sac Pavement Section, dated August 4, and August 13, 1999, respectively.

5. The City of Burlington and Leonard, Boudinot & Skodje provided the construction and site photographs, and aerial photographs.

At the beginning of this project, we understood that ZZA would receive additional construction observation notes prepared by a Leonard, Boudinot & Skodje field inspector. However, after requesting this information, Leonard, Boudinot & Skodje did not provide it to us.

Based on the records observed, it is difficult to determine what company or agency provided the final geotechnical engineering for the design or was overseeing the geotechnical components of the project. Based on the information provided to ZZA, it appears the L, B, & S was the only engineering company that was involved with the project on a regular basis.

Here, the Court would agree with the scientific opinions of the Defendants experts presented who opine that the City of Burlington had failed in its duty and responsibilities to the planning and approval process and field oversite requirements. Based on the design requirements the City of Burlington was required to oversee the geotechnical components of the project designed by L, B, & S. Based on the information provided to ZZA, it appears that the City of Burlington have no written record of inspections, that they complied with the 1998 Standard Specifications approving the soils engineer requirement prior to placement of the structural fill material.

03/20/2009

Declaration of Scott Thomas Attorney for the City of Burlington Answer and Affirmative Defenses to Complaint and Cross Claim; Excerpts as Follows:

This Defendant specifically denies that any person had full knowledge of the failure of Hillcrest Drive at all times material to the lawsuit.

This Defendant specifically denies that any person had full knowledge of the need for a complete redesign and reconstruction of Hillcrest Drive at all times material to the lawsuit, or that a complete redesign and reconstruction of the entirety of Hillcrest Drive was ever necessary.

Plaintiff knew or should have known about the settlement of roads which are the subject of this action and the need for reconstruction since the information was open to the public, and physically obvious to anyone utilizing the roadways.

11/18/2013

Declaration of Scott Thomas Attorney for the City of Burlington; Excerpts as Follows:

Burlington Hill is a "small rock knob" located in the Skagit Valley near the historic downtown area of the City of Burlington, and is one of several such geologic features common to the Skagit River delta. Geologically, Burlington Hill is underlain primarily by **Greenschist**, a rock that is "fairly common to western Washington.

The old rock quarry that was located in the subdivision, in the 1930's was an apparent mining operation, and was owned by a company called "Asbestos - Talc Products of Washington." As the United States Environmental Protection Agency would later discover after taking samples from the Burlington Hill development in the year of 2012, **Actinolite** was present, (which is a form of a Naturally Occurring Asbestos or **Greenschist**).

In the summer of 1998, and before Burlington Hill was annexed into the City of Burlington, a Forest Practices Permit Application was submitted to the State Department of Natural Resources ("DNR") by Lester Stafford, to harvest the timber on Burlington Hill.

DNR issued a Forest Practice Permit, and Burlington Hill was logged. To facilitate the logging, additional roads were established and cut into the hillside. These roads, over which a portion of the roads serving the Tinas Coma subdivision would later be constructed, were completed prior to the annexation of Burlington Hill into the City.

A Geologic Report was Prepared Prior to Annexation of Burlington Hill that did not identify any Asbestos. In the mid 1990's, the owners of property on Burlington Hill, including Property Investors, began to actively pursue annexation of Burlington Hill to the City of

Burlington. Property Investors retained various consultants to advise them on the development of property on Burlington Hill for residential use, including AGRA Earth and Environmental, an international environmental consulting firm.

On June 11, 1996, AGRA provided Property Investors with its geotechnical engineering evaluation for Burlington Hill. AGRA's report was jointly prepared by Kurt Merriman, an engineer licensed to practice in Washington, and Robert Cousins, an engineering geologist licensed by the State of Washington. At the time of the report, AGRA noted that "several unpaved roads pass over the hill," which were used to access the existing apartment building, homes, and radio towers near the tip of the hill. ***AGRA conducted an apparently thorough investigation, including the review of available geologic maps and geotechnical reports; a site reconnaissance; subsurface explorations; laboratory testing; and geotechnical analysis.***

Under guidelines prepared by the Washington State Geologist Licensing Board and adopted by the State Department of Licensing that require geologists to characterize in an engineering geology report the geology of a site "that could impact the site and its suitability for the proposed use," Guidelines at § II (B), AGRA's report would be expected to identify any rocks containing asbestos that would make the site of the future Tinas Coma subdivision unsuitable for residential use. In its geotechnical report, AGRA did not mention any occurrence of talc or asbestos.

Kurt Merriman, Engineer from Agra Earth and Environmental, Asserted on 07/30/2014:

I worked for AGRA Earth and Environmental in 1996 when we were contacted by Dan Madlung to complete a geotechnical evaluation of the proposed main road alignment for the Burlington Hill project. I was the project manager and stamping engineer on our report. Our scope of work was to excavate pits along the alignment with a ***tracked excavator to evaluate the soil and rock conditions with respect to proposed excavation cuts and reuse of the excavated soils for fill***. Our study was preliminary as the project was in the early design phase. We completed a total of 18 test pits as summarized in our 1996 report you have a copy of. ***Our scope of work did not include an evaluation of the mineral composition of the soil or rock underlying Burlington Hill. Our focus was cut slope stability and the reuse of excavated materials for fill.*** Our report recommended additional field exploration and engineering once the

road location had been finalized. We were not contacted to perform additional work on the project.

The AGRA test pits summarized in the 1996 report were performed at locations based on a preliminary road alignment. Based on my review of the aerial photos and the transparent overlays on July 28, 2014, it looks like the AGRA test pits 1, 16, 17 and 18 were not located on the final, as constructed, road alignment. Although I do not know the precise limits of the road failures, it does not appear that any of the 18 AGRA pits were excavated in the areas of road failure that occurred after the road was built. To the best of my knowledge, AGRA was not asked to evaluate the road failures. The only work I was involved in on this project was the 1996 AGRA road report which was based on a preliminary alignment.

To the best of my knowledge, none of the test pits AGRA completed in 1996 ended up in areas that had future road failures.

The word "GREENSCHIST" was capitalized to represent that was the predominate material observed in the excavation. As an example, a sand with gravel and silt would have a description like: "silty fine to course SAND trace medium to course gravel….." SAND would be the predominate soil type observed in this example.

My stamp did expire in November of 1997. Everyone's stamp expires on a regular basis and must be renewed. My stamp was and has been renewed with the state every time it has come due.

Plaintiffs expert clearly state their opinion that it does not appear that any of the 18 AGRA pits were excavated in the areas of road failure that occurred after the road was built. To the best of my knowledge, AGRA was not asked to evaluate the road failures.

Defendants may compare Plaintiffs' experts' opinions to those rejected in the *Price* case as conclusory and insufficient. The Defendants non-scientific evidence supporting the contention that the 2001 Nisqually earthquake, along with a wet winter (1) year after the roads were built were the contributory cause of the road failures.

11/18/2013

Declaration of Scott Thomas Attorney for the City of Burlington Explaining that the NOA on Burlington Hill Constitutes an Actionable Nuisance under RCW 7.48; Excerpts as Follows:

Each of the homes constructed by Plaintiffs was expensive, of high quality, and buyers of those homes typically coming from outside of Skagit County. (***Sherwood Declaration 11/18/2013***).

In November of 2001, City public works crews first noticed potential defects that had begun to appear on the northwest slope of Hillcrest Drive. (***Kidder Declaration11/18/2013***).

These defects took the form of cracks in the asphalt pavement, which suggested to City staff that the bed for the roadway was settling. Because settlement could result in significantly higher maintenance costs, the City requested the engineer that had designed the plat infrastructure to inspect the roadway. Four months later, in April of 2001, the City notified the design engineer that road failure problems had also been discovered on the southeast portion of the roadway; these failures were uphill from Plaintiffs' lot 85.

By the summer of 2002, it had become apparent from monitoring performed by the design engineer that the roadbed was moving. In August, 2002, the City retained Zipper Zemen Associates ("ZZA"), a geotechnical consulting firm, to review the site and the site geology. ZZA delivered its report to the City on October 2, 2002.

Finally, on June 1, 2004, an engineer with the firm that designed the Tinas Coma plat infrastructure stated his opinion in a letter to the City that a critical failure could occur, thus imperiling the traveling public. (***Kidder Declaration11/18/2013*).** In particular, the engineer was concerned that the roadbed movement could place undue stress on a waterline serving the plat, which could cause the waterline to rupture; if that were to occur, it would be possible for the waterline to wash out the roadway.

Plaintiffs rely on ***Asche v. Bloomquist***, 132 Wn. App. 784, 133 P.3d 475 (2006) and ***Womack v. Bardon***, 133 Wn. App. 254, 135 P.3d 542 (2006) to argue that the City has no standing to bring a nuisance claim, because the City is not a property owner that could be affected. But Plaintiff is mistaken. The City does own park property abutting the Tinas Coma

plat, as well as the public rights-of-way. See, (***Sexton Declaration 11/18/2013)***. Plaintiffs' argument thus fails.

Plaintiffs next argue that the City is pursuing damages that do not exist. Without any citation to authority, Plaintiffs state that damages for the investigation and remediation of an asbestos exposure are not allowed. However, RCW 7.48.010 explicitly provides that damages are allowed. There is likely a reason that Plaintiffs have not cited to any authority for their argument: no authority exists. It has long been the law in Washington that money damages are a proper remedy for a nuisance. See, e.g., ***Hardin v. Olympic Portland Cement Co***., 89 Wash. 320, 323, 154 P. 450 (1916); ***Champa v. Washington Compressed Gas Co***., 146 Wash. 190, 262 P. 228 (1927); ***Vance v. XXXL Development, LLC***, 150 Wn. App. 39, 206 P.3d f,79 (2009). Because of the value of the City's property to the public, remediation is the only option available.

Third, Plaintiffs argue that they have no duty to notify the City of the presence of asbestos. In its Counterclaim, the City has brought a nuisance cause of action. Plaintiffs apparently conflate negligence, which requires a party to prove that a tortfeasor has a duty in order to prevail, with nuisance, which does not.