MAY 16, 2005

MEMORANDUM
TO: ROD GARRETT, MARGARET FLEEK
FROM: SCOTT G. THOMAS, CITY ATTORNEY
SUBJECT: OPINION: TINA'S COMA
DATE: MAY 16, 2005

As you are aware, the City Council considered the Planning Commission's recommendation for a contract rezone for the Tina's Coma condominium project on May 12th. At the conclusion of the Council's discussion, the Council decided to accept the Planning Commission's recommendation, and grant the contract re-zone subject to several conditions; one of those conditions was that no building permits would be granted until "the streets serving the site are repaired to City Standards." Although the clear intent of the Council was that the developer bear the costs to repair Hillside Drive, the Council's discussion reflected their opinion that the costs to repair the roadway would not be excessive.

The Ordinance that the Council adopted, a copy of which is attached hereto, provides that a contract rezone agreement be prepared and submitted to the city of a rezone agreement. It seems to me as though a number of issues are raised by the Ordinance, and the requirement that an agreement be prepared, which I have outlined as follows:

1. **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.

2. **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.

In the alternative, the developer may seek to have building permits issued prior to completing road repairs. This would not trouble me too much, if the City were to receive adequate assurances that the roadwork would be completed, and if the City Council were made aware of this course of action.

3. **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 Phase I report **2002**) 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.
cc: Jon Aarstad

7/26/2006

HISTORY OF TINAS COMA ROAD PROBLEM LETTER; EXCERPTS AS FOLLOWS:

Met w/ Dan, Bob, John, Chad, Marc McGinnis w/Geotech Consulting. Developer proposes to complete the repair by moving road into the hillside w/blasting.

Developer states that they can design and fix problem much cheaper than ZZA report and would use Bob & Geotech Consultant to do design.

Developer urged the city to not put on building moratorium for the hill due to public outcry, lawsuits, news, etc.

Nov 7, 2008

SCOTT THOMAS CITY OF BURLINGTON ATTORNEY, QUOTED IN THE SKAGIT VALLEY HERALD WHY THEY CAN'T DISCLOSE THE FACTS:

"The city's position is (that) we were not ***obligated***" to inform…about the road problems, Thomas said.

Thomas said the city didn't find out how damaged Hillcrest Drive was until the road repairs were well under way. Thomas said the city could have actually been sued by Property Investors, which built the road and sold four Tinas Coma lots to Welch, had officials bad-mouthed the road.

05/29/2013

SCOTT G. THOMAS CITY OF BURLINGTON ATTORNEY, IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I, EXPLAINING THAT ORDINANCES MUST BE CONSTRUDED TO EFFECTUATE THEIR LEGISLATIVE INTENT; EXCERPTS AS FOLLOWS:

To determine whether the City misinterpreted its own Code, this Court must give unambiguous ordinances their plain meaning. ***Pasco v. Public Employment Relations Cornm'n***, 119 Wn.2d 504, 507, 833 P.2d 381 (1992). An unambiguous ordinance is one that is susceptible to only one reasonable interpretation. ***Lakeside Indus, v. Thurston County***, 119Wn. App. 886, 83 P.3d 433, (2004).

If, on the other hand, an ordinance is ambiguous, the Court must defer to the City's interpretation of its own laws, rules and regulations. RCW 36.70C.130(1)(b) ("allowing for such deference as is due the construction of a law by a local jurisdiction with expertise"); ***Dev. Servs. v. Seattle***, 138 Wn.2d 107, 117, 979 P.2d 387, 392 (1999) ("[I]n any doubtful case, the court should give great weight to the contemporaneous construction of an ordinance by the officials charged with its enforcement.").

Second, ordinances must be construed to effectuate their legislative intent. Milestone ***Homes, Inc. v. Bonney Lake***, 145 Wn. App. 118, 126, 186 P.3d 357 (2008); see also ***HJS Dev., Inc. v. Pierce County***, 148 Wn.2d 451, 472, 61 P.3d 1141 (2002)

("Courts must reasonably construe ordinances with reference to their purpose.").

08/26/2013

SCOTT G. THOMAS CITY OF BURLINGTON ATTORNEY, RESPONSE TO PLAINTIFFS' MOTION FOR REMAND EXPLAINING THAT THIS CASE IS UNWISE TO APPLY ANY "SIMPLE TEST" BOTH IN TERMS OF THE NATURE OF THE CAUSE OF ACTION, THE UNDERLYING FACTS, AND THE POTENTIAL DAMAGES; EXCERPTS AS FOLLOWS:

This case illustrates why it is unwise to apply any "simple test" to determine if an amendment has changed the nature of a lawsuit. Id., 841 F. Supp. 2d at 747 ("There is no litmus test for whether an amendment does so change the nature of a lawsuit.") While the original complaint included a cause of action alleging liability under 42 U.S.C. § 1983, it was a "federal takings based on road closure" case. Since then, this case has undergone a drastic transformation. What began as a lawsuit by two plaintiffs, alleging in essence that the defendants had negligently closed and repaired a public road and thereby damaged plaintiffs, by no more than the value of a single family residence valued by the Skagit County Assessor…in 2008, has now been revised into an asbestos contamination lawsuit in which plaintiffs' damage claims are expected to multiply exponentially.

If **80** of the lots within the subdivision are occupied by homes with a view, the potential liability faced by defendants could, arguably, run to **$80,000,000**, exclusive of attorney's fees (**80 lots x $lM/house)** solely for property damages; liability for additional damages related to asbestos exposure would only multiply that amount.

This is a much different lawsuit from the one that the defendants faced when served with plaintiffs' original complaint, both in terms of the nature of the cause of action, the underlying facts, and the potential damages.

11/18/2013

CITY OF BURLINGTON ATTORNEY SCOTT THOMAS "DOWN PLAYING" THE DANGERS OF THE NATURALLY OCCURRING ASBESTOS IN AND AROUND THE BURLINGTON HILL SITE; EXCERPTS AS FOLLOW:

I am Legal Counsel for the City of Burlington. I have been employed by the City for over 10 years and do hereby make this declaration in that capacity. Naturally occurring asbestos poses no health risk when its asbestos fibers remain in the soil undisturbed and do not become airborne through human disturbance.

In my role as City Attorney, I have attended meetings held to discuss the public health impacts of the discovery of asbestos on Burlington Hill. Attached and marked as **Exhibit "F"** is a copy of one of the agendas for a meeting. Those meetings were also attended by representatives of the United State Environmental Protection Agency; the Washington State Department of Natural Resources; the Washington State Department of Health; the Washington State Department of Ecology; the Skagit County Department of Health; and the Northwest Clean Air Agency. During those meetings, discussion was held on the likely danger to residents living on Burlington Hill and others who work in the area (including construction workers), and whether it is appropriate to take additional steps to address the issue, including providing notification to residents of a hazard. The consensus from the group seems to be that the risk of hazard is very low, that notification will provide few benefits, and may cause additional harm. I was told by one agency representative that the greatest hazard of naturally occurring asbestos is increased blood pressure. Although the representative meant to be humorous, his point was well taken.

The City had not provided any notice to workers or to residents, at that time because the City had been in discussions with the Environmental Protection Agency, the State Department of Health, the State Department of Ecology, the Northwest Clean Air Agency, and the Skagit County Public Health Department, and others in an attempt to determine whether notification is proper, given the amount of information that is currently known.

"The City has learned that the possibility of asbestos exposure is very small, and the risk of health impacts ***may*** be minimal". "One clean air professional observed that the greatest risk from naturally occurring asbestos is typically higher blood pressure, due to unnecessary anxiety". **"<u>However, it is this anxiety that deflates the value of the land owned…</u>"**

<u>11/18/2013</u>

<u>DEFENDANT CITY OF BURLINGTON'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE AND FOR SANCTIONS PURSUANT TO WASHINGTON'S ANTI-SLAPP STATUTE, RCW 4.24.525; EXCERPTS AS FOLLOWS:</u>

Scott Thomas City Attorney Acknowledging the Naturally Occurring Asbestos, and the Law of Nuisance, Sued whistleblower, intent was to Censor, Intimidate and Silence; Excerpts as Follows:

The City's cause of action is based on nuisance, and stems from Plaintiffs' disturbance of significant quantities of rock containing naturally-occurring asbestos in the Tinas Coma subdivision in the course of constructing homes for resale. As a consequence of Plaintiffs' construction activities, the City will be put to the expense of determining the asbestos contamination that originated with the homes that Plaintiffs were building, and ultimately cleaning up that contamination.

The law of nuisance has been codified by the legislature in RCW 7.48. Washington's statutory definition of "nuisance" includes activities that "annoy[], injure[] or endanger[] the comfort, repose, health or safety of others." RCW 7.48.120; ***Lakey v. Puget Sound Energy***, 176 Wn.2d 909, 296 P.3d 860 (2013). Nuisances that are offenses against the possession *and* use of land have been defined by the Washington Supreme Court as "an unreasonable interference with another's use and enjoyment of property." ***Kitsap County v. Allstate Insurance Co.***, 136 Wn.2d 567, 592, 964 P.2d 1173, 1185 (1998). The essential elements of statutory nuisance are identical to the elements of a common law nuisance: a tortuous or unlawful act that substantially interferes with the claimant's use and enjoyment of property. ***Peterson v. King County***, 45 Wn. 2d 860, 278 P.2d 774 (1954); *see also*, 6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 380.01 (6th ed.) Where a defendant's conduct causes **a reasonable fear of using property**, this constitutes an injury taking the form of an interference with property. ***Lakey***, 176 Wn.2d at 923; ***Wilson v. Key Tronic Corp.***, 40 Wn. App. 802, 701 P.2d 518 (1985); ***Ferry v. City of Seattle***, 116 Wash. 648, 662-63, 203 P. 40 (1922).

In ***Asche***, the court held that the only way that the Plaintiffs could prove their nuisance allegations was if a neighbor's building permit violated the county's development regulations. Here, the City is not alleging that Plaintiffs violated any development regulations.

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 679 (2009). Because of the value of the City's property to the public, remediation is the only option available.

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:

Defendants own, and are responsible for, all rights-of-way in the Tinas Coma subdivision. In addition, Defendants own open space and park property on Burlington Hill, adjacent to the Tinas Coma subdivision. All of these properties have been contaminated by Plaintiffs' construction activities.

Plaintiffs' did not comply with industry or regulatory guidance applicable in situations where construction activities are taking place in an area suspected of containing naturally-occurring asbestos.

Insofar as Plaintiffs' have alleged facts in their Complaint concerning asbestos that constitute a nuisance actionable at common law or under the statutes of Chapter **7.48 RCW** of the State of Washington, Plaintiffs' own actions, as set forth in this Counterclaim, constitute a nuisance actionable at common law or under Chapter **7.48 RCW** of the State of Washington.

As a direct and proximate result of the conduct of Plaintiffs, this Defendant has incurred, is presently incurring and will incur in the future, liability for the costs of investigating potential asbestos contamination resulting from Plaintiffs' construction activities in an amount to be determined at trial.

As a further direct and proximate result of the conduct of Plaintiffs, this Defendant has incurred, and will incur, liability expenses for the costs of safeguarding public safety that this Defendant would not have incurred had it not been for Plaintiffs' deliberate actions. Such expenses include the costs of cleaning up asbestos debris resulting from Plaintiffs' construction activities. Such asbestos debris is situated on the Defendant's public rights-of-way, and on the Defendant's real property situated on Burlington Hill.

The Defendant City of Burlington seeks damages resulting solely from plaintiffs' and third party defendant's construction activities, including costs incurred by the City in the investigation of asbestos contamination resulting from plaintiffs' and third party defendant's

construction activities. The Defendant City of Burlington explicitly disclaims any damages resulting from plaintiffs' protected speech.

WHEREFORE, the Defendant City of Burlington requests judgment against Plaintiffs, and each of them, for:

1. General Compensatory damages attributed to asbestos contamination resulting from Plaintiffs' construction activities according to proof;

All reasonable and statutory attorneys' fees and all costs of suit; and such other and further relief as the court may deem just and equitable.