

DEC 19 2017

Jorge Navarrete Clerk

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Deputy

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**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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CITY OF OROVILLE, *Petitioner*

v.

SUPERIOR COURT OF BUTTE COUNTY, *Respondent*

CALIFORNIA JOINT POWERS RISK  
MANAGEMENT AUTHORITY et al., *Real Parties in Interest*

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**REPLY BY CITY OF OROVILLE TO ANSWER BRIEF ON THE MERITS  
OF TIMOTHY G. WALL, D.D.S.; SIMS W. LOWRY, D.M.D.; WILLIAM A.  
GILBERT, D.D.S., INDIVIDUALLY AND DBA WGS DENTAL COMPLEX  
*Real Parties in Interest.***

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After an Unpublished Decision of the Court of Appeal  
Third District Court of Appeal, Case No. C077181  
Arising from Butte County Superior Court, Case No. 152036  
The Honorable Sandra L. McLean, Judge

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## I. Introduction

The WGS Plaintiffs' cursory Answer Brief makes two things clear: First, no meaningful facts are disputed here — the issue is one of law. Second, they concede sewer spills sometimes occur no matter how well a sewer system is designed, constructed, and maintained. Yet, they urge an interpretation of existing law to impose strict liability on municipalities for all backups in public sewer lines that cause damage, even when plaintiffs or their licensed contractors defeat the design of the sewer system by failing to install legally required backwater valves.

The WGS Plaintiffs' brief thus serves to reinforce the argument of the City's Opening Brief: Some lower courts interpret *California State Auto. Ass'n Inter-Insurance Bureau v. City of Palo Alto* ("CSAA") (2006) 138 Cal.App. 4<sup>th</sup> 474, to impose a rule of strict liability on public sewer agencies for all spills that damage private property. The WGS Plaintiffs urge this result even when damage arises from a property owner's unlawful failure to install and maintain an inexpensive backflow valve designed — and required by law — to protect the owner's property.

The WGS Plaintiffs' Answer Brief arguments unroot the rule of liability from the fundamental constitutional rationale for inverse condemnation liability — that society should bear the full cost of its public infrastructure and services so government cannot treat private property as its own by burdening individuals to benefit the public at large. Their argument for strict liability here turns this rationale on its head — they seek to allow owners and licensed contractors to negligently, or even knowingly, ignore basic building codes designed to protect private property from the fundamental characteristics of sewer systems, thereby transferring the risk of their unlawful conduct and protecting themselves and their insurers at public

expense. Their argument produces a perverse result.

Existing law and common sense support the position of City's opening brief. The City reasonably expected compliance with the Uniform Plumbing Code requirement that owners of low-lying property like that at issue here design for, install and maintain backwater valves on their property. The City's sewer system did not fail to function properly. Rather, the WGS Plaintiffs failed to maintain their property in compliance with laws intended to protect their property.

Multiple times the Answer Brief acknowledges the deliberate allocation of risk requirement on the part of municipalities for possible inverse condemnation liability to attach. Such a requirement is not met when the design of the sewer system is defeated by plaintiffs' failure to have a required backwater valve to prevent overflows into their property.

City respectfully prays for this Court to clarify the law muddled by *CSAA* and confirm the City cannot be liable in inverse condemnation on this record. The City's unchallenged design and reasonable maintenance of its sewer system was defeated by the WGS Plaintiffs' failure to maintain their property in compliance with the plumbing code. The Court may do so on existing law or, as the Opening Brief demonstrates, on modest extensions of existing law to apply the rule of reason from stormwater flooding cases to wastewater cases, or by establishing a plaintiff's failure to mitigate damages as a defense to liability.

## **II. The Parties Agree the Facts are Undisputed**

The WGS Plaintiffs generally agree with City that the facts are undisputed. (RB at p. 13.) Indeed, they quote the trial court's conclusion it was constrained by case law to impose liability on the City. (Answer Brief on

the Merits (“AB”) at p. 9, citing Exhibit B to Petition for Review at p. 12:17–21 [“the Court is constrained by case law, as set out in the *CSAA* case ... to find in favor of the plaintiffs.”].)

Still, WGS’ rendering of facts demonstrates a point central to this case — sewer system backups and spills occur. There was one known backup and overflow in the sewer main adjoining WGS’ property over 25 years. Established procedures exist to address spills. The WGS Plaintiffs refer to “the City’s standard ‘sewer report form’” and its “boxes for roots and grease.” (AB at p. 4.) Referring to proffered evidence excluded from their reply brief in the trial court, WGS cites the City’s person most knowledgeable “regarding all sanitary sewer overflow events reported to the State of California by the City of Oroville between March 6, 2008 and June 30, 2010.” (AB at p. 5; see Vol. 4, Exh. 32, p. 1010 at lines 12-15, [Court’s Ruling excluding WGS reply brief evidence].) They note the State Water Resources Control Board’s standard requirement that “SSO [sewer system overflow] report be certified.” (AB at p. 6.) Thus, plaintiffs themselves show that appropriate mechanisms are in place to discourage sewer overflows. Their Answer Brief fails to explain the absent backwater valve the law required them to install and maintain.

The closest the WGS Plaintiffs come to disputing a fact is their claim the spill in issue here might have occurred even if a backwater valve had been installed because the valves can fail. (AB at p. 8.) However, as the City discusses in its Opening Brief on the Merits (“OBOM”), backwater valves would logically only fail when they are not maintained as required by law. Given that the WGS Plaintiffs never installed the legally required valve, they can hardly be heard to claim it might have failed. This very argument, like their case in chief, asks the public to insure them for risks the law expects

them to mitigate.

Furthermore, the WGS Plaintiffs' speculation about the possible failure of a non-existent valve uses a factual expert to indict the professional judgment of the plumbing profession reflected in the Uniform Plumbing Code and the legislative judgment of public officials, including the California Building Standards Commission and the Oroville City Council, which made the backwater valve requirement mandatory by adopting the California Plumbing Code, by ordinance. (AB at p.8.) Building standards are not defeated by the testimony of paid experts who find them irksome. (E.g., *In Re Jones*, 56 Cal.App.2d 658, 663 (1943) [police power incorporates power to legislatively define nuisances]; see also, Cal. Const., art. XI, § 7 [municipal police power]; Cal. Gov. Code § 38771 [empowering general law cities to “declare what constitutes a nuisance” “[b]y ordinance”].)

Moreover, plaintiffs' expert complains about check-type valves, stating that other valve types are more reliable. No backwater valve was ever installed here, so no specific type of valve is at issue here, and neither the Uniform Plumbing Code nor City Ordinances require any particular type of backwater valve – simply one that is approved.

### **III. Legal Discussion**

#### **A. The WGS Plaintiffs Tacitly Concede Many of the City's Arguments**

The WGS Plaintiffs cursory Answer Brief, citing just nine cases, simply ignores many of the City's arguments, including:

- *California State Auto. Ass'n Inter-Insurance Bureau v. City of Palo Alto* (2006) 138 Cal.App.4th 474 (CSAA) conflated the cause of the sewer backup with the cause of the damage to the



plaintiff's property. (OBOM at pp. 21–26.)

- Lower courts have interpreted *CSAA* to impose strict liability even though it states strict liability does not apply. (OBOM at pp. 26–29.)
- The City ought to prevail under *CSAA* because the City's sewer system design reasonably assumes compliance with the Uniform Plumbing Code by owners of low-lying properties like the WGS Plaintiffs. (OBOM at pp. 29–31.)
- The law allowing an inverse condemnation plaintiff to recover the cost of mitigating damages can be helpfully extended to a requirement to do so to prevent damage and as a defense to liability if a defendant agency can prove a property owner failed to mitigate damages by installing a backwater valve.

**B. The Design of the City's Sewer System Reasonably Assumes Backwater Valves Required by Law Are in Place**

The WGS Plaintiffs deny the Opening Brief's observation that the trial court concluded the absence of a backwater valve from their property defeated the design of the City's sewer system. (AB at p. 10.) However, they do so without citation to evidence or even persuasive argument. The City's citation at page 17 of the Opening Brief to Volume 4, Exhibit 32, page 1011 of the Record is thus unanswered. ["However, a significant secondary cause of the damage was the failure to install the backwater valve device. A backwater valve device was a necessary part of the sewer design and plan. Plaintiffs' failure to do so was not doing all they could to prevent the problem, contrary to the facts of *CSAA*."] ]

**C. Plaintiffs Fail to Establish the Fundamental Requirement of Deliberateness**

WGS acknowledges at least seven times that inverse condemnation liability requires a showing of deliberateness. (AB at pp. 1, 11, 13, 16, 17, 18, 19.) The closest the Answer Brief comes to explaining how that requirement is met is citation to *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 607, that the “deliberateness requirement is met by a public improvement that as designed and constructed presents inherent risks of damage to private property, and the inherent risks materialize and cause damage.” (AB at p. 16.) Plaintiffs fail to acknowledge – let alone rebut – that the risk of sewage overflow was addressed by the design requirement that properties with plumbing fixtures below the elevation of the next uphill manhole have an approved backflow device to prevent overflow into their property. Furthermore, plaintiffs fail to address – let alone rebut – that plaintiffs themselves defeated this design element by failing to have such a device, in violation of the Uniform Plumbing Code and City Ordinances.

Moreover, it cannot be that any potential risk from a project constitutes an inherent risk that establishes inverse condemnation liability. It is only when that potential risk is known to the entity and the entity chooses a “course of action – or inaction” that causes that risk to materialize and cause damage. (*Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 85-8, citing *Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722, 744.)

Here, in the face of the known risk of sewer backups, the City proactively required builders to follow the Uniform Plumbing Code, which required here the installation of a backwater valve to prevent sewage intrusion into WGS’ property in the event of a sewer backup. If all that was required was a potential of damage, then *Tilton* and *Arreola* (as well as

*Pacific Bell and McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App. 3d 683) would have resulted in automatic inverse liability. Indeed, by definition, no damage could be caused by a public improvement unless a risk of that damage was inherent to the project. That simply cannot be enough. If it were, then inverse condemnation liability would lie wherever a public improvement caused damage to private property.

The inherent risk of damage must be an unreasonable risk of which the public entity makes the deliberate, calculated decision to allow. Here, however, the City made the deliberate decision to address potential backups into private property by requiring backwater valves in these circumstances.

#### **D. The WGS Plaintiffs Argue for Strict Liability**

As the WGS Plaintiffs argue:

“An inherent risk of a sewer system is blockage caused by roots or other foreign material in the sewer main.” (AB at p. 13.) Yet they argue an inverse condemnation plaintiff need only allege that wastewater flowed into property rather than away from it to establish inverse condemnation liability, irrespective of the missing backwater valve they do not attempt to explain or address:

Because of the roots, the City’s sewer system did not function as intended — it did not take and dispose of waste material but, instead, caused the waste to back up and enter onto Plaintiffs’ property. The City sewer main failed to function as intended. Thus, the blockage in the City’s mainline is a substantial or proximate cause of the sewer spill. Whether or not the root blockage was foreseeable and whether the City acted reasonably in the operation of its sewer system [are] irrelevant

for the purposes of determining proximate cause in an inverse condemnation action. Thus, under the rationale of *Belair* and *CSAA*, as the trial court found and appellate court affirmed, the City is liable under inverse condemnation.

(AB at pp. 13–14.)

Elsewhere they assert: “An inherent risk in the City’s sewer system is that it will be affected by tree roots and backup onto private property.” (AB at p. 19.) The risk of a clog/backup inheres in any sewer system because the mains are connected to every private property served, at the mercy of the maintenance — or not — of private lateral lines, and of whatever anyone in society chooses to flush down the drain, including fats, oils and grease and other substances known to cause sewer obstructions. The risk of a backup into private property is not inherent to the City’s design (which, again, was not even challenged below) because the design anticipates and requires plaintiffs to have a functioning backwater valve installed on their property. And again, WGS does not address or attempt to explain the missing but legally required backwater valve designed to prevent a backup onto private property. The only risk that materialized here was the risk that plaintiffs would disobey the law.

Thus, plaintiffs assert a rule of strict liability that socializes all losses from sewer system backups, which the WGS Plaintiffs acknowledge occur at times, even if overflows into private property are caused by plaintiffs’ conduct. Indeed, they use the phrase “strictly liable” to argue their point. (AB at p. 16.) Their argument bears no relation to the constitutional principles underlying inverse condemnation liability — that government should pay when private property is damaged by the deliberate design, construction or maintenance of public improvements. The WGS Plaintiffs acknowledge this

fundamental rationale for inverse condemnation liability:

The fundamental policy underlying the concept of inverse condemnation is that the costs of a public improvement benefiting the community should be spread among those benefited rather than allocated to a single member of the community. *Belair, supra*, 47 Cal.3d at 558; *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 607.

(AB at p. 15-16.)

The rule the WGS Plaintiffs argue for here, and the rule the lower courts applied, is precisely the rule of strict liability the Opening Brief argues to be error arising from *CSAA*, and which *CSAA* says ought not to apply. (OBOM at pp. 26–29.)

**E. WGS Cannot Rely on Estoppel or Waiver by City for the Absent Backwater Valve**

The WGS Plaintiffs note, and the court of appeal briefly mentions below, that City inspected and permitted the construction of the WGS Plaintiffs' building without, it seems, ensuring installation of a backwater valve. (AB at pp. 3, 10.) However, WGS makes no legal argument and does not cite, much less engage, the immunity statutes the City's Opening Brief cites. These statutes demonstrate this cannot be a basis for liability without making cities and counties de facto insurers of all property. All construction requires permits and inspections under the Uniform Building Code. (OBOM at pp. 15, 42.) Building permits are issued based on representations of owners and their contractors that plans comply with applicable codes.

To claim estoppel, the WGS Plaintiffs must allege facts giving rise to the estoppel, and all essential elements of the claim. A party pleading facts to

raise an estoppel must do so specifically. (*Williams v. Galloway* (1962) 211 Cal.App.2d 302; *Chalmers v. County of Los Angeles* (1985) 175 Cal.App.3d 461, 467; *Windsor Mills v. Richard B. Smith, Inc.*, (1969) 272 Cal.App.2d 336, 341; *Frank Pisano & Associates v. Taggart*, (1972) 29 Cal.App.3d 1; *Benson v. Andrews* (1958) 166 Cal.App.2d 44, 52; *Del Paso Recreation & Park Dist. v. Board of Supervisors* (1973) 33 Cal.App.3d 483, 501–502.)

Thus, suggestion in the WGS Plaintiffs' Answer Brief or the lower courts' rulings here that City somehow waived the backwater valve requirement must be rejected. The WGS Plaintiffs did not plead, must less prove waiver here and waiver against a public agency is disfavored. (E.g., *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal. 4th 305, 316 [“neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public”]; *US Ecology, Inc. v. State of California* (2001) 92 Cal.App.4th 113, 135 [promissory estoppel].)

The WGS Plaintiffs never pled estoppel or waiver or facts to support those claims. Furthermore, the evidence below could never estop the City from requiring compliance with the backwater valve requirement of the Uniform Plumbing Code. Plaintiffs submitted plans for their dental offices in 1985. (Vol.2, Exh.5, pp.227-229.) Those plans did not contain an approved backwater valve as required by City of Oroville Ordinance 1450, and determining if a backwater valve was required on the proposed construction plans required a private land elevation survey. (Vol.2, Exh.5, pp. 215, 219.) As inspectors inspect and seek compliance with approved plans drawn for and submitted by property owners (Vol.2, Exh.5, p. 219), and as the WGS Plaintiffs' plans did not comply with applicable codes, plaintiffs and/or their

agents mislead the City and its inspectors, not the reverse. To treat a City's failure to identify a code deficiency in plans as a basis for inverse condemnation liability not only ignores permitting immunity under Government Code section 818.2, and the rule that negligence cannot create inverse condemnation liability, it also makes the City the de facto insurer of every property in the City, as construction requires a building permit. (OBOM at pp. 15 and 42.) The WGS Plaintiffs effort to spin their failure to install and maintain a backwater valve into liability against City for inadequate plan check and inspection services cannot raise an estoppel, not least because the Legislature has declared the rule of immunity for such alleged errors. Accepting this argument would also amount to an unfair advantage to plaintiffs, which is prohibited under the estoppel doctrine. (*In re Marriage of Brinkman* (2003) 111 Cal.App.4th 1281, 1289.)

**F. The City Does Not Concede that Root Blockage Caused the WGS Plaintiffs' Damages**

The WGS Plaintiffs' would convert the City's admission the backup originated in root blockage of a City sewer main into an admission that root blockage caused their damages. (AB at pp. 2, 18.) Not so. As the Opening Brief explains at length, the City concedes the backup was caused by a root blockage of its sewer main. However, the WGS Plaintiffs' injuries arose from their failure to install and maintain a legally required backwater valve on their property. (OBOM at pp. 29–31.)

**G. The Policy Rationale for the Rule of Reason in Flooding Cases Applies Equally to Sewer System Backups and Overflows**

The WGS Plaintiffs would limit the rule of reason articulated by this Court in *Locklin v City of Lafayette* (1994) 7 Cal.4th 327 — a case they neither cite nor discuss — to stormwater flooding cases. They acknowledge the policy of such cases to avoid discouraging government from undertaking the inherently risky task of flood control by a rule that will necessarily produce liability whenever a flood control system is insufficient for a storm larger than its design capacity. (AB at pp. 19–20.) However, that social policy is equally relevant here. Municipalities undertake the risk of providing sewer services that allow all of society to discharge materials, without supervision. It is only fair and reasonable that owners be required to follow applicable laws pertaining to use of those systems to avoid financial risk and detriment to these municipalities and to the public at large from damages that might result if they do not. The WGS Plaintiffs merely assert, but do not persuade, to the contrary. (AB at p. 20.) This point is further developed in the Opening Brief at pp. 34–43.

**IV. Conclusion**

In the end, inverse condemnation should apply when a public agency's design, construction or maintenance of its facilities deliberately allocates risk to private property. With the social benefit of these services must flow the total cost. However, these are not the circumstances here. Oroville reasonably designed, constructed and maintained its sewer system assuming owners of low-lying property like that of the plaintiffs here would comply with the Plumbing Code duty to install and maintain a backwater



valve.

Like lower courts here and elsewhere, the WGS plaintiffs interpret *CSAA* to impose strict liability on sewer system operators for overflows which damage property, even when private property owners fail to install and maintain backwater valves required by law that are intended to prevent such damage. The Opening Brief demonstrates this is not the law. The Answer Brief does not persuade to the contrary but rather confirms it urges the rule of strict liability *CSAA* itself disavowed.

The Answer Brief completely ignores the Opening Brief's argument for a rule requiring inverse condemnation plaintiffs to mitigate their damages by taking legally required preventative actions and rejects, without authority or persuasive argument, the Opening Brief's argument for an extension of *Locklin's* rule of reason to wastewater flooding cases.

On this record, it is both unfair and outside the rationale for inverse condemnation liability to ask the public to bear a risk arising from omissions by the WGS Plaintiffs and their licensed contractors, and for which both were insured.

The Court might also extend the rule of reason of flooding cases to cases like this one, which raises very similar policy issues: How to regulate government services to private property to create appropriate incentives for design and maintenance, without creating perverse incentives for private property owners and their contractors to ignore laws intended to mitigate those very risks.

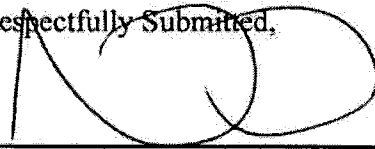
The Court might also extend the rule that property owners may mitigate their damages and recover their costs to do so into a requirement and defense to liability in missing backwater valve and analogous cases.

The City respectfully urges this Court to grant the appellate writ the

court of appeal denied, and to order the respondent trial court to vacate the order imposing liability on the City, and to issue a new order finding no liability against the City on the inverse condemnation cause of action. There is no evidence here the City had a deliberately deficient plan of maintenance or that its sewer system design, which is and was dependent on the WGS Plaintiffs' compliance with the Uniform Plumbing Code, unreasonably used their property for social benefit.

Dated: December 18, 2017

Respectfully Submitted,



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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 8.520(c)(1) of the California Rule of Courts, I hereby certify that this Reply By City Of Oroville To Answer Brief On The Merits Of Timothy G. Wall, D.D.S.; Sims W. Lowry, D.M.D.; William A. Gilbert, D.D.S., Individually and dba WGS Dental Complex, Real Parties In Interest, contains 3,742 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By:   
MARK A. HABIB

**PROOF OF SERVICE BY MAIL**

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I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is: 811 Wilshire Boulevard, Suite 900, Los Angeles, California 90017. On December 19, 2017 I served **REPLY BY CITY OF OROVILLE TO ANSWER BRIEF ON THE MERITS OF TIMOTHY G. WALL, D.D.S.; SIMS W. LOWRY, D.M.D.; WILLIAM A. GILBERT, D.D.S., INDIVIDUALLY AND DBA WGS DENTAL COMPLEX** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on December 19, 2017, at Los Angeles, California.

Fernando Mercado  
PRINT NAME

  
SIGNATURE

**PROOF OF ELECTRONIC SERVICE**

STATE OF CALIFORNIA )  
 ) ss.  
COUNTY OF LOS ANGELES )

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is: 811 Wilshire Boulevard, Suite 900, Los Angeles, California 90017. On December 19, 2017 I served **REPLY BY CITY OF OROVILLE TO ANSWER BRIEF ON THE MERITS OF TIMOTHY G. WALL, D.D.S.; SIMS W. LOWRY, D.M.D.; WILLIAM A. GILBERT, D.D.S., INDIVIDUALLY AND DBA WGS DENTAL COMPLEX** on the interested parties in this action by electronic service based on the parties to accept electronic service, I caused the document to be sent to the persons at the electronic service addresses listed for each party addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on December 19, 2017 at Los Angeles, California.

Fernando Mercado  
PRINT NAME

  
SIGNATURE