CASE #: S243247

No:_____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF OROVILLE, *Petitioner,*

v.

SUPERIOR COURT OF BUTTE COUNTY, *Respondent.*

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

Court of Appeal, Third Appellate District, Case No. C077181
Butte County Superior Court Case No. 152036
(Consolidated with Case No. 153408)
The Honorable Sandra L. McLean, Judge
Civil Division – (530) 532-7009

PETITION FOR REVIEW

After a decision by the Court of Appeal
Third District

IMMEDIATE STAY REQUESTED

CRITICAL DATE: October 27, 2017
Further Case Management Conference (and expected Trial Setting)

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[Petitioner is exempt from fees pursuant to Govt. Code §6103]

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES Page

Cases

Page

Statutes

Rules

Other Authorities

TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA, AND THE HONORABLE ASSOCIATE JUSTICES:

Petitioner City of Oroville respectfully petitions this Court for review of the Opinion of the Court of Appeal, Third Appellate District, filed unpublished on June 13, 2017 as modified on June 16, 2017, to resolve entirely unsettled questions of law on issues of statewide concern. No matter how the court decides the issue, it needs to be resolved because there are issues of statewide importance with no published opinion on the issues presented, and courts of appeal are in direct conflict when deciding and issuing unpublished decisions on the issues presented. The Opinion of the Court of Appeal became final on July 13, 2017. Thus, this petition is timely under California Rule of Court 8.500, subdivision (e)(1). A copy of the opinion of the Court of Appeal is attached as Exhibit A.

I.

LEGAL ISSUES AND QUESTIONS PRESENTED

1. Whether inverse condemnation liability against a public entity for sewage backup into real property should be applied where the design and operation of the sewer system is defeated by plaintiffs' violations of state and local building code ordinances requiring the installation and maintenance of functioning backwater valves on private property sewer laterals to prevent sewage backups onto private property.

2. Whether strict liability can be applied against a public entity when sewage intrudes on private property without evidence of a design or construction defect in the sewer system, without evidence of a deficient or unreasonable plan of maintenance by the public entity, and where a backwater valve is not installed and maintained on

private property by owners as legally required by state and local building codes.

3. Whether a public entity is strictly liable in inverse condemnation whether its properly designed and constructed public improvements function as intended, or fail to function as intended.

II.

STATEMENT OF JURISDICATION - GROUNDS FOR REVIEW

California Rules of Court, rule 8.500(a)(1) and 8.500(b)(1) state in pertinent part as follows:

> Rule 8.500. Petition for review
>
> (a) Right to file a petition, answer, or reply
> (1) A party may file a petition in the Supreme Court for review of any decision of the Court of Appeal, including any interlocutory order, except the denial of a transfer of a case within the appellate jurisdiction of the superior court. ...
>
> (b) Grounds for review
> The Supreme Court may order review of a Court of Appeal decision:
> (1) When necessary to secure uniformity of decision or to settle an important question of law; ...

(CRC, Rule 8.500(a)(1) and 8.500(b)(1).)

III.

WHY IMMEDIATE INTERVENTION AND REVIEW IS NECESSARY

This case presents critical and important questions of law impacting hundreds of public entities that provide sewage disposal services throughout Cities and Counties of the State of California, potentially millions of private property owners throughout the State, and untold

millions of dollars in actual and potential expenses and expenditures of public and private funds. An immediate stay and review by this Court is necessary and should be granted because:

1. There are no published legal decisions from any California Court of Appeal on the issues presented - namely, the law governing inverse condemnation claims arising out of sewage intrusions on private property where legally required "backwater valves"[1] designed to prevent such intrusions are not installed and maintained on private property sewer laterals by private owners as required by State and local building and plumbing codes;

2. This issue is of continuing and urgent statewide concern. The issues raised by this case implicate important public policies that impact governmental entities and citizens throughout the entire

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[1] The backwater valve under discussion is a valve that is often required to be installed on a private sewer lateral under the California Building and Plumbing Codes, typically installed where the private sewer lateral connected to a municipality's sewer main enters the private building. (Vol.6, Ex.38, pp. 1256, 1282, 1310.) It consists of a "coupling" type fitting with a flap that opens and closes, allowing affluent from the private structure to exit the structure into the sewer lateral flowing towards the sewer main and then the flap closes, preventing affluent from the private sewer lateral and municipal mainline to enter the building. (See generally Vol.6, Ex.38, pp. 1256, 1299.) The coupling device is normally accompanied by an access box type structure that has an above ground lid allowing access to the valve to clean and maintain the backwater valve as required, to ensure its continued operation. (Vol.6, Ex.38, p. 1311.) Plaintiffs and their representatives did not include the required backwater valve on plans submitted to the City of Oroville. Determining the necessity of a backwater valve requires a private survey or other determination by property owners of the elevation of the top of the public sewer main, in relation to the elevation of plumbing fixtures (tops of toilets, shower drains, sink drains, etc.) planned for in the private structure. (See Vol.6, Ex.38, p. 1261.)

State of California, resulting in tremendous expense and litigation in the courts below that will be diminished or eliminated by a clear statement from this Court on the legal issues presented.

3. Four unpublished decisions in different jurisdictions throughout the State over the past ten years have reached wildly different and sometimes (as in this case) legally untenable results when grappling with the issues presented, all after considering language in the published decision of *California State Auto Ass'n Inter-Insurance Bureau v. City of Palo Alto* ("*CSAA*") (2006) 138 Cal.App.4th 474. As a result, it will be of great benefit statewide for the rule of law governing inverse condemnation cases involving sewage backups in these or related circumstances, where building code requirements on private buildings interface with public utility connections,[2] to be examined and established by this Court. (Cal. Rules of Court, rule 8.500(b)(1).)

4. Review is appropriate because of the high likelihood that public entities, private individuals, and attorneys throughout the state will continue to wade through *CSAA* and unpublished decisions

[2] A partial list of privately designed for and privately installed, owned, and maintained devices required or often required under California building codes include: (1) backwater valves for public sewer connections; (2) backflow valves for public water connections; (3) gas regulator valves for public gas connections; and, electric utility panels for public electricity connections. It is hard to imagine public policy and applicable law ignoring these decades long standing obligations of private landowners, by automatically holding municipalities and public utility companies liable in inverse condemnation when sewage intrusion, flooding, gas explosions or fires involving private property are caused by the failure of private citizens to install these devices.

on this area of law at tremendous expense and burden to the courts and parties, trying to determine how the law does, or should, apply to sewage intrusion cases involving missing backwater valves, such that the legal issues involved should be clarified and resolved through a published decision by this Court.

IV.

STATEMENT OF THE CASE

A. The Parties

Petitioner CITY of OROVILLE (hereinafter "CITY" or "Oroville") is a public agency within the meaning of Government Code §6252, subdivision (d), and a defendant in an action now pending in Respondent Superior Court entitled *Wall, et al. v. City of Oroville, et al.* Butte Superior Court Case No.: 152036 (consolidated with 153408).

Plaintiffs Timothy Wall, DDS, Sims W. Lowry, DMD, and William A. Gilbert, DDS, individually and doing business as WGS DENTAL COMPLEX (hereinafter collectively "WGS") and The Dentists Insurance Company[3] (hereinafter "TDIC") are named herein as real parties in interest.

Respondent is the Superior Court of Butte County. Petitioners request review of the Opinion issued by the California Court of Appeal, Third Appellate District.

B. Procedural Background and Court of Appeal Proceedings

Plaintiffs WGS and Plaintiff-in-Intervention TDIC sought a determination of the CITY's liability for inverse condemnation, by motion procedure pursuant to California Code of Civil Procedure section 1260.040.

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[3] The California Joint Powers Risk Management Authority (CJPRMA) is the Assignee of plaintiff The Dentists Insurance Company pursuant to a settlement of subrogated first party property damage claims and assignment of rights between TDIC and CJPRMA, notice of which was filed with the Court of Appeal on October 30, 2014.

The trial court granted WGS and TDIC's motions, finding CITY liable for inverse condemnation in a ruling filed on July 25, 2014, which was subsequently made an Order of the trial court. The case was set to go to trial on the remaining tort cause of action for nuisance (on liability and damages), and for a trial on inverse condemnation damages.

On August 25, 2014, CITY filed a Petition for Writ of Mandamus in the Third District Court of Appeal, Case No. C077181, seeking reversal of the superior court order (described below) finding liability as a matter of law against CITY on the inverse condemnation claim. CITY petitioned the Appellate Court to review and set aside the trial court liability ruling,[4] asking for an immediate stay of the superior court proceedings to relieve it of the duty to conduct a lengthy (anticipated three month) trial. CITY's Petition for Writ of Mandate was granted by Alternative Writ and the case was stayed. After about thirty (30) months in the appellate court, the Third District's, the Court of Appeal's June 13, 2017 opinion denied the Petition for Writ of Mandate and vacated the stay previously imposed.

CITY petitions this Court to challenge the finding of liability based upon inverse condemnation where plaintiffs defeated the design of the CITY's sewer system by failing to install and maintain a legally required backwater valve on the private sewer lateral connection to their building.

C. Factual Background

On December 29, 2009, sewage from CITY's sewer main entered the plaintiff's building through the building's private lateral service line that did not have a legally required backwater valve in place. The CITY's Public Works crew later discovered and removed root growth partially blocking flow through the sewer main. The relevant portion of CITY's sewer main where the partial blockage occurred had never before experienced a backup

[4] Pages 1 and 6-14 from the trial court's ruling are attached as Exhibit B. (10 pages.)

between 1985-1986, when plaintiffs constructed and began occupying their building, until the date of the incident in 2009. CITY's main line at the location in question had been serviced/maintained by Petitioner only two months or so before the incident. There was no evidence presented in the case below of deficient maintenance or a deliberately deficient maintenance plan on the part of Petitioner. The quality of design and construction of Petitioner's sewer main was not challenged or at issue in the proceedings below.

Applicable plumbing codes and CITY ordinances in place when WGS constructed their building required the installation and ongoing maintenance of a back flow prevention device (hereinafter "backwater valve" or "BWV") on WGS's private sewer lateral to interface with the design and operation of CITY's sewer system. Based on WGS's failure to install a backflow prevention device at their property, WGS's building constituted a public nuisance under the CITY's municipal code on the date of the incident. The design of the CITY's sewer system, which relies on adherence to building and plumbing codes and includes manholes for access which allow for the escape of sewage from manholes immediately upstream of any sewer line blockage, is the accepted engineering method for the proper design of sanitary sewage mains.

V.

THERE IS CONSIDERABLE CONFUSION AND WILDLY VARYING RESULTS IN THE LAW SURROUNDING SEWAGE BACKUP CASES AND UNPUBLISHED CASES INVOLVING BACKWATER VALVES SINCE *CSAA* WAS PUBLISHED

Since *CSAA*[5] was decided in 2006, there have been at least five (5) unpublished appellate opinions that address inverse condemnation as it

[5] *CSAA* is discussed in greater detail below, at page 20 and following.

relates to municipal sewage systems, with four (4) cases involving missing or malfunctioning backwater valves. The four (4) backwater valve related cases[6] were decided in different districts (Second, Third, and Sixth), with wildly differing results. It is unknown how many cases or settlements have worked their way through the system statewide, or at what cost, that are not documented in public records. Petitioner believes the number of cases is high and that costs of litigation amount to many, many millions of dollars spent on this issue throughout different parts of the State.

Petitioner has found no published case in the State of California addressing the legal issues presented in missing backwater valve cases. This has resulted in confusion, multiple unpublished cases grappling with these issues, and highly disparate results among the four (4) unpublished appellate decisions.

Below are summaries of the appellate courts' holdings in the four (4) unpublished cases involving missing or inoperable backwater valves found by CITY:

1) ***Starks v. City of Los Angeles*** **(2008) Cal. App. Unpub. Lexis 1837, 2008 WL570775 (Second District, Division 3)**

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[6] The fifth sewer case did not involve the issue of a legally required backwater valve. In *Connect to Communications, Inc. v. City of Glendale* (2008) Cal.App. Unpub. Lexis 9426 and 2008 WL5124008 (Second District, Division 4) Connect to Communications (Connect) sued the City of Glendale (the City) for inverse condemnation after sewage overflow from a public sewer main damaged Connect's premises. (*Id.* at *1.) The appellate court found that evidence regarding maintenance was immaterial to the issue, applying *CSAA*. The court stated that "inherent risks of damage to private property... materialized and caused damage." (Id. at *5.) "A danger inherent to the construction of a sewer line is that the line will become clogged and blocked by roots or other foreign material (the exact situation which materialized and caused damage to Connect's property) and on that basis the City was liable to Connect for its damages." (*Id.* at *5.)

Plaintiffs and appellants James and Joyce Starks sued defendant and respondent City of Los Angeles ("City") for damages incurred when a City sewer line backed up, causing sewage to flow into their home. The Starks alleged causes of action for inverse condemnation, nuisance, dangerous condition of property, and negligence. After the Starks presented their evidence, the trial court granted a nonsuit in favor of the City on all causes of action except nuisance. The basis of the trial court's ruling was a determination that the Starks had violated a City ordinance requiring them to install a "backwater valve" to protect their home from sewage backups. "Had the Starks installed the valve as required, they would not have been harmed." On appeal, the Starks contended the trial court erred in its interpretation of the controlling ordinance. The appellate court concluded the trial court correctly interpreted the unambiguous language of the ordinance, and therefore affirmed. (*Id.* at *1.) The appellate court found that "the ordinance, was 'part and parcel' of the deliberate design of the sewer system, *required* the Starks to install a backwater valve and that the Starks' failure to install the backwater valve resulted in the system n*ot functioning as designed*, due solely to the Starks' error." (*Id.* at *7, original italic emphasis.) The appellate court also found that the City was not even partially liable for the Starks' failure to install the backwater valve based on Government Code section 818.6 (inspection immunity). (*Id.* at *fn 22.) Further, "the sewer system was found to have functioned *exactly* as intended; sewage backed up into the Starks' home because they failed to comply with the ordinance requiring them to install a protective backwater valve." (*Id.* at *fn 23, original italic emphasis.) The court specifically distinguished *CSAA* on this basis. (*Ibid.*)

2) ***Burns v. City of Los Altos*** **(2006) Cal. App. Unpub. Lexis 7527, 2006 WL2442909 (Sixth District)**

Plaintiffs Thomas and Deborah Burns appealed from a judgment

after a court trial in their action for inverse condemnation, nuisance, and trespass. They contended that the trial court erred in finding that the sewer maintenance practices of defendant City of Los Altos did not cause the damage resulting from the intrusion of sewage into their home from a blocked main line. The appellate court found no error and affirmed the judgment. Plaintiffs' residence was constructed during 1983 and 1984. The construction was completed, inspected, and approved without the installation of a "backwater valve" or backflow device to protect the property from the backflow of sewage. On February 3, 2003, plaintiffs' home was flooded with sewage and contaminated water from a blocked sewer main. Plaintiffs' shower drain inside was 3.91 feet lower than the manhole cover immediately upstream of the residence and a backwater device was required. The trial court determined that the installation of a backflow device on plaintiffs' property was required, and that sewage would not have intruded into their home if the valve had been in place. In other words, the court concluded the absence of this preventive device "defeated the proper functioning of the sewer system as deliberately designed and constructed." (*Id.* at *2.) This finding was based in part on another section of City's Ordinance, which described the habitation of any building in violation of City ordinances as a public nuisance. (*Ibid.*) The court found this to be a "strong public statement which, at the very least, leads to a reasonable inference that the lack of such a device defeats the deliberate design of the City's sewer system." (*Ibid.*) Accordingly, the trial court concluded that the City's sewer main had not caused plaintiffs' damages. The trial court further found that the City's liability depended on its having engaged in a deliberate plan or a calculated risk by implementing maintenance plans that it knew were inadequate and would likely cause damage to users of the system. (*Ibid.*) That situation was not present; instead, "the City adopted, funded and implemented a proactive plan of

sewer maintenance intended to keep the City's sewer mains flowing without obstruction." (*Ibid.*) Consequently, the City's maintenance program "was not, under the facts of this case, a legal cause of Plaintiffs' damage." (*Ibid.*) The appellate court analyzed whether the City caused plaintiff damages by the following test: "whether the City's maintenance of the sewer system was in accordance with a deliberate plan or omission; and, if so, whether its deliberate conduct or failure to act was a substantial cause of the harm suffered by plaintiffs. Only if the first question is answered in the affirmative is the second question necessary for a verdict of liability." (*Id.* at *3.) The appellate court stated:

> When, as here, a public entity's *maintenance* of a public improvement is in question, its liability for inverse condemnation necessitates a finding that the entity engaged in "a deliberate act to undertake the particular plan or manner of maintenance." (*Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722, 742; see also *Bauer v. County of Ventura* (1955) 45 Cal.2d 276, 285-286 [deliberate taking or damaging for maintenance is compensable act].) Simple negligence cannot support a constitutional claim of inverse condemnation. (*Ibid.*) Thus, poor *execution* of the entity's maintenance plan is by itself insufficient to constitute a taking. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 87; *Bauer v. County of Ventura, supra,* 45 Cal.2d at pp. 285-286.) On the other hand, liability can be shown if the entity "was aware of the risk posed by its public improvement and deliberately chose a course of action -- or inaction -- in the face of that known risk." (*Arreola, supra,* 99 Cal.App.4th at p. 744, original emphasis.)

(*Id.* at *3.)

In discussing liability and determining the "City had not adopted, implemented, or funded a maintenance plan that it knew was inadequate and that created a risk of damage to users of the sewer system," the appellate court examined *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App. 3d 683 and *Pacific Bell v. City of San Diego*

(2000) 81 Cal. App. 4th 596 [water main break cases indicating that inverse liability depends on establishing this element]. (*Id.* at *4.) The court also distinguished *CSAA* on that same basis. (*Id.* at *5.)

3) ***Nisevic v. City of Los Angeles*** **(2013) Cal. App. Unpub. Lexis 7402, 2013 WL 5636483 (Second District, Division 5)**

Nisevic owned a house in Venice, California, that was damaged by a sewer backup on August 4, 2010, caused by root intrusion in the City's sewer main. The house was connected to the sewer main in an alley behind the house. The City maintained the sewer main as a public improvement. Sewage damaged various parts of Nisevic's home-office. After two sewage backups occurred while the previous owner owned the property, the previous owner hired a plumber to install a backwater valve on the lateral line running from the house to the main sewer line in the alley. The valve, if functioning properly, would prevent sewage from passing back into the house in the event of a blockage. Backwater valves are required on lateral connections to the main sewer line, installed by licensed plumbers with a permit. No permit could be found for the valve on the property, nor did it have the required vault built around the valve, which is designed to allow access for maintenance and cleaning. At the time of the incident, there was not a manhole in place behind the property. The City contended that one existed, but had been paved over before the incident. After the incident, the City installed a manhole or "terminal maintenance hole." Furthermore, it was discovered that the sewer main was "tilting the wrong way, causing the sewer to run uphill" from Nisevic's home. There was evidence that the backwater valve failed due to the improper slope of the sewer main. The court found the City caused the damage to plaintiff because: 1) the terminal maintenance hole (manhole) was missing; 2) there was no evidence Nisevic removed the manhole; 3) other manholes in the area were also missing; 4) the City admitted that sometimes it paved over manholes on accident; 5) the

sewer main was tilted at an improper angle that allowed sewage to move into the lateral line rather than flow downhill; and, 6) the improper tilt could cause solid material to get under the flap on the backwater valve, resulting in a malfunction that allowed sewage to pass in the direction of the home. (*Id.* at *4.)

4) ***City of Oroville v. Superior Court*** **(2017) Cal. App. Unpub. Lexis 4050 and 4158, 2017 WL2554447 (Third District)**

City of Oroville v. Superior Court is the basis of this Petition, wherein the Third District Court of Appeal, relying heavily on *CSAA*, imposed strict liability on Petitioner Oroville while ignoring the issue of plaintiffs' failure to design for, install, and maintain a legally required backwater valve on their property, suggesting that Petitioner Oroville should have itself ensured the BWV was installed on plaintiffs' property if a backwater valve was necessary to avoid damage to plaintiff's property.

A. The Four Unpublished Cases Involving Missing or Inoperable Backwater Valves Discussed Above All Take *CSAA* Into Consideration and Reach Wildly Differing Results.

The Third District Court of Appeal's remarkable assertion that Petitioner Oroville was responsible to make sure that plaintiffs obeyed the law by complying with building and plumbing codes by installing a backwater valve[7] makes no legal sense in light of: (1) the factual record establishing that civil engineering surveys of property and internal private plumbing fixture elevations in relation to the public sewer pipe mainline elevation are required to determine if a BWV is legally required on private property under the code; (2) private owners are required to make that determination through obtaining land surveys to determine if BWV devices

[7] The Third District's holding is in direct conflict with the Second District's holding in *Starks v. City of Los Angeles* (2008) Cal. App. Unpub. Lexis 1837, 2008 WL570775 at *7 and fn 22 (Second District, Division 3). (See Section V(1) above.)

on their building plans are required by law; and, (3) since no BWV was included on plaintiffs' plans there would have been no way for a local building inspector to make a determination that the BWV was necessary or missing. In any event, CITY's "negligence" in failing to enforce a building code law that plaintiffs are responsible for complying with should not result in inverse condemnation liability pursuant to *CSAA*, despite the Third District's ruling otherwise, given the immunity protections and law setting forth that negligence on the part of Petitioner does not constitute inverse condemnation and taking of private property, as was relied on and discussed in the unpublished *Starks* and *Burns* opinions.

The trial and Third District courts relied heavily on *CSAA* to impose strict liability against a municipality in a sewage intrusion case. Yet, the factual issues presented in *CSAA* point decisively **against** finding Petitioner liable for inverse condemnation. *CSAA* did not address a missing but legally required BWV situation. The Third District below was apparently confused by, or ignored, much of the reasoning set forth in *CSAA*, including *CSAA*'s discussion over whether the municipality had a deliberately deficient plan of maintenance, whether the building owner did "everything possible" to protect and take care of the private property, and *CSAA*'s statement that "strict liability" should not apply.

The language of *CSAA* is causing considerable confusion in cases such as the one presented, at great cost to municipalities, parties, and the courts on a statewide basis. This Court is asked to review and issue appropriate legal standards and guidelines for determining when and under what circumstances public entities and owners are legally responsible for damages caused in such circumstances.

VI.

ARGUMENT

THE THIRD DISTRICT COURT BELOW PERPETUATED CONFUSING STANDARDS OF LAW SET FORTH IN *CSAA* TO ESTABLISH INVERSE CONDEMNATION LIABLIITY AGAINST PETITIONER IN A CASE INVOLVING A LEGALLY REQUIRED BUT MISSING BACKWATER VALVE ON PRIVATE PROPERTY

A. Discussion of *CSAA* and Inconsistent Trial and Appellate Court Rulings Involving Missing Backwater Valves and the *CSAA* Case.

Petitioner contends that the trial and appellate court decisions imposing inverse condemnation liability against CITY are wrong as a matter of law. The decisions below represent an unwarranted extension of, and indeed a misapplication of, the case of *California State Auto Ass'n Inter-Insurance Bureau v. City of Palo Alto*, *supra,* (2006) 138 Cal.App.4th 474.

First, the rulings below in effect impose strict liability on municipalities for sewer backups, despite that *CSAA* warns against doing so. Plaintiffs never alleged or claimed that their damages were caused by the deliberate design and construction of a public work operating as intended. To the contrary, plaintiffs and the trial court confirmed during motion for summary judgment proceedings that this case does not even allege or rely on any defect in the design or construction of CITY'S main sewer line serving plaintiffs' property. (Vol. 2, Ex. 9, p. 00432; Vol. 3, Ex. 9, pp. 00588-00589.) Nor did plaintiffs put on evidence that CITY allocated risk to private property owners by deliberately adopting a deficient plan of maintenance, as would be legally required to find liability against CITY. Mere negligence in the maintenance or operation of public works, it has

been universally held, will not suffice. (*McMahon's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App. 683-[water main break]; *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596-[water main break].)

Second, the *CSAA* decision itself relied upon the fact that the homeowner in that case was a ***faultless*** **plaintiff** that did everything possible to prevent a sewer backup, including installing an entirely new private sewer lateral shortly before the backup in question. (*CSAA, supra,* at 484). The *CSAA* trial court also determined that the municipality's main line was deficient and not laid at a sufficient slope to carry sewage away from that homeowner's building. Here, by contrast, the WGS property owners actually *violated* the Uniform Building Code and applicable CITY ordinances by failing to install and maintain a backwater valve that was specifically required to prevent a backup from entering their building. (Vol. 4, Ex. 32, pp. 01010-01011.) This violation of Code actually defeated the design of the sanitary sewer system - the system is designed such that a backup should exit through the next upstream manhole in the street.[8] (Vol. 4, Ex. 32, pp. 01010-01011.) This violation of Code was the sole fault of plaintiffs (or in the case of insurer TDIC, their subrogee) and eliminated a necessary feature of the design of the public work in question.

Furthermore, while *CSAA's* holding was seemingly dependent on the plaintiff having done everything possible to avoid an overflow on the property (*CSAA* at 484), the suggestion that a factor in establishing inverse liability in a sewer case is that a public improvement failed to function as intended was borrowed from *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 500. *Belair* was a flood-control case, a discrete body

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[8] The trial court expressly acknowledged that "a backwater valve device was a necessary part of the sewer design and plan" as did the *Starks* and *Burns* courts. (Court of Appeal slip opinion at p. 7, *Starks, supra* at *7, and *Burns, supra* at *2.)

of inverse condemnation law,[9] in which a factor in determining inverse condemnation liability is whether a flood control project fails to function as intended.

B. The "Failed to Function as Intended" Test Set Forth in *CSAA* is Causing Confusion in Courts on Sewage Backup Cases, Particularly Where Backwater Valves are Legally Required but Missing from Private Property.

CSAA primarily applied flood control law to address legal requirements for imposing liability against a public entity in a sewer backup context that did not involve a legally required but missing backwater valve on the *CSAA* plaintiff's property.

The general rule of inverse condemnation law imposes liability only when a public project functioning as intended causes damage. (*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 261-262.) Flood control cases are an exception because flood control measures are intended to protect land historically subject to flooding, and to encourage public entities to build flood control projects despite potential exposure to inverse condemnation claims; thus, unique flood control rules evolved. If a flood control project, such as a levee, is designed to withstand a 25-year storm, the public entity is not liable for failure caused by a 50-year storm, even though failure to prevent all flooding from a 50-year storm would be inherent to the design. Instead, the public entity is potentially liable if the levee fails against a 10-year storm, i.e., the levee does not function as

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[9] (See *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 436 ["narrow and unique context of flood control litigation"].) To be clear, Petitioner contends that the *CSAA* case was wrongly decided because the opinion, in analyzing the failure, does not distinguish between the deliberate plan/"public use" element of an inverse condemnation cause of action and the proximate cause element.

intended and the entity had acted unreasonably.[10] (See *Belair* at 556-561; *Bunch v. Coachella Valley Water Dist.*, (1997) 15 Cal.4th 432, 454.) (Also see *Biron v. City of Redding* (2014) 225 Cal. App. 4th 1264, which Petitioner suggests might set forth an appropriate "reasonableness" standard when determining liability in missing BWV cases.)

The unique standard for flood control cases has no objectively ascertainable application to sewer cases. Considering that *CSAA* coupled this test with a requirement that property owners do "everything possible" to protect their property (which clearly did not occur in this Petitioner/WGS case), to even suggest that CITY could be liable for inverse condemnation under *CSAA* was wrong on the facts before this Court.

Courts, attorneys and parties are having difficulty interpreting and applying *CSAA*. After all, if the design of the sewer system was to overflow onto Plaintiffs' property, such would manifestly be an inverse condemnation taking. It cannot also be true that a taking occurs if the overflow on Plaintiffs' property occurs because the system fails to function as intended due to plaintiffs' non-compliance with established state and

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[10] Moreover, *Belair's* "failed to function as intended" test applies only when an *independent* force, such as a rainstorm, overwhelms the system and therefore contributes to the injury. (*Id.* at 555-60.) Here, plaintiffs' own failure to install the required BWV valve is hardly an *independent* cause.

Furthermore, liability against CITY under the "failed to function as intended" test requires a finding that the City acted unreasonably, which is not present here. (*Id.* at 562-565.)

> [W]here the public agency's design, construction or maintenance of a flood control project is shown to have posed an unreasonable risk of harm to the Plaintiffs, and such *unreasonable* design, construction, or maintenance constitutes a substantial cause of the damages, Plaintiffs may recover .... . (*Belair* at 565, emphasis added.)

local building codes. If a city is liable for an overflow caused either by the system failing to function as intended or by the system functioning as intended, the city (as plaintiffs desire) will always be liable, even if its design is (as here) specifically defeated by the very plaintiffs making a claim.[11] [12]

The Third District Court states in its ruling while discussing *CSAA* that "...the principle that failure of a public improvement to function as intended is a factor in inverse condemnation is not unique to flood control projects." (See bottom of Page 14 of Ruling.) Yet, the Third District cites no cases to support this proposition. Petitioner is only aware of flood control cases using "failure to function as intended" as a test to find inverse liability in the flood control specific context. By discussing and applying flood control cases to the sewer backup at issue in *CSAA*, *CSAA* has created confusion in the law between two very different types of potential harm caused by public projects, not to mention that sewer backup cases sometimes involve the issue of missing, but legally required, backwater

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[11] This reasoning was appropriately applied by appellate courts in the unpublished cases of *Starks* and *Burns*, *supra*, to rule out inverse condemnation liability of the defendant municipality.

[12] The fundamental principle of inverse condemnation is damage caused by a public project functioning as designed. The proposition that inverse condemnation liability also occurs when a project does not function as designed could mean that the public entity is virtually always liable in inverse condemnation and would render the discussions in numerous cases moot, and the holdings of many of those cases wrong. For example, the discussion and holding in *Pacific Bell v. City of San Diego* (2000) 81 Cal.app.4th 596 regarding the "fix it when it breaks" maintenance plan would have been utterly superfluous. Moreover, in the cases subsequently discussing *Pacific Bell's* theory of inverse condemnation, the discussions would be irrelevant. (See e.g. *Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848; *Paterno v. State of California* (1999) 74 Cal.App.4th 68; *Hayashi v. Alameda County Flood Control* (1959) 167 Cal.App.2d 584; *Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722; *Kelly v. Contra Costa Water District* (2015) Cal.App. Unpub. 2015 WL555753.)

valves that must interface with municipal sewer systems.

This Court is asked to review and clear up this issue of significant and statewide concern.

C. The Facts And Law Underlying This Case Illustrate Why Using A "Failed To Function As Intended Test" Should Not Apply When Legally Required Backwater Valves Are Not Installed And Maintained By Owners.

Here, WGS did not allege any deficiency in the design or construction of CITY's sewer mainline. WGS did not offer proof of any deliberately deficient plan of official maintenance for the system. Plaintiffs below argued, and the Third District Court of Appeal accepted, a strict liability argument that *CSAA* expressly indicated it was not adopting. As a result, this Court should consider the legal issues presented to clarify this important and recurring legal matter of statewide concern.

D. Discussion of the Trial Court Ruling Affirmed by the Third District

The trial court's final Ruling and Order includes the following significant findings and conclusions that logically contradict the trial court Order and Third District Court opinion finding liability against CITY:

(1) "...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." (Vol. 4, Ex. 32, p. 01011, lines 22-25.);

(2) "Damages will reflect both the primary and significant secondary causes of the backup of sewage into the building" (Vol. 4, Ex. 32, p. 01012, lines 4-5); and

(3) "The City's evidence shows a plan of maintenance was in effect and was being followed." (Vol. 4, Ex. 32, p. 01011, lines 10-12.)

(4) The trial court also recognized that sewer provisions in the

CITY's ordinances apply to the Property. Specifically, Part 6 of Ordinance No. 1450 adopting the Uniform Plumbing Code, 1982 edition, at section 409, provides: "Drainage piping serving fixtures which have flood level rims located below the elevation of the next upstream manhole cover of the public sewer serving such drainage piping **shall be protected from backflow of sewage by installing an approved type backwater valve**." (Vol. 2, Ex. 5, p. 00240, 268; bold underline emphasis added.)

Factually, on August 3, 1985, only a month or so after obtaining their undeveloped property by grant deed, WGS plaintiffs applied to connect to CITY's sewer system and for a building permit, promising and certifying as property owners that they would abide by all ordinances and state laws relating to building construction. (Vol. 2, Ex. 5, pp. 00227-00229, 00234-00235, 00237.)[13] CITY's Ordinances and Plumbing Codes required installation of a BWV on the Property. Sewage would not have intruded into their building if the BWV had been in place and properly maintained in December of 2009, as was found and relied on in the unpublished *Burns* opinion (6th District). The absence of this preventive device defeated the proper functioning of the sewer system as deliberately designed and constructed. This finding can also be based in part on Ordinance No. 1719, which describes the owning, leasing, renting, occupying or possessing a premise in violation of Chapter 6 of the Oroville Municipal Code (pertaining to building regulations) as a public nuisance. (Vol. 2, Ex. 9, pp. 00486-00491.) CITY enacted this ordinance as a strong

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[13] Plaintiffs' agent and predecessor in interest, Gerald DeRoco, signed on their behalf to obtain a building permit and a permit to connect to the City's sewer system. City Ordinance 1200 states "'Applicant' shall mean the person making application for a permit for a sewer connection, who shall be the owner of the premises to be served by the sewer for which a permit is requested, or his authorized agent appointed to do so. (Vol. 2, Ex. 9, p. 00493, 00564, 00565.)

public statement that, at the very least, leads to a reasonable inference that the lack of such a device defeated the deliberate design of the CITY's sewer system and amounted to a public nuisance.[14]

Finally, the BWV at issue here was part and parcel of the deliberate design of the sewer system, as the trial court ruled.[15] This is precisely because the design of the system, which anticipates the ordinary operation of the forces of gravity, expects overflow to be carried away uphill and emerge upstream when and if a backup occurs. (Vol. 1, Ex. 2, p. 00022, lines 23-26; Vol. 5, Ex. 36, p. 01057, lines 25-28.) Here, the sewer main functioned *exactly* as intended.[16] Sewage backed up into the Dental Complex property only because WGS plaintiffs and their contracting representatives failed to comply with ordinances requiring them to install and maintain at all relevant times a BWV, thus frustrating and defeating the deliberate design of CITY's sewer system.[17] Stated differently, plaintiffs' failure to install and maintain the BWV resulted in CITY's sewer system *not functioning as designed and constructed,*[18] due solely to the conduct of the WGS plaintiffs and their contracting representatives. The absence of a BWV was not an "additional cause," but *the cause*, because plaintiffs

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[14] The *Burns* Court based its decision, in part, on the City having an applicable nuisance ordinance, which contradicts the Third District's holding here. (See *Burns* at *2.)

[15] The *Starks* Court also held a legally required BWV was "part and parcel" of the deliberate design of the sewer system, which contradicts the Third District's holding here. (See *Starks* at *2.)

[16] As held by the *Starks* Court, in direct contradiction of the opinion of the Third District here. (See *Starks* at *fn.23.)

[17] As held by the *Burns* Court, in direct contradiction of the opinion of the Third District here. (See *Burns* at *2.)

[18] As held by the *Starks* Court, in direct contradiction of the opinion of the Third District here. (See *Starks* at *7.)

defeated the design of the system. But for the absence of the BWV, no damage to plaintiffs would have occurred. While an overflow might have occurred elsewhere, the overflow would not have entered WGS plaintiffs' building.

Here, the Court of Appeal relied extensively on *CSAA's* holding that inverse condemnation liability lies when a non-flood-control public improvement fails to function as intended without considering or fairly addressing the missing BWV, which is legally required and integral to the design and operation of the sewage system. Petitioner contends that the missing BWV should be the legal cause of the damages complained of in the circumstances presented, and that ambiguity created by *CSAA* in a sewer backup case that did not even involve a missing BWV is causing the wide variance of unpublished opinions on this important and Statewide area of law. A review and statement of the law applicable to missing BWV cases by this Court will help resolve these important issues Statewide.

CONCLUSION

Petitioner asks the Court to establish and set forth legal standards to resolve current and significant uncertainty and tension between the legal responsibility of public entities to deliver public utility services in a manner that does not cause harm to private interests, and the legal responsibility of private builders and property owners to comply with building and plumbing codes to protect their property and the interests of the public.

The Court is respectfully further requested to issue an immediate order reversing the Court of Appeal's modified stay order and reinstating the initial stay order, or alternatively, staying the modified order while it considers this petition and any response thereto by the real party in interest.

The City of Oroville urges this court to issue an immediate stay and grant review.

Dated: July 19, 2017

Respectfully Submitted,

/s/ Mark A. Habib

By Mark A. Habib (SBN 150087)
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Attorneys for Petitioner CITY OF OROVILLE

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.049(c) of the California Rule of Courts, I hereby certify that this Petition contains 5,840 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By: /s/ Mark A. Habib
Mark A. Habib

EXHIBIT A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

CITY OF OROVILLE, Petitioner, v. THE SUPERIOR COURT OF BUTTE COUNTY, Respondent; CALIFORNIA JOINT POWERS RISK MANAGEMENT AUTHORITY et al., Real Parties in Interest.	C077181 (Super. Ct. No. 152036)

Blockage in a city sewer main resulted in raw sewage backing up into a dental office building owned by three dentists doing business as WGS Dental Complex (WGS). An inverse condemnation action (Cal. Const., art. I, § 19) against City of Oroville was filed by Timothy G. Wall, D.D.S., Sims W. Lowry, D.M.D., and William A. Gilbert, D.D.S., individually and doing business as WGS (real parties in interest), and by

intervener The Dentist Insurance Company (TDIC). On the bifurcated issue of liability (Code Civ. Proc., § 1260.040, hereafter § 1260.040), the trial court found City liable despite its claim that the sole reason the sewage entered the building was WGS's failure to install on its property a backwater valve mandated by city ordinance adopting the Uniform Plumbing Code.

City petitions this court for a peremptory writ of mandate. Over opposition by real parties in interest, we issued an alternative writ and stayed trial court proceedings on damages.

TDIC assigned its intervention rights to California Joint Powers Risk Management Authority (CJPRMA). CJPRMA's separate return to the alternative writ states that, while recovery for inverse condemnation in this case would be in CJPRMA's financial interests, CJPRMA -- on behalf of its self-insured and municipal members like City of Oroville -- aligns itself with City's position that inverse condemnation should not be available when sewage overflows onto private property because the landowner failed to have a backwater valve required by local ordinances and plumbing codes. City and CJPRMA hope we will publish an opinion to that effect.

City's argument is premised on its mistaken view that "the only reason" sewage backed up onto private property is that the private property owner defeated, even "sabotaged," the design of the sewer system by failing to install a backwater valve on the private sewer lateral, as mandated by city ordinances and the state plumbing codes. However, the trial court found there were two concurrent causes for the sewage in the building: (1) Blockage in the City's sewer main from tree root intrusion was the primary cause; and (2) the property owner's failure to install a backup valve was a "significant secondary cause." City also argues that, regardless of the valve issue, City is not liable because there was no showing that the damage was caused by a "deliberately deficient" maintenance plan by City.

We conclude City fails to show grounds for reversal. We will affirm the trial court's order finding the City liable in inverse condemnation, discharge the alternative writ, and lift the stay previously imposed on the bifurcated issue of damages. We express no view on the outstanding nuisance claims.

FACTS AND PROCEEDINGS

Late during the night of December 29, 2009, a large amount of raw, untreated sewage backed up from City's sewer main, through the private sewer lateral of the office building, through sinks, toilets, and drains, and into the interior spaces of the building. City dispatched technicians to clear a blockage from the municipal sewer main. The building was uninhabitable during decontamination, and the dentists had to relocate their practices for the duration.

WGS filed a complaint for inverse condemnation and nuisance, and TDIC filed a complaint in intervention. The operative pleadings alleged (1) the City's sewer lines were deliberately designed and maintained to divert sewage from the building, and were being used for their intended purpose at the time of this incident, and (2) City failed to maintain the sewer main free of blockages.

Though not directly at issue in this court, City moved for summary judgment or adjudication of the original complaints on the ground the backup was the property owner's fault for failure to have a backwater valve. WGS opposed the motion, asserting it had no role in constructing the building and was unaware of any issue about a backwater valve until after the backup occurred. WGS submitted declarations asserting inadequate maintenance by City, which were challenged in City's reply papers. The trial court denied the motion for summary judgment or adjudication, stating, "[I]t appears that either prevention of the blockage or installation of the backflow prevention device could have prevented the damage. The relative importance of these two factors in causing the damage will be something for the trier of fact to decide. The motion, insofar as it is

based on lack of causation, is denied." The court also stated: "Defendant contends that the problem was caused by the plaintiff's omission to put in a backflow preventer rather than defendant's omission to properly maintain the sewer. This will be a question of fact." In this court, City incorrectly claims the trial court made "findings" that absence of a backwater valve was the only cause of the backup, but City merely cites the trial court's overruling of certain evidentiary objections to the engineer's declaration.

WGS and TDIC then filed motions under section 1260.040 for the trial court to determine the legal issue of inverse condemnation liability, deferring the matter of damages. City opposed the motions, arguing it did not cause the damage, had no duty to protect against defects on the private property, and had design immunity. The parties reiterated their positions from the summary judgment motion, and the trial court took judicial notice of most of the documents submitted in the summary judgment proceedings.

We need not detail all the evidence because, even assuming for the sake of argument that City was not negligent in the design or maintenance of the sewer system, City remains liable in inverse condemnation.

WGS submitted evidence that the City's sewer main was backed up, and the cause of the sanitary sewer overflow (SSO) was root intrusion between manholes JJ-10 and JJ-11, and "roots were cut out of the subject sewer line subsequent to the incident that occurred in December of 2009. Maintenance and repair work involved putting a camera in the sewer line and determining that there was root blockage, and then cutting out the roots to eliminate the root blockage, which work took place during the early months of 2010."

City submitted documents and a declaration from Rick Walls, a senior civil engineer and former interim director and director of public works for City, that City Ordinance No. 1450, adopted in 1984, adopted the 1982 edition of the Uniform Plumbing Code (UPC), which in section 409 requires property owners to install a backwater valve

on their private sewer lateral, where flood level rims of fixtures on the property are located below the elevation of the next upstream manhole cover of the public sewer. A 2005 City Ordinance No. 1719 makes it a public nuisance for a property owner to violate city building regulations. Walls attested the ordinances and UPC required installation of a backwater valve on the private property at issue in this case. Walls stated City "found evidence of a partial stoppage or blockage in the CITY main sewer line between Manholes JJ-10 and JJ-11 on December 29, 2009." Walls opined the "root condition" found in that sewer main did not cause the backup of sewage into WGS's building, because if a backwater valve had been installed on the private property, the sewage would not have entered the building but instead would have exited at the next upstream manhole cover.

City submitted evidence that WGS acquired the subject building in 1985 when it was under construction pursuant to a building permit. In 1986, City inspected the construction and issued a "Certificate of Occupancies" to the individual dentists. City offered no explanation as to why a City inspector signed off on a building that failed to comply with the backup valve requirement, other than Walls's declaration that city inspectors "do not survey elevations or investigate ground or sewer main elevations to determine if backflow prevention devices are required on buildings" but instead rely on owners and their architects and engineers. City submitted no evidence that any owner of this property falsified the data in this case.

WGS's expert, Mark Hunter, testified in deposition that the incident could have been averted if there was a functioning backwater valve on the private property, but the backwater valves at issue here are problematic, are easily damaged during routine sewer cleaning operations, and there is only about a 50-50 chance that they will work correctly when needed. In this court, City claims the trial court disregarded this evidence because it was submitted for the first time in WGS's reply papers. However, the same evidence

was submitted with WGS's motion. What the trial court disregarded was new evidence of negligence by the City, which the trial court said was unnecessary.

The trial court granted the motions of WGS and TDIC, finding City liable for inverse condemnation. In ruling on the motions, the trial court declined City's request for a statement of decision, stating the court's determination was a question of law rather than fact. Nevertheless, the trial court issued detailed written rulings. The court reviewed the evidence and said, "Plaintiff's evidence is sufficient to establish the basic underlying facts; i.e., that there was a blockage in the City owned sewer main, the blockage most likely was caused by roots, the blockage resulted in sewage backup in the plaintiffs' offices, and the backup caused damage to plaintiffs' property." The court said these basic facts were not in dispute, and the only real dispute was as to legal responsibility for the resulting damage.

The court said, "To the extent the lack of a backflow preventer [valve] constituted an additional cause, this alone would not have caused the backup. Plaintiffs' position is that, even if there were several concurrent causes, the public improvement need only be one substantial cause of the damage in order for liability to attach." The court continued: "Even though the failure of the property owner to have a backflow preventer may have been a contributing cause, the damage would not have occurred absent the failure of the sewer to operate as intended, and therefore the City is liable in inverse condemnation."

The trial court indicated liability was a question of law to be resolved by the court. The court noted that City submitted documents that "tend to show that the plaintiffs violated the City Code in failing to install an appropriate and required backflow valve, which probably would have prevented the sewage backup that occurred. Like the Plaintiffs' facts, these facts are fundamentally undisputed. Only the legal effect of the facts is to be determined by the Court upon this motion."

The trial court stated: "Even though the facts of the case show that the failure of the property owners to have a legally required backflow device in place was a

contributing cause of the sewage backup, the Court is constrained by case law . . . to find in favor of the plaintiffs. . . . [¶] In this case, root intrusion is the primary cause of the blockage. 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."

The trial court felt constrained because: There was no evidence of negligence by City; some cases hold there is no inverse condemnation liability even when the public entity is negligent; yet another case held that root blockage was a natural risk inherent in sewer systems thereby making a city liable in inverse condemnation.

We explain *post* that the confusion about negligence arises from rules applicable only to flood control projects.

Proceedings on damages have been stayed pending resolution of this writ petition concerning inverse condemnation. The nuisance claims are not before us.

DISCUSSION

I

Standard of Review

City urges de novo review on the ground that legal issues are presented, and City could not find any case exactly on point. Alternatively, says City, an abuse of discretion standard should apply, but certainly not a substantial evidence standard. We agree we review legal questions de novo (*Biron v. City of Redding* (2014) 225 Cal.App.4th 1264, 1272 (*Biron*)), but insofar as the trial court's ruling implicates factual matters about causation, it is subject to substantial evidence review. Thus, section 1260.040 permits either party in an eminent domain or inverse condemnation case to move for a ruling by the trial court, rather than a jury, on "an evidentiary or other legal issue affecting the determination of compensation," such as liability, even where liability turns on factual

questions about causation. (§ 1260.040, subd. (a); *Dina v. People ex rel. Dept. of Transportation* (2007) 151 Cal.App.4th 1029, 1041, 1043 (*Dina*); *Goebel v. City of Santa Barbara* (2001) 92 Cal.App.4th 549, 555-556 [substantial evidence review of factual questions]; *Healing v. California Coastal Com.* (1994) 22 Cal.App.4th 1158, 1170 [trial court decides mixed questions of law and fact regarding liability for inverse condemnation].)

City cites *Dina, supra*, 151 Cal.App.4th at pages 1045-1047, which held section 1260.040 allowed the trial court to decide liability as a question of law in an inverse condemnation case. However, in *Dina*, the question of liability presented only a question of law. Property owners claimed freeway construction caused cracks in their homes and patio slabs, but the government submitted expert declarations that the damage was not caused by the freeway construction, and the property owners merely submitted expert declarations opining that the damage occurred recently and therefore must have been related to the freeway construction. (*Id.* at pp. 1036, 1048-1049.) The trial court ruled the declarations lacked foundation and evidentiary proof; the opinions were based on assumptions lacking evidentiary support. (*Id.* at pp. 1048-1049.)

Here, the evidence supports the trial court's finding of concurrent causation.

II

Inverse Condemnation

A. *Concurrent Causes*

City argues the "*only reason* [italics added] a back-up in the city's sewer main spilled onto private property is that private property owners defeated the design of the city's sewer system by failing to install and maintain a legally required back water valve on their private sewer lateral, as mandated by city ordinances and the state plumbing codes[.]" We explain that City misperceives inverse condemnation law. In order to absolve itself of liability, City would have to prove "that other forces *alone* produced the

injury." (*California State Automobile Assn. v. City of Palo Alto* (2006) 138 Cal.App.4th 474, 481, 483 (*CSAA*).) Here, City argues a backwater valve *alone* could have *prevented* the blockage in City's sewer main from entering the private property. That is not the same as saying that absence of the valve "alone produced the injury" or was the "only reason" that sewage backed up into the building.

City's argument is reminiscent of a sort of contributory negligence theory from tort law, where a plaintiff's contributory negligence would preclude recovery in tort despite negligence of the defendant -- a theory which no longer applies even in tort law, having been replaced with comparative negligence. (*Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804.) Moreover, inverse condemnation does not derive from tort law but rather on the constitutional requirement of just compensation. 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 v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 558 (*Belair*).) Contributory negligence by a plaintiff does not defeat an inverse condemnation claim for damage substantially caused by a public project. (*Blau v. City of Los Angeles* (1973) 32 Cal.App.3d 77, 87 [city's excavation and brush removal for road construction caused landslide].)

" 'In order for liability in inverse condemnation to lie, a causal connection must exist between the defendant public entity's conduct and plaintiff's damages. [Citation.] The public use or improvement need not be the sole cause of the property damage. Liability in inverse condemnation may be shown where the public improvement was a substantial concurring cause of the damage. [Citation.] There must be a showing of " 'a substantial cause-and-effect relationship excluding the probability that other forces *alone* [orig. italics] produced the injury.' [Citations.]" [Citation.]' " (*Dina, supra,* 151 Cal.App.4th at p. 1049; see also, *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 440 [(*Bunch*)] [public entity is liable where public improvement is a

substantial cause of the damage, even though it is not the only cause].) We recently said that if a public improvement substantially causes damage, inverse condemnation liability attaches, even though the improvement was only one of several concurrent causes. (*Pacific Shores Property Owners Assn. v. Department of Fish & Wildlife* (2016) 244 Cal.App.4th 12.)

"[T]he element of proximate causation for inverse condemnation is established if the plaintiff can prove ' " 'a substantial cause-and-effect relationship excluding the probability that other forces *alone* produced the injury.' " ' [Citation.] Even where an independent force contributes to the injury, the public improvement remains a substantial concurrent cause if 'the injury occurred in substantial part because the improvement failed to function as it was intended.' [Citation.] The public improvement is a substantial cause unless 'the damage would have occurred even if the project had operated perfectly.' [Citation.] A public improvement is a 'substantial concurring cause' if other forces alone would not have caused the damage and the public improvement failed to function as intended. [Citation.]" (*CSAA, supra*, 138 Cal.App.4th at p. 481.)

In *CSAA, supra*, 138 Cal.App.4th 474, homeowners' insurer filed an inverse condemnation action against the city, as subrogee for property damage the insurer paid the homeowners as a result of a raw sewage backup into their home. It was the second backup in two months. The first backup was caused by the homeowners; it was caused by tree root intrusion in the sewer lateral located on the homeowners' private property. (*Id.* at p. 477.) CSAA paid to replace the sewer lateral and did *not* seek subrogation from the city. (*Ibid.*) A month later, the home was again flooded with raw sewage for a second time. A video inspection obtained by CSAA found that the pipes on the private property were in perfect condition, and this time there were tree roots intruding in the city's sewer main. (*Ibid.*) CSAA paid the homeowners' damages and then sued the city in subrogation, but *only* for the *second* backup. (*Id.* at pp. 477-478.)

CSAA did not establish the specific cause of the second backup, but did present evidence of three potential causes of the blockage, all in the city's sewer main: (1) there were tree roots invading the porous clay pipe of the sewer main; (2) the main was designed with an inadequate slope to effectively carry sewage away from homes; and (3) there was standing water in the main. (*Id.*, *supra*, 138 Cal.App.4th at p. 482.)

The trial court rejected all three potential causes. (*CSAA, supra*, 138 Cal.App.4th at p. 482.) Even though tree root invasion was visible from a video inspection, the trial court found that the lack of any other sewage backups on that street, coupled with the city's hydroflushing records showing no tree root problem, indicated the blockage was not from tree roots, but was something temporary in nature and quickly dissipated. (*Ibid.*) The trial court rejected the inadequate design theory, stating CSAA's plumbing expert relied on inapplicable standards, and the slope could not be inadequate because the sewer was in place for 40 years without any backup problems. (*Ibid.*) The trial court also said CSAA failed to prove the city's maintenance and replacement program for the sewer pipes proximately caused the damages, because the city did not simply wait until something broke but instead had a regular maintenance program to clean the pipes and removed any tree roots. (*Ibid.*)

Thus, the trial court in *CSAA* ruled the city was not liable. (*CSAA, supra,* 138 Cal.App.4th at p. 478.)

The appellate court reversed, noting the trial court also specifically found that a blockage occurred in the sewer main owned and operated by the city. (*CSAA, supra,* 138 Cal.App.4th at p. 483.) The appellate court said: "How or why the blockage occurred is irrelevant. The purpose of the sanitary sewer is to carry wastewater *away* from the residence. The [c]ity's sanitary sewer failed to carry wastewater away from the . . . residence *because* of a blockage in the [c]ity's main, and therefore, failed to function as intended." (*Ibid.*) "In addition, by requiring CSAA to show 'how and why' the blockage occurred, the trial court applied a higher standard of proof to its claim of inverse

condemnation, requiring CSAA to prove tortious conduct on the part of the [c]ity. In citing the fact that the sewer main . . . had no history of sewage backups over 40 years . . . [and] that the [c]ity had a regular system of hydroflushing . . . , the trial court was evaluating whether the [c]ity acted *reasonably* in the operation of its sanitary system or sewer system. However, whether or not the [c]ity acted reasonably or whether or not the . . . sewage backup was foreseeable is completely irrelevant in determining if the [c]ity is liable under a theory of inverse condemnation." (*Ibid.*)

The appellate court in *CSAA* said that because there were three substantial factors in causing the backup, the burden shifted to the city to prove "that other forces alone" produced the damage. (*Id.* 138 Cal.App.4th 483.) "Any other result would have the effect of making the proof bar so high that a homeowner could *never* prevail against a city in a case such as this. . . . [¶] We do not mean to say, as CSAA argues, the [c]ity would be 'strictly liable for all property damage resulting from the blockage . . . .' But here, where the new, nonporous lateral pipe installed by the homeowner was conclusively shown *not* to be the source of the blockage, it was error for the trial court to deem the proof of causation insufficient. The blockage occurred on [c]ity land and in piping strictly under the control of the [c]ity." (*Id.* at pp. 483-484.)

CSAA continued: "Our discussion should not be taken as converting an inverse condemnation claim into a solely strict liability concept. The homeowner here had the duty to demonstrate the actual cause of the damage to him. He did that. In finding the proof of causation insufficient because of a failure to establish the 'how and why' of the blockage, the trial court asked for too much. In order to satisfy such a standard of proof, one would have to prove with particularity the actual mechanism of the backup. But our Constitution does not require that. It only requires proof of a substantial cause of the damage, indeed as was said by our Supreme Court in *Belair*, ' " 'a substantial' cause-and-effect relationship which excludes the probability that other forces *alone* produced the injury." ' [Citation.] In this case, there were a substantial cause and effect relationship

between factors entirely within the [c]ity's control, namely, tree roots, slope and standing water in the main that contributed to the backup; there is no need to distinguish among them to specifically determine 'how and why' the blockage occurred." (*CSAA, supra*, 138 Cal.App.4th at p. 484.)

CSAA declined the city's invitation to teach the insurance industry a lesson not to expect public agencies to bail them out of insurance losses every time there is a sewer backup. (*Id.* 138 Cal.App.4th at p. 484.) "What the [c]ity fails to recognize in this case is that CSAA did everything in its power to address the [homeowners'] plumbing issue, even going so far as to replace the entire lateral pipe from the . . . home to the [c]ity's sewer main, including the portion *owned and operated by the [c]ity*. There was nothing more CSAA could do to protect the homeowners from sewage backup. CSAA paid the costs to repair the portion of the lateral that was under the control of the homeowner, and did not claim that such costs were attributable to the [c]ity. CSAA should not also be required to pay the costs of damages as a result of a blockage in the [c]ity's main over which CSAA had no control." (*Ibid.*)

Here, City argues *CSAA* is distinguishable because there the design was deficient in that the slope was inadequate. However, the slope issue was not necessary to a finding of inverse condemnation liability.

City also argues *CSAA* is inapposite because it "relies upon the fact that the homeowner in that case was a faultless plaintiff that did everything possible to prevent a sewer backup . . . ." City maintains *CSAA* creates a rule that a property owner must prove its own innocence as a prerequisite to recovering inverse condemnation damages. Not so. *CSAA* said the homeowners -- who were responsible for the first blockage -- were not the source of the second blockage, i.e., the blockage did not occur only in the private sewer lateral. (*Id.* 138 Cal.App.4th at pp. 483-484.) In our case, the property owner's failure to install a backup valve did not cause the blockage in City's sewer main.

City falsely claims the trial court "found" in the earlier summary judgment motion that the landowner's failure to have a backup valve was the "sole" cause of the damage. But the City cites only the trial court's overruling of some evidentiary objections. The City omits to mention that the trial court went on to *deny* summary judgment/adjudication based on causation, stating, "Defendant contends that the problem was caused by the plaintiff's omission to put in a backflow preventer rather than defendant's omission to properly maintain the sewer. This will be a question of fact." Indeed, the City in connection with the section 1260.040 motion made the same misrepresentation about prior "findings," refuted by the trial court's ruling on the section 1260.040 motion that "To the extent the lack of a backflow preventer constituted an additional cause, this alone would not have caused the backup."

City argues it is unfair to make it pay for the private landowner's dereliction of duty. City says it cannot be true that a taking occurs if the overflow onto private property occurs because the system fails to function as intended due to the private property owner not complying with state and local building codes. City argues its sewer would have functioned as intended -- by diverting the blocked sewage up through the next uphill manhole -- had the private property owner not "sabotaged" the system. Again, City is attempting to inject into inverse condemnation law some sort of contributory negligence theory that does not even apply in tort law anymore, where it has been substituted with comparative negligence.

City argues *CSAA* was wrongly decided in that it conflated the deliberate plan and proximate cause elements and improperly borrowed from a flood control case to say that a factor in inverse condemnation in a sewer case is that a public improvement failed to function as intended. However, *CSAA* conflated nothing and, although flood control cases are distinct in some respects as we discuss *post*, the principle that failure of a public improvement to function as intended is a factor in inverse condemnation is not unique to flood control projects.

We accordingly reject City's causation argument.

B. *Deliberate Design*

To prevail on an inverse condemnation claim, the landowner must show that the public improvement as deliberately designed, implemented, or maintained, caused the damage to private property. (*San Diego Gas & Electric Co. v. Superior Court* (*Covalt*) (1996) 13 Cal.4th 893.)

City confuses "deliberate design" with wrongdoing, arguing WGS produced no evidence of a "DELIBERATELY DEFICIENT OR UNREASONABLE OFFICIAL 'PLAN' " pursuant to which City took a calculated risk of sewer backups occurring at the property. City argues that mere negligence by the public entity will not suffice. City argues it never acted deliberately with a purpose to injure or impose a particular risk of injury on the subject property.

However, City mistakenly relies on cases, including our recent opinion in *Biron, supra*, 225 Cal.4th 1264, discussing a special rule of reasonableness for *flood control projects*, as an exception to the rule of liability for inverse condemnation, in order to encourage public entities to engage in flood control endeavors. (E.g., *Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 855, fn. 4.)

In *Biron*, we said: "Inverse condemnation cases originally were analyzed with reference to traditional tort and property law concepts under the assumption that inverse condemnation liability tracked private party liability. [Citation.] The Supreme Court changed this assumption in *Albers [v. County of Los Angeles* (1965)] 62 Cal.2d 250, which held that a property owner may recover just compensation from a public entity for 'any actual physical injury to real property proximately caused by [a public] improvement as deliberately designed and constructed . . . whether foreseeable or not.' [Citation.] [¶] *Albers, supra*, 62 Cal.2d 250 [a flood case] recognized two exceptions to the rule of strict liability: (1) where the damages were inflicted in the proper exercise of

the public entity's police power, and (2) where the public entity had a common law right to inflict damage, as where an upper riparian owner is privileged to protect against the common enemy of floodwaters. [Citation.]" (*Biron, supra*, 225 Cal.App.4th at pp. 1272-1273.)

Given the special nature of flood control projects, in inverse condemnation claims involving flood control projects, the public entity is not strictly liable and is not liable for simple negligence, but rather is liable only if its design, construction, or maintenance poses an "unreasonable risk of harm" to private property, and the unreasonable aspect of the improvement is a substantial cause of damage. (*Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722, 739.)

Biron involved flooding after the city deferred upgrades to its storm drainage system. (*Id.* 225 Cal.App.4th at p. 1268.) We held the reasonableness standard for flood control projects, rather than strict liability, applied, and the evidence supported the finding that the city acted reasonably in not increasing the capacity of its storm drainage system, such that the city was not liable in inverse condemnation. (*Id.* at pp. 1272-1280.)

Accordingly, City is wrong in demanding proof that its sewer system was "deliberately deficient." In this non-flood-control case, "Damage caused by the public improvement as deliberately conceived, altered or maintained may be recovered under inverse condemnation [citation] and the presence or absence of fault by the public entity ordinarily is irrelevant. [Citation.]" (*Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 602 (*Pacific Bell*).) Additionally, the "deliberateness" requirement is satisfied 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." (*Id.* at pp. 604, 607.)

The City thinks *Pacific Bell* and another case, *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683 (*McMahan's*), required more than negligence in non-flood-control contexts. Not so. Both were water diversion cases

involving city water delivery systems where corroded pipes burst and caused damage to private property. The city in each case argued that when private property is damaged by water flooding from a public improvement, Supreme Court decisions (including *Bunch, supra*, 15 Cal.4th 432, and *Belair, supra*, 47 Cal.3d 550) have supplanted the ordinary rule of strict liability with a rule of unreasonableness. (*Pacific Bell, supra*, 81 Cal.App.4th at p. 610, citing *McMahan's*.) Though both cases discussed evidence of possible negligent maintenance, both cases endorsed a rule of liability without fault. As explained in *Pacific Bell*, the Supreme Court cases were flood control cases inapplicable in a non-flood-control context:

"City notes that both *Bunch* and *Belair* referred to numerous cases, including *McMahan's*, as setting forth a rule that applies strict inverse condemnation liability to public improvements that divert water from its natural drainage channel and cause damage. [Citations.] City argues that *Bunch*'s decision to replace the strict liability standard with a reasonableness standard overruled the entire line of cited cases, including *McMahan's*, applying the strict liability standard, and therefore in cases with factual patterns analogous to *McMahan's* an inverse condemnation claim must be evaluated under the reasonableness test.

"Although [the Supreme Court] replaced the strict liability approach with a reasonableness requirement *for flood control improvements* [italics added], we do not perceive those cases to have overruled *McMahan's*. *McMahan's* did not involve a failure of a flood control improvement causing damage to a property that was historically subject to flooding. Furthermore, the ratio decidendi of [the Supreme Court cases] does not support extension of the reasonableness standard here. The [Supreme Court] approach was decided in the narrow and unique context of water law, and holds that neither the common law absolute immunity rule formerly applicable to damages caused by private flood protection measures, nor the strict liability rule applicable to damages caused by public improvements, appropriately balanced the competing interests.

"In the present context, damages caused by failure of a private water pipe system would not have enjoyed absolute immunity at common law. More importantly, the concerns that animated the rejection of the strict liability rule in the context of public flood control projects has no counterpart here. [The Supreme Court] reasoned that strict liability for failure of a public flood control improvement would make the public entity an insurer against floods; the potentially enormous exposure could deter the public entity from building flood control projects and thereby deprive the public as a whole, including the damaged landowner, of protection against flooding. Because the landowner would suffer some flood damage in the absence of the flood control project or if the constructed project failed, the principle requiring compensation if the damaged landowner bore a disproportionate cost of the public benefit did not require a strict liability approach; instead, compensation was required only if the project exposed him to an unreasonable risk of harm. [Citation.]

"Unlike flood control improvements, the purpose of a water delivery system is not to protect against the very injury that its failure caused. Unlike flood control improvements, failure of the pipe here subjected Pacific Bell's facility to injury from flooding that was not a risk it was exposed to in the absence of the pipe. [Fn. omitted.] Thus, the private landowner damaged by failure of the pipe, if left uncompensated, is forced to contribute a disproportionate share of the public undertaking. Because damages caused by failure of a water delivery system do not resemble damages caused by failure of a flood control system, we conclude the [Supreme Court] reasonableness test should not be extended to the facts of this case, and the ordinary rules of inverse condemnation strict liability for damages caused by public improvements are applicable." (*Pacific Bell, supra*, 81 Cal.App.4th at pp. 613-615, citing *McMahan's, supra*, 146 Cal.App.3d 683.)

We accordingly reject the City's reliance on *Pacific Bell* and *McMahan's* as requiring more than negligence in a non-flood-control context.

City acknowledges that blockage is an inherent risk of a sewer system, stating in its brief to this court that "everyone knows and agrees that City's system was designed to overflow, when and if an overflow became necessary for any reason, at the next upstream manhole cover. Plaintiffs and their experts freely acknowledge this to be the accepted design and construction for City's gravity flow system." City then argues there was no inherent risk of a backup onto the private property if the property owner had installed a backwater valve. City states, as did the trial court, that the valve was a necessary part of the sewer design. Then perhaps City should assure compliance before issuing certificates of occupancy. In any event, we have explained that absence of the valve does not defeat the inverse condemnation claim.

We conclude the trial court properly found City liable in inverse condemnation.

DISPOSITION

The stay previously imposed on the bifurcated issue of damages is lifted. The trial court's order finding the City liable in inverse condemnation is affirmed. The parties, including CJPRMA, may continue to litigate the remaining matters. Real parties in interest are awarded their costs.

HULL, Acting P.J.

We concur:

ROBIE, J.

MAURO, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: City of Oroville v. The Superior Court of Butte County
C077181
Butte County
No. 152036

Copies of this document have been sent by mail to the parties checked below unless they were noticed electronically. If a party does not appear on the TrueFiling Servicing Notification and is not checked below, service was not required.

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✓ Honorable Sandra L. McLean
Judge of the Butte County Superior Court - Main
One Court Street
Oroville, CA 95965

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

CITY OF OROVILLE,

Petitioner,

v.

SUPERIOR COURT OF BUTTE COUNTY,

Respondent;

CALIFORNIA JOINT POWERS RISK MANAGEMENT AUTHORITY et al.,

Real Parties in Interest.

C077181

(Super. Ct. No. 152036)

MODIFICATION OF OPINION [NO CHANGE IN JUDGMENT]

THE COURT:

The opinion filed on June 13, 2017, is modified as follows:

1. On page 3, delete the first two sentences beginning with "We conclude" and insert:

We conclude the trial court correctly found the City liable in inverse condemnation. We will deny the petition for writ of mandate and vacate the stay.

2. On page 19, delete the first three sentences under DISPOSITION and insert:

The stay previously imposed is vacated upon finality of this decision in this court. The petition for writ of mandate is denied.

These modifications do not change the judgment.

BY THE COURT:

HULL, A.P. J.

ROBIE, J.

MAURO, J.

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

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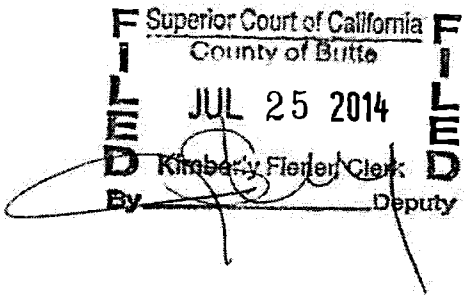
✓ Honorable Sandra L. McLean
Judge of the
Butte County Superior Court - Main
One Court Street
Oroville, CA 95965

EXHIBIT B



SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF BUTTE

THE DENTISTS INSURANCE COMPANY, et al.,

Plaintiffs,

vs.

CITY OF OROVILLE, et al.,

Defendants.

CASE NO. 152036

RULING ON PLAINTIFFS' MOTION FOR JUDICIAL DETERMINATION OF THE CITY'S LIABILITY FOR INVERSE CONDEMNATION

The motion of Plaintiffs TIMOTHY WALL, SIMS LOWRY, WILLIAM GILBERT, individually and dba WGS for judicial determination of Defendant CITY OF OROVILLE's liability for inverse condemnation under CCP §1260.040 came on regularly for hearing before this department on July 23, 2014 at 8:30 p.m. The court heard argument and took the matter under submission. The City requested a statement of decision under CCP §632, however a statement of decision is only required upon trial of a question of fact, not determination of a question of law. The request is denied.

of Douglas C. Humphrey filed August 17, 2012, and the Declaration of William Gilbert, filed November 2, 2012. The City objects to the declaration of Gilbert, but not to the other declarations.

Plaintiffs' evidence is sufficient to establish the basic underlying facts; i.e., that there was a blockage in the City owned sewer main, the blockage most likely was caused by roots, the blockage resulted in sewage backup in the plaintiffs' offices, and the backup caused damage to plaintiffs' property. These basic facts are not in dispute; the only real dispute is as to legal responsibility for the damage which resulted from the sewage backup. The amount of damages may also be disputed, but amount of damages is not a part of this motion.

According to Plaintiffs, inverse condemnation lies where damages are caused by the deliberate design or construction of a public work that fails to function as intended, and other forces alone would not have cause the damage. In this case, according to Plaintiffs, the sewer system failed to function as intended when tree roots blocked the mainline and prevented sewage from flowing through the line, as was intended by the deliberate design and construction of the sewer system. The City admits, according to Plaintiffs, that the primary cause of the system overflow on December 29, 2009 was a tree root intrusion and blockage. To the extent the lack of a backflow preventer constituted an additional cause, this alone would not have caused the backup. Plaintiffs' position is that, even if there were

several concurrent causes, the public improvement need only be one substantial cause of the damage in order for liability to attach.

Plaintiffs rely on *California State Auto Ass'n v. Palo Alto* (2006) 138 Cal.App.4th 474, in which the Court found that a backup in the City Sewer main establishes the public improvement failed to function as intended. The Court stated, in that case, that,

> "... the element of proximate causation for inverse condemnation is established if the plaintiff can prove 'a substantial cause-and-effect relationship excluding the probability that other forces alone produced the injury.' (Belair, supra, 47 Cal.3d at p. 559.) Even where an independent force contributes to the injury, the public improvement remains a substantial concurrent cause if 'the injury occurred in substantial part because the improvement failed to function as it was intended.' (Id. at pp. 559-560.) .... A public improvement is a 'substantial concurring cause' if other forces alone would not have caused the damage and the public improvement failed to function as intended. (Ibid.)." *California State Automobile Assn. v. City of Palo Alto*, 138 Cal. App. 4th 474 (Cal. App. 6th Dist. 2006).

The CSAA court was dealing with a sewage backup case very similar to that involved in the present case. In reversing the trial court, the *CSAA* Court also stated that,

> "While the trial court found that neither tree roots nor inadequate slope caused the sewage backup into the McKennas' home, and that the City had a regular program of maintenance for the sewer, it also specifically found that the blockage occurred in the main owned and operated by the City. How or why the blockage occurred is irrelevant. The purpose of the sanitary sewer is to carry wastewater away from the residence. The City's sanitary sewer failed to carry wastewater away from the McKennas' residence because of a blockage in the City's main, and therefore, failed to function as intended." *California State Automobile Assn. v.*

City of Palo Alto, 138 Cal. App. 4th 474 (Cal. App. 6th Dist. 2006).

Under the CSAA analysis, a sewer blockage such as occurred in the present case exhibits a failure of the project to operate as intended. Even though the failure of the property owner to have a backflow preventer may have been a contributing cause, the damage would not have occurred absent the failure of the sewer to operate as intended, and therefore the City is liable in inverse condemnation.

Inverse condemnation does not require any foreseeability or breach of a standard of care. *Aetna Life v. City of Los Angeles* (1985) 170 Cal.App.3d 865. Any actual injury to real property proximately caused by a public improvement as deliberately designed or constructed is compensable, whether or not the injury was foreseeable. Id. At 873-74. 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. *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 607. Thus, whether or not the City acted reasonably is irrelevant to determining liability. *CSAA v. Palo Alto* (2006) 138 Cal.App.4th 474, 483. Plaintiffs argue that this conclusion is consistent with the fundamental policy underlying inverse condemnation of distributing the costs of public improvements among those who benefit from it rather than imposing a disproportionate burden

upon the party damaged by the public entity's operation of the improvement. *Holtz v. Superior Court* (1970) 3 Cal.3d 296, 303.

Opposition to the Motion

The City agrees that determining whether a taking has occurred and whether liability can attach to the City under an inverse condemnation theory is a question of law that can and must be resolved by the Court, pursuant to CCP 1260.040. The City asks that the plaintiffs' request be denied, and the Court instead decide that the City is not liable for inverse condemnation.

In support of its position, the City submits various documents attached to and authenticated by a Declaration of attorney Mark Habib: The Answer of the City of Oroville to the Second Amended Complaint, the Court's ruling on previous motions for summary judgment, three unpublished opinions, the City of Oroville Ordinance Nos. 1719 and 1200, the Supplemental declaration of Rick Walls filed in connection with an earlier motion, and the City of Oroville's Second Amended Cross Complaint. As mentioned above, unpublished opinions are not properly considered by the Court. The other documents submitted by the City tend to show that the plaintiffs' violated the City Code in failing to install an appropriate and required backflow valve, which probably would have prevented the sewage backup that occurred. Like the Plaintiffs' facts, these facts are fundamentally undisputed. Only the legal effect of the facts is

to be determined by the Court upon this motion.

The City argues that it is illogical to allow property owners to "ignore well-established State and Local Building Code requirements that are specifically designed to compliment and interface with the design and operation of a municipality's sanitary sewer system … and then sue municipalities for inverse condemnation when the very damage that owners were legally obligated to protect against occurs…" The City contends that one "can easily imagine owners and contractors cutting corners on the installation of private electrical boxes and breakers, gas regulators, private storm drain facilities, and backwater valves .. expecting to be 'off the hook' and/or compensated down the road for such foolish and irresponsible behavior…." According to the City's theory, the failure by plaintiffs and their contractors to install and maintain the required backwater valve interfered with and defeated the ability of the City's sewer system to operate as it was intended and designed to operate.

The City argues that the plaintiffs misunderstand the *CSAA* case, in that it also states that "inverse condemnation lies where damages are caused by the deliberate design or construction of the public work, but the cause of action is distinguished from, and cannot be predicated on, general tort liability or a claim of negligence in the maintenance of a public improvement."

The City also argues that there is an element of deliberateness required for a finding of inverse condemnation

that is missing here. Under *Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722, 742, "The necessary finding is that the wrongful act be part of the deliberate design, construction, or maintenance of the public improvement. The fundamental justification for inverse liability is that the government, acting in furtherance of public objectives, is taking a calculated risk that private property may be damaged. That is why simple negligence cannot support the constitutional claim." Defendant also relies of *Tilton v. Reclamation* (2006) 142 Cal.App.4th 848, 855, fn.4: "The plaintiffs, as stated, also allege that the collection of debris and stumps in the [storm drain ditch constructed by the defendant county] raised an obstruction which caused the water to back up on their land. If this was due to the mere negligent operation of the ditch system, it is not within the scope of liability as a taking or damaging for a public use…."

The City argues that the sewer system did not fail to function as intended, but that it actually was sabotaged and ultimately defeated by plaintiffs' failure to comply with established building and plumbing codes.

Reply

In reply to the motion, plaintiffs agree that deliberateness is an element of inverse condemnation and requires a public entity's deliberate design, construction or maintenance of a public improvement, however they argue it is enough to show the

public improvement failed to function as intended or an inherent risk in the design of a public improvement materialized and caused damage.

Plaintiffs argue, in addition, that the evidence establishes the City deliberately adopted an inadequate maintenance plan. In support of this argument, the plaintiffs submit a substantial amount of new evidence as part of their reply, attempting to show that the City "knowingly operated and maintained a deficient system and adopted an inadequate maintenance plan with a skeleton crew in the sewer division."

New evidence generally is not permitted on reply and, in this instance, the Court finds it is not necessary. The Court is not considering the newly submitted evidence because it is untimely.

Analysis

Even though the facts of the case show that the failure of the property owners to have a legally required backflow device in place was a contributing cause of the sewage backup, the Court is constrained by case law, as set out in the *CSAA* case and other cases cited by the plaintiffs, to find in favor of the plaintiffs. It is true, as the City argues, that some cases have held there is no liability in inverse condemnation for failures that are the result of negligent or inadequate operation or maintenance. *Tilton v. Reclamation* (2006) 142 Cal.App.4th 848, 858-859; *Hayashi v. Alameda County Flood Control & Water*

Conservation Dist., (1959) 167 Cal. App. 2d 584, 591-592. Thus, the analysis for inverse condemnation is, ~~in a sense, exactly~~ counter to our accustomed legal analysis for a finding of liability in the tort realm. If the facts showed that an individual employee negligently failed to carry out assigned duties or, for example, accidently broke a pipe by crashing a truck into it, this could bar a finding of liability in inverse condemnation. In the present case, there is no showing of any such negligence by any City employee or contractor. Rather, the City's evidence shows a plan of maintenance was in effect and was being followed. See the Supplemental Declaration of Rick Walls in Support of the City's Motion for Summary Judgment, originally filed November 13, 2012, and supported again in opposition to the plaintiffs' motion as Exh. M to the Declaration of Mark Habib. This is quite similar to the facts in the CSAA case, in which the Court did not determine exactly why the line became blocked, but assumed one of the possible causes was root blockage, and found that because root blockage was a natural risk inherent in sewer operation, it subjected the City to inverse condemnation liability.

In this case, root intrusion is the primary cause of the blockage. 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*. Damages will reflect both the primary and significant secondary causes of the back up of sewage into the building.

CONCLUSION

The Court is not considering either the unpublished cases submitted by Mr. Habib, or the evidence submitted with the reply papers. The request for sanctions against Mr. Habib is denied because the Court believes such a request would have to be brought by a separate motion.

Plaintiffs motion for a determination of the City's liability for inverse condemnation is granted based on the case law, particularly the *CSAA* case. The question of damages remains to be determined.

7/25/14
Date

Sandra L. McLean
Sandra McLean
Superior Court Judge

PROOF OF SERVICE BY MAIL

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 July 19, 2017 I served **PETITION FOR REVIEW** 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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Third Appellate District Court
914 Capitol Mall, 4th Floor
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Honorable Sandra L. McLean, Judge
Butte County Superior Court
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Oroville, CA 95965

(BY MAIL) I am readily familiar with the firm's practice of collection and processing correspondence by mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit

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

Fernando Mercado	/s/ 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 July 19, 2017 I served **PETITION FOR REVIEW** 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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Clerk of the Court of Appeal
Third Appellate District Court
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

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

Fernando Mercado
PRINT NAME

/s/ Fernando Mercado
SIGNATURE

Jorge E. Navarrete, Court Administrator and Clerk
Electronically FILED on 7/19/2017

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **City of Oroville v. Superior Court of Butte County; California Joint Powers Risk Management Authority, et al.**
Case Number: **TEMP-D8PY69VC**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **mhabib@peterslawchico.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

07-19-2017
Date

/s/Mark A Habib
Signature

Habib, Mark A (150087)
Last Name, First Name (PNum)

Ace Attorney Service, Inc.
Law Firm