No: S243247

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*

OPENING BRIEF ON THE MERITS

After an Unpublished Decision of the Court of Appeal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

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

I know of no interested entities or persons as defined in California Rules of Court, Rule, 8.208, other than parties to this proceeding, that have a financial or other kind of interest in the outcome of this proceeding.

Dated: 10/28/17

By: _____
MARK A. HABIB

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LEGAL ISSUES PRESENTED FOR REVIEW

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.

I.

INTRODUCTION

Inverse condemnation is based on a public agency's deliberate taking of private property. The rule in property damage cases is that damage from a public improvement functioning as deliberately designed and constructed constitutes inverse condemnation. Inverse condemnation liability should not apply to a sewage overflow when plaintiffs defeat the design of the city's sewer system by violating multiple city and state codes, by failing to have a legally required backwater valve[1]

[1] The backwater valve under discussion is a valve that is often required to be

in place to prevent sewage from entering their building. Yet, there is confusion and inconsistent results in lower courts in cases like this one, involving sewer overflows into properties that are in violation of the California Plumbing Code's requirement to install and maintain backwater valves. Backwater valves are designed to prevent damage from sewer overflows by directing discharge to streets, where wastewater can be contained, collected and treated before it damages more sensitive property.

This Court can, and should, clarify existing law governing inverse condemnation in cases such as this, to conclude that damages caused by property owners' violations of plumbing standards on which public sewer agencies are entitled to rely does not result in inverse condemnation. Any other rule amounts not only to strict liability for sewer agencies, but an invitation to property owners and their licensed contractors throughout the State to ignore well-established building and plumbing code requirements.

The root of the confusion that brings this case to bar is unfortunate language

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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.) While various types of BWV's could be used, they generally consist 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 effluent 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.)

in *California State Auto Ass'n Inter-Insurance Bureau v. City of Palo Alto* ("*CSAA*") (2006) 138 Cal.App.4th 474. Some lower courts read *CSAA* to impose what amounts to strict liability on sewer system operators for wastewater overflows — inverse condemnation liability without considering the claimants' violation of the California Plumbing Code, or the reasonableness of the parties' conduct. Under the lower courts' view in this particular case, liability accrues to the public entity even if a sewer system is designed, constructed, and maintained flawlessly, whether or not the plaintiff property owner takes reasonable steps to protect her property, and whether or not she flouts California Building and Plumbing Code ordinances requiring backwater valve installations. This creates perverse incentives for private property owners and their licensed contractors, allowing them to evade the relatively small cost to install and maintain backwater valves and impose on the public the much higher cost to repair damaged property when an overflow occurs. Such a rule does not serve the intent of the inverse condemnation provision of our Constitution, or the historical development of case law.

CSAA erroneously eliminated the deliberateness requirement by grafting the *Belair v. Riverside County Flood Control Dist.* (1989) 47 Cal.3d 550 ("*Belair*") flood control proximate cause test of whether damage was caused by a public improvement "failing to function as intended" as the sole requirement to establish inverse condemnation liability. Compounding that error, *CSAA* omitted *Belair*'s additional requirements of an independent force and unreasonable conduct by the public entity. Outside of flood control cases, inverse condemnation cannot be established without damage caused by some deliberately deficient act of the public entity, whether it be in the design, construction, or plan of maintenance.

Thus, the City of Oroville should prevail here, whether this Court merely clarifies the law muddled by the language of *CSAA,* or extends the reasoning of modern storm water flooding cases to the sewer overflow context.

II.

FACTUAL SUMMARY

A. Overview

On December 29, 2009, sewage from the City of Oroville's (CITY) sewer main entered a building located at 3579 Oro Dam Boulevard, through the building's private sewer lateral that did not have a backwater valve installed as required by Code. (Vol. 1, Ex. 3, p. 23; Vol. 2, Ex. 8, pp. 378-379.)[2] In response, CITY's Public Works crew discovered and removed root growth partially blocking flow through the sewer main. The CITY had never experienced an overflow in this section of sewer main between 1986, when Plaintiffs constructed and began occupying their building, until the 2009 incident. The CITY had serviced the line only two months or so before the incident. (Vol. 1, Ex. 3, pp. 22-23; Vol. 2, Ex 9, p. 440.)

Plaintiffs are three dentists — Timothy Wall, Sims W. Lowry, and William A. Gilbert, individually and doing business as WGS DENTAL COMPLEX (collectively "WGS Plaintiffs"), and the CALIFORNIA JOINT POWERS RISK MANAGEMENT AUTHORITY ("CJPRMA"), subrogated to the claims of the WGS Plaintiffs' insurer. The WGS Plaintiffs and the insurer in whose shoes CJPRMA stands are collectively identified as "Plaintiffs" here. CJPRMA is the CITY's risk pool.

WGS Plaintiffs did not present admissible evidence in the trial court of a deliberately deficient maintenance plan on CITY's part. Nor did they challenge the sewer main's design and construction. (Vol. 2, Ex. 8, p. 378; Vol. 2, Ex. 9, pp. 432, 434, 435.) Plumbing codes and CITY ordinances in place when the WGS Plaintiffs constructed their building in 1985 and 1986 required the installation and ongoing maintenance of a backwater valve on WGS Plaintiffs' private sewer lateral because

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[2] References to the record submitted with the petition for writ to the Court of Appeal are in the form: Vol. X, Exhibit Y, pp. #–#.

they installed plumbing fixtures at an elevation lower than the next uphill manhole. (Vol. 2, Ex. 8, pp. 348-349; Vol. 2, Ex. 8, p. 386; Vol. 2, Ex. 9, p. 397; Vol. 2, Ex. 5, pp. 213-215.) Such a valve allows sewage to only flow away from a property, and is legally required as part of the standard design of sewer systems that rely on manholes to limit the consequences of sewer system backups and overflows. Specifically, Part 6 of the CITY's Ordinance No. 1450 adopting the 1982 edition of the Uniform Plumbing Code, provides at section 409:

> 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, pp. 240, 268.)

On August 3, 1985, only a month or so after buying their undeveloped property, the WGS Plaintiffs' agent and immediate predecessor in interest that sold them the property, Gerald DeRoco, applied on their behalf for a building permit and a permit to connect to the CITY's sewer system, promising to abide by all ordinances and state laws relating to building construction. (Vol. 2, Ex. 5, pp. 213-215, 227-229, 234-235, 237.) The plans submitted to CITY did not include the required backwater valve. No backwater valve was ever installed or maintained on the property. CITY first learned a backwater valve was missing from the WGS Plaintiffs' property in 2012 during discovery in this case. (Vol. 2, Ex. 8, p. 379.) Accordingly, WGS's building constituted a public nuisance under the CITY's municipal code at all times relevant to the case. (Vol. 2, Ex. 5, pp. 287, 290, 293.)

The CITY's sewer system relies on adherence to building and plumbing codes and includes manholes for access and to allow for the escape of sewage from manholes immediately upstream of any sewer line blockage. This is the accepted

and proper design of sanitary sewage systems. (Vol. 1, Ex. 3, p. 22; Vol. 2, Ex. 5, pp. 218, 346.)

B. The CITY Sewer Main Line

The CITY owns and maintains the sewer main section identified as JJ-10 and JJ-11 located beneath Oro Dam Boulevard, adjacent to and serving the WGS Plaintiffs' property. (Vol. 2, Ex. 5, p. 213.) The sewer main was designed, approved, and constructed in accordance with CITY engineering standards in the late 1950's, by CITY employees exercising discretionary authority to establish such standards and to approve such designs and construction. (Vol. 2, Ex. 5, pp. 216–217, 346.) The sewer system is a typical gravity flow system (i.e., one that relies on gravity rather than pumps to convey wastewater) to carry sewage down Oro Dam Boulevard and eventually to the regional sewage treatment facility owned and operated by the Sewage Commission Oroville Region ("SCOR"), an entity distinct from the CITY. (Vol. 2, Ex. 5, p. 218.)

The line is designed so that in the event of a blockage, wastewater will stay confined in the main (a "backup") or will exit from the next manhole upstream of the blockage (an "overflow"), rather than entering a residence or other building. (Vol. 1, Ex. 3, p. 22; Vol. 2, Ex. 5, pp. 218, 346.) The system is specifically designed and continues to function as intended when blockages occur in the main line – waste water backs up in the main and is carried away from private laterals and to the nearest uphill manhole. This requires compliance with backwater code provisions. (Vol. 1, Ex. 3, p. 22.)

Users are required to design their buildings and connect to sewer mains in accordance with the CITY's building codes, which adopt the California Building Standards Codes, which, in turn, are based on triennial updates of the privately published Uniform Plumbing Code and other such codes. (Vol. 2, Ex. 5, p. 218, Line 11; Vol. 2, Ex. 9, p. 419.) (See Health & Safety Code, § 17921; Cal. Municipal

Law Handbook (Cont.Ed.Bar. 2017) Land Use, § 10.244–10.245, pp. 1133–1134.) When the codes and regulations require a backwater valve, such as for Plaintiffs' building, users must be in compliance, otherwise the design of the CITY's sewer system is defeated.

Manhole No. JJ-11 is the first manhole upstream from the connection of the WGS Plaintiffs' private sewer lateral to the sewer main. (Vol. 2, Ex. 5, p. 218.) That manhole is 303.59 feet above sea level. The lowest plumbing fixture in WGS' Plaintiffs' building is a toilet with a flood level rim elevation of 301.2 feet — 2.39 feet below the flood level rim of manhole JJ-11. Surveys of the WGS Plaintiffs' property during this litigation discovered that **all** plumbing fixtures in their building were below the upstream manhole. Thus, the building was always required by CITY's Plumbing Code (§409 of the 1982 Uniform Plumbing Code) and Ordinance No. 1450, section 6-6, to have a backwater valve. The WGS Plaintiffs and their contractors failed to design for, install, or maintain the required backwater valve. (Vol. 6, Ex. 38, pp.1400-1401, ¶ 8.)

C. CITY Ordinances Required the WGS Plaintiffs to Install and Maintain a Backwater Valve

The WGS Plaintiffs' office building is located within the CITY limits and therefore subject to its land use and building regulations. (Vol. 2, Ex. 5, pp. 212–213.) When the building was constructed, these regulations included the 1982 editions of the Uniform Building Code and Uniform Plumbing Code, which the CITY adopted April 14, 1984, by Ordinance No. 1450. (Vol. 2, Ex. 5, pp. 214–215.) Section 409 of the Uniform Plumbing Code required the WGS Plaintiffs and their contractors who designed and constructed the building to determine if any plumbing fixture had a lower elevation than the overflow elevation of the next upstream manhole, and if so, to install and maintain a backwater valve. (Vol. 2, Ex. 5, p. 215, ¶ 17.) Although CITY building officials review plans and issue plumbing, building,

and other permits, and inspect construction for conformance to codes, they are not guarantors of all private construction and are not all-knowing. There is no evidence in this record that the plans submitted to the CITY by WGS Plaintiffs in 1985 and 1986 alerted CITY officials to the low elevation of this site in relation to the nearest manhole. In any event, it is plain that no backwater valve was installed on this property. (Vol. 6, Ex. 38, pp. 1400-1401, ¶ 8.)

The CITY considers its building regulations to be extremely important and therefore adopted an ordinance that states that buildings in violation of the CITY's building codes, including the plumbing code, constitute a public nuisance. CITY Ord. No. 1719 states that it is unlawful and declared a public nuisance for any person owning, leasing, renting, occupying or having charge or possession of any premises in the CITY to allow such premises to be in any condition in violation of Chapter 6 of the Oroville Municipal Code (pertaining to building regulations). (Vol.2, Ex.5, p.214-215; Vol.2, Ex.5, p.486-490.) Since plaintiffs' building was built in contravention of UPC §409 and remained so at the time of the incident, it was a public nuisance under the CITY's Municipal Code.

Responsibility for the maintenance and safety of private property remains with private property owners, bolstered by the requirements of their insurers. Indeed, the Government Claims Act immunizes cities and counties for liability for permitting and inspection work, lest the risk of public safety regulation be prohibitive and to avoid socializing all risk arising from the construction and maintenance of private property. (Gov. Code, §§ 818.2 [law enforcement immunity], 818.4 [permitting immunity], 818.6 [inspection immunity].)

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D. The WGS Plaintiffs Constructed Their Dental Offices in 1985 and 1986, Omitting a Backwater Valve

The WGS Plaintiffs constructed their building in 1985 and 1986, dividing it into three dental office suites. As is typical, they connected their building to the City's sewer main via a private lateral installed in that initial construction. (Vol. 2, Ex. 5, pp.213, 237.) The WGS Plaintiffs' immediate predecessor in title and agent for the site development, Gerald N. DeRoco, applied for the building permit to develop WGS Plaintiffs' building on August 3, 1985. (Vol. 2, Ex. 5, pp. 213, 227-229, 237.) He applied for a sewer connection approval five days later. (Vol. 2, Ex. 5, pp. 213, 237.) The CITY's building permit application form required owners and/or their contractors to affirm they would comply with all CITY building codes. The WGS Plaintiffs retained a civil engineer and licensed contractors, including a licensed plumbing contractor, to plan, design, and construct their building. (Vol. 2, Ex. 5, pp. 213, 272–274.) Nevertheless, these professionals omitted the necessary backwater valve on their building plans and the property for reasons not apparent in this record developed decades later. (Vol. 6, Ex. 38, pp. 1400-1401.)

CITY representatives do not survey elevations or investigate ground or sewer main elevations to determine if backwater valves are required on buildings. (Vol. 2, Ex. 5, p. 219, ¶ 32.) Surveying every private construction project would be costly and that cost, of course, would have to be recouped from those who develop, making development even more costly than it is. (See *County of Orange v. Barratt America, Inc.* (2007) 150 Cal.App.4th 420 [generally discussing cost recovery via building permit fees as controlled by statute].) Accordingly, like most cities and counties, the CITY relies on developers and their professional contractors to comply with construction codes and to develop the site survey and other data necessary to do so. CITY did not waive the WGS Plaintiffs' obligations to comply with codes generally and to install and maintain a backwater valve specifically. (Vol. 2, Ex. 5,

p. 219, ¶ 32.)

A professional survey performed for the CITY in discovery in this case established that the flood level rim of every plumbing fixture in the building is below that of the next upstream manhole cover. (Vol. 2, Ex. 5, pp. 348-349; Vol. 6, Ex. 40, pp. 1428-1429.) The lowest plumbing fixture has a flood level rim that is 2.39 feet below the next uphill manhole cover. (Vol. 2, Ex. 5, pp. 348-349.) Based on the survey, the WGS Plaintiffs' toilets would need to have been nearly four feet tall (taller than sink counters) to be above the next uphill manhole cover. WGS Plaintiff's property was an accident waiting to happen.

E. The 2009 Sewer Backup

The WGS Plaintiffs occupied their property from1986 until December 29, 2009, without any apparent incident or problem associated with their sewer lateral or the main sewer line. On December 29, 2009, however, sewage flowed from CITY's sewer main into the building's plumbing fixtures through WGS Plaintiffs' private lateral. The CITY's Public Works crew later discovered and removed a root mass in the sewer main between manholes JJ-10 and JJ-11, which partially blocked the line. A properly maintained and functioning backwater valve would have protected Plaintiffs' property, forcing wastewater to flow out of the next upstream manhole, where it could have been contained in the street. (Vol. 6, Ex. 40, pp. 1456, 1458–1459.) Indeed, the trial court specifically found no deficiency in the CITY's maintenance of its main, which had been inspected just months earlier, and concluded that the reasonable design of the CITY's sewer system - relying on manholes to protect property - was defeated by the absence of a backwater valve on the WGS Plaintiffs' property. (Vol. 4, Ex. 32, p. 1011.)

III.

STATEMENT OF THE CASE

The WGS plaintiffs and TDIC, their insurer appearing as a plaintiff in intervention, sued the CITY in inverse condemnation to recover their loss from the sewage overflow. They moved pursuant to Code of Civil Procedure 1260.040 for a determination of CITY's liability. This procedure, unique to eminent domain and inverse condemnation, allows an early determination of legal issues, including liability, by the court before a jury is empaneled. Akin to summary judgment, it is well described in *Dina v. People ex rel. Dept. of Transp.* (2007) 151 Cal.App.4th 1029 ("*Dina*"). The trial court granted the motions, finding CITY liable for inverse condemnation. (Vol. 4, Ex. 32, pp. 995-1011.) The case was set for jury trial on liability and damages on the remaining nuisance claim and damages on the inverse claim.

The CITY timely petitioned the Third District Court of Appeal for an appellate writ to review the inverse condemnation liability determination. That court issued an alternative writ and stayed the trial. After briefing and argument, the Court of Appeal issued an unpublished decision denying the writ and affirming the trial court's finding of liability against the CITY. The CITY's successful petition for review by this Court followed.

IV.

STANDARDS OF REVIEW

Generally, a trial court's factual findings are reviewed for substantial evidence and legal issues are reviewed de novo. (*Gutierrez v. County of San Bernardino* (2011) 198 Cal.App. 4th 831, 844 [review of non-suit on inverse

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claim].) "The application of the appropriate legal standard to the facts properly found by the trial court is a legal question." (*Ibid.*) *Dina, supra*, 151 Cal.App.4th at pp. 1047–1048, applied non-suit standards on review of an Order under Code of Civil Procedure section 1260.040, accepting as true all facts asserted in an opening statement and indulging inferences from those facts to determine that no substantial evidence could support a judgment for the plaintiff. Yet, there, as here, the stringent standard of review still permits a ruling for the defendant agency when the law will not permit liability on the facts shown.

In any event, the issues on review here do not turn on disputed facts. It is plain that a blockage occurred in the CITY's main, sewage overflowed into the WGS Plaintiffs' properties, and plaintiffs would have come to no harm had they installed and maintained a backwater valve as required by law.

V.

LEGAL ARGUMENT

A. *CSAA* Established Confusing and Erroneous Standards for Inverse Condemnation Liability in Sewage Overflow Cases

1. *CSAA*'s "Failed to Function as Intended" Test is Erroneous, Particularly in Sewage Backup Cases Where Backwater Valves are Legally Required but Missing from Private Property.

CSAA primarily applied flood control case law to address legal requirements for imposing liability against a public entity in a sewer backup context. *CSAA* did not involve the issue of a legally required but missing backwater valve (which is at issue here). Elsewhere in this brief, we explain why the CITY is not liable even if the "failed to function as intended" test were to apply. However, first, and most fundamentally, the "failed to function as intended" test should not apply to sewage backup cases.

The general rule of inverse condemnation 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 ("*Albers*").) Flood control cases are an exception because flood control measures are intended to protect land historically subject to flooding, and they 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 or 20-year storm, i.e., the levee does not function as intended and the entity had acted unreasonably. (See *Belair*, supra at 47 Cal.3d 550 556-561; *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 454 ("Bunch"); also see *Biron v. City of Redding* (2014) 225 Cal. App. 4th 1264 ("*Biron*").)

This unique standard for flood control cases should not apply here. After all, if the design of the sewer system was to overflow into plaintiffs' property, such would manifestly be an inverse condemnation taking. It cannot also be true that a taking occurs if the overflow into plaintiffs' property occurs because the system fails to function as intended due to plaintiffs' non-compliance with established state and local building codes. If a city were liable for an overflow caused either by the system failing to function as intended or by the system functioning as intended, the city would always be liable, even if its design is (as here) specifically defeated by the very plaintiffs making a claim.

The fundamental necessary element 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, cases subsequently discussing *Pacific Bell's* theory of inverse condemnation, and cases prior to *Pacific Bell*, would be irrelevant. (See e.g. *Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848 ("*Tilton*"); and *Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722 ("*Arreola*"); see also *Paterno v. State of California* (1999) 74 Cal.App.4th 68 ("Paterno"); *Hayashi v. Alameda County Flood Control* (1959) 167 Cal.App.2d 584 ("*Hayashi*".)

By applying *Belair's* "failed to function as intended" test to sewage backup cases without the attendant requirements of an independent force and unreasonable conduct by the public entity, *CSAA* and the lower courts in this case have created a type of super inverse condemnation liability in which the public entity is always liable, regardless of whether the public improvement functions as intended or does not function as intended, and even if the public entity acts reasonably and the plaintiff acts unreasonably (and unlawfully). Certainly that cannot and should not be the law.

2. *CSAA* Confused the Cause of Sewer Backup with the Cause of Harm to an Inverse Condemnation Plaintiff

The decisions for the WGS Plaintiffs below extend and misapply *CSAA*. The lower courts erred because they focused on the cause of the sewer blockage, rather than the cause of the damage to Plaintiffs — the issue which animates inverse condemnation law. The *CSAA* parties disputed the cause of the sewer blockage. (*Id.* at pp. 481–483.) However, the Court of Appeal twice acknowledged that "[h]ow or why the blockage occurred is irrelevant." (*Id.* at pp. 483, 484.) The relevant inquiry is whether the blockage in the City's sewer main caused sewage to back into the plaintiff's home. (*Ibid.*) It is *CSAA*'s unfortunate language that invites this

confusion:

> But our Constitution does not require that [proof of how a blockage occurred]. 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.'" (*Belair, supra*, 47 Cal.3d at p. 559.) In this case, there was a substantial cause and effect relationship between factors entirely within the City'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, quoting *Belair v. Riverside County Flood Control Dist.* (1989) 47 Cal.3d 550.)

The *CSAA* court found Palo Alto liable because it could not show that other forces alone produced plaintiff's damage. However, *CSAA* did not involve the issue of a missing but legally required backwater valve. In the context of this case, blockages, in and of themselves, will not cause harm to users if legally required backwater valves are in place and maintained. This is because the system is engineered so that when backups occur, effluent should either stay within the main line or overflow safely through the upstream manhole into a public right of way. The system function is reliant on compliance with backwater valve codes. Thus, CITY urges this Court to clarify *CSAA* by noting that government is not liable in inverse condemnation unless its actions or inactions legally cause the plaintiff's damages.

Indeed, the *CSAA* court found:

> CSAA did everything in its power to address the [plaintiff] McKenna's plumbing issue, even going so far as to replace the entire lateral pipe from McKenna's home to the City's sewer main, including the portion owned and operated by the City. 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 City. CSAA should not also be required to pay the costs of damages as a result of a blockage in the City main over which CSAA had no control.

(*Id.* at 484.)

Because there was no backwater valve required for the property in *CSAA* (at least the issue was not raised), it seems the system did function as designed – a backup in the main overflowed to the next available upstream opening. Unfortunately for the *CSAA* plaintiff, that opening was in a private building. In *CSAA*, Palo Alto should have been deemed liable because its improvements were functioning as designed and caused damage, not because its improvements failed to function as designed.

The *CSAA* language invites error and confusion. There, the plaintiff property owners did all the law requires and more to protect their property from sewer system overflows. In stark contrast, WGS Plaintiffs failed to install and maintain the backwater valve essential to the design of the CITY's (indeed, most) sewer system. Here, Oroville's design and maintenance was proper and it was the WGS Plaintiffs' code violation that turned an ordinary sewer blockage and backup within the main line into a damaging overflow event.

The lower courts here did precisely what *CSAA* should say the law prohibits. They focused on the cause of blockage rather than the cause of the WGS Plaintiffs' damages – assuming that a sewer system backup is necessarily the cause of damages – thereby imposing what amounts to strict liability for sewer system overflows if blockage occurs in the public line.

Illustrative of the confusion caused by *CSAA*, the Third District noted the failure to install the backwater valve did not cause the blockage: "In our case, the property owner's failure to install a backup valve did not cause blockage in the City's sewer main." (Slip Op. at p. 13.) The court of appeal did not consider or focus

on Plaintiffs' failure to install and maintain the legally required backwater valve as being the cause of their damage here. Indeed, the court of appeal even suggests that CITY was at fault for not having prevented WGS Plaintiffs' substandard construction (Slip Op, at p. 19), ignoring the broad social policies reflected in tort immunities, which do not require the government to guarantee the code compliance of every private structure. True, tort immunities may not apply in inverse condemnation, but society's need to allow government to regulate construction, without insuring it, is compelling in both settings.

Properly looking to the cause of damage rather than the cause of a sewer line blockage reverses the outcome here. Had the WGS Plaintiffs installed and maintained the legally required backwater valve, they would have suffered no damage. Indeed, the court of appeal acknowledged the trial court's finding that the CITY's documents "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 back up that occurred." (DCA Slip Opinion at p. 6; Vol. 4, Ex. 32, p. 1007.)

This distinguishes *CSAA*. The absent backwater valve in this case is a logical and probable "other force" which alone could and did produce the injury (not the backup, but the overflow into the plaintiffs' building and resultant damages) under long-standing inverse condemnation standards. (*CSAA, supra*, 138 Cal.App.4th at p. 484 [quoting *Belair, supra*, 47 Cal.3d at p. 559].) The trial court's finding here that the absent but legally required backwater valve "probably would have prevented the sewage backup that occurred" (Vol. 4, Ex. 32, p. 1007) precludes a finding that the blockage in the CITY's sewer main was "a substantial cause-and-effect relationship which excludes the probability that other forces alone produced the injury.'" (*CSAA, supra*, 138 Cal.App.4th at p. 484.) The WGS Plaintiffs suffered harm not because the sewer main backed up, but because they

failed to install and maintain an inexpensive valve that would have protected their property and was a premise of the design of the CITY's sewer system. Under the circumstances presented, Plaintiffs' failure to install and maintain the BWV should be deemed the intervening and superceding cause of their damages.

This Court articulated the causation standard of inverse condemnation in *Albers, supra,* 62 Cal.2d at p. 263–264. As *CSAA* renders the *Albers* rule: "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." (*CSAA, supra*, 138 Cal.App.4th at p. 479 (citing *Albers, supra*, 62 Cal.2d at pp. 263–264).) *Albers* distinguishes inverse liability from that in tort and the rule remains that "damage caused by the public improvement as deliberately conceived, altered or maintained may be recovered." (*Ibid.* citing *Barham v. Southern California Edison Co.* (1999) 74 Cal.App.4th 744).)

As inverse law developed, the causation analysis *Albers* articulated as damage proximately caused by a public improvement as deliberately designed and constructed proved problematic in its combining of the tort concept of proximate cause while also eliminating foreseeability as an element of an inverse claim. Thus, this Court adopted in *Belair* a recommendation of Professor Van Alstyne's generative article *Inverse Condemnation: Unintended Physical Damage* (1969) 20 Hastings L.J. 431, 435–438 and restated the standard to require "'a substantial' cause and effect relationship [which] exclude[es] the probability that other forces alone produced the injury." (*Belair, supra*, 47 Cal.3d at pp. 558–559.)

To establish a causal connection between the public flood control improvement at issue in *Belair* and the plaintiff's flooding damages, a setting in which other forces commonly contribute to the damage, this Court rendered the standard as thus:

> Where independently generated forces not induced by the public flood control improvement — such as a rainstorm — contribute to the injury, proximate cause is established where the public improvement constitutes a substantial concurring cause of the injury, i.e., where the **injury** occurred in substantial part because the improvement failed to function as it was intended. The public improvement would cease to be a substantial contributing factor, however, where it could be shown that the damage would have occurred even if the project had operated perfectly, i.e., where the storm exceeded the project's design capacity. In conventional terminology, such an extraordinary storm would constitute an intervening cause which supersedes the public improvement in the chain of causation.

(*Id.* at pp. 559–560, emphasis added.)

Under inverse condemnation doctrine as historically developed by this Court, causation focuses on the causes of the plaintiff's damage, not the cause of flooding, be it a rainstorm or a blocked sewer line.

3. The Lower Courts Misinterpret *CSAA* to Impose Strict Liability

The lower court rulings effectively impose strict liability on municipalities for sewer backups, although *CSAA* warns against doing so. (*CSAA, supra*, 138 Cal.App.4th at p. 484 ["Our discussion should not be taken as converting an inverse condemnation claim into a solely strict liability concept."])

Here, the WGS Plaintiffs never alleged or claimed that their damages were caused by the deliberate design or construction of a public work operating as intended — this Court's long-standing test of inverse condemnation liability. (*Albers, supra,* 62 Cal.2d at p.261–262.) To the contrary, the WGS Plaintiffs and the trial court confirmed on a motion for summary judgment that this case alleges no defect in the design or construction of CITY's sewer. (Vol. 2, Ex. 9, p. 432; Vol. 3, Ex. 9, pp. 588–589.)

Nor did the WGS Plaintiffs offer admissible evidence that CITY allocated risk to private property owners by deliberately adopting a deficient plan of

maintenance — another element of inverse condemnation liability. (E.g., *Arreola, supra,* 99 Cal.App.4th at 742 ["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. [Citations.] That is why simple negligence cannot support the constitutional claim."].)

Absent such allegations and proof, liability cannot be established here. Mere negligence in the maintenance or operation of public works does not suffice to establish inverse condemnation liability. (E.g., *Arreola, supra,* 99 Cal.4th 722 [blocked drainage channel]; *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, supra,* 81 Cal.App.4th 596 [same].)

Using *CSAA* to apply strict liability, as the lower courts did here, is especially inappropriate given the unique facts of that case — a **faultless plaintiff** that did everything possible to prevent a repeated sewer backup into his home, installing an entirely new private sewer lateral, and repairing part of the city's line shortly before the backup. (*CSAA, supra,* at p. 484.) The trial court there also determined the city's main was not laid at a sufficient slope — a defect in design or construction. Here, the facts are the reverse. The trial court found that "a backwater valve device was a necessary part of the sewer design and plan." (Slip Op. at p.7; Vol. 4, Ex. 32, p. 1011.) City had a maintenance plan in place. There was no concern with the design or construction of the sewer main. In sum, The WGS Plaintiffs' code violations caused their damages by defeating the CITY's sewer system design.

4. *CSAA* Inadvertently Makes the "Failed to Function as Intended" Test a Rule of Strict Liability

Despite its precaution against doing so, some lower courts are using the ambiguous nature of language in *CSAA* to apply what amounts to strict liability for sewer system overflows if a blockage occurs on the government's side of the

private-public sewer connection. *CSAA* stated that it was not applying strict liability because the homeowner "had the duty to demonstrate the actual cause of the damage to him." (*CSAA, supra*, 138 Cal.App.4th at p.484.) But one must always prove causation, even for strict liability.

As set forth above, the CITY believes the "failed to function as intended" test should be limited to flood control cases. But even if this Court extended the rule to sewer overflow cases, the CITY should still prevail. Flood control cases teach that general inverse condemnation liability arises only when a public project causes damage while functioning as intended. (*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 261-262.) The core idea is that a design that has the consequence of harming private property ought to socialize the cost of the harm. However, this Court developed a rule to encourage public entities to build flood control projects despite potential exposure to inverse condemnation claims; the entity is not liable if damage is caused because a storm exceeds a flood project's design. However, the public entity risks liability if the levee fails against a storm within its design capacity, i.e., if the levee does not function as intended and the entity had acted unreasonably. (E.g., *Belair, supra*, 47 Cal.3d at pp. 556–561 [levee failed to contain flood within its design capacity]; *Bunch, supra,* 15 Cal.4th at p. 454 [flood control failure subject to reasonableness analysis]; *Biron, supra,* 225 Cal. App. 4th 1264 [same]).

Moreover, *Belair*'s "failed to function as intended" test applies only when an independent force, such as a rainstorm, overwhelms a flood control system and contributes to the injury. (*Belair, supra*, 47 Cal.3d at pp. 555–560.) Here, the WGS Plaintiffs' failure to install the required backwater valve caused their injury and there was no "independent force." Thus, the "failed to function as intended" test does not apply. Furthermore, liability under the "failed to function as intended" test

requires a finding the CITY acted unreasonably. (*Belair, supra*, 47 Cal.3d at pp. 555–560.) Yet, this was not proved. (Vol. 2, Ex. 9, p. 432; Vol. 3, Ex. 9, p. 589.)

CSAA has proven difficult to apply given its unique facts and confusing language. Damage caused by a sewer system, designed to overflow into plaintiffs' property, would manifestly be an inverse condemnation taking; the system would be using private property to achieve a public end. This is not the case here, where CITY's sewer system is designed to depend on the WGS Plaintiffs' compliance with a code requirement to install and maintain a relatively inexpensive backwater valve. 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, it will always be liable, even if plaintiffs act to defeat its design. This amounts to strict liability and socializes every loss even when the sewer agency acts reasonably and the plaintiff acts unreasonably, violating the law. If such were the rule, *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 607 need not have held that inverse liability arises from a "replace it when it breaks" maintenance attitude; the water main break there would alone have sufficed for liability. *Pacific Bell* and cases imposing similar constraints on liability would be surplusage, as well. (E.g., *Tilton, supra,* 142 Cal.App.4th 848; *Paterno, supra,* 74 Cal.App.4th 68; *Hayashi, supra,* 167 Cal.App.2d 584; *Arreola, supra*, 99 Cal.App.4th 722.)

5. CITY Prevails Even Under The "Failure to Function as Intended" Test If Applied to Account for Sewer System Designs Which Assume Plumbing Code Compliance

On this record, the CITY should prevail if the lower courts' erroneous reading of *CSAA* to impose strict liability is addressed. The trial court's final Ruling and Order include these findings:

- "...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. 1011, lines 22-25.)

- "Damages will reflect both the primary and significant secondary causes of the backup of sewage into the building." (Vol. 4, Ex. 32, p. 1012, lines 4-5)
- "...there is no showing of any such negligence by any City employee or contractor"; (Vol. 4, Ex. 32, p. 1011, lines 9-10.)
- "The City's evidence shows a plan of maintenance was in effect and was being followed." (Vol. 4, Ex. 32, p.1011, lines 10-12.)
- The trial court recognized the code requirement for backwater valves: "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. 240, 268.)

The failure of the WGS Plaintiffs and their contractors to install and maintain a code-required backwater valve defeated the design of the CITY's sewer system as deliberately designed and constructed. The missing backwater valve was the cause of the WGS Plaintiffs' harm. The system design anticipates the ordinary operation of the forces of gravity and hydraulics to carry backed up effluent away from code-compliant low-lying properties protected by backwater valves to emerge and overflow, if necessary, through upstream manholes maintained for that purpose. (Vol. 1, Ex. 2, p. 22, lines 23–26; Vol. 2, Ex. 5, pp. 218, 346; Vol. 5, Ex. 36, p. 1057, lines 25–28.)

Thus, when the subject incident which prompted this suit occurred in 2009, Oroville's sewer main was functioning as designed. Sewage entered the Dental Complex property only because the WGS Plaintiffs and their contractors failed to comply with ordinances requiring them to install and maintain a backwater valve on

their private lateral line. Stated differently, the WGS Plaintiffs' failure to install and maintain a backwater valve resulted in CITY's sewer system **not** functioning as designed and constructed, diverting flow from the manhole designed to accommodate it, to their private property, causing the harm of which they complain here. The absence of a backwater valve was not an "additional cause," but **the** cause of their injury. But for the missing valve, an overflow might have occurred elsewhere, but wastewater would not have entered their building.

Here, the trial court and Third District 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 addressing the missing but legally required backwater valve which is integral to the design and operation of the sewer system. CITY contends the missing backwater valve was or should be the sole legal cause of all damages complained of. CITY believes that ambiguity created by the *CSAA* decision in a sewer backup case that did not even involve a missing backwater valve, and which borrows flood control cases as the basis for its reasoning, should be resolved by this Court's strong rejection of the "failed to function as intended" test for sewer backup cases. However, if this Court applies any portion of the "failed to function as intended" test for sewer backup cases, it should also adopt additional requirements for that test under which City should still prevail.

6. Inverse Condemnation Should Not Apply Where Plaintiffs' Damages Were Not Caused by A Deliberately Deficient Plan of Maintenance

Case law developed in the storm water flooding context is instructive here. Inverse condemnation requires some proxy for use of private land for public benefit; more than mere negligence in the maintenance of public facilities. As *Arreola* explains in a case arising from a flood control channel blocked by vegetation:

> To be subject to liability in inverse condemnation, the governmental action at issue must relate to the "public use" element of article I, section 19. "Public use"" is the threshold requirement. (Cal. Const., art. I, § 19.) .... [para] 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." [Citations.] That is why simple negligence cannot support the constitutional claim.

(*Arreola, supra,* 99 Cal.App. 4th at 742.)

Bauer v. Ventura County (1955) 45 Cal.2d 276, 286 (overruled on other grounds by *Belair)* is to similar effect:

> The plaintiffs, as stated, also allege that the collection of debris and stumps in the [drainage 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 under [predecessor to art. I, § 19.]

If damage occasioned by a backup due to the unintended clogging of a ditch in *Bauer* is not an inverse condemnation taking, nor is plaintiffs' injury by the unintended partial clogging of CITY'S sewer line and the failure of plaintiffs to comply with liability and plumbing code requirements.

Tilton cites additional cases, all confirming that damages resulting from negligence in routine operations does not give rise to liability in inverse condemnation. (*Tilton, supra,* 142 Cal.App.4th at 855–859.) Rather, such liability arises only if the injury is a necessary consequence of the public project design. (*Id.* at p. 857.) What *Tilton* refers to as "garden variety inadequate maintenance" does not suffice. (*Id,* at pp. 858-859.)

Paterno, supra, 74 Cal.App.4th at 88 continues this line of authority:

> To repeat, "deliberate" action invokes takings liability, where, and only where, the deliberation is **by a public entity**, not by an employee: "Damage resulting from negligence in the routine operation having no relation to the function of the project as conceived is not within the scope of the rule applied in the present case." (*Bauer, supra,* 45 Cal.2d at p. 286, quoted in *Customer Co. v. City of Sacramento* (1995), 10 Cal.4th [368] at p.382 ["*Customer Co.*"].) (Emphasis original.)

(See also *Pacific Bell, supra,* 81 Cal.App.4th at 608-609 [simple negligence "does not create a claim in inverse condemnation"]; *McMahon's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App. 683, 695–696 ["In order to hold a public entity liable, maintenance must involve '**a deliberate act** which has as its object the direct or indirect accomplishment of the purpose of the improvement as a whole.'" (Emphasis added.)].

Paterno also held that inverse condemnation plaintiffs "must prove that an unreasonable plan caused the failure ...An injury resulting from a violation of the project plans is not a result of the 'public use' for which the project was created." (*Paterno, supra,* 74 Cal.App.4th at p.86, emphasis added). For "shoddy maintenance" to rise to a taking, a plaintiff must show an unreasonable maintenance plan (such as "replace it when it breaks"), not merely poor execution of a reasonable plan. (*Id.* at p. 87; see also *Customer Co., supra,* 10 Cal.4th at pp. 381-382.)

Tilton, McMahon and Paterno each make clear that inverse condemnation liability can be established only by proof that a public agency deliberately adopted a deficient design or plan of maintenance that causes expected injury to a claimant's property. There is no such proof in this record. CITY developed a comprehensive Sewer System Management Plan ("SSMP") under the force of Regional Water Quality Control Board regulations over a course of years, adopting it a month before the spill here. (Vol. 3, Ex. 9, pp. 504–548.) Consequently, the CITY's adopted maintenance program was not a legal cause of plaintiffs' damage. (Vol. 3, Ex. 9, pp.

504–507; Vol. 4, Ex. 32, p. 1011.) Moreover, the trial court found the CITY was not even negligent here. (Vol. 4, Ex. 32, p. 1011.) The CITY maintained the subject sewer line only two months before the spill; there is no evidence of "shoddy maintenance" here. (Vol. 2, Ex. 9, pp. 439–443; Vol. 4, Ex. 32, p. 1011.) The trial court found: "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." (Vol. 4, Ex. 32, p.1011, lines 9–12.) This record shows almost 25 years of incident-free service to the WGS Plaintiffs' property and a one-time backup — in contrast to the multiple spills and extraordinary protective efforts by the plaintiff in *CSAA*.

Thus, CITY should not be liable for inverse condemnation. There is no evidence of a deliberately deficient plan by which CITY took a calculated risk of sewer overflows into the WGS Plaintiffs' dental offices. Instead, the CITY's plan was to prevent such injury by private property owners' anticipated compliance with the Uniform Plumbing Code requirement for a backflow valve. Absent such a deliberate and deficient maintenance plan, poor maintenance of a sewer line would, at most, be negligence, not inverse condemnation. The contrary result below makes the CITY an insurer of private plumbing design and maintenance, and eliminates the need for private insurance like the WGS Plaintiffs had here.

B. The Reasonableness Analysis of Storm Flooding Cases Provides an Alternative Analysis Which Also Counsels Reversal

Citing *CSAA* and WGS Plaintiffs' arguments from that case, the trial court concluded "whether or not the City acted reasonably is irrelevant to determining liability." (Vol. 4, Ex. 32, p. 1006, lines 19-21.) However, the reasonableness test first articulated in *Belair* and most recently applied in *Biron, supra,* 225 Cal.App.4th 1264 provides an alternative reason to reverse here.

1. This Court's Reasonableness Test Applies Broadly to Flood Control, Water Main, and Storm Drain Cases

This Court's precedents developed the reasonableness rule to protect public entities from liability that disserves the purposes of the inverse condemnation provision of our Constitution. The rule has two sources: *Belair* and *Keys v. Romley* (1966) 64 Cal.2d 396.

First, after this Court articulated the reasonableness rule in *Belair*, it has evolved to govern water damage cases. Unless inverse liability against CITY is rejected pursuant to other arguments above, CITY respectfully urges this Court to extend reasonableness requirements to all wastewater flooding cases, particularly in cases where, as here, plaintiffs' failure to install a code-required backwater valve caused the damage.

Belair's "failed to function as intended" test, which animates *CSAA,* was developed in that, and other, flood control cases. While *CSAA* applies the "failed to function as intended" aspect of *Belair*'s causation analysis, it overlooked the accompanying reasonableness test that protects a public agency from inappropriate consequences, not least because *CSAA*'s facts could not sustain such a defense. *CSAA* analyzed the plaintiff's conduct for reasonableness and concluded that the owner did everything in his power to prevent repeated sewer backups and concluded there was "nothing more CSAA could do to protect the homeowners from sewage backup." (*CSAA, supra,* 138 Cal.App.4th at p. 484.)

Belair considered whether an inverse plaintiff may recover damages when a flood control levee failed to retain waters within its design capacity. This Court concluded plaintiffs could not recover without proof the defendant agency acted unreasonably. (*Belair, supra*, 47 Cal.3d at 554.) *Belair* sought to harmonize inverse condemnation causation principles with tort principles governing the conduct of upstream and downstream property owners as to water flow. It applied a

reasonableness rule to claims arising when a flood control improvement failed to perform within its design capacity. (*Id.* at p. 562.) This Court concluded there:

> ...that when a public flood control improvement fails to function as intended, and properties historically subject to flooding are damaged as a proximate result thereof, plaintiffs' recovery in inverse condemnation requires proof that the failure was attributable to some unreasonable conduct on the part of the defendant public entities.

(*Id.* at p. 567.)

Belair rejected the claim that failure of the levee to contain a storm within its design aspirations constituted a substantial concurring cause of plaintiff's damage necessitating liability, apart from any unreasonable act or omission by the defendant government. (*Belair, supra*, 47 Cal.3d at p. 562.) "The reasonableness of the public agency's conduct must be determined on the facts of each individual case, taking into consideration the public benefit and the private damages in each instance." (*Id.* at p. 566 (citing *Keys v. Romley* (1966) 64 Cal.2d 396, 409–410 ("*Keys*") [tort claim for flooding arising from actions of private property owner].) The constitutional core of inverse condemnation liability is the idea that a private individual ought not to bear a disproportionate share of the costs of a public improvement. (*Id. at p. 558* [citing *Holtz v. Superior Court* (1970) 3 Cal.3d 296, 303].)

The second source of the reasonableness rule is *Keys*, in which this Court articulated the tort standard applicable to the behavior of upstream property owners as to the discharge of water affecting property downstream, rejecting an earlier "common enemy" rule allowing every property owner to fend off flooding without regard to the impact on neighbors:

> No party, whether an upper or a lower landowner, may act arbitrarily and unreasonably in his relations with other landowners and still be immunized from all liability.

> It is therefore incumbent upon every person to take reasonable care in using his property to avoid injury to adjacent property through the flow of surface waters. Failure to exercise reasonable care may result in liability by an upper to a lower landowner. It is equally the duty of any person threatened with injury to his property by the flow of surface waters to take reasonable precautions to avoid or reduce any actual or potential injury.

(*Keys, supra,* 64 Cal.2d at p. 409.)

This analysis balances the reasonableness of the conduct of the parties. While a lower property owner need not take affirmative steps to alter the flow of water, he or she must act reasonably. As this Court more recently applied the rule in an inverse case:

> The issue of reasonableness becomes a question of fact to be determined in each case upon a consideration of all the relevant circumstances, including such factors as the amount of harm caused, the foreseeability of the harm which results, the purpose or motive with which the possessor acted, and all other relevant matter.

(*Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 359 ("*Locklin*".)

Under this reasonableness analysis, the social utility of an upper owner's conduct is balanced against the burden that conduct imposes on lower owners. More often than not, a lower owner's unreasonable conduct will consist of affirmative conduct increasing the danger to his property – rather than passive failure to protect his or her property. However, a "downstream owner must take reasonable measures to protect his property. Liability on an inverse condemnation theory will not be imposed if the owner has not done so." (*Locklin, supra,* 7 Cal.4th at p. 338.) In *Keys*, for example, the plaintiff had removed a dirt wall, permitting his land to be flooded. This Court held that this act must be weighed against the defendants conduct to make a finding on the issue of reasonableness. (*Keys, supra,* 64 Cal.2d at 411.)

Precedent applies this rule of reason in disparate circumstances. In *Locklin*, this Court noted the rule was broad and applied it to the discharge of surface waters onto adjoining land or into a natural watercourse. (*Locklin, supra,* 7 Cal.4th at p. 357.) *Locklin* articulated the rule in these terms: "no party, whether an upper or a lower landowner, may act arbitrarily and unreasonably in his relations with other landowners and still be immunized from all liability." (*Id.* at 351.) *Locklin* also identified six factors to be considered in evaluating reasonableness:

(1) "The overall public purpose being served" by a public project;

(2) "the degree to which the plaintiff's loss is offset by reciprocal benefits;"

(3) "the availability to the public entity of feasible alternatives with lower risks;"

(4) "the severity of the plaintiff's damage in relation to risk-bearing capabilities;"

(5) "the extent to which damage of the kind the plaintiff sustained is generally considered as a normal risk of land ownership; and"

(6) "the degree to which similar damage is distributed at large over the other beneficiaries of the project or is peculiar only to the plaintiff."

(*Locklin, supra*, 7 Cal. 4th at p. 368–369.)

A plaintiff must also:

> ...demonstrate that the efforts of the public entity to prevent downstream damage were not reasonable in light of the potential for damage posed by the entity's conduct, the cost to the public entity of reasonable measures to avoid downstream damage, and the availability of and cost to the downstream owner of means of protecting that property from damage.

(*Id.* at 369.)

This Court subsequently applied *Locklin*'s standards "to all cases involving unintentional water runoff, whether they involved facilities designed to keep water

within its natural course or designed to divert water safely away from a potentially dangerous natural flow." (*Bunch, supra,* 15 Cal.4th at p. 439.)

Most recently, *Biron, supra,* 225 Cal.App.4th at pp. 1272, 1276 applied *Locklin*'s reasonableness test to claims for storm water intrusions caused by a City's storm drain system, which did not discharge surface waters into a natural watercourse and which was not a flood control project protecting lands historically subject to flooding.

If applied here, *Locklin*'s factors weigh heavily in favor of CITY rather than Plaintiffs for several reasons. (1) The overall public purpose of a sanitary sewer system is manifestly important. (2) The loss to the WSG Plaintiffs is easily outweighed by reciprocal benefits - their property would be worthless for its intended use without sewer service. (3) There is no evidence the CITY could have feasibly eliminated the need for code-compliant backwater valves in low-lying properties - it is, indeed, impossible under the laws of gravity. (4) The damages to the WGS Plaintiffs were extra-ordinary because of the high value of a suite of three dental offices. However, that property was insured to the extent of its value and the WGS Plaintiffs and their insurer were able to bear a risk that occurred only once in 25 years and need not have occurred at all. (5) The risk of damage to property arising from a failure to install and maintain a code-required safety device can be understood as a normal risk of land ownership. (6) Plaintiffs could and should have avoided the loss entirely by complying with laws requiring the installation and maintenance of the inexpensive backwater valve on their property.

Those who maintain faulty electric wiring risk loss to fire. So, too, those who install faulty plumbing or fail to install necessary protective devices such as a backwater valve bear the risk of sewer overflows. For this same reason, the risk of similar damage is wide-spread among all who fail to maintain their properties in compliance with mandatory safety features of the building codes. The Constitution

need not distinguish low-lying property owners with sewer overflow risk from other property owners who bear risks arising from the absence of other safety features, whether they be domestic water backwater valves, electrical circuit breakers, etc.

Applying *Locklin*'s additional factors, the WGS Plaintiffs cannot persuade that the CITY's use of manholes in conjunction with code-required backwater valves on low-lying private property to protect private property was unreasonable in light of the potential for damage. When the costs of further action by the CITY (an engineering feat to overcome the laws of gravity) is weighed against the cost the WGS Plaintiffs would bear to install and maintain an inexpensive valve, the outcome becomes clearer still. *Biron* similarly concluded the plaintiffs there could have mitigated the risk of flooding by purchasing flood insurance and installing floodgates. (*Biron, supra*, 225 Cal.App.4th at p. 1278.)

Thus, the CITY acted reasonably in its design and maintenance of its sewer system, and the WGS Plaintiffs' maintained a public nuisance by constructing and maintaining their property without the safeguards required by law. The consequence of the WGS Plaintiffs' decision to flout code requirements by not installing a backwater valve should not be socialized through sewer fees burdening all of the public. They, their insurers, and the professional liability insurers of the engineers and contractors who designed and built their property are better incentivized to prevent such losses if they bear the risk of them. Socializing the risk creates perverse incentives - why install a cheap valve that requires maintenance if the CITY must insure the risk at no cost to you? Why would an insurer bother to ensure its insureds comply with Plumbing Codes if complete reinsurance from the public at large is cost-free?

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2. Sound Public Policy Supports Applying *Locklin*'s Rule of Reason to Missing Backwater Valve Cases and Determining As A Matter of Law That Inverse Liability Does Not Apply

Belair explains that inverse condemnation liability ultimately rests on the idea that a private property owner ought not to bear a disproportionate share of the costs of an improvement that benefits the public in general. (*Belair, supra*, 47 Cal.3d. at p. 558 (citing *Holtz v. Superior Court* (1970) 3 Cal.3d 296, 303.) As *Biron* explained, "[i]n considering inverse condemnation liability, courts must balance the interests of property owners who should not be required to contribute more than their fair share to the public undertaking, with the 'possibility that imposing open-ended liability on public entities charged with creating and maintaining flood control improvements will discourage the development of needed public works.'" (*Biron, supra*, 225 Cal.App.4th at 1276.) This rationale is particularly applicable to sewer systems where a property owner can easily install and maintain an inexpensive backwater valve that would have prevented any damage, especially when assisted by licensed contractors and insurers, as were the WGS Plaintiffs here.

Just as this Court developed inverse condemnation law in cases involving flooding by storm water based upon "prior case law, public policy and common sense," it should do so in this sewer overflow case.

As *Belair* explains:

> Thus, while we recognized in *Albers* that strict inverse condemnation liability may not be appropriate in the case of flood control improvements, we emphasized in *Holtz* that such improvements should not be cloaked with the same immunity as private flood control measures. The question, therefore, is *what* standard applies in such cases. We draw the answer from prior case law, public policy and common sense.
> On the one hand, a public agency that undertakes to construct or operate a flood control project clearly must not be made the absolute insurer of those lands provided protection. On the other

> hand, the damage potential of a defective public flood control project is clearly enormous. Therefore, as we observed in *Holtz*, the courts have consistently held that "even when a public agency is engaged in such 'privileged activity' as the construction of barriers to protect against floodwaters, *it must [at least] act reasonably and non-negligently*. [Citations.]" (*Holtz v. Superior Court, supra*, 3 Cal.3d at p. 307, fn. 12, 90 Cal.Rptr. 345, 475 P.2d 441, italics added; see also *Shaeffer v. State of California, supra*, 22 Cal.App.3d at p. 1021, 99 Cal.Rptr. 861.) Contrary to plaintiffs' position, the fact that a dam bursts or a levee fails is not sufficient, standing alone, to impose liability. However, where 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 constituted a substantial cause of the damages, plaintiffs may recover regardless of the fact that the project's purpose is to contain the "common enemy" of floodwaters.

(*Belair, supra*, 47 Cal.3d at pp. 564-565 [abridgements and emphasis by *Belair* court].)

These considerations arise in inverse condemnation cases under both the California and federal Constitutions. (*Belair, supra*, 47 Cal.3d at p. 565; *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 124–125, [reasonableness a factor in inverse condemnation under the federal Constitution]; *Armstrong v. United States* (1960) 364 U.S. 40, 49 [federal takings clause does not obligate individual property owners to bear burdens the public should bear].)

These policy arguments also support a similar rule in missing backwater valve and other sewage intrusion cases:

- The rationale for permitting immunity under Government Code sections 818.2, 818.4 and 818.6 - without it, government would be the de facto insurer of all private property, displacing private insurance, and disincentivizing essential public safety regulation.

- The inevitability of occasional sewer system overflows and the great lengths sewer system agencies go to prevent backups is based not only on good public policy, but on mandatory penalties imposed under state and federal clean water laws for such spills, even if quickly mitigated in rights of way before they flow to the environment. (E.g. *Department of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749 [considering reimbursable mandates for storm-sewer management under state and federal clean water laws].) Thus, inverse condemnation liability for sewer system overflows need not be strict to incentivize reasonable behavior by sewer system agencies.
- The moral hazards and perverse incentives created for private property owners and those who design and build private construction facilities, and their insurers, should be avoided as a matter of public policy. Government entities should not bear strict liability for sewer overflows when private property owners can mitigate the risk of incurring damages at much lower social cost, absent clear fault on the part of public entities. Here, where private parties are not in compliance with basic building and plumbing code requirements to install and maintain a backwater valve to protect their property, no policy consideration supports inverse condemnation liability. To the contrary, social policy and fairness to the public at large weigh heavily in favor of avoiding strict liability claims against public entities under these circumstances presented.

C. The Court Might Add a Plaintiff's Failure to Act Reasonably to Mitigate Damages to the *Locklin* Reasonableness Analysis

Another modest extension of *Locklin*'s principles would further justify reversal here. The CITY ought not be required to socialize this loss given the WGS Plaintiffs' complete failure to take reasonable — indeed, legally required — steps to protect their property. Put differently, the WGS plaintiffs' code violation was the

substantial cause of their injury, defeating their inverse claim. Again, we analogize to common law, as did *Belair* and *Locklin*.

> The doctrine of mitigation of damages holds that '[a] plaintiff who suffers damage as a result of ... a breach of contract ... has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses which could have been thus avoided.'" (Citation.) Under the doctrine, "[a] plaintiff may not recover for damages avoidable through ordinary care and reasonable exertion." (Citation.) However, "[t]he duty to mitigate damages does not require an injured party to do what is unreasonable or impracticable." (*Citation.*)

(*Agam v. Gavra* (2015) 236 Cal.App.4th 91, 111.)

The requirement to mitigate damages applies to inverse condemnation, but has been limited to a requirement that a plaintiff offset damage once it has occurred. The general rule is that an owner whose property is taken or damaged by a public entity must take all reasonable steps available to minimize his loss. (*Albers, supra,* 62 Cal.2d at p. 269.)

The doctrine has typically allowed compensation for good faith efforts to prevent or minimize damage as it occurs or begins to manifest itself. (E.g., *CUNA Mutual Life Ins. Co. v. Los Angeles County Metropolitan Transportation Auth.* (2003) 108 Cal.App.4th 382, 399, (citing *Albers*.) As *Albers* explained, the rule serves the public interest because "the owner ... is ordinarily in the best position to learn of and guard against danger to his property" and is thereby encouraged to attempt to minimize the loss inflicted on him by the condemnation, "rather than to sit idly by and watch otherwise avoidable damage accumulate." (*Id.)* Why should this rule apply only to a property owner that is harmed? Why not apply the rule to a property owner who knows or is legally required to know of the potential for damage and the owner's obligation to prevent it? It makes little sense to expect reasonable behavior of inverse condemnation plaintiffs only after harm occurs, but

not when they might take reasonable steps to prevent harm in the first place, by complying with established Building and Plumbing Code requirements.

Since damage is a necessary element of the inverse condemnation claim, the Court should recognize a property owner's failure to prevent damages when he or she reasonably could do so as a complete defense to liability. This equitable rule of reason serves well recognized social policies to avoid perverse incentives and to minimize collective loss at minimal social cost. It ought not to be applied only to incentivize reduced damages; it ought to incentivize avoiding them completely. It ought not to be only a tool to compensate plaintiffs, but also a tool to hold them to reasonable standards of risk management as well.

VI.

CONCLUSION

The trial court found the installation and maintenance of a backwater valve was the WGS Plaintiffs' legal obligation. The code required "back water valve device was a necessary part of the sewer design and plan." (Vol. 4, Ex. 32, p. 1011.) Yet no backwater valve was ever installed by WGS Plaintiffs to protect their property. It also found the CITY reasonably planned to, and did, maintain its sewer system, including the main segment at issue here: "The City's evidence shows a plan of maintenance was in effect and was being followed." (Vol. 4, Ex. 32, p. 1011.)

The facts of this case do not establish inverse condemnation liability because there was no unreasonable design or maintenance plan or unreasonable implementation of a plan. Rather, the WGS Plaintiffs' code violations defeated the reasonable design of the CITY's sewer system and constituted intervening and superceding causes of their damages when the sewer backup and overflow occurred.

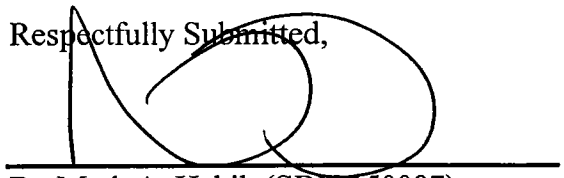
The "failed to function as intended" test should not apply beyond flood control cases. However, if this Court is inclined to extend the test to sewage

overflow cases, it should clarify that *Locklin*'s rule of reason and its multi-factor test also apply to wastewater overflows as they do to storm water flooding. It might further free the doctrine of mitigation of damages from its current pro-plaintiff confines and incentivize plaintiffs not only to mitigate damage once it occurs, but to act reasonably to prevent damage in the first place.

For all of the reasons set forth above, the CITY urges this Court to reverse the Third District Court of Appeal's decision and direct the trial court to enter judgment in favor of CITY on the inverse condemnation claims.

Dated: October 28, 2017

Respectfully Submitted,



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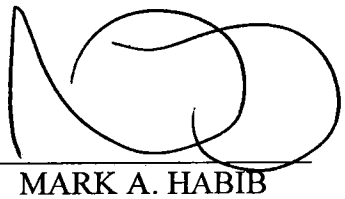
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.520(c)(1) of the California Rule of Courts, I hereby certify that this Opening Brief contains 11,806 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By: 

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