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## Rothweiler v. Clark Cty., 29 P.3d 758 (Wash. App. 2001)

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that were once a part of Lake Memphremagog. It discovered, through a prospective purchaser's title search in 1969, the Vermont Water Resources Board ("Board") had required a former owner to dredge a portion of the lake bottom, and use it as fill for a Newport city boathouse. The Board stated the order did not convey any title or interest to the landfill or to lands lying under public waters or waters affected. The current land owners, the Stevens, brought their concerns to Reginald LaRosa, the Department of Water Resources, and Environmental Engineering's operations chief. As a result, LaRosa concluded the order had not required work done below the low water mark and the state had no property interest.

In 1998, National Bank discovered the property was located on filled land and reduced the units' appraised value. As such, it commenced action against Vermont, seeking a declaration that the public trust doctrine did not apply, or, alternatively, estopping Vermont from asserting any interest in the property.

National Bank first argued the legislature had the power to transfer public trust lands into private ownership free from state claim. The court entertained the transfer idea but rather, required the state's intent to abandon. The court ruled intent must be clearly expressed or necessarily implied and statutes were interpreted in favor of retaining public interest in tidelands. In the case at bar, the court found no express or implied intent. The plaintiffs argued LaRosa's declaration constituted Vermont's intent to hold no interest in the condominium property. While LaRosa was in charge of managing the State's public trust lands, the court ruled the legislature had not delegated authority to LaRosa to abandon or convey into private ownership all public trust lands.

Thus, National Bank alternatively argued Vermont was equitably estopped from asserting the public-trust doctrine because the diminished property values resulted in injustice, which required an equitable remedy. However, the court found the injustice was not of sufficient magnitude to justify estoppel. Thus, the court held the equitable estoppel doctrine applicable to lands held in public trust. Ultimately, the appellate court affirmed the superior court's decision.

*Jon Hyman*

## WASHINGTON

**Rothweiler v. Clark Cty., 29 P.3d 758 (Wash. App. 2001)** (holding Clark County did not have a duty to improve a drainage system, but did have a duty to maintain the system's original efficiency; the County was not liable for damages resulting from the system being overwhelmed).

In June 1997, heavy rains overwhelmed a drainage system

maintained by Clark County, Washington ("County"), resulting in the flooding of the Rothweilers' home. Both parties agreed the flooding resulted from an inadequate drainage system being overwhelmed by extremely heavy rainfall. The Rothweilers sued the County for negligence, negligent intrusion, nuisance, statutory nuisance, and statutory negligence. The trial court granted the County's motion for summary judgment, and the Rothweilers appealed.

On appeal, the County asserted both that a municipality had no common law duty to drain surface water, and the common enemy doctrine, which permits landowners the opportunity to dispose of unwanted surface water with no liability for damages to one's neighbor that may occur. However, this law has long been perceived as inequitable by Washington courts, and as a result, exceptions to the no duty rule have evolved. As such, the Rothweilers argued three applicable exceptions.

The Rothweilers first sought relief under the "watercourse or natural drainway" exception. This exception asserts that a municipality that dams a stream, gully, or natural drainway is not shielded from the ensuing damage. However, the court found this exception inapplicable because the drainage system the County operated did not qualify as a natural drainway or watercourse. The Rothweilers' second argument relied on the "collect and discharge" exception. This exception provides surface waters may not be artificially collected and discharged on adjoining lands in quantities greater than, or in a manner different from, the natural flow thereof. However, the Rothweilers' expert witnesses were unable to support this position with any material facts. Therefore, the court found there was inadequate support for attempting to assert this exception. Finally, the Rothweilers asserted the "due care" exception. This exception requires landowners who alter surface water flow to act in good faith in order to avoid unnecessary damage to others' property. However, the County was able to successfully reject this assertion because the issue did not involve a stream or natural drainway, nor does failing to drain naturally accumulating water constitute altering the flow of surface water.

The Rothweilers then attempted to attach liability for their flooding damages by asserting that a municipality has a duty to reasonably maintain its drains. This rule does not require a city to modify its system over the passage of time. Rather, it requires a positive duty to use reasonable care to maintain its original efficiency once a city has adopted a particular plan. The County admitted the drainage system was insufficient for handling the storm water that flooded the Rothweilers' house. However, the County maintained it was not liable for using an inadequate system because it was only required to maintain the original efficiency of the system. As such, the County produced evidence it had cleaned the drainage system six months before the flooding. The Rothweilers were unable to produce any evidence that the drain was clogged. Rather, evidence by both parties reinforced the idea that the failure of the system was because of

it being overwhelmed. The court thus held there was no duty for the County to upgrade the system. The appellate court affirmed the decision of the lower court finding no duty to drain surface water, and a duty only to maintain the drain system, not to improve it.

*Michael Sheehan*

**Tapps Brewing, Inc. v. City of Sumner, 22 P.3d 280 (Wash. Ct. App. 2001)** (holding city imposed General Facilities Charges, billing property owners for city storm drainage system improvements, valid).

Tapps Brewing, Inc., Daniel, and Andrea McClung (collectively “Tapps”) appealed the trial court’s denial of summary judgment. Tapps had challenged the imposition of a General Facilities Charge (“GFC”) the City of Sumner (“City”) imposed in order to improve the City’s storm drainage system. Under the City’s scheme, the GFC is imposed upon the issuance of property improvement permits, and is based on the amount of impervious surface on the developed property.

Tapps applied for a development permit to remodel its property, and was charged \$9,950 as a storm drainage GFC. The McClungs replaced an existent building and paved a parking lot. The storm drainage pipe running through McClung’s property was too small; therefore, the City required the McClungs to replace the pipe with a larger pipe as a condition of the development permit. The GFCs give the City authority to construct “systems of sewerage” by “control[ing] the rates and charges for their use.” The court found the statutory language clear and unambiguous in legally authorizing the City to impose the instant GFCs.

Tapps first argued the GFC was invalid because the City’s power to impose fees on land development was limited and any city “charges must be proportionate to the cost of the system attributable to the property being charged.” However, the Court found the charges imposed did not meet this proportionality standard.

Tapps then argued the City had “unlawfully discriminated against them by requiring them to pay more than other customers.” They claimed the charges were disproportionately applied, in violation of the statutory uniformity standard. Nonetheless, the Court refused to hear this issue as it was not raised as a stipulation, and therefore was outside of the scope of the Court’s discretionary review.

*Anne Francis*