

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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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respectfully petitions this Court for review of the Opinion of the Court of Appeal, Third Appellate District, filed unpublished on June 13, 2017 as modified on June 16, 2017, to resolve entirely unsettled questions of law on issues of statewide concern.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no published opinion on the issues presented, and courts of appeal are in direct conflict when deciding and issuing unpublished decisions on the issues presented.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 JURISDICTION - 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

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 Company³ (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.

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 cases⁶ 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)**

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 *not 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 valve⁷ 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 LIABILITY 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

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

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

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

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

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

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

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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