

**LEGAL CORNER**  
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**Caselaw Update**

Two recent high court cases highlight potential problems for developers and sellers.

1. Common Enemy Doctrine Requires Due Care

Since this is the flooding time of year, a review of new caselaw regarding developer's liability for flooding might be a good idea.

The Common Enemy Doctrine generally governs the law of surface water. Surface water is regarded as an outlaw and a common enemy, against which anyone may defend himself, even though injury may result to others. A landowner may fight the common enemy and develop his land without regard to the drainage consequences to others. However, many exceptions abound.

For example, Washington courts now hold the developer to a standard of due care. The due care exception now requires the developer to avoid the *unnecessary* infringement upon a neighbor's free enjoyment of the neighbor's property. Developers may improve their land so long as the developer acts in good faith and mitigates damage to adjacent property beyond that called for by the particular project. So said the Court in Currens v. Sleek, Washington Supreme Court, No. 66830-2, September 9, 1999. (These issues confuse lawyers also).

Developer Sleek sought to develop four home sites. As a condition of plat approval, Sleek was required to plant trees and install dry wells to reduce the flow of surface water over

the sites. Sleek cleared the land, but she failed to plant the trees or install the dry wells. The following year, flooding occurred on the neighboring property, causing damages.

The Court held Sleek to the standard of due care for not planting trees or installing the dry wells. Expert witnesses testified that Sleek's land clearing conduct substantially increased the volume and flow rates of water onto the neighbors' property, causing the damages.

Note: Had Sleek performed properly and flooding still occurred, she may have been liable anyway. The County likely would not be liable due to public duty doctrine immunity.

## **2. Legal Description**

In another case, the Court determined that lack of a proper legal description invalidated a real estate purchase and sale agreement. The parties had a common street address rather than a legal. The purchase and sale agreement form noted that "Full and complete legal description must be inserted prior to execution by the parties." The parties signed, but they failed to insert the legal, a most common practice in my experience.

The challenger sought to have this extreme and unusually strict rule modified. The Court found no modern trend toward an exception in this regard, and the Court invalidated the contract.

Key Design, Inc. v. Moser, Washington Supreme Court, No. 66916-3, September 9,

1999.

Forewarned is forearmed.