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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CITY OF CLOVERDALE, Cross-Complainant and Appellant, v. DEPARTMENT OF TRANSPORTATION, Cross-Defendant and Respondent.	A115570 (Sonoma County Super. Ct. No. SCV229936)

This lawsuit concerns a drainage channel constructed by the Department of Transportation (Department) when it rerouted Highway 101 to bypass the center of the City of Cloverdale (City). Nearby property owners (plaintiffs) sued the Department and the City for flooding caused by the drainage channel, and the City cross-complained against the Department for indemnity, damages, and declaratory relief. Plaintiffs settled with the City and obtained a judgment on jury verdicts for damages against the Department. Judgment was entered for the Department on the City's cross-complaint.

A threshold issue in the case was whether the Department, after completing the bypass project, effectively relinquished title to the drainage channel to the City. That issue was tried to the court, and the court determined that title was in fact relinquished. The court subsequently ruled for the Department on the City's indemnity claim, and

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II and III.

granted in part the Department's motion to dismiss other City causes of action. This appeal by the City contests the relinquishment, indemnity, and dismissal rulings.

In the published portion of this opinion, we set forth our reasons for affirming the relinquishment ruling, which include the City's failure to exhaust an administrative remedy by which the relinquishment could have been challenged. In the unpublished portion, we explain our reversal of the indemnity ruling and affirmance of the dismissal ruling. The court determined from an analysis of the settlement agreement and the jury verdicts that the City was not entitled to equitable indemnity from the Department. We disagree with that ruling and conclude that a retrial of the indemnity issue is required.

I. RELINQUISHMENT

A. Background

The Department and the City entered into a Freeway Agreement in August 1990 providing for the bypass project; the project was completed in 1994. The drainage channel at issue is in Cloverdale and was built as part of the bypass project. The project included construction of Asti Road, a frontage road that disrupted the natural course of Heron Creek, so the creek was reconfigured to run through the drainage channel, which lies next to the frontage road.

Robert Perrault, City Manager from 1990 to 2000, told the Department in a June 1992 letter that the City "will maintain the constructed improved channels within the City limits upon their relinquishment from Caltrans to the City. It is the City's understanding that this relinquishment will occur after the Cloverdale Bypass is completed and after the three year plant establishment phase and the five year monitoring for assessing the success of the riparian vegetation."

Perrault advised the Department in a February 1994 letter of a "drainage problem" with "the channelization at Heron Creek." He said that "the present system is not working. After very modest rainfall, substantial ponding is occurring at the bottom of the channel. The City believes this ponding presents a potential health and safety problem and will also inhibit the City's ability to maintain the channel once it is relinquished. [¶] I am requesting CalTrans resolve these issues. Prior to the City assuming any

responsibility for the channel, it must drain properly and be in a state that will enable easy maintenance."

The City received a "Notice of Intention to Relinquish Highway Right of Way" pursuant to Streets and Highways Code section 73[1] from the Department on December 6, 1996. Section 73 provides for relinquishment to a county or city by the California Transportation Commission (Commission) of: (1) "any portion of any state highway within the county or city that has been deleted from the state highway system by legislative enactment"; (2) "any portion of any state highway that has been superseded by relocation"; (3) certain "frontage or service road[s] or outer highway[s]"; and (4) certain "nonmotorized transportation facilit[ies]." The frontage road provision, and the relevant balance of the statute, are as follows:

"Whenever the [D]epartment and the county or city concerned have entered into an agreement providing therefor, or the legislative body of the county or city has adopted a resolution consenting thereto, the commission may relinquish, to that county or city, any frontage or service road or outer highway, within the territorial limits of the county or city, which has a right-of-way of at least 40 feet in width and which has been constructed as a part of a state highway project, but does not constitute a part of the main traveled roadway thereof. . . .

"Relinquishment shall be by resolution. A certified copy of the resolution shall be filed with the board of supervisors or the city clerk, as the case may be. A certified copy of the resolution shall also be recorded in the office of the recorder of the county where the land is located and, upon its recordation, all right, title, and interest of the state in and to that portion of any state highway shall vest in the county or city, as the case may be, and that highway or portion thereof shall thereupon constitute a county road or city street, as the case may be.

"[¶] . . . [¶]

[1] All further statutory references are to the Streets and Highways Code unless otherwise indicated.

"Prior to relinquishing any portion of a state highway to a county or a city, except where required by legislative enactment, the department shall give 90 days' notice in writing of intention to relinquish to the board of supervisors, or the city council, as the case may be. . . .

"[¶] . . . [¶]

"Within the 90-day period, the board of supervisors or the city council may protest in writing to the [C]ommission stating the reasons therefor, including, but not limited to, objections that the highway is not in a state of good repair, or is not needed for public use and should be vacated by the [C]ommission. In the event that the [C]ommission does not comply with the requests of the protesting body, it may proceed with the relinquishment only after a public hearing given to the protesting body on 10 days' written notice."

Attached to the notice to the City was a copy of the relinquishment resolution to be presented to the Commission. In accordance with the statute, the notice advised that the resolution would not be taken up by the Commission until 90 days after the notice was received. The notice specified where objections should be sent.

The relinquishment resolution recited that, in the freeway agreement, the City had agreed to accept title to "frontage roads, reconstructed and relocated city streets and cul-de-sacs" upon relinquishment by the State of California, and that the State "ha[d] acquired right of way for and ha[d] constructed the above-mentioned collateral facilities in the City" pursuant to the agreement. The property to be relinquished was "all of the State of California's right, title and interest in and to said collateral facilities in said City, together with the right of way and appurtenances thereof, described as follows: [¶] Segments 3, 4, 5, 6, 8 and 9, as shown on that certain set of maps of 13 sheets" to be filed in the Sonoma County (County) Recorder's office. The 13 maps were attached to the resolution. The first map gave an overview of the 12 segments to be relinquished, some to the City and some to the County, and showed how the areas to be received by the City and County were shaded differently; maps of the individual segments followed.

The maps were interpreted at the trial of the relinquishment issue by Matthew Goetz, a land surveyor working in the right-of-way section of the Department. Goetz did

not prepare the maps; he was asked to review them and assess what they revealed. He testified that the maps depicted the boundaries of the areas to be relinquished, and constituted "a technical description of the real property to be transferred." He said that the drainage channel in question was located within segment 6, one of the segments to be given to the City as shown on the maps. One of the maps of segment 6 bore the label "Frontage Road," but no topographical features were shown and the drainage channel was not identified by any words or markings. Goetz said that the letters "FR" on the maps were shorthand for "frontage," and the " 'FR' Line" shown on the maps of segment 6 was the center line of Asti Road. He said it was readily apparent from the size of the shaded area around this center line that the area to be relinquished was "much wider than the rights-of-way that are normally associated with a road." One could have taken the maps and a tape measure out to the center of the road, walked the length of the shaded area shown on the maps, and determined that it included the drainage channel.

The City did not protest the relinquishment during the 90 days following receipt of the notice. Perrault testified at trial that he reviewed the notice and "could not discern that it covered the channel," and that he "relied on the recommendation and assurance of the City Engineer," John Wanger. Perrault said that, to the best of his recollection, Wanger reviewed the notice during the 90-day period and did not find anything objectionable, but Wanger testified in his deposition that he did not get a copy of the notice from Perrault until after the 90 days had expired.

The relinquishment resolution was approved by the Commission on April 2, 1997, and recorded with the Sonoma County Recorder on May 2, 1997. The City received a recorded copy of the resolution three weeks later.

After the relinquishment, the City continued complaining to the Department about the condition of the drainage channel. Wanger wrote the Department a letter on June 18, 1997, noting the City's long-standing concern with the flat slope of the channel, and pointing out problems the channel was posing to a nearby City facility. Among other things, it appeared that "a 36 [inch] storm drain with a flap gate installed through the dike between the corporation yard and Heron Creek . . . allow[ed] flows from Heron Creek to

flow adversely back into the City corporation yard ditches." The City "appreciate[d] the State's commitment to performing the remedial drainage work" the Department had identified in a letter dated April 22, 1997. In a September 25, 1997 letter, Wanger listed the City's "minimum" expectations of the Department, which included installation of "appropriate sized pipe(s) . . . through the levy to replace the existing undersized pipe with the faulty flap gate." The Department proceeded to replace the 36-inch pipe with two 48-inch pipes, but Wanger thought that the new pipes were installed at an incorrect elevation, and wrote to the Department in December 1997 asking how it proposed to remedy that defect.

Wanger testified that he did not realize the Department considered the channel part of the relinquished property until he was so advised by Department officials at a meeting in late 1997 or early 1998. Wanger told the Department officials that the City did not agree that the channel had been relinquished.

Wanger acknowledged at trial that, in the relinquishment, the City had received a right of way from the Department. "Q. What you got from CalTrans was right-of-way, wasn't it? [¶] A. Yes. [¶] . . . [¶] [¶] Q. You knew you were getting titled boundaries as identified in the right-of-way; correct? When that's relinquished? [¶] A. That's correct. [¶] Q. What was formerly the State property was now your property from the limits of the right-of-way; correct? [¶] A. Correct. [¶] Q. From the width of the right-of-way as depicted on maps that you received; correct? [¶] A. Correct."

However, at another point during this exchange, Wanger denied knowing what the City received when it obtained the right of way. He elaborated: "This was the first relinquishment that I as . . . an engineer had gone through with CalTrans, and my experience with the City is such that—let's say somebody was going to give us a right-of-way on a map or on a separate document. The City would generally accept the right-of-way but would not necessarily accept the improvements, and this is my experience, until those improvements were in a condition that the City felt was appropriate. And in this particular case I felt I didn't have any issues with Asti Road, but we clearly had documented, gosh, since 1992 that we had issues with the drainage channel . . . ."

Perrault conceded that no one in the Department ever told him the channel would not be relinquished, but while he had "anticipated the relinquishment of the channel," he believed that the channel "would have to work correctly before the City would be in a position to be able to accept it."

B. Discussion

(1) Whether Section 73 Authorized Relinquishment of the Drainage Channel

The City contends that section 73 does not permit relinquishment of the drainage channel. Section 73 does not appear to have been construed in any reported case.

As has been noted, section 73 provides for relinquishment of "highway[s]," "road[s]," and "transportation facilit[ies]." Section 23 states that "[a]s used in this code, unless the particular provision or the context otherwise requires, 'highway' includes bridges, culverts, curbs, drains, and all works incidental to highway construction, improvement, and maintenance." A drainage channel created to replace a creek displaced by a new highway could literally be characterized as a "drain," and would unquestionably constitute a "work[] incidental to highway construction" within the meaning of section 23. Therefore, "unless . . . the context otherwise require[d]," relinquishment of a highway would include relinquishment of a drainage channel necessitated by the highway's construction. The City concedes that section 73 does not distinguish, as to the scope of what may be relinquished, between a "highway" and a "road." The concession is well taken; nothing in the statute suggests such a distinction. Accordingly, unless the context dictates otherwise, the relinquishment of Asti Road, the frontage road in this case, included relinquishment of the drainage channel that was built to permit the construction of that road.

The City does not explain why the context of a relinquishment would require any other result. The City simply dismisses section 23 as one among "an array of statutes" where "different definitions apply in different contexts." However, unlike the other statutes the City cites, section 23 bears directly on section 73: It defines the scope of the term "highway" in section 73, and thus, per the City's apt concession, the scope of the term "road" in section 73 as well. We see no reason why the Legislature would provide

for relinquishment of highways and roads, but prohibit relinquishment of the works incident to their construction. Consequently, we conclude that the drainage channel could be relinquished as part of the frontage road under section 73.

(2) Whether a Relinquishment Occurred

(a) The Freeway Agreement

Section 73 requires an agreement between the Department and the city or county for relinquishment of a frontage road. Paragraph 4 of the Freeway Agreement in this case authorized the Department to acquire on the City's behalf "all necessary right of way as may be required for construction, reconstruction, or alteration of CITY streets, frontage roads, and other local roads" in connection with the bypass project. Paragraph 6 provided: "CITY will accept control and maintenance over each of the relocated or reconstructed CITY streets, and the frontage roads, and other [Department] constructed local roads on receipt of written notice to CITY from [Department] that the work thereon has been completed, except for any portion which is adopted by [Department] as a part of the freeway proper. CITY will accept title to the portions of such roads lying outside the freeway limits, upon relinquishment by [Department]."

The City refers to an "absence of even an oblique reference to 'drainage facilities' in the 1990 Freeway Agreement," and, presumably to point up the alleged omission, underlines the references to "roads" in its quotation of paragraph 6. However, the terms "frontage road" in the paragraph of the Freeway Agreement dealing with relinquishment would likely have the same meaning as in the relinquishment statute, which, as we have said, includes drains and other works incidental to construction. This understanding was confirmed by City Manager Perrault's June 1992 and February 1994 letters to the Department, which contemplated that drainage channels would be part of the relinquished property. (See generally 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 749, p. 838 [parties' subsequent conduct may establish meaning of contract]; CACI No. 318 (2008 ed.) [same].) Perrault admitted at trial that he had anticipated relinquishment of the channel at issue. Thus, the City does not deny that it was "well aware that the drainage channel would be relinquished" after construction was completed, nor does it

dispute that the Freeway Agreement was one that provided for relinquishment of frontage roads as required by section 73.

The City nonetheless believes that the Department was not unilaterally entitled to decide when work on the channel was complete, and it reads the Freeway Agreement to provide for a "consensual" future acceptance of the channel. The text of the agreement does not support these positions. The agreement states in mandatory terms that the City "will accept" control and maintenance of completed frontage roads, and title to such roads upon relinquishment by the Department. This language does not purport to depart from section 73, which requires an advance agreement for relinquishment, but provides that a relinquishment can ultimately be accomplished over a city's objection.

(b) Relinquishment Notice and Resolution

The City contends that the notice of relinquishment it received and the resolution of relinquishment thereafter recorded did not effectively transfer title to the drainage channel. This issue, as the City implicitly concedes, is essentially one of fact, governed for purposes of appellate review by the substantial evidence rule. Substantial evidence supported the trial court's findings "that the notice of relinquishment did in fact put the City on notice that the drainage channel would be relinquished and that the recorded relinquishment did in fact convey the drainage channel to the City."

The resolution, furnished with the notice, provided for relinquishment of "collateral facilities" that included "frontage roads," "together with the right of way and appurtenances thereof" as shown on attached maps. The drainage channel, again, could be part of a frontage road, and City Engineer Wanger confirmed in his testimony that the City received rights of way in the relinquishment. Thus, the only question was whether the channel was shown on the maps to be within a frontage road right of way conveyed to the City. The only evidence on this issue was the testimony of Department surveyor Goetz, who indicated that the maps were precise legal descriptions of the areas conveyed, and that the channel was located within one of those areas. That testimony fully supported the court's finding that notice and resolution were adequate to transfer title to the drainage channel to the City.

The City observes that the maps did not depict or identify the channel itself, but cites no authority for the proposition that any such description was legally required to effectuate the transfer of title. A deed will generally "be sustained if it is possible from the whole description to ascertain and identify the land intended to be conveyed with reasonable certainty." (*Denbo v. Senness* (1953) 120 Cal.App.2d 863, 866; see, e.g., *Blume v. MacGregor* (1944) 64 Cal.App.2d 244, 251-252 [description is generally sufficient "if a competent surveyor can take the deed and locate the land on the ground . . . with or without the aid of extrinsic evidence"].) Goetz explained how relinquishment of the channel could be determined by taking the maps into the field, and the City offered no evidence that called that explanation into question.

(c) Administrative Remedy

The City argues that the drainage channel was not relinquished because it was not prepared to accept the channel unless it was satisfied with how the channel worked, and had conveyed that position to the Department before it received the relinquishment notice. This argument flows from a misconception that a relinquishment is consensual, which, again, it ultimately is not. Moreover, section 73 afforded a means of protesting the relinquishment on the ground that the channel was "not in a state of good repair." In that event, the Commission would have been required to hold a public hearing to resolve the issue. That issue is not properly before us because the City failed to pursue that administrative remedy.

"[W]here an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292.) This rule "is not a matter of judicial discretion, but is a fundamental rule of procedure . . . binding upon all courts." (*Id.* at p. 293.) "Exhaustion of *administrative* remedies is 'a jurisdictional prerequisite to resort to the courts.' [Citation]." (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70.) The exhaustion doctrine "has been successfully invoked as a bar to legal proceedings in a wide variety of situations" (3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 308, p. 393), including Commission proceedings (see *People ex rel.*

Dept. of Transportation v. Cole (1992) 7 Cal.App.4th 1281, 1286). The doctrine precludes the City from contesting the relinquishment based on the channel's alleged defects.

The City contends that exhaustion doctrine cannot be invoked here because the relinquishment notice did not adequately advise that the drainage channel would be included (see *Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 384 [doctrine not applicable where party not advised that administrative review procedure was available]), but we have already explained that the notice with respect to the channel was sufficient. The City protests that it "genuinely did not realize" that the channel was to be relinquished, but the City has only itself to blame for that ignorance. According to the evidence, the City neglected to have the maps in the notice examined during the 90-day period when the relinquishment could have been contested; Perrault and Wanger essentially pointed the finger at each other for that failing.

The City notes that a court can agree to hear a case involving important questions of public policy even if the arguments as to those issues would ordinarily be waived by virtue of the exhaustion doctrine (*Lindeleaf v. Agricultural Labor Relations Bd.* (1986) 41 Cal.3d 861, 870-871), and the City submits that issues involving section 73 are important enough to warrant that treatment. However, defects in the drainage channel and the City's unwillingness to accept relinquishment of the channel in light of those defects are not matters of general public interest. The trial court correctly accepted the Department's exhaustion of administrative remedies argument as to those issues, and we can assume without deciding that the exhaustion doctrine would not apply to the other relinquishment issues we have discussed.

II. INDEMNITY

A. Background

(1) Settlement Between Plaintiffs and the City

Eight days after the court rendered its decision on relinquishment the City settled with plaintiffs. The City agreed to pay plaintiffs the sum of $600,000, of which $25,000 was earmarked for reimbursement of costs incurred by the City to repair the drainage

channel. The settlement agreement, which referred to the drainage channel by its trapezoidal shape, stated: "The Plaintiffs and the City understand and acknowledge that the aforementioned payment is intended to recompense the Plaintiffs due exclusively of conditions, circumstances, events and damages attributable to maintenance or lack of maintenance of the Trapezoidal Channel, since the Plaintiffs and the City understand and acknowledge that City did not participate in or have responsibility for either the design or the construction of the Trapezoidal Channel. Consequently, the City's responsibility and liability for the Trapezoidal Channel are, for the purposes of this Agreement and in the belief of Plaintiffs and the City, a consequence solely of the Relinquishment Decision's determination that ownership of the Trapezoidal Channel was transferred to the City by [the Department] in May of 1997." The settlement agreement provided that the settlement was being entered into for the exclusive benefit of plaintiffs and the City, and would not limit any relief they would seek from the Department.

(2) Plaintiffs' Case Against the Department

Plaintiffs asserted causes of action for nuisance, dangerous condition of public property, and inverse condemnation against the Department. A nonsuit was granted on the inverse condemnation count, and the other causes of action were submitted for decision to a jury.

The Department filed various pretrial motions in limine, including its motion in limine No. 2, which sought to exclude evidence of damages sustained prior to September 27, 2000, one year before the plaintiffs filed their government tort claim against the Department. Motion in limine No. 6 sought to exclude evidence critical of the Department's design, construction, or maintenance of drainage facilities relinquished to the City. This motion rested on arguments that "an essential element in Plaintiffs' prima facie case for either dangerous condition or nuisance liability is proof of ownership or control at the time of damage," and that by virtue of the relinquishment the Department neither owned nor controlled the drainage channel as of September 27, 2000, when plaintiffs' entitlement to damages allegedly began. In their opposition to motion in limine No. 6, plaintiffs conceded that the dangerous condition cause of action required

ownership or control of the public property, but argued that the Department continued to exercise control over the drainage channel after its relinquishment. Plaintiffs argued that continuing ownership or control was not required for nuisance liability, citing *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1137 (*Mangini*), and *Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 343 (*Newhall*), cases where prior owners were held liable for nuisances they had created.

The court denied these in limine motions. The court concluded with respect to motion No. 2 that, because plaintiffs were alleging continuous flooding of their properties: their damages had not stabilized when they filed their tort claim; their causes of action had not accrued when the claim was filed; and they could recover for damages sustained prior to one year before the filing of the claim. The court relied on *Lee v. Los Angeles County* (2003) 107 Cal.App.4th 848 (*Lee*) in reaching these conclusions. The court based its denial of motion No. 6 on its ruling on motion No. 2, and on the *Mangini* and *Newhall* cases.

After the motions in limine were taken under submission, the City's counsel advised that he would not participate in plaintiffs' trial, and it was agreed that the City's cross-complaint against the Department would be tried after plaintiffs' case.

Presentation of evidence to the jury began with a stipulation that ownership of the drainage channel had been relinquished to the City on May 2, 1997, the date when the relinquishment resolution was recorded. Department surveyor Goetz told the jury how the relinquishment was effected, said that he had participated in relinquishments to which cities and counties had objected, and noted that no objection was raised here.

City engineer Wanger, called as a witness in plaintiffs' case, and Department engineer Joseph Peterson, a Department witness, testified about communications between the City and the Department concerning the drainage channel around the time of the relinquishment and thereafter. These communications included the April 22, 1997, letter from the Department to the City, alluded to above in connection with the relinquishment issue, in which the Department, prior to recordation of the relinquishment resolution, said that it would, among other things: "clean out the vegetation along the channel bottom for

that portion of Heron Creek within State right of way"; "remove accumulated silt and perform minimal regrading at the south end of Heron Creek" within the "State right of way"; and if necessary "upsize" a drainage pipe in the channel. The City continued to request that the Department take these steps after the relinquishment. The Department replaced a 36-inch pipe with two 48-inch pipes, as noted above, in November 1997, and cleaned out the channel later that year.

When Wanger wrote the Department in December 1997 to complain about how the 48-inch pipes had been installed, he noted that a City inspector had monitored part of the installation, but added: "As you know, this was a Caltrans project where we have no jurisdiction. Our inspector was there simply to observe if any City facilities were impacted." Wanger's letter also raised concerns about an 18-inch pipe that was "buried during these operations," and the flap gate on one of the 48-inch pipes. The Department's January 1998 reply letter stated that the Department had placed the 18-inch pipe in 1994 "as directed by the City of Cloverdale's Engineer." The letter concluded:

"Caltrans would be willing to abandon this system [apparently referring to the 18-inch pipe] providing the City of Cloverdale concurs. This work could be performed by the State this summer as the stage drops in Heron Creek. The issue regarding the leaking gate on the southerly 48" pipe will be investigated. If Caltrans verifies that it is leaking, the State will adjust or reinstall the gate this summer. [¶] Caltrans maintains that the ultimate solution will require an improved channel all the way to the Russian River. The drainage improvements required to produce a permanent solution would involve construction downstream of State right of way. Therefore, a local agency should take the lead toward developing a long-term solution. Caltrans maintains that the highway improvements in the vicinity have had a negligible impact on the drainage in this area."

There was no evidence that the Department did any further work on the drainage channel after 1997. In 1999, City Manager Perrault wrote a letter to the Department complaining that the Department "does nothing to maintain the [drainage] channel," and asking the Department "to fix [the flooding] problem once and for all." In 2000, Perrault renewed his demand that the Department maintain the channel, but by then the City and

the Department were disputing whether the channel had been relinquished. In a March 2000 letter Perrault wrote: "I understand the State's position relative to the relinquishment of the drainage channel as previously expressed by you. The City's position is that the relinquishment did not include the drainage facility. Unfortunately, the City and the surrounding property owners continue to be impacted by the inadequate drainage facilities. It is true the area has always been subject to flooding but as has been documented, the construction of the Freeway increased the problem." In a September 2000 letter Perrault wrote: "This facility has never been adequate to handle runoff from a normal winter season let alone the wet years that frequent here. Today, the facility is so choked with plant growth and weeds as to render the facility useless. Unless the State takes immediate steps to clean the channel, I am certain that the City and the adjacent property owners will incur significant damages." Wanger testified that the City cleaned out the channel in 2000, and again in January 2005, after the court ruled that the channel had been relinquished.

One of plaintiffs' experts opined that the flooding on their properties was caused: 60 percent by the drainage channel's design, 30 percent by the channel's construction, and 10 percent by failure to maintain the channel. Another of plaintiffs' experts opined as to the amounts their properties had been diminished in value as of November 12, 2004, because of the flooding.

The court instructed the jury on the dangerous condition of public property cause of action pursuant to CACI No. 1100 (2008 ed.) (Essential Factual Elements), which required, among other things, proof that the Department "owned or controlled the property," and CACI No. 1101 (2008 ed.) (Control), which stated: "Plaintiffs claim that [the Department] controlled the property at the time of the incident. [¶] In deciding whether [the Department] controlled the property, you should consider whether it had the power to prevent, fix, or guard against the dangerous condition. You should also consider whether [the Department] treated the property as if it were its property." The court added an instruction requested by the Department that "[a] person does not have a legal duty to maintain real property it does not own or control."

The jury was instructed with respect to the nuisance cause of action pursuant to CACI No. 2921 (2008 ed.), which required proof, among other things, that the Department "created a condition that was an obstruction to the free use of [plaintiffs'] property so as to interfere with the comfortable enjoyment of life or property." Over the Department's objection, the court added an instruction requested by plaintiffs stating: "It is not material that defendant created the nuisance at some time in the past but does not currently have a possessory interest in the property. Not only is the party who maintains the nuisance liable but also the party or parties who create or assist in its creation . . . ." The court rejected the Department's proposed instruction that read: "A public entity such as [the Department] is not liable for dangerous condition or nuisance if, at the time of Plaintiffs' damages, it neither owns nor controls the real property alleged to be causing the damages." The court said that these instructional rulings, like the ruling on the Department's motion in limine No. 6, were based on the *Mangini* and *Newhall* cases, and that it was not persuaded by the Department's argument based on *Preston v. Goldman* (1986) 42 Cal.3d 108 (*Preston*).

Consistent with these instructions, questions on the special verdict form regarding the dangerous condition cause of action asked whether the Department owned or controlled the drainage channel when plaintiffs' property was damaged, while those on the nuisance cause of action asked whether the Department had created or maintained a condition that unreasonably interfered with plaintiffs' use and enjoyment of their properties. The jurors answered both questions in the affirmative, ruled for plaintiffs on both causes of action, and awarded damages totaling $880,000.

The court denied the Department's motion to offset damages by the amount of the City's settlement with plaintiffs (Code Civ. Proc., § 877),[2] and entered judgment against

[2] The propriety of this ruling was a matter between plaintiffs and the Department and is not at issue in this appeal.

the Department on the jury verdicts. Plaintiffs appealed, and the Department cross-appealed, from the judgment. The matter was settled and the appeal was dismissed.[3]

(3) The City's Indemnity Action Against the Department

The City's cross-complaint against the Department asserted causes of action for equitable indemnity, implied indemnity,[4] declaratory relief, and money recovery. The indemnity causes of action were tried to the court after the verdicts were rendered in plaintiffs' case against the Department.

At the outset of the indemnity trial, the City indicated that the evidence it would present was intended to supplement the evidence introduced at the trial of plaintiffs' case, and asked the court to consider the evidence in plaintiffs' case "to the extent it deems appropriate as part of its decision-making process" on the indemnity issues. The settlement agreement between plaintiffs and the City was admitted into evidence, and the parties agreed that the evidence would include all exhibits admitted in the trial of plaintiffs' case.[5]

The sole witness at the indemnity trial was Geoffrey Casburn, an expert in civil engineering and hydrology, who was called by the City to opine on the relationship between the drainage channel and the flooding of plaintiffs' property. He compared the capacity of: (1) Heron Creek prior to construction of the drainage channel; (2) the "as built" channel, i.e., the channel upon completion of construction; and (3) the "seasoned"

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[3] We do not know the amount of the settlement, and express no opinion on the effect, if any, of the settlement on the issues in this appeal.

[4] Equitable indemnity has been described as a form of implied indemnity (*Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1736), and the briefs do not suggest that any appellate issues turn on any distinction between the indemnity causes of action.

[5] The Department later sought to move into evidence correspondence between the parties around the time of the relinquishment, in case the documents were not already admitted in plaintiffs' trial. The City objected to admission of the documents on relevance and hearsay grounds; the court took the objections under submission, but did not rule on them. The objections were thereby impliedly overruled. (*Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, 566.)

channel, i.e., the channel after a year or two of operation. He said that the as built channel was substantially narrower and less efficient than the original creek, and that the seasoned channel was less efficient than the as built channel because of the build up of vegetation choking the flow of water. The Department's design plan had called for the channel to have a "clean bottom," but the channel's earth bottom and its relatively flat slope provided "a wonderful place for tules . . . to grow," resulting in the accumulation of vegetation and silt. The "sum and substance of [Casburn's] testimony" was that "the channel capacity has been reduced."

The parties stipulated that, in 1997, the Department had, at the City's request, performed one maintenance project on the drainage channel, and placed the 48-inch pipes in the channel. It was also stipulated that the Department did no further work on the channel thereafter.

In its decision, the court concluded that the Department could be liable for negligent design or construction of the drainage channel under theories of nuisance or dangerous condition "even though it no longer owns the property." In support of its conclusion regarding the nuisance claim, the court again cited the *Mangini* and *Newhall* cases. In support of its conclusion on the dangerous condition theory, the court cited *Lee*, *supra*, 107 Cal.App.4th 848, which addressed when a cause of action involving continuing damages accrues for purposes of the deadline for filing a government tort claim (*id.* at pp. 855-858).

The court was persuaded by Casburn's testimony that "the flow in Heron Creek is less efficient with the construction of the trapezoidal channel," and by the evidence in the trials of the complaint and cross-complaint that "the cause of increased flooding after construction of the trapezoidal channel was a combination of poor design by the [Department] and poor maintenance by the [Department] before May of 1997 and poor maintenance by the City after May of 1997."

Although the court determined that the Department was at fault, and that the Department remained liable, after relinquishing ownership, for negligent design of the channel, the court nevertheless concluded, for two reasons, that the City was not entitled

to equitable indemnity. The court reasoned, first, that because "[t]he jury [in plaintiff's case] was not asked to make any findings as to damages caused by the City . . . the $880,000 damages awarded by the jury fully compensated plaintiffs for all damages solely caused by the [Department]." Second, the court found that the settlement agreement between plaintiffs and the City "was intended to compensate the plaintiffs for damages caused solely by the conduct of the City, i.e., lack of maintenance after relinquishment of the facilities on May 2, 1997," and that "the consideration paid under the agreement did not relate to any damages caused by the conduct of [the Department]."

In view of the findings the jury was called upon to make, and the language of the settlement agreement, it appeared to the court that the City and the Department had each paid its "fair and equitable proportion" of plaintiffs' damages: "the [Department] is obligated to pay its fair proportion of the plaintiffs' damages related to design and construction of the facility and lack of maintenance before the relinquishment as a result of the jury's award and the City is obligated to pay its fair proportion of plaintiffs' damages related to lack of maintenance after the relinquishment as a result of the Settlement Agreement with the plaintiffs."

B. Discussion

Equitable indemnity "permit[s] a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis." (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 598.) Equitable indemnification can be obtained from a public entity on grounds for which the entity would be liable. (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1366, p. 788, and cases cited.) In order to obtain indemnity, a settling defendant must prove that the settlement amount has been paid, that the amount of the settlement was reasonable, and that fault on the part of the nonsettling defendant contributed to the plaintiff's injuries. (*Mullin Lumber Co. v. Chandler* (1986) 185 Cal.App.3d 1127, 1134-1135.)

The equitable indemnity doctrine "applies only among defendants who are jointly and severally liable to the plaintiff," but the concept of "joint and several liability in the context of equitable indemnity is fairly expansive," and "can apply to acts that are

concurrent or successive, joint or several, as long as they create a detriment caused by several actors. [Citation.] [¶] One factor is necessary, however. With limited exception, there must be some basis for tort liability against the proposed indemnitor," which is "[g]enerally . . . based on a duty owed to the underlying plaintiff . . . ." (*BFGC Architects Planners, Inc. v. Forcum/Mackey Construction, Inc.* (2004) 119 Cal.App.4th 848, 852.) Here, the City's exposure to liability to plaintiffs began when the drainage channel was relinquished. If the Department's liability to plaintiffs ended at that time, there was no "basis for tort liability against [the Department]" (*ibid.*) supporting equitable indemnification of the City—the amount paid in the settlement would have been for the City's liability alone.

Thus, as the trial court apparently recognized, the threshold question with respect to equitable indemnity was whether the Department had any ongoing liability to plaintiffs after relinquishing ownership of the channel. We agree, for different reasons than those given by the trial court, that such ongoing liability could be found to exist.

Flooding caused by a malfunctioning work of improvement can support causes of action for a dangerous condition of public property and nuisance (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 75, 103-104 (*Paterno*)), public entities can be held liable on a nuisance theory, as well as a dangerous condition theory (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 932-937 [Civ. Code, § 3479 provides statutory ground for nuisance liability]), and the weight of authority allows both theories to be pursued simultaneously (*Paterno, supra*, at pp. 103-104). Therefore, the continuing liability of the Department required for equitable indemnity of the City can be shown under either theory.

Looking first at liability for a dangerous condition of public property, it is clear that such liability can be based on control as well as ownership of the property at the time of the injury. (*Tolan v. State of California ex rel. Dept. of Transportation* (1979) 100 Cal.App.3d 980, 984 (*Tolan*).) "For liability to be imposed on a public entity for a dangerous condition of property, the entity must be in a position to protect against or warn of the hazard. [Citation.] Therefore, the crucial element is not ownership, but

rather control." (*Mamola v. State of California ex rel. Dept. of Transportation* (1979) 94 Cal.App.3d 781, 788.) In deciding whether control is exercised, a trier of fact can consider whether the public entity "had the power to prevent, fix, or guard against the dangerous condition," or "treated the property as if it were its property." (CACI No. 1101 (2008 ed.).)

The jury here found that the Department controlled the drainage channel after the relinquishment, and that finding was supported by substantial evidence. The parties' correspondence around the time of the relinquishment, which the Department sought to admit and the City attempted to exclude at the indemnity trial, favored the City on the control issue. The Department cleaned out the drainage channel after the relinquishment, and also installed the 48-inch pipes in the channel—a project over which the City, in a December 1997 letter, professed to have no jurisdiction. The Department's January 1998 response did not disclaim jurisdiction over the channel; to the contrary, it outlined further Department investigation and work on the channel. These actions and communications supported findings that the Department had the power to prevent or fix problems with the channel, and thereby exercised control over the channel for remediation purposes, after the relinquishment.

The Department reads *Tolan*, *supra*, as precluding dangerous condition liability for relinquished facilities, but that case does not stand for that broad proposition. The plaintiff in *Tolan* sued the State of California for an injury sustained in 1976 allegedly caused by the dangerous condition of a roadway. The facts were simply that the State owned and maintained the roadway until 1973, when it relinquished the roadway to a city. *Tolan* recognized that "control" involves the ability to " 'protect against or warn of the hazard,' " and " 'to prevent, remedy or guard against a dangerous condition' " (*Tolan, supra,* 100 Cal.App.3d at p. 984), and cited no facts indicative of such ability on the part of the State like those present here. *Tolan* is therefore distinguishable. We would grant that control would ordinarily pass along with ownership upon a relinquishment, but the case at bench demonstrates that this is not invariably true. While the Department might have been powerless after the relinquishment to remedy problems with the channel over

the City's objection, the City in this instance was not standing in the Department's way but rather imploring the Department to take remedial action, and the Department stepped in and made some repairs at the City's urging.

A finding that the Department retained control of the drainage channel after the relinquishment would thus support ongoing liability to plaintiffs and establish a necessary predicate for equitable indemnification of the City under the dangerous condition theory. It is less clear whether a continued control finding would be required to permit equitable indemnity of the City under the nuisance theory.

On the one hand, as the trial court recognized, the *Mangini* and *Newhall* cases hold that the creator of a nuisance remains liable for ensuing damages even if the creator is not " 'in the position to abate it.' " (*Mangini, supra*, 230 Cal.App.3d at p. 1137, fn. 7; *Newhall, supra*, 19 Cal.App.4th at p. 344.) The plaintiffs in these cases were authorized to recover damages from prior owners of their properties who had contaminated the properties with hazardous waste. After surveying *Mangini*, *Newhall*, and other precedents, the court in *City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th 28, 38 (*Modesto*), declared: "liability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance." (See also *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292, 306 (*Santa Clara*) [quoting this same language in *Modesto*].) In *Mangini*, *Newhall*, *Modesto*, and *Santa Clara* the defendants were private parties.

On the other hand, ownership or control has been deemed a prerequisite for nuisance liability in cases against public entities. In *Longfellow v. County of San Luis Obispo* (1983) 144 Cal.App.3d 379 (*Longfellow*), the plaintiffs sued the City of Atascadero and the County of San Luis Obispo for injuries sustained from a fall on a sidewalk in Atascadero in October of 1980. The court held that the county was not liable on a nuisance cause of action for several reasons, including the fact that the city took over responsibility for the "control and maintenance" of the street from the county on July 1,

1980. (*Id.* at pp. 382, 384.) The opinion noted that the county "was not the owner or in control of the property at the time of the injury," and continued: "The general rule is that former owners of land are not liable for injury sustained by persons while on the land after the property has been transferred. (*Copfer v. Golden* (1955) 135 Cal.App.2d 623, 631.) Civil Code section 3483 imposes liability on owners at the time of the injury for nuisances created by former owners that the later owners do not abate. It does not impose liability on former owners whose period of ownership predated the injury. [¶] While *Copfer* does not deal with nuisances, its principles apply to this case and are consistent with the *Tolan* case which provides liability on the part of a public entity only for property it either owns or controls at the time of injury. [Citation.]." (*Longfellow, supra,* 144 Cal.App.3d at p. 384; see *Phleger v. Superior Court* (1985) 172 Cal.App.3d 421, 429 [nuisance case against public entities, agreeing with this aspect of *Longfellow*]; see also *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 373-374 [citing *Preston, supra,* 42 Cal.3d at pp. 125-126].)

We adhere to the precedents involving public entities, which are more closely on point than the cases with private party defendants, and accordingly conclude that public entity ownership or control at the time of the injury is required to hold the entity liable on a nuisance theory.

While the trial court did not conclude that a finding of control was necessary, it did determine, as have we, that the Department could be liable for postrelinquishment damages. While it thus appeared that the City and the Department could be found jointly and severally liable to plaintiffs as required for the City's equitable indemnity claim, the court nevertheless denied that claim on the ground that the City's and the Department's liabilities had been equitably apportioned in the settlement and the jury verdicts. We disagree with the court on this point, and conclude that a retrial of the indemnity issue is required.

Turning first to the settlement, the court apparently reasoned that because the settlement agreement recited that the City's obligation to plaintiffs was limited to postrelinquishment maintenance of the channel, and because maintenance of the channel

was the City's sole responsibility after the relinquishment, the consideration paid under the settlement was for damages caused solely by the City and not by the Department. This reasoning disregards the settlement agreement's provision prohibiting its terms from being construed to limit the City's ability to prosecute its cross-complaint against the Department. More fundamentally, this reasoning overlooks the City's exposure to joint and several liability for the plaintiffs' postrelinquishment damages, which might have prompted the City to settle for an amount greater than the damages it believed it had "solely caused." Issues raised by the City's indemnity claim—whether the amount of the settlement was reasonable in light of the City's potential liability, and whether as a matter of comparative fault the City was equitably entitled to indemnity from the Department for some portion of that amount—were not resolved by the terms of the settlement agreement.

Nor were these issues resolved by the jury verdicts. The Department misconstrues the trial court's indemnity decision when it states that the court "ultimate[ly] conclu[ded] that the jury verdict against the [Department] was solely for plaintiff[s'] damages up to the date of relinquishment." As the Department knows from the rulings on the in limine motions, jury instructions, and verdict form in the trial of plaintiffs' case, the court refused to preclude the jury from awarding postrelinquishment damages. The Department acknowledges that the jury was asked to assess postrelinquishment damages, but notes that the court's indemnity decision stated that the jury awarded damages "related to design and construction of the facility and lack of maintenance before the relinquishment." Contrary to the Department's position, this language in the decision was not a finding that the verdicts were limited to prerelinquishment damages. Even if the words "before the relinquishment" were intended to modify "design and construction of the facility," those words, in context, simply meant that the design and construction *occurred* before the relinquishment. The court consistently rejected the Department's attempts to confine its liability to the prerelinquishment period, and it did so in its indemnity decision, as we have indicated, by concluding, based on the *Mangini*, *Newhall*,

and *Lee* cases, that the Department remained liable "even though it no longer own[ed] the property."

What the court determined as to indemnity was that, because the jury was not asked to make any findings as to the City's liability, the verdicts must have covered all of the damages caused by the Department. This conclusion was likely strengthened in the court's mind by the fact that the verdicts awarded postrelinquishment damages. But the verdicts' failures to address the City's liability prevented them from being dispositive on the question of equitable indemnity. The jury was not called upon to determine the extent of the City's liability, much less the reasonableness of the settlement in view of that liability, or the City and the Department's comparative fault.

Another trial of the indemnity causes of action is therefore required. In order to prevail, the City must show: (1) that the Department remained liable to plaintiffs after the relinquishment on a dangerous condition of public property or a nuisance theory; under either theory, it must be demonstrated that the Department exercised control over the drainage channel after the relinquishment;[6] (2) that the amount of the settlement was reasonable; and (3) that the Department should equitably bear some of the City's liability given their relative culpability.

III. OTHER CITY CAUSES OF ACTION

A. Background

After the court rendered its decision on the indemnity causes of action, the Department moved to dismiss the causes of action in the City's cross-complaint for damages and declaratory relief. The cause of action for money recovery sought "reimbursement from [the Department] for all monies expended to clean and maintain" the drainage channel. The cause of action for declaratory relief sought a determination of the parties' "responsibilities relative to the ownership, maintenance and control of said drainage improvements." The declarations sought were: (1) that the City was entitled to

[6] We have discussed the evidence on the control issue only to show that a finding of control would be supportable, not that such a finding is compelled.

indemnity so that it would be "required to pay to plaintiffs an amount no greater than its proportionate share of legal responsibility," and (2) that the Department owned and was responsible for "maintenance and control" of the drainage channel.

The court granted both the motion to dismiss the declaratory relief count, and the motion to dismiss the monetary recovery count insofar as that count sought damages incurred after the relinquishment. The court determined that damages were not recoverable for that period because the Department had no duty to maintain the channel after the relinquishment, and the City's government tort claim did not encompass damages for defective design of the channel, or damages incurred after ownership of the channel was transferred. As a consequence, the cause of action was limited to "damages for expenses incurred by the City as a direct result of the alleged failure of the [Department] to properly maintain the property during the period of time before the property was conveyed to City."

The City declined to further prosecute the monetary recovery cause of action in the wake of this ruling. The City explains in its appellate brief that it never contended that its property was damaged prior to the date of the relinquishment.

B. Discussion

The City advances no effective arguments against the rulings on these causes of action.

The City sought monetary recovery for the costs it incurred to maintain the drainage channel after the relinquishment. However, the City has not shown that the Department remains responsible for maintaining relinquished properties; the rule is to the contrary (see, e.g., *Tolan*, *supra*, 100 Cal.App.3d at p. 982 [state maintained boulevard until it relinquished control to city]). As we noted at the beginning of this opinion, the City acknowledged in its correspondence with the Department that it would "maintain the constructed improved channels within the City limits upon their relinquishment." Thus, as between the City and the Department, the duty to maintain the channel, along with ownership of the channel, passed to the City with the relinquishment. An administrative remedy was available to the City to contest the relinquishment and avoid assumption of

that duty. Having failed to exhaust that remedy, the City cannot recover the cost of fulfilling that duty from the Department in this action.[7]

The declaratory relief cause of action was properly dismissed as superfluous. The subjects on which relief was sought—ownership of the channel, responsibility for its maintenance, liability for indemnity—have been or will be resolved in the trials of the relinquishment and indemnity issues.

IV. DISPOSITION

The judgment for the Department on the City's cross-complaint is reversed on the indemnity causes of action, and is otherwise affirmed. The parties shall bear their own costs on appeal.

[7] Although the court did not dismiss the monetary recovery count on this ground, the ruling can be affirmed on any correct theory. (See *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 692, fn. 13.)

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Marchiano, P.J.

We concur:

_____
Stein, J.

_____
Margulies, J.

City of Cloverdale v. Dept. of Transportation, A115570

TRIAL COURT: Sonoma County Superior Court

TRIAL JUDGES: Honorable Laurence K. Sawyer and Honorable Conrad L. Cox

ATTORNEYS:

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