S279857

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. _____

BRIAN SHENSON et al.,
Plaintiffs and Appellants,

v.

COUNTY OF CONTRA COSTA et al.,
Defendants and Respondents.

Court of Appeal of California
First District, Division Two
No. A164045

Superior Court of California
Contra Costa County
No. CIVMSC1701267
Hon. Jill Fannin

PETITION FOR REVIEW

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Petition for Review

I. ISSUES FOR REVIEW

This Petition raises four issues:

1. Did this Court, in *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327 *(Locklin)*,[1] "implicitly overrule" *Frustuck v. City of Fairfax* (1963) 212 Cal.App.2d 345 *(Frustuck)*, one of California's leading inverse condemnation cases, without citing *Frustuck* and without addressing either of the two legal issues that *Frustuck* decided?
2. Does *Locklin* and/or the Subdivision Map Act (Gov. Code, § 66410 *et seq*.) establish a procedure whereby respondent County of Contra Costa (the "County") could compel a private property owner/developer to install drainage improvements on his property to receive surface water diverted from its natural drainage channels and convey that water across his property to Murderer's Creek (a "natural watercourse"), and also compel him to dedicate irrevocable public drainage easements over those improvements "to the County for public use," but then allow the County to avoid any obligation to maintain either the improvements or the public drainage easements by accepting the easement dedications "for recording only"?

[1] Petitioners have inserted hyperlinks to all citations to legal authorities and to the Appellant's Appendix. Readers can immediately access referenced authorities and evidence by "clicking" on the citations.

3. Did the Court of Appeal improperly adjudicate that the County did not enter into a contract to maintain the storm drainage improvements that it required a developer to install on private property to serve two of the County's off-subdivision storm drainage needs, despite Petitioners' evidence that the County *did* enter into such a contract?
4. Did the Court of Appeal misapply the *Locklin*/Van Alstyne "reasonableness analysis" by adjudicating, as matters of law, that Respondents' joint management of the Murderer's Creek watershed (a) did not incorporate the Creek into the public drainage system, and (b) is not placing an "unreasonable" (disproportionate) burden on the downstream riparian property owners?

II. REASONS WHY THE COURT SHOULD GRANT REVIEW

Petitioners are homeowners in two severely damaged subdivisions in Contra Costa County. They ask the Court to review a published decision of the Court of Appeal ("Opinion") that affirms an order of the Superior Court granting summary judgment for respondents County and its Flood Control and Water Conservation District (collectively, "Respondents") on what should have been a routine inverse condemnation case. Petitioners are seeking to recover for massive erosion and subsidence damage to their yards – damage that is still ongoing and that has become so extensive it is now threatening their homes. (See AA 2146–2155 [Exh. Z, photographs of property damage].) This damage is being caused by an expanding "scour hole" created by the County's refusal – over several years of accelerating water flows through Murderer's Creek due to

changing weather patterns in Northern California[2] – to maintain or replace a forty-year-old concrete spillway (the "Spillway"). The Spillway had been part of a drainage system that the County required a private developer to install in the 1970s to serve two off-subdivision drainage needs ("the Drainage System").

The Spillway that failed was situated in Brookwood Park, between Petitioners' two subdivisions. Brookwood Park is public property and neither owned nor controlled by Petitioners.

As in *Frustuck*, this County-imposed Drainage System collects and diverts surface water out of its natural drainage channels onto one of the private residential subdivisions (referred to herein as either "Subdivision MS102–72" or simply "the Subdivision"). In the 1970s, the County required the Subdivision's developer to construct the Spillway and most of the other drainage improvements within the Drainage System on his private property as a condition for its acceptance of his Subdivision.

This Drainage System is still operating today – albeit now without its Spillway. It is still channeling diverted surface water across the Subdivision to Murderer's Creek. It is still needed to serve the County's same two public drainage needs.

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[2] This issue is timely because the problem Petitioners are confronting is exacerbated by climate change, a trend that will continue to challenge the State and its residents. (See, e.g., Dreyzin, G., The Next Wave of Climate Change Litigation: Comparing Constitutional Inverse Condemnation Claims in the United States, South Africa, and Japan, 31 Georgetown Envntl. L. Rev. 183 (2018).) This is an opportune time for the Court to revisit inverse condemnation law and clarify public entities' role in furnishing drainage service in a manner that promotes sensible land use in California.

The four issues presented for review are explained more fully below along with the reasons why review is needed.

Issue No. 1. First, the Court of Appeal held that in *Locklin*, this Court "implicitly overruled" *Frustuck* on two interrelated points. (Opinion, p. 22.) *Frustuck* holds that (1) a public entity is strictly liable for inverse condemnation whenever (as here) its public drainage improvements divert surface water out of its natural drainage channel onto private property, causing damage; and (2) the public entity is not relieved of liability where, as here, some of the drainage improvements were built by private property owners or developers to satisfy requirements the public entity imposed upon them during the subdivision approval process.

According to the Court of Appeal's Opinion, this Court's purported overruling of *Frustuck* on both of these points was "implicit." That is a conceit because *Locklin* never mentions *Frustuck* and does not address either of the issues *Frustuck* decided. Further, during the thirty years that have elapsed since this Court decided *Locklin*, no other published or even unpublished decision has stated or implied that *Locklin* might have overruled or even disapproved of *Frustuck* on these or any other issues. (See section III.A. below.) On the contrary, the courts of appeal have repeatedly relied upon *Frustuck* in deciding that inverse condemnation claims are meritorious under the legal principles that *Frustuck* acknowledged and reaffirmed.

The holding of the Court of Appeal in this case creates confusion in long-settled inverse condemnation law because for six decades – including three decades that have elapsed since this Court decided *Locklin* – courts have continued to cite *Frustuck*

with approval and to apply its holdings and reasoning. This Court should grant review to clarify which case – the published Opinion in this case or *Frustuck* – correctly states California law. Such clarification is now, unfortunately, imperative.

Issue No. 2. Second, the Court of Appeal held that this Court's reasoning in *Locklin*, applied to several provisions of the Subdivision Map Act, allow public entities to nullify their constitutional, legal, and contractual obligations to maintain the public drainage improvements they require developers to construct on private property. Here, Petitioners submitted in their oppositions to summary judgment three pieces of evidence that, if credited by a neutral factfinder, will prove that the County entered into a contract that obligated it to maintain the Spillway and the other drainage improvements that it required the developer to install within his Subdivision. However, the County had required the developer to dedicate irrevocable storm drainage easements over those improvements "to the County for public use" and then recorded a document purporting to limit its acceptance of those dedications to "recording only." By taking these steps, the Court of Appeal has held, so long as the County has never exercised "dominion and control" over the dedicated easements by performing any maintenance work within the easements, the County was able to acquire the right to *use* those easements and the drainage improvements within them, for its own purposes, *in perpetuity*, while forcing its maintenance obligation back onto the developer – and from him onto the Subdivision's unsuspecting future homeowners. (*Id.* at pp. 6, 29.)

This holding violates two longstanding and universally accepted principles of California real property law. First, owners

of real property cannot own easements that burden their own properties. These are called "nonsensical easements" and their creation is prohibited by statute. (Civ. Code, § 805.) Moreover, they are extinguished by operation of law (the merger doctrine) whenever they arise through acquisition. (§ 811.) Therefore, to the extent the County does not "own" these easements, they cannot exist. Second, anyone "using" an easement that burdens someone else's real property, as the County is indisputably doing here, must maintain the land within easement so as not to damage the servient estate. The County's failure to perform the necessary maintenance is deemed "overburdening" the easement, and it is actionable.

In this case, the Court of Appeal has ruled that *Locklin* did away with both of these real property laws and allows public entities to compel the creation of, and to use, easements and drainage improvements on private property, quite literally, with impunity, *but only so long as they refrain from performing any maintenance work on them*. (Opinion, p. 29.) That would be "exercising dominion and control," and it would subject the public entities to liability for failing to maintain them. (*Ibid.*) *Locklin* neither says nor implies this, of course, and nothing in the Subdivision Map Act recognizes such a rule. The Opinion therefore creates confusion in what has been, for decades, settled real property law.

But this holding does something even more pernicious than merely generating confusion and litigation. The lower court's misinterpretation of *Locklin* and its misapplication of the Subdivision Map Act establish a deleterious public land use policy. If allowed to stand, this Opinion will establish an "if you

touch it, you own it" rule for both public drainage improvements and dedicated public easements over private property. So long as public entities refrain from taking any action to honor their statutory and contractual obligations to maintain public improvements on private property, and so long never do anything to maintain dedicated but ambiguously accepted public drainage easements that burden those private properties, public entities can quietly transfer their maintenance obligations onto the unsuspecting future homeowners in the subdivisions.

If allowed to stand, this holding will disincentivize public entities from ever inspecting and maintaining public drainage systems in residential subdivisions throughout California, even where – as here – they are still needed for public drainage purposes. This will have the practical effect of activating hundreds if not thousands of proverbial "ticking time bombs," in the form of unmaintained and aging public improvements on private property. As these bombs go off, as they will with increasing frequency during times of accelerating climate change (cf. Dreyzen article, fn. 2, supra), they will subvert sensible land use policy and depress real property values throughout California. For this additional reason, this Court should intervene and clarify the law in this area that is vital to the economic health of California.

Issue No. 3. Third, the Court of Appeal adjudicated a hotly controverted triable issues of material fact: did the County enter into a contract to maintain the Spillway? Petitioners introduced three separate pieces of evidence that it did. But, like the trial court before it, the Court of Appeal found that Petitioners' evidence to prove this contract is unpersuasive.

This case was summarily adjudicated before any expert discovery had been taken[3] after the Superior Court had excluded Petitioners' expert declaration about the customs and practices in subdivision approval process in Contra Costa County during the 1970s – an evidentiary ruling that the Court of Appeal labeled "harmless error," raising and deciding an issue that the parties had neither mentioned nor briefed. This holding, if allowed to stand, will establish an exception to the universally accepted rule that summary judgment motions involve *identifying* triable issues of material fact, but not *deciding* them.

Issue No. 4. Finally, Petitioners' invocation of the *Locklin*/Van Alstyne requires the adjudication of two fact-intensive questions: Has Respondents' joint, affirmative management of drainage within the Murderer's Creek watershed incorporated the Creek into the public drainage system? If not, is Respondents' election not to require mitigation measures (e.g., small retention ponds) upstream placing a disproportionate, and therefore "unreasonable," burden on the downstream riparian property owners? Scores of cases (including *Locklin* itself) have held that both of these questions turn on the evidence and the particular circumstances of each case, and they are therefore not amenable to summary judgment. Yet the Court of Appeal has held that, in fact, both of these questions *can* be summarily

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[3] The Opinion asserts at page 1: "The parties [have] complet[ed] all or most discovery." That is not a true statement. The trial court repeatedly vacated the trial date to accommodate Covid-19 restrictions, so expert disclosures and discovery, which are triggered by the trial date, have not yet taken place. Although Petitioners pointed out this misstatement in their petition for rehearing, the Court of Appeal elected not to correct it.

adjudicated, even in the face of evidence such as the expert declarations that Petitioners submitted below. Here, again, the Court of Appeal is carving out an exception to the accepted rule that disputed issues of material fact cannot be decided without full discovery and a trial.

On April 13, 2023, Petitioners filed a petition for rehearing in which they pointed out each of these errors in the Court of Appeal's Opinion. On April 24, 2023, the Court of Appeal issued an order summarily denying it, declining to modify its Opinion in any respect.

Petitioners believe there is ample evidence in the record to decide the legal issues presented by this Petition. However, Petitioners acknowledge that the evidentiary record is not as fully developed as it would be if the lower courts had allowed expert discovery and given Petitioners an opportunity to present their evidence at trial. Petitioners believe this procedural posture makes this case well suited for the Court's "grant and transfer" procedure, established in article 6, section 12 of the California Constitution and implemented in California Rules of Court, rules 8.500(b)(4) and 8.528(d).

Petitioners therefore respectfully submit that this Court should grant this Petition and *either* (1) order full briefing of the merits of the important legal issues presented by this case on the existing record, or (2) de-publish the Opinion of the Court of Appeal and transfer the case back to Division Two of the First District Court of Appeal with an order or summary opinion stating that the lower Court erred in holding that *Locklin* had "implicitly overruled" *Frustuck*, that *Frustuck* and its progeny remain controlling law, and that these cases require reversal of

the summary judgment on this record – and further directing the Court of Appeal to remand this case to Superior Court with a directive to vacate its summary judgment, enter a new order denying Respondents' summary judgment motions, and then allow the parties to disclose experts, take expert discovery, and, if thereafter warranted, to proceed to trial.

III. THE EVIDENCE THAT PETITIONERS INTRODUCED IN OPPOSITION TO RESPONDENTS' SUMMARY JUDGMENT MOTIONS RAISED TRIABLE ISSUES OF FACT.

This case was decided on summary judgment before expert disclosures and without expert discovery. In their opposition to Respondents' summary judgment motions, Petitioners introduced the following evidence:[4]

> • The Spillway is a component of the Drainage System that the County required the developer of the Subdivision (Albert Bowler) to construct as a condition for its acceptance of his proposed Subdivision. (AA 1920–1922 [¶¶ 6, 9–13, 17]; AA1932–1934 [Exh. A]; AA1942 [Exh. D].)
>
> • Gloria Terrace, a County-owned road, is a component of the Drainage System because it traverses a hillside. As it does so, it diverts surface water out of and away from its natural drainage path, and it concentrates and conveys that water

[4] All citations to the Appellant's Appendix ("AA") can be accessed by clicking on the AA cite. Petitioners have also electronically highlighted the relevant text in the exhibits to expedite the Court's review.

along the roadway. (AA 1922, ¶ 17.) This concentrated surface water needs to be disposed of without causing damage to private property. (*Ibid*.)

• This Drainage System collects this unwanted surface water that accumulates during rain events on Gloria Terrace, a County-owned street, and *diverts it out of its natural drainage path* onto and through the MS102–72 Subdivision to a discharge point on Murderer's Creek. (AA 1921–1922 [¶¶ 13, 17]; AA 2309 [¶ 12]; cf. AA 1407 [Respondents' admission that Gloria Terrace is a "County Road"].)

• During the approval process for the Subdivision, the County demanded that Mr. Bowler *expand* the Drainage System (then under construction on his Subdivision) by constructing *additional* drainage improvements (a lined ditch, a second catch basin, another underground pipeline) to receive *additional* surface water that the County now needed to divert onto and through the MS102–72 Subdivision from Subdivision 4234, the adjacent subdivision to the north, and ultimately into Murderer's Creek. (AA 1920–1921 [¶¶ 10–12], AA 1935–1940 [Exhs. B-C].) The County needed these additional drainage improvements to remove Subdivision 4234's accumulating surface water to correct an oversight by the County when it had accepted *that* subdivision without confirming that its developers had completed its drainage system (they hadn't). (*Ibid*.)

• *None* of the surface water that is being diverted from Gloria Terrace and from the adjacent Subdivision 4234 onto the MS102–72 Subdivision would enter the latter Subdivision, let alone arrive at the discharge point where the Spillway used to sit, if it were not being diverted there by the Drainage

System, which is a combination of County-owned and County-mandated drainage improvements. (AA 2309 [¶ 12].)

• The County further required the MS102–72 Subdivision's owner to place drainage easements over each of the major components of this Drainage System on his property (i.e., over the drop inlet, both catch basins, the underground pipelines, and the Spillway) and irrevocably dedicate those easements to "the County for public use." (AA 1920 [¶ 9, condition (d)]; AA 1924 [¶ 27]; AA 1942 [Exh. D]; AA 1957 [Exh. I].) He did so. Because the County has not *rejected* these dedications, the private property owners can never withdraw the easements, and they must let the County continue to use them to serve the public interest in perpetuity. (See ROB p. 45 ["if the offer is not accepted, or even if it is rejected, it remains open and cannot be revoked (except in the manner provided in the Map Act) and may be accepted at a later time"].)

• Thus, the County is asserting the right to *use* these dedicated public drainage easements on private property, and to use each of the drainage improvements contained within them, forever, to satisfy what it has determined to be the public's storm drainage needs. (*Ibid.*)

• On September 30, 1975, while the County was negotiating the MS102–72 subdivision agreement with Mr. Bowler, his engineer (Robert C. Humann) wrote a letter to the County memorializing his client's understanding that the County had agreed to assume responsibility for maintaining these drainage improvements upon its "acceptance" of his proposed Subdivision. (AA 1942 [Exh. D].)

• The parties' agreement is further confirmed by the MS102–72 subdivision agreement itself, which provides that the developer's maintenance obligation terminates one year after the County's "acceptance" of his proposed Subdivision. (AA 1944 [Exh. E], ¶ 3.)

• This mutual understanding between Mr. Bowler and the County is further confirmed by the absence of a homeowners' association for the MS102–72 Subdivision, which the County would have required, as a matter of its then existing custom and practice, if it were *not* agreeing to maintain the drainage improvements. (AA 1926 [¶ 33].)

• On April 3, 1979, the County "accepted" the MS102–72 Subdivision. (See AA 1926 [¶ 34]; AA 1952–1954 [Exhs. G and H].)

• When the County recorded the final parcel map for Subdivision MS102–72, it also recorded a resolution stating that it was accepting the dedicated drainage easements "for recording only." (AA 1806 [Exh. 13].) There is no evidence in the record that the County revealed to the developer (or to anyone else) its reason for purporting to limit its acceptance of the easement dedications to "recording only," or what legal effect that limitation supposedly has.

• In 2016, when the Spillway was approaching the end of its service life and starting to fail, the current owners of homes near the Spillway notified the County of the need to repair or replace it. (AA 1923 [¶ 21]; AA 2002 [¶ 14].)

• The County refused to maintain the Spillway, breaching both the MS102–72 subdivision agreement

and its express agreement with the Subdivision's developer. (*Ibid.*) The County allowed the Spillway to collapse into the Creek. (*Ibid.*)

• The County then continued to do nothing for two more years, allowing the failed Spillway to sit in the Creek bed causing turbulence and erosion and forming the scour hole. (AA 1924 [¶¶ 23–25]; AA 1929 [¶¶ 48–50]; AA 2002 [¶ 14].)

• The expanding scour hole is causing catastrophic damage to Petitioners' homes and yards. (AA 1986–1991, AA 1994–1998; AOB p. 23 [Figures 2–3]; AA 2022 [¶ 15]; AA 2146–2155 [Exh. Z, photographs of property damage].)

• Both before and after its collapse into the Creek, the Spillway was not located on property owned or controlled by Petitioners, so Petitioners did not have the power to maintain, repair, or replace the Spillway. (AA 1927–1929 [¶¶ 40–45].)

• The expansion of the scour hole has been exacerbated by the increasing volume and velocity of water in Murder's Creek caused by ongoing development within the Murderer's Creek watershed upstream of Petitioners' properties. (AA 1929–1930 [¶¶ 51–52].)

• Respondents are actively managing development within that watershed, and, through its subdivision approval process, they have the power to decide whether or not developers within the watershed must install mitigation measures (such as detention ponds) to reduce the flow in Murderer's Creek. (*Ibid.*; see also AA 1623 [Contra Costa County Ordinance no. 914–2.004].)

• This authority lets Respondents choose how to allocate the burden of using the Creek to furnish storm drainage between the upstream developers and the downstream riparian property owners. (AA 1929–1930 [¶¶ 51–52]; AA 1623.)

• Respondents, working in coordination with each other, are assessing and collecting storm drainage fees from developers within the watershed for their use of Murderer's Creek to provide storm drainage service to their properties. (AA 2001 [¶¶ 9–13].) As of the date Respondents filed their Opposition Brief in this appeal, Respondents had collected $1.5 million in storm drainage fees through these assessments. (ROB, p. 4 "The fees generated total approximately $1.5 Million"].)

IV. LEGAL ANALYSIS

A. *Locklin* Did Not "Implicitly Overrule" *Frustuck*.

The Decision announces at page 22 that "*Frustuck* was implicitly overruled by *Locklin*." *Locklin* never cites or mentions *Frustuck*, though it is one of the leading inverse condemnation cases in California, because *Locklin* never addressed either of the two issues that *Frustuck* decided. This holding is manifest error that, if allowed to stand, will create confusion in the law.

Frustuck, like this case, involved damage to private property caused by storm drainage improvements on both public and private property that diverted surface waters out of their natural drainage channels onto the plaintiff's parcel. (*Frustuck*, *supra*, 212 Cal.App.2d at p. 362.) There, like here, some of the drainage improvements causing the diversion had been constructed on

private property by developers, and all of them had been "planned, specified and authorized" by a public entity (the City of Fairfax) to address public storm drainage needs. (*Ibid.;* see also *id.* at pp. 362–363 ["[t]he fact that the [construction of the drainage improvements] is performed by a contractor, subdivider or a private owner of property does not necessarily exonerate a public agency, if such contractor, subdivider or owner follows the plans and specifications furnished or approved by the public agency"].) The *Frustuck* court, relying on precedent that already (in 1963) dated back several decades, affirmed a trial court's judgment that held the public entity defendant strictly liable for the damage to private property that its approval and use of these drainage improvements had caused. (*Id.* at p. 363.)

At all times prior to the publication of the lower court's Decision – and well after this Court decided *Locklin* – *Frustuck* has been consistently reaffirmed by California's appellate courts on both issues. With respect to the first issue – that a public entity is strictly liable when it participates in the diversion of surface water out of its natural drainage channel and onto private property – see, e.g., *Bauer v. Cnty. of Ventura* (1955) 45 Cal.2d 276, 283 ["It is well established that the diversion of water from its natural course resulting in damage to adjacent property is actionable"]; *Akins v. State* (1998) 61 Cal.App.4th 1, 18 ["plaintiffs need not prove unreasonable conduct by defendants if the public works, operating as intended, diverted water to properties which were not historically subject to flooding"]; *Yee v. City of Sausalito* (1983) 141 Cal.App.3d 917, 922 [city "gutter [designed] to collect and convey surface water away from the surrounding residences" was "diverting and collecting rain water

in an unintended manner and at plaintiff's expense"]; *Youngblood v. Los Angeles Cnty. Flood Control Dist.* (1961) 56 Cal.2d 603, 607 [". . . when waters are diverted by a public improvement from a natural watercourse onto adjoining lands the agency is liable for the damage to or appropriation of such lands where such diversion was the necessary or probable result even though no negligence could be attributed to the installation of the improvement"]; *Clement v. State Reclamation Bd.* (1950) 35 Cal.2d 628, 637–638 [where flood control improvement "diverts natural stream waters onto the land of a private owner and causes damage thereto, that property is as much taken or damaged for a public use for which compensation must be paid as if it were condemned for the construction of a highway or a school"]; and *House v. Los Angeles Cnty. Flood Control Dist.* (1944) 25 Cal.2d 384, 394] [inverse condemnation liability attaches where "the invasion of plaintiff's land by the flood water was caused by the defectiveness of defendant's structures, which diverted the water out of its natural channel onto the plaintiff's land"].

With respect to the second issue that *Frustuck* reaffirmed – that public entities are not relieved of liability where construction of the drainage improvements was performed by private developers instead of by the public entity itself – see, e.g., *Arreola v. Cnty. of Monterey* (2002) 99 Cal.App.4th 722, 762 [quoting *Frustuck* with approval on this point]; *Marin v. City of San Rafael* (1980) 111 Cal.App.3d 591, 595 ["the fact that the work of construction was performed by a private property owner does not . . . exonerate the public agency from liability [where] the work is somehow approved or accepted by the public agency"]; *Sheffet v.*

Cnty. of Los Angeles (1970) 3 Cal.App.3d 720, 734 ["It is true that defendant County merely approved the plans and accepted the streets, leaving the actual planning and construction to a private contractor, but the County is not thereby shielded from liability"].)

In *Locklin*, this Court *never addressed either of these issues*.[5] *Locklin* addressed an entirely different question: at what point does damage to downstream private riparian property caused by a public entity's upstream use and management of a "natural watercourse" for storm drainage purposes give rise to inverse condemnation liability?

The Court of Appeal's holding that *Locklin* "implicitly overruled" *Frustuck* on these two points suggests that *Locklin* also must have "implicitly overruled," or at least called into question, *all of the cases cited above*. That will now certainly be argued in courts throughout California unless this Court intervenes and corrects this manifest error. And this will cause confusion and litigation in what had been, for almost a century, two settled principles of California's inverse condemnation law.[6]

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[5] Only two drainage improvements were discussed in *Locklin*, the "Sizeler outfall" and the "sheet pile structure." Neither of these improvements was implicated in the appeal because "plaintiffs had not proved that either structure was a substantial concurring cause of the damage to any plaintiff's property." (*Locklin*, *supra*, 7 Cal.4th at p. 341.)

[6] The Decision also holds that in *Ullery v. Contra Costa Cnty.* (1988) 202 Cal.App.3d 562, this Court "reject[ed] the proposition in *Frustuck* for which [Petitioners] cite it here." (Decision, p. 22.) This is a stunning misreading of *Ullery*. In *Ullery*, the plaintiffs' properties had been damaged by subsidence (landslides), which they alleged had been caused by erosion in a seasonal drainage channel. (*Id.* at pp. 555–556.) *Unlike* here, and also unlike in

B. Neither *Locklin* Nor The Subdivision Map Act Allows Public Entities To Void Their Contractual Commitments To Maintain Public Storm Drainage Improvements On Private Property.

1. Property Owners Cannot Own Easements Over Their Own Properties.

The Court of Appeal's Opinion holds that the County has voided its contractual agreement to maintain the drainage improvements that it had required the developer to install within the Subdivision, along with its legal obligation to maintain the drainage easements that burden the Subdivision, because:

> When it approved the subdivision maps . . . the County did not accept the offers of dedication for the drainage improvements, which remained in the ownership of the developers and later the homeowners who purchased the property.

(Decision, p. 2.) This statement conflates two distinct legal issues and reveals the lower court's confusion about rudimentary law governing easements in real property. The court is confusing the drainage *improvements* that the County required Mr. Bowler to

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Frustuck, the plaintiffs in *Ullery* were *not* claiming that public drainage improvements were diverting surface water onto private property. (*Id.* at p. 571 ["Here, the County did not approve or actively construct a drainage system which diverted waters onto appellants' property"].) Nor were they alleging that improper maintenance of such improvements had caused them any damage. In *Ullery* the Court merely distinguished *Frustuck* on its facts, but it did not disagree with or disapprove of the case in any way.

build within the Subdivision with the drainage *easements* that it required him to place over those improvements and dedicate to the County for public use. While the *easements* were (per the County's instruction) dedicated to the County for public use, the drainage *improvements* were never, and legally could not have been, "dedicated" to anyone for anything.

Assuming, arguendo, that the Court of Appeal simply misspoke, and that it intended to say that *the easements* "remained in the ownership of the developers and later the homeowners," that would be another legal impossibility. An easement – which is a nonexclusive right to use another person's property for a specific purpose – cannot be created over a parcel of real property in favor of the owner of that parcel. (Civ. Code, § 805.) And if such an easement comes into existence by acquisition, such as when the owner of the servient tenement acquires the dominant tenement (or vice versa), the easement is extinguished by operation of law (the doctrine of merger). (§ 811; cf., e.g., *Zanelli v. McGrath* (2008) 166 Cal.App.4th 615, 623 ["[t]he rationale underlying sections 805 and 811 is to avoid nonsensical easements – where they are without doubt unnecessary because the owner owns the estate"] [quoting *Beyer v. Tahoe Sands Resort* (2005) 129 Cal.App.4th 1458, 1475, internal quotation marks removed].)

The Court of Appeal's conflation of the *easements* with the *improvements* that the County required the developer to install on the Subdivision appears to be analytical error that the Court of Appeal committed in its haste to achieve a preferred result. If left uncorrected, however, they will create confusion in what had

been, prior to now, universally accepted real property laws. This Court should grant review to reaffirm the continued vitality of existing law on easements.

2. Anyone Using An Easement Over Another Person's Property Has An Obligation To Maintain The Land Within The Easement So As Not To Overburden The Servient Tenement.

It is hornbook law that "[t]he owner of an easement not only has the *right* to maintain and repair the easement, he or she also has the *duty* to keep the easement in a safe condition to prevent injury to third persons and to the servient tenement." (Miller & Starr, Cal. Real Estate 4th § 15.67 [footnotes and citations omitted, italics in original].) Indeed, this rule is so longstanding and broadly accepted that this Court acknowledged it in *Locklin* itself. (Cf. *Locklin*, *supra*, 7 Cal.4th at p. 356, fn. 17 [describing it as one of the "traditional rules of property law"].) Yet the Court of Appeal rejects it, holding that the Subdivision Map Act allows public entities to evade the rule by taking a few simple steps.

According to the Opinion, any public entity can acquire possessory interests in private property for public use, without having to pay "just compensation," by (a) requiring the owners, as a condition for its approval of their proposed subdivisions, to construct drainage improvements on their property that serve the public entity's drainage needs, (b) requiring those owners to place drainage easements over the improvements and irrevocably dedicate them to the entity for public use, but then (c) ambiguously "accepting" those dedications (e.g., "for recording

only"). According to the Court of Appeal, through this simple process – which is nowhere mentioned let alone condoned in either *Locklin* or the Subdivision Map Act – the County gets to "have its cake and eat it too." It can take possessory interests in private property for public use, and build drainage improvements on that property (or, better yet, compel the property owners to build them at their own expense to satisfy the County's conditions for subdivision acceptance), and then it can use those improvements in perpetuity to serve its public drainage needs, and it can even overburden the easements whenever and to whatever extent it sees fit, all the while forcing the costs and maintenance burdens back onto the developers and from there onto unsuspecting future private homeowners.

This is a bold new rule of law never before recognized by any appellate court of this State. And it is a flagrantly oppressive and heavy-handed rule. It runs squarely afoul of the California Constitution's Takings Clause because it allows public entities to take and damage private property for public use without just compensation. If allowed to stand, it will create widespread confusion in both real property and inverse condemnation law and it will damage California's real property markets. This Court should grant review and clarify these core principles of California law.

C. The Lower Courts' Resolution Of Hotly Contested Factual Issues Against Petitioners Makes This Case An Excellent Candidate For A "Grant And Transfer."

One of the most firmly established rules of California civil procedure holds that "the function of the trial court in ruling on a motion for summary judgment is merely to determine whether such issues of fact exist, and not to decide the merits of the issues themselves." (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) This rule required both the Superior Court and the Court of Appeal to credit "all favorable inferences that may reasonably be derived from the declaration[s]" submitted by the parties opposing summary judgment. (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 125 [reversing trial court for sustaining objection to conclusory statements in expert declaration submitted by party opposing summary judgment]; see also *Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 189 [reversing trial court for abuse of discretion where it "failed to liberally construe the declaration as required"]; *Hanson v. Grode* (1999) 76 Cal.App.4th 601, 607 [same].)

Both of the lower courts ignored this standard. They construed Petitioners' documentary evidence and expert declarations strictly and skeptically. This is most evident in the Court of Appeal's finding of "harmless error" in the trial court's refusal to consider a piece of plainly relevant evidence. (Opinion, at pp. 36–38.) If allowed to stand, these errors, too, will create confusion in yet another area of established law.

Each of the triable issues of material fact and the relevant, admissible supporting record evidence is described below.

1. A Triable Issue Of Material Fact Exists Over Whether The County Agreed To Maintain The Spillway.

In their opposition to Respondents' summary judgment motions, Petitioners introduced three pieces of evidence that, if credited by a neutral factfinder, would prove that the County had acceded to the developer's request that, upon its "acceptance" of his proposed Subdivision, the County would assume the maintenance obligation for Spillway and the other storm drainage improvements that it was requiring the developer to install on his property. These three pieces of evidence were: (1) the letter written by Mr. Humann, the developer's engineer, confirming and memorializing his client's understanding of the County's future maintenance obligations (AA 1942); (2) the subdivision agreement itself, which required the developer to maintain the improvements for one year after the County's "acceptance" of the Subdivision (AA 1944), after which he was to be relieved of that obligation; and (3) the absence of any homeowner's association for the MS102–72 Subdivision, which the County customarily would have required if it had intended that the Subdivision's future homeowners were to assume the maintenance obligation. (AA 1926 [¶ 33].)

Each of these pieces of evidence supports the inference that the developer, Mr. Bowler, had asked the County for its reassurance that it would take on the maintenance obligation for the drainage improvements that it was requiring him to install on his Subdivision, and the County had agreed to his request. However, the Court of Appeal ruled that this entire body

evidence is insufficiently persuasive to prove what it plainly implies. That Court's strained and unorthodox justifications of these rulings reveal that it was applying the wrong standard to achieve a desired result.

a. . The Humann Letter

The September 30, 1975 letter to the County from Mr. Humann, the developer's engineer, listed the "improvements to be installed within the right-of-way of Gloria Terrace" and "the drainage system which will lie within dedicated easements in said subdivision [the MS102–72 Subdivision], which *shall be maintained* by the county upon acceptance." (AA 1942 [Exh. D].) The Court of Appeal held that this letter is not evidence of an agreement because:

> [Mr. Humann] is not a party to the subdivision agreement with the County, and his letter does not refer to that or any other agreement between the developer and the County. The engineer's assertion *may* simply reflect an assumption or prediction that the easements would be accepted by the County. It is not evidence that the County agreed to accept the offer of dedication.

(Opinion, p. 31 [italics added].) The Court can presume that during the subdivision process, developers typically communicate with the County through their retained engineering consultants. The engineer does not need to be a party to the contract himself in order to communicate his client's understandings to the County. And Mr. Humann's letter could not have referred to the

subdivision agreement *because that document did not yet exist* – it was still being negotiated and was executed three weeks later, on October 20, 1975, by Mr. Bowler and the County. (See AA 1944–1946.)

More pointedly, however, the Court of Appeal's musings about what Mr. Humann "may" have been "assuming" or "predicting" is not only patently speculative, but highly implausible. The Court of Appeal is speculating that Mr. Bowler might have agreed to install all of these drainage improvements on his subdivision at his own (substantial) expense, and agreed further to compromise the value of his lots by allowing the County to divert surface water onto the Subdivision from a County road and from an adjacent subdivision, and agreed to compromise the value still further by burdening it with a network of dedicated public drainage easements, *all in exchange for an empty promise*. The promise is empty because, according to the Court of Appeal, the County was free to accept the dedicated easements at any time, or never, as it saw fit.

This is not a plausible interpretation of what Mr. Humann was saying in his letter, and it is a legally untenable interpretation to give the subdivision agreement, especially on summary judgment. The subdivision agreement was drafted by the County so any ambiguity in its language must be construed against the County. (*Tahoe Nat'l Bank v. Phillips* (1971) 4 Cal.3d 11, 19–20.)

b. . The Subdivision Agreement

The Court of Appeal's interpretation of the subdivision agreement itself is even less plausible. This agreement requires the developer to "construct, install, and complete road and street improvements, tract drainage, street signs, fire hydrants, and all improvements as required . . . in the approved improvement plan," and then to "maintain it for one year after its completion *and acceptance* . . . ." (AA 1944 [italics added].) The word "acceptance" at least *appears* to refer to the County's acceptance *of the Subdivision* – an event which everyone agrees took place on April 3, 1979. (See AA 1952, AA 1954.) And the obvious implication of this language is that the County – the only other party to this contract – must have been agreeing, consistently with Mr. Humann's letter, to assume the maintenance obligation for the drainage improvements (including the Spillway) after the developer's obligation to maintain them terminated – i.e., upon the County's "acceptance" of his Subdivision.

Yet the Court of Appeal holds that the word "acceptance" actually refers to the County's acceptance of the dedicated drainage easements over the improvements, not its acceptance of the Subdivision itself. And since thus far the County has accepted those dedications "for recording only," this event has not yet occurred. This is – rather obviously – a hotly contested factual issue that should not have been adjudicated either by the trial court on summary judgment or by the Court of Appeal on appeal. It was error to do so.

c. . Mr. Flett's "Custom And Practice" Testimony.

Finally, the Court of Appeal holds that the trial court's ruling sustaining Respondents' objection to Petitioners' custom and practice evidence in Mr. Flett's declaration is "harmless error" – an issue never raised or briefed below – because, as a matter of law, Mr. Flett's testimony cannot prove what it clearly implies.

That is an untenable holding. The trial court had sustained Respondents' lack of foundation objection to Mr. Flett's declaration without explanation and, in response, Petitioners pointed out, to both the trial court and the Court of Appeal, that the witness had established the foundation in paragraphs 2, 3, 7, 27, 28, 29 and 32 of his declaration. (AA 1919–1925.) In those paragraphs, Mr. Flett explained that he is a 1961 University of California graduate with a degree in civil engineering, and that he worked extensively with, and is therefore familiar with, subdivision approvals in the County during the 1970s, when it was approving Subdivision MS 102–72.

The substance of Mr. Flett's testimony raises a powerful inference that bears on the interpretation of the subdivision agreement: how the contract allocates the maintenance obligation for the drainage improvements. The three sentences that the trial court sustained Respondents; objection to (lines 18–25 of paragraph 39 – at AA 1927) state:

> If the County had intended the drainage improvements in Subdivision MS 102–72 to be private instead of public, it would have included a *similar provision* in the conditions for approval

> providing for their maintenance, and it would not have had the owner dedicate the drainage easements over those improvements to the County for public use. Those easements would have been conveyed to the homeowners' association instead of to the County. This is further evidence that at the time of the creation of this subdivision, the parties understood that the County would have the maintenance obligation for the drainage system that serves the subdivision.

(Italics added.) The "similar provision" that Mr. Flett was referring to in the first sentence (italicized above) is paragraph 4 of the County's conditions for approval of Subdivision 4983, the Via Ferrari subdivision. (AA1947 [Exhibit F to Mr. Flett's Declaration].) The Via Ferrari cul-de-sac is privately owned and maintained, and the County's conditions for approval of that subdivision required its developer to submit to its Planning Department "[p]rovisions for the maintenance of the private streets." (*Ibid.*)

Mr. Flett's point is not a subtle one. According to the County's established practice for subdivision approvals in the 1970s, the absence of a comparable provision in either the conditions for approval or the subdivision agreement for the MS 102–72 Subdivision (AA1932 and AA1944, respectively) is compelling evidence that the County and the developer had mutually agreed that *the County* would take on the maintenance obligation for the MS 102–72 drainage improvements upon its "acceptance" of the Subdivision.

The Decision nevertheless labels the trial court's exclusion of Mr. Flett's testimony "harmless error," reasoning that the

County's ambiguous acceptance of the dedicated drainage easements ("for recording only") constituted its rejection of the maintenance obligation, thereby precluding the formation of a contractual obligation as a matter of law. (Decision, p. 36–37.) The Court of Appeal has misunderstood the reason why Petitioners offered Mr. Flett's testimony. Petitioners offered it (along with Mr. Humann's letter) to explain a patent ambiguity about the meaning of the word "acceptance" in the subdivision agreement, not to create a new or different contract aside from the subdivision agreement.

This evidence raised a triable factual issue. It was error for the trial court to have sustained Respondents' objection to it, and the Court of Appeal's labelling of the trial court's error "harmless" simply compounded the error.

2. Triable Issues Of Material Fact Also Exist Over Whether Respondents' Use Of Murderer's Creek Satisfies The *Locklin*/Van Alstyne "Reasonableness Test."

Finally, Petitioners' second basis for liability, which they alleged against both Respondents instead of solely against the County, is the one that invokes the *Locklin* analysis. This is an independent basis for liability that does not apply to the County's potential liability arising out of its refusal to maintain the Spillway.

Locklin addressed inverse condemnation liability in the context of a public entity's use of a "natural watercourse" to furnish storm drainage service. *Locklin* did not involve a public

entity's construction and use of storm drainage improvements to remove excess and unwanted surface water from a County road and an adjacent subdivision.

Whenever a public entity makes use of a natural watercourse to furnish storm drainage service to the public and a downstream riparian property owner sues it in inverse condemnation whose property is damaged due to the increased flow in the watercourse, *Locklin* requires the trial court to apply a two-step analysis. First, the trial court must ascertain whether the entity's use of the watercourse has incorporated it into the public drainage system. (*Locklin*, *supra*, 7 Cal.4th at pp. 897–898 [citing with approval *Souza v. Silver Dev. Co.* (1985) 164 Cal.App.3d 165, 170].) If so, strict liability attaches. (*Ibid.*) Second, if the threshold question is answered in the negative – i.e., if the evidence establishes that the watercourse has *not* been incorporated into the public drainage system – the trial court addresses the main question: based on its application of the six *Locklin*/Van Alstyne "reasonableness factors" to the unique circumstances of the case, is that use imposing an "unreasonable" (disproportionate or inequitable) cost or burden on the downstream riparian property owners?

Both of these inquiries are fact intensive and turn on the specific circumstances of each case.

In their opposition to the summary judgment motions, Petitioners introduced evidence of Respondents' joint management of the Murderer's Creek watershed. (AA 1929–1930 [¶¶ 51–52]; AA 1623 [Contra Costa County Ordinance no. 914–2.004].) This evidence, if credited by the neutral factfinder, will prove that (a) the expansion of the scour hole caused by the

collapse of the Spillway is being exacerbated by the increasing volume and velocity of water in Murderer's Creek, which is the result of upstream development within the watershed (AA 1929–1930 [¶¶ 51–52]); (b) Respondents are jointly managing development within that watershed and they have expressly taken power to require upstream developers to discharge all increased runoff into the Creek, and to require them to install mitigation measures that, if applied, would reduce the burden on Petitioners and other downstream riparian property owners (*Ibid.*; 3/4/2022 Ryan Decl., Exh. F [Contra Costa County Ordinance no. 914–2.004]); (c) Respondents' decision *not* to impose such mitigation requirements upon the watershed's developers is shifting the burden of the excess runoff from upstream development onto the downstream riparian property owners (*Ibid.*); and (d) Respondents are assessing and collecting storm drainage fees ($1.5 million as of one year ago) from developers within the watershed for their use of Murderer's Creek for drainage service to their properties. (AA 2001 [¶¶ 9–13]; ROB, p. 4.)

Petitioners' evidence raises triable factual issues on both of the questions that *Locklin* requires the trial court to adjudicate. This is a fact-intensive inquiry that turns on the specific circumstances of this case. Petitioners' evidence should have easily defeated summary judgment. The Court of Appeal misinterpreted *Locklin*, however, and held that Petitioners' evidence is insufficient as a matter of law to merit even expert discovery, let alone a trial. This is manifest error.

V. PRAYER

Petitioners respectfully ask the Court to grant review and either (1) order full briefing on the merits to address the Court of Appeal's misinterpretation of *Locklin* and its erroneous assertion that this Court "implicitly overruled" the long, unbroken line of cases (including *Frustuck*) on which Petitioners rely for their primary theory of inverse condemnation liability, and to resolve the conflicts created as to that line of precedent by the published Opinion below, or (2) depublish the Court of Appeal's Opinion and invoke its "grant and transfer" procedure to send this case back to the Court of Appeal with instructions to consider *Frustuck* and its progeny still good law, and to order the trial court to vacate its summary judgment and enter an order denying Respondents' summary judgment motions, and allowing Petitioners to complete expert discovery and present their evidence at trial.

Mackenzie & Albritton LLP

Respectfully submitted,

Dated: May 5, 2023

By: /s/ Mark L. Mosley

Attorney for Plaintiffs and Appellants
BRIAN SHENSON et al.

Certificate of Compliance

This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **8,156 words**, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements and contains fewer words than permitted by rule or Order of this Court.

Dated: May 5, 2023 By: /s/ Mark L. Mosley

Attachment A – A164045
Opinion

Filed 3/30/23

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

BRIAN SHENSON et al., Plaintiffs and Appellants, v. COUNTY OF CONTRA COSTA et al., Defendants and Respondents.	A164045 (Contra Costa County Super. Ct. No. CIVMSC1701267)

Plaintiffs and appellants (collectively, Owners) are two couples who purchased residential properties in neighboring subdivisions within Contra Costa County (County) in 2010 and 2016. Both properties are adjacent to a creek. They sued the County and a flood control district (collectively, Government Entities) for inverse condemnation and parallel tort causes of action after drainage improvements the subdivision developers had constructed 40-plus years earlier failed and serious erosion and subsidence damaged Owners' properties. Owners appeal from the judgment the superior court entered after granting summary judgment against them on their complaint.

The parties litigated the case for about four years, completing all or most discovery. The Government Entities filed motions for summary judgment or in the alternative summary adjudication. The material facts are undisputed. In substance, in the mid-1970s, the County approved

subdivision maps for two subdivisions containing the parcels later acquired by Owners. The creek that runs along Owners' properties is a natural watercourse that functions as the main receptacle for storm runoff emanating from the watershed above Owners' properties and is the only reasonable means of collecting and conveying that runoff. Pursuant to the Subdivision Map Act, the County required the developers to make certain drainage improvements to collect and convey water from the two subject subdivisions as well as one adjacent subdivision, to the creek. Among the properties that contribute runoff to the creek by way of the improvements were three roads, two private roads serving as ingress and egress to the subdivisions and one county owned road that is adjacent to one of the subdivisions.

As provided by the Subdivision Map Act, the County also required the subdivision developers to dedicate drainage easements to the County. When it approved the subdivision maps, however, the County did not accept the offers of dedication for the drainage improvements, which remained in the ownership of the developers and later the homeowners who purchased the property.

Owners claim the County assumed ownership and responsibility for the drainage improvements by requiring the subdivision developers to construct them and to offer to dedicate easements to the County to enable it to maintain them. The County contends that it did not accept the offers to dedicate the easements and did not otherwise assume responsibility for maintaining them.

Owners sued the flood control district under inverse condemnation and other theories, positing that its collection of drainage fees from homeowners in subdivisions within the watershed rendered it responsible for the drainage improvements constructed by the subdivision developers. The evidence

indicates the district did not fund those improvements, which preceded its formation. It contends it cannot be liable for merely collecting fees for future improvements that, thus far, have not been constructed because of the unavailability of matching federal funds.

We affirm the judgment. As a matter of law, a public entity must either own or exercise actual control over a waterway or drainage improvements to render them public works for which the public entity is responsible. The undisputed facts here do not establish any such ownership or control.

BACKGROUND

I.

Facts

In the 1970s and 1980s, the County approved subdivision maps for minor subdivisions in then-unincorporated parts of the County. As relevant here, the County approved the developer's application for a subdivision map for Minor Subdivision (MS) 102-72 in 1973, subject to various conditions. It approved the application for Subdivision 4983 in 1980, again apparently subject to conditions.

Both subdivisions were bordered on one side by a tributary of a creek known as "Murderer's Creek." As the parties have done, for ease of reference we will refer to the tributary as "Murderer's Creek" or "the Creek." The Creek is a natural watercourse that has functioned historically as the main receptacle for storm water runoff emanating from the watershed upstream of these subdivisions. When the applications for the subdivision maps for subdivisions MS 102-72 and 4983 were made, the County imposed certain conditions relating to drainage.

One condition for approval of the MS 102-72 subdivision map was that the subdivision developer "construct, install and complete . . . tract drainage" and conduct related work and improvements "in a good, workmanlike manner. In accordance with accepted construction practices and in a manner equal or superior to the requirements of the County Ordinance Code and rulings made thereunder . . . ." The developer was required by county ordinance to collect and convey "[a]ll surface waters flowing from the subdivision in any form or manner" from the development to the nearest natural watercourse with a definable bed and banks or to a public storm drainage facility. The developer of MS 102-72 was required, among other things, to improve the channel of the Creek "to convey the peak design runoff for the watershed" and to provide drainage of runoff from a private cul-de-sac within the subdivision known as "Kelly Ann Court" via a conduit to the Creek.

Some of the other drainage improvements the developer constructed and installed were an outfall at the Creek with a spillway to protect the bed and bank of the Creek against erosion from the accelerated discharge of surface water from the pipeline into the Creek, sidewalks, curbs, and gutters on Gloria Terrace, a County road adjacent to the subdivision, and a means of diverting and conveying surface water accumulating on that road through MS 102-72 to the discharge point at the Creek. At some point during the subdivision process, the County requested the developer's cooperation in obtaining an easement within MS 102-72 for the purpose of installing a drain line to complete public improvements benefiting a neighboring subdivision (Subdivision 4234). MS 102-72 improvement plans submitted to the County included the "buried storm drain line" running along the western limit of the subdivision where it adjoined Subdivision 4234, which received runoff from

that subdivision, merged with runoff from MS 102-72 in a catch basin and was conveyed through an underground pipeline through MS 102-72 to the Creek.

The developers of MS 102-72 (and Subdivision 4234) designed and constructed the improvements, not the County. However, a county ordinance required developers to submit plans for required improvements to the County's Public Works Department for review and required the Department to inspect the work and, when satisfied it was complete and met county requirements, to recommend that the County Board of Supervisors accept the improvements. The limited purpose of such acceptance was to establish an end date for the contractor's liability under a provision requiring it to guarantee performance of the work and repair of defects for a one-year period after acceptance.

The Board by resolution accepted the improvements for MS 102-72 as "completed for the purpose of establishing a terminal period for filing liens in case of action under [the MS 102-72] Subdivision Agreement" in 1978. As also required by ordinance, the Board adopted a resolution at the end of the one-year period finding "the improvements have satisfactorily met the guaranteed performance standards for one year after completion and acceptance."

The developer was required to obtain or dedicate drainage easements to the County for certain drainage improvements. The parcel map for MS 102-72 depicts two drainage easements and a note indicating they are "dedicated to Contra Costa County for drainage purposes." The actual drainage easement dedication language is contained in a separate document entitled "Offer of Dedication" that was recorded in 1975. It provided that the developer "being the present title owner(s) of record of the herein described

parcel of land, do hereby make an irrevocable offer of dedication to Contra Costa County and its successor or assign, of an easement for storm, flood and surface water drainage, including construction, access, or maintenance of works, improvements and structures, . . . or the clearing of obstructions and vegetation, upon the real property . . . described as follows . . . ." The document refers to the parcel map for the location of the easements. It further states, "It is understood and agreed that CONTRA COSTA COUNTY and its successor or assign shall incur no liability with respect to such offer or dedication, and shall not assume any responsibility for the offered parcel of land or any improvements thereon or therein, until such offer has been accepted by appropriate action of the Board of Supervisors, or of the local governing body of its successor or assign." In December 1975, the County issued and recorded an order stating that the offer was "ACCEPTED *for recording only*." (Italics added.)[1]

The subdivision process for Subdivision 4983 took place a few years after MS 102-72 was completed. The County required the developer of this subdivision to make drainage improvements as well. The improvements appear to have been more modest and included an asbestos cement pipe coupled to a corrugated steel pipe storm drain to collect storm water runoff from Via Ferrari, a small private street within the subdivision, and carry it to an outlet at the Creek. The County did not design, construct or install the drainage improvements on Subdivision 4983. It did inspect the drainage plans and the improvements as required by local ordinance.

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[1] Six months later, it rescinded that order because of an error in the subdivision number and issued and recorded a corrected order, again providing that the acceptance of the offer was "for recording only."

On the subdivision map, the developer offered to dedicate two drainage easements to the County. The County expressly did not accept or reject the offer to dedicate the easements.

There is no record of the County ever expressly accepting the offers of the subdivision developers for either MS 102-72 or Subdivision 4983 to dedicate drainage easements. There is no record of the County indicating it has ever performed maintenance or repair of the drainage improvements constructed on MS 102-72 or Subdivision 4983. Nor are there any County records indicating the County performed maintenance of or repairs to Murderer's Creek at or upstream of the subdivisions.

Owners purchased properties in the subdivisions three to four decades after the subdivision maps were approved. In 2011, Brian Shenson and Emily Shenson purchased real property at 1904 Via Ferrari in Subdivision 4983 (the Shenson Property). The Creek flows along the Shenson Property's northeasterly property line. In 2016, Megan Frantz and David Mariampolski purchased property near the Shenson Property at 18 Kelly Ann Court in MS 102-72 (the Frantz Property). The Creek flows along or near the Frantz Property's southwesterly property line.[2]

In early 2016, the spillway the developer had constructed four decades earlier failed and collapsed into the Creek bed. The uncontrolled discharge of water into the Creek caused a scour hole to form and expand, eventually onto the neighboring private subdivisions. Owners allege the scour hole caused

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[2] Owners contend that a portion of MS 102-72 that includes part of the Creek where it adjoins the lot that later became the Frantz Property was deeded to the Pleasant Hill Park District and became part of Brookwood Park. The Park District is not a party to this appeal. Whether some of the improvements are on the Frantz Property or the Park District's property is not material to this appeal.

erosion and subsidence damage to their respective properties. Owners contend the Government Entities are responsible for the formation of the scour hole because they failed to maintain the Creek's bed and banks and refused to repair or replace the spillway after it failed. In 2017–2018, the expanding scour hole contributed to the failure of a second spillway that was located 20 feet north of the first spillway and had served the water discharge needs of Subdivision 4983.

II.

Complaint and Motion for Summary Judgment

The operative third amended complaint alleged causes of action for inverse condemnation, trespass, nuisance and dangerous condition of public property.[3] Owners alleged the County was responsible for the damage the Creek and drainage improvements caused to their properties for several reasons. First, the County approved subdivision MS 102-72; second, it required the developer of that subdivision to construct the drainage improvements, including a pipeline, a spillway and a catch basin; third, it used those facilities to discharge water from another subdivision and from city streets into the Creek; fourth, it required the developer to offer to dedicate to the County an easement over the property containing those improvements and portions of the bed and banks of the Creek; and fifth, it permitted and encouraged private development of properties upslope from Owners' properties. Owners further alleged that the County accepted the drainage improvements from the developer, used them for public purposes, approved subdivision maps depicting the drainage easements and now "owns

[3] The pleading also included claims against the Pleasant Hill Park District. The claims against the Park District are not the subject of this appeal.

and controls" the land within the drainage easements. They alleged that the County "approved, owned, operated, controlled, repaired and/or maintained a public drainage system" of which the Creek is a part and that the drainage system caused damage to Owners' properties.

Owners alleged that the Contra Costa County Flood Control and Water Conservation District (District) incorporated the Creek into the public drainage system through its establishment of a statutory drainage area known as Drainage Area 46 that includes the Creek, Owners' properties and other properties in the area. They alleged the County and District assessed and continue to assess "storm drainage fees" from property owners within Drainage Area 46 to offset the increased burden that new and expanding development in the area has put on the public drainage system. They further alleged that the District chose to hold the funds from the collected drainage fees to be used for a future project instead of using them to install mitigation measures against the increased water runoff or to repair the spillway.

The County and the District filed motions for summary judgment or summary adjudication. The County argued it was not liable to Owners for inverse condemnation because (1) the Creek was not a public improvement owned or controlled by the County; (2) its acts in approving the subdivisions and requiring drainage improvements and offers of dedication did not transform the Creek into a public storm drain system or otherwise make it or the improvements a public work; (3) it had not accepted the offers of dedication of drainage easements after they were made; and (4) it had not made repairs or maintained the improvements or otherwise impliedly accepted the offers. Finally, the County argued that Owners' related tort causes of action for nuisance, dangerous condition of public property, and

trespass also fail since neither the Creek nor the drainage improvements were public improvements owned or controlled by the County.

The District made similar arguments. The District explained that it was formed in 1951 and was statutorily authorized to establish "drainage areas" and to "institute drainage plans for the specific benefit of such areas." It argued that none of its activities, including forming Drainage Area 46 "with the goal of implementing a regional concept-plan for flood protection to protect areas in the City of Pleasant Hill downstream of Taylor Blvd.," adopting a Drainage Fee Ordinance, establishing a drainage facilities fund for that project, and requesting (but not receiving) matching federal funds, transformed the Creek into a District-owned or controlled public improvement. Further, it argued that it was not an offeree and did not accept the offers of dedication by the subdivision developers, did not provide any storm drainage services, is not a landowner in the watershed, does not divert flows from outside areas into the watershed, does not own any upstream properties or discharge any runoff into the creek, and did not use or otherwise impliedly accept the easements.

In opposition to the County's motion, Owners contended the County was liable for inverse condemnation because it (1) required the developer of MS 102-72 to install drainage improvements as a condition of approval so that surface water from Gloria Terrace (a County road) and a neighboring subdivision could be conveyed through MS 102-72 and into the Creek; (2) required the developer to place drainage easements over these improvements and dedicate them to the County; and (3) jointly with the District, exercised dominion and control over the Creek by requiring all property owners within Drainage Area 46 to discharge additional runoff caused by improvements to their properties into the Creek.

Owners opposed the District's motion on grounds similar to those in its opposition to the County's motion. Owners additionally argued that the District incorporated the Creek into the public drainage system by (1) creating Drainage Area 46; (2) compelling property owners who develop land in the watershed to use the Creek to dispose of additional storm drainage; and (3) collecting storm drainage fees from property owners for this use.

As part of their oppositions, Owners submitted the declaration of Douglas Flett, a civil engineer. As relevant to this appeal, the declaration stated that if the County had intended the drainage improvements in MS 102-72 to be private instead of public, it would not have required the property owner to dedicate the drainage easements to the County for public use. Further, if the County had intended for the owner to maintain the improvements, the easements would have been conveyed to a homeowners' association. The expert concluded that this was "evidence that at the time of the creation of [MS 102-72], the parties understood that the County would have the maintenance obligation for the drainage system that serves the subdivision." The County and the District objected to this testimony on the bases of lack of foundation (Evid. Code, § 403), improper expert opinion (*id.,* § 801), and speculation (*id.,* § 801, subd. (b)).

The trial court granted summary judgment in favor of the County and the District, concluding there was insufficient evidence to support the assertion that they exerted control over or assumed responsibility for either the Creek or the drainage system and that the County's use of the Creek to drain surface water from county roads and to require other riparian owners in the watershed to do the same did not transform the Creek into a public drainage system. The court held that under our Supreme Court's decision in *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327 (*Locklin*), requiring the

dedication of drainage easements as a condition precedent to subdivision approval "does not demonstrate [defendants'] control over a natural watercourse." The undisputed evidence established that the County did not accept the drainage easements on the Shenson Property and accepted the easements on the Frantz Property for recording purposes only. The trial court sustained the County's objection to a portion of Flett's declaration.

Nor, the court held, were the District's acts in collecting fees from property owners evidence of control of the Creek or storm drain facilities. The fees collected were "in service of a proposed plan that has not been implemented." There was no evidence that the District provided storm drainage services or maintained any of the easements and the court concluded the evidence failed to show control by the District.

The court entered judgment in favor of the County and the District, and Owners timely appealed.

DISCUSSION

I.

Standard of Review

Summary judgment is proper "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant seeking summary judgment "bears the burden of persuasion that there is no triable issue of material fact and that [it] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) A defendant meets this burden by showing that plaintiff "has not established, and cannot reasonably expect to establish" an essential element of his claim. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

We review a grant of summary judgment de novo, which means we "decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law." (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) In deciding whether a material issue of fact exists for trial, we "consider all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence." (Code Civ. Proc., § 437c, subd. (c).) We view the evidence in the light most favorable to the plaintiffs, as the nonmoving parties, liberally construing their evidentiary submission while strictly construing the defendants' own showing and resolving any evidentiary doubts or ambiguities in plaintiffs' favor. (*Saelzler v. Advanced Group 400*, *supra*, 25 Cal.4th at p. 768.)

II.

Substantive Law

A. The Subdivision Map Act

"The Subdivision Map Act is 'the primary regulatory control' governing the subdivision of real property in California. [Citation.] The Act vests the '[r]egulation and control of the design and improvement of subdivisions' in the legislative bodies of local agencies, which must promulgate ordinances on the subject. ([Gov. Code,] § 66411.) The Act generally requires all subdividers of property to design their subdivisions in conformity with applicable general and specific plans and to comply with all of the conditions of applicable local ordinances." (*Gardner v. County of Sonoma* (2003) 29 Cal.4th 990, 996-997 (*Gardner*), fn. omitted.)

"Ordinarily, subdivision under the Act may be lawfully accomplished only by obtaining local approval and recordation of a tentative and final map pursuant to [Government Code] section 66426, when five or more parcels are

involved, or a parcel map pursuant to [Government Code] section 66428 when four or fewer parcels are involved. [Citation.] A local agency will approve a tentative and final map or a parcel map only after extensive review of the proposed subdivision and consideration of such matters as the property's suitability for development, the adequacy of roads, sewer, drainage, and other services, the preservation of agricultural lands and sensitive natural resources, and dedication issues. (See, e.g., [Gov. Code,] §§ 66451–66451.7, 66452–66452.13, 66453–66472.1, 66473–66474.10, 66475–66478.)" (*Gardner*, *supra*, 29 Cal.4th at p. 997.)

"By generally requiring local review and approval of all proposed subdivisions, the Act aims to 'control the design of subdivisions for the benefit of adjacent landowners, prospective purchasers and the public in general.' [Citation.] More specifically, the Act seeks 'to encourage and facilitate orderly community development, coordinate planning with the community pattern established by local authorities, and assure proper improvements are made, so that the area does not become an undue burden on the taxpayer.' " (*Gardner*, *supra*, 29 Cal.4th at pp. 997-998.)

The Act defines "[d]esign" to include, among other things, "drainage and sanitary facilities and utilities, including alignments and grades thereof." (Gov. Code, § 66418.[4]) It defines "[i]mprovement" to include "any street work and utilities to be installed, or agreed to be installed, by the subdivider on the land . . . as are necessary for the general use of the lot owners in the subdivision and local neighborhood traffic and drainage needs as a condition precedent to the approval and acceptance of the final map thereof." (§ 66419, subd. (a).) It has been said that "[o]ne of the main purposes of the

[4] All further statutory references are to the Government Code unless otherwise specified.

Subdivision Map Act is to require the subdivider to install properly the streets and drains under the provisions of that act." (*City of Buena Park v. Boyar* (1960) 186 Cal.App.2d 61, 67.)

The Act provides "the key authorization for imposing conditions on development." (4 Manaster & Selmi, Cal. Environmental Law and Land Use (2022) Subdivision Regulation (4 Manaster & Selmi) § 61.03[6] at pp. 61-28 to 61-28.1 (rels. 51-10/2009, 60-3/2014).) "In approving subdivisions, local agencies require that land be dedicated for public uses, that public and private improvements be built, that design review fees be paid to cover the cost of design review, and that capital or impact fees be paid to cover the subdivided land's share of the costs for a wide range of amenities." (*Id.*, § 61.06[1] at p. 61-74.2 (rel. 76-4/2022).)

The Act contains "provisions authorizing local agencies to impose specific conditions on subdivision approvals to achieve certain public purposes or offset particular impacts." (4 Manaster & Selmi, *supra,* § 61.06[2] at pp. 61-74.2 to 61-74.3 (rel. 76-4/2022); see *Youngblood v. Board of Supervisors* (1978) 22 Cal.3d 644, 652 ["The Subdivision Map Act contemplates that the local agency, when it approves a tentative map, will normally attach conditions to that approval, such as the completion of planned subdivision improvements, and will approve the final map only after certifying that the subdivider has complied with those specified conditions"].) This includes improvements for such things as streets, utilities and drainage. (4 Manaster & Selmi, *supra,* § 61.03[6] at pp. 61-28 to 61-28.1 (rels. 51-10/2009, 60-3/2014).) Indeed, requiring the subdivider to install drainage has been described as one of "several salutary purposes" of the Act. (*Pratt v. Adams* (1964) 229 Cal.App.2d 602, 605-606.) It is typical for a subdivision agreement to require a subdivider to perform the work constructing

improvements in accordance with plans and specifications previously approved by the local agency and to require security to ensure performance of the work. (4 Manaster & Selmi, *supra,* § 61.04[9][b][ii] at pp. 61-58 to 61-59 (rel. 38-3/03).) Another common condition is that the subdivider dedicate or make an irrevocable offer of dedication for such purposes such as streets, drainage, public utilities or public access. (See § 66475.)

B. Inverse Condemnation

The primary theory asserted by Owners is based on the law of inverse condemnation. To understand the parties' allegations and arguments and the issues in the summary judgment proceedings at the heart of this appeal, some background about tort and inverse condemnation law as it pertains to subdivisions and drainage is required.

A public entity may be liable as a property owner when alterations or improvements to its own upstream property result in the discharge of an increased volume of or velocity of surface water in a natural watercourse causing damage to the property of a downstream owner. (*Locklin*, *supra*, 7 Cal.4th at p. 337.) As with any upstream property owner, whether public or private, a government entity is only liable if, considering all of the circumstances, its conduct was unreasonable and the lower property owner acted reasonably. (*Ibid*.) Damage resulting from improvements on publicly owned property may also result in inverse condemnation liability. (*Id*. at pp. 337-338.)

Further, a government entity may be liable in inverse condemnation where the increased volume or velocity of surface waters and resulting damage are caused by discharge of increased surface waters from public works or improvements on publicly owned land or if it has incorporated the watercourse or public improvements into a public drainage system. (*Locklin*,

supra, 7 Cal.4th at pp. 337-338.) The theory underlying inverse condemnation liability in these contexts is similar to that for inverse condemnation generally: the downstream owner "may not be compelled to accept a disproportionate share of the burden of improvements undertaken for the benefit of the public at large." (*Id*. at p. 338; see also *id*. at p. 367; *Belair v. Riverside County Flood Control Dist*. (1988) 47 Cal.3d 550, 558 [decisive consideration is whether owner of damaged property if uncompensated would contribute more than his proper share to public undertaking].) Similar to a tort, under inverse condemnation, the reasonableness of the public entity's conduct matters. The public entity will be liable only "if it fails to use reasonably available, less injurious alternatives." (*Locklin*, *supra*, at p. 338.) In addition, the downstream owner must take reasonable measures to protect his property and if he fails to do so, there is no liability. (*Ibid*.)

"A storm drainage system constructed and maintained by a public entity" is a public work. (*Souza v. Silver Development Co.* (1985) 164 Cal.App.3d 165, 170.) To convert an existing watercourse into a public work, "[a] governmental entity must exert control over and assume responsibility for maintenance of the watercourse if it is to be liable for damage caused by the streamflow on a theory that the watercourse has become a public work." (*Locklin*, *supra*, 7 Cal.4th at p. 370.) The same is true of converting privately constructed improvements into public works. (*Ullery v. County of Contra Costa* (1988) 202 Cal.App.3d 562, 570 (*Ullery*).) "Official acts of dominion and control constituting acceptance of the private drainage system can be shown if the public entity does maintenance and repair work. [Citations.] Use of land for a public purpose over time may constitute implied acceptance of the offer of dedication. [Citation.] On the

other hand, where 'there is no acceptance of a street or the drainage system within it, there is no public improvement, public work or public use and therefore there can be no public liability for inverse condemnation.' " (*Id*. at pp. 568-569.)

"[I]nverse condemnation liability will not lie for damage to private property allegedly caused by private development approved or authorized by the public entity, 'where the [public entity's] sole affirmative action was the issuance of permits and approval of the subdivision map.' " (*Ullery*, *supra,* 202 Cal.App.3d at p. 570.)

III.

Plaintiffs' Theories on Appeal

Owners assert three theories to support their claims of inverse condemnation, one as to the County only and two as to the County and the District jointly.

As to the County alone, Owners claim the MS 102-72 spillway was a component of a drainage system that must be considered public. This is so, they argue, because (1) the County required the subdivider to construct it as a condition of approval of the subdivision; (2) it serves two off-subdivision needs and provides no benefit to the subdivision itself; and (3) the drainage system does not follow any "natural" drainage path but instead collects and conveys water that would never enter the subdivision if not for the system. This evidence, they contend, raises a triable issue whether the drainage system is a public use under inverse condemnation standards.

As to the County and the District jointly, Owners claim there is a triable issue whether defendants "have incorporated Murderer's Creek into the public drainage system through their joint management, and evident mismanagement, of Drainage Area 46." Owners also claim that even if

defendants' "joint management of and control over the Murderer's Creek watershed did not incorporate the Creek into the public drainage system," they are liable "if their management of Drainage Area 46 places a disproportionate and therefore 'unreasonable' burden on downstream riparian property owners." They contend the trial court erred by failing to apply the six "*Locklin* factors" required to analyze this issue.

IV.

Plaintiffs' Claims Fail As a Matter of Law.

Whether an improvement or waterway is a public use or public work for purposes of inverse condemnation liability is a question of law when factual issues are not in dispute. (See *Locklin*, *supra*, 7 Cal.4th at pp. 369-370.)

A. Plaintiffs Have Not Raised a Triable Issue Whether the Spillway Is a Public Improvement or Use and Given the Undisputed Facts It Is Not a Public Work As a Matter of Law.

Locklin established that "a governmental entity may be liable under the principles of inverse condemnation for downstream damage caused by an increased volume or velocity of surface waters discharged into a natural watercourse *from public works or improvements on publicly owned land*" "if it fails to use reasonably available, less injurious alternatives, or if it has incorporated the watercourse into a public drainage system or otherwise converted the watercourse itself into a public work." (*Locklin*, *supra*, 7 Cal.4th at pp. 337-338, italics added.) Owners contend there is a triable issue of fact as to whether the MS 102-72 spillway—the failure of which they assert caused turbulence that damaged their land—was a public improvement.

The three facts Owners contend support a finding of public improvement or use are, as we have said, that the County required the

developer to construct a drainage system and place it within an easement dedicated to the County; that the spillway served the needs of two areas outside of MS 102-72 while "providing essentially no benefit to the residents of [MS 102-72]"; and that the drainage system collects water from outside its "natural" drainage path and directs it to the discharge point at the Creek.

1. *Requiring Construction of the Drainage System and an Offer of Dedication Did Not Convert Private Improvements into Public Works.*

There is no genuine dispute about the material facts concerning the spillway or the other drainage improvements. The County imposed on the developer a condition requiring it to "construct, install and complete . . . tract drainage," and a County ordinance required it to collect and convey "[a]ll surface waters flowing from the subdivision in any form or manner" from the development to the nearest natural watercourse with a definable bed and banks or to a public storm drainage facility. It required the developer to offer to dedicate easements for drainage purposes to the County.

The developer of MS 102-72—not the County—designed and built improvements to satisfy these requirements, including underground drainage pipelines, catch basins, and an outfall at the Creek with a "spillway feature ('Spillway') comprised of grouted and loose rock riprap lining the earthen banks of the Creek." The waters flowing through the pipelines consisted of runoff from MS 102-72, including a private road serving that subdivision known as "Kelly Ann Court"; runoff from an adjacent subdivision referred to as "Sub. 4234"; and runoff from Gloria Terrace, a county road adjacent to the subdivision. The purpose of the spillway was to protect the bed and bank of Murderer's Creek against erosion from the waters spilling into the creek from the pipeline.

The County required the subdivider to offer easements to the County for drainage purposes, and the subdivider did so. The County has thus far never expressly accepted the offer. There are no records of the County ever having maintained or repaired the pipeline, outlet or spillway. The County has never performed maintenance or repairs to the portion of Murderer's Creek upstream of plaintiffs' properties or installed any improvements in the creek bed or channel.

The facts Owners claim indicate the spillway is a public work are essentially undisputed.[5] And for the following reasons, we conclude as a matter of law that they do not show the County converted the Spillway into a public drainage system.

Owners' argument is somewhat difficult to follow. It begins with the proposition that " 'construction and maintenance of storm drainage systems are matters of "public policy," and such a system created by a public entity becomes a "public improvement" and a "public use." ' " Citing pre-*Locklin*

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[5] Owners assert, without citation, that the drainage improvements required as conditions for their subdivision "provid[e] essentially *no benefit to the residents of the Subdivision*." (Italics added.) There is no evidence to support this assertion, and the County's evidence shows the opposite is true. For example, a catch basin and the pipeline buried under the MS 102-72 collected and carried runoff from that subdivision, including the private cul de sac that serves it, to the outfall and into the creek. The spillway beneath the outfall was designed to prevent erosion of the creek bed and banks adjacent to it, which were part of the subdivision.

Owners also assert, again without citation, that the drainage "system" that the County required the subdividers to construct convey waters that would "*never enter the Subdivision* . . . were it not for the drainage system." We have reviewed the evidence proffered by Owners and find no support for this assertion. Further, we note it is undisputed that the road and subdivision that Owners describe as the "off-subdivision" areas served by these improvements, Gloria Terrace and Subdivision 4234, are immediately adjacent to MS 102-72.

cases for that proposition, it proceeds to contend that "[i]t does not matter whether the public entity constructed the drainage improvements itself or whether, as is more common (and happened here), the public entity required a private property owner to construct [them] through its 'approval of the subdivision maps and plans which include the drainage systems.' " The 1963 decision it quotes for that proposition, *Frustuck v. City of Fairfax*, 212 Cal.App.2d 345 (*Frustuck*), has since been rejected by this court in *Ullery*, rejecting the proposition in *Frustuck* for which plaintiffs cite it here. Division Three of this court stated, "Appellants misconstrue the law when they state that the subdivision map approval process represents a sufficient level of governmental involvement to constitute a public use or improvement subjecting the public entity to inverse condemnation liability. The cases do not stand for the proposition that approval alone creates liability in inverse condemnation." (*Ullery, supra,* 202 Cal.App.3d at p. 571.)

Further, *Frustuck* was implicitly overruled by *Locklin*. In *Locklin*, the plaintiffs alleged that the city and county had allowed development of properties upstream of plaintiffs' properties, required developers to construct roads, rights of way, culverts, storm drains and other public improvements in the watershed and required irrevocable offers of dedication of storm drainage easements on creekside properties as a condition of development permits. (*Locklin*, *supra*, 7 Cal.4th at pp. 340-342 & fn. 10.) *Locklin* held neither this, nor evidence that the city assisted residents in removing falling trees from the creek bed with permission from the owners and repaired an outfall above the creek, was sufficient to establish that the creek had been converted into a public work or improvement or a part of the public storm drainage system. A government entity, it opined, "*must exert control over and assume responsibility for maintenance* of the watercourse if it is to be liable for

damage caused by the streamflow on a theory that the watercourse has become a public work." (*Id*. at p. 370, italics added.) Without a showing that the city or other defendants exercised control over the creek, it "remain[ed] a privately owned natural watercourse." (*Id*. at pp. 370-371.)

The *Locklin* court was not moved by the assertion that the city had required drainage easements. Noting that the evidence did not establish an express or implied acceptance of the drainage easements, the court expressed doubt that "requiring and/or accepting drainage easements across private property to a privately owned natural watercourse" is even "*evidence* of control over the watercourse itself." (*Locklin*, *supra*, 7 Cal.4th at p. 370, fn. 21, italics added.)

Notably, Owners cite no current authority for the proposition that a county's imposition of conditions of approval through the Subdivision Map Act, including requirements that drainage improvements be implemented and that an offer to dedicate easements be made converts the improvements or the watercourse they affect into a public work, and we are aware of none. And *Locklin* repudiated the notion when, in rejecting an argument that the evidence in that case converted a creek into a public work, it opined, "Utilizing an existing natural watercourse for drainage of surface water runoff and requiring other riparian owners to continue to do so does not transform the watercourse into a public storm drainage system." (*Locklin*, *supra*, 7 Cal.4th at p. 370.) The latter is precisely what the County did in this case when it adopted an ordinance requiring upstream property owners of the Creek in the watershed to convey surface waters to and discharge them into the Creek. In doing so, it exercised its authority under the Subdivision Map Act to regulate the "design and improvement" of subdivisions by requiring subdivision developers to construct drainage improvements. (See

§§ 66411, 66418, 66419, 66421; 7 Miller & Starr, Cal. Real Estate (4th ed. 2022) §§ 20:1, 20:25.)

Requiring drainage-related improvements as conditions of approval of a map and offers to dedicate of easements is not an exercise of control over, or an assumption of responsibility for, maintenance of the improvement or the watercourse—especially where, as here (and in *Locklin*), there has been no acceptance of the dedication. (See *Locklin, supra,* 7 Cal.4th at p. 370 & fn. 21 [questioning whether even accepted offer of dedication would suffice].) The County also argues persuasively that *Ruiz v. County of San Diego* (2020) 47 Cal.App.5th 504 (*Ruiz*) and the cases it relies on (*Locklin*, *supra,* 7 Cal.4th 327, *DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329 (*DiMartino*) and *Ullery, supra,* 202 Cal.App.3d 562), likewise refute the notion that improvements constructed in connection with a subdivision over which easements are offered but not accepted by the public entity, nonetheless become public works when they are used for drainage of public or other private properties. (See *Ruiz,* at pp. 509, 515-519; *Ullery*, at p. 570 [although creek was part of system draining 40-acre watershed, absence of dominion and control by public entities supported finding of no public use].) This is so even where the public has used the improvements for drainage for decades (see *Ruiz,* at pp. 514, 516 [50 or " 'over 60' " years].)

Owners attempt to distinguish *Locklin*, claiming in that case the city had required developers "to place drainage easements over natural drainage swales across private property," whereas here the County sought "to allow future County access to the drainage improvements (curbs, gutters, two drop inlets and catch basins, two underground drainage pipelines, and the MS 102-72 Spillway that ultimately failed) that the County had required [the developer] to install to serve two off-subdivision drainage needs. These

drainage improvements collect and convey surface water from two off-Subdivision locations onto and across the Subdivision, into an area that this water could never reach without them."

While Owners' argument is not entirely clear, we take it to mean that by requiring offers to dedicate easements with respect to drainage improvements that served an adjacent subdivision and an adjacent street owned by the County (Gloria Terrace) and by diverting surface water to catch basins and pipelines to convey it to the Creek, the County in effect converted the improvements into public works. They cite no authority for this proposition, and we do not agree with it.

Locklin held that using an existing natural watercourse for drainage of surface water runoff and requiring other riparian owners to do so "does not transform the watercourse into a public storm drainage system." (*Locklin, supra,* 7 Cal.4th at p. 370.) We hold that requiring and using drainage improvements within a subdivision to convey water, including from an adjacent public road and adjacent subdivision, does not convert the improvements into public works either. As the County puts it, "Drainage improvements in all developments are designed to accommodate the anticipated storm water runoff quantities to be received by the development—including any runoff flows emanating from beyond a subdivision's boundary." Further, because developments "disrupt the natural drainage patterns," "installation of artificial drainage facilities that collect and convey the runoff" that before "may have been conveyed as natural sheet flows" is necessary "to ensure the waters will safely pass through the community without causing damage."

2. *That the Drainage Improvements Serve Some Off-Subdivision Needs Does Not Convert Them into Public Works.*

Contrary to Owners' arguments, requiring artificial drainage facilities and conveying water across properties over which it might not have flowed when the area was undeveloped does not convert those improvements into public works. Development requires that drainage systems be constructed to channel water beneath or around the obstacles development creates. A government could not require owners whose properties are not adjacent to a natural watercourse (i.e., landlocked) to drain waters from their properties into such a watercourse without allowing them to flow through properties that are closer to and/or adjacent to the watercourse. Thus, waters from landlocked properties must at least sometimes be conveyed through drainage improvements on other properties to reach a natural watercourse. This is recognized by the County in its ordinance regarding conveyance of surface waters, which provides that when "surface waters must be collected or conveyed beyond the boundaries of the subdivision in order to discharge into a natural watercourse," appropriate easements must be obtained from "all property owners between the boundaries of the subdivision and the point at which the surface waters will be discharged into a natural watercourse."

For these reasons, it is not surprising that the Subdivision Map Act contemplated that improvements would be used for the good of the subdivision and properties beyond it. Its aim was to require local governments to exercise control over " 'the design of subdivisions for the benefit of *adjacent landowners*' " as well as " 'prospective purchasers and the public in general' " (*Gardner*, *supra*, 29 Cal.4th at p. 997.) It defined "[i]mprovement" to include work "necessary for the general use of the lot owners in the subdivision *and local neighborhood . . . needs*." (§ 66419,

subd. (a), italics added.) As a leading commentator has put it, "[t]he local authorities have a great deal of latitude to require a subdivider to make adequate arrangements for drainage and sewage disposal both within and outside of the subdivision." (7 Miller & Starr, Cal. Real Estate, *supra,* § 20:30.)

A rule that government-required improvements on one subdivision are public if they serve drainage needs of properties outside that subdivision or convey water that might not naturally have flowed through the servient subdivision would undermine the purposes of the Subdivision Map Act. Indeed, local governments would be reluctant to " 'facilitate orderly community development, coordinate planning with the community pattern . . . , and assure proper improvements are made' " (*Gardner, supra,* 29 Cal.4th at pp. 997-998) if doing so would impose responsibility and the associated costs on them for maintaining and repairing all such improvements.

Owners contend our decision in *DiMartino, supra,* 80 Cal.App.4th 329 supports the rule they propose because it "distinguished the installation of drainage improvements by private property owners to achieve private objectives from County-mandated drainage improvements required by public entities to achieve public objectives." Owners misconstrue what we decided in *DiMartino*. In concluding the drainage pipe installed under the plaintiffs' house was not a public work, this court focused on whether the city had played any role in *constructing* that pipe and concluded the evidence did not show that it had. (*Id*. at pp. 336-344.) We referred to the purpose for which the pipe was built simply as evidence that it had been installed by an earlier owner of the lot. We did not hold or suggest that improvements that serve

drainage needs that extend beyond the subdivision are necessarily public works. (*Id.* at p. 344.)

On the contrary, as the County points out, in *DiMartino* we rejected the argument that "connection of a private pipe segment to an admittedly public pipe segment converts the former to a public improvement." (*DiMartino, supra,* 80 Cal.App.4th at p. 343; see also *Ruiz*, *supra*, 47 Cal.App.5th at p. 518 [fact that pipe was part of system that was used to drain valley watercourse, even over an extended period, did not constitute implied acceptance of drainage easement].) We further observed that "such a rule would allow circumvention of the Subdivision Map Act: a developer would no longer need to comply with requirements of dedication and acceptance, connection of any pipe on private property to a public roadway cross-culvert would transform the private pipe to a public one. We have found no case recognizing such a doctrine." (*DiMartino,* at p. 343.)

Owners also contend there is a triable issue here because the County "both refused to either 'accept or reject' the drainage easements [it] required developers to place over the bed and banks of the Creek" and therefore may have effectively accepted them and converted the improvements and the Creek into public works. Owners disregard the well-established rule that an acceptance of an offer to dedicate must be unqualified and unequivocal. (See *Mikels v. Rager* (1991) 232 Cal.App.3d 334, 353-354 [valid acceptance of offer must be "absolute and unqualified"]; *Flavio v. McKenzie* (1963) 218 Cal.App.2d 549, 551-552 [" 'To effect a dedication of land by a private owner to public use, it is essential that there be an unequivocal offer of dedication by the owner and an unequivocal acceptance of the offer by the public' "].) " 'A dedication without acceptance is, in law, merely an offer to dedicate, and such an offer does not impose any burdens nor confer any

rights, unless there is an acceptance.' " (*Mikkelsen v. Hansen* (2019) 31 Cal.App.5th 170, 176.)

With respect to the drainage improvements on MS 102-72, the County did not accept the offer for the purpose it was offered, i.e., to access the improvements. It accepted the offer *only* for the purpose of recording the deed. An acceptance "for recording only" is not the kind of unequivocal and unconditional acceptance required to create a valid dedication. As for Subdivision 4983, the County stated it "*did not accept or reject* on behalf of the public any of the streets, roads, avenues or easements shown [on the Final Map] as dedicated to public use." This was not an unequivocal or absolute acceptance. Given that the offer was irrevocable, declining to accept or reject it left open to the County the option to accept it at some later time. It is undisputed that it never expressly did so.

Although there can be implied acceptance of an offer of dedication, it is undisputed that the County made no effort to maintain or repair the Spillway, any other improvements or the Creek itself. "Absent an easement or accepted dedication, liability is imposed on a public entity only when the public entity has exercised dominion and control over the private property." (*Ruiz, supra,* 47 Cal.App.5th at p. 523.) In other words, in the absence of an express acceptance, there must be evidence of implied acceptance of dedication through, for example, the public entity's assumption of maintenance or repair of the property. (*Ibid*.) In *Ruiz*, the court held the fact that public water drained through a privately owned pipeline did not constitute an implied acceptance of an offer of dedication that the public entity had previously expressly rejected. (*Id*. at p. 517.) The court indicated a previous case answered the question of "how much more" was required to constitute an implied acceptance, noting that in the earlier case "the public

entity was substantially involved in installing the privately owned pipe. For example, a surveyor employed by the public entity instructed the property owner ' "exactly what pipe to lay and how to do it" ' and "provided the trucks, dirt, and water to complete the installation." (*Id.* at p. 518.) There is no similar evidence here, and the County has provided evidence showing that it never owned, constructed or repaired the drainage improvements.[6]

3. *There Was No Implied Acceptance of the Drainage Easements by the County.*

Owners further contend they have raised a triable issue of fact as to whether the County otherwise assumed control or maintenance of the spillway because (1) it required the developer to install the drainage improvements; (2) its acceptance of the easements for MS 102-72—for recording only—suggests it impliedly accepted the easement; (3) there is a letter from the developer's engineer to the County purportedly confirming the County's obligation to maintain the drainage system; and (4) the October 22, 1975 subdivision agreement confirmed that the County would assume responsibility for the drainage improvements after one year.

We begin with the first two points. As we have explained, under *Locklin* and other cases, requiring improvements and easements does not convert the improvements into public works. It is likewise insufficient to constitute implied acceptance. To hold otherwise would be an end run

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[6] Owners also argue that in requiring the dedication of the drainage easements, the County's "purpose" was "to ensure [it] would have access to the system in perpetuity to perform periodic maintenance," citing the declaration of Flett, their civil engineering expert. Even if the Flett declaration had been competent evidence of the County's purpose or intent (which we discuss further below), it would not matter. " '[A] dedication, like a contract, consists of an offer and acceptance, . . . proof of which must be unequivocal.' " (*Biagini v. Beckham* (2008) 163 Cal.App.4th 1000, 1009.) A party's unstated purpose or intent is not acceptance of an offer.

around those cases. As we have discussed, *Ullery* and *Ruiz* indicate the kinds of conduct necessary for implied acceptance, such as substantial involvement in construction of the improvement or performing "maintenance and repair work." (*Ullery*, *supra*, 202 Cal.App.3d at p. 568; accord, *Ruiz*, *supra*, 47 Cal.App.5th at p. 523 ["Absent an easement or accepted dedication, liability is imposed on a public entity only when the public entity has exercised dominion and control over the private property"].) The undisputed evidence shows the County did not construct the improvements and performed no maintenance or repair work on the improvements.

Turning to the third item, the letter from the developer's engineer, that letter is not competent evidence that the County *agreed* to maintain the spillway. In the letter, the engineer provided the County with a cost estimate of the improvements for MS 102-72 and stated, "The following also includes the drainage system which will lie within dedicated easements in said subdivision and which shall be maintained by the county *upon acceptance*." (Italics added.) The County objected to the letter as lacking foundation and improper opinion. The trial court did not rule on the objection but concluded the letter was not evidence of an agreement by the County that the drainage improvements would become public and be maintained by the County. We agree. The engineer is not a party to the subdivision agreement with the County, and his letter does not refer to that or any other agreement between the developer and the County. The engineer's assertion may simply reflect an assumption or prediction that the easements would be accepted by the County. It is not evidence that the County agreed to accept the offer of dedication.

Finally, Owners argue that the County's agreement to maintain the drainage improvements was "reaffirmed, albeit ambiguously, by the

October 22, 1975, subdivision agreement" between the County and the developer for MS 102-72. The agreement includes a provision that following the completion of work (including the drainage improvements) for MS 102-72, the developer agreed to maintain the work and repair any defects for a one-year period. Owners argue the implication was that the County would assume maintenance of the drainage system after the one-year period. The inference Owners suggest we draw is not a reasonable one. The provision for a one-year period guaranteeing the adequacy of the improvements, which is required by county ordinance, is essentially a warranty that the improvements will work and, that if they fail during the warranty period, the developer will repair any defect. The Subdivision Map Act contemplated local governments would take steps to ensure that subdividers performed the obligations they undertook, including to construct required improvements. (See §§ 66499 et seq.; 74 Ops. Cal. Atty. Gen. 89 (1991).) The duration of a warranty or guarantee has no tendency to show the local government agreed to accept long-term responsibility for the improvements the subdivider warranted.

B. Plaintiffs Have Not Established a Triable Issue As to Whether the Creek Was Incorporated into the Public Drainage System.

Owners separately contend a triable issue of fact exists as to whether the Creek has been incorporated into the public drainage system through the Government Entities' management of Drainage Area 46. Specifically, Owners argue that through their management, defendants are (1) requiring property owners developing parcels within the watershed to drain increased surface water runoff into the Creek; (2) collecting drainage fees from property owners for this use; and (3) choosing not to require property owners to install mitigation measures to reduce downstream runoff.

Owners' first point lacks merit, as "[u]tilizing an existing watercourse for drainage of surface water runoff and requiring other riparian owners to continue to do so does not transform the watercourse into a public storm drainage system." (*Locklin, supra,* 7 Cal.4th at p. 370.) There must be some *affirmative* action by the public entity to assume ownership or responsibility of the watercourse. (*Ibid*.) Here, neither the County nor the District had any ownership interest in the Creek nor performed any maintenance on the Creek on or upstream of Owners' properties. Owners' reliance on *Souza v. Silver Development Co., supra*, 164 Cal.App.3d 165 is unavailing. There, this court found there was sufficient evidence to support the trial court's finding that a creek had been incorporated into the public drainage system because the city "required the developer to construct storm drains to carry surface water into the creek *and accepted* the dedication of those drains." (*Id*. at p. 170, italics added.) The city also required *and accepted* an easement for drainage along the creek channel. (*Ibid*.) Such express acceptance is wholly absent here.

Second, the evidence shows that the Government Entities do not provide any storm drainage services to Owners' properties or any upstream properties within the watershed. The "drainage fees" Owners reference are fees that the District collected pursuant to the Drainage Fee Ordinance enacted in 1988. The fees are imposed on all new development in Drainage Area 46 based on a dollar amount of square foot of impervious surface area developed. Revenue generated from these fees was placed in a fund intended to cover a local match that was required to implement a flood protection project. The project was not implemented because it did not meet federal requirements, and the District is now working with the City of Pleasant Hill

to determine whether to create a new drainage plan that would include new, proposed drainage improvements.

The District's act in implementing and collecting drainage fees to fund a proposed project that was never built does not raise a triable issue as to whether the District or the County incorporated the Creek into a public drainage system. Finally, that the Government Entities allegedly could have but did not require upstream property owners to install mitigation measures to offset the downstream runoff is not an *affirmative* act that demonstrates public control or dominion over the Creek. (*Locklin, supra,* 7 Cal.4th at p. 370.)

C. There Is No Triable Issue of Fact Under the *Locklin* Reasonableness Test Because that Test Does Not Apply Unless There Is a Public Improvement.

Owners next argue that even if the Government Entities' management of Drainage Area 46 did not incorporate the Creek into the public drainage system, there is still a triable issue of fact as to whether their management of Drainage Area 46 was unreasonable to support liability under the "reasonableness" test set forth in *Locklin, supra,* 7 Cal.4th 327. Owners concede that the surface water entering the Creek does not drain from any publicly owned land but argues it does "emanate from improvements constructed on private parcels under the direct supervision of Respondents."

In *Locklin*, our Supreme Court explained that "[b]ecause a public agency, like any riparian property owner, engages in a privileged activity when it drains surface water into a natural watercourse or makes alterations to the watercourse, article I, section 19, of the California Constitution mandates compensation only if the agency exceeds the privilege by acting unreasonably with regard to other riparian owners." (*Locklin, supra,* 7 Cal.4th at p. 367.) To determine reasonableness, the court set out the

following six factors: "(1) The overall public purpose being served by the improvement project; (2) the degree to which the plaintiff's loss is offset by reciprocal benefits; (3) the availability to the public entity of feasible alternatives with lower risks; (4) the severity of the plaintiff's damage in relation to risk-bearing capabilities; (5) the extent to which damage of the kind the plaintiff sustained is generally considered as a normal risk of land ownership; and (6) the degree to which similar damage is distributed at large over other beneficiaries of the project or is peculiar only to the plaintiff." (*Id.* at pp. 368-369.)

"However, in determining whether [a public entity] acted unreasonably in this context, 'the critical inquiry' is not whether the public entity acted reasonably with respect to someone else's property, but whether 'the [public entity] acted reasonably in its maintenance and control over those portions of the drainage system *it does own*.' " (*Ruiz, supra,* 47 Cal.App.5th at pp. 526-527, italics added.) Similarly, as Division Three of this court has held, "Where a *public improvement* is unreasonably a substantial cause of the plaintiff's damage, a public agency may be liable for its role in diverting surface water in order to protect urban areas from flooding." (*Skoumbas v. City of Orinda* (2008) 165 Cal.App.4th 783, 796, italics added.) Thus, only where the public entity owns the property that has caused the harm or by conduct converts that formerly private property into a public work is the reasonableness of the public entity's and the private owner's conduct assessed. Because we have held as a matter of law that neither the drainage improvements nor the Creek was or became a public work, the "reasonableness" test set forth in *Locklin* is not implicated. There is therefore no triable issue of fact raised by this argument.

V.

The Exclusion of Flett's Custom and Practice Opinion About Homeowners' Associations Was Harmless Because It Did Not Raise a Triable Issue Whether an Agreement Was Formed.

Owners contend the trial court abused its discretion in sustaining the objection to a paragraph in their expert Flett's declaration, without explanation. As we have recognized elsewhere, there is a debate as to whether the abuse of discretion standard of review that generally applies to evidentiary rulings should be applied in the context of summary judgment, where review is generally de novo. (*Turley v. Familian Corp.* (2017) 18 Cal.App.5th 969, 978.) Owners do not argue we should review the trial court's evidentiary ruling de novo here, " 'except to the extent the ruling is based on the court's conclusion of law.' " We need not decide what standard of review applies to evidentiary rulings made in the summary judgment context because any error in excluding the opinion in Flett's declaration was harmless.

The trial court excluded Flett's opinion that if the County had intended for the drainage improvements in MS 102-72 to be private, it would have included in the conditions for approval of the subdivision map a requirement that the property owner assume responsibility for maintaining the drainage system rather than requiring an irrevocable offer to dedicate the drainage easements to the County. Flett stated this was the custom and practice of the County and its failure to include a requirement that the owner form a homeowners' association to take responsibility for the drainage improvements shows the County intended to take responsibility for them. Owners reprise this argument on appeal, arguing, "the absence of a County requirement that [the subdivision developer] establish a homeowners'

association for the MS 102-72 subdivision to provide for the maintenance of the drainage system is evidence that the County agreed to maintain it."

The Flett opinion, even if admitted, would fail to raise a triable issue because it exceeds the permissible use of custom and practice evidence. Generally, offers of dedication are governed by contract principles. (*Mikels v. Rager*, *supra*, 232 Cal.App.3d at pp. 353-354 & fn. 3.) Such offers must be accepted before they create binding obligations, and a "qualified acceptance of the offer of dedication [does] not result in a completed dedication of a public easement." (*Id*. at p. 353; *Biagini v. Beckham, supra,* 163 Cal.App.4th at p. 1009; *Copeland v. City of Oakland* (1993) 19 Cal.App.4th 717, 722 [conditional nature of public entity's acceptance prevents creation of public liability for street].)

Under general contract interpretation principles, "[i]t is a well-established rule that evidence of usage and custom may be introduced as an instrument of interpretation, but *may not be used to create a contract*." (*Magna Development Co. v. Reed* (1964) 228 Cal.App.2d 230, 240, italics added; *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 817.) Equally well-established is the rule that terms of a contract may be implied from custom and usage evidence only " '*in the absence of agreement to the contrary*.' " (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 851, italics added; *Miller v. Germain Seed & Plant Co.* (1924) 193 Cal. 62, 77; see Civ. Code, § 1655; 1 Witkin, Summary of Cal. Law (11th ed. 2017) Contracts, § 778, pp. 836-837.)

Applying these principles, custom and usage evidence cannot be used to establish an acceptance of the offers to dedicate easements or the formation of any other agreement to maintain the improvements on the dedicated property. For that reason alone, Flett's opinion about the "intent" of the

County, which he infers from the absence of a homeowners' association requirement, does not create a triable issue as to whether the County accepted the offers and thereby undertook to maintain the drainage improvements.

There is another reason the Flett opinion does not raise a triable issue regarding the MS 102-72 subdivision, which is that the term he would imply conflicts with the express terms of the parties' agreement. As we have discussed, in the offer to dedicate, the subdivision developer provided, "It is understood and agreed that CONTRA COSTA COUNTY and its successor or assign *shall incur no liability with respect to such offer of dedication, and shall not assume any responsibility for the offered parcel of land or any improvements thereon or therein*, until such offer has been accepted by appropriate action of the Board of Supervisors, or of the local governing body of its successor or assign." (Italics added.) The parties thus agreed that the County would not become responsible for the improvements unless its Board of Supervisors took appropriate action to accept the offer of dedication. A term requiring the County to bear that responsibility without any acceptance by the Board is contrary to the parties' express agreement and therefore cannot be implied based on custom and practice evidence.

In short, Flett's opinion about custom and usage fails to raise a triable issue because it cannot be used for the purposes for which it was offered: either to imply an acceptance by the County of the offers of dedication and associated responsibility for the drainage improvements or to imply a term imposing such responsibility by means other than those specified in the actual agreement. For these reasons, any error in excluding that opinion is harmless.

VI.

Plaintiffs Concede Their Tort Claims Fail If the Inverse Condemnation Claim Is Not Viable.

Lastly, Owners concede their related tort causes of action for nuisance, trespass, and dangerous condition on public property are all conditioned on the viability of their inverse condemnation claim. For example, Owners argue that they have a claim for nuisance *if* it is proven that either the drainage improvements or the Creek is part of the public drainage system. Because we conclude they are not, Owners' tort claims also fail.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

STEWART, P.J.

We concur.

RICHMAN, J.

MILLER, J.

Shenson v. County of Contra Costa (A164045)

Trial Court:Contra Costa County Superior Court

Trial Judge: Hon. Jill C. Fannin

Counsel:

Seiler Epstein, MacKenzie & Albritton, Mark L. Mosley, for Plaintiffs and Appellants.

Bold, Polisner, Maddow, Nelson & Judson, Timothy J. Ryan, for Defendant and Respondent.

PROOF OF SERVICE

I declare:

At the time of service I was at least 18 years of age and not a party to this legal action. My business address is 155 Sansome Street, Suite 800, San Francisco, CA 94104. I served document(s) described as PETITION FOR REVIEW as follows:

By U.S. Mail

On May 05, 2023, I enclosed a copy of the document(s) identified above in an envelope and deposited the sealed envelope(s) with the US Postal Service with the postage fully prepaid, addressed as follows:

Contra Costa County Superior Court
Attn: Hon. Jill Fannin
1020 Ward Street
Martinez, CA 94553

I am a resident of or employed in the county where the mailing occurred (San Francisco, CA).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: May 5, 2023 By: /s/ Mark L. Mosley