

*M. Douglas Kelly
Charles R. Arndt
Matthew R. Walker*

Kelly, Arndt & Walker, PLLP

*P.O. Box 290
6443 Harding Ave.
Clinton, WA 98236*

Scope of Work

Kelly, Arndt & Walker, PLLP were engaged, in part, to evaluate the obligations and liabilities of various entities and owners of real property that had existing infrastructure located within the defined area. The defined area is roughly a portion of the watershed draining into the area around the tide gate located on the property owned by Greenbank Beach and Boat Club.

Summary

Over the years, the water shed landscape adjacent to Greenbank farm has been changed by the surrounding development. Initially, there was no dike, tide gate, culverts, catch basins, improved county roads, and private roads. The land a century ago would be almost unrecognizable to the appearance of the land today. This is a function of progress in general and not individuals or entities.

There have been problems with the operation of the tide gate going back at least 20 years and likely much longer based upon local historical accounts. The mostly clay outflow pipe has continued to degrade and break over the years. While, repairs were done in 1998 to the tide gate and pipe, they were only minor repairs necessary to alleviate the major flooding that had occurred in 1997. The tide gate basin and unreplaced outflow pipes are all likely over 70 years old at this point.

The dike, tide gate, and redirection and concentration of surface water all create potential legal liability. No one has initiated a lawsuit to determine the extent of the liability in a court of law. However, the alteration of the land and natural waterways makes clear there is likely liability in the event damage does occur. GBBC is the owner of the property

where the tide gate is located. GBBC did not install the tide gate but is a successor owner to the land. The same for the owners of the portions of Tract A of the Greenbank Waterfront Tracts Div. 1. The developers of the Tract did not create the dike but purchased land with a dike that was already created. Likewise, Island County, through the permitting of structures, building of roads, redirection of surface water concentrated and redirected the water onto the GBBC property to be discharged through the tide gate. Hence, the County, the owners of the dike, and GBBC may have liability if damage occurs from surface water within the drainage basin. Any actual liability would depend on the factual circumstances and causes of damage at the time.

Factual Background

Real Property Within Main Area of Interest

The area reviewed in this memorandum is not the entire drainage basin served by the tide gate. The actual drainage area is far larger. The further away from Tract A of Greenbank Waterfront Tracts Div. 1 the lesser the impact and significance to this memo. The area reviewed consists mainly of Greenbank Farm, Greenbank Waterfront Tracts Div. 1 and Div. 2, Greenbank Beach, and Holmes Harbor Estates. The area is shown on Exhibit 1.

Calvin Phillips was the first historic owner of the 522 acre farm where he raised a dairy herd. In the 1940's Mr. Phillips began selling off portions of the farm. Most notably John Molz purchased the operating portion of the farm. (Source: South Whidbey Historical Society). There is no historical documentation as to the creation of the dike that still exists today.

Calvin Phillips sold a portion of the waterfront to W. James Pratt. Exhibit 2. W. James Pratt then created the Plat of Greenbank Beach on July 11, 1944. Exhibit 3. The plat contains the following provision regarding drainage, "also the right to drain all the streets shown hereon over and across any lot or lots where water might take a natural course after the streets are graded." The original street name was Beach Drive. The Greenbank Beach Plat contains a Tract A as the northern most lot.

Calvin Phillips then platted Greenbank Waterfront Tracts Division 1 on May 28, 1945. Exhibit 4. Greenbank Waterfront Tract contains “Tract A” as the southern most lot and adjacent to Tract A of Greenbank beach. Calvin Phillips in 1952 created Division No. 2 of the Greenbank Waterfront Tracts further north and adjacent to Division 1. Exhibit 5.

These three developments constitute the water front plats draining into the low point of what was then Tract A of the Greenbank Waterfront Tracts Div. 1. The elevations are contained in Exhibit 6. The county map shows the elevation of Tract A is between 0 feet above sea level and 25 feet above sea level. The map also shows the wetlands and streams designated by Island County.

In 1962 the plat of Holmes Harbor Estates Div. 1 was created. This plat does not have any shoreline contained within the plat. Exhibit 7. Holmes Harbor Estates, Inc. was also incorporated at about the same time. There were covenants created and amended. Exhibit 8. Shortly after Holmes Harbor Estates came into being Greenbank Beach & Boat Club, Inc. was created in 1962. Exhibit 9. The Superior Court of Washington for Island County has found that Greenbank Beach & Boat Club, Inc. has the authority to enforce the covenants of Holmes Harbor Estates. Exhibit 10. For purposes of this analysis “Greenbank Beach & Boat Club” will be used instead of Holmes Harbor Estates. No legal analysis was done regarding the juxtaposition of the two entities.

At some point Greenbank Beach & Boat Club purchased portions of Tract A of Greenbank Waterfront Tracts Div. 1. Both Tract A of the Greenbank Beach plat and Tract A of Greenbank Waterfront Tracts Div. 1 were divided into additional parcels.

Exhibit 11 shows the County satellite map of the subdivided Tract A of Greenbank Waterfront Tracts. Tract A of Greenbank Waterfront Tracts was divided into smaller parcels as follows:

- Greenbank Beach & Boat Club, Inc. owns parcels S7050-00-00001-0(not part of Tract A), S7050-00-00A03-0, and S7050-00-00A04-0.
- Tanuauan Martin owns, Parcel S7050-00-00A08-0 (this is combined A07 and A08)
- David and Katherine Merisko own parce S7050-00-00A06-0
- Clark and Kris Watkins own S7050-00-00A10-0
- Carla Merisko Living Trust owns S7050-00-00A02-0

- James and Frances Sylvester own S7050-00-00A09-0
- Randall Weers owns S7050-00-00A01-0
- Joyce Johnson owns S7050-00-00A05-0

Exhibit 12 shows the most recent deeds on file with the Island County Auditor.

Exhibit 13 shows the division of Tract A of the Plat of Greenbank Beach. Tract A of Greenbank Beach was divided into smaller parcels as follows:

- Judith Ann Boyden 2012 Residence Trust owns S7040-00-00A01-0
- Phillip and Adele Anderson own S7040-00-00A02-0
- Jane Johnson owns S7040-00-00A03-0
- Christopher and Brenda DeForest own S7040-00-00A04-0

Exhibit 14 shows the most recent deeds on file with the Island County Auditor.

Exhibit 14 shows the area northwest of North Bluff Rd. This area is also low lying.

- Greenbank Beach & Boat Club own parcels R23004-014-0620 and R23009-513-0440.
- The Port of Coupeville owns R23009-480-0190 which is a combination of two parcels(Former R23005-012-4960 and R23009-480-0190). Parcel R23009-480-0190

Exhibit 15 shows the Port of Coupeville information.

Historical Information of Dike and Tide Gate

Island County engineer Roy Allen opined the “flood gate” was most likely installed decades prior to his letter from December 30, 1994. Exhibit 16. In 1997 Ruth Johnston sent a letter to the then owners of the Greenbank Farm. Exhibit 17. Ms. Johnston relates that “old timers” remember the gate and the dike being in the same place for at least 50 years prior, approximately 1947. Various documents show that it was a swing type tide gate, the concrete was deteriorating to some extent, there was a wood ladder into drainage box, there was a wood cover over the vault, and the outfall pipes were made of clay. Exhibit 24.

As early as 1993, (23 years ago) repairs to the tide gate were attempted to be made which would indicate it was not functioning properly at that time. Exhibit 18. In December 1996 and into the first part of January 1997 there were storm events on Whidbey Island including heavy amounts of rainfall. Frank Mead documented the events and its impact on the tide gate in several letters dated January 1997. Exhibit 19. Island County Public Works Department became involved. Washington State Department of Transportation was also undertaking improvements at that time to Route 525 including drainage systems. A meeting was held at Greenbank Farm which include representatives from Island County, Washington State Department of Transportation, Greenbank Farms Management Group, and two property owners affected in the flooding. There was no representative from GBBC present at the meeting. The members at the meeting decided that the privately owned tide gate was a major source of the problems. The recommendation was for GBBC to assist in allowing the tide gate to be repaired and to help pay for those repairs. Exhibit 20, letter from Island County.

In December 1997 a preliminary inspection report was conducted. The preliminary report shows there was a 30" culvert under N. Bluff Rd. connecting the marsh land (Exhibit 14) to the small pound on the land side of the tide gate. The report indicated the outflow pipe from the tide gate had broken about 30 feet on the shore side of the tide gate creating erosion. The floodgate was "frozen" in place restricting the outflow of water as well as allowing water to flow from the sound into the catch basin at high tide. The report recommended repair and replacement of the tide gate. Exhibit 21 Preliminary Inspection Report.

A plan to repair the tide gate and ouflow pipe was put into place. Exhibit 22 Letter from Frank Mead. Island County then became very involved with the repair process taking on a role of dividing responsibilities, choosing and ordering the new gate type, and even calling themselves an "agent" for GBBC. Exhibit 23 various correspondence. Island County Public Works applied for the shoreline exemption. Island County ordered the Tideflex valve and had it shipped to the Coupeville road shop. Island County was invoiced by the engineering firm. Exhibit 24 various invoices, contracts, and engineering for repairs.

The overall plan was for GBBC to sign for the work and pay for the work then Island County would reimburse for the work performed. Exhibit 23. Ultimately, the repairs were

completed in 1998. In December 1998 Island County and GBBC signed a document titled, "Drainage Agreement and Covenants". Exhibit 25. The agreement describes the work completed and how the work responsibility was divided. The documents does not grant any easement to Island County to discharge additional waters onto the GBBC property. However, the agreement contains a provision that GBBC will take on current and future liability regarding the tide gate repairs. The agreement also makes clear that GBBC is responsible for all future work and repair to the tide gate.

A section of the outflow pipe was damaged in 2003 and noticed by Mr. Mead. Mr Mead then sent a letter describing his belief of the history of the dike and tide gate. Exhibit 26. The accuracy of his statements is not certain but he does mention he witnessed a break in the pipe about 30 feet on the shore side of the dike.

Waterflow and Drainage in area of Interest

As noted above the area of interest was owned as a working dairy farm since at least the turn of the century. Historical videos show the land had dirt roads, cattle, some structures including cottages by the beach, and was mostly in its natural state. In the initial waterfront plats Tracts A of both Greenbank Beach and Greenbank Waterfront Tracts Div. 1 were left as open tracts. Viewing the land an observer can see where these historic Tract A's were located is the geographic low point of the drainage system. This is a likely reason why a dike and flood gate were built in this area. Greenbank Beach plat contains an expressed easement allowing for surface water to flow across all lots where the water may take its natural course. This again would indicate that water run off in this area was known and taken into account as far back as 1944 when the Greenbank Beach plat was formed.

Island County began installing a series of culverts and catch basins from Wonn Rd. and Hwy 525 all the way to the tide gate area. Island County Storm Water Infrastructure maps show there are 20 catch basins and 24 culverts from Wonn Rd. to the tide gate area. Exhibit 27. Island County also accepted Beach Drive and turned it into a public road known as North Bluff Rd. This includes maintaining the pavement and grading of the road. No study has been presented as to the current amount of run off directed through the culverts and catch basins to the tide gate area. We have found no written agreement in the county

records which would indicate Island County ever asked for or was given permission to utilize the privately owned property as a discharge point for the culverts and catch basins.

Liability

Common Law Liability Avoidance

A. Creating a new District (Diking, Drainage, or LID)

One of the options to reduce or remove liability for the tide gate, surface water, and dike would be to work with Island County to create either a diking district under RCW 85.05 or a drainage district under RCW 85.06 or Local Improvement District. Once formed the District could acquire through gift, purchase, or condemnation the parcels containing the dike.

The Diking District would be formed and the costs would be shared between the area defined in the diking/drainage district. The real property where the dike is located would be owned by the district and thus remove liability from both the County and the private property owners including Greenbank Beach and Boat Club.

B. Boundary Line Adjustment and County Ownership

Greenbank Beach and Boat Club could adjust the boundary lines between the two parcels in the drainage basin. The parcel containing the boat launch could be reconfigured to contain only the property necessary for the boat launch. The remaining reconfigured parcel could then be conveyed to the County.

Island County would not have to accept the “gift” from the Greenbank Beach and Boat Club because the County is not required under the law to accept gifts. Further, the County may view the parcel as a liability requiring funding for maintenance and upkeep. Other state entities or individuals may accept a gift.

C. Habitat Restoration

The main areas of potential liability arise from the obstruction of the natural flow of the water into the sound. Returning the land to a state that allows the original flow of water would also be a way to mitigate potential liability. Whidbey Island Conservation District has been putting together plans to remove the obstructions from the natural flow and

restore native habitat. However, Greenbank Beach and Boat Club only has partial ownership of the real property that would be required to restore this natural habitat. Port of Coupeville owns the real property to the west of N. Bluff Road where some of the tidal surge would possibly flow into once obstructions have been removed. It is also unknown if the real property owners to the Southeast would be willing to allow their property to be altered to allow for the restoration. Any removal of a portion of the dike would likely require new permitting under the State and County ordinances (Exhibit 28). A complete solution could require partnership with the adjacent real property owners.