County of Santa Cruz v. City of Santa Cruz

Court of Appeal of California, Sixth Appellate District

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COUNTY OF SANTA CRUZ, Plaintiff and Appellant, v. CITY OF SANTA CRUZ, Defendant and Respondent.

Prior History: [*1] Santa Cruz County Super. Ct. No. 22CV01094.

Counsel: Office of the County Counsel, Negine Marie Mansour Sewitsky, for County of Santa Cruz Plaintiff and Appellant.

Atchison, Barsone & Condotti, APC, Alexander C. Geise and Barbara H. Choi, for City of Santa Cruz Defendant and Respondent.

Judges: Greenwood, P. J.; Danner, J., Bromberg, J. concurred.

Opinion by: Greenwood, P. J.

Opinion

Plaintiff County of Santa Cruz (County) sued defendant City of Santa Cruz (City) for costs the County incurred for emergency repairs to a portion of Capitola Road and the nearby area located within the City's jurisdiction. The repairs allegedly resulted from City water that flowed from a creek, through drainage pipes under the road, out of the pipes on the other side of the road, and onto City land, where the water ultimately undermined the support under the road. The road and drainage pipes were planned and constructed by the County, and the County owned the road. The County alleged, however, that the City was responsible for the damage to the road due to the City's failure to maintain the "outfall" of the drainage pipes and failure to maintain the City property where the water landed after exiting the pipes.

The trial court sustained a demurrer [*2] by the City to the operative pleading. Relevant here, the court also denied the County's motion for leave to amend to add a cause of action against the City for inverse condemnation under the California Constitution.[1] A judgment of dismissal was subsequently entered in favor of the City.

On appeal, the County contends that the trial court erred in denying leave to amend to add an inverse condemnation cause of action against the City.

For reasons that we will explain, we will affirm the judgment.

I. Factual and Procedural Background

A. *The County's First Amended Complaint Against the City*

The County filed a lawsuit against the City for damages. In a first amended complaint, the County alleged that it paid for emergency repairs to a portion of Capitola Road and the nearby area within the jurisdiction of the City. According to the County, as a result of the repairs and related work, it "suffered a loss of not less than $1,249,793.63." The County alleged that the repairs were necessitated by the City's failure to maintain and manage the area, including the "outfall" from certain drainage pipes, which "severely compromised the structural integrity of a portion of Capitola Road" and

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[1] *Article I, section 19 of the California Constitution (article I, section 19)* requires the payment of "just compensation" if "[p]rivate property" is "taken or damaged for a public use." (*Art. I, § 19, subd. (a)*.)

caused the [*3] road to be at imminent risk of collapse. The County alleged causes of action against the City for (1) dangerous condition of public property, (2) trespass, (3) nuisance, (4) waste, (5) indemnity and contribution, (6) removal of lateral and "subadjacent" (*sic*) support, (7) declaratory relief, (8) account stated, and (9) goods and services rendered. The County further alleged that it was not required by the Government Code to present a claim to the City before bringing the lawsuit.

B. *The City's Demurrer and Mandate Petition*

The City demurred to the first amended complaint. The City contended that the complaint was barred because the County failed to plead that it had filed a claim with the City pursuant to the Government Claims Act and the Santa Cruz Municipal Code. The City also argued that each of the County's causes of action failed because the County owned the road, and the County built and owned the drainage pipes. Under these circumstances, the City contended that it had no responsibility for maintaining or repairing the drainage pipes or the road. In support of this argument, the City requested judicial notice of several documents, including the County's improvement plans which [*4] showed the County's plans for constructing the road and the culvert under the road.

The County contended that it was not required to present a claim to the City before filing its lawsuit. Further, regarding damages to the road, the County argued that the City was "charged with managing, regulating, and controlling the outfall water flow from the drainage pipes onto its property"; "the City failed to maintain the outfall water flow of City water onto the City's property"; and this "failure to regulate the outfall water flow caused water to scour the area extending directly underneath" the road. The County contended that the City's demurrer was based "on the flawed grounds that the basis of this lawsuit is regarding the ownership of the Subject Road or the Drainage Pipes. Instead, this lawsuit is based on the City's failure to maintain the outfall area where the drainage pipes drained into the City property." According to the County, it was "irrelevant *who* made the improvements," which consisted of "a road and drainage infrastructure."

The trial court granted the County's request for judicial notice, and the court sustained in part and overruled in part the City's demurrer. Among other [*5] rulings, the court determined that the County was not required to comply with the City's claim presentation ordinance before filing a lawsuit against the City.

The City filed a petition for a writ of mandate in this court. This court concluded that the trial court erred in determining that the County was not required to comply with the City's claim presentation ordinance before filing the lawsuit against the City. (*City of Santa Cruz v. Superior Court (2024) 101 Cal.App.5th 475, 480, 320 Cal. Rptr. 3d 270*.) This court issued a peremptory writ of mandate directing the trial court to vacate its order regarding the City's demurrer and to enter a new order sustaining the demurrer. Based on the County's expressed intent to seek leave to amend in the trial court, this court directed the trial court to decide in the first instance whether leave to amend should be granted.

C. *The County's Motion for Leave to File a Second Amended Complaint*

In the meantime, while the City's mandate petition was pending in this court, the County filed a motion in the trial court for leave to file a second amended complaint. The County sought to add a cause of action against the City for inverse condemnation under the California Constitution.

In a supporting memorandum, the County stated that the new cause [*6] of action arose "out of the City's failure to maintain its infrastructure which led to the ultimate failure of Capitola Road." The County indicated that it filed its lawsuit after the City refused to reimburse the County for funds expended to make "emergency repairs to Capitola Road within City limits . . . ." The County contended that an inverse condemnation cause of action was not subject to the Government Claims Act. The County also argued that the City would not be prejudiced by the amendment because the proposed cause of action arose from the same set of facts as the other causes of action, no trial date had been set, and discovery had not yet begun.

The County provided a copy of the proposed second amended complaint with its motion. In the proposed pleading, the County indicated that it owned Capitola Road, but that the City "had possession" of the road and "operate[d], manage[d], control[led], and maintain[ed]" the road. Two drainage pipes "traverse[d] under Capitola Road," carrying "City water" from "Arana Creek and surrounding City lands" on one side of the road, to "a developed portion of the Arana Gulch," which was "owned, maintained, and/or controlled" by the City, on the [*7] other side of the road. According to the County, the City "owned, controlled, and[/]or maintained the

[d]rainage [p]ipes at their outfall . . . ."

The County alleged that the City had a duty to maintain the road, the drainage pipes, and the land and infrastructure in the area where the City's water flowed out of the drainage pipes. However, the City allegedly failed to maintain the drainage pipes, failed to manage and regulate the flow of water coming from the drainage pipes, and failed to maintain the area receiving the water. Specifically, "the City allowed the outfall from the [d]rainage [p]ipes to flow unregulated onto its land without a working energy dissipation device. This failure combined with the City's failure to manage and maintain the Subject Area where the outfall from the [d]rainage [p]ipes occurred, caused scouring, removal of road fill material and undermining of structural road support beneath Capitola Road. In so doing, the City caused and allowed the creation of a large cavity or void to form under Capitola Road at the City owned and controlled outfall side of the [d]rainage [p]ipes which severely compromised the structural integrity of a portion of Capitola Road [*8] and subjected it to collapse and structural failure . . . ."

In the proposed cause of action for inverse condemnation under *article I, section 19*, the County alleged: "The outfall side of the Drainage Pipes is owned, maintained, and/or controlled by [the] City. [¶] . . . The City's failure to properly maintain the outfall side of the Drainage Pipes resulted in the removal of road fill material directly beneath Capitola Road. This compromised the structural integrity of a portion of Capitola Road and ultimately caused it to collapse and fail. [¶] . . . As a direct result of the City's failures, the County had to make emergency repairs to Capitola Road."

The City filed opposition to the motion for leave to amend. The City contended that (1) the proposed pleading failed to state a claim for inverse condemnation, and (2) the City would be prejudiced by the County's unreasonable delay in seeking leave to amend. Regarding the failure to state a claim, the City argued that the County's inverse condemnation claim was based on the City's alleged negligent maintenance of the drainage pipes, Capitola Road, and the adjacent land. According to the City, an inverse condemnation claim had to be based on a deliberate act [*9] in relation to a public improvement, not simply negligence in the routine operation of the public improvement.

In reply, the County contended that its road "sustained damages when the City's infrastructure failed." The County argued that the "City own[ed], maintain[ed], and operate[d] the two underground pipes which carry water from the City, under the [road] and into the Arana Gulch. That infrastructure was installed for the distinct purpose of carrying out the City's water for the public's benefit." The County contended that case law supported liability for inverse condemnation "when the damage resulted from the public entity's maintenance and use of a public improvement." In a footnote, the County also argued that "a public entity whose property has been damaged by another public entity suffers no less taking merely because of its public entity status." The County further contended that the amendment would not prejudice the City because the case was still at the pleading stage and no discovery had been propounded yet.

At the initial hearing on the motion,[2] the trial court requested supplemental briefing from the parties regarding whether a public entity may state a claim for inverse [*10] condemnation.

The City filed a supplemental opposition brief contending that the County may not allege an inverse condemnation claim because only a private party may bring such a claim. The City also argued that even if the County could bring such a claim, the County failed to allege sufficient facts in its proposed pleading. On this point, the City contended that "the County designed and constructed Capitola Road and its underlying storm drainage system." The City also referred to the "drainage system plans, designed and constructed by the County," which the trial court had previously taken judicial notice of in connection with the City's demurrer. The City contended that it was "absurd that the County, the entity that constructed the failed storm drainage system, is alleging inverse condemnation against the City for failing to maintain the County's own infrastructure." The City requested that the court deny the City's motion for leave to amend.

The County filed a supplemental memorandum in support of its motion for leave to amend. The County contended that a public entity may bring a claim for inverse condemnation against another public entity, citing *Marin Mun. Water Dist. v. City of Mill Valley (1988) 202 Cal.App.3d 1161, 249 Cal. Rptr. 469 (Marin)*. The County also argued that [*11] the City owned, maintained, and controlled "water infrastructure that runs through the City of Santa Cruz, under Capitola Road, and deposits City water into the Arana Gulch."

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[2] The record on appeal does not contain a record of the oral proceedings.

The County contended that the failure of the drainage system ultimately led to the road's failure. The County argued that as a result of the County's emergency repairs, "the taxpayers of the County have been disproportionately forced to bear the cost of repair that was caused by the City's unconstitutional taking of the road."

D. *Trial Court's Order Denying Leave to Amend*

After a further hearing,[3] the trial court filed a written order denying the County's motion for leave to amend to add a cause of action for inverse condemnation. The court determined that the "plain language" of *article I, section 19* provided compensation for inverse condemnation regarding private property only and not public property. The court observed that inverse condemnation liability is based on the view that a private party "'should not be required to bear a disproportionate share of the costs of a public improvement.' [Citation.]" The court found "illogical" the reasoning of *Marin, supra, 202 Cal.App.3d 1161*, which held that a municipal water district, a public entity, could state a cause of [*12] action for inverse condemnation against a city, another public entity. (*Id. at p. 1165*.) The trial court stated that it would follow more recent California Supreme Court precedent, *City of Oroville v. Superior Court (2019) 7 Cal.5th 1091, 250 Cal. Rptr. 3d 803, 446 P.3d 304 (City of Oroville)*, which the trial court found to "consistently refer[] to the public entity's responsibility to compensate for damages to *private property*."

The trial court also determined that the County could not properly bring an inverse condemnation claim "in an effort to recover tort-based damages." The court believed that it would "nullify all applicable governmental immunity standards" and would be an "end run" around the government claim presentation requirement.

Based on the denial of leave to amend and the peremptory writ of mandate, the trial court filed an order sustaining the City's demurrer to the County's first amended complaint for failure to allege compliance with the City's claim presentation ordinance without leave to amend. A judgment of dismissal was subsequently entered in favor of the City.

II. Discussion

The County contends that the trial court erred in denying the County leave to amend to add a cause of action for inverse condemnation. The County argues that (1) a public entity may bring a cause of action for inverse [*13] condemnation under the California Constitution, and (2) the County properly alleged such a cause of action in this case.

The City contends that the trial court did not err in denying leave to amend. The City argues that the California Constitution limits an inverse condemnation claim to the taking of private property, not public property. The City also contends that the County cannot bring an inverse condemnation claim in order to recover tort based damages. Further, the City argues that the County failed to sufficiently plead, and cannot sufficiently plead, a cause of action for inverse condemnation, including regarding (1) a public improvement planned, designed, or operated by the City, and (2) causation between the improvement and the County's damages.

In reply, the County contends that its inverse condemnation cause of action was independent of any tort claims. The County also argues that its allegations regarding the City's improper or inadequate maintenance of public infrastructure were sufficient to state a cause of action for inverse condemnation.

We need not determine in this case whether a public entity may allege a cause of action for inverse condemnation under the California [*14] Constitution. As we shall explain, we determine that even if such a claim may be alleged, the County cannot state such a claim in this case with respect to a public improvement by the City that caused the County's damages. Consequently, the trial court did not abuse its discretion in denying leave to amend.

A. *Standard of Review*

"'Where the complaint is defective, "[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his complaint, and it ordinarily constitutes an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment. [Citations.]"' [Citations.]" (*Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 970-971, 9 Cal. Rptr. 2d 92, 831 P.2d 317*.) Further, the plaintiff should be given "a fair opportunity to amend [the] complaint to state a cause of action under any other legal theory.

[3] The record on appeal does not contain a record of the oral proceedings.

[Citations.]" (*Id. at p. 971*.) "[L]eave to amend is liberally allowed as a matter of fairness, unless the complaint shows on its face that it is incapable of amendment. (*City of Stockton v. Superior Court (2007) 42 Cal.4th 730, 747, 68 Cal. Rptr. 3d 295, 171 P.3d 20*.) The appellant has the "burden . . . to demonstrate how it can amend the complaint and how the proposed amendment will change the legal effect of the pleading. (*Today's IV v. Los Angeles County Metropolitan Transportation Authority (2022) 83 Cal.App.5th 1137, 1174, 300 Cal. Rptr. 3d 61 (Today's IV)*.)

B. *General Legal Principles Regarding Inverse [*15] Condemnation*

Article I, section 19 states in part, "Private property may be taken or damaged for a public use and only when just compensation . . . has first been paid to . . . the owner." (*Art. I, § 19, subd. (a)*.) Under this provision, "a public entity must pay the owner just compensation when it takes or damages private property for public use. [Citation.]" (*City of Oroville, supra, 7 Cal.5th at p. 1102*.) If the government "fails to pay the requisite compensation for the property in question, the property's owner can . . . pursue an 'inverse condemnation' action. [Citations.]" (*Ibid.*) Thus, "*article I, section 19* provides the basis for two kinds of actions: a conventional eminent domain proceeding, instituted by a public entity to acquire private property for public use; and an inverse condemnation action, initiated by a private property owner seeking compensation for a taking or damage to his or her property. [Citation.]" (*Ibid.*) "[T]he policy underlying the just compensation clause is to ensure that the owner of damaged property is not forced to ""contribute more than his proper share to the public undertaking""; in other words, the clause aims ""to distribute throughout the community the loss inflicted upon the individual by the making of the public improvements' . . ."' [Citations.]" [*16] (*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp. (1997) 16 Cal.4th 694, 715-716, 66 Cal. Rptr. 2d 630, 941 P.2d 809*.)

An inverse condemnation claim "can arise in a wide variety of contexts." (*City of Oroville, supra, 7 Cal.5th at p. 1103*.) In the "traditional context," it involves "the taking or damaging of private property in connection with public improvement projects." (*Customer Co. v. City of Sacramento (1995) 10 Cal.4th 368, 377, 41 Cal. Rptr. 2d 658, 895 P.2d 900 (Customer)*.) It "has [also] been extended[] in limited circumstances . . . to encompass government regulations that constitute the functional equivalent of an exercise of eminent domain." (*Ibid.*, fn. omitted.)

1. Public improvement

"An essential element of the claim [for inverse condemnation] is that the property was taken for public use or *damaged in connection with a public work of improvement*. [Citation.]" (*Granny Purps, Inc. v. County of Santa Cruz (2020) 53 Cal.App.5th 1, 11, 266 Cal. Rptr. 3d 752*, italics added (*Granny Purps*).) A "public improvement is a project or use that involves '(1) a deliberate action by the state (2) taken in furtherance of public purposes.' [Citation.]" (*Mercury Casualty Co. v. City of Pasadena (2017) 14 Cal.App.5th 917, 928, 222 Cal. Rptr. 3d 408 (Mercury Casualty)*; see *id. at pp. 928-929* [observing that "in virtually every case affirming inverse condemnation liability, the responsible public entity, or its predecessor, deliberately constructed the improvement that caused damage to private property"].)

Consequently, "[t]o state a cause of action for inverse condemnation, the plaintiff must allege," among other things, that "the defendant substantially participated in the planning, approval, [*17] construction, or operation of a public project or improvement . . . ." (*Wildensten v. East Bay Regional Park Dist. (1991) 231 Cal.App.3d 976, 979, 283 Cal. Rptr. 13 (Wildensten)*.) "[I]f the instrumentality that allegedly caused the plaintiff's damages . . . is part of the construction of a public improvement . . . , the public improvement element of an inverse condemnation claim is satisfied. [Citations.]" (*City of Pasadena v. Superior Court (2014) 228 Cal.App.4th 1228, 1235, 176 Cal. Rptr. 3d 422 (City of Pasadena)*.)[4]

On the other hand, there is "no deliberate action by the state" nor "'substantial participation' in a public project or improvement" if, for example, "a governmental entity

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[4] As explained by the California Supreme Court, generally, "in the absence of any connection with the construction or operation of a public improvement," an activity resulting in property damage "has not been considered to constitute either the taking of a compensable property interest in property or the damaging of property so as to entitle the property owner to just compensation under the state takings clause. [Citations.] Instead, any potential recovery by a property owner against a public entity outside the public improvement context has been based on tort principles. [Citation.]" (*Property Reserve, Inc. v. Superior Court (2016) 1 Cal.5th 151, 191-192, 204 Cal. Rptr. 3d 770, 375 P.3d 887*.)

'mere[ly] own[s] . . . undeveloped land and [has] refus[ed] to stabilize part of the land.' [Citation.]" (*City of Pasadena, supra, 228 Cal.App.4th at p. 1234*; see, e.g., *Wildensten, supra, 231 Cal.App.3d at p. 980* [explaining that in "inverse condemnation cases involving land subsidence to adjacent property, liability has resulted from *affirmative actions* the entity undertook to further some public project" (italics added)]; *Skoumbas v. City of Orinda (2008) 165 Cal.App.4th 783, 796, 81 Cal. Rptr. 3d 242 (Skoumbas)* [stating that "a public agency may be liable for its role in diverting surface water in order to protect urban areas from flooding"]; *Locklin v. City of Lafayette (1994) 7 Cal.4th 327, 337-388 (Locklin)* [holding that a public entity may be liable when its upstream alterations or improvements causes downstream property damage]; cf. *Mercury Casualty, supra, 14 Cal.App.5th at p. 929* [holding that a tree that was owned and pruned by a city "was not a work of public improvement," and thus the city was [*18] not liable for inverse condemnation after the tree fell and damaged a home].)

2. Causation

Further, the "damage to [the plaintiff's] property must occur *as a result of* a public improvement, public work, or public use." (*Skoumbas, supra, 165 Cal.App.4th at p. 794*, italics added; accord, *Customer, supra, 10 Cal.4th at p. 378* [explaining that compensation is required when "construction of a public work causes damage to adjacent or nearby property owners"]; *Souza v. Silver Development Co. (1985) 164 Cal.App.3d 165, 171, 210 Cal. Rptr. 146 (Souza)* [indicating that there must be a "causal connection" between the defendant's public improvement and the plaintiff's damage]; *Eli v. State of California (1975) 46 Cal.App.3d 233, 235, 120 Cal. Rptr. 63 (Eli)* [stating that "the loss or damage must result from a use for public purposes" (italics omitted)].)

Specifically, "a plaintiff must ordinarily show . . . that the damage to private property was *substantially caused* by inherent risks associated with the design, construction, or maintenance of the public improvement." (*City of Oroville, supra, 7 Cal.5th at p. 1098*, italics added.) Regarding substantial causation, the "damage must be the '"necessary or probable result" of the improvement, or if "the immediate, direct, and necessary effect" thereof was to produce the damage.' [Citation.]" (*Id. at p. 1108*, italics omitted.) In other words, the damages must have '"followed in the normal course of subsequent events' and [have been] 'predominantly' produced [*19] by the improvement. [Citations.]" (*Ibid.*; see also *id. at p. 1106* [explaining that the "inherent risk assessment requires a reviewing court to consider whether the inherent dangers of the public improvement as deliberately designed, constructed, or maintained materialized and were the cause of the property damage"].)

"If damage to private property is substantially caused by the inherent risks of the design or construction of a public improvement, a public entity must provide just compensation for the damage, whether it was intentional or the result of negligence by the public entity. [Citations.]" (*City of Oroville, supra, 7 Cal.5th at p. 1106*.) Further, liability may exist "even where the public improvement as deliberately designed, constructed, and maintained was only one of several concurrent causes—provided the causal nexus between the risks inherent in the public improvement and the harm in question was sufficiently robust to create a pronounced likelihood of damage. (*Customer . . . , supra, 10 Cal.4th at p. 382* ['"[t]he destruction or damaging of property is sufficiently connected with 'public use' as required by the Constitution, if the injury is a result of dangers *inherent in the construction of the public improvement* as distinguished from dangers *arising from the negligent [*20] operation of the improvement*"'] . . . .)" (*Id. at p. 1104*; see *id. at p. 1108*.)

"[T]he 'inherent risk' aspect of the inverse condemnation inquiry is not limited to deliberate design or construction of the public improvement. It also encompasses *risks from the maintenance or continued upkeep of the public work*. [Citation.] A public entity might construct a public improvement and then entirely neglect any kind of preventive monitoring or maintenance for the improvement. [Citation.] If the public entity *makes a policy choice* to benefit from the cost savings from declining to pursue a reasonable maintenance program, for instance, inverse condemnation principles command 'the corollary obligation to pay for the damages caused when the risks attending these cost-saving measures materialize.' [Citation.] It may be sensible in some sense for a public entity to forgo regular monitoring and repair and instead adopt a 'wait until it breaks' plan of maintenance to save on the costs of imposing a monitoring system. But the damages that result from the inherent risks posed by the public entity's *maintenance plan* should be spread to the community that benefits from lower costs, instead of leaving property owners adversely affected [*21] by the public entity's choice to shoulder the burden alone. [Citation.]" (*City of Oroville, supra, 7 Cal.5th at p. 1107*, italics added; accord, *Arreola v. County of Monterey (2002) 99 Cal.App.4th*

722, 742, 122 Cal. Rptr. 2d 38 (Arreola)] [a "public entity's maintenance of a public improvement constitutes the constitutionally required public use so long as it is the entity's deliberate act to undertake the particular plan or manner of maintenance"].)

C. *Analysis*

The County admits that it owns Capitola Road. Indeed, the proposed second amended complaint indicated that the County has "fee ownership" of the road. At or near the relevant segment of the road, the City allegedly owned land on each side. Specifically, on one side of the road, there was Arana Creek, which contained "City water." On the other side of the road, there was Arana Gulch, which was owned by the City. Two underground drainage pipes carried City water from Arana Creek, under the road, and into Arana Gulch. The County planned and constructed Capitola Road, as well as the underlying culvert or drainage pipes, according to judicially noticed records from the City's demurrer to the first amended complaint.

In the proposed cause of action for inverse condemnation, the County alleged that the "outfall side of the Drainage Pipes is owned, maintained, and/or controlled [*22] by [the] City." According to the County, the "City's failure to properly maintain the outfall side of the Drainage Pipes resulted in the removal of road fill material directly beneath Capitola Road," which ultimately failed. Elsewhere in the proposed pleading, the County alleged that the road's land failure was "caused by the City's concentration and contribution of surface waters and its subsequent failure to manage and maintain the unrestricted flow of said waters through the" drainage pipes. Further, "the City allowed the outfall from the [d]rainage [p]ipes to flow unregulated onto its land without a working energy dissipation device. This failure combined with the City's failure to manage and maintain the Subject Area where the outfall from the [d]rainage [p]ipes occurred, caused scouring, removal of road fill material and undermining of structural road support beneath Capitola Road. In so doing, the City caused and allowed the creation of a large cavity or void to form under Capitola Road at the City owned and controlled outfall side of the [d]rainage [p]ipes which severely compromised the structural integrity of a portion of Capitola Road and subjected it to collapse and structural [*23] failure . . . ."

These allegations by the County are insufficient to state a claim for inverse condemnation against the City. The County failed to allege or identify on appeal a public improvement that the City substantially participated in and that caused the County's damages. (See Granny Purps, supra, 53 Cal.App.5th at p. 11; Wildensten, supra, 231 Cal.App.3d at p. 979; City of Pasadena, supra, 228 Cal.App.4th at p. 1235.) For example, the County's allegations concerning the existence of Capitola Road and the underlying drainage pipes are insufficient to establish the *City's* substantial participation in a public improvement. (See Wildensten, supra, at p. 979 [explaining that a plaintiff must allege "the defendant substantially participated in the planning, approval, construction, or operation of a public project or improvement"]; see City of Oroville, supra, 7 Cal.5th at p. 1098 [holding that the damage must be "substantially caused by inherent risks associated with the design, construction, or maintenance of the public improvement"].) As reflected in the records judicially noticed by the trial court, the drainage pipes and the road were planned, designed, and constructed by the County, not the City.

Likewise, the mere fact that the City failed to regulate the water in the creek, or failed to maintain its land where the water flowed out of the drainage pipes, is insufficient to show the City's [*24] substantial participation in a *public improvement*. (See Locklin, supra, 7 Cal.4th at p. 370 [explaining that a governmental entity that "[u]tiliz[es] an existing natural watercourse for drainage of surface water runoff . . . does not transform the watercourse into a public storm drainage system"]; City of Pasadena, supra, 228 Cal.App.4th at p. 1234 [stating that there is "no deliberate action by the state when a governmental entity 'mere[ly] own[s] . . . undeveloped land and [has] refus[ed] to stabilize part of the land'"].)

The County's proposed second amended complaint did contain allegations regarding a "developed" portion of City land. Specifically, the County alleged that Arana Gulch was "an open space with certain developments located on approximately 67 acres at the eastern border of the City . . . ." The water exiting the pipes "drained towards and into a developed portion of the Arana Gulch." However, there was no allegation indicating that the "developed portion" of Arana Gulch constituted a public improvement. Further, even assuming the developed portion constituted a public improvement, there was no allegation connecting this downstream developed portion of Arana Gulch to the upstream water flowing unregulated out of the drainage pipes and onto land, or otherwise [*25] connecting the downstream developed portion to the upstream damage to Capitola

Road.[5] (See City of Oroville, supra, 7 Cal.5th at pp. 1098 [holding that the damage must be "substantially caused by inherent risks associated with the design, construction, or maintenance of the public improvement"], 1108 [explaining that the damages must have been "'predominantly' produced by the improvement"]; City of Pasadena, supra, 228 Cal.App.4th at p. 1235 [explaining that "the public improvement element of an inverse condemnation claim is satisfied" when "the instrumentality that allegedly caused the plaintiff's damages . . . is part of the construction of a public improvement"]; Skoumbas, supra, 165 Cal.App.4th at p. 794 [stating that the "damage to [the plaintiff's] property must occur as a result of a public improvement, public work, or public use"]; Customer, supra, 10 Cal.4th at p. 378 [explaining that compensation is required when "construction of a public work causes damage to adjacent or nearby property owners"]; Souza, supra, 164 Cal.App.3d at p. 171 [indicating that there must be a "causal connection" between the defendant's public improvement and the plaintiff's damage]; Eli, supra, 46 Cal.App.3d at p. 235 [stating that "the loss or damage must result from a use for public purposes" (italics omitted)].)

The County also included allegations in the proposed second amended complaint that (1) the City controlled, operated, and/or maintained [*26] the road and the drainage pipes; (2) the City had a duty to maintain the road and the drainage pipes; and (3) the City failed to maintain the road and drainage pipes. However, these allegations asserting the City controlled, operated, and/or maintained the road and the drainage pipes, and/or had the duty to do so, are inconsistent with (1) the judicially noticed records that the County planned, designed, and constructed the road and pipes, and (2) the County's *admissions* that it owns the road and maintains and/or controls the road. (See Cantu v. Resolution Trust Corp. (1992) 4 Cal.App.4th 857, 877, 6 Cal. Rptr. 2d 151 [stating that a "complaint should be read as containing the judicially noticeable facts, 'even when the pleading contains an express allegation to the contrary'"].) There are no allegations, for example, indicating that the parties entered into an agreement in which the City agreed to assume maintenance obligations for the road and the drainage pipes, which were planned, constructed, and owned by the County.

Moreover, even assuming the City had a maintenance obligation for the road, the pipes, the water flow, or the land at the outfall, the County's general allegations concerning the City's maintenance failures were insufficient. Such "garden variety" [*27] allegations of "inadequate maintenance, as distinguished from a faulty *plan* involving the . . . maintenance . . . , is not an adequate basis for an inverse condemnation claim." (Tilton v. Reclamation Dist. No. 800 (2006) 142 Cal.App.4th 848, 859, 48 Cal. Rptr. 3d 366, italics added.) "A public entity's maintenance of a public improvement constitutes the constitutionally required public use so long as it is the entity's *deliberate act* to undertake *the particular plan* or manner of maintenance." (Arreola, supra, 99 Cal.App.4th at p. 742, italics added; see also *ibid.* [explaining that for the "'public use' element" of an inverse condemnation claim, "[t]he necessary finding is that the wrongful act be part of the *deliberate* design, construction, or maintenance of the public improvement" (italics added)].) In this case, there was no allegation that the City's maintenance or lack thereof was "a policy choice," part of a "plan," or otherwise a "deliberate" decision. (City of Oroville, supra, 7 Cal.5th at pp. 1108, 1106.)

The County has not suggested any additional facts that could be alleged to cure these defects in its pleading, such as the existence of a public improvement that the City substantially participated in and that caused the County's damages, or facts showing that the City had a maintenance obligation for the road and the pipes (notwithstanding the County's [*28] construction and ownership of them) and that the City made a plan to not maintain them. We therefore conclude that leave to amend was properly denied. (See Today's IV, supra, 83 Cal.App.5th at p. 1174 [explaining that the appellant has the burden of demonstrating a viable amendment].)

III. Disposition

The judgment is affirmed.

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[5] The City in its demurrer to the first amended complaint contended that the parcels of land it owned adjacent to Capitola Road in Arana Gulch were "undeveloped" and "unimproved." In support of this contention, the City sought judicial notice of a county map reflecting the City's parcels. The trial court granted judicial notice of the map but accepted as true for purposes of the demurrer the County's allegation in its first amended complaint that the water drained into a developed portion of Arana Gulch. We need not and do not resolve the dispute regarding the extent to which Arana Gulch may have been developed. We simply determine that whatever the development, the County in its proposed second amended complaint did not allege that the downstream development caused the upstream damage to Capitola Road.

Greenwood, P. J.

WE CONCUR:

Danner, J.

Bromberg, J.

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