E-FILED 2020 JUN 19 2:21 PM POTTAWATTAMIE - CLERK OF DISTRICT COURT

IN THE IOWA DISTRICT COURT IN AND FOR POTTAWATTAMIE COUNTY

| | |
|---|---|
| SHARI A. HUGHES AS TRUSTEE OF THE JANICE A. HUGHES FAMILY TRUST,<br><br>Plaintiff,<br><br>vs.<br><br>CITY OF COUNCIL BLUFFS; POTTAWATTAMIE COUNTY, HILLS OF CEDAR CREEK HOMES ASSOCIATION; AND HCC INVESTMENTS, LLC, an Iowa Corporation<br><br>Defendants, | CASE NO. 04781 EQCV 120659<br><br>**ORIGINAL NOTICE** |

**YOU ARE HEREBY NOTIFIED** that a Petition at Law and Demand for Jury Trial has been filed in the office of the clerk of this court naming you as a Defendant in this action. A copy of the Petition and Demand for Jury Trial is attached to this notice. The attorney for Plaintiff, Shari Hughes as Trustee of the Janice A. Hughes Family Trust is Sean A. Minahan of LAMSON DUGAN & MURRAY LLP, whose address is 10306 Regency Parkway Drive, Omaha, Nebraska 68114. The attorney's telephone number is (402) 397-7300; facsimile number is (402) 397-7824; and e-mail address is sminahan@ldmlaw.com.

**YOU MUST SERVE** a motion or answer within 20 days after service of this Original Notice upon you and, within a reasonable time thereafter, file your motion or answer with the Clerk of Court for Pottawattamie County, at the county courthouse in Council Bluffs, Iowa. If you do not, judgment for default may be rendered against you for the relief demanded in the Petition.

**IF YOU REQUIRE** the assistance of auxiliary aids or services to participate in court because of a disability, immediately call your District ADA Coordinator at (If you are hearing impaired, call Relay Iowa TTY at 1-800-735-2942).

(SEAL)

CLERK OF COURT
Pottawattamie County Courthouse
Suite 400 - 227 South 6th Street
Council Bluffs, Iowa 51501

**IMPORTANT**
**YOU ARE ADVISED TO SEEK LEGAL ADVICE AT ONCE TO PROTECT YOUR INTERESTS.**

# 710634

RECEIVED
JUL 17 2020

Action by Council:
Receive & File:
Date: 8.10.20

CLERK RCVD
21 JUL '20
PM 3:49

E-FILED 2020 JUN 19 4:11 PM POTTAWATTAMIE - CLERK OF DISTRICT COURT

# STATE OF IOWA JUDICIARY

*Case No.* EQCV120659
*County* Pottawattamie

*Case Title* SHARI HUGHES VS CITY OF CO BLUFFS ETAL

**THIS CASE HAS BEEN FILED IN A COUNTY THAT USES ELECTRONIC FILING.**
Therefore, unless the attached Petition and Original Notice contains a hearing date for your appearance, or unless you obtain an exemption from the court, you must file your Appearance and Answer electronically.

You must register through the Iowa Judicial Branch website at http://www.iowacourts.state.ia.us/Efile and obtain a log in and password for the purposes of filing and viewing documents on your case and of receiving service and notices from the court.

**FOR GENERAL RULES AND INFORMATION ON ELECTRONIC FILING, REFER TO THE IOWA COURT RULES CHAPTER 16 PERTAINING TO THE USE OF THE ELECTRONIC DOCUMENT MANAGEMENT SYSTEM:**
http://www.iowacourts.state.ia.us/Efile

**FOR COURT RULES ON PROTECTION OF PERSONAL PRIVACY IN COURT FILINGS, REFER TO DIVISION VI OF IOWA COURT RULES CHAPTER 16:** http://www.iowacourts.state.ia.us/Efile

*Scheduled Hearing:*

If you require the assistance of auxiliary aids or services to participate in court because of a disability, immediately call your district ADA coordinator at **(712) 328-5883** . (If you are hearing impaired, call Relay Iowa TTY at **1-800-735-2942.**)

*Date Issued* 06/19/2020 04:11:50 PM

*District Clerk of* Pottawattamie *County*

/s/ Wanita DeYeager

IN THE IOWA DISTRICT COURT IN AND FOR POTTAWATTAMIE COUNTY, IOWA

| | |
|---|---|
| SHARI HUGHES as Trustee of the JANICE A. HUGHES FAMILY TRUST,<br><br>Plaintiff,<br><br>vs.<br><br>CITY OF COUNCIL BLUFFS; POTTAWATTAMIE COUNTY; HILLS OF CEDAR CREEK HOMES ASSOCIATION; and HCC INVESTMENTS, LLC, an Iowa Corporation,<br><br>Defendants. | CASE NO.:<br><br>**PETITION AT LAW AND DEMAND FOR JURY TRIAL** |

**COMES NOW** Plaintiff, Shari Hughes, as Representative of the Janice A. Hughes Family Trust, and states and alleges the following:

**PARTIES**

1. Plaintiff is a resident and citizen of Pottawattamie County, Iowa, and has been duly appointed as representative of the Janice A. Hughes Family Trust. The Trust owns property commonly referred to as 15779 State Orchard Road, Council Bluffs, Pottawattamie County, Iowa.

2. Defendant City of Council Bluffs ("Council Bluffs") is a municipality located in Pottawattamie County, Iowa, and is responsible for approving the construction of developments and maintaining stormwater drainage within the municipality.

3. Defendant Pottawattamie County ("Pottawattamie County") is a county in the State of Iowa and is responsible for maintaining stormwater drainage within its borders.

4. Defendant HCC Investment, LLC ("HCC") is a residential development company licensed to do business in the State of Iowa with its principal place of business at 1473 Abercorn Drive, Council Bluffs, Pottawattamie County, Iowa.

5. Defendant Hills of Cedar Creek Homes Association (the "HOA") is a home-owners association for The Hills of Cedar Creek Subdivision.

**JURISDICTION AND VENUE**

6. Jurisdiction and venue are appropriate as the Plaintiff's cause of action occurred in Pottawattamie County, Iowa, and all Defendants are located in Pottawattamie County, Iowa.

**FACTUAL BACKGROUND**

7. The allegations contained in Paragraphs 1 – 5 are incorporated herein by reference.

8. The Janice A. Hughes Family Trust (the "Trust") owns property commonly referred to as 15779 State Orchard Road, in Council Bluffs, Pottawattamie County, Iowa (the "Property"). The Property abuts the Little Pony Creek and has a driveway that crosses the creek via a culvert to reach State Orchard Road.

9. In or before 2005, Defendant HCC, or its predecessor in interest, requested approval from Council Bluffs to develop and construct Phase One of The Hills of Cedar Creek Subdivision (the "Subdivision").

10. Council Bluffs approved HCC's initial construction and development of the Subdivision, which began in 2004-05, and has approved HCC's several requests for additions to the Subdivision since then.

11. The Subdivision, which is upstream of the Property, incorporates a stormwater drainage system that includes holding ponds and various ditches to divert stormwater from the Subdivision into Little Pony Creek.

12. HCC and the HOA had a duty to inspect and maintain the catch basins, to excavate their sediment at a specified level of accumulation, and to maintain the storm sewers and drainage facilities that are part of the Subdivision's common facilities.

13. Council Bluffs, Pottawattamie County and/or HCC is responsible for maintaining the stormwater drainage system, holding ponds and ditches to ensure the proper drainage of all stormwater without negatively affecting downstream property owners.

14. The construction and development of the Subdivision has substantially altered the manner of stormwater drainage into Little Pony Creek so that its water flow will reach flood level at the Property after rain events that did not cause flooding before construction of the Subdivision began.

15. Pottawattamie County is responsible for maintaining stormwater drainage through ditches, holding ponds and creeks located within the County.

16. Since the construction and development of the Subdivision, the Property has experienced intermittent flooding during rain events which prohibit ingress and egress from the Property, and which have physically damaged the Property. Such flood events have occurred intermittently over several years, and specifically on June 18, 2018, over several days in September and October 2019, and on June 9, 2020.

17. Council Bluffs and the Pottawattamie County have extended the main roadway for the Subdivision to improved connections for additional upstream housing development.

18. HCC is still expanding housing development in the Subdivision.

## COUNT I

## HCC INVESTMENTS

19. The allegations contained in Paragraphs 1 – 18 are incorporated herein by reference.

20. HCC, or its predecessor in interest, negligently designed and constructed stormwater drainage system for the Subdivision. The system has changed the manner in which stormwater drains into Little Pony Creek so that its water flow will reach flood level at the Property after rain events that did not previously cause flooding. This substantial change in the manner of drainage has caused recurrent, intermittent flooding of the Property.

21. HCC failed to properly design and construct a drainage system that would be sufficient for its planned eventual development of almost 500 residential lots and homes, and not injure downstream property.

22. HCC has also failed to maintain the Subdivision's drainage system, causing or contributing to stormwater drainage from the Subdivision exceeding the natural flow capacity of Little Pony Creek after rain events that did not previously cause flooding.

23. The flooding caused by HCC's negligent design and construction of the Subdivision's stormwater drainage system, its failure to correct the system, and its failure to maintain the Subdivision's existing system has caused a recurrent, intermittent nuisance and injuries to the Property. The flooding has prevented access to and from the Property and has physically damaged the Property. Plaintiff will continue to incur damages as a result of flooding in the future unless the Subdivision's drainage system is properly maintained and corrected, or the capacity of Little Pony Creek is increased to handle the excess stormwater drainage from the Subdivision.

**WHEREFORE**, Plaintiff seeks injunctive and equitable relief in the form of ordering HCC to correct its design and construction errors to increase the stormwater drainage system's capacity to carry the stormwater from the Subdivision without flooding the Property, and return the Subdivision's existing stormwater drainage system to its original capacity, or for monetary damages for the cost to Plaintiff to repair the Property to manage the current stormwater drainage and monetary damages for the physical damage to the Property in an amount to be proven at trial.

## COUNT II

## HILLS OF CEDAR CREEK HOMES ASSOCIATION

24. The allegations contained in Paragraphs 1 – 23 are incorporated herein by reference.

25. The HOA was established in 2005. It had the duty to inspect and maintain the catch basins, excavate their sediment at a specified level of accumulation, and maintain the storm sewers and drainage facilities that are part of the Subdivision's Common Facilities, including its ponds, streams, creeks, and drainage and retention facilities.

26. The HOA failed to maintain the drainage and retention components of the Subdivision's Common Facilities, causing or contributing to the Subdivision's stormwater drainage exceeding the natural flow capacity of Little Pony Creek at the Property after rain events that did not previously cause flooding. The HOA's negligence has caused a recurrent, intermittent nuisance and injuries to the Property. The flooding has prevented access to and from the Property and has physically damaged the Property. Plaintiff will continue to incur damages as a result of flooding in the future unless the drainage and retention components of the

Subdivision's common facilities are restored to their original capacity or their capacity is increased to handle the Subdivision's excess stormwater drainage.

**WHEREFORE,** Plaintiff seeks injunctive and equitable relief in the form of ordering the HOA to return the drainage and retention components of the Subdivision's common facilities to their original capacity or to increase their capacity to safely retain and release stormwater from the Subdivision without flooding the Property; or for monetary damages for the cost to Plaintiff to repair the Property to manage the current stormwater drainage and monetary damages for the physical damage to the Property in an amount to be proven at trial.

**COUNT III**

**COUNCIL BLUFFS**

27. The allegations contained in Paragraphs 1 – 26 are incorporated herein by reference.

28. Council Bluffs has negligently failed to properly maintain the stormwater drainage system in or around the Subdivision including ditches, holding ponds, and streams which drain into the Little Pony Creek.

29. Council Bluffs has performed maintenance and management of the storm water drainage from the Subdivision into the Little Pony Creek since the construction of Phase One of the Subdivision.

30. Council Bluffs' failure to maintain the drainage system has caused the stormwater drainage to exceed the creek's natural flow capacity at the Property after rain events that did not previously cause flooding. Council Bluffs' negligence has caused intermittent flooding of the Property.

31. The flooding caused by Council Bluffs' negligent failure to maintain the drainage system has prevented access to and from the Property and has physically damaged the Property. Plaintiff will continue to incur damages as a result of flooding in the future unless the drainage system is maintained to safely handle the excess stormwater drainage from the Subdivision.

**WHEREFORE,** Plaintiff seeks injunctive and equitable relief in the form of ordering Council Bluffs to return the stormwater drainage system to its original capacity and to maintain the system's capacity to carry the stormwater drainage from the Subdivision without flooding the Property, or monetary damages for the cost to Plaintiff to repair the Property to manage the current stormwater drainage.

**COUNT IV**

**POTTAWATTAMIE COUNTY**

32. The allegations contained in Paragraphs 1 – 31 are incorporated herein by reference.

33. Pottawattamie County has negligently failed to properly maintain the stormwater drainage system of which it has authority including ditches, holding ponds, and streams which drain into the Little Pony Creek.

34. Pottawattamie County's failure to maintain the drainage system has caused the stormwater to exceed the natural flow capacity of Little Pony Creek at the Property after rain events that did not previously cause flooding. The County's negligence has caused recurrent, intermittent flooding of the Property.

35. The flooding caused by Pottawattamie County's negligent failure to maintain the drainage system has prevented access to and from the Plaintiff's Property and has physically damaged the Property. Plaintiff has incurred monetary damages and will continue to incur

damages as a result of flooding in the future unless the system is maintained to safely handle the excess stormwater drainage from the Subdivision.

**WHEREFORE,** Plaintiff seeks injunctive and equitable relief in the form of ordering Pottawattamie County to return the stormwater drainage system to its original capacity and to maintain the system's capacity to carry the stormwater from the Subdivision without flooding the Property, or monetary damages for the cost to Plaintiff to repair the Property to manage the current stormwater drainage.

**COUNT V**

**TEMPORARY INJUNCTION**

36. The allegations contained in Paragraphs 1 – 35 are incorporated herein by reference.

37. HCC is continuing to develop the Subdivision for further residential construction and has not taken actions to correct its stormwater drainage system despite knowing that the system was causing a recurring, intermittent flooding nuisance at the Property.

39. Council Bluffs and the Pottawattamie County have the duty to maintain their stormwater drainage systems and the power to require the abatement of public and private nuisances. They have not maintained their drainage systems and have taken no actions to require an abatement of excessive drainage from the Subdivision, despite knowing that the drainage was exceeding the natural flow capacity of Little Pony Creek and causing a recurring intermittent flooding nuisance at the Property.

40. Plaintiff's affidavit, attached hereto as Exhibit A, shows that flooding at the property has caused extensive damage.

41. Council Bluffs and the Pottawattamie County have extended the main roadway for the Subdivision and have taken steps to approve and allow additional upstream housing development without maintaining the stormwater drainage system to handle the stormwater drainage from the existing development.

42. Stormwater drainage from additional upstream infrastructure and housing construction will increase flooding problems at the Property and further violate Plaintiff's property rights.

43. Plaintiff faces a grave threat of irreparable harm from continued flooding, and is likely to show that the Defendants' negligence has caused this continuing nuisance and that no other remedy at law besides injunctive relief will adequately protect the Property.

WHEREFORE, pursuant to Iowa R. Civ. P. 1.1502(1), Plaintiff requests a temporary injunction, enjoining Council Bluffs and Pottawattamie County from permitting and facilitating further upstream construction and enjoining HCC from continuing development of the Subdivision, in order to maintain the status quo during the pendency of this action and protect the Property that is the subject of this litigation.

**DATED** this 17th day of June, 2020.

SHARI A. HUGHES, Trustee of the Janice A. Hughes Family Trust, Plaintiff

By: _____

Sean Minahan, #AT0005370
LAMSON DUGAN & MURRAY LLP
10306 Regency Parkway Drive
Omaha, Nebraska 68114
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ATTORNEY FOR PLAINTIFF

#707687.3

E-FILED 2020 JUN 17 5:37 PM POTTAWATTAMIE - CLERK OF DISTRICT COURT

IN THE IOWA DISTRICT COURT IN AND FOR POTTAWATTAMIE COUNTY, IOWA

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| SHARI HUGHES as Trustee of the JANICE A. HUGHES FAMILY TRUST,<br><br>Plaintiff,<br><br>vs.<br><br>CITY OF COUNCIL BLUFFS; POTTAWATTAMIE COUNTY; HILLS OF CEDAR CREEK HOMES ASSOCIATION; and HCC INVESTMENTS, LLC, an Iowa Corporation,<br><br>Defendants. | CASE NO.:<br><br>**AFFIDAVIT OF SHARI HUGHES IN SUPPORT OF A TEMPORARY INJUNCTION** |

STATE OF IOWA )
) ss.
COUNTY OF POTTAWATTAMIE )

I, Shari Hughes, being duly sworn and upon her oath, depose and state as follows:

1. I am over the age of 21, competent to testify, and have personal knowledge of the facts stated here. I am the daughter of Janice Hughes and the trustee of the Janice A. Hughes Family Trust. The trust owns the property, located at 15779 State Orchard Road in Council Bluffs, Iowa, which property is the subject of this litigation.

2. My parents acquired the trust property around 1979. The property abuts Little Pony Creek, and the driveway crosses the creek to reach State Orchard Road.

3. In 1999, an 11-inch rain event caused flooding of the driveway culvert, and the culvert was rebuilt with 4-foot diameter culvert. But other than that exceptional rain event, the



EXHIBIT
A

Little Pony Creek did not flood at the trust property until the 2004-05 construction began on the subdivision known as the Hills of Cedar Creek, which is upstream of the trust property.

4. The Subdivision has a drainage system that diverts its stormwater into Little Pony Creek through drainage ditches.

5. Since construction of the Subdivision began, Little Pony Creek has intermittently flooded at the trust property. My mother notified the City of Council Bluffs and Pottawattamie County of these events and asked for assistance. But neither the City nor the County have taken actions to maintain their drainage systems so that the trust property is not flooded. Instead, they are facilitating more upstream housing development, which will further overload the stormwater drainage systems for the Subdivision, City, and County.

6. As upstream development has increased, Little Pony Creek has intermittently flooded at the trust property after much less significant rainfall events.

7. Recent dates that the trust property has flooded include but are not limited to June 18, 2018, over several days in September and October 2019, and on June 9, 2020. The flooding has caused extensive erosion damage, washing out much of the bank abutting the property, crumbling parts of the driveway, which will require significant repairs to allow ingress and egress of the property. Exhibits A through F, attached hereto, are true and accurate copies of pictures depicting the erosion damage from June 2018.

8. Because the Subdivision's stormwater drainage has increasingly caused the water flow to exceed the natural flow capacity of Little Pony Creek after rain events, further upstream housing development is highly likely to increase the times that Little Pony Creek will flood and damage the trust property.

FURTHER AFFIANT SAYETH NOT NAUGHT.

Shari Hughes

Shari Hughes

SUBSCRIBED AND SWORN before me this 17th day of June, 2020.

DeAnn R. Fritsch

Notary Public

# 710291

NOTARIAL SEAL IOWA

DEANN R. FRITSCH
Commission Number 715736
My Commission Expires
March 26, 2023

LAMSON DUGAN & MURRAY LLP
ATTORNEYS AT LAW

March 19, 2020

City of Council Bluffs
209 Pearl Street
Council Bluffs, Iowa 51503

Attn: Mayor Matt Walsh

Pottawattamie County Board of Supervisors
227 South 6th Street
Council Bluffs, Iowa 51501

Attn: Chairman Tim Wichman

HCC Investments, LLC
1473 Abercorn Drive
Council Bluffs, Iowa 51503

Attn: James Duggan
Registered Agent

Re: Janice A. Hughes Family Trust:
Recurring flooding on 15779 State Orchard Road, Council Bluffs, Iowa

Gentlemen:

As you may or may not know, we have filed suit in accordance with our last correspondence. You should be expecting service within the next few days. Despite the filing of suit, my clients would still like to resolve this matter amicably and would be willing to stipulate to a short extension on answering the petition if the parties would agree to meet and attempt to resolve the flooding issues on the Trust's property.

While the City of Council Bluffs' engineer believes the storm water flows to the property have not increased over the years, it is important to note that many of the culverts in the drainage area have been substantially enlarged since the development was established to handle the drainage from the development. The City of Council Bluffs' engineer's report also did not take into consideration the City's and County's failure to properly maintain holding ponds and the drainage system which serves the development.

We understand that construction on State Orchard Road is underway and that the Trust property is within the grading limits of the construction plans. In light of the construction, we believe now would be the opportune time to sit down and discuss potential alternatives to remedy the flooding issue; including but not limited to grading the channel to alleviate culvert outlet drop, reinforcement of channel banks, bottoms and culvert inlet and outlet, replacement of the single culvert with 2 or 3 longer and larger culverts, or construction of a bridge over the channel.

As stated above, we would like the opportunity to resolve this matter short of the cost of litigation and are willing to suspend litigation while the parties negotiate a resolution. It would be greatly appreciated if you would contact us so that we could schedule a meeting to discuss.

Very truly yours,
LAMSON DUGAN & MURRAY LLP

Sean A. Minahan, Partner
sminahan@ldmlaw.com
FOR THE FIRM

cc: Matt Wilbur
Pottawattamie County Attorney
Pottawattamie County Courthouse
227 South 6th Street
Council Bluffs, Iowa 51501-4238

Dick Wade
Council Bluffs City Attorney
Suite 304
City Hall
209 Pearl Street
Council Bluffs, Iowa 51503

SAM:mrr/#705191