No: S243247

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF OROVILLE, *Petitioner*

v.

SUPERIOR COURT OF BUTTE COUNTY, *Respondent*

CALIFORNIA JOINT POWERS RISK MANAGEMENT AUTHORITY et al., *Real Parties in Interest*

ANSWER BRIEF ON THE MERITS BY CJPRMA

After an Unpublished Decision of the Court of Appeal
Third District Court of Appeal, Case No. C077181
Arising from Butte County Superior Court, Case No. 152036
The Honorable Sandra L. McLean, Judge

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

I know of no interested entities or persons as defined in California Rules of Court, Rule, 8.208, other than parties to this proceeding, that have a financial or other kind of interest in the outcome of this proceeding.

Dated: November 21, 2017

By: _____
A. BYRNE CONLEY
PETER URHAUSEN

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2. Whether strict liability can be applied against a public entity when sewage intrudes on private property without evidence of a design or construction defect in the sewer system, without evidence of a deficient or unreasonable plan of maintenance by the public entity, and where a backwater valve is not installed and maintained on private property by owners as legally required by state and local building codes.

3. Whether a public entity is strictly liable in inverse condemnation whether its properly designed and constructed public improvements function as intended, or fail to function as intended.

I.
INTRODUCTION

Development of inverse condemnation law should be based on "prior case law, public policy and common sense."[1] Common sense dictates that property owners should not recover under inverse condemnation when the very damage to their property was caused by their own illegal connection to a

[1] *Belair v. Riverside County Flood Control District.* (1988) 47 Cal.3d 550, 565.

city's sewer system. Here, Plaintiffs' failure to have a backwater valve ("BWV") is undisputed. That such failure violated Petitioner City of Oroville ("City") ordinances and the Uniform Plumbing Code is undisputed. That the BWV required was a "necessary part of the sewer design and plan" is undisputed. That the presence of a properly functioning BWV would have prevented the sewage overflow into Plaintiffs' building is undisputed. Consequently, it should also be undisputed that the City is not liable to Plaintiffs for inverse condemnation.

Yet, the trial court felt compelled by a faulty analysis in *CSAA*[2] to find the City liable for inverse condemnation. The analysis in *CSAA* is incorrect because the fundamental basis for inverse condemnation is the deliberate taking or damaging of private property for public use. Accidents and negligence do not constitute inverse condemnation. The failure to prevent all clogs in a sewer main, even if negligent, does not constitute inverse condemnation, unless the City has a deliberately deficient plan of maintenance —such as no maintenance, and simply "fix it when it breaks."[3] Maintenance of a public improvement "constitutes the constitutionally required public use" if it is the entity's "deliberate act to undertake the particular plan or manner of maintenance."[4] The "deliberate design, construction, or maintenance of the public improvement" must be the cause of the damage.[5] Here, the trial court found no deficient plan or manner of maintenance.

CSAA misinterpreted *Belair* to have eliminated the inverse

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[2] *California State Auto Assn. Inter-Insurance Bureau v. City of Palo Alto* (2006) 138 Cal. App.4th 474.
[3] E.g., see *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 607.
[4] *Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722, 742, citing *Bauer v. County of Ventura* (1955) 45 Cal.2nd 276, 284-285.
[5] *Arreola* at 742.

condemnation requirement that damage be caused by the deliberate act of the public entity, and to instead replace it with a "failed to function as intended" test. *CSAA* overlooked that the deliberateness requirement was already satisfied in *Belair* (the levee's specific design angled incoming water to the base of the levee, causing "deep scouring" that lead to the levee's failure). *Belair's* discussion of the damage being caused by the levee's failing to function as intended was in addition to the deliberateness requirement, not in lieu of it. Deliberateness having already been established, *Belair* added the "failed to function as intended" test to the proximate cause analysis to counter the defendant's argument that the levee failure there did not cause plaintiff's damages because plaintiff's property would have flooded if the levee did not exist.

CSAA's "failed to function as intended" rule of inverse condemnation liability, borrowed from flood control caselaw, cannot apply to sewage backup cases. It makes no sense in this context. The unique circumstances of flood control cases – including the proximate cause issue that flooding would have occurred in the absence of the flood control project – do not exist in sewer cases.

Public entities are already liable for inverse condemnation when a public improvement functioning as intended causes damage. The public entity cannot also be liable in inverse condemnation whenever damage is caused by the public improvement failing to function as intended. If that were the law – as *CSAA* indicates – public entities would **always** be liable for inverse condemnation when their public improvements cause damage. And if that were truly the law, then cases such as *Pacific Bell* and *Arreola* did not need to analyze the public entities' maintenance plans – they could have simply said failure of a water pipe or a channel to function as intended results

in inverse condemnation liability. Indeed, much of this Court's development of inverse condemnation law would be antiquated – the test would simply be "was the public improvement a substantial cause of damage." Obviously, that is not and cannot be the law.

Moreover, even in flood control cases, the "failed to function as intended" test does not apply unless an **independent** force, such as a rainstorm, overwhelms the system and the system poses "an unreasonable risk of harm to the Plaintiffs, and such unreasonable design, construction, or maintenance constitutes a substantial cause of the damages."[6] If the "failed to function as intended" test is grafted onto sewer backup cases, then these additional requirements should be included as well. Here, the Plaintiffs' failure to have a legally required BWV is hardly an "independent force" and Plaintiffs failed to establish that the sewer system's design, construction, or maintenance was unreasonable.

Additionally, in the inverse condemnation analysis, "the decisive consideration is whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking."[7] Here, Plaintiffs are not disproportionally impacted because their property damage was caused by their own failure to have a legally required BWV. Indeed, Plaintiffs are seeking to have their neighbors and other fellow citizens pay for the consequences of Plaintiffs' own unlawful conduct.

Furthermore, public policy weighs against imposition of inverse condemnation liability. Property owners' incentive to obey City ordinances and the Uniform Plumbing Code would be negated if they could recover in

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[6] *Belair v. Riverside County Flood Control District, supra*, 47 Cal.3d 550, 559-560, 565.
[7] *Belair* at 558.

full (including attorney fees and expert costs) for damage caused by their own unlawful failure to install and maintain a BWV. Moreover, insurance coverage is available to property owners for such damage, but inverse condemnation liability is generally not covered by insurance for public entities. Indeed, in this case, Plaintiffs were reimbursed by their insurer for well over $1,000,000, and Respondent CJPRMA (see below) does not provide pooled self-insurance to the City of Oroville for inverse condemnation liability, although it does cover the related nuisance claim.

II.

PARTIES

Petitioner City of Oroville (hereinafter "City" or "Oroville") is a public agency within the meaning of Government Code §6252, subdivision (d), and a defendant in this action pending before Respondent Butte County Superior Court.

Plaintiffs Timothy Wall, DDS, Sims W. Lowry, DMD, and William A. Gilbert, DDS, individually and doing business as WGS Dental Complex (hereinafter collectively "WGS"), and California Joint Powers Risk Management Authority ("CJPRMA"), are named herein as real parties in interest. CJPRMA purchased an assignment of the rights of the WGS first party property insurer, The Dentists Insurance Company ("TDIC"). TDIC insured the WGS plaintiffs and paid out well over $1 million for this claim. All of TDIC's rights to recover its payments (and costs and fees) now belong to CJPRMA.

CJPRMA is a public entity risk-sharing pool providing coverage to the City of Oroville. CJPRMA, as is typical, does not provide coverage for inverse condemnation liability, and thus could financially benefit from a

ruling adverse to the City that preserves the TDIC-assigned inverse condemnation subrogation claim against the City. Nonetheless, CJPRMA's position is that any potential recovery it may have against the City is far outweighed by the benefit to its member and the membership as a whole (in addition to California public entities generally) of a holding that missing BWV sewage overflow cases, such as this one, do not create inverse condemnation liability. Consequently, CJPRMA supports the City's position that the opinion of the court of appeal should be reversed.

III.

FACTS OF THE CASE

The facts of the case are set forth in City of Oroville's Brief, which CJPRMA adopts by reference pursuant to California Rules of Court, rule 8.200(a)(5). Briefly, Plaintiffs built their office building without a legally required BWV.[8] About 25 years later, a clog in the City's sewer main caused sewage to back up in the main.[9] Instead of overflowing at the nearest uphill manhole, per design of the sewer system, the sewage overflowed into Plaintiffs' building due to Plaintiffs' missing BWV.[10] Plaintiffs' insurer paid them well over $1,000,000 for property damage and lost income.[11] Plaintiff and its insurer sued the City.

IV.

PROCEDURAL HISTORY AND COURT OF APPEAL OPINION

The procedural history is set forth in City of Oroville's Brief, which

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[8] Vol. 2, Ex. 5, pp. 213-215, 227-229, 234-235, 237, 287-293; 347-349.
[9] Vol. 4, Ex. 32, p. 1004; Vol. 7, Ex. 57, p. 1935.
[10] Vol. 4, Ex. 32, p. 1007, 1010-1011.
[11] Vol. 4, Ex. 34, p.1044.

CJPRMA adopts by reference pursuant to California Rules of Court, rule 8.200(a)(5).

V.
STANDARD OF REVIEW

The primary issues here are legal questions and thus subject to de novo review.

> Our standard of review is mixed. The question of whether to apply a standard of reasonableness (under *Belair* and *Locklin*) or a strict liability standard (under *Albers*) is a legal issue we review de novo. (See *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 601 [96 Cal.Rptr.2d 897].) When the reasonableness standard applies, the question of whether a public agency acted reasonably is a fact-based inquiry. (*Belair, supra,* 47 Cal.3d at p. 566, 253 Cal.Rptr. 693, 764 P.2d 1070; *Skoumbas v. City of Orinda* (2008) 165 Cal.App.4th 783, 796 [81 Cal.Rptr.3d 242].) We review the court's factual findings under the substantial evidence standard. (Cf. *Akins v. State of California* (1998) 61 Cal.App.4th 1, 36 [71 Cal.Rptr.2d 314].) The application of the appropriate legal standard to the facts properly found by the trial court is a legal question. (See *Paterno v. State of California* (2003) 113 Cal.App.4th 998, 1023 [6 Cal.Rptr.3d 854]; *Ali v. City of Los Angeles* (1999) 77 Cal.App.4th 246, 250 [91 Cal.Rptr.2d 458].)

(*Gutierrez v. County of San Bernardino* (2011) 198 Cal.App.4th 831, 844.)

VI.

POTENTIAL THEORIES OF RECOVERY IN SEWER BACKUP CASES

Before discussing inverse condemnation liability, it is important to note that sewer backup claims can be litigated under "dangerous condition" and nuisance theories. When damage is accidental, recovery should be limited to these tort causes of action. As with the exercise of police powers,

> the government's potential liability for this type of conduct properly should be evaluated, as it always has been in the past, under the provisions of the Tort Claims Act. (Gov. Code, §810, et seq.) In enacting the elaborate and detailed provisions of that act, the Legislature carefully considered the competing considerations that arise from the imposition of liability upon the government in various tort settings, and deliberately fashioned immunity provisions designed to avoid deterring the government from proceeding with the enforcement of important public policies. As noted above, to allow Customer to bring an action for inverse condemnation would "trump" all of the immunity provisions set forth in the Tort Claims Act.

(*Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 391.)

Conversely, inverse condemnation liability should only be available when the taking or damage is for a "public use," i.e., a result of a deliberate

design, construction, or plan of maintenance. Because the damage to the WGS Plaintiffs was not caused by any of those, inverse condemnation liability should not be available.

A. Negligence

Generally, cities cannot be sued for negligence under Civil Code section 1714 for conditions of public property, since the dangerous condition statutes (Government Code §§ 830, et seq.) occupy the field. (*Zelig v. County of Los Angeles (*2002) 27 Cal.4th 1112, 1132.)

B. Dangerous Condition of Public Property

For dangerous condition of public property liability to attach, a claimant must prove that the property created a substantial risk of injury when used with due care, and that the public entity either (1) had actual or constructive notice of the dangerous condition, or (2) created the dangerous condition through a negligent or wrongful act. (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1132; Gov. Code § 835.) Design immunity under Government Code section 830.6 provides a potential defense.

C. Nuisance

Nuisance liability is often asserted in sewer backup claims. Nuisance liability attaches to conduct that obstructs "the free use of property, so as to interfere with the comfortable enjoyment of life or property...." (Cal. Civil Code § 3479.) Public entities may be subject to nuisance liability. (*Nestle v. County of Santa Monica* (1972) 6 Cal.3d 920 [airport noise].)

Nuisance liability requires "some sort of conduct, i.e., intentional and unreasonable, reckless, negligent, or ultrahazardous, that unreasonably interferes with another's use and enjoyment of ... property." (*Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 102 [timber, debris and water washed from District's land onto adjacent property; no liability

found because district was not negligent].) Thus, to prevail on a nuisance theory for a sewer backup claim, the claimant generally must show negligence or some affirmative act of the entity that led to the backup.

Defenses such as design immunity apply. (*Mikkelsen v. State* (1976) 59 Cal.App.3d 621, 630.)

D. Inverse Condemnation

Inverse condemnation liability is based on the California Constitution rather than the Government Claims Act. Unlike dangerous condition and nuisance actions, no Government Code claim need be filed. (See Government Code § 905.1.)

In 2006, *California State Auto Assn. Inter-Insurance Bureau v. City of Palo Alto, supra,* 138 Cal.App.4th 474, greatly expanded liability for public entities in sewer backup cases, holding that inverse condemnation liability can be applied to such claims when the sewer system fails to function as intended.[12] As set forth in this brief, *CSAA*'s analysis was erroneous, and inverse condemnation liability should not be available in sewer backup cases

[12] A sewage overflow constituted inverse condemnation in *Ambrosini v. Alisal Sanitary District* (1957) 154 Cal.App.2d 720, but that finding of liability was based on damage caused by the design of the system transporting treated water from a sewage disposal plant to the Salinas River. Unusually heavy rains had raised the level of the Salinas River to 47 feet, higher than a non-pressure manhole's elevation of 43 feet adjacent to Plaintiff's celery field. (*Id.* at 722, 731.) The system design allowed a backup to overflow that non-pressure manhole adjacent to the Plaintiff's celery field, inundating and destroying the celery crop. (*Id.* at 723.) The court relied on *Bauer*, rejecting a claim of mere negligence, and finding that the damage was caused by the project "functioning as deliberately conceived, for a river flood level of 47 feet." (*Id.* at 731.) [The District ended up suing its engineer for not contemplating a rise in the Salinas River in the design of the piping system – see *Alisal Sanitary District v. Kennedy* (1960) 180 Cal.App.2d 69, 72.]

unless the property damage is caused by the public entity's deliberate design, construction, or plan of maintenance.

VII.

DELIBERATE DESIGN, CONSTRUCTION, OR PLAN OF MAINTENANCE IS REQUIRED FOR INVERSE CONDEMNATION LIABILITY

In this section, we set forth authorities demonstrating that —for at least six decades — inverse condemnation liability has required an element of deliberateness. In the next section, we explain that *CSAA* misread *Belair* to eliminate that requirement.

The State Constitution provides: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." (Cal. Const., art. I, § 19.) On the basis of this one sentence, an entire area of case law rests.

With two exceptions not relevant here, inverse condemnation liability is established where physical injury to real property is proximately caused by a public improvement "as deliberately designed and constructed." (*Albers v. Los Angeles County, supra*, 62 Cal.2d 250, 263-264; *Holtz v. Superior Court* (1970) 3 Cal.3d 296, 304; *Belair v. Riverside County Flood Control Dist., supra*, 47 Cal.3d 550, 556; *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 440.) In *Bauer v. Ventura County* (1955) 45 Cal. 2d 276, 286 (abrogated by *Belair* on other grounds), this Court recognized that the line between construction and maintenance is sometimes blurred and that a plan of maintenance can be sufficient to meet the deliberateness needed to satisfy the public use requirement for inverse condemnation. In *Bauer*, the plaintiffs

alleged:

> that the collection of debris and stumps in the ditch raised an obstruction which caused the water to back up on their land. If this was due to the mere negligent operation of the ditch system, it is not within the scope of liability as a taking or damaging for a public use under section 14 [now article 1, section 19]. If, on the other hand, the obstruction of the ditch was in some way part of the plan of maintenance or construction, then liability would attach ...
>
> .

(*Id.* at 286.)

Thus, the cause of the damage under inverse condemnation must be the public improvement functioning as deliberately designed and constructed, including consideration of the plan of maintenance deliberately adopted. In contrast, simple negligence or negligent failure to follow the maintenance plan is not sufficient to give rise to inverse condemnation liability. (*Bauer, supra,* 45 Cal.2d at p. 286.) A number of appellate courts, before and after *Belair*, have employed these rules in analyzing liabilities alleged to arise from maintenance of public improvements.

In *Hayashi v. Alameda County Flood Control and Water Conservation Dist.* (1959) 167 Cal.App.2d 584, plaintiffs suffered substantial damage when the levee maintained by the defendant flood control district suffered a 60–foot break. The court allowed a negligence claim (the case predates the Government Claims Act), but held that the district had no liability for inverse condemnation:

> The most recent cases have made a distinction between negligence which occurs when a public agency is carrying out a deliberate plan with regard to the construction of public works, and negligence resulting in damage growing out of the operation and maintenance of public works. These cases hold that the damage resulting from the former type of negligence is compensable under article I, section 14, whereas damages resulting from the second type of negligence are not recoverable in an inverse condemnation proceeding, but are recoverable, if at all, only in a negligence action. [Citing *Bauer* and other cases.] It has been definitely held that a property owner may not recover in an inverse condemnation proceeding for damages caused by acts of carelessness or neglect on the part of a public agency. [Citation.]

(*Id.* at pp. 591–592.)

A year later, citing both *Bauer* and *Hayashi,* the court of appeal in *Kambish v. Santa Clara Val. Water Conservation Dist. of San Jose*(1960) 185 Cal.App.2d 107, 111, held: "Damage resulting from negligence in routine operation having no relation to the function of the project as conceived is not a taking for public use and thus not a basis for inverse condemnation." The case involved overflow of a creek after heavy rains caused a reservoir to overtop.

Next, *Sheffet v. County of Los Angeles* (1970) 3 Cal.App.3d 720, involving damage from water overflowing from city streets, held that "[i]nverse condemnation does not involve ordinary acts of carelessness in the carrying out of the public entity's program. [Citations.] Property is only

deemed taken or damaged for a public use if the injury is a necessary consequence of the public project. (*Albers v. County of Los Angeles*, *supra*, pp. 263-264.)" (*Id.* at pp. 733-734.)

McMahan's of Santa Monica v. City of Santa Monica (1983) 146 Cal.App.3d 683 [disapproved on other grounds by *Bunch v. Coachella Valley Water Dist., supra,* 15 Cal.4th 432] concluded that a property owner could recover for inverse condemnation based on the city's plan of maintenance for its system of deteriorating water delivery pipes. *McMahan's* recognized inverse condemnation lies only for an injury to private property caused by a deliberate act for the purpose of fulfilling one of the public objects of the project as a whole, and that negligence committed during the routine day-to-day operation of the public improvement does not establish inverse condemnation. (*Id.* at p. 694.) Relying on *Bauer v. County of Ventura, supra,* 45 Cal.2d 276, 285, the court concluded that the city's construction of the system without monitoring capabilities, and a maintenance plan of simply waiting for a section of the deteriorating pipe to burst before replacing it, amounted to the deliberate act needed to impose inverse condemnation liability. *McMahan's* recognized that, under *Bauer,* the concept of "maintenance" and "construction" can be synonymous for purposes of article I, section 19. "[W]hether the City's program of water main installation and replacement is characterized as 'construction' or 'maintenance,' the fact remains that it was inadequate and contributed to the break due to corrosion of the [water main]. The City's knowledge of the limited life of such mains and failure to adequately guard against such breaks caused by corrosion is as much a 'deliberate' act as existed in *Albers*, *supra,* 62 Cal.2d 250." (*Id.* at 696.)

> "The governmental decision to proceed with the project without incorporating the essential precautionary modifications in the plan thus represents ... a deliberate policy decision to shift the risk of future loss to private property owners rather than to absorb such risk as a part of the cost of the improvement paid for by the community at large. In effect, that decision treats private damage costs, anticipated or anticipatable, but uncertain in timing or amount or both, as a deferred risk of the project. If and when they materialize, however, the present analysis suggests that those costs should be recognized as planned costs inflicted in the interest of fulfilling the public purpose of the project and thus subject to a duty to pay just compensation."

(*Id.* at p. 697, quoting Van Alstyne, *Inverse Condemnation: Unintended Physical Damage* (1969) 20 Hastings L.J. 431, 491–492.)

> In the instant appeal, the City was taking a calculated risk by adopting a plan of pipe replacement and maintenance that it knew was inadequate. The City's plan of replacement of the water mains reflected the deferred risks of the project both foreseeable and unforeseeable, and it is proper to require the City to bear the loss when the damage occurs.

(*McMahan's* at 698.)

After this Court decided *Belair* in 1988, the courts of appeal continue to apply these rules.

Consistent with the principles set forth in *Bauer*, *Hayashi, Kambish*, *Sheffet,* and *McMahan's — Paterno v. State of California* (1999) 74 Cal.App.4th 68, 79 (another levee flood control case) reversed the trial court's finding of inverse condemnation, in part because "the trial court conflated negligent maintenance with a negligent **plan** of maintenance. Takings liability attaches, if at all, only to the latter." (Emphasis original.) To establish inverse condemnation liability, plaintiff "must prove that an unreasonable **plan** caused the failure." (*Id.* at 86, emphasis original.) "In the case of alleged shoddy maintenance, as here, it is the **plan** of maintenance which must be unreasonable to establish a taking. Poor **execution** of a maintenance plan does not result in a taking." (*Id.* at p. 87, citing *Bauer* and *McMahan's*, emphasis original.)

> Paterno points to the phrase (from *Bauer*, *supra*, 45 Cal.2d at p. 286) "negligence in the routine operation having no relation to the function of the project as conceived," and construes it to mean that if there is negligence in the routine operation which **is** related to the function of the project, takings liability attaches. Paterno asserts that "case law merely uses the word 'plan' ... in the context of a broader inquiry as to whether a defendant inflicted injury through deliberate conduct which ostensibly attempted to further a public project's purpose." **Any act**, he claims, "in direct or indirect furtherance of a project's public purpose" is a "plan" such that an inverse taking results if the act causes damage and is found to be unreasonable, and the "pivotal

> requirement under *Bauer* and its progeny thus is whether the defendants' action related to the purpose of a public project, not whether the action constituted a 'plan.' " He also points to a snippet of discussion about exhibits in the trial court, stating the District conceded that "what they do every year, ... is a plan," **but this is not the law**.
>
> To repeat, "deliberate" action invokes takings liability, **where, and only where,** the deliberation is **by a public entity**, not by an employee: "Damage resulting from negligence in the routine operation having no relation to the function of the project as conceived is not within the scope of the rule applied in the present case." (*Bauer, supra*, 45 Cal.2d at p. 286, quoted in *Customer Co., supra*, 10 Cal.4th at p. 382.)

(*Paterno* at 87–88, emphasis original and added.)

Next came *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 608 with facts substantively identical to *McMahan's. Pacific Bell*, labelling the maintenance plan a "replace it when it breaks" program, whole-heartedly endorsed *McMahan's*. (*Id.* at pp. 607, 610.) In *Pacific Bell*, as in *McMahan's,* the city's water delivery system was deliberately designed, constructed, and maintained without any method or program for monitoring the inevitable deterioration of cast-iron pipes, other than waiting for a pipe to break. As in *McMahan's*, the city knew that its pipes were badly deteriorated and that its replacement program would take more than a decade. (*Id.* at pp. 599-600, 608-609.) The city had a program, motivated by cost savings, to "replace it when it breaks" as the method of maintenance,