

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

Ashton Park Trace)	
Apartments, LLC,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. _____
)	
City of Decatur, Georgia; Urban)	
Redevelopment Agency of the City of)	Jury Trial Demanded
Decatur; The Potts Company, LLC;)	
The Potts Company, Inc.;)	
Reeves Contracting Company, Inc.;)	
and Silverman Construction)	
Program Management, Inc.,)	
)	
Defendants.)	

COMPLAINT

Plaintiff Ashton Park Trace Apartments, LLC (Park Trace) files its Complaint against Defendants City of Decatur, Georgia (the City); Urban Redevelopment Agency of the City of Decatur (URA); The Potts Company, LLC and The Potts Company, Inc. (collectively, Potts); Reeves Contracting Company, Inc. (Reeves); and Silverman Construction Program Management, Inc. (Silverman), and alleges as follows:

Statement of the Case

This is a case about structural damage to Park Trace's apartment building in Decatur, Georgia. The damage—collapsed ceilings, falling concrete, massive cracks in walls, abnormal settling of floor slabs, and substantial sinking and leaning of the building—was caused by the construction of the City's \$38-million Beacon Municipal Complex Redevelopment Project.

Park Trace's eight-story apartment building sits on a small hill overlooking and immediately adjacent to the City's construction project. The City and its contractors, through their excavation, temporary bracing, and dewatering construction activities, removed the apartment building's soil support. This removal caused the structural damage, which forced Park Trace to evacuate residents and install extensive emergency shoring to prevent further collapse of its building. Park Trace is now in the process of making permanent structural repairs—at its own expense—because the City and its contractors have refused to voluntarily accept responsibility for the damage they have caused.

Parties

1. Plaintiff Park Trace is a limited liability company organized and existing under the laws of Washington with its principal place of business in California. Park Trace has two members:

a. BLF Holdings, LLC, a Washington limited liability company whose sole member is Brian L. Fitterer Revocable Trust, whose sole member is Brian L. Fitterer who is a citizen of California.

b. Joseph Sherman who is a citizen of California.

2. Defendant City is a municipal corporation existing by virtue of the laws of the State of Georgia, and is a body corporate subject to suit in this Court.

3. Defendant URA is a public body corporate and politic of the City of Decatur, Georgia, and is subject to suit in this Court.

4. Defendant The Potts Company, LLC is a limited liability company organized and existing under the laws of Georgia with its principal place of business in Georgia. The LLC's members Eric Young, David Buser, Steve Heyward, Robert Kelly, Jeff Buser, and Mike Potts are all citizens of Georgia.

5. Defendant The Potts Company, Inc. is a Georgia corporation with its principal place of business in Georgia.

6. Defendant Reeves is a Georgia corporation with its principal place of business in Georgia.

7. Defendant Silverman is a Georgia corporation with its principal place of business in Georgia.

Jurisdiction and Venue

8. This Court has subject matter jurisdiction over the lawsuit under 28 U.S.C. § 1332(a)(1) because the Plaintiff and Defendants are citizens of different states and the amount in controversy exceeds the sum of \$75,000, excluding interest and costs.

9. This Court has personal jurisdiction over all of the Defendants because each had some interest or involvement with the design, construction management, supervision, or construction of the City's Beacon Municipal Complex Redevelopment Project, which caused damage to Park Trace's apartment building located in Decatur, Georgia. The exercise of jurisdiction over the parties will not violate due process because Park Trace's causes of action grew out of the Defendants'

purposeful contact with Georgia through the Beacon Municipal Complex Redevelopment Project, and the defendants reasonably should have anticipated defending suit in this Court.

10. Venue is proper in this District under 28 U.S.C. § 1391(b)(2) because this is the District in which a substantial part of the events or omissions giving rise to Park Trace's claims occurred and is also the District where the Beacon Municipal Complex Redevelopment Project and Park Trace's apartment building are located.

General Allegations

11. Park Trace is the owner of an eight-story apartment building, known as Park Trace Apartments, which is located at 700 Atlanta Avenue in Decatur, Georgia. The apartment building is on land that is owned by Park Trace.

12. Park Trace's apartment building is adjacent to land that was owned at all relevant times by the City or the URA.

13. The City has a multimillion-dollar construction project—the Beacon Municipal Complex Redevelopment Project (Project)—located on

the City's land that adjoins Park Trace's land on which Park Trace's apartments are located.

14. On or about September 26, 2012, the City hired The Potts Company, Inc. as the "Construction Manager as Constructor" for the Project.

15. On or about March 28, 2013, the City hired Silverman for "Construction and Post Construction" management services on the Project. Silverman was hired to, among other things, establish and manage a quality assurance program for all aspects of the Project, including design and construction through the life of the Project, and to monitor the quality of work on the Project.

16. On or about April 8, 2014, The Potts Company, Inc. assigned its contract with the City to The Potts Company, LLC. The City consented to that assignment on or about May 10, 2014.

17. The Project included a significant upgrade to the City's stormwater system. The stormwater system upgrade is known as the Ebster Park Regional Stormwater Management Facility (Stormwater Upgrade), and cost approximately \$10 million.

18. The Stormwater Upgrade portion of the Project included the planning, design, construction management, construction, and supervision of a two-acre stormwater management vault under Ebster Field on the City's land adjoining Park Trace's land.

19. The construction of the underground stormwater management vault required excavation, shoring, and dewatering activities on the City's land immediately adjacent to Park Trace's land.

20. The Stormwater Upgrade required a deep excavation to install the stormwater management vault.

21. Upon information and belief, the City's excavation work for the stormwater management vault was started near the east property line of Park Trace's land—where Park Trace's land and the City's land adjoin—along the toe of an existing slope.

22. Upon information and belief, the City's excavation used a steepened slope for approximately the first 15 feet, and was further deepened using temporary excavation bracing.

23. Upon information and belief, the temporary bracing wall consisted of soldier piles and wood lagging.

24. Upon information and belief, the estimated total excavation depth for the stormwater management vault, including the steepened slope and the temporary bracing wall, was about 30 feet.

25. Upon information and belief, the excavation and construction process for the stormwater management vault used a temporary dewatering system consisting of continuous (24/7) pumping of groundwater from deep wells located along the edge of the stormwater management vault.

26. After the City's excavation, bracing, and dewatering activities on the Stormwater Upgrade began, Park Trace's apartment building suffered structural damage—including collapsed ceilings, falling concrete, significant interior and exterior cracking of walls, significant settling of the building's floor slabs, and substantial sinking and leaning of the building (Property Damage).

27. Dozens of the apartment building's residents had to be evacuated because of the Property Damage.

28. The apartment building continues to sustain additional damage.

29. Following the City's excavation, bracing, and dewatering activities, Park Trace's apartment building experienced a significant tilt downward on the east end of the building—the end nearest the City's adjoining land where the City's excavation, bracing, and dewatering activities on the Stormwater Upgrade took place.

30. The City's excavation, bracing, and dewatering construction activities on the Stormwater Upgrade caused, among other things, a drawdown of the groundwater table and the loss of soil support beneath Park Trace's apartment building, which resulted in the Property Damage.

31. After the Property Damage was noticed, Park Trace sent multiple written notices to the City and Potts regarding the Property Damage.

32. City representatives also had actual knowledge of the Property Damage to Park Trace's apartments through visits by City representatives to the apartment building to view the damage.

33. Despite the notices and repeated visits to the apartment building by City representatives, the City has refused to accept

responsibility for the damages and has refused to act upon Park Trace's claim for damages.

34. Park Trace has incurred, and will continue to incur, substantial damages resulting from the City's construction of the Project, which removed Park Trace's apartment building's soil support.

CAUSES OF ACTION

Count One - Breach of Contract Against the City of Decatur

35. Park Trace incorporates by reference the allegations in Paragraphs 1 through 34 as if fully set forth herein.

36. On February 19, 2013, Park Trace and the City entered into a Right-of-Entry Agreement (Agreement). A true and correct copy of the Agreement is attached as **Exhibit A** and incorporated herein by reference.

37. The Agreement states that "the City is undertaking a construction project known as Beacon Municipal Complex," which "is located adjacent to" Park Trace's apartment building property. Ex. A, p. 1.

38. Under the Agreement, the City requested that Park Trace allow the City to install on Park Trace's apartment building property a groundwater monitoring well for the purpose of ensuring that the City's construction of its Project did not adversely affect Park Trace. *Id.*

39. Under the Agreement, Park Trace gave the City permission to access Park Trace's property to install the groundwater monitoring well. *Id.*

40. Under the Agreement, the City promised that "[a]ll work shall be performed in a good, substantial and workmanlike manner." *Id.* ¶ 1.

41. Under the Agreement, the City promised that "[d]uring construction, the City shall ensure that the Property [*i.e.*, Park Trace's property] will be maintained at all hours of operation for" Park Trace's "tenants." *Id.* ¶ 2.

42. Under the Agreement, the City further promised that "[d]uring construction, the City shall minimize any interruption of or interference with [Park Trace's] use and enjoyment of [Park Trace's] property." *Id.* ¶ 3.

43. Implied in the Agreement is a legal duty to perform the Agreement skillfully, carefully, and in good faith.

44. Park Trace faithfully, properly, and fully performed its obligations under the Agreement.

45. The City breached the Agreement by failing during construction to ensure that Park Trace's property was maintained for Park Trace's tenants. The City failed to maintain Park Trace's property for its tenants because the City's construction caused tenants to be displaced when their apartments were damaged by the City's construction activities on the Project.

46. The City breached the Agreement by failing during construction to minimize any interruption of or interference with Park Trace's use and enjoyment of its property. The City's construction activities on the Project caused substantial interruption and interference with Park Trace's use and enjoyment of its apartment building because the City's construction activities caused Property Damage—resulting in tenants being evacuated and emergency measures being taken to stabilize the building.

47. The City breached the Agreement by failing to perform the work in a good, substantial, and workmanlike manner by either failing to install the groundwater monitoring well in a timely fashion or failing to properly monitor the groundwater after the installation of the well, which resulted in a substantial drawdown of the groundwater level, which removed soil support from Park Trace's apartment building, which resulted in the apartment building's Property Damage.

48. Park Trace has been damaged by the City's breaches of the Agreement.

49. The City is liable to Park Trace for all damages arising from the City's breaches of the Agreement in an amount to be proven at trial.

50. All conditions precedent to the bringing of this claim and to the recovery of the damages and other relief sought have been satisfied, waived, excused, or otherwise discharged.

**Count Two – Violation of O.C.G.A. § 44-9-3
Against the City of Decatur and the URA**

51. Park Trace incorporates by reference the allegations in Paragraphs 1 through 50 as if fully set forth herein.

52. Under O.C.G.A. § 44-9-3, the City and the URA, as the owners of the land adjoining the land owned by Park Trace, had a legal duty to Park Trace to maintain the support of Park Trace's soil.

53. Upon information and belief, the City/URA and Park Trace each derived title for its land from a common grantor, the Housing Authority of the City of Decatur.

54. Upon information and belief, the City transferred the land where the Project is located to the URA sometime during construction of the Project, and the land is to be transferred back to the City after the Project has been completed.

55. Consequently, at all relevant times the Project land adjoining Park Trace's land was owned by either the City or the URA.

56. The City/URA failed to exercise ordinary care and reasonable precautions to sustain Park Trace's land during the excavation, temporary bracing, and dewatering activities for the Stormwater Upgrade.

57. The City/URA's failures were a breach of its legal duty to maintain support for Park Trace's land.

58. The excavation, temporary bracing, and dewatering activities for the Stormwater Upgrade inflicted damage upon Park Trace's adjoining land by withdrawing the support of the soil for the apartment building, which resulted in the apartment building's Property Damage.

59. As a result of the City/URA's failure to exercise ordinary care and reasonable precautions to sustain the support of Park Trace's land during the planning, design, construction management, supervision, and construction of the Stormwater Upgrade, Park Trace's apartment building sustained substantial damage, in an amount to be proven at trial.

60. Under O.C.G.A. § 44-9-3, the City/URA is liable to Park Trace in tort for the damages to Park Trace's apartment building, which resulted from the City/URA's failure to exercise ordinary care and reasonable precautions to sustain the land of adjoining landowner Park Trace.

61. All conditions precedent to the bringing of this claim and to the recovery of the damages and other relief sought have been satisfied, waived, excused, or otherwise discharged.

**Count Three – Negligence
Against the City of Decatur**

62. Park Trace incorporates by reference the allegations in Paragraphs 1 through 61 as if fully set forth herein.

63. The City owed Park Trace the duty to construct the Project in a non-negligent manner so as not to harm Park Trace.

64. The City had a legal duty to conform to the standard of conduct or care expected of those performing excavation, temporary bracing, and dewatering work to ensure that these construction activities did not impact Park Trace or cause damage to Park Trace's apartment building.

65. The City acted negligently and breached its legal duty by not timely and properly monitoring the excavation, temporary bracing, and dewatering work taking place on the Project in a manner so that Park Trace's adjoining land would not be damaged by having its soil support removed.

66. The City breached its duties in the planning, design, construction management, supervision, and construction of the Stormwater Upgrade because the City failed to exercise ordinary care and reasonable precautions in those activities, which resulted in Property Damage to Park Trace's apartment building.

67. The City's negligence was the direct cause of the Property Damage to Park Trace's apartment building.

68. The City is liable to Park Trace for all damages arising from the City's negligence in an amount to be proven at trial.

69. All conditions precedent to the bringing of this claim and to the recovery of the damages and other relief sought have been satisfied, waived, excused, or otherwise discharged.

**Count Four – Inverse Condemnation
Against the City of Decatur**

70. Park Trace incorporates by reference the allegations in Paragraphs 1 through 69 as if fully set forth herein.

71. The City, through its planning, design, construction management, supervision, and construction of the Stormwater

Upgrade, created a condition on Park Trace's private property that amounts to a taking without compensation under Georgia law.

72. The City's excavation, temporary bracing, and dewatering activities on its Stormwater Upgrade caused Property Damage to Park Trace's apartment building.

73. The work on the Stormwater Upgrade was being done at the direction of the City.

74. The City's liability is primary and absolute because the damage to Park Trace's property resulted from the City's work on the Stormwater Upgrade.

75. Park Trace is entitled to recover just compensation from the City for damages to Park Trace's property that resulted from the City's work on its Stormwater Upgrade. Damages are in an amount to be proven at trial.

76. All conditions precedent to the bringing of this claim and to the recovery of the damages and other relief sought have been satisfied, waived, excused, or otherwise discharged.

**Count Five – Nuisance
Against the City of Decatur**

77. Park Trace incorporates by reference the allegations in Paragraphs 1 through 76 as if fully set forth herein.

78. The City had a duty not to create a nuisance by which third parties may be injured.

79. “A nuisance is anything that causes hurt, inconvenience, or damage to another and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance.” O.C.G.A. § 41-1-1.

80. The City caused hurt, inconvenience, and damage to Park Trace through the City’s planning, design, construction management, supervision, and construction of the Stormwater Upgrade, which resulted in Property Damage to Park Trace’s apartment building.

81. The City caused hurt, inconvenience, and damage to Park Trace through the City’s excavation, temporary bracing, and dewatering activities on the Stormwater Upgrade, which caused the groundwater table to drop and a loss of soil support, which resulted in Property Damage to Park Trace’s apartment building.

82. The City exercised its planning, design, construction management, supervision, and construction activities on the Stormwater Upgrade in an unreasonable manner by failing to properly monitor the groundwater table.

83. The City's construction activities on the Stormwater Upgrade had a duration of many weeks with continuous dewatering, which would require continuous monitoring of the groundwater table.

84. The City had knowledge of the dangerous condition—that is the lowering of the groundwater table—as evidenced by the City entering into the Agreement with Park Trace under which the City was to install a groundwater monitoring well to prevent from happening exactly what happened. That is, the City knew it should monitor the groundwater table during construction of the Project to avoid lowering the groundwater table and damaging Park Trace.

85. The City failed to act within a reasonable time to prevent its dewatering activities from lowering the groundwater table and damaging Park Trace.

86. The City had a legal duty to terminate its dewatering activities before those activities adversely affected the groundwater table and removed Park Trace's soil support.

87. The City failed to terminate its dewatering activities before the groundwater table was lowered, which caused loss of soil support and Property Damage to Park Trace's apartments.

88. The nuisance created by the City caused Property Damage to Park Trace's apartments.

89. Park Trace is entitled to recover its damages from the City in an amount to be proven at trial.

90. All conditions precedent to the bringing of this claim and to the recovery of the damages and other relief sought have been satisfied, waived, excused, or otherwise discharged.

**Count Six – Interfering with Enjoyment of Private Property
(Violation of O.C.G.A. § 51-9-1)
Against All Defendants**

91. Park Trace incorporates by reference the allegations in Paragraphs 1 through 90 as if fully set forth herein.

92. “The right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a tort for which an action shall lie.” O.C.G.A. § 51-9-1.

93. Park Trace has an absolute right of enjoyment of its private property located at 700 Atlanta Avenue in Decatur, Georgia.

94. The Defendants’ acts in the planning, design, construction management, supervision, and construction activities on the Stormwater Upgrade unlawfully interfered with Park Trace’s enjoyment of its private property by lowering the groundwater table and removing soil support, which caused Property Damage to Park Trace’s apartment building.

95. The Defendants’ acts in the excavation, temporary bracing, and dewatering activities on the Stormwater Upgrade unlawfully interfered with Park Trace’s enjoyment of its private property by lowering the groundwater table and removing soil support, which caused Property Damage to Park Trace’s apartment building.

96. The City, as the owner of the land, the Project, and the Stormwater Upgrade, violated O.C.G.A. § 51-9-1 through its acts in the planning, design, construction management, supervision, and construction activities on the Stormwater Upgrade, which unlawfully interfered with Park Trace's enjoyment of its private property by lowering the groundwater table and removing soil support, which caused Property Damage to Park Trace's apartment building.

97. The City, as the owner of the land, the Project, and the Stormwater Upgrade, violated O.C.G.A. § 51-9-1 through its acts in the excavation, temporary bracing, and dewatering activities on the Stormwater Upgrade, which unlawfully interfered with Park Trace's enjoyment of its private property by lowering the groundwater table and removing soil support, which caused Property Damage to Park Trace's apartment building.

98. Silverman, as the City's agent and the City's Program Manager for Construction and Post Construction Phase services, violated O.C.G.A. § 51-9-1 through its acts of failing to establish and manage an adequate quality assurance program for the design,

construction management, supervision, and construction activities on the Stormwater Upgrade, which unlawfully interfered with Park Trace's enjoyment of its private property by lowering the groundwater table and removing soil support, which caused Property Damage to Park Trace's apartment building.

99. Silverman, as the City's agent and the City's Program Manager for Construction and Post Construction Phase services, violated O.C.G.A. § 51-9-1 through its acts of failing to establish and manage an adequate quality assurance program for the excavation, temporary bracing, and dewatering activities on the Stormwater Upgrade, which unlawfully interfered with Park Trace's enjoyment of its private property by lowering the groundwater table and removing soil support, which caused Property Damage to Park Trace's apartment building.

100. Potts, as the City's agent and the City's Construction Manager as Constructor, violated O.C.G.A. § 51-9-1 through its acts of failing to properly manage and supervise the construction activities on the Stormwater Upgrade, which unlawfully interfered with Park

Trace's enjoyment of its private property by lowering the groundwater table and removing soil support, which caused Property Damage to Park Trace's apartment building.

101. Potts, as the City's agent and the City's Construction Manager as Constructor, violated O.C.G.A. § 51-9-1 through its acts of failing to properly manage and supervise the excavation, temporary bracing, and dewatering activities on the Stormwater Upgrade, which unlawfully interfered with Park Trace's enjoyment of its private property by lowering the groundwater table and removing soil support, which caused Property Damage to Park Trace's apartment building.

102. Reeves, as Potts' subcontractor responsible for the construction of the Stormwater Upgrade, violated O.C.G.A. § 51-9-1 through its acts of performing the excavation, temporary bracing, and dewatering activities on the Stormwater Upgrade in such a way that these activities unlawfully interfered with Park Trace's enjoyment of its private property by lowering the groundwater table and removing soil support, which caused Property Damage to Park Trace's apartment building.

103. The Defendants' acts in lowering the groundwater table caused a substantial drop in the groundwater level beneath Park Trace's apartment building, which resulted in, among other things, loss of soil support and Property Damage to the apartment building.

104. The Defendants' violations of O.C.G.A. § 51-9-1 were the direct cause of Park Trace's damages, in an amount to be proven at trial.

105. All conditions precedent to the bringing of this claim and to the recovery of the damages and other relief sought have been satisfied, waived, excused, or otherwise discharged.

**Count Seven – Negligent Construction
Against Potts and Reeves**

106. Park Trace incorporates by reference the allegations in Paragraphs 1 through 105 as if fully set forth herein.

107. Potts and Reeves had a duty implied by law to perform the work on the Project in accordance with industry standards.

108. Potts was hired by the City as Construction Manager as Constructor for the Project.

109. Reeves was hired by Potts to construct the Stormwater Upgrade.

110. Potts and Reeves are building contractors and performed as building contractors on the Project.

111. The law imposes upon Potts and Reeves the obligation to exercise a reasonable degree of care, skill, and ability that, under similar conditions, is ordinarily employed by other building contractors.

112. Potts failed to exercise a reasonable degree of care, skill, and ability in its construction management, supervision, and construction of the Stormwater Upgrade because the excavation, temporary shoring, and dewatering activities on the Stormwater Upgrade caused an unreasonable drop in the groundwater table and a loss of soil support, which resulted in Property Damage to Park Trace's apartment building.

113. Reeves failed to exercise a reasonable degree of care, skill, and ability in its construction of the Stormwater Upgrade because the excavation, temporary shoring, and dewatering activities on the Stormwater Upgrade caused an unreasonable drop in the groundwater

table and loss of soil support, which resulted in Property Damage to Park Trace's apartment building.

114. Potts and Reeves acted negligently and breached their legal duties by improperly performing skilled services on the Stormwater Upgrade.

115. Potts and Reeves failed to perform work in accordance with industry standards because the excavation, temporary shoring, and dewatering activities on the Stormwater Upgrade caused an unreasonable drop in the groundwater table and a loss of soil support, which resulted in Property Damage to Park Trace's apartment building.

116. Potts and Reeves did not exercise a reasonable degree of care, skill, and ability on the Stormwater Upgrade as evidenced by Park Trace's loss of soil support and the Property Damage to Park Trace's property, which is immediately adjacent to the Stormwater Upgrade.

117. Potts' and Reeves' failure to perform work in accordance with industry standards and failure to exercise the requisite degree of care, skill, and ability resulted in damages to Park Trace, in an amount to be proven at trial.

118. All conditions precedent to the bringing of this claim and to the recovery of the damages and other relief sought have been satisfied, waived, excused, or otherwise discharged.

**Count Eight – Negligence
Against Potts and Silverman**

119. Park Trace incorporates by reference the allegations in Paragraphs 1 through 118 as if fully set forth herein.

120. Potts, as the Construction Manager as Constructor, and Silverman, as the Program Manager for Construction and Post Construction Phase services, performed skilled services on the Project.

121. The law imposes upon those performing skilled services—and therefore upon Potts and Silverman—the obligation to exercise a reasonable degree of care, skill, and ability, which is generally taken and considered to be such a degree of care and skill as, under similar conditions and like surrounding circumstances, is ordinarily employed by others of the same professions.

122. Potts performed the skilled services of managing and supervising the construction of the Stormwater Upgrade.

123. Silverman performed the skilled services of establishing and managing a quality assurance program for the design and construction of the Stormwater Upgrade, and monitoring the quality of the work on the Stormwater Upgrade.

124. Potts and Silverman failed to exercise a reasonable degree of care, skill, and ability in performing their skilled services because they allowed the excavation, temporary shoring, and dewatering activities on the Stormwater Upgrade to cause an unreasonable drop in the groundwater table, resulting in a loss of soil support and Property Damage to Park Trace's apartment building.

125. Potts' and Silverman's breach of their duties was the direct cause of the damage to Park Trace's apartment building.

126. Potts and Silverman are liable to Park Trace for all damages arising from Potts' and Silverman's negligence, in an amount to be proven at trial.

127. All conditions precedent to the bringing of this claim and to the recovery of the damages and other relief sought have been satisfied, waived, excused, or otherwise discharged.

**Count Nine - Negligence Per Se
Against the City of Decatur**

128. Park Trace incorporates by reference the allegations in Paragraphs 1 through 127 as if fully set forth herein.

129. The City violated the following Georgia statutes: O.C.G.A. §§ 12-5-90 to -107; O.C.G.A. § 44-9-3; O.C.G.A. § 51-1-6; O.C.G.A. § 51-9-1; and O.C.G.A. § 51-9-9.

130. O.C.G.A. §§ 12-5-90 to -107 is the Groundwater Use Act of 1972.

131. Upon information and belief, the City violated the Groundwater Use Act in the construction of its Stormwater Upgrade by groundwater withdrawals in excess of those allowed by the Environmental Protection Division or the City's approved water conservation plan. *See* O.C.G.A. § 12-5-96.

132. Under Georgia law, a landowner who makes excavations that cause injury to the adjoining property is liable for damages. O.C.G.A. § 44-9-3.

133. The City violated O.C.G.A. § 44-9-3 as explained above in Paragraphs 51–61.

134. O.C.G.A. § 51-1-6 requires the City to refrain from doing an act which may injure another.

135. The City violated O.C.G.A. § 51-1-6 and breached its legal duty in its planning, design, construction management, construction, and supervision of the Stormwater Upgrade because these acts injured Park Trace by causing Property Damage to Park Trace's apartments.

136. O.C.G.A. § 51-9-1 prohibits the City from interfering with enjoyment of private property.

137. The City violated O.C.G.A. § 51-9-1 as explained above in Paragraphs 91–105.

138. “The owner of realty has title downwards and upwards indefinitely; and an unlawful interference with his rights, either below or above the surface, gives him a right of action.” O.C.G.A. § 51-9-9.

139. Park Trace, as the owner of realty, has title downwards and upwards indefinitely on its apartment building property.

140. The City violated O.C.G.A. § 51-9-9 by unlawfully interfering with Park Trace's rights below the surface by drawing down the groundwater table below the surface of Park Trace's realty, which

resulted in loss of soil support and caused Property Damage to Park Trace's apartment building.

141. Park Trace has been damaged, in an amount to be proven at trial, by the City's negligence per se.

142. All conditions precedent to the bringing of this claim and to the recovery of the damages and other relief sought have been satisfied, waived, excused, or otherwise discharged.

**Count Ten – Negligence Per Se
Against Potts and Reeves**

143. Park Trace incorporates by reference the allegations in Paragraphs 1 through 142 as if fully set forth herein.

144. Potts and Reeves violated the following Georgia statutes: O.C.G.A. § 51-1-6; O.C.G.A. § 51-9-1; and O.C.G.A. § 51-9-9.

145. O.C.G.A. § 51-1-6 requires Potts and Reeves to refrain from doing an act which may injure another.

146. Potts and Reeves violated O.C.G.A. § 51-1-6 in their construction management, construction, and supervision of the Stormwater Upgrade because these acts injured Park Trace by causing Property Damage to Park Trace's apartment building.

147. O.C.G.A. § 51-9-1 prohibits Potts and Reeves from interfering with enjoyment of private property.

148. Potts and Reeves violated O.C.G.A. § 51-9-1 as explained above in Paragraphs 91–105.

149. “The owner of realty has title downwards and upwards indefinitely; and an unlawful interference with his rights, either below or above the surface, gives him a right of action.” O.C.G.A. § 51-9-9.

150. Park Trace, as the owner of realty, has title downwards and upwards indefinitely on its apartment building property.

151. Potts and Reeves violated O.C.G.A. § 51-9-9 by unlawfully interfering with Park Trace’s rights below the surface by drawing down the groundwater table below the surface of Park Trace’s realty, which caused a loss of soil support and Property Damage to Park Trace’s apartment building.

152. Park Trace has been damaged, in an amount to be proven at trial, by Potts’ and Reeves’ negligence per se.

153. All conditions precedent to the bringing of this claim and to the recovery of the damages and other relief sought have been satisfied, waived, excused, or otherwise discharged.

**Count Eleven – Negligence Per Se
Against Silverman**

154. Park Trace incorporates by reference the allegations in Paragraphs 1 through 153 as if fully set forth herein.

155. Silverman violated O.C.G.A. § 51-9-1 as explained above in Paragraphs 91–105.

156. Park Trace has been damaged, in an amount to be proven at trial, by Silverman’s negligence per se.

157. All conditions precedent to the bringing of this claim and to the recovery of the damages and other relief sought have been satisfied, waived, excused, or otherwise discharged.

**Count Twelve – Attorney’s Fees and Expenses of Litigation
Against All Defendants Under O.C.G.A. § 13-6-11**

158. Park Trace incorporates by reference the allegations in Paragraphs 1 through 157 as if fully set forth herein.

159. The Defendants, by refusing to pay or compensate Park Trace for the damages sustained to Park Trace's apartment building, caused by the Defendants' breaches and negligence as detailed above, have acted in bad faith, been stubbornly litigious, or caused Park Trace unnecessary trouble and expense.

160. Under O.C.G.A. § 13-6-11, Park Trace is entitled to recover its reasonable attorney's fees and other expenses of litigation from all the Defendants on Park Trace's claims detailed above.

161. All conditions precedent to the bringing of this claim and to the recovery of the damages and other relief sought have been satisfied, waived, excused, or otherwise discharged.

**Count Thirteen - Punitive Damages Against
All Defendants Under O.C.G.A. § 51-12-5.1**

162. Park Trace incorporates by reference the allegations in Paragraphs 1 through 161 as if fully set forth herein.

163. The negligence of the Defendants as described above, clearly and convincingly demonstrates willful misconduct, malice, wantonness, oppression, and an entire want of care giving rise to the presumption of conscious indifference to the consequences of their actions which resulted

in substantial damage to the Park Trace's apartments, thus warranting an award of punitive damages against the Defendants under O.C.G.A. § 51-12-5.1.

164. An award of punitive damages against the Defendants is necessary to punish and penalize the Defendants and to prevent them from engaging in similar conduct in the future; the amount of punitive damages to be awarded is to be determined by the enlightened consciousness of the jury.

165. All conditions precedent to the bringing of this claim and to the recovery of the damages and other relief sought have been satisfied, waived, excused, or otherwise discharged.

Prayer for Relief

WHEREFORE, Park Trace respectfully requests that this Court:

a. Enter judgment in favor of Park Trace on Count One against the City in an amount to be proven at trial;

b. Enter judgment in favor of Park Trace on Count Two against the City and the URA in an amount to be proven at trial;

- c. Enter judgment in favor of Park Trace on Count Three against the City in an amount to be proven at trial;
- d. Enter judgment in favor of Park Trace on Count Four against the City in an amount to be proven at trial;
- e. Enter judgment in favor of Park Trace on Count Five against the City in an amount to be proven at trial;
- f. Enter judgment in favor of Park Trace on Count Six against all Defendants in an amount to be proven at trial;
- g. Enter judgment in favor of Park Trace on Count Seven against Potts and Reeves in an amount to be proven at trial;
- h. Enter judgment in favor of Park Trace on Count Eight against Potts and Silverman in an amount to be proven at trial;
- i. Enter judgment in favor of Park Trace on Count Nine against the City in an amount to be proven at trial;
- j. Enter judgment in favor of Park Trace on Count Ten against Potts and Reeves in an amount to be proven at trial;

k. Enter judgment in favor of Park Trace on Count Eleven against Silverman in an amount to be proven at trial;

l. Enter judgment in favor of Park Trace on Count Twelve against all Defendants and award Park Trace its attorney's fees and other expenses of litigation under O.C.G.A. § 13-6-11;

m. Enter an award of punitive damages in favor Park Trace on Count Thirteen against all Defendants in an amount to be determined by the enlightened consciousness of the jury; and

n. Award Park Trace such other and further relief as the Court deems just and proper.

Jury Demand

Pursuant to Federal Rule of Civil Procedure 38(b), Park Trace demands a jury trial for all claims and issues so triable.

Dated: December 23, 2014

Respectfully submitted,

/s/ John M. Mastin, Jr.

John M. Mastin, Jr.

Georgia Bar No. 300123

Joseph J. Dinardo

Georgia Bar No. 302914

Smith, Currie & Hancock LLP

2700 Marquis One Tower

245 Peachtree Center Avenue NE

Atlanta, GA 30303-1227

Tel: 404-521-3800

Fax: 404-688-0671

Email: jmmastin@smithcurrie.com

Email: jjdinardo@smithcurrie.com

Attorneys for Plaintiff

Ashton Park Trace Apartments, LLC