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STATE OF WASHINGTON

NO. 34798-9-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

MM

PAUL W. POST, REX WILLIAMS and FRANCES WILLIAMS
(husband and wife), and GERALD PAULSON and CAROL PAULSON
(husband and wife), *Appellants*

v

CITY OF TACOMA, *Respondent*

RESPONDENT'S RESPONSE BRIEF

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I. INTRODUCTION

Washington State law provides cities with the authority to establish a storm water utility and to set rates for services provided. The City of Tacoma (“City”) assesses storm water fees based on the size and use of one’s property.

State law also requires cities to pay storm water fees just as private owners do. But state law also permits a city to consider the value of a city’s “in-kind” contribution, such as stream improvements or donations of property, when setting rates. The City determined that the City streets, curbs, and gutters provide a benefit to the storm water utility because they gather and transport storm water. As a result of this benefit, the City reasonably determined that the City streets constitute an in-kind contribution and that the City should not pay storm water fees on City streets.

Appellants Paul Post and others (“Post”) challenge this exemption. They assume that because the City does not pay storm water fees on the City streets, then the storm water fees for private property owners increase above what the owners would otherwise pay based on the size and use of their property alone. There is no evidence whatsoever in the record to support their claim. Storm water fees are based solely on the size and use of one’s property. Because Post has not proven that private property

owners are paying any additional amount, their challenge is baseless and the superior court properly granted judgment in favor of the City.

II. RESTATEMENT OF THE ISSUES

1. Under RCW 35.92.021 and RCW 35.67.025, the state legislature authorized cities to set sewer rates, including rates for storm and surface water, and to consider the value of a public entity's in-kind contributions. TMC 12.08.530 takes into account the benefit that City streets and gutters provide in gathering and transporting storm and surface water. Did the superior court properly grant summary judgment in the City's favor when it held that the City is permitted to exclude City streets from storm water charges because of the value they provide?

2. For nearly 100 years, Washington courts have held that a storm water utility is a proprietary function. An ordinance dealing with a proprietary function will be upheld as long as it is not plainly and clearly unreasonable. Did the superior court properly find that the City reasonably considered the benefit the City streets provide to the storm water utility when it exempted the streets from storm water charges in TMC 12.08.530?

3. The superior court certified this case as a class action, but did not define the scope of membership of the class or determine the required notice to be sent to class members. If Post prevails, should the Court remand the attorney fee issue to the superior court?

III. COUNTER STATEMENT OF THE CASE

A. Statement of Facts.

Respondent City of Tacoma ("City") is a municipal corporation. Under the Tacoma Municipal Code ("TMC"), the City's Department of Public Works is responsible for operating and maintaining, as a utility, all

storm drainage structures, facilities, storm water pumping stations, and all other phases of surface water drainage management and operation.

TMC 1.06.710(H) at CP 149.

The first components of the City's storm drainage system were constructed in the 1880s. CP 152, 163. Generally, the City maintained and operated the storm drainage system until approximately 1979, with moneys from the General Fund of the City and from voter-approved general obligation bonds. CP 154, 163, 205. In 1979, the Tacoma City Council, in recognition of the need to improve the storm drainage system and to obtain a reliable funding source for maintenance, operation, and capital improvements for the storm drainage system, established a storm sewer utility. CP 236-77. This effectively transferred all storm and surface water facilities of the City (hereinafter collectively referred to as "storm water facilities") and the responsibility for such systems to the City's then-existing sanitary sewerage utility. CP 237. Also in 1979, the City Council enacted an ordinance authorizing the City to fix "rates and charges for the use" of the storm water system. CP 240, 265-66 (now codified at TMC 12.08.500). The objectives of Chapter 12.08 TMC also include providing for the control of the quantity and quality of the water discharged into the municipal storm drainage system, managing storm

water to minimize flooding and erosion, and managing runoff from developed properties and construction sites. TMC 12.08.005 at CP 279, attached as Exhibit 1.

B. Legal Background.

Chapters 35.21, 35.67, and 35.92 RCW each provide statutory authority for the City to establish, control, regulate, manage, fix rates, and charge for the use of a storm and surface water drainage system.

RCW 35.67.020(1) provides that “Every city and town may construct, condemn and purchase, acquire, add to, maintain, conduct, and operate systems of sewerage¹ and systems and . . . to fix, alter, regulate, and control the rates and charges for their use.” See also RCW 35.21.210; RCW 35.92.020(1). For the purposes of this case, the rate authority and the factors that may be considered when setting rates are the same under each of these statutes.

Storm water fees are based on “the area of each premises (sic) of land and the land use designation for that premises (sic).”

TMC 12.08.500, attached as Exhibit 1. Owners of undeveloped land are assessed a storm water fee that is less than owners of developed land. Id.

All money received from storm water fees are deposited into the City’s Sewer Utility Fund. TMC 12.08.630. All expenses for the

¹ A “system of sewerage” includes storm or surface water sewers. RCW 35.67.010(3).

operation, maintenance, and repair of the sewer system, including the storm water system, are charged to the Sewer Utility Fund. Id.

State law also requires that local governments be subject to the same rates and charges as private individuals. See RCW 35.67.025. However, in setting these rates and charges, “consideration may be made of in-kind services, such as stream improvements or donation of property.” (*Emphasis added*). RCW 35.67.025; see also, RCW 35.92.021.

Pursuant to RCW 35.92.021 and RCW 35.67.025, the City enacted TMC 12.08.530, which provides that because City streets serve the function of gathering and transporting storm and surface water, no storm water fees shall be levied against the City streets. TMC 12.08.530 states:

Storm and surface water sewerage charges shall not be levied directly to:

A. Any City street, road, alley or right-of-way the storm and surface water drainage function of which has been transferred to and made a part of the Municipal Sewer System by Ordinance No. 21638 passed April 3, 1979; it being expressly found that all such City streets, roads, alleys and rights-of-way provide storm and surface water sewerage to the City by collecting and transporting storm and surface water from multiple individual properties to Storm Sewers of a value equal to the reasonable charge therefor that would otherwise be charged by the City.

TMC 12.08.530 (attached as Exhibit 2). This language essentially operates as an offset. It excludes City streets, roads, alleys and rights-of-way (hereinafter collectively referred to as “streets”) from storm water sewerage charges because of the benefit the City streets provide to the storm water utility for collecting and transporting storm water. This exemption is at issue here.

C. Statement of Procedure.

In 2004, Appellant Paul Post and several others (collectively referred to as “Post”) filed a class action lawsuit against the City. CP 1-9. Post alleges that because the City does not pay storm water fees on City streets, private property owners are “subsidizing” the storm water system and are paying the City’s proportionate share of the fees. CP 5.

The superior court certified the lawsuit as a class action under CR 23(b)(1), (2), and (3), and stated that the “scope or membership of the class and the terms of the required notice remain to be determined.” CP 112. Neither party petitioned the court to further define the scope of the class or determine the type of notice required.

Both parties petitioned the court for summary judgment. In support of Post’s motion, Post provided only one declaration. CP 315-317. Paul Post simply concluded that “it is apparent” that he pays

more in storm water fees because the City does not pay such fees.

CP 317. The class provided no other evidence to the court to support their claim.

The superior court found in favor of the City and held that the City's storm water rates and exclusion for City streets, alleys, and rights-of-way were valid. CP 335-340. Post petitioned the superior court to reconsider its decision. CP 342-49. The superior court denied Post's motion. CP 359-360.

Post sought discretionary review with the supreme court, but the supreme court denied review and transferred the appeal to this Court. CP 361-362.

IV. ARGUMENT

A. Standard of Review.

The facts are not in dispute. On appeal from an order granting summary judgment, the Court engages in the same inquiry as the superior court. Benjamin v. Washington State Bar Ass'n, 138 Wn.2d 506, 515, (1999). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993); CR 56(c). In addition, this Court may affirm the superior court's decision on any basis established by the pleadings and proof. LaMon v. Butler, 112

Wn.2d 193, 200-01 (1989). The City requests this Court to affirm the superior court's decision in favor of the City.

B. TMC 12.08.530 is a valid exercise of the City's authority.

1. TMC 12.08.530 is presumed constitutional.

Municipal ordinances, like statutes, are presumed constitutional. Carrillo v. City of Ocean Shores, 122 Wn. App. 592, 602 (2004). Where a court is asked to review a legislative decision, the applicable standard of review is the "arbitrary and capricious" test. Teter v. Clark County, 104 Wn. 2d 227, 234 (1985). A legislative determination will be sustained if the Court can reasonably conceive of any state of facts to justify that determination. Teter, *supra* at 234-235; *see also*, Carrillo, 122 Wn. App. at 602. The setting of rates and charges is a legislative act. Jorgensen Co. v. Seattle, 99 Wn. 2d 861, 867 (1983). Thus, it is entitled to the presumption of constitutional validity.

Moreover, rates and charges established by a municipality are presumptively reasonable and anyone challenging such rates or classification has the burden of proving that the rates are unreasonable and that they are excessive and disproportionate to the services rendered. Teter, 104 Wn. 2d at 237; *see also* Hillis Homes, Inc. v. Public Utility Dist. No. 1, 105 Wn. 2d 288, 300 (1986). To be void for

unreasonableness, an ordinance must be clearly and plainly unreasonable. Teter, 104 Wn. 2d at 235. Thus, Post has a heavy burden of proof.

Additionally, declarations of facts in a legislative enactment are also presumptively valid. Post is flatly wrong when he claims that this “presumption only relates to the legislative bodies declaration of an emergency.” Brief of Appellants, p. 25. Washington courts have long held that the judiciary will generally not question legislative findings of fact, even when an emergency does not exist. City of Tacoma v. O’Brien, 85 Wn.2d 266, 270 (1975); State ex rel. Govan v. Clausen, 108 Wash. 133, 137 (1919). In addition, if a set of facts justifying an ordinance can reasonably be conceived, such facts will be presumed to exist and the ordinance will be presumed to have been passed in conformity with those facts. Carrillo, 122 Wn. App. at 602.

2. TMC 12.08.530 is reasonable.

TMC 12.08.530 will be upheld if it is found to be fair or reasonable and not arbitrary or capricious. Teter, 104 Wn. 2d 234. In this case, the City articulated a reasonable basis for excluding City streets from storm water sewerage charges, finding that the streets “provide storm and surface water sewerage to the City by collecting and transporting storm and surface water from multiple individual properties to Storm Sewers of a value equal to the reasonable charge therefor that would otherwise be

charged by the City.” CP 268. In other words, the streets provide a benefit because the streets collect storm water from these properties and transport it to the sewer system.

The value of this benefit, the City found, was equal to the charge that would be levied on the City for the burden created by the City streets to the storm water system. This finding is entitled to a conclusive presumption and creates a clear and reasonable basis for distinguishing between the City streets and other properties in the City. Teter, 104 Wn. 2d at 237. Thus, the exclusion is reasonable.

Although it is not entirely clear, presumably Post argues that the City’s exemption from paying storm water fees is not reasonable. Post claims that if the City does not pay the fees on the City streets, then the City is “passing its proportionate share of the cost of storm drainage on to private property owners.” CP 8. Essentially, Post claims that if the City does not pay the fees, then private property owners are charged more than the fees otherwise due based on the size and use of their property. Post’s assumption is utterly baseless. Post has completely failed to establish, either by way of evidence or reference to the Tacoma Municipal Code, that there is any increment added to private property owners’ fees attributable to the fact that the City is exempt from paying storm water

fees on City streets. Without any evidence of such a claim, Post cannot prove that excluding City streets from storm water fees is unreasonable.

3. TMC 12.08.530 fully complies with state law.

The exclusion also satisfies statutory requirements. State law requires that public property be subject to rates and charges for storm water control facilities to the same extent private persons and private property are subject to such rates and charges. RCW 35.67.025; RCW 35.92.021. But the City can consider in-kind contributions as a specific factor when setting rates and rate classifications for publicly used property:

In setting these rates and charges, consideration may be made of in-kind services, such as stream improvements or donation of property.

RCW 35.67.025; see also RCW 35.92.021. State law also allows rate classifications to be based upon “any other factors that present a reasonable difference as a ground for distinction.”

RCW 35.67.020(i), RCW 35.67.190(8), and RCW 35.92.020(h).

“In-kind service” is not defined in the statute. When a word is not defined in a statute, courts are to give the word its usual and ordinary meaning. State v. Watson, 146 Wn.2d 947, 954 (2002). In the ordinary sense, “in-kind service” means “of the

same species or category” or “a loan [that is] returned ‘in kind’ when not identical to the article, but one corresponding and equivalent to it, is given to the lender.” Black’s Law Dictionary 787 (6th ed. 1990).

In this case, the exemption is based on the value of in-kind services and the unique function of City streets. The City found that streets “provide storm and surface water sewerage to the City by collecting and transporting storm and surface water from multiple individual properties to Storm Sewers . . .” CP 268. That is, City streets actually provide a benefit by catching and transporting water to the storm water drains. As a result, the City’s storm water rates may be reduced.

Post argues that the value the City streets provide in gathering and transporting water is not the type of in-kind contribution envisioned by the state legislature. Post states that “[i]f it was the intent of the legislature to include an in-kind service of this nature, it would have been a simple matter to state the same along with stream improvements and donation of property.” Brief of Appellants, p. 6. However, this claim ignores the fact that the state legislature provided only examples of the types of in-kind services permitted to be used as an offset to the storm water rates.

The legislature did not intend to include an exhaustive or conclusive list of recognized in-kind services. The legislature stated that “consideration may be made of in-kind services, such as stream improvements or donation of property.” The phrase “such as” is a means of providing examples. The Oxford English Dictionary 102 (2nd ed. 1989 Volume XVII). To argue that the legislature must list a specific in-kind contribution ignores the fact that the legislature obviously intended to provide only a few examples of in-kind contributions, not a definitive list.

Post also argues that TMC 12.08.530 “would have to be extraordinarily construed” to find streets and the improvements thereon to be an in-kind contribution. Brief of Appellants, p. 6. This argument is nonsensical. The two types of in-kind contributions the legislature listed are stream improvements or donation of property. Both deal directly with real property benefiting the storm water program. Stream improvements, for example, are substantially similar to the street improvements because they assist in transporting storm water runoff. Accordingly, the City’s consideration of the streets as an in-kind contribution when setting rates fully comports with state law.

4. TMC 12.08.530 is also consistent with the local government accounting statute.

The local government accounting statute requires that services rendered by one public entity or department to another be paid for at its true and full value. RCW 43.09.210, which has essentially remained unchanged since its original enactment in 1909 (See Laws of 1909, chapter 76, § 3) provides in pertinent part as follows:

All service rendered by, or property transferred from, one department, public improvement, undertaking, institution, or public service industry to another, shall be paid for at its true and full value by the department, public improvement, undertaking, institution, or public service industry receiving the same, and no department, public improvement, undertaking, institution, or public service industry shall benefit in any financial manner whatever by an appropriation or fund made for the support of another.

(Emphasis added). RCW 43.09.210 “prohibits one governmental fund from benefiting at the expense of another.” Rustlewood Ass'n v. Mason County, 96 Wn. App. 788, 795 (1999). Thus, the value of the benefit provided to the storm water utility and its ratepayers by transportation and collection function performed by City streets must be paid for by the utility.

In this case, the storm water utility receives a benefit from the transportation and collection services provided by the City streets, which is part of, and was constructed by, the City's General Government. The City's General Government must be compensated for the benefit it is providing the utility. The storm water utility could pay the City's General Government for this benefit, and the City's General Government could then pay storm water fees. Or, to make the transaction simpler, the utility could agree to offset the City's General Government obligation by treating the value the City streets provides as an in-kind contribution as permitted by RCW 35.67.025 and RCW 35.92.021.

This offset and exclusion from storm water fees comports with the requirements of RCW 43.09.210 because it ensures that the value of the service the City streets is providing is fully accounted for. The compensation to the City's General Government is accomplished by excluding the streets from paying storm water fees. Thus, if the utility did not compensate the fund that supports the City streets for the true and full value of the service, the City would be in violation of state law.

In sum, the City's legislative determination is presumed valid and is reasonable. The City carefully considered how the City streets benefit nearby property owners and the utility by transporting and collecting storm water. To offset this benefit conferred, the City does not pay storm

water fees on City streets. Such a legislative determination is wholly reasonable and comports with state law. Accordingly, the superior court properly ruled in favor of the City.

C. Storm water fees are valid and not unconstitutional taxes.

As fully explained above, the City's storm water fees under TMC 12.08.500 are valid. Post assumes, however, that because the City does not pay storm water fees on the City streets, then private property owners are charged more than what they would otherwise pay based on the size and use of their property.

Notably, Post completely fails to establish that the rates include any increment, or additional amount, by virtue of the City streets being exempt from storm water fees. The only statement before the Court that a private property owner's storm water fees increase if the City does not pay such fees is Paul Post's statement that "from the charges by the City that are owed by me, it is apparent" that private property owners are paying an increased fee. CP 317. Such a statement is utterly conclusory.

Conclusory statements are insufficient under CR 56(e) to defeat a summary judgment motion. Overton v. Consol. Ins. Co., 145 Wn.2d 417, 429 (2002).

Moreover, TMC 12.08.500 clearly establishes that storm water fees are based only on the size and use of one's property. TMC 12.08.500.

Since there is no evidence to support Post's assumption that private property owners are "subsidizing" the City's storm water utility (CP 5) or that there is any additional amount being paid by private property owners, the superior court properly granted the City's motion for summary judgment and the Court's analysis should end here. There is no reason for the Court to analyze whether the alleged additional amount constitutes an unconstitutional tax.

Nonetheless, Post argues that this "additional" increment somehow attributable to the City's exemption from paying storm water fees is an unconstitutional tax. To determine if the storm water fees are an unconstitutional tax, the Court must first determine if providing storm water drainage is a governmental or a proprietary function of the government. Okeson v. City of Seattle, 150 Wn.2d 540, 549 (2003).

A municipal corporation is generally considered to act in one of two capacities—a governmental capacity or a proprietary capacity. If the Court determines that storm drainage is a proprietary function and the actions are within the purpose and object of the enabling ordinance and no express limitations apply, then judicial review of the exclusion of City streets from the fees, pursuant to TMC 12.08.530, is limited to whether the exclusion is arbitrary, capricious, or unreasonable. Id. at 550. In contrast, if storm water drainage is a governmental function, then the Court must

determine if the charge imposed upon customers is a tax or a fee. If the charges are a fee, the City may impose such fees under its general police power. On the other hand, if the charges are a tax, the Court must determine if the tax is lawfully imposed. Id. at 549-50. To be a valid tax, the tax must be statutorily authorized and must be uniform. Teter, 104 Wn.2d at 240.

1. Storm water drainage is a proprietary function and the fees are reasonable.

The principal test in distinguishing governmental functions from proprietary functions is whether the act performed is for the common good of all, or whether it is for the special benefit or profit of the private entity. Okeson v. City of Seattle, 150 Wn.2d 540, 550 (2003). It is not, as Post claims, whether or not the fee payer can control the amount he or she is paying. Brief of Appellants, p. 8-9. This has no bearing on the question of whether storm water drainage is a proprietary or governmental function.

Governmental functions include building code inspections, (Taylor v. Stevens Cty., 111 Wn. 2d 159, 166 (1988)), workplace safety inspections, (Loger v. Wash. Timber Prod., Inc., 8 Wash. App. 921, 928-29 (1973)), and public streetlights, (Okeson, 150 Wn. 2d at 551). In contrast, proprietary functions include medical or psychiatric care, (Petersen v. State, 100 Wn. 2d 421, 429 (1983)), operation of a water

system, (Russell v. Grandview, 39 Wn. 2d 551, 554-55 (1951)), and operation of an electrical utility (Okeson, 150 Wn. 2d at 550). Moreover, providing sewer services, which includes storm and surface water services², has been found to be a proprietary service of government for nearly 100 years. Seattle v. Stirrat, 55 Wn. 560, 566 (1909) (holding that since sewer services were not a governmental function, the City could be liable for tort damages); Hayes v. Vancouver, 61 Wn. 536, 539 (1911) (holding that held that the power to lay sewer and water pipes was not a governmental function).

Even in recent years, Washington courts hold that a municipal sewer system is a proprietary function. Port of Seattle v. Int'l Longshoremen's & Warehousemen's Union, 52 Wn.2d 317, 322 (1958) (stating that municipal sewer systems are a proprietary function); Algona v. Pacific, 35 Wn. App. 517, 520 (1983) (holding that a municipality furnishing sewer facilities is acting in its proprietary capacity); Smith v. Spokane County, 89 Wn. App. 340, 362 (1997) (quoting Algona, 35 Wn. at 520, "Furnishing sewer services is a proprietary

² See RCW 35.67.010(3).

function.”); Borden v. City of Olympia, 113 Wn. App. 359, 371 (2002).³

Post does not challenge that storm water drainage “to handle runoff from private properties” is a proprietary function. See Brief of Appellants at 9.

Despite overwhelming authority to the contrary, Post attempts to argue that the storm water utility is a governmental function some of the time. Although he concedes that handling “runoff from private properties” is a proprietary function, he also claims that “there can be no question that the same function of handling runoff from public properties (city streets) is governmental in nature. See Brief of Appellants at 9. (*Emphasis added*). This is nonsensical. Post fails to distinguish 100 years of case law holding that a storm water utility—in its entirety—is a proprietary function. He also fails to cite any authority or to explain how

³ There are a few Washington cases that hold that operation of a sewerage system is a governmental function. But these cases involve the governmental purpose necessary to exercise the power of eminent domain. See, Steilacoom v. Thompson, 69 Wn. 2d 705, 709 (1966) (“Building, maintaining and operating them are governmental functions for which the municipality may exercise the powers of eminent domain”); State ex rel. Church v. Superior Court for King County, 40 Wn.2d 90, (1952) (“Nor can it be said that the use of land for a sewage disposal plant is not a public use or that the disposal of sewage is not a governmental function for which the city has a right to condemn property”); and, Snavely v. Goldendale, 10 Wn.2d 453, 457 (1941). (“That municipal corporations do have the right to condemn property rights in performance of their governmental function of disposing of garbage and sewage, is not to be doubted.”). Also, in Teter v. Clark County, 104 Wn. 2d 227, 234 (1985), the Court appears to assume that the storm water service was governmental in nature. The Teter Court did not engage in any analysis distinguishing governmental and proprietary functions and thus cannot be viewed as disturbing nearly 100 years of case law holding that storm water services are proprietary.

the same function is proprietary when it relates to private property, but governmental when it relates to public property.

Moreover, Post seems to argue that because managing storm and surface drainage may aide in the maintenance of the streets—a governmental function—then storm collection and disposal from City streets must also be a governmental function. Again, Post cites no authority whatsoever for such a claim. Essentially, Post is attempting to bootstrap one of the alleged benefits of storm drainage by City streets and curbs—maintaining the City streets—to conclude that the storm collection and transportation must be a governmental function as well. This is contrary to case law. The focus is on the function or benefit actually being provided. Okeson, 150 Wn. 2d at 550.

Because the storm water utility is a proprietary function, the City’s storm water rate plan is reasonable. The storm water rates and the exclusion of City streets from those charges will be upheld as long as the actions are within the purpose and object of the enabling statute and the City’s actions are not “arbitrary, capricious, or unreasonable.” Okeson, 150 Wn.2d at 549-550. A legislative determination will be sustained if the Court can reasonably conceive of any state of facts to justify that determination. Ace Fireworks Co. v. Tacoma, 76 Wn.2d 207, 210 (1969).

To be void for unreasonableness, an ordinance or resolution must be "clearly and plainly" unreasonable. Id.

As already explained thoroughly in Section B.2, the City's legislative choice to exclude City streets from storm water fees is entirely reasonable. The City articulated a reasonable basis for excluding City streets from storm water charges. CP 268. Post has not, and cannot, prove that the City's actions were "clearly and plainly" unreasonable.

2. Even if the Court concludes that storm water drainage is a governmental function, TMC 12.08.530 is still valid.

Post argues that the storm water utility is a governmental function and that the "extra" fees private property owners are paying are an unconstitutional tax. Post is wrong. Even if the Court agrees that private property owners are "subsidizing" the storm water system—which Post has not proven—and agrees that this system is a general governmental function, the Court must first determine whether the costs imposed are a tax or a fee. Because of the different restrictions for imposing taxes versus fees, it is important to correctly classify the charge at issue. Okeson, 150 Wn.2d at 552. If the charges are a fee, the City may impose such fees under its general police power. On the other hand, if the charges are a tax, the Court must determine if the tax is lawfully imposed. Id. at 549-50. To

be a valid tax, the tax must be statutorily authorized and must be uniform.

Teter, 104 Wn.2d at 240.

a. The storm water charges are fees.

Although Post fails to cite to it, the state supreme court has already stated that storm water charges are fees, and not taxes. Teter, 104 Wn. 2d at 234. Just as in this case, in Teter, the county ordinance required property owners to pay storm water charges based on the size and use of their lots. Id. at 237. The ordinance stated that the purpose of the charges were for “necessary regulatory actions, e.g., runoff control ordinances, erosion control ordinances, and septic tank regulations.” Id. at 240. “Accordingly,” the court stated, “because the primary purpose of these ordinances is regulatory, the charges are properly characterized as ‘tools of regulation’, rather than taxes.” Id. While the court discussed the tax versus fee issue “as a point of clarification, since neither party has argued the question” (Id. at 238) and is arguably dictum, the court’s discussion is nonetheless instructive on how it perceives storm water fees.

Ten years after the supreme court decided Teter, the supreme court articulated a three-part test for determining whether a charge imposed by a governmental entity is a tax or a regulatory fee. The first factor to consider is whether the primary purpose of the charge is to accomplish desired public benefits which cost money, or whether the primary purpose

is to regulate. If the primary purpose of the charges is to raise revenue, rather than to regulate, then the charges are a tax. Conversely, if the primary purpose is regulatory, the charges are properly characterized as “tools of regulation” rather than taxes.

The second factor is whether the money collected is allocated for only the authorized regulatory purpose. The third inquiry is whether there is a direct relationship between the fee charged and either the service received by those who pay the fee, or the burden produced by the fee payer. Where such a relationship exists, then the charge is a regulatory fee even though the charge is not individualized according to the benefit accruing to each fee payer or the burden produced by the fee payer.

Covell v. City of Seattle, 127 Wn.2d 874, 879 (1995).⁴

(1) The primary purpose of the storm water fees is regulatory.

Under the first factor in Covell, the purpose of the storm water utility includes preventing pollution, providing for the control of the quantity and quality of water discharged into the storm drainage system, minimizing flooding and erosion, and mitigating the impact of increased runoff due to urbanization. See TMC 12.08.005(A), (B), (I), (J), and (K).

⁴ While the Court decided the Teter case ten years before it outlined the test for differentiating between a tax and a fee as outlined in Covell, the holding in Teter is entirely consistent with Covell and is still valid. In fact, the Court in Covell cited to Teter when it articulated the second factor. Covell, 127 Wn.2d at 879.

The storm water fees in this case, like the fees in Teter, are intended to promote the health, good order, and welfare of the people, and are therefore for regulatory purposes. Teter, 104 Wn. 2d at 233. See also Smith v. Spokane County, 89 Wn. App 340, 350 (1997) (holding that the overall purpose of the set aquifer fee was to regulate water sources); Hillis Homes, Inc. v. Public Utility District No. 1, 105 Wn.2d 288, 299 (1986) (holding that the District “exacted a connection charge from its new water system customers as part of an overall plan to regulate the use of water.”)

This case is unlike Okeson, Samis Land v. City of Soap Lake, 143 Wn.2d 798 (2001); Covell v. Seattle, and Carrillo, upon which Post relies, because the primary purpose for those fees were to solely raise revenue and were not for any regulatory purpose. Okeson, 150 Wn.2d at 553 (holding the primary purpose of Seattle’s streetlight utility charge was to raise revenue, and not to regulate streetlights); Samis, 143 Wn.2d at 808 (finding that the primary purpose “standby utility” charges was “clearly” to raise revenue because “all of its [the ordinance’s] provisions deal exclusively with revenue collection.” (*Emphasis in original*)); Covell, 127 Wn.2d at 881, 882 (ruling that the “thrust” of Seattle’s street utility charge was “clearly funding” and that ordinance made “no reference to how street utility charges [were] going to enhance the health, safety or welfare” of city residents); and Carrillo, 122 Wn. App. at 605 (finding that the City

conceded that “the primary purpose of the availability charges is ‘to fund water and sewer capital facilities.’”)

There is no evidence in the record whatsoever, or anywhere in the Tacoma Municipal Code, to support Post’s claim that the primary purpose of TMC 12.08.530 is to “pass on its costs of maintaining city streets” and that “the City is offsetting the cost of maintaining the streets by imposing an additional fee upon the property owners.” Brief of Appellants, p. 13, 15. Essentially, Post claims that by not paying fees, the City is saving money from the General Fund. Brief of Appellants, p. 14. While the City may be saving money by not having to pay storm water fees on its streets, this does not mean such savings is improper. Because the storm water rates are imposed to control pollution, flooding, and erosion, they are regulatory in nature.

(2) Storm water fees are allocated only for the operation and maintenance of the system.

The second factor is whether the money collected is allocated only for the authorized regulatory purpose. Unlike the fees in Carrillo where the revenue was not segregated (Carrillo, 122 Wn. App. at 606), all of the revenue raised from storm water fees are deposited into the Sewer Utility Fund. These moneys are used exclusively for the “operation, maintenance, and repair” of the storm water system. TMC 12.08.630.

(3) There is a direct relationship between the storm water fee and the burden produced by the ratepayers.

The final factor to determine if a charge is a tax or a fee is whether there is a direct relationship between the fee charged and either the service received by those who pay the fee or the burden produced by the fee payer. Like the set fees in Smith v. Spokane County, where the fees ensured clean drinking water and directly benefited everyone (89 Wn. App at 350), the fees in this case are directly related to pollution control and reduction of flooding and erosion (TMC 12.08.005 (A), (B), and (J)). Reducing pollution, contamination, flooding, and erosion unquestionably benefits everyone.

The fees are also related to the burden produced by the fee payer. Contrary to Post's claims, storm water fees are not based on "the amount of runoff created by the city street" in front of one's property. Brief of Appellants, p. 9. Rather, they are based on the size and use of the land. TMC 12.08.500. Owners of undeveloped land are assessed a storm water fee that is less than those imposed on owners of developed land. Id. The City recognized that owners of undeveloped land should be charged less in storm water fees because their property absorbs more water than developed land, which usually contains an impervious surface. CP 181.

Thus, a direct relationship exists between the fees and the burden produced by the fee payers.

This case is unlike Okeson, Samis, and Carrillo where the court found that the charges bore no relationship to the services being provided or to the burden produced by the rate payers. Okeson, 150 Wn.2d at 554 (holding that “it is impossible to quantify how much streetlight a person uses, or the burden a person produces that necessitates a streetlight” and so no direct relationship existed); Samis Land Co. v. City of Soap Lake, 143 Wn.2d 798, 813 (2001) (finding that the standby utility charges bore no relationship whatsoever to any water or sewer utility service, or to any burden imposed on those utilities); and Carrillo, 122 Wn. App. at 607-08 (holding that the City failed to show how the water and sewer “availability charges” imposed on owners of vacant lots whose property was not connected to the utilities were used to regulate the owners, particularly those with functioning septic systems.)

Once the Court concludes that storm water charges are indeed fees, the inquiry ends. Under its police powers, the City has the authority to impose regulatory fees as long as they do not conflict with general laws. Covell, 127 Wn.2d at 878. Unlike taxes, regulatory fees are “exempt from fundamental constitutional constraints on governmental taxation authority, including the tax uniformity requirements. Samis, 143 Wn.2d at 805 .

b. Even if the storm water charges are taxes, they are valid.

If the Court agrees that the “increment” between what private property owners owe, based on the size and use of their property, and what they actually pay, is not a fee but a tax, it is still a valid charge. Post argues to the contrary and claims that the “additional” fees are taxes in disguise. Even if Post were correct though, the taxes are valid.

To be a valid tax, the tax must be statutorily authorized and it must be uniform. Id. Here, state law authorizes the City to impose storm water fees. Just as “RCW 36.89⁵ expressly authorizes the county to impose these [storm water] charges” in Teter, RCW 35.67 authorizes the City to impose these storm water charges here. RCW 35.67.020(1) provides that a city may “fix, alter, regulate, and control the rates and charges” for storm water. Under Teter, this language is sufficient to find that the legislature authorized the City to impose a storm water tax.

The storm water charges are also uniform as required by our state constitution:

All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only.

⁵ RCW 36.89.080(1) provides that a county may adopt a resolution “fixing rates and charges for the furnishing of service to those served or receiving benefits . . . or contributing to an increase in surface water runoff.”

Wash. Const. Art. 7, Section 1. In interpreting Article 7, Section 1, the supreme court stated that absolute uniformity in taxation is not required. If the system is administered in a systematic, nondiscriminatory manner, it meets the constitutional requirement. Sator v. Dept. of Rev., 89 Wn.2d 338, 344 (1977). This court has also held that legislative bodies have broad power to classify for the purposes of taxation. Pacific Northwest Annual Conference of United Methodist Church v. Walla Walla Cy., 82 Wn.2d 138, 144 (1973) (quoting Bates v. McLeod, 11 Wn.2d 648 (1941)).

As in Teter, the rate classifications here are based upon a determination that properties which are highly developed contribute more to water runoff, due to increased impervious surfaces, than undeveloped land. Unlike the fees in Covell where the city imposed one fee on all single family residences regardless of property size (127 Wn.2d at 877), here the fees imposed on owners of developed property vary depending on whether the use of the property is light, moderate, heavy, or very heavy. All properties pay according to a formula which applies equally to all properties in each category. Private property owners do not pay any more because the City does not pay storm water fees for the streets. Thus, the charges imposed are uniform as to each member in each category.

Accordingly, as the supreme court found in Teter, even if the charges are characterized as taxes, they are both statutorily authorized and uniform and are valid. Teter, 104 Wn.2d at 241.

D. Even if Post prevails, the class will not receive the benefit it seeks.

Even if Post prevails, he may not obtain the relief he seeks. This is because if any storm water fees are due on the City streets, there is no evidence in the record to support a claim that Post's rates will decrease. Storm water rates are based solely on the owner's size and use of the property. TMC 12.08.500.

Instead, the storm water utility will assess the City a storm water fee for the streets. And the City will charge the utility a fee for the benefit provided to the utility by the City streets gathering and transporting storm water. Post has not shown that there will be any impact on private property owners' rates.

E. Even if Post prevails, this Court should not address the attorney fee issue.

Post spends exactly five lines in his appellate brief analyzing and requesting attorney fees under the common fund doctrine. Brief of Appellants, p. 27. But even if Post prevails, the Court should not address this request.

The superior court never identified the class members. In its order certifying the class, the superior court stated that the “scope or membership of the class and the terms of the required notice remain to be determined.” CP 112. The class was never defined and the terms of the notice never determined. As a result, if the Court finds in favor of Post, it should remand this case to the superior court to define the class, determine the required notice, and decide whether the common fund doctrine applies.

V. CONCLUSION

Post’s entire case depends on the assumption that private property owners pay more in storm water fees because the City streets are exempt from the fees. Post failed to provide any evidence to the superior court whatsoever to support such a claim. As a result—and because the City’s rate structure is reasonable—the superior court properly granted summary judgment in favor of the City. The City respectfully requests this Court to affirm the superior court’s decision.

DATED this 11 day of September, 2006.

ELIZABETH A. PAULI, City Attorney

By: Debra E. Casparian
DEBRA E. CASPARIAN
WSB #26354
Assistant City Attorney
Attorney for Respondent

EXHIBIT 1

EXHIBIT 2

EXHIBIT 1

- 12.08.362 Charges for fixed-term discharges to the sanitary sewer of effluent from groundwater pump-and-treat systems.
- 12.08.365 Charges for special approved discharges.
- 12.08.368 Charges for TAGRO.
- 12.08.370 Classification of users of sanitary sewers.
- 12.08.380 Types of Charges and Fees Relating to Use of Sanitary Sewers.
- 12.08.390 Basis for determination of commercial/industrial charges for use of wastewater system.
- 12.08.400 Charge for Commercial/Industrial Wastewater User Groups.
- 12.08.410 *Repealed.*
- 12.08.420 Water source.
- 12.08.430 Reconsideration of wastewater rates.
- 12.08.440 Regular review of wastewater and surface water rates.
- 12.08.450 New services - Rates.
- 12.08.460 Minimum charge.
- 12.08.470 Unlawful installations.
- 12.08.500 Surface water rates and charges.
- 12.08.510 Billing for storm and surface water sewerage charges.
- 12.08.520 Reconsideration of storm and surface water sewerage charges.
- 12.08.530 Exclusions of certain properties from storm and surface water sewerage charges.
- 12.08.540 Organized drainage or drainage improvement districts.
- 12.08.550 *Repealed.*
- 12.08.560 Low impact development stormwater and surface water systems.
- 12.08.600 Billing periods, payments, and collections.
- 12.08.610 Property owner liability - Supplemental charges.
- 12.08.620 Contracts with the state, sewer or water districts and other municipal corporations.
- 12.08.630 Sewer fund created.
- 12.08.640 Environmental Services Conservation Loan Program.
- 12.08.650 *Repealed.*
- 12.08.660 *Repealed.*
- 12.08.670 Violation - Penalties.
- 12.08.675 Violation - Civil penalties.
- 12.08.677 Dischargers in significant noncompliance.
- 12.08.678 Appeal.
- 12.08.680 Severability - Saving.

- 12.08.700 Utility Reimbursement Agreements Wastewater and Surface Water Utility Improvements.

12.08.005 Purpose and policy.

Pursuant to the authority conferred by RCW 90.48, this chapter sets forth uniform requirements for users of the Publicly Owned Treatment Works (POTW) and the storm drainage system of the City of Tacoma, and allows the City to comply with all applicable state and federal laws including, but not limited to, the Clean Water Act, the General Pretreatment Regulations, 40 CFR Part 403, and the Stormwater Regulations in 40 CFR Parts 122, 123, and 124. The objectives of this chapter are to:

- A. Prevent the introduction of pollutants into the POTW that will interfere with the operation of the POTW, or otherwise be incompatible with the POTW;
- B. Prevent the introduction of pollutants into the POTW that will pass through the POTW inadequately treated, into receiving waters;
- C. Protect personnel who may be affected by wastewater and biosolids in the course of their employment, and to protect the general public;
- D. Ensure that the quality of POTW biosolids is maintained at a level that allows its use and disposal in compliance with applicable statutes and regulations;
- E. Improve the opportunity to recycle and reclaim wastewater and biosolids from the POTW;
- F. Support economic development with the establishment of a new program to support conservation of the municipal sewer system through economic incentives and technical assistance for wastewater source control and wastewater pretreatment processes;
- G. Fix the price of service for the City's POTW;
- H. Fix the price of service for the City's storm water system;
- I. Provide for the control of the quantity and quality of the water discharged into the municipal storm drainage system so as to comply with the City's Stormwater Management Program, its NPDES permits, and applicable state and federal laws;
- J. Manage stormwater to minimize flooding, erosion, and contact with contaminants or pollutants; and to manage runoff from developed properties and construction sites;

K. Mitigate the impacts of increased runoff due to urbanization, correct or mitigate existing water quality problems related to stormwater, and to help restore and maintain the chemical, physical, and biological integrity of the City's waters for the protection of beneficial uses, including salmon.

The purpose of this chapter is to provide for and promote the health, safety, and welfare of the general public. The provisions of this chapter shall be liberally construed to give full effect to the objectives and purposes for which it was enacted. Compliance with the provisions of this chapter and regulations and manuals referenced under this chapter does not necessarily mitigate all impacts to the environment. Compliance with this chapter and related regulations and manual should not be construed as mitigating all stormwater impacts, and additional mitigation may be required to protect the environment. This chapter does not create or otherwise establish or designate any particular class or group of persons who will or should be especially protected or benefited by the provisions of this chapter. The primary obligation for compliance with this chapter and for preventing environmental harm on or from property is placed upon responsible parties, as defined by this chapter. (Ord. 27003 § 1; passed Nov. 19, 2002; Ord. 25802 § 1; passed Dec. 5, 1995; Ord. 25587 § 1; passed Sept. 20, 1994)

12.08.007 Applicability and administration.

A. General. This chapter shall apply to all direct and indirect users of the City's Municipal Sewer System. The Director of Public Works is hereby authorized and directed to enforce all provisions of this chapter. The Director shall have the authority to render interpretations of this chapter, and may adopt reasonable rules and administrative procedures to enforce the provisions of this chapter. Such interpretations, rules, and administrative procedures shall be in conformity with the intent and purposes of this chapter.

B. Deputies. In accordance with prescribed procedures, the Director may appoint such number of technical officers, inspectors, and other personnel as shall be authorized from time to time. The Director may deputize such inspectors or employees as may be necessary to implement the provisions of this chapter.

C. Inspections. All activities regulated by this chapter, except those exempted under Section 12.08.090, are subject to inspection by the Director to determine that adequate control is being exercised, or to determine whether an approval is warranted. The Director may establish inspection

programs to ensure compliance with the requirements of this chapter and accomplishment of its purposes. Inspection programs may be established on any reasonable basis including, but not limited to, routine inspections, random inspections, inspections based upon complaints or other notice of possible violations, inspection of drainage basins or areas identified as higher than typical sources of sediment or other contaminants or pollutants, inspections of businesses or industries of a type associated with higher than usual discharges of contaminants or pollutants or with discharges of a type which are more likely than the typical discharge to cause violations of state or federal water or sediment quality standards or the City's NPDES stormwater permit, and joint inspections with other agencies inspecting under environmental or safety laws. Inspections may include, but are not limited to, reviewing maintenance and repair records; sampling discharges, surface water, and material or water in drainage control facilities; and evaluating the condition of drainage control facilities and other best management practices.

D. Right of Entry. Whenever necessary to make an inspection to enforce any of the provisions of this chapter or monitor for proper function of stormwater facilities, or whenever the Director or the Director's authorized representative has reasonable cause to believe that there exists in any building or upon any property any condition or violation of this chapter relating to the pollution or the possible pollution of any of the waters of the state, the Director or the Director's authorized representative may enter such building or premises at all reasonable times to inspect the same or to perform any duty imposed upon the Director by this chapter, provided that if such building or premises be occupied, the Director shall first present proper credentials and request entry; and if such building or premises be unoccupied, the Director shall first make a reasonable effort to locate the owner or other persons having charge or control of the building or premises and request entry. If such entry is refused, the Director shall have recourse to every remedy provided by law to secure entry.

E. Authority to Stop Work. Whenever construction work is being done that is contrary to the provisions of this chapter, or contrary to the provisions of plans, drawings, specifications, or calculations approved by the Director, then the Director may order the construction work stopped by notice in writing, served on those persons engaged in or causing the work to be done. Any such persons shall thereafter stop such work until authorized by the Director to proceed.

EXHIBIT 2

parcel shall be rounded to the nearest 500-square foot increment (the area of premises less than 250-square feet shall be set at 500 square feet) and the appropriate rate from Table III shall be multiplied by the number of such increments in the parcel. In addition to the area charge listed above, the City shall charge a monthly fixed fee of:

Effective January 1, 2005 \$4.05

Effective January 1, 2006 \$4.31

Single-family residential parcels have been placed in the "Moderate" Basic Category of Development for determination of monthly charges. All single-family residential parcels of 15,000 square feet and less shall pay at the specified rate. Those single-family residential parcels larger than 15,000 square feet shall pay on the basis of the first 15,000 square feet at the moderate rate and the remainder at the undeveloped rate. The fixed charge will be computed only once per parcel per month, regardless of area.

Residential customers who qualify as low-income elderly or low-income disabled shall be eligible for a 25 percent reduction from the regular residential storm drainage charges. The determination of low-income elderly and low-income disabled shall be made as set forth in Section 12.06.165. Individuals must submit applications for review and acceptance by the Director to qualify for this reduction. The effective date of the reduction shall be the first of the month following acceptance by the Director.

(Ord. 27285 § 15; passed Nov. 2, 2004: Ord. 27003 § 19; passed Nov. 19, 2002: Ord. 26729 § 14; passed Nov. 7, 2000: Ord. 26526 § 7; passed Nov. 30, 1999: Ord. 26338 § 9; passed Dec. 8, 1998: Ord. 25979 § 8; passed Nov. 19, 1996: Ord. 25802 § 19; passed Dec. 5, 1995: Ord. 25659 § 10; passed Jan. 24, 1995: Ord. 25521 § 7; passed Jun. 7, 1994: Ord. 25317 § 5; passed Jun. 8, 1993: Ord. 24879 § 26; passed May 21, 1991: Ord. 23792 § 1; passed Mar. 3, 1987: Ord. 23240 § 1; passed Aug. 28, 1984)

12.08.510 Billing for storm and surface water sewerage charges.

The City shall bill for storm and surface water sewerage to each and every parcel of real property inside the boundary of the City except only as specifically excluded in Section 12.08.530. Owners of parcels which are contiguous and have a single land use designation may receive a single bill for storm and surface water sewerage charges for all parcels by having the parcels consolidated on the Pierce County Assessor's tax rolls. Persons responsible for charges for sanitary sewerage or other City utility charges shall be the recipient of the

monthly or bimonthly storm and surface water sewerage charges. Owners of vacant property or property not otherwise receiving City utility bills shall be billed for storm and surface water sewerage charges. The owner or other responsible party as listed above may request that storm and surface water sewerage charges be billed to another party by request in writing in form and content approved by the Director. Such request, designation and billing to such other person shall not release any owner or other person from responsibility for payment of City storm and surface water sewerage charges, or release any parcel from the lien for delinquent charges, interest, costs, and fees allowed herein or by applicable law. (Ord. 25802 § 20; passed Dec. 5, 1995: Ord. 25587 § 35; passed Sept. 20, 1994: Ord. 23240 § 1; passed Aug. 28, 1984)

12.08.520 Reconsideration of storm and surface water sewerage charges.

If an owner or other person responsible for paying storm and surface water sewerage charges is of the opinion that the rate thereof and resulting charge applicable to that owner or other person is based on erroneous information, that owner or other person may produce such information as the Director reasonably requires and, if warranted in the reasonable opinion of the Director, the Director shall make an appropriate adjustment to such rate or charge. (Ord. 23240 § 1; passed Aug. 28, 1984)

12.08.530 Exclusions of certain properties from storm and surface water sewerage charges.

Storm and surface water sewerage charges shall not be levied directly to:

A. Any City street, road, alley or right-of-way the storm and surface water drainage function of which has been transferred to and made a part of the Municipal Sewer System by Ordinance No. 21638 passed April 3, 1979; it being expressly found that all such City streets, roads, alleys and rights-of-way provide storm and surface water sewerage to the City by collecting and transporting storm and surface water from multiple individual properties to Storm Sewers of a value equal to the reasonable charge therefor that would otherwise be charged by the City; and

B. Real property within Point Defiance Park, which area has been previously excluded from the service area for City storm and surface water sewerage by Ordinance No. 21632 passed April 3, 1979. (Ord. 26526 § 8; passed Nov. 30, 1999: Ord. 23240 § 1; passed Aug. 28, 1984)

FILED
COURT OF APPEALS

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NO. 34798-9-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Am
CITY

PAUL W. POST, REX WILLIAMS and FRANCES WILLIAMS
(husband and wife), and GERALD PAULSON and CAROL PAULSON
(husband and wife), *Appellants*

v

CITY OF TACOMA, *Respondent*

**AFFIDAVIT OF SERVICE OF RESPONDENT'S RESPONSE
BRIEF**

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