

No. 35608-2-II

---

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

---

STOREDAHL PROPERTIES, LLC,

Appellant,

v.

CLARK COUNTY,

Respondent.

FILED  
BY *mm*  
CLERK OF COURT  
APR 12 2016

---

**REPLY BRIEF OF APPELLANT  
STOREDAHL PROPERTIES, LLC**

---

Scott M. Edwards, WSBA No. 26455  
SEdwards@perkinscoie.com  
Perkins Coie LLP  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Telephone: 206.359.8000  
Facsimile: 206.359.9000

**CONTENTS**

SUMMARY OF ARGUMENT .....1

ARGUMENT .....2

1. The Washington Supreme Court has expressly held that distinguishing between taxes and fees is an issue of law subject to de novo review ..... 2

2. The admitted purpose of the Clean Water Charge – to fund any “additional activities” the County is required to perform under its NPDES permit – establishes that it is a tax..... 3

3. As the County affirms, the additional activities funded by the Clean Water Charge encompass a broad array of governmental services providing an undifferentiated benefit to the general public..... 5

4. In *Teter* the parties did not even assert that the Burnt Bridge Creek Utility Fee (a different charge enacted for a different purpose than the Clean Water Charge) was a tax ..... 9

5. The GAO Opinion applies the same analysis and reasoning as the controlling Washington cases ..... 13

CONCLUSION..... 15

## TABLE OF AUTHORITIES

### Cases

<i>Arborwood Idaho, LLC v. City of Kennewick</i> , 151 Wn.2d 359, 89 P.3d 217 (2004) .....	5, 6, 10
<i>Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1</i> , 124 Wn.2d 816, 881 P.2d 881 (1994) .....	10
<i>Covell v. City of Seattle</i> , 127 Wn.2d 874, 905 P.2d 324 (1995) .....	1, 3, 7, 9, 10, 11, 14
<i>Okeson v. City of Seattle</i> , 150 Wn.2d 540, 78 P.3d 1279 (2003) .....	2, 3, 14
<i>Samis Land Co. v. City of Soap Lake</i> , 143 Wn.2d 798, 23 P.3d 477 (2001) .....	3, 9, 14
<i>San Juan Cellular Tel Co. v. Public Service Comm'n of Puerto Rico</i> , 967 F.2d 683 (1st Cir. 1992) .....	13
<i>Teter v. Clark County</i> , 104 Wn.2d 227, 704 P.2d 1171 (1985) .....	1, 9, 10, 11
<i>Thurston County Rental Owners Assoc. v. Thurston County</i> , 85 Wn.App. 171, 940 P.2d 655 (1997) .....	5
<i>United States v. Huntington</i> , 999 F.2d 71 (4th Cir. 1993) .....	9, 14

## SUMMARY OF ARGUMENT

As the County acknowledges, the purpose of a municipal charge is “determinative” in analyzing whether the charge is a tax or a fee. Resp. Br. at 17. Thus, fatal to the County’s position, is its concession that the purpose of its Clean Water Charge is “to provide a funding mechanism to pay for the [additional] activities required by the [NPDES] permit,” Resp. Br. at 5. The admitted purpose of the County’s Clean Water Charge both (1) establishes that it is a tax under the test established by the Supreme Court in *Covell v. Seattle*, 127 Wn.2d 874, 889, 905 P.2d 324 (1995) and (2) distinguishes the Clean Water Charge from the Burnt Bridge Creek Utility District charge discussed in *Teter v. Clark County*, 104 Wn.2d 227, 704 P.2d 1171 (1985). The County erroneously characterized *dicta* from *Teter* as a holding that Clark County’s “storm water fees” is not a tax. Resp. Br. at 3, 12-13. Yet, the Burnt Bridge Creek Utility District charge at issue in *Teter* was enacted for a different purpose than the Clean Water Charge at issue in this case. Moreover, the parties in *Teter* did not even raise or argue the tax versus fee issue. Finally, the County’s efforts to distinguish its Clean Water Charge from a similar King County charge that the U.S. General Accounting Office recently concluded is a tax is ineffective; the County ignores the reasoning and analysis actually applied by the GAO, which is essentially the same applied by Washington Courts.

## ARGUMENT

- 1. The Washington Supreme Court has expressly held that distinguishing between taxes and fees is an issue of law subject to de novo review.**

The County mischaracterizes Storedahl's brief as generically addressing the standard of review of summary judgments. Resp. Br. at 10. In so doing the County ignores Storedahl's discussion of the Washington Supreme Court's express ruling that tax versus fee cases raise "issues of law to be determined de novo by this court." App. Br. at 8 *quoting Okeson v. City of Seattle*, 150 Wn.2d 540, 549, 78 P.3d 1279 (2003). Instead the County discusses a standard of review that is irrelevant to this case – the standard the County asserts would apply if Storedahl were challenging the "rate structure" of the Clean Water Charge, which it is not. Resp. Br. at 11.

The County also erroneously suggests that simply because the Clean Water Charge violates constitutional limitations on taxes there is a burden of proof to establish that the charge is unconstitutional beyond a reasonable doubt. Resp. Br. at 10. This argument is likewise misplaced. This case was decided on cross motions for summary judgment, there are no disputed facts to prove, whether beyond a reasonable doubt or otherwise. As in *Okeson*, whether the Clean Water Charge is lawful or unlawful is determined by answering the pure legal question: whether the

Clean Water Charge is a tax or a fee. Because the Clean Water Charge is a tax, it violates the Uniformity Clause of the Washington Constitution, a consequence that the County does not dispute.

Because liability for the street utility charge in *Covell* resulted unavoidably from real estate ownership, we found it to be a property tax, which had to be “imposed in a uniform manner based on the value of property” under Wash. Const. art. VII, § 1.

Here also, [the disputed charge] does not levy a charge against the discretionary exercise of any particular right of ownership. Rather, it imposes an unavoidable demand upon ownership itself. ... Because the tax is set ... without regard to each land’s worth, it is clearly not levied uniformly upon the entire class of real estate as constitutionally required.

*Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 815, 23 P.3d 477 (2001).

**2. The admitted purpose of the Clean Water Charge – to fund any “additional activities” the County is required to perform under its NPDES permit – establishes that it is a tax.**

As the County concedes, the Supreme Court has held that the *purpose* of a municipal charge “is what is *determinative*” in establishing whether it is a tax or a fee. Resp. Br. at 17, *citing Okeson*, 150 Wn.2d at 552-53 (emphasis added). Under *Covell* and its progeny, the purpose of a fee must be to “regulate the entity or activity being assessed” *Covell*, 127 Wn.2d at 881, 886 while the purpose of taxes is to pay for the cost of

governmental activities performed for general public benefit. Contrary to the County's bare assertion, Storedahl does not claim that the Clean Water Charge is a tax merely because it generates revenue. Resp. Br. at 16. Rather, Storedahl's opening brief discusses at length the purpose behind the revenues generated. Resp. Br. At 2-5, 10-14. As Storedahl demonstrated, the purpose behind the adoption of the Clean Water Charge was *not* to regulate the "entity or activity being assessed" (in this case ownership of property with existing impervious surfaces). Rather the purpose of the charge is to fund any "additional activities" the County is required to undertake as a condition of negotiating for and obtaining its NPDES permit required by the federal Clean Water Act, including reducing livestock impacts on riparian habitat, promoting natural lawn care, reinstating an educational program in the elementary schools and increased road maintenance activities such as frequent street sweeping and scheduled mowing of roadside ditches.

Ironically the County's brief confirms Storedahl's position by affirming and emphasizing that the purpose of its Clean Water Charge is to provide a funding mechanism for whatever "additional activities" the County is required to perform as a condition of its NPDES permit. Resp. Br. at 19 (Clean Water Charge "was necessary to fund the cost of an increased level of service called for by the NPDCS permit."). The County

also concedes that “not every activity paid for by [the Clean Water Charge] provides a service to or mitigates a burden created by” the ownership of assessed property. Resp. Br. at 9.

**3. As the County affirms, the additional activities funded by the Clean Water Charge encompass a broad array of governmental services providing an undifferentiated benefit to the general public.**

The County expressly acknowledges that regulating the entity or activity being assessed requires “providing them [fee payers] with a targeted service or alleviating a burden to which they contribute.” Resp. Br. at 20, *quoting Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 371, 89 P.3d 217 (2004). Nevertheless, the County proceeds to argue that the Clean Water Charge should be deemed to have a “regulatory purpose” because each broad category of activities financed *could* be generically characterized as “regulatory” (Resp. Br. at 23-28) despite the County’s admission (Resp. Br. at 9) that many of those additional activities are not directed at the entity or activity being assessed.

Thus, for example the County asserts that “*education*” has been found to be “*regulatory*” activity. Resp. Br. at 26.<sup>1</sup> According to the

---

<sup>1</sup> The case relied on by the County, *Thurston County Rental Owners Assoc. v. Thurston County*, 85 Wn.App. 171, 940 P.2d 655 (1997) does not support its position. In that case permit fees charged for installing, improving, or operating a septic system were used to fund the regulation of septic systems including informing people “about the hazards of failing septic systems” and were thus directed at the entity or activity being assessed. 85 Wn.App. at 179.

County's theory, paying for any educational programs required by its NPDES permit satisfies the requirement that a fee have a regulatory purpose. As discussed in Storedahl's opening brief, the additional educational activities paid for by the Clean Water Charge include a "River Rangers" program in the public schools (a program that had been cut due to funding constraints) and paying for a traveling puppet show in the elementary schools, training "watershed stewards" about the benefits of natural lawn care and promoting decreased uses of pesticides and fertilizers. In contrast to *Thurston Rental*, and as the County has admitted, these educational activities do not regulate properties assessed the Clean Water Charge. CP 648-50.

Similarly, the County argues that the *maintenance of public infrastructure is regulatory* in nature. Resp. Br. at 25.<sup>2</sup> Thus, according to the County, paying for increased levels of public road maintenance, including more frequent street sweeping, is a regulatory purpose making the Clean Water Charge a fee. *Id.* This is directly contrary to the Supreme Court's holding in *Covell*, that charging a group of property owners to pay for public road maintenance activities that inure to the

---

<sup>2</sup> Surprisingly, the County cites *Arborwood* as the leading case supporting its assertion, yet in *Arborwood*, (as in *Covell*) the Supreme Court held that the disputed charge was a tax because the public facilities supported by the charge were maintained for the benefit of the public, not just those assessed. 151 Wn.2d at 371-72.

benefit of everyone who uses the roads regardless of whether they pay the assessment is a tax. *Covell*, 127 Wn.2d at 889 (“The street utility payments are added to a general transportation fund to provide better service for the public at large, which includes nonresidents who travel the city streets without paying the charge.”)<sup>3</sup>. As the County admits, it has historically paid for these road maintenance activities with tax dollars and continues to use tax dollars to fund the level of maintenance being performed at the time its NPDES permit was issued. CP 657, 685. Yet the County has not (for good reason) made any effort to explain how sweeping the streets nine times per year is a tax funded governmental activity while sweeping the streets three additional times is instead a “regulatory” activity paid for with “fees.”

The same problem arises with the County’s admission that it used Clean Water Charge revenue to pay for the cost of revising its development ordinance and to hire additional building inspectors. Resp.

---

<sup>3</sup> The Court had also earlier noted:

Seattle's street utility charge does not regulate the use of city streets by residential occupants. Instead, it transfers part of the responsibility for maintaining and constructing city streets to this limited segment of the population. While this may be part of the price a person pays to live within Seattle's city limits, it is difficult to characterize that price as a “regulatory fee.” Rather, the charges authorized appear to be a new way to raise revenue to accomplish a desired public benefit-better streets.

*Covell*, 127 Wn.2d at 886.

Br. at 23-23 The development code applies to persons who voluntarily decide to engage in regulated development activities, yet the Clean Water Charge is assessed against owners of properties with *existing* impervious surfaces, without regard to whether they are engaged in development activities regulated by the development code. CP 759. While the development code may be “regulatory,” it does not regulate the entities or activities assessed the Clean Water Charge. Rather, as the County acknowledges, it revised its development code and hired additional inspectors because its NPDES permit “requires the County to control runoff from *construction sites*.” Resp. Br. At 23 (emphasis added).

The County also uses the Clean Water Charge to adopt and enforce an illicit discharge ordinance that the County admits prohibits illicit discharges by “all persons, not just persons who own property” subject to the Clean Water Charge. CP 640; *see also* Resp Br. at 4, 22. Charging a limited group of property owners a to pay for the cost of enforcing an ordinance the County admits regulates the conduct of the general public regardless of property ownership is exactly the circumvention of constitutional constraints on municipal taxing authority that the Courts have long protected citizens from and which the Washington Supreme Court has repeatedly emphasized as the role of the *Covell* test:

As we noted in *Covell*, unless sharp distinctions between fees and taxes are maintained in the law, “virtually all of what now are considered “taxes” could be transmuted into “user fees” by the simple expedient of dividing what are generally accepted as taxes into constituent parts, e.g., a “police fee”.” Courts must therefore look beyond a charge’s official designation and analyze its core nature by focusing on its purpose, design and function in the real world.

*Samis*, 143 Wn.2d at 806, quoting *Covell*, 127 Wn.2d at 888, quoting *United States v. Huntington*, 999 F.2d 71 (4th Cir. 1993). Grouping the expenditure of Clean Water Charge funds into various categories of public benefits does not transmute that tax into a fee. As was the charge in *Samis*, the Clean Water Charge is a “thinly disguised tax designed to raise funds to finance broad based public purposes.” 143 Wn.2d at 814.

**4. In *Teter* the parties did not even assert that the Burnt Bridge Creek Utility Fee (a different charge enacted for a different purpose than the Clean Water Charge) was a tax.**

The County argues that “precedence favors the County” on the theory that the Clean Water Charge at issue in this case was held to be a fee rather than a tax in *Teter v. Clark County*, 104 Wn.2d at 239. Resp. Br. at 12-15. There are several major flaws with the County’s argument. First, the parties in *Teter* did not even raise, let alone argue the tax versus fee issue; thus the Court’s discussion in that case is *dicta* not precedent. Second, the Burnt Bridge Creek Utility District Fee that was the subject of

*Teter* is not the same charge as the Clean Water Charge at issue in this case. The two charges were enacted for different purposes.

The County mischaracterizes the *Teter* court's discussion as a holding. Resp. Br. at 12. After deciding the issues before it and resolving the case, the Court expressly noted that "neither party has argued the question" of "whether these charges are actually taxes." 104 Wn.2d at 238. Thus, the Court's subsequent discussion of whether the Burnt Bridge Creek Utility charges levied by the City of Vancouver and Clark County for the operation of the multi-jurisdictional Burnt Bridge Creek Utility District were taxes or fees was *dicta*, not precedent. It is well settled that a case in which a legal theory was not litigated by the parties "is not controlling on a future case in which the legal theory is properly raised." *Berschauer/Phillips Const. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 881 (1994).

Having mischaracterized that the tax versus fee issue was before the Court in *Teter*, the County emphasizes that *Teter* was cited in both *Covell* and *Arborwood* asserting that those citations constitute judicial "recognition" that the Clean Water Charge is a fee rather than a tax. Resp. Br. at 13, 15. However, the mere fact that the Court later distinguished the joint City/County Burnt Bridge Creek Utility District Fees involved in *Teter* from the municipal charges at issue in *Covell* and *Arborwood* does

not convert the *Teter* discussion from *dicta* into a holding. In other words, saying something three times does not make it true, much less the law.

Importantly, in both *Covell* and *Arborwood* the Court was evaluating the purpose of the disputed charge. In *Teter* the City of Vancouver and Clark County, concerned about the adverse impact of rapid growth on the ecology of the Burnt Bridge Creek Drainage Basin, formed a joint storm and surface water utility to build, operate, and manage flood control and stormwater drainage facilities to protect the drainage basin, which was located partly within the City of Vancouver and partly within unincorporated Clark County. 104 Wn.2d at 228-229. A utility fee was imposed on all properties within the Burnt Bridge Creek Drainage Basin. *Id.* at 229.

In stark contrast, the Clean Water Charge is not a joint city/county charge imposed as part of a plan to protect a specific drainage basin. Rather, fundamentally, the Clean Water Charge is a funding mechanism developed in response to fiscal concerns about financing the additional activities the County would be required to perform as conditions of its NPDES permit following an adverse judgment holding the County in violation of the federal Clean Water Act for not having the permit. See App. Br. At 2-4. Contrary to the County's self-serving statements, it was neither conceived nor adopted as an amendment to the Burnt Bridge Creek

Utility District Fee but rather was the funding mechanism recommended by a Clean Water Funding Task Force after considering a wide array of possible funding mechanisms, including new or increased property, sales and/or gasoline taxes. CP 800-802. Importantly, in developing the funding mechanism, the committee was instructed to concern itself only with how to raise the required funds, not on how the money would be spent because the County intended to only do the “minimum agreeable to [the state Department of] Ecology” as conditions of the NPDES permit approval process. CP 793.

Thus, while the Burnt Bridge Creek Utility District Fees were charged only to properties located within the Burnt Bridge Creek Drainage Basin (whose boundaries were determined by extensive engineering and hydrological studies), 104 Wn.2d at 235; the Clean Water Charge is assessed on all developed property in the unincorporated areas of the County without regard to which drainage basin the property may be located in. CP 627. More importantly, while the Burnt Bridge Creek Utility District fees were spent only on the construction operation and maintenance of flood control and storm water facilities in the regulated drainage basin, the Clean Water Charge is spent on any and all additional activities required by the County’s NPDES permit without regard to whether those activities are directed to assessed properties. Resp. Br. at 5,

9. As discussed above (and in Storedahl's opening brief) many of the required additional activities impact on improving water quality have nothing to do with stormwater runoff from existing impervious surfaces on CWC payors' assessed properties. see CP 797 ("county wide needs [under the NPDES permit] are not lessened" by private stormwater management).

**5. The GAO Opinion applies the same analysis and reasoning as the controlling Washington cases.**

As discussed in Storedahl's opening brief, the United States Government Accounting Office ("GAO") has recently ruled that a nearly identical charge levied by King County to pay for activities King County is required to perform under its NPDES permit is a tax. App. Br. at 20-22. While this ruling is not binding or precedent in this case, it is instructive. The County seeks to deflect the relevance of this ruling by ignoring the GAO's analysis and reasoning; instead it attempts to dismiss the decision by noting the tax versus fee issue was raised in the context of Federal government immunity from state taxation (the taxpayer in that case was the U.S. Forrest Service). Resp. Br. at 42. As one of the cases cited in the GAO opinion notes: "Courts have had to distinguish 'taxes' from 'regulatory fees' in a variety of statutory contexts. Yet in doing so, they have analyzed the issue in similar ways." *San Juan Cellular Tel Co. v. Public Service Comm'n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992).

Consistent with that observation, Storedahl pointed out that one of the federal cases the GAO relied on for its primary purpose analysis, *United States v. Huntington*, 999 F.2d 71 (4th Cir. 1993), is also quoted by the Washington Supreme Court in *Covell*. App. Br. at 21. Moreover, the *Covell* quote is repeated by the Court in *Samis*, 143 Wn.2d at 806 and *Okeson*, 150 Wn.2d at 552, leading right back to the County's recognition of the Supreme Court's instruction in *Okeson* that the purpose of a municipal charge is "determinative" of whether it is a tax or a fee.

Thus, it is not surprising that the GAO readily concluded that the purpose of a charge imposed on developed property to pay for a wide array of governmental activities that provide undifferentiated benefits to the general public (cleaner water for recreational, wildlife habitat, stock watering, and other purposes) rather than benefits or services targeted to the payors *is a tax*.<sup>4</sup> The Comptroller General explained that "unlike a fee ... the benefits paid for by King County's [charge] ... are not narrowly circumscribed but benefit the general population at large.... *Nor is the assessment of the [charge] incident to a voluntary act such as a request for a permit ... the assessment, rather, supports the provision of undifferentiated benefits to the entire public.*" *Id.* (emphasis added).

---

<sup>4</sup> The activities performed by Clark County under its NPDES permit promote the same general public benefits. CP 706.

## CONCLUSION

The County's admission that the purpose of the Clean Water Charge is to fund any "additional activities" the County is required to perform under its NPDES permit establishes that the Clean Water Charge is a tax under *Covell*. The funded additional activities encompass a broad array of governmental services performed for general public benefit, including elementary school education, public road maintenance and regulation of new development activities; they are not targeted to or directed at the entities or activities assessed – owners of property containing existing impervious surfaces. As a tax the charge violates the Uniformity clause of the Washington Constitution. For the reasons discussed above and in Storedahl's opening brief, the trial court's ruling should be reversed and judgment entered in favor of Storedahl.

DATED: July 12, 2007

Perkins Coie LLP

By:   
Scott M. Edwards, WSBA No. 26455  
Attorneys for Appellant  
Storedahl Properties, L.P.

No. 35608-2-II

---

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

---

STOREDAHL PROPERTIES, LLC,

Appellant,

v.

CLARK COUNTY,

Respondent.

---

**CERTIFICATE OF SERVICE**

---

Scott M. Edwards, WSBA No. 26455  
SEdwards@perkinscoie.com  
Perkins Coie LLP  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Telephone: 206.359.8000  
Facsimile: 206.359.9000

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the Reply Brief of Appellant Storedahl Properties, LLC was served this day via electronic mail and U.S. mail, at the following addresses:

bronson.potter@clark.wa.gov

E. Bronson Potter  
Sr. Deputy Prosecuting Attorney  
Clark County  
1013 Franklin Street  
Vancouver, WA 98668-5000

DATED this 12th day of July, 2007.

  
Theresa A. Trotland

CLERK OF COURT  
CLARK COUNTY  
07 JUL 12 PM 2:18  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY