

Original

NO. 35608-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

<p>STOREDAHL PROPERTIES, L.L.C., Appellant v. CLARK COUNTY, Respondent.</p>	<p>07 JUN 13 11: 9: 33 HILL APPEALS COURT OF APPEALS DIVISION II STATE OF WASHINGTON BY DEPUTY</p>
<p>BRIEF OF RESPONDENT</p>	

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I.
ISSUE PRESENTED

Whether Storedahl Properties LLC (“Storedahl”) met its burden of establishing that Clark County’s stormwater fee is an unconstitutional tax, as opposed to a regulatory fee, beyond a reasonable doubt.

II.
STATEMENT OF THE CASE

A. Procedural History.

Storedahl filed a complaint for declaratory judgment seeking a declaration that Clark County’s stormwater fees were an unconstitutional tax “applied to Storedahl” and for a judgment refunding Storedahl’s previously paid fees.¹ The parties filed cross-motions for summary judgment. The court entered an order granting Clark County’s motion for summary judgment and denying Storedahl’s motion for summary judgment. This appeal followed.

B. Factual Background.

The Environmental Protection Agency has identified stormwater runoff as “the most significant source of water pollution today.”² Stormwater runoff occurs when precipitation from rain or snow melt flows

¹ See, *First Amended Complaint for Declaratory Judgment*, CP 1 - 7.

² See, Appendix A to *Clark County’s Response to Storedahl’s Motion for Summary Judgment*, CP 839-867.

over the ground. Impervious surfaces, like driveways, sidewalks and streets prevent stormwater from naturally soaking into the ground.³ Stormwater carries sediment, oil, grease, pesticides, nitrogen, phosphorus, and other pollutants into storm drains and then, into nearby water bodies.⁴ Impervious surface also affect water quality by “significantly increasing the volume and velocity of runoff and the amount of pollutants in stormwater.”⁵ According to the EPA, water quality “begins to decline when impervious surfaces cover just 10% of a watershed.”⁶ Because stormwater runoff is such a major source of water pollution, in 1987 and 1992, Congress amended the Clean Water Act to establish a national program to control water pollution from stormwater runoff.

Clark County recognizes the impacts that stormwater runoff can have. CCC 13.30A.010 states:

The Board of County Commissioners finds and declares that existing stormwater runoff conditions within the unincorporated areas of Clark County constitute a potential hazard to the health, safety and welfare of the lives and property of inhabitants . . .

³ See, Appendix B to *Clark County's Response to Storedahl's Motion for Summary Judgment*, CP 839-867.

⁴ See, Appendix A to *Clark County's Response to Storedahl's Motion for Summary Judgment*, CP 839-867.

⁵ *Id.*

⁶ *Id.*

The county owns, operates and maintains a municipal separate storm sewer system that collects and conveys stormwater runoff from properties to their outfalls into waters of the state.⁷ Clark County has been charging stormwater fees since 1980. At that time, stormwater fees were charged to developed properties within the Burnt Bridge Creek drainage basin.⁸ In the landmark case of *Teter v. Clark County*, 104 Wn.2d 227, 704 P. 2d 1171 (1985), the Supreme Court held that the fee was not an unconstitutional tax and that it was a valid regulatory fee.

Because Clark County has a population of over 100,000 people within its unincorporated area, it is required to have a National Pollutant Discharge Elimination System (“NPDES”) stormwater permit.⁹ On July 16, 1999, the Washington State Department of Ecology (“Ecology”) issued an NPDES stormwater permit to Clark County and, as a condition of the permit, required the county to undertake the activities described in the

⁷ See, the NPDES permit attached as *Exhibit C* to the Declaration of Brian Carlson, which is attached as “Exhibit A” to the *Declaration of E. Bronson Potter*, CP 243 – 588.

⁸ See, CP 206 – 209.

⁹ The County did not fail to apply for a NPDES permit, as stated by Storedahl in its brief at pages 1 - 2. Rather, the Department of Ecology and the County agreed to an extension for filing the second part of the application. This extension was challenged and the County agreed that there was no statutory authority for the extension. See, *Waste Action Project v. Clark County*, 45 F.Supp.2d 1049, 1051 (W.D. Wash. 1999).

county's Storm Water Management Program ("SWMP") including the following:¹⁰

Monitoring groundwater quality, controlling stormwater runoff from development, reducing pollutants exiting development, operate and maintain stormwater facilities, adopt ordinance relating to stormwater discharge, reduce discharge of pollutants from pesticides and fertilizers, prevent illicit discharges into the county stormwater system, reduce discharges of pollutants from industrial facilities, and provide education programs aimed at activities that would impact stormwater quality.¹¹

Additionally, the NPDES permit required the county to develop a funding strategy to support the required activities by December 31, 1999, and to maintain the funding.¹² Clark County has complied with the requirements of its permit.

The Clark County board of commissioners undertook a number of legislative actions that satisfied the requirements of the NPDES permit. It adopted an illicit discharge ordinance that prohibits the discharge of pollutants into surface waters or ground waters in the unincorporated or into the Clark County stormwater system. *See, Chapter 13.26A., CCC.* The County Commissioners also adopted Ordinance 2000-07-34, which

¹⁰ A copy of the NPDES permit is attached as *Exhibit C* to the Declaration of Brian Carlson, which is attached as "Exhibit A" to the *Declaration of E. Bronson Potter*, CP 243 – 588.

¹¹ *See, Special Condition S5.B* of the NPDES permit.

¹² *See, Special Condition S9.D.1* of the NPDES permit.

made extensive modifications to its development regulations as they relate to stormwater runoff and erosion control.¹³ The County Commissioners also adopted Ordinance 2000-07-32A. This ordinance made a number of amendments to the county's regulations of wetlands and the impacts of stormwater runoff to wetlands. The County Commissioners also adopted Ordinance 1999-11-09, which amended the county's stormwater fee ordinances.¹⁴ These legislative actions satisfied the NPDES requirement to make the county's stormwater regulations equivalent to the 1992 Puget Sound Manual.

Especially significant to the present case is the NPDES permit requirement to provide a funding mechanism for the regulatory activities required by the permit.¹⁵ To satisfy this requirement, the board of commissioners amended the stormwater fee ordinance to provide that the current (pre-NPDES permit) level of stormwater activities would be funded from sources other than stormwater fees; and to fund the increased ("proposed activities" in the SWMP) level of activities required by the permit from stormwater fees. *See, CCC 13.30A.010.*

¹³ A copy of this ordinance is attached as *Exhibit D* to the Declaration of Brian Carlson, which is attached as "Exhibit A" to the *Declaration of E. Bronson Potter*, CP 243 – 588.

¹⁴ A copy of this ordinance attached as *Exhibit F* to the Declaration of Brian Carlson, which is attached as "Exhibit A" to the *Declaration of E. Bronson Potter*, CP 243 – 588.

¹⁵ *Id.*

The 1999 amendments to the stormwater fee ordinances only slightly modified the stormwater fee ordinances reviewed by the court in *Teter*. First, the amount of the fee was slightly increased (\$33.00/single family residence versus \$21.00). Second, it increased the geographic area subject to the fee from the Burnt Bridge Creek Basin to the unincorporated area of the county. Third, beginning in 1999, the fee was calculated by actual measurements of impervious surface area; whereas, under the 1980 ordinance, fees were calculated based on the acreage of the parcel. While both the 1980 and 1999 versions of the ordinance only charge fees to properties with impervious surfaces, the 1999 amendment established a threshold level of development (\$10,000 of value or more) that had to exist before a property would be subject to a fee. Finally, beginning in 1999, rates were graduated for residential property based upon parcel size (*i.e.*, \$33.00 for less than one-half acre; \$29.70 for one-half to one acre; \$26.00 for 1 to 5 acres; \$23.10 for 5 to 20 acres; and \$19.80 for more than 20 acres). Prior to 1999, all developed residential parcels were charged the same rate. As can be seen, the 1999 rate structure was more directly related to stormwater impacts because: 1) it was based on actual measurements of impervious surface area; 2) did not impose a charge unless a minimum threshold of development existed; and 3) it established

a graduated rate based on parcel size because stormwater impacts decreased as the size of the surrounding parcel increased.¹⁶

The dollar amount of the stormwater fee set forth in CCC 13.30A was determined by calculating the number of single-family and multi-family residences and the amount of retail, commercial and industrial impervious surface area that would be charged a fee. The total number of residences and retail, commercial and industrial impervious surface area was then compared to the amount of money required to finance the new “proposed” activities identified in the five program elements of the County’s SWMP (approximately four million dollars). Based upon this comparison, the \$33.00/base unit (3,500 square feet of impervious surface area) was arrived at.¹⁷

III. SUMMARY OF ARGUMENT

Clark County’s stormwater fee is a regulatory fee under the three-factor analysis established by the Washington Supreme Court in *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995). A party challenging the constitutionality of an ordinance has the burden of proving that the

¹⁶ See, Declaration of Brian Carlson which is attached as “Exhibit A” to the *Declaration of E. Bronson Potter.*, CP 243 – 588.

¹⁷ *Ibid.*

ordinance is unconstitutional beyond a reasonable doubt. The declaratory relief sought by Storedahl (to have the fee declared unconstitutional as applied to Storedahl) is fatally flawed because the constitutionality of fees is not determined on an individual fee payer basis.

The trial court properly granted Clark County's motion for summary judgment dismissing the first amended complaint.

Argument

A. The "As Applied" Challenge is Flawed.

In its amended complaint, Storedahl asks the court to do the impossible. It asks the court to find that Clark County's stormwater fee is a tax, rather than a regulatory fee, "as applied to Storedahl."¹⁸ Storedahl also argues that the fee is invalid because Storedahl's gravel mining operation has its own NPDES permit and certain programs funded by the fee are targeted at residential properties that don't directly benefit Storedahl.¹⁹ The request and argument are fatally flawed because the "fee versus tax" analysis not done on an individual property-by-property basis. There is no authority or precedent for a court to find a fee to be a tax on an "as applied" basis. Rather, fees have been held to be valid "even though

¹⁸ See, *First Amended Complaint for Declaratory Judgment*, CP 1 - 7.

¹⁹ See, *Appellant's Brief* at pages 17 – 18.

the charge is not individualized according to the benefit accruing to each fee payer or the burden produced by each fee payer.” *Covell at 879*. Nor is it necessary for the amount of the fee to be proportionate to the cost of the system attributable to the property charged. *Tapps Brewing, Inc., v. City of Sumner*, 106 Wn.App. 79, 85, 22 P.3d 280 (2001).

It is true that not every activity paid for by stormwater fees provides a service to or mitigates a burden created by every fee payer. However, this is not required. Rather, it is the “overall plan” that is considered. *Smith v. Spokane County*, 89 Wn. App. 340, 350, 948 P. 2d 1301 (1997). As the court held in *Teter* at 229 - 231, charges are valid fees even though service is not provided to every fee payer or some fee payers do not contribute runoff or pollution to surface water. In the first regulatory fee case in Washington, *Morse v. Wise*, 37 Wn.2d 806, 226 P. 2d 214 (1951), water and sewer charges were imposed on all customers to pay for the installation of additions to the original system. Customers who did not benefit from the additions challenged the fees. The court stated, “(w)e gather from the argument of appellants that they consider the sewer service charge to pay for the new sewers to be an assessment, and that as such it is illegal because they are not specially benefited.” *Morse at 810*.

The court rejected this argument stating “(t)he special benefit idea does not enter into the picture at all.” *Morse at 811*.

Storedahl’s request to have Clark County’s fee declared invalid “as applied to Storedahl” must be rejected because of the validity of fees are not determined on a property-by-property basis.

B. The Standard of Review.

Storedahl is correct in stating that review of an order granting summary judgment is heard de novo.²⁰ However, absent from Storedahl’s argument is any discussion of the applicable standard of review. Storedahl asks the court to find that Clark County’s stormwater fee is an unconstitutional tax, as opposed to a regulatory fee. Their burden of proof is onerous. An ordinance is presumed to be constitutional and the party challenging the ordinance bears the burden of establishing its unconstitutionality beyond a reasonable doubt. *Leonard v. City of Spokane*, 127 Wn.2d 194, 197-8, 897 P.2d 358 (1995). Municipal ordinances must, whenever possible, be interpreted in a manner which upholds their constitutionality. *Brown v. City of Yakima*, 116 Wn.2d 556,

²⁰See, Appellant’s *Brief* at page 8.

559, 807 P.2d 353 (1991); and *City of Tacoma v. Luvene*, 118 Wn.2d 826, 841, 827 P.2d 1374 (1992).

Apart from a constitutional challenge, challenges to the county's rate structure (*i.e.*, *what properties to impose the charge upon or what amount to charge*) are reviewed under the arbitrary and capricious standard. *Tarver v. City Commissioners*, 72 Wn.2d 726, 73, 435 P.2d 531 (1967). A legislative decision setting a regulatory fee "will be sustained if the court can reasonably conceive of **any** state of facts to justify that determination" (*court's emphasis*). *Teter at 234-5 citing, Ace Fireworks Co. v. Tacoma*, 76 Wn.2d 207, 210, 455 P.2d 935 (1969). To prevail, the challenger has "a heavy burden of proof that the respondent's actions were willful and unreasoning, without regard for facts and circumstances." *Teter at 235, citing, Miller v. Tacoma*, 61 Wn.2d 374, 390, 378 P.2d 464 (1963).

In the present case, Storedahl has not established that the county stormwater fee is unconstitutional beyond a reasonable doubt; nor has Storedahl established that the legislative decision regarding which properties to charge or how to structure the rates was arbitrary and capricious.

C. Precedence Favors the County.

The Washington Supreme Court has, on four occasions, stated that Clark County's stormwater fee is a regulatory fee and not a tax. It is surprising the Storedahl completely ignores the *Teter* decision given its significance to the present lawsuit. In *Teter*, the Supreme Court upheld Clark County's stormwater fee ordinance. In all material respects, the fee ordinance being challenged in this case is the same as the fee ordinance reviewed in *Teter*. *Teter* is a leading case on the issue of whether a fee is a regulatory fee or tax, and is cited nearly as often as *Covell*.²¹

In *Teter*, the court noted that the ordinance refers to regulation and control of stormwater. The court held:

Because the primary purpose of these ordinances is regulatory, the charges are properly characterized as 'tools of regulation,' rather than taxes.

Teter, supra at 239.

²¹ *Teter* has been cited in the following cases on the issue of whether a fee is a regulatory fee or a tax: *Hillis Homes v. PUD*, 105 Wn.2d 288; *Margola Associates v. Seattle, supra*; *King County Fire Protection District No. 16 v. Housing Authority of King County*, 123 Wn.2d 819; *Covell v. Seattle, supra*; *Franks and Son, Inc., v. State*, 136 Wn.2d 737 (1998); *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798 (2001); *Prisk v. Poulsbo*, 46 Wn.App. 793 (1987); *Smith v. Spokane County*, 89 Wn.App. 340 (1997); *Dean v. Lehman*, 143 Wn.2d 12 (2001); *Irvin Water District v. Jackson Partnership*, 109 Wn.App. 113 (2001); *Tapps Brewing, Inc., v. City of Sumner*, 106 Wn.App. 79 (2001); *Arborwood Idaho v. Kennewick*, 151 Wn.2d 359 (2004); and *Okeson v. City of Seattle*, 150 Wn.2d 540 (2003).

The ordinance being challenged by Storedahl is virtually identical to the ordinance reviewed by the court in *Teter*.²² The ordinance challenged by Storedahl recognizes that stormwater runoff conditions constitute a potential hazard to public health, safety and welfare. The ordinance further recognizes that:

Implementing the regulations and additional proposed activities identified in the SWMP [*“stormwater management plan”*] shall provide regulation and protection from stormwater runoff in the incorporated areas of the county.

CCC 13.30A.010. The court’s holding in *Teter* is directly applicable to the ordinance challenged by Storedahl.

Following *Teter*, the Washington Supreme Court recognized the validity of Clark County’s stormwater fee on three occasions. First, in *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 811-12, 23 P.3d 477 (2001), the court stated:

In *Teter v. Clark County*, we ruled that the charges collected from lands shown to be contributing to an increase in surface water runoff “were tools of regulation,” rather than taxes because, even though no service was being provided to every fee payer, “the rate schedule bears a reasonable (*albeit imprecise*) relation to the contribution of each lot” to the shared burden being alleviated by storm and surface water control facilities.

²² The court can compare the 1980 ordinance and the 1999 ordinance, which are attached as Appendix A and B to the *Memorandum in Support of Summary Judgment*, CP 206 - 216.

Subsequently, in *Covell*, the court recognized the validity of Clark County's stormwater fee. The court noted that both the state legislature and the county had recognized that stormwater runoff posed potential danger to public health, safety and welfare, and that the creation and operation of stormwater systems "are well within the definition of police power as health, safety or welfare measures." *Covell, supra at 882*.

Describing the fee, the court went on to state:

Thus, the purpose of the ordinances enacted to affect these measures clearly was regulatory, with the charges being collected only to pay for the necessary regulatory actions. Because their primary purpose was regulatory, the charges imposed were properly characterized as tools of regulation, rather than taxes.

Covell at 882. The ordinance being challenged by Storedahl is not different, in any significant manner, from the ordinance described by the *Covell* court. That is, the county commissioners found that stormwater runoff conditions "constitute a potential hazard to the health, safety and welfare of inhabitants"; that the county's stormwater management program and implementing regulations "provide regulation of and protection from stormwater runoff"; and that "to fund this work, it is necessary to adopt service charges." *CCC 13.30A.010*.

Clark County's stormwater fee ordinance was next recognized as being a valid fee in *Arborwood Idaho v. City of Kennewick*, 151 Wn.2d 359, 89 P.3d 217 (2004). There, the court noted:

Clark County collected the charge to enforce regulatory schemes, such as runoff control ordinance and erosion control ordinances and would adopt a single plan for a drainage area.

Arborwood at 372. Clark County's stormwater fee has been repeatedly cited by the Washington Supreme Court as an example of a regulatory fee. The fee in force today is the same as the fee approved by the Court in all material respects. It is a valid regulatory fee.

D. The Covell Analysis.

In determining whether a charge is a regulatory fee or a tax, Washington courts consider the three factors set forth in *Covell*. No single factor is dispositive. Rather, courts review each of the factors to determine whether the charge is most likely a regulatory fee or a tax. The Clark County stormwater fee is properly characterized as being a regulatory fee considering each of the factors.

1. The primary purpose factor. Under the primary purpose factor, the court determines whether the primary purpose of the charge is to raise revenue for general public benefit or is it to regulate fee payers by providing them a service or alleviating a burden to which they contribute,

in which case, the charge is an incidental tool of regulation. *Arborwood at 223; Samis at 806-7; Covell at 879; and Teter at 239*. Of course, all fees raise revenue. The issue considered when reviewing the primary purpose factor is whether the fees are used exclusively to finance regulation or whether they are used for other non-regulatory purposes. Taxes are defined as being impositions imposed to supply the public treasury. *State ex rel Nettleton v. Case, 39 Wash. 177, 182, 81 P. 554 (1905)*. Tax revenue may be used for any governmental function unless specially earmarked by the legislature. Tax revenue may be placed in any fund; either the general fund for any use or in an earmarked fund designated by the legislative authority. See, “*Taxes vs. Fees; A Curious Confusion,*” *Hugh D. Spitzer, 38 Gonz. L. Rev. 335 (2002)*. As described by Spitzer:

Taxes, then, are vehicles to raise money for allocation to a proper governmental purpose. There is no connection between the property or activities taxed and the use of the proceeds. Further, there is no connection between the burdened tax payer and the person or group benefited. Tax money may be deposited in any fund the legislative body elects. In some, taxes are a broad-brush method of raising revenue.

38 Gonz. L. Rev. at 341.

The fact that a fee ordinance raises revenue does not mean it is a tax. As explained in *Okeson v. City of Seattle, 150 Wn.2d 540, 552-3, 78 P. 3d 1279 (2003)*:

It is a misnomer to simply ask whether the charges raise revenue, because both taxes and regulatory fees raise revenue. What is important is the purpose behind the money raised – a tax raises revenue for the general public welfare, while a regulatory fee raises money to pay for or regulate the service that those who pay will enjoy (or to pay for or regulate the burden those who pay have created).

The *Okeson* court also noted, “the purpose behind the money raised” is what is determinative. And, as *Covell* requires, the central rationale for enactment of a charge is determined by focusing on the legislative language found in the ordinances themselves. *Covell at 880-81*.

Somewhat amazingly, Storedahl contends “there is nothing in the CWC ordinance identifying any targeted service the County is providing to CWC payers”.²³ Quite the opposite, the Clark County stormwater fee ordinance clearly refers to the overall plan of regulation that the fee implements and the use of the fee is limited to the implementation of the increased level of stormwater regulation identified in the SWMP. The purpose of the stormwater fee and the services provided are described in CCC 13.30A.010. That ordinance provides, in relevant part:

. . . In order to effectively regulate storm and surface waters within unincorporated Clark County, an ordinance must be implemented under RCW 36.89, and Article XI, Section

²³ See, Petitioner’s *Brief* at page 11.

11, of the Washington State Constitution, to provide the financing and governance necessary for control and regulation of required stormwater activities. The State of Washington Dept. of Ecology issued Clark County a National Pollutant Discharge Elimination System (“NPDES”) and state waste discharge permit. Under the terms and conditions of the permit, Clark County is required to fund and undertake a large number of activities. These activities are described in the Storm Water Management Program (“SWMP”) dated September 30, 1998, which was approved as revised by the Dept. of Ecology. The county has funded and undertaken stormwater related activities described in the SWMP as “current activities”, without a storm and surface water service charge in the unincorporated areas of the county. Implementing the regulations and additional imposed activities identified in the SWMP shall provide regulation and protection from stormwater runoff in the unincorporated areas of the county. To fund this work, it is necessary to adopt service charges in the unincorporated area of the county with rates varying according to the services furnished, the benefits received, and the character, use and stormwater characteristics of the land.

Additionally, CCC 13.30A.100 states, in relevant part:

13.30A.100 Revolving fund.

Subject to Section 13.30A.070, service charges, interest and penalties for delinquent payments and earnings thereon shall be deposited into a special fund . . . Such funds are to be used only for the purpose of paying all or any part of the expense of regulating, monitoring and evaluating stormwater impacts; maintaining the operating stormwater control facilities, educating the public on issues related to stormwater; and all or any part of the cost and expense of planning, designing, establishing, acquiring, developing, constructing and improving any such facilities; . . .

The fact that the primary purpose of the fee is regulatory is also made clear by CCC 13.30A.070 states:

13.30A.070 Capital facilities fund.

The service charges collected pursuant to this chapter shall be used to fund the additional activities undertaken by Clark County, as required by its NPDES permit. Any revenues collected in excess of the cost of such activities and finds collected for the violation of stormwater regulations shall be set aside into a capital facilities fund maintained by the county treasurer. The money set aside into the capital facilities funds and earnings thereon shall only be used for the acquisition and construction of stormwater facilities.

As can be seen from the legislative language above, the county commissioners expressly recognized the public health and safety impacts of stormwater runoff and clearly specified the regulatory activities that the fee would fund.

They recognized that while prior to 1999, the county had been providing a level of stormwater regulation (“current activities”) without a stormwater fee. The imposition of a fee was necessary to fund the cost of an increased level of service called for by the NPDES permit. The SWMP contains a breakout of the cost of the “current activities” that the county had been funding prior to the 1999 ordinance and the cost of the additional “proposed” activities called for by the NPDES permit that were over and above the “current activities.” The stormwater fee provides funding for

only the incremental or increased level of activity described in the “proposed activities.”²⁴

Storedahl devotes a significant part of its brief to explaining that other revenues fund the “current activities” of the SWMP.²⁵ However, the fact that the county uses other revenues to fund its “current activities” has no bearing on whether or not using the fee to fund the “additional activities” is a tax. As explained Mr. Spitzer’s law review article quoted above, taxes deposited in the county general fund can be used for any proper governmental purpose. Rather, the critical inquiry is whether or not the fee pays for a regulatory activity.

“Regulation” is defined as “providing them [*fee payers*] with a targeted service or alleviating a burden to which they contribute.” *Arborwood at 371*. Remarkably, Storedahl repeatedly makes statements that the county’s fee or activities are not “regulatory” without ever providing any discussion of what is meant by “regulatory.” The absence of this discussion may be understandable because “regulation” is defined very broadly as “providing [*fee payers*] with a targeted surface or alleviating a burden to which they contribute.” *Arborwood at 371*. The

²⁴ See, *Declaration of Brian Carlson* at page 7 and Exhibit G, Setting Forth the Costs of the “Current Activities” and the “Proposed Activities.”

²⁵ See, Appellant’s Brief at pages 1 – 5, 9 and 12.

Covell Court recognized these powers as being “extensive.” *Covell*, at 878. In *Hillis Homes, Inc. v. Snohomish County*, 97 Wn. 2d 804, 809, 650 P. 2d 193 (1982), the court noted that police powers are broad “encompassing all those measures which bear a reasonable and substantial relationship to the promotion of the general welfare of the people.” The county legislative authority has wide discretion in deciding what regulatory activities to adopt. As noted by the court in *Teter*, because the regulation is adopted by the county under its police power, the legislative authority has the discretion of determining “whatever measures were reasonably necessary to meet the public health needs.” *Teter* at 233. While Storedahl may believe that some of the activities funded by the fee are not appropriate, that decision is made by the board of county commissioners and is subject to limited judicial review under the arbitrary and capricious standard of review.

In determining whether the legislation imposing the fee satisfies the primary purpose factor, courts look to the “overall plan” of regulation. *Margola Assoc. v. Seattle*, 121 Wn.2d. 625, 637, 854 P. 2d 23 (1993), citing *Teter*, *supra*. The flaw in Storedahl’s argument is that it views Chapter 13.30A, CCC, in isolation, rather than as a component of a comprehensive regulatory scheme. Obviously, any ordinance that adopts a

fee has raising revenue as one of its purposes. However, the correct analysis is to “consider the overall plan when reviewing whether a charge is a fee or a tax.” *Smith at 350*. Fee ordinances “should not be viewed in isolation.” *Samis at 808*. The adoption of the stormwater fee set forth in Chapter 13.30A, CCC, was part of an overall effort to manage the impacts of stormwater runoff. These efforts included:²⁶

1. The passage of Ordinance 2000-07-34, which was an exhaustive revision of the county’s stormwater control, erosion control, and development regulations related to stormwater runoff.
2. The passage of Ordinance 1998-11-17, which is the illicit discharge ordinance prohibiting the discharge of pollutants into the county stormwater system;
3. The passage of Ordinance 1999-11-09, which amended the stormwater fee in place since 1980;
4. Amendment of the county’s wetland ordinance relating to stormwater impacts upon wetlands and limiting the installation of stormwater facilities within wetland; and
5. The adoption and implementation of the county’s Stormwater Management Program (“SWMP”).

Viewed in this overall context, Storedahl’s contention that the stormwater fee is primarily focused upon fiscal matters does not stand up.

²⁶ See, pages 6 – 7 of Declaration of Brian Carlson attached to *Declaration of E. Bronson Potter*, CP 251 – 252.

The SWMP breaks out the stormwater activities to be undertaken by the county into five program elements. These elements are: regulatory, operations and maintenance, monitoring and evaluation, public involvement and education and capital improvement program. The SWMP includes a budget amount for each of the current and proposed activities for each program element.²⁷

Each of the SWMP program elements is discussed below, indicating:

- 1) The amount of the stormwater fee budget dedicated to the program element;
- 2) The activities conducted under the program element; and
- 3) The case authority in Washington for determining that the activity is a “regulatory” activity.

a. *Regulatory program.* The NPDES stormwater permit requires the county to control runoff from construction sites.²⁸ The county spends approximately 9% of its stormwater fee budget on regulation of development.²⁹ Under this program element, the county conducted 1,929

²⁷ *Id.* at pages 2 – 3, CP 247 – 248.

²⁸ *See, NPDES permit condition S5.B.8.a.* A copy of the NPDES permit is attached as *Exhibit C* to the Declaration of Brian Carlson, which is attached as “Exhibit A” to the *Declaration of E. Bronson Potter*, CP 243 – 588.

²⁹ *See, chart attached as Exhibit C to the Declaration of E. Bronson Potter.* CP 587-8.

stormwater control inspections; reviewed 179 stormwater and erosion control plans; conducted 7,838 inspections of compliance with erosion control measures; inspected 3,115 sites with utility permits for erosion control compliance; and resolved 1,454 stormwater code enforcement matters.³⁰ There can be no argument that these activities are not regulation.

b. Operation and maintenance. The NPDES stormwater permit requires the county to maintain roads to reduce the impacts of stormwater runoff.³¹ Approximately 16% of the 2005-06 Clean Water Fee Budget is dedicated to the operation and maintenance of the county's stormwater facilities.³² In 2005, the county engaged in the following activities under this program element: Inspection and cleaning of approximately 7,500 catch basins; inspection of approximately 2,400 manholes and 900 drywells; maintenance of 892 detention facilities; maintenance of 386 biofiltration swales; inspection of 6,578 feet of storm

³⁰See, County 2005 NPDES Annual Report at pages 23 – 27, attached as Exhibit B attached to the *Declaration of E. Bronson Potter*. CP 534 – 585.

³¹See, *NPDES permit* at section S5.B.8.d.

³²See, chart attached as Exhibit C to the *Declaration of E. Bronson Potter*. CP 587-8.

sewer pipe; 9 to 12 sweepings of residential and arterial roads; and inspection and cleaning of roadside ditches and culverts.³³

Operation and maintenance of facilities has been found to be a regulatory activity in *Arborwood at 372; Smith at 347; and Lakewood v. Pierce County, 106 Wn.App.63, 75, 23 P. 2d 1 (2001).*

c. Monitoring and evaluation. The NPDES stormwater permit requires the county to monitor the effectiveness of its SWMP.³⁴ The county dedicates approximately 13% of the 2005-06 stormwater fee budget to water quality monitoring and evaluation.³⁵ In 2005, the county engaged in the following activities under this program element: engaged in stream characterization and assessment; monitored stream flow gauges; monitored rainfall gauges; monitored water quality in various streams, lakes and wetlands; and distributed water quality monitoring equipment and information.³⁶ Water quality monitoring has been recognized as being a regulatory activity in *Smith at 347* and *Thurston County Rental Owners Assoc. v. Thurston County, 85 Wn.App. 171, 177, 940 P.2d 655 (1997).*

³³ See, 2005 County NPDES Annual Report, attached as Exhibit B attached to the *Declaration of E. Bronson Potter* at pages 32 - 33. CP 590 - 1.

³⁴ See, *NPDES permit* at Section S5.B.4.

³⁵ See, chart attached as Exhibit C to the *Declaration of E. Bronson Potter*. CP 587-8.

³⁶ See, 2005 County NPDES Annual Report, attached as Exhibit B attached to the *Declaration of E. Bronson Potter* at pages at pages 8 - 18. CP 542-52.

d. Public education. The county's NPDES permit requires the county to have an education program aimed at reducing stormwater pollution.³⁷ The county dedicates approximately 10% of its 2005-06 Clean Water Fee Budget to this program element.³⁸ The county engages in the following activities under this program element: education to reduce stormwater pollution from use of pesticides and fertilizers and improper waste disposal; provides technical assistance to owners of private stormwater facilities; conducts water pollution education programs at schools and festivals; trains volunteers in watershed and water quality protection; supports student programs for water quality monitoring; conducts stormwater stenciling; produces informational materials containing tips for clean water practices which are sent to approximately 59,000 fee payers; and certifies development contractors in erosion and sediment control practices.³⁹ Public education has been recognized as being a regulatory activity in *Thurston County Rental Owners Assoc. at page 179.*

³⁷ See, NPDES permit at Section S5.B.8.i.

³⁸ See, chart attached as Exhibit C to the *Declaration of E. Bronson Potter*. CP 587-8.

³⁹ See, 2005 County NPDES Annual Report, attached as Exhibit B attached to the *Declaration of E. Bronson Potter* at pages 38 - 43. CP 572-7.

e. Capital improvements. The county's NPDES permit requires the county to have appropriate treatment and in control facilities to reduce pollutants and stormwater runoff.⁴⁰ The 2005-06 Clean Water Fee Budget dedicates approximately 44% of the budget to capital improvements.⁴¹ In this program element, the county engages in the following activities: identifies, prioritizes, and builds stormwater projects. In 2005, approximately One Million Dollars was spent on constructing stormwater facilities to retrofit existing development to treat stormwater runoff to current standards.⁴² Construction of capital facilities has been recognized as being a regulatory activity in *Morse; Teter; and Hillis Homes v. PUD No. 1 of Snohomish County*, 105 Wn.2d 288,714 P. 2d 1163(1986).

f. Administration. Although not recognized as a separate program element, approximately 9% of the 2005-06 Clean Water Fee Budget is dedicated to administration. The administrative expense of engaging in regulatory activities has been recognized as being regulation in *Thurston County Rental Owners Assoc.; Holmes Harbor Sewer District*

⁴⁰ See, NPDES permit at Section S5.B.8.b.

⁴¹ See, chart attached as Exhibit C to the *Declaration of E. Bronson Potter*. CP 587-8.

⁴² See, NPDES Annual Report for 2005 at pages 28-30. CP 562-4.

v. Frontier Bank, 123 Wn.App. 45, 55, 96 P. 3d 442 (2004), *rev'd on other grounds at 155 Wn.2d 858 (2005)*; and *Lakewood*, *supra*.

It is clear that the primary purpose of the fee is to implement the overall plan of stormwater regulation.

Storedahl cites to *Covell* and *Samis Land Co.* in support of its argument that the primary purpose of the county stormwater fee is fiscal. However, the fees in question in those cases are very different than the county's stormwater fee. In *Covell*, the court invalidated a street utility charge imposed upon all owners or occupants of residential property. The court noted that "most of the regulatory language is devoted to fiscal planning, rather than toward the type of service or benefit for those who pay the fees" and that the language of the ordinance with respect to the services to be provided was "of an extremely general nature" and it made "no attempt to regulate the use of city streets." *Covell* at 880-1. In contrast, the county's stormwater fee ordinance identifies the specific services that are funded by the fee and lists them in its Stormwater Management Plan which are related to the regulation of stormwater. It is telling to note that the *Covell* court contrasted the street utility charge imposed by the City of Seattle to Clark County's stormwater fee. The *Covell* court cited *Teter v. Clark County*, 104 Wn.2d 227 (1985), and

specifically noted that the county ordinance provided that stormwater runoff posed a potential danger to property and life of all of the residents of the county, and that the facilities funded by the ordinance would provide protection from such dangers. *See, Covell* at 881. The *Covell* court stated:

This court then observed that the police powers broad enough to encompass all laws intending to promote the health, peace, morals, education, good order and welfare of the people (*citations omitted*) “the cleanup by residents of Burnt Bridge Creek and Lake Vancouver, along with measures to prevent flooding the entire drainage basin are well within the definition of the police power as health, safety, or welfare measures.” *Teter* at 104 *Wn.2d* at 233. **Thus, the purposes of the ordinances enacted to affect these measures clearly was regulatory**, with the charges being collected only to pay for the necessary regulatory actions. Because their primary purpose was regulatory, the charges imposed were properly characterized as tools of regulation, rather than taxes. (*Emphasis added.*)

Covell at 881-82.

In stark contrast to the street utility charge addressed in *Covell*, Clark County’s ordinance identifies the services to be provided and is nearly identical to the ordinance addressed in *Teter*, where the court found the primary purpose to be clearly regulatory.

Storedahl also cites *Samis*, where the court invalidated a standby charge imposed upon unimproved land for the availability of city water and sewer. The court observed that the City of Soap Lake’s overall plan

failed to reference any service being provided to or any burden being created by the vacant land. *Samis* at 809. Again, the court in *Samis* referred to the county's stormwater fee reviewed in *Teter* as a fee that's primary purpose was regulatory. In *Samis*, there was no showing that the vacant lands charged a standby charge either created a burden that the fee helped alleviate or received any service funded by the fee. In contrast, the county stormwater fee exclusively funds activities that alleviate the burden caused by stormwater runoff on impervious surfaces or provide services to the fee payers.

Finally, Storedahl argues that the primary purpose of the stormwater fee is not regulatory because it funds activities "for the benefit of the general public."⁴³ However, the fact that there is a benefit to the general public from mitigating the water quality impacts of stormwater runoff does not mean that the activities funded are not regulatory. In *Smith*, the court upheld an aquifer protection fee that provided a "benefit to everyone who receives water from the aquifer." *Smith* at 351

In *Dean v. Lehman*, 143 Wn.2d 12, 18 P. 3d 523 (2001), a fee payer challenged the state's imposition of a charge of 35% of all funds

⁴³ See, Appellant's *Brief* at page 14 - 20.

received by prison inmates. This deduction was allocated as followed: 10% to an inmate savings account; 20% to contribute to the costs of incarceration; and 5% to a victim's compensation fund. The court stated, "While the general public may receive an incidental benefit from the deductions . . . the primary purpose of these charges is not to raise revenue, but to benefit a small group of individuals, the inmates themselves and crime victims." *Dean at 23-24*. Similarly, while the general public may benefit from pollution prevention and flood control, the stormwater fees are only used to finance a portion of the costs of stormwater regulatory activities which provide services to the fee payers or mitigate burdens created by the fee payers. The critical point is not whether the general public receives a benefit of cleaner water. Rather, the critical point is that the stormwater fees fund activities which either provide a service to the fee payer (such as providing stormwater facilities to accommodate their stormwater runoff) or alleviate a burden (i.e., mitigate the water quality impacts of stormwater runoff) created by the fee payer.

By focusing on the legislative language found in the county's ordinances, as *Covell* requires, one can easily identify the activities that the fee pays for. These activities are all related to either providing services

(e.g. construction and maintenance of stormwater facilities) to properties with impervious surfaces (i.e., the fee payers) or mitigating the impacts of stormwater runoff from those properties through regulation, enforcement and education. The ordinances satisfy the primary purpose factor of *Covell*.

2. The Exclusive Allocation Factor. The second *Covell* factor is whether the money collected must be exclusively allocated to the regulatory purpose. Again, there is no question that the Clark County stormwater fee satisfies this factor. CCC 13.30A.100 requires the fees to be deposited into a special account and it can only be used to fund the regulatory activities identified in the ordinances. Simply depositing the stormwater fees into a segregated account, by itself, does not satisfy the exclusive allocation factor of *Covell*.

Storedahl does not contend that the county expended any of the fees on activities not identified in the ordinances. Rather, Storedahl challenges whether some of these activities either provide a service or mitigate a burden created by the fee payers. For example, Storedahl contends that using the fee to pay for an increased level of street sweeping,

catch basin cleaning and roadside ditch mowing is impermissible.⁴⁴

Actually, the operation and maintenance program element of the SWMP is for maintenance and operation of stormwater facilities of which, streets are a part. The stormwater fees are not paying for patching potholes or paving roads. Rather, they pay for an increased level of street sweeping, catch basin inspection and cleaning, and drywell inspection and cleaning because these parts of the streets convey and treat stormwater. The operations and maintenance program element of the SWMP also provides increased maintenance of stormwater biofiltration swales and stormwater retention and detention facilities. It also pays for increased inspection and maintenance of road ditches and culverts which convey stormwater. All of these activities provide a service to owners of properties that have impervious surface which generate stormwater runoff because it conveys and treats stormwater from these properties.

Storedahl also claims that using stormwater fees to modify the stormwater regulations of the development code and enforcing those regulations is impermissible because the stormwater fee is assessed against property owners with impervious surface, rather than only those seeking

⁴⁴ See, Appellant's *Brief* at pages 12 – 13.

development permits.⁴⁵ However, the development code referred to was drafted and is enforced to ensure the properties developed with impervious surfaces have adequate stormwater facilities to mitigate the stormwater runoff impacts from those properties.

The stormwater fee is deposited into a segregated fund and that fund is only used to pay for the additional activities identified in the county's Stormwater Management Program, as required by its NPDES stormwater permit. The county legislative authority has wide discretion in determining what regulatory activities to adopt. As noted by the court in *Teter*, because the regulations are adopted by the county under its police power, the legislative authority has the discretion of determining "whatever measures are reasonably necessary to meet the public health needs." *Teter at 233*. The ordinances satisfy the exclusive allocation factor of *Covell*.

3. The Direct Relationship Test. The final factor for determining whether a charge is a fee or a tax is whether there is a "direct relationship between the fee charged and the service received by those who pay the fee or the fee charged and the burden produced by the fee payer." *Covell at 879*. Storedahl claims that it does not receive any

⁴⁵ See, Appellant's *Brief* at page 13.

services or create any burden.⁴⁶ Even if this was true, and, the county contests that it is, it does not result in the fee being invalid. In *Covell*, the court stated:

The charge may be deemed a regulatory fee even though the charge is not individualized according to the benefit accruing to each fee payer or the burden produced by each fee payer.

Covell at 879.

Storedahl also challenges certain activities, such as educational programs related to water quality impacts of livestock because those programs “are not related to the operation of an NPDES permitted gravel processing facility on Storedahl’s property.”⁴⁷ However, whether activities are regulatory or not is not determined by looking exclusively at whether those activities provide a service to or mitigate against a burden created by Storedahl’s property. As stated by the court in *Teter*, the argument that a fee is not regulatory because an individual fee payer does not receive a service or create a burden “misconceives the nature of judicial review of a legislative action.” *Teter at 236*. The court stated, “We do not undertake to a certain whether the appellant’s property is actually contributed to the increased surface water runoff.” *Teter at 236*.

⁴⁶ See, Appellant’s Brief at pages 16-17.

⁴⁷ See, Storedahl’s *Motion* at page 19.

Similarly, in this case, whether the activities funded by the stormwater fee are regulatory activities are not determined with sole reference to whether they provide a service to or mitigate a burden created by Storedahl's property.

Storedahl also argues that, because its mining operation is covered by a statewide Sand and gravel NPDES permit, it does not burden the county system.⁴⁸ The county's NPDES stormwater permit requires the county to regulate stormwater discharges associated with industrial activity. Special Condition S5 of the county's NPDES permit requires the county's Stormwater Management Program to include adequate legal authority to regulate stormwater discharges associated with industrial activity to the county stormwater system.⁴⁹ That section of the permit and 40 CFR 122.26(d)(2)(i) require the county to control the discharges of pollutants from industrial activity. The county met this condition by adopting CCC 13.26A.025 which requires entities operating under another regulatory program (e.g. the Sand and Gravel NPDES permit) to properly design, construct and maintain their stormwater facilities.

This is not the first case where a fee payer has challenged a fee ordinance claiming they do not receive any benefit or create any burden.

In *Morse*, a sewer customer challenged a fee that was imposed to pay for the expansion of sewer service. The challenger claimed that it already received sewer service and would receive no benefit from the expansion project. The court rejected this argument stating that there was no need to show that each fee payer was benefited from the expansion that the fee paid for. The court stated, “[t]he special benefit idea does not enter into the picture at all.” *Morse at 811*.

In *Teter*, the fee payer claimed, as does Storedahl, that no surface water left their property and all rain water percolated into underlying gravel beds and that they did not receive services funded by the fees. The court summarily dismissed the legal validity of this claim stating that it “misconceives the nature judicial review of a legislative action.” *Teter at 236*. Rather, the court noted that its review was limited to determining whether or not a legislative decision related to what properties to impose the fee upon was arbitrary or capricious. The court stated, “[w]e do not undertake to ascertain whether appellants’ properties actually contribute to the increased surface water runoff.” *Teter at 236*.

The *Teter* court noted the definition of “arbitrary” as being a “willful and unreasoning action without consideration and regard for the

⁴⁸ See, Appellant’s brief at pages 16 – 17.

facts and circumstances.” *Teter at 237*. The court noted that the stormwater fee classified properties based upon their use as being residential, industrial or commercial. With residential being charged a flat rate and industrial and commercial being charged more, depending upon the size of the lot. *Teter at 237*. The rate structure of the ordinance challenged by Storedahl is very similar to that reviewed in *Teter*. It uses the same use classifications as the ordinance reviewed in *Teter*. Additionally, it charges residential parcels a graduated rate, depending upon the size of the lot and charges industrial and commercial properties, depending upon the actual amount of impervious surface. The court found that “the rate schedule bears a reasonable relationship to the contribution of each lot to surface runoff.” *Teter at 237-8*. The present ordinance challenged by Storedahl is equally reasonable and bears a direct relationship to the burden produced by the fee payer.

In *Franks & Son, Inc.*, the state imposed a fee on trucking companies, based upon the vehicle weight of their trucks. The challengers claim that there was no direct relationship between the fee charged and the burden created by the fee payer because the fee was based not upon the number of miles the truck within the state. The court rejected this

⁴⁹ See, County NPDES permit at Section S.5.

argument noting that “the charge may be deemed 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.” *Franks & Son at 751.*

In *Irvin Water District v. Jackson P'ship.*, 109 Wn.App. 113, 129, 34 P. 3d 840 (2001), the fee payer complained that a water connection fee was only charged to multi-unit structures; whereas, single-family residents were not charged a connection fee. In rejecting this argument, the court state, “[c]harges need not be tailored individually to the benefit received by each customer and that only a practical basis for the rates is required, not mathematical precision,” (quoting, *Teter at 238*).

In *Tapps Brewing, Inc., v. City of Sumner*, 106 Wn.App. 79, 22 P. 3d 280 (2001), the court approved a stormwater fee that was very similar to Clark County’s in that it was based upon the amount of impervious surface present on the fee payer’s property. The payers challenged the fee claiming that the amount of the fee was disproportionate to the service they received or the burden they created. The court rejected the fee payers’ argument noting that the stormwater fee “need not produce a special benefit for the property charged.” *Tapps Brewing at 84, citing, Teter and Morse.*

In *Thurston County Rental Owners Assoc.*, the county charged a \$40.00 operation fee to all property owners with septic systems, regardless of whether the septic system was failing or not. The purpose of the fee was to monitor the effects of the septic systems on ground water quality. In rejecting a claim that there was not a direct relationship between the fee and the burden created or service received, the court quoted from *Covell*, stating:

The charge may be deemed a regulatory fee even though the charge is not individualized according to . . . the burden produced by the fee payer.

Stormwater is not like water or electricity. That is, it is not a utility which can be metered and charges imposed based upon the amount consumed. Rather, in Clark County, stormwater fees are charged based upon the amount of impervious surface existing on each parcel with improvements over \$10,000 in value. It is the reasonableness of this rate structure that is the determinative issue.

Storedahl also argues that there is no direct relationship between the fee charged and the service provide or impact alleviated because the general public also derives a benefit from the activities paid for by the

fee.⁵⁰ This “benefit to the general public” argument has been addressed above⁵¹ and will not be repeated here.

The county commissioners determined that “the amount of impervious surface and the nature of the land use of developed parcels have a proportional relationship to stormwater runoff impacts.”⁵² Stormwater fees are “based upon the relative contribution to increased surface and stormwater runoff from developed parcels and based upon the land use of the parcel.” *CCC 13.30A.050*. In order to prevail on the direct relationship factor, Storedahl would have to prove that it is arbitrary and capricious to conclude that there is a reasonable relationship between stormwater runoff and the amount of impervious surface present on a parcel. This it cannot do. The board of commissioners’ decision regarding what properties to impose a fee upon and the amount of the fee is not clearly and plainly erroneous. The reasonableness of the decision is not determined by whether Storedahl’s particular property actually burdens the system or receives a benefit. The ordinances satisfy the direct relationship factor of *Covell*.

⁵⁰ See, Appellant’s *Brief* at pages 15 – 16.

⁵¹ See, pages 8 – 10 and 30 – 31 *infra*.

⁵² See, Ordinance 1999-11-09 at page 2, attached hereto as *Appendix A*.

E. The General Accounting Office Decision.

Storedahl relies on a decision of the General Accounting Office, GAO No. B-306666.⁵³ This reliance is misplaced. In that decision, the GAO framed the issue before it as follows, “whether the Forest Service is constitutionally immune from paying the King County surface water management fee.”⁵⁴ The GAO concluded that the United States Forest Service was immune from having to pay King County’s stormwater fee. Federal agencies’ immunity from paying state taxes is premised upon the United States Constitution. The GAO decision does not cite to or conduct the analysis set forth in *Covell, supra*.

The general principal that states cannot tax the federal government derives from Chief Justice Marshall’s opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 L. Ed. 579 (1819). Although the immunity of the federal government and its agencies has been the source of often conflicting decisions:

The one constant . . . is simple enough to express; a state may not, consistent with the Supremacy Clause, U.S. Const., Art. IV, Cl. 2, lay a tax “directly upon the United States”. . . The court has never questioned the propriety of absolute immunity from state taxation.

United States v. New Mexico, 455 U.S. 720, 733, 71 L. Ed.2d 580, 102

⁵³ See, Appellant’s Brief at pages 20 – 21.

⁵⁴ See, GAO Decision No. B-306666 at p. 5.

S.Ct. 1373 (1982) (quoting, Mayo v. United States, 319 U.S. 441, 447, 87 L. Ed. 1504, 63 S.Ct. 1137 (1943)).

Storedahl incorrectly asserts that the fee is “a compulsory charge on all property.”⁵⁵ The fee is only charged to properties that are developed with impervious surfaces and the amount of the fee is dependent upon the amount of the impervious surface.

The Washington Supreme Court has already determined the analysis this Court is to conduct in determining whether a charge is a regulatory fee or an unconstitutional tax in *Covell*. Where the Washington State Supreme Court has already determined, in a particular context, the appropriate state constitutional analysis, it will not apply a different federal analysis under the United States Constitution. *State v. Gunwall, 104 Wn.2d 54, 720 P.2d 808 (1986); State v. Reichenbach, 153 Wn.2d 126, 101P.3d 80 (2004).*

GAO Decision B-306666 sets forth a federal analysis of whether the King County stormwater management fee is a tax for purposes of the federal immunity from state taxation under the Supremacy Clause of the United States Constitution. It does not consider any issue of Washington

⁵⁵ See, Appellant’s Brief at page 20.

constitutional law, nor does it apply the *Covell* analysis. It is of no authority in this proceeding.

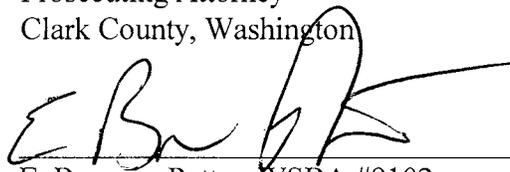
**IV.
CONCLUSION**

Storedahl has a heavy burden of proof to show that the county's stormwater fee is unconstitutional beyond a reasonable doubt. The fee they challenge was found to be a constitutional fee in *Teter v. Clark County*. The present day fee ordinance continues to meet the factors identified in *Covell* for determining the validity of a regulatory fee. The request to find the fee invalid "as applied to Storedahl" fails to recognize that the fee's validity is not determined on a property by property basis. The Court should uphold the constitutionality of the fee and affirm the trial court's entry of summary judgment in favor of Clark County.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By



E. Bronson Potter, WSBA #9102
Senior Deputy Prosecuting Attorney

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STOREDAHL PROPERTIES, L.L.C.,

Appellant,

v.

CLARK COUNTY,

Respondent.

No. 35608-2-II

AFFIDAVIT OF SERVICE

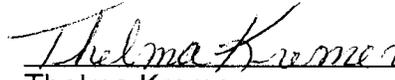
The undersigned, being first duly sworn, upon oath, deposes and says:

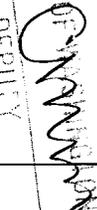
That I am a citizen of the United States of America and of the State of Washington, living and residing in Clark County, in said state; that I am over the age of 21 years, not a party to the above-entitled action and competent to be a witness therein; that by service indicated below, affiant caused true and correct copies of *Brief of Respondent* and *Affidavit of Service* to be directed to the clerk of the court and to the attorney-of-record for the above-named appellant at the following address:

Via e-mail to sedwards@perkinscoie.com on the 11th day of June, 2007, and, via U.S. mail on the 12th day of June, 2007, addressed as follows:

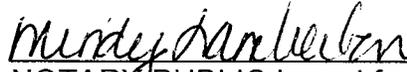
Scott M. Edwards
Perkins Coie
1201 – 3rd Avenue #4800
Seattle WA 98101-3099

Further your affiant saith not.


Thelma Kremer

FILED
COURT OF APPEALS
DIVISION II
07 JUN 13 AM 9:33
STATE OF WASHINGTON
BY DEPUTY 

SUBSCRIBED and SWORN to before me this 12th day of June, 2007.


NOTARY PUBLIC in and for the State of
Washington, residing in Vancouver.
My commission expires: 4-1-08