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## I. INTRODUCTION

RCW 54.04.030 prohibits public utility districts from levying property taxes within city limits for any utility, “**or part thereof,**” that is of “like character” to any utility owned or operated by the city. The Public Utility District No. 1 of Jefferson County<sup>1</sup> is doing just that – taxing Port Townsend property owners for **part of** its water utility expenses, even though the City operates its own water utility. Appellants, Ted Shoulberg and Charles Haniford, individually and on behalf of the class of all persons similarly situated, commenced this lawsuit to obtain declaratory and injunctive relief to bring an end to this illegal tax levy. They also sought reimbursement of taxes illegally collected in the past.

The material facts are not in dispute. The Utility District is collecting property taxes within Port Townsend. The District’s budgets show that those tax revenues are being spent by the District to protect and increase water supply for its water utility. The tax revenues also are being spent on sewer utility services. The Utility District is taxing property within the City of Port

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<sup>1</sup> We refer to the respondent variously as the “Jefferson County PUD” or the “Utility District” or simply the “District.” We reserve the “PUD” acronym for references to public utility districts generally (as in “the statute grants PUDs authority . . .”).

Townsend for these utility expenses even though the City provides its own municipal water and sewer services to its residents.

The Utility District presents two arguments to justify its tax. One, it argues that the tax prohibition in RCW 54.04.030 applies only to the initial acquisition of utility assets. According to the District, while a PUD may not tax within a city to pay for the initial acquisition of a utility (e.g., condemning a private utility), thereafter a PUD may tax inside the city to support that utility, even if the city is providing its own identical utility service.

The plain language of the statute provides no support for this distinction. RCW 54.04.030 prohibits a tax inside a city to support “any part” of a utility of like character, not just the original acquisition. The District cannot point to a single word in the statute that supports its distinction.

Further, the District’s distinction makes no sense when reading this provision in the context of the statute as a whole. The statute authorizes PUDs to include cities within the PUDs’ jurisdictional boundaries because cities may not provide some or all of the utility services offered by the PUD. But the statute’s anti-invasion clause statute expressly prohibits a PUD from offering utility services inside a city if that city owns or operates a utility of “like character.” RCW 54.04.030.

The proviso at issue here is the taxation corollary to the statute's anti-invasion clause. RCW 54.04.030 authorizes PUDs to tax within cities (because the city may not be providing all the utility services offered by the PUD), but the PUD may not tax inside the city to cover expenses of any utility "or part thereof" which duplicates a city utility.

Thus, in the context of the overall statutory scheme, the District's distinction makes no sense. The legislation clearly intends to keep the PUDs at bay, precluding them from invading the territory of a municipal utility and precluding them from taxing municipal property owners to pay for a PUD utility that the PUD does not (and cannot) offer inside the city. The District offers no logical explanation for reading the legislation to allow the District to tax inside the city to support some parts of the District's utility which is of "like character" to a utility offered by the city (and supported by the city's ratepayers).

Even if there were any ambiguity in the statute, basic rules of statutory construction lead to the same result. Most importantly, tax statutes are to be construed in favor of the taxpayer and against the taxing entity. Further, the District's construction would render the "or part thereof" clause superfluous.

The District's other justification is that the disputed tax proceeds pay for activities that are not part of its water utility. According to the Utility District, the protection and enhancement of water supply is not "part of" its water utility. The District contends it participates in "watershed planning" for some broader, regional purpose, un-tethered from (not "part of") its water utility.

The plain language of the PUD statute and the watershed planning statutes clearly demonstrates otherwise. The watershed planning statute, for instance, includes PUDs within its definition of "water supply utilities." RCW 90.82.060 (2)(a). It is in that role — as a "water supply utility"— that PUDs engage in watershed planning. The Utility District, like other "water supply utilities" (and water users generally), has the responsibility and authority to protect water supplies for its own use and use by others. The District's watershed planning activities are "part of" the District's water utility and, therefore, subject to the statutory limitation on the District's property tax power.

Consequently, appellants request that the Court reverse the decision of the trial court and enter appropriate declaratory and injunctive relief.

## II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

Assignment of Error. Appellants assign error to the Superior Court's Order Granting Jefferson County PUD's Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment (November 19, 2010).

Issues Presented. RCW 54.04.030 prohibits public utility districts from levying property taxes within city limits for any utility, "or part thereof," that is of "like character" to any utility owned or operated by the city.

1. Does this limitation on the property tax authority of a PUD apply only to prohibit use of those tax funds for initial acquisition of infrastructure by the PUD or does it apply to all parts of the utility, including on-going planning, acquisitions, and operations?
2. Does this limitation on the property tax authority of a PUD apply to a PUD's watershed planning functions?
3. Does this limitation on the property tax authority of a PUD apply to the Jefferson County PUD's acquisition of a potential water source (Peterson Lake)?

4. Does this limitation on property tax authority apply to the Jefferson County PUD's expenditures for certain elements of its sewer program?

III. STATEMENT OF THE CASE

A. The Jefferson County PUD and Its Operations

Defendant Public Utility District No. 1 of Jefferson County is a public utility district organized and acting under the authority of Title 54 RCW. That statute authorizes the creation of public utility districts to provide "public utility service, including water and electricity for all uses."<sup>2</sup>

Chapter 54.16 RCW sets forth the many functions of a PUD's water utility: a PUD has the power to acquire water utility infrastructure;<sup>3</sup> plan for and secure future water supplies;<sup>4</sup> operate the water utility infrastructure;<sup>5</sup> undertake surveys and plan for the development of the water utility;<sup>6</sup> condemn property for operation of the water utility;<sup>7</sup> acquire water rights for

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<sup>2</sup> 1931 Laws of Wash., ch. 1, § 1 (Historical Note in RCWA 54.04.020).

<sup>3</sup> RCW 54.16.020.

<sup>4</sup> RCW 54.16.030.

<sup>5</sup> RCW 54.16.100.

<sup>6</sup> RCW 54.16.010; -.020; -.090.

<sup>7</sup> RCW 54.16.020.

utility operations;<sup>8</sup> undertake water conservation activities;<sup>9</sup> and engage in watershed planning within the areas used and affected by the water utility.<sup>10</sup>

The Jefferson County PUD's jurisdictional boundaries are coextensive with the boundaries of Jefferson County and include the City of Port Townsend. But while the Utility District encompasses the entire county, the District's water and sewer utilities serve only certain unincorporated areas outside the City of Port Townsend. The Utility District provides no water or sewer service inside the City. CP 496, 500; CP 343.

B. The City of Port Townsend Operates Its Own Water and Sewer Utilities

While the City of Port Townsend is located within Jefferson County PUD's corporate boundary, the City operates its own water and sewer utilities. CP 495-496. The City water utility provides retail water services for all property within city limits. *Id.* The City has its own water rights and distribution lines. *Id.* The Jefferson County PUD plays no role in providing water to property inside the City. *Id.*

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<sup>8</sup> RCW 54.16.050.

<sup>9</sup> RCW 54.16.032 and 1989 Laws of Washington, ch. 421, § 1.

<sup>10</sup> RCW 54.16.360.

C. The Utility District Levies a Property Tax on Real Property Inside the City of Port Townsend

For years, the Jefferson County PUD has levied taxes on real property countywide, including within the City of Port Townsend. Mr. Shoulberg and Mr. Haniford own real property within the City of Port Townsend. For more than a decade, they have been assessed taxes by the Utility District for services provided by the City of Port Townsend. CP 29; CP 32. Mr. Shoulberg has paid approximately \$370 in real property taxes to the District since 2006. *Id.* Mr. Haniford has paid approximately \$339 in real property taxes to the District since 2006. CP 29. The Utility District continues to levy this tax. *Id.*

Since 2006 (three years before this lawsuit was commenced), approximately \$530,000 of property taxes have been levied by the Utility District against residents of the City for the Utility District. CP 290. As will be shown below, almost half of that money has been used to buy Peterson Lake and most of the remainder has been used for other water utility functions (“watershed planning”). Only 2 to 3 percent is spent for Utility District utilities not replicated by the City (*e.g.*, telecommunications and power).

D. Watershed Planning

1. The statutory scheme

The term “watershed planning” refers to a planning effort authorized by the Legislature. *See* 1997 Laws of Washington, ch. 442 (codified partially in ch. 90.82 RCW). The Legislature was concerned that public and private water utilities and other water users were withdrawing water from the same watershed without adequate planning to assure adequate supplies for all users and sufficient stream flows for fish:

. . . The development of [watershed] plans serves the state's vital interests by ensuring that the state's water resources are used wisely, by protecting existing water rights, by protecting instream flows for fish, and by providing for the economic well-being of the state's citizenry and communities. Therefore, the legislature believes it necessary for units of local government throughout the state to engage in the orderly development of these watershed plans.

RCW 90.82.010.

The legislation provides for watershed planning in geographic areas known as “Watershed Resource Inventory Areas” or “WRIAs.” The State is divided into 62 WRIAs.

Watershed plans are to address the competing demands placed on water resources by water utilities and to “[d]etermine how best to manage the

water resources of the WRIA or multi-WRIA area to balance the competing resource demands for that area within the parameters under RCW 90.82.120.” RCW 90.82.060(1)(b).

The legislation authorizes cities, counties, and “water supply utilities” to convene the major interested entities in each WRIA for purposes of addressing their competing needs and mitigating the impact of water withdrawals on aquifers, instream flows, and fish. RCW 90.82.060(2)(a). PUDs are included as one of the “water supply utilities.” RCW 90.82.020(5). Participants—including the PUDs as a “water supply utility”—are to create a “watershed plan,” which must include a water quantity component, including the following sub-elements:

- An estimate of the total water resources present and available in the basin;
- An estimate of future needs;
- Identification of areas where aquifers are recharged and where they discharge to surface water bodies;
- An estimate of surface and groundwater available for future appropriation, taking into account minimum instream flows;
- Strategies for increasing water supplies, such as conservation, reuse, voluntary water transfers, aquifer recharge and recovery, and additional water allocations or storage.

RCW 90.82.070.

2. Both the Utility District and the City are deeply involved in the local watershed planning function

The watershed encompassing Port Townsend and much of Jefferson County is known as the “Quilcene-Snow Water Resource Inventory Area” or WRIA 17. CP 456 (map). Because the City’s and the District’s water utilities make large water withdrawals from this watershed, the City and the District were co-conveners of the WRIA 17 “Planning Unit” and have been heavily involved in the planning process throughout. CP 497-98. The City and the Utility District (along with the County) have remained as leaders of the effort over the ensuing years. Both the Utility District and the City serve on the Planning Unit’s Steering Committee and its Technical Committee. Both the District and the City were centrally involved in the development of the Watershed Plan and are actively involved in implementing its various recommendations. *Id.*

3. The WRIA 17 watershed planning process recognizes the connection between the Utility District’s groundwater withdrawals and water levels in nearby streams

The WRIA 17 Planning Unit has grappled with water resource issues confronting the two major water utilities – the Utility District and the City – and other water users (e.g., irrigators) who sometimes are at odds with

interest groups advocating for adequate stream flows for fish (*e.g.*, the Tribes). As the Utility District states in one of its publications:

The Planning Unit is responsible for assessing water resources within the basin as well as developing strategies to assure water is available for both people and fish.

CP 435.

While the Utility District relies on groundwater to serve its customers, the aquifer the Utility District uses is hydraulically connected to surface waters, like Chemicum Creek. As a result, the Utility District's large production wells not only impact area aquifers, but also reduce the water in Chemicum Creek. This is a problem that the Utility District and the whole WRIA 17 Planning Unit have been addressing. Thus, the Utility District has obtained funding for a study "to develop a pumping schedule [for its wells] that will have the least amount of impact to Chemicum Creek while still providing adequate water for the needs of the community." CP 433. The study is intended "to develop pumping schemes that will minimize impact to Chemicum Creek while meeting demands" and "allow the Utility District to add the Four Corners well into its set of tools for meeting demand and minimizing stream impacts." CP 437.

Because groundwater withdrawals by water purveyors like the Utility District are impacting area aquifers and streams, the WRIA 17 aquifer protection recommendations are slated for implementation by “water purveyors” – *e.g.*, the District’s water utility – as the Utility District itself has recognized. CP 457-58.

4. The Watershed Plan recommends that water utilities, including the Utility District, conserve water to protect instream flows and aquifers

The WRIA 17 watershed planning effort has resulted in a series of studies and plans. The overarching “Watershed Plan” was adopted in 2003. CP 438. The Plan’s Executive Summary ties the watershed plan to the efforts to assure adequate water for human consumption, while assuring adequate protection for fish habitat.

It is the intent of the plan to recommend actions to ensure clean water in sufficient quantities to provide both adequate habitat for fish and an adequate supply for human uses.

CP 443.

A review of the WRIA 17 Watershed Plan demonstrates a focus on issues of central concern to any water utility: water supply, water quality, and water conservation. *See, e.g.*, Watershed Plan at chapters 3.2 (Water Quantity), 3.3 (Water Quality), 4.1 (Options to Increase Water Supplied and

Reduce Water Consumption), 4.2 (Options for Water Quality Protection and Enhancement). CP 440-41.

The plan “recommends that water purveyors and major water users in the WRIA prepare and implement water conservation plans,” including public “education and outreach.” CP 446.

The District recognizes its role in this effort to conserve water and maintain instream flows is as a “water purveyor:”

Recommendation Number 5 [of the Watershed Management Plan] . . . asks **water purveyors** to protect critical aquifer recharge areas and wellhead protection zones.

CP 457 (Utility District-County Interagency Agreement) (emphasis supplied).

5. The WRIA 17 “Detailed Implementation” Plan also links water conservation to the Utility District’s (and City’s) utility functions

In 2007, the WRIA 17 Planning Unit adopted a Detailed Implementation Plan. CP 459 – 467 (excerpts). This plan, like the ones before, links the Utility District’s and City’s water conservation efforts to their water utility functions. The implementation plan notes a new state rule “requires all municipal water systems” to meet new conservation requirements; that the Utility District and the City had adopted new conservation plans prior to the new State rules; and that the Utility District

and City will still be required to meet the terms of the new State rule. CP 465. The plan identifies a number of water conservation actions undertaken by both the Utility District and the City, *e.g.*, leak detection programs and public education. *Id.* Likewise, the Implementation Plan identifies future conservation actions to be undertaken by both the City and the Utility District. CP 465-67.

The activities the District tags as “regional” or “county-wide” are the very activities the District has undertaken as part of the watershed planning process. The development of water conservation plans, public education about water use, leak detection, and the like are all intended to reduce the environmental impact of water withdrawals by the Utility District (and other water purveyors).

6. The District’s “Water System Plan” for its water utility repeatedly acknowledges that water conservation and Watershed Planning are part of its water utility

The District’s own Water System Plan (CP 572 – 594) for its water utility includes an entire chapter addressing water conservation opportunities. CP 579 – 590. The plan describes one of the utility’s objectives as providing a “regional perspective” regarding “resource management” issues. CP 577. This objective is not housed in the plan for

some other conservation entity created by the District. The District acknowledges that these regional water resource management issues are “part of” its water utility by including those regional resource management issues as a component of its water utility’s Water System Plan.

The District’s Water System Plan recognizes that State law mandates conservation plans to be developed by water purveyors, like the District’s water utility. The District’s Water System Plan explains that “new laws dictate that a municipal water supplier must: (a) integrate conservation planning into its overall system operation and management; (b) appropriately fund conservation activities; [and] (c) adopt and achieve water conservation objectives as part of its water system plan . . .” CP 579. The District’s Water System Plan goes on to acknowledge that the WRIA 17 watershed plan “will ‘include provisions for . . . water conservation’ and calls for incentive-based water conservation programs **through water purveyors.**” CP 587 (emphasis supplied). One component of the water utility’s conservation plan is “watershed planning.” *Id.* In all these ways, the District’s own plan for its water utility acknowledges that water conservation and watershed planning are “part of” its water utility function.

7. The District's efforts to protect instream flows are directly linked to its effort to expand the water supply for its water utility and to mitigate the impact of its water utility's water withdrawals

The District has tried to characterize its efforts to maintain instream flows as a conservation function separate from its water utility. But the District's documents demonstrate the direct and vital tie-in between the District's efforts to maintain instream flows and the District's quest for additional groundwater withdrawals to meet burgeoning demand.

In response to increasing water demands, the District's consultant (Golder & Associates) prepared a report which explained the link. The Golder report first explains that the District "recently drilled a 600-foot well in the Tri-Area to explore for deeper aquifer zones in the area (PGG 2007), using funding provided by an Ecology grant to the WRIA 17 PU [Planning Unit]." CP 602. The report notes that the District also has filed four applications for groundwater rights. CP 603. But, significantly, processing those new applications for water rights is expected to be delayed until instream flow issues are addressed:

The incorporation of an instream flow rule into water management for the Chimacum Sub-Basin may limit new water use during low-flow periods, and **could have a substantial impact on the availability of new sources of uninterrupted water supplies for**

**out-of-stream users (e.g., purveyors and residential users).**

*Id.* (emphasis supplied).

Golder also explains that if this project is a success, it could provide water directly for the District as well as for instream flows (which would unlock the District's groundwater applications pending with Ecology):

Although the needs of the Chimacum Valley Tri-Area communities of Chimacum, Irondale, and Port Hadlock, along with Marrowstone Island is used as a starting point for quantifying enhanced recharge quantities, benefits may be available to other areas in the Chimacum Sub-Basin. Additionally, stream flows in Chimacum Creek are often at critically low levels during the summer and early fall. Therefore, a key consideration in the selection of enhanced recharged locations will be the ability to directly or indirectly benefit instream flows in the basin, in addition to providing additional water for municipal use.

CP 604.

If this system is designed solely to directly enhance instream flows, then it is anticipated that it could be used **as part of a mitigation plan for new groundwater rights for PUD use.**

CP 607 (emphasis supplied).

Mr. Graham, the District's Resource Manager, does not dispute this and, indeed, concurs: "Stream augmentation from the lake could be used for PUD water rights." CP 541 (¶ 30). So much for the District's claim that it is

addressing instream flow issues apart from its own water utility needs.

In sum, the Golder Report (and this statement from Mr. Graham) demonstrate that the Utility District is involved in these so-called “regional” water resource issues, including instream flow issues, because the District has a need to develop additional water supplies for its customers, particularly those in the rapidly growing Tri-Area. Addressing near-term and long-term water supply issues is a vital part of any water utility’s functions. (That is precisely why the State requires water utilities to include an assessment of their water rights and long-term water supplies in their water plans. WAC 246-290-100(4)(f)(ii).) Characterizing these long-term water supply issues as part of a “regional” watershed planning process does not make them any less a part of the District’s water utility.

E. The Peterson Lake Acquisition was Carried out as Part of the Utility District’s Water Utility

The public utility district statute allows a public utility district to purchase water for the purpose of having an ample supply of water for all purposes. RCW 54.16.030; RCW 54.16.020. The Jefferson County PUD purchased Peterson Lake for this purpose. That acquisition was carried out as part of the Utility District’s water utility.

The Utility District is paying for Peterson Lake with property taxes collected from Port Townsend property owners. Indeed, 43 percent of those tax proceeds are used to pay for Peterson Lake – more than any other item. CP 290. The District’s efforts to characterize acquisition of the lake as something other than part of its water utility (and, therefore eligible for use of Port Townsend taxpayer funds) is one of the principal issues in this suit.

In 2003, Bernard (“Bernie”) Peterson approached the District about selling his Peterson Lake property to the District. As recounted by the Utility District’s Resource Manager, “Bernie said that he had seen lots of water problems in the newspaper and thought the lake could help solve them.” CP 387. In May, 2005, the District applied for a grant to investigate potential benefits if it purchased the lake. In its grant application, the Utility District described the expected benefits in terms clearly related to its water utility role, both as a potential water supply source and to maintain instream flows:

Water supplies for people are limited in the Olympic rain shadow. Threatened summer chum salmon also compete for use of limited water resources. This project would address both the need to provide water as well as assist fish when they need it most. **Water could be utilized for public drinking water during the late fall, winter, and early spring.** During the summer and late fall prior to rains water could be pumped into Chemicum Creek, increasing flows to dampen temperature effects and provide more habitat for rearing and spawning. **The community would get an additional,**

**reliable, and safe source of drinking water** from a fenced and protected upper watershed that would never be developed residentially.

CP 388 (emphasis supplied).

An August 10, 2004 internal e-mail from the Utility District's Resource Manager to its General Manager states that the property, if purchased, might be used to develop up to three wells in the medium to high yield range. CP 398. Three months later, the General Manager communicated to the District's appraiser that the property has the "potential to serve as both a source and as a storage vessel for public water." CP 400. Consistent with this representation, the letter agreement executed by the Utility District and the appraiser states that "the Public Utility District is more interested in using Peterson Lake as a water source and/or storage vessel for public water than in the land surrounding the lake." CP 401-402.

On October 12, 2005, the Utility District entered into a Real Estate Purchase and Sale Agreement with Peterson for the purchase of his property. CP 391-395. The Utility District's press release that day clearly linked the purchase of the lake to the Utility District's water utility functions:

Jefferson County PUD No. 1 has purchased property surrounding Peterson Lake; a deep, 24 acre lake at the head of the Chemicum Valley. The purchase, **viewed as access to a potential future source of water for the burgeoning Tri-**

**Area** system (now known as the Quimper Water System which includes Marrowstone Island), would also serve to protect nearly 240 acres in the Chemicum watershed from future development.

. . . The Quimper system is dependent primarily upon one large production well, the Sparling well. Due to the inherent risks of and impacts from this dependency, the PUD has long sought to diversify its sources. Peterson Lake would help to alleviate this dependency.

\* \* \*

. . . Graham [the Utility District's Resource Manager] said, "if the lake is to be a potential public water supply it needs to be protected as a public water supply." That includes security fencing, patrolling the access points, stiff fines and the threat of jail time. . . .

CP 387 (emphasis supplied).

On January 18, 2006, the Utility District Board of Commissioners authorized its manager, James Parker, to close the transaction. CP 396-397.

PUD Resolution 2006-001 explained the Utility District's purpose in acquiring the Peterson Lake property:

WHEREAS, the PUD Commissioners find that the Peterson Lake Property is suitable for its intended purposes, which include a water storage reservoir, water supply, and watershed resource uses, a recharge source for Chemicum Creek, and potential environmental mitigation for future well water development; and

WHEREAS, the Commissioners find that **the Peterson Lake property will represent an unparalleled and unique public**

**asset of great benefit to present and future water service customers of the PUD**, and furthers the Commissioners' duty to engage in present and future water system and watershed planning . . .

CP 396 (emphasis supplied).

In addition to justifying purchase of the lake for obvious water utility purposes such as providing a new water supply and storage, the Utility District also has contemplated using the lake to mitigate the impacts of their wells on aquifers and instream flows. In 2003, in the WRIA 17 Storage Alternatives Analysis (CP 485), Peterson Lake was included on a preliminary list of potential storage sites. In the August 2004 e-mail from Mr. Graham to Mr. Parker referenced earlier (CP 398), another rationale for purchasing the lake was to ensure adequate flows into Chemicum Creek and for related watershed protection purposes. Likewise, in the "Memorandum for Record" (CP 407-408), another possible function of the lake was identified as augmenting stream flows at times of low flow.

To examine that potential, the Utility District retained the Pacific Groundwater Group (PGG) to analyze the possible use of Peterson Lake as a source to recharge Chemicum Creek to offset groundwater pumping (in addition to assessing its potential for water storage). In December 2005, PGG determined that "storage in Peterson Lake could provide 'mitigation

water' for stream flow impacts due to groundwater pumping further downstream . . ." CP 409-410. Likewise, the District's watershed planning funding agreement with Jefferson County states that the "PUD is in the process [of] purchasing Peterson Lake to protect a critical aquifer recharge area in the Chimacum Creek Sub-basin." CP 457.

After acquiring the lake, the Utility District has continued with its efforts to use it as a public water supply source and/or to mitigate the impacts of its wells on aquifers and streams. Through the watershed planning process, it has promoted the Peterson Lake Storage and Stream Augmentation Feasibility Study "to determine if the Peterson Lake site can be used for water supply storage and/or for stream augmentation **as mitigation for water rights** and, if so, develop a design and plan to provide additional water for **public supply** and flow augmentation for Chimicum Creek during critical low flow periods." CP 412 (emphasis supplied).

These twin, water utility related objectives (*i.e.*, (1) developing a new water source for "public supply" and (2) mitigating impacts from other Utility District wells) are highlighted again in the Utility District's description of this project:

The proposal is to use Peterson Lake, a unique, invasive species-free lake at the headwaters of Chimicum Creek, to

store water during the late fall and winter using the water for public supply as well as augment flows in the summer for ESA-listed summer chum, and perhaps dampen harmful temperature effects in the process. The community would get a safe, protected, reliable source of spring-fed drinking water that is not dependent upon snow pack and is better suited as a long term supply source.

CP 414.

Consistent with the foregoing, the Utility District's rate study specifically includes debt associated with the acquisition of Peterson Lake in the water utility rate analysis. CP 420. The Utility District's rate study states that Peterson Lake was purchased to serve a number of functions, all related to the water utility, including serving as a drinking water source; as a reservoir; and recharging and protecting Chemicum Creek. CP 422.<sup>11</sup>

The Utility District borrowed \$2 million to buy the Peterson Lake property. CP 40. The Utility District is now liable for a principal and interest charge of more than \$200,000 annually for twenty years. *Id.* Even though the Peterson Lake property was acquired to benefit the Utility District's "present and future water service customers" CP 396 (PUD Resolution 2006-001), and for other purposes related to the Utility District's water utility, and

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<sup>11</sup> While the utility rate study identifies the Peterson Lake debt expense as an expense related to the water utility, it asserts that the expense can be funded by tax proceeds pursuant to RCW 54.16.080. *Id.* The rate study author makes no reference to the limitation on the PUD's taxing authority in RCW 54.04.030.

even though the City of Port Townsend has its own water utility, the Utility District has been using tax revenues from within the City of Port Townsend to pay for the lake.

F. The Utility District Uses Virtually All of Its Tax Revenues to Pay for the Purchase of Peterson Lake and Watershed Planning Activities

The Utility District's operating budget is divided into a Utility Fund and a General Fund. The General Fund is funded almost exclusively by the proceeds from its property tax. CP 301. Because the General Fund includes tax revenues from inside the City of Port Townsend, the Utility District cannot use the General Fund to pay for water or sewer utility expenses. RCW 54.04.030.<sup>12</sup>

The issue in this lawsuit is whether expenses charged to the General Fund are "part of" the Utility District's water or sewer utility and, thus, are not properly chargeable against Port Townsend property owners. As will be described in more detail below, nearly half of the expenses charged against the General Fund (the property tax fund) are related to the purchase of Peterson Lake. Much of the remaining General Fund expenses are for the

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<sup>12</sup> Receipts from the Utility District's utility activities (*e.g.*, payments by water and sewer utility customers) and expenses that the Utility District acknowledges are related to those utilities are charged against the Utility Fund. CP 301. In 2010, the Utility Fund accounted for 82% of the District's budget. *Id.*

Utility District's watershed planning functions. A small amount of expenses charged to the General Fund relate to the sewer utility. CP 301.

G. Expenses Related to the Purchase of Peterson Lake and/or Watershed Planning Are Included in Each of the Four Sub-Categories of the General Fund

The Utility District's 2010 Budget charges four categories of expenses against the General Fund. CP 301 (2010 Budget Worksheet). Each of these General Fund categories includes expenses related to the purchase of Peterson Lake, watershed planning, or both.

1. "Debt repayment – Non-Bond Fund" (\$171,943)

This category consists of a single item: repayment of the principal and interest on the bond used to finance the purchase of Peterson Lake. *See* CP 308. If the Peterson Lake acquisition is "part of" the Utility District's water utility, then this expense should not be charged against the General Fund (*i.e.*, the fund that includes tax payments from property owners inside the City of Port Townsend).

2. "Programs" (\$84,895)

Three programs being charged against the General Fund in the "Programs" section of the 2010 Budget are part of the water utility:

- Community involvement/education: fairs, education, water watchers.
- Regional Water Resource – Aquifer Properties (Digi Loggers Support).
- Peterson Lake maintenance (area police, protection).

CP 308. The first of these three programs is related to the Utility District’s water conservation efforts. *See* CP 296; CP 468. Water conservation is a key element of any water utility. Indeed, it is a required element of every water utility’s state-approved water plan. WAC 246-290-810.

The Regional Water Resource item is related to the Utility District’s watershed planning efforts (detailed below). *See* CP 298. The Peterson Lake maintenance item is obviously directly related to the Utility District’s purchase of Peterson Lake.<sup>13</sup>

### 3. “General and Administrative” (\$33,402)

This category includes a number of overhead items like insurance, utilities, per diem expenses for the Commissioners, and accounting services. *See* CP 305. The Utility District has allocated varying percentages of these different items to the General Fund. For example, 25 percent of the

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<sup>13</sup> Recent budgets have charged other water and sewer utility related “programs” against the General Fund, too. For instance, in the 2009 Budget and in the 2008 Budget, programs for “SSMA Technical Assistance,” (pertaining to satellite water systems (CP 298)), “water/sewer studies,” and “MOS training for loan income” (an on-site sewage inspection program (CP 299)) were charged against the General Fund. Each of these items is related to the Utility District’s water utility or sewer utility functions, too. *See* CP 298-299.

accounting fees, 50 percent of a State Auditor expense, and ten percent of telephone and postage are charged to the General Fund. *Id.*

The Utility District considers many factors in making these allocations. *See* CP 471-472. The first factor is pretty close to the mark and states: “Whether the task directly or indirectly affects PUD water and sewer service activities. . . ?” *Id.* The problem, however, is that this is stated in juxtaposition to another factor which is not relevant. Stated in its entirety, this factor states: “Whether the task directly or indirectly affects PUD water and sewer service activities or is a regional countywide benefit that will benefit all Jefferson County residents equally?” The second part of this factor confuses the issue. If a task is part of the Utility District’s water or sewer utility, it cannot be allocated for payment by City taxpayers. It does not matter whether the sewer or water utility task might have “countywide benefit.” For instance, a water utility function of conserving water in the aquifer may have regional benefits. But because water conservation is a part of the water utility’s activities (and because the City has its own water utility engaged in similar activities), the Utility District cannot allocate any part of this activity to City taxpayers.

Using this first factor, the Utility District asserts that it is entitled to treat its watershed planning activities not as part of its water utility, but as activities with a “regional countywide benefit.” If the Utility District’s watershed planning and Peterson Lake activities are part of the Utility District’s water utility and, therefore, not properly chargeable against Port Townsend tax revenues, then the Utility District should be directed to reexamine its allocation of these general and administrative expenses and adjust them accordingly.

4. “Personnel and Benefits” (\$107,260)

This category includes the salaries paid for the County Commissioners, the Utility District’s employees, and various related taxes and benefits. CP 304. As with the overhead expenses, the Utility District has allocated varying percentages of these expenses to the General Fund. For instance, slightly more than 50 percent of the Utility District’s Resource Manager’s salary was charged to the General Fund, *id.*, mostly because of work on “watershed planning,” CP 473. If the Court determines that time spent by the Commissioners and employees related to watershed planning and/or Peterson Lake are not properly charged against tax revenues collected from inside the City, then the Court should direct the Utility District to

reexamine these “Personnel Costs” allocations and adjust them accordingly, too.

#### H. Procedural History

On July 16, 2009, Plaintiffs Ted Shoulberg and Charles Haniford filed a Complaint for Declaratory and Injunctive Relief challenging the illegal property tax levy assessed and collected by the County Treasurer on behalf of the Utility District. CP 1-8.

On December 3, 2009, appellants moved for certification of the class. CP 9-27. Both the appellants and the respondent moved for summary judgment on February 11, 2010. CP 647. The motions were heard by a visiting Clallam County Superior Court judge, who issued his decision on October 14, 2010 granting the District’s motion for summary judgment and denying appellants’ motion for summary judgment. CP 627-644. The class certification issue was not addressed by the trial court. This appeal followed.

### IV. ARGUMENT

#### A. Standard of Review

On review of an order granting or denying summary judgment, the appellate court engages in the same inquiry as the trial court. *Corbally v. Kennewick School Dist.*, 94 Wn. App. 736, 739-740, 973 P.2d 1074 (1999).

Because of the *de novo* nature of summary judgment review, the findings of the trial court are superfluous and not considered by the appellate court on appeal. *Hubbard v. Spokane County*, 103 Wn. App. 671, 14 P.3d 806 (2000).

The usual summary judgment standards apply. CR 56(c); *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 557-558, 27 P.3d 1208 (2001).

- B. The Plain Language of RCW 54.04.030 Prohibits a PUD from Taxing within a City for a Utility, “Or Part Thereof,” If the Utility is of “Like Character” to a Utility Provided by the City.

RCW 54.04.030 states (emphasis supplied):

**Restrictions on invading other municipalities.**

This act shall not be deemed or construed to repeal or affect any existing act, or any part thereof, relating to the construction, operation and maintenance of public utilities by irrigation or water districts or other municipal corporations, but shall be supplemental thereto and concurrent therewith. No public utility district created hereunder shall include therein any municipal corporation, or any part thereof, where such municipal corporation already owns or operates all of the utilities herein authorized: PROVIDED, that in case it does not own or operate all such utilities it may be included within such public utility district for the purpose of establishing or operating therein such utilities as it does not own or operate: PROVIDED, further, that no property situated within any irrigation or water sewer districts or other municipal corporations shall ever be taxed or assessed to pay for any utility, or part thereof, of like character to any utility, owned or operated by such irrigation or water district or other municipal corporations.

The court's obligation is to ascertain and give effect to the legislative intent of RCW 54.04.030. *Blueshield v. State Office of Ins. Comm'r*, 131 Wn. App. 639, 646, 128 P.3d 640 (2006). If the language of the statute is clear, statutory construction is unnecessary, and the words of the statute shall be given their plain and ordinary meaning. *Id.* In addition, a court cannot add words or clauses to an unambiguous statute, but must apply the statute as written. *Id.* at 647.

RCW 54.04.030 is plain on its face. This section unambiguously forbids PUDs from collecting taxes from any property located within a city to pay for the PUD's utility, or part thereof, that is of like character to any utility owned or operated by the city. For example, when a city owns or operates its own water utility, a PUD cannot levy taxes on property within the city for any part of the PUD's water utility.

This provision was examined in *Public Util. Dist. No. 1 of Whatcom County v. Superior Court*, 199 Wash. 146, 90 P.2d 737 (1939) ("*Whatcom County PUD*"), where the Supreme Court stated:

From this section, it clearly appears that it is not the intent of the law that a utility district may, within the boundary of a municipal corporation, duplicate utilities already owned or operated by the municipality, and assess the property within the boundaries of such municipal corporation for such duplication. The territory embraced within the limits of the

cities may be included within the utility district, because the cities do not own or operate all of the utilities contemplated by chapter 1, Laws of 1931, but their property cannot be taxed to construct, purchase or support public utility district utilities already owned or operated by the cities.

199 Wash. at 158-59 (emphasis supplied). The Court found that the language was “clear” and affirmed the trial court’s ruling that the PUD “has no right to levy a tax upon the property within the corporate limits of Blaine and Sumas” for utility services already provided by those cities. *Id. See also Pub. Util. Dist. No. 1 of Pend Oreille Cy. v. Town of Newport*, 38 Wn.2d 221, 228 P.2d 766 (1951) (municipality authorized to establish electric utility even though PUD was serving it first); AGO 1982 No. 8. (RCW 54.04.030 precludes PUD from taxing inside municipality, even if municipality created its own like character utility after formation of the PUD).

C. The Prohibition in RCW 54.04.030 is Not Limited to the Initial Acquisition of Utility Infrastructure.

Jefferson County PUD argued below that the language of RCW 54.04.030 is limited only to the initial acquisition of duplicative, competing utility assets. With this, the Utility District manufactures a nuance that is nowhere to be found in the statute’s plain language nor gleaned from the standard canons of statutory construction.

1. The plain language of RCW 54.03.040 provides no support for the District's claim that it applies only to a PUD's initial acquisition of utility infrastructure

The PUD seeks to read into the statute words that simply are not there. There are no words in the statutory prohibition that express or imply the distinction the District claims. Indeed, the legislation does just the opposite. The statute's tax limitation applies to the competing utility "or part thereof." This phrase destroys the District's contention that the prohibition applies only to certain portions of a PUD's utility. The statute does not permit a PUD to parse between initial infrastructure purchases, subsequent infrastructure purchases, operational expenses, or any other "part" of the utility. The language of the statute could not be clearer. The prohibition applies to the duplicated utility "or part thereof."

The Supreme Court had no problem understanding the full import of this statutory limitation in *Whatcom County PUD, supra*. There, the court read the prohibition to apply not just to the "purchase" of infrastructure, but to "construct[ion]" and general "support." *Id.* at 159.<sup>14</sup> This provision

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<sup>14</sup> *Whatcom County PUD* did not involve a water utility's watershed planning or water supply protection efforts, but instead only the construction and acquisition of utility assets. But the opinion reveals a recognition by that court that the statute's plain language applies to more than just the initial construction and purchase of infrastructure for the utility.

applies to every part of the utility, including (for a water utility) its efforts to protect water supply and instream flows (via watershed planning).

In AGO 1982 No. 8, the Attorney General considered the scenario where the Grays Harbor PUD was levying a tax prior to the existence of the Town of McCleary. After the town's incorporation, the PUD continued to levy the tax to provide ongoing support for the PUD's electric utility, even though the new town was now operating its own electric utility. In concluding that the tax could not be maintained, the Attorney General drew no distinction between taxes to fund the PUD's initial infrastructure acquisitions versus taxes used for ongoing support. "Property situated within the Town of McCleary may not be taxed to construct, purchase **or support** the public utility district's electrical system, so long as the town continues to own or operate its own electrical utility." (Emphasis supplied.) *Id.* at 1.

In discerning a statute's plain meaning, the court should consider the language in context of the statute as a whole. *One Pacific Towers Homeowners Ass'n v. HAL Real Estate Investments, Inc.*, 148 Wn.2d 319, 330, 61 P.3d 1094 (2002) (internal citation omitted). The PUD statute's anti-invasion clause prohibits a PUD from including a city within its territory except for the purpose of providing a utility not owned or operated by the

city. RCW 54.04.030. The proviso at issue here is the taxation corollary to the anti-invasion clause. Thus, the statute not only prohibits a PUD from competing inside a city, but, in like manner, prohibits a PUD from taxing inside a city (for a utility of “like character” to one provided by the city).

In view of this statutory scheme, it would make no sense to allow a PUD to tax inside a city to cover all of its duplicative utility expenses other than the expense of initial infrastructure acquisition. The statutory scheme evinces a total separation of the PUD from the city’s utilities, both in terms of competing operations and double taxation. PUDs may include cities in their territory because a city may not duplicate every utility offered by the PUD. (For instance, the Jefferson County PUD has a nascent power utility. The city has no similar utility. We do not oppose the District taxing inside the city to support its power utility.) But if a city operates a utility of “like character,” the territory inside the city is “hands off” both in terms of the PUD offering competing service and raising tax revenues.

2. Even if RCW 54.04.030 were considered ambiguous, statutory construction reveals an intention for broad application of the prohibition to all parts of the utility, not just the original acquisition of infrastructure.

If, despite the foregoing analysis, the court concludes that the language in RCW 54.04.030 is ambiguous, the canons of statutory

construction lead to the same conclusion: the prohibition applies to all parts of the utility, not just the initial acquisition of infrastructure.

“The most pertinent of [the statutory construction] rules is that if there is any doubt as to the meaning of a tax statute, it must be construed against the taxing power.” *Duwamish Warehouse Company v. Hoppe*, 102 Wn.2d 249, 254, 684 P.2d 703 (1984). “If there is any doubt about a legislative grant of taxing authority to a municipality, it must be denied.” *Okeson v. City of Seattle*, 150 Wn.2d 540, 558, 78 P.3d 1279 (2003). “Municipal corporations have no inherent power to levy taxes. The powers are derived through legislative grant, and are strictly construed. No implications are indulged to expand the powers granted.” *State ex rel. Tacoma School District No. 10 v. Kelly*, 176 Wash. 689, 690, 30 P.2d 638 (1934) (internal citation omitted).

This rule decisively requires construing any ambiguity to protect Port Townsend property owners from paying a tax to support any “part” of the District’s water utility (because the city has a water utility of its own). Even if there is an ambiguity, it should be construed to preclude the District from imposing its tax inside the city to support any part of its water utility.

Yet another relevant canon of statutory construction is that every part of a statute must be presumed to have some effect and not be rendered meaningless or superfluous. *Ballard Square Condominium Owners Ass'n v. Dynasty Const. Co.*, 158 Wn.2d 603, 610, 146 P.3d 914 (2006). Any reading of RCW 54.04.030 that suggests limitations of the prohibition to only initial acquisitions makes the “or part thereof” phrase meaningless and superfluous. Any such reading ignores that this phrase demonstrates an intent that the prohibition have a broad reach to include all aspects of the utility, not just its formation.

D. The Limitation in RCW 54.04.030 Applies to the District's Efforts to Acquire Future Potential Water Sources and to Mitigate the Impacts of its Water Withdrawals on Instream Flows

The largest expenditures supported by the disputed tax revenues from inside the City of Port Townsend are expenditures for the acquisition of Peterson Lake and expenditures to maintain instream flows (through “watershed planning”). The issue here is whether these expenditures are for functions that are “part of” the District’s water utility or whether the Utility District incurred these expenses for reasons separate from its water utility.

We approach this issue from two perspectives. In part, we consider the functions bestowed on PUDs by the PUD statute (Title 54). We

demonstrate that all of a PUDs functions are to support one utility or another (e.g., water, sewer or power). There is no utility pigeonhole that these expenditures fit into other than the District's water utility.

But we also consider the watershed planning laws. We demonstrate that those laws provide PUDs authority to conserve water in their role as “water supply utilities,” not otherwise.

First, Title 54 RCW as a whole leaves no doubt that everything that a public utility district does is “part of” either its water utility, its sewer utility, its electric utility, or some other utility. Their name—public utility districts— says it all. PUDs are not granted powers other than as a utility.

If the intent of the initiative were to create some kind of conservation agency, separate from the utility district, the initiative would have included provisions describing how such entities were to be created, managed, funded and operated. But there is nothing of the sort in the legislation. To the contrary, the structure and content of the statute (in its original form and as amended over the years) underscores that the law focuses exclusively on the creation of utility districts. As noted earlier, the statute grants PUDs authority to acquire utility infrastructure and operate the infrastructure, authority to undertake surveys and plans for the development of utilities;

condemn property for operation of the utility; and acquire water rights for operation of the utilities. *See supra* at 6 - 7. There are no corresponding provisions regarding the establishment of a conservation district.

As the District explains in its Water System Plan recounting the creation of the District: “The proposition forming the District to comprise all of Jefferson County was submitted to the voters of the County and approved in the fall of 1940. The District was authorized to acquire, construct and operate water and electrical systems within and without its limit for the benefit of the County’s residents.” CP 576. There is no indication in the Water System Plan or elsewhere that the District was established or authorized to function as some kind of conservation agency separate and apart from its utility functions.

According to the District, the issue of whether watershed planning is “part of” a utility district’s water utility function or, in contrast, whether it is part of some separate entity or function turns on the statement of purpose in section one of the PUD initiative. That sentence states:

The purpose of this Act is to authorize the establishment of public utility districts to conserve the water and power resources of the State of Washington for the benefit of the people thereof, and to supply public utility service, including water and electricity for all uses.

Laws of 1931, ch. 1, § 1 (reprinted as Historical Note to RCWA 54.04.020). The District argues that this purpose statement creates dual functions: authority to operate utilities and, separately, to undertake water and power conservation programs independent of a PUD's utility functions. *Id.* This claim finds no support in the codified sections of the statute or in any case law construing any part of the statute.

We begin with the well-recognized principle that the purpose statement of a statute does not create authority to do anything. A purpose statement “while serving as a guide in comprehending the intended effect of operative sections, nevertheless, is without operative force.” *City of Moses Lake v. Grant Cy*, 39 Wn.App. 256, 693 P.2d. 140 (1984). The District must find support for its dual functions argument somewhere in the statute other than in the purpose statement. That language simply does not exist. The operative (codified) sections of the statute speak solely to PUDs' functions as *utility* districts.<sup>15</sup>

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<sup>15</sup> The legislative history of the initiative is consistent. It reflects that the “law’s purpose is to conserve the water and power resources of the State for all the people, by authorizing the establishment of public utility districts comprising a county or less in area.” *State ex rel. Public Utility Dist. No. 1 of Skagit Cy v. Wylie*, 28 Wn.2d 113, 128, 182 P.2d 706 (1947) (*quoting* voters’ pamphlet). That is, a purpose of the law was conservation. The means by which that purpose would be achieved was by the establishment of “utility districts.”

Further, the powers of municipal corporations “are limited to those necessarily or fairly implied in or incident to, powers expressly granted by statute, and to those essential to the declared objects and purposes of a corporation.” *Hite v. Pub. Util. Dist No. 2*, 112 Wn.2d 456, 483, 772 P.2d 481 (1989). “If there is a doubt as to whether the power is granted, it must be denied.” *Port of Seattle v. Washington Util. and Trans. Comm.*, 92 Wn.2d 789, 795, 597 P. 2d 383 (1979).

While we do not question that PUDs have authority to conserve water, that purpose of the statute is effectuated through the PUDs’ utility operations. As noted earlier, the watershed planning statute provides that PUDs in their role as a “water supply utility” may convene a watershed planning group. RCW 90.82.060 (2)(a). When the Legislature provided explicit authorization to PUDs to engage in watershed planning (RCW 54.16.360), it did so because of their role as a water utility which uses and impacts water supplies:

Cooperative watershed management actions by local governments, special districts, and utilities can help maintain healthy watershed function and support the beneficial use of water by these entities and protect the quality of the resource **that they use or affect** by participating in cooperative watershed management actions, local governments, special districts, and utilities are acting in the public interest in a manner that is intended to sustain maximum beneficial use

**and high quality of water over time and to maintain the services that these entities provide.**

2003 Laws of Washington, ch. 327, § 1 (emphasis supplied).

The “use or affects” language covers precisely the District’s activities at issue here. The District “uses” groundwater (and surface water purchased from the City) and “affects” those resources, including instream flows. Because of that “use and affect,” the Legislature authorized PUDs to participate in watershed planning so that they could “maintain the services that these entities provide.” Clearly, the Legislature saw watershed planning as “part of” a water utility’s function. The Jefferson County PUD may use its authority to participate in watershed planning to implement the conservation purposes of the PUD statute, but it does so in its role as a “water supply utility,” not otherwise.<sup>16</sup>

In sum, a public utility district is just what its name suggests: a “utility district.” It has various powers and responsibilities, all of which stem from its role as a utility district. Building utility infrastructure, operating the

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<sup>16</sup> In other statutes, too, the Legislature has authorized PUDs to take steps to effectuate the initiative’s stated purpose to conserve resources, but always in the context of the PUDs’ utility status. *See, e.g.*, RCW 54.16.390(1) (PUD “may as part of its utility operation, mitigate environmental impacts, such as greenhouse gas emission, of its operation and any power purposes”); 1989 Laws of Washington, Ch. 421, § 1 (PUDs “that are engaged in the sale or distribution of water” are authorized to implement water conservation programs); RCW 54.16.280 (PUDs are authorized to implement energy

utility, mitigating the impacts of utility operations, and providing financial support for conservation measures are all part of the utility district's functions and responsibilities. In all of those arenas, the entity is operating as a utility. It has no role other than as a utility.

Thus, the tax revenues the Jefferson County Public Utility District collects from inside the City of Port Townsend for watershed planning activities are funds that are being used to pay for "part of" its water utility. As such, they fall within the prohibition in RCW 54.04.030 and this Court should so rule.

E. The Property Tax Dollars to Pay the Debt for Acquisition of Lake Peterson are Levied in Violation of RCW 54.04.030

Like the watershed planning activities, the acquisition of Peterson Lake can be viewed from two perspectives, neither of which supports the Utility District's tax of City property owners. The lake was purchased either to augment the Utility District's water supplies for human use or to augment stream flows and aquifers to mitigate impacts from the District's production wells. Either way, the Utility District purchased Peterson Lake because the District is operating a water utility.

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conservation programs if the costs are less than the PUD's avoided costs of producing new energy).

To the extent that the lake was purchased to conserve instream flows as part of the watershed planning effort, we have discussed the impropriety of using the disputed tax funds in the prior section. We address here the District's alternative characterization: that the lake was purchased for water supply purposes.

It is difficult to conceive of the District's argument that funds expended to plan for and develop water storage are not a principal function of its water utility. Planning for adequate water storage is an integral part of the planning effort for water purveyors. State law requires all major water purveyors to adopt a "Water System Plan." WAC 246-290-100; WAC 246-291-140. The required elements of a water system plan are included in WAC 246-290-100 and in the Department of Health's Water System Planning Handbook (April 1997). CP 553. The Water System Plan must include a map of the water system including "storage facilities." *Id.* The "System Description Analysis Section" of the plan is to include a description of the condition and capacity of the four principal components of the water system: Source; Treatment; **Storage**; and Distribution System. CP 556 (emphasis supplied). "The existing installed [storage] capacities should be compared to the projected required storage capacities to identify the amount and timing of

any additional needed storage facilities.” CP 557.

A water utility’s plan must include proposed improvements to the water system, including a “storage analysis.” CP 554. If the utility is contemplating expanding its service area, “storage” is one of the “key considerations” that must be addressed. CP 553. “Typical improvements based upon growth include the development of additional source, increase in storage, or completion of a transmission grid.” CP 559.

Some of the water utility’s efforts can be done in conjunction with other water users. Thus, the plan can include joint use agreements, including provision for joint use of “storage reservoirs with other utilities.” CP 560.

Given that planning for water storage is an integral part of planning for water utilities generally, it is no surprise that the City of Port Townsend is involved in water storage planning efforts, too. CP 561-62.

In sum, we do not question that a PUD is authorized to expend funds to address water storage issues. But those activities are an integral part of its water utility functions. Even if some of these efforts are undertaken in a joint planning process and result in “joint use” agreements, planning for water storage remains “part of” a water utility’s functions. The District cannot tax inside the City of Port Townsend for this water utility function.

F. The Utility District Cannot Collect Property Taxes in the City of Port Townsend for Sewage Related Functions Because the City of Port Townsend Has Its Own Sewer Utility

The Utility District has been using tax dollars to pay for sewer studies and a septic tank-drainfield inspection program. CP 299. These are sewage related functions that cannot be charged to City taxpayers because the City operates its own sewer utility. CP 495-496; CP 500.

G. Only a Small Portion of the Services Provided by the Utility District Are for a Utility which is Not of “Like Character”

Appellants acknowledge that the District incurs some expenses for utilities that are not of “like character” to those offered by the City of Port Townsend, *i.e.*, the Port’s telecommunications utility and its fledgling power utility. However, these amount to only a very small percentage of the District’s overall budget. For instance, in recent years, the expenses related to telecommunications and power utilities have ranged from \$20,000 to \$71,395, just 2% to 3.2% of the District’s budget. CP 299.

These limited, unique services provided by the Utility District are overshadowed by the “like character” water and sewer utilities already provided by the City within its limits. Accordingly, while a tiny percentage of the property taxes collected may be properly allocated toward these unique services, this Court should find that any amount beyond that necessary for the

Utility District's power and telecommunication functions was unlawfully assessed and collected within the City and may not be assessed in the future, as long as the City operates its own water and sewer utilities.

#### V. CONCLUSION

Pursuant to RCW 54.04.030, the Court should reverse the trial court's summary judgment order and enter summary judgment in favor of the appellants. The Court should determine that the District's watershed planning and Peterson Lake expenses are part of its water utility functions; that its sewer related activities described above are part of its sewer utility; and, therefore, that those items are not chargeable to Port Townsend property owners as long as the City operates its own water and sewer utilities. The Court should then remand the matter for entry of appropriate

declaratory and injunctive relief; calculation of the amount of refunds due;  
and resolution of the class certification issue.

Dated this 28<sup>th</sup> day of February, 2011.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By:

A handwritten signature in black ink, appearing to read "David A. Bricklin", written over a horizontal line.

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I am the legal assistant for Bricklin & Newman, LLP, attorneys for plaintiffs herein. On the date and in the manner indicated below, I caused the Opening Brief of Appellants to be served on:

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DATED this 28<sup>th</sup> day of February, 2011, at Seattle,  
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ANNE BRICKLIN

Shoulberg\Appeals\Decsv