

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

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NO. 41545-3-II

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TED SHOULBERG and CHARLES HANIFORD,  
individually and on behalf of the class of all persons similarly situated,

Appellants,

v.

PUBLIC UTILITY DISTRICT NO. 1 OF JEFFERSON COUNTY, a  
Washington public utility district,

Respondent.

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REPLY BRIEF OF APPELLANTS

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## I. INTRODUCTION

The issue presented is not whether PUDs have the purpose, authority, or duty to conserve water resources. They unquestionably do.<sup>1</sup> The primary issue here is whether PUDs have the purpose, authority, and duty to conserve water resources in their role as water utilities or as some other kind of entity. If a PUD's water conservation activities are undertaken in its role as a water utility, it cannot tax inside city limits if that city also has a water utility. RCW 54.04.030. Because the statutes that create PUDs create only utilities, not some other kind of entity, the District's arguments ultimately fail. Its tax inside the City of Port Townsend is illegal.

## II. THE OPERATIVE SECTIONS OF THE STATUTES CREATE UTILITY DISTRICTS – NOT SOME OTHER KIND OF ENTITY – TO PROVIDE UTILITY SERVICES AND CONSERVE RESOURCES

### A. The Purpose Statement of the Statute Does Not Create Authority to Do Anything and Refers Only to "Utility Districts," Not Any Other Kind of Entity

One looks in vain in the District's brief for a citation to an operative section of the PUD or watershed planning statute that authorizes PUDs to participate in watershed planning or engage in other resource conservation

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<sup>1</sup> 1931 Laws of Wash., ch. 1, § 1 (purpose); RCW 90.82.020(5) & 90.82.060(2)(a) (authority); WAC 246-290-810 (duty).

activities in any role other than as utility districts. The absence of any grant of such authority is fatal to the District's argument that its watershed planning activities are not a "part of" its water utility. RCW 54.04.030.

Lacking any support for its claim in the operative sections of the statute, the District turns to the purpose statement of the statute. But the District both inflates its significance and misconstrues the purpose section.

1. The purpose statement does not create operative authorization

We agree with the District that the purpose statements in a statute may be used to "comprehend[] the intended effect of operative sections." *City of Moses Lake v. Grant County*, 39 Wn. App. 256, 261, 693 P.2d 140 (1984). But purpose statements, by themselves, are "without operative force." *Id.*

Thus, the District must identify one or more operative sections of the statute which create an entity other than its water utility to undertake watershed planning activities. If there were some operative section of the statute which was ambiguous as to whether PUDs may create entities other than utilities to engage in watershed planning, then the statement of purpose could be useful in construing that section. But that is not the case. The District has not cited a single operative section of the statute which provides it authority to create a non-utility entity to engage in watershed planning.

Instead of using the purpose statement to construe an operative section of the statute, the District tries to transform the purpose statement into an operative section in its own right (and, thereby, create authority for a new non-utility entity that simply is not created by the operative sections of the law). This misuse of the purpose statement should be rejected.

2. The purpose statement identifies dual purposes to be pursued by utility districts, not other entities

We do not dispute that the people identified dual purposes when the PUD initiative was adopted. The legislation clearly identifies both the purpose of conserving water and power resources and supplying utility services. But the question is to determine what *means* the legislation uses to accomplish those twin purposes. The *sole* means is the creation of utility districts:

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 . . . and to supply public utility service . . .

1931 Laws of Wash., ch. 1, § 1 (emphasis supplied).<sup>2</sup>

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<sup>2</sup> Utility companies (public or private) are entities that provide a “utility service or commodity to the public for compensation.” RCW 80.01.040 (specifying duties of the Washington Utilities and Transportation Commission). Like the PUD statute, the WUTC statute identifies a number of types of utilities subject to its regulation, *e.g.*, gas, electric, water, and telecommunications. *See* chapters 80.32 and 80.36 RCW. The WUTC has adopted regulations governing a variety of utilities, *i.e.*, entities that provide services or

The purpose statement of the PUD statute makes clear that the intent of the legislation is to authorize creation of public utility districts to accomplish dual purposes (provision of utility services and conservation of resources). The legislation does not authorize the creation of a conservation district or a watershed planning organization and nothing in the purpose statement suggests otherwise. While the utility districts authorized by the PUD statute certainly are intended to operate and provide utility services in a manner that conserves resources, that purpose is effectuated *solely* via the operations of the utility district.

Consistent with the original intent that public utilities conserve resources, the Legislature in more recent years has fleshed out those responsibilities and determined that utility districts should be involved in the watershed planning process and may take the lead in convening a watershed planning group. But notably, the watershed planning statute provides that PUDs have authority to convene a watershed planning group in their role as a “water supply utility.” RCW 90.82.060(2)(a). The District ignores this key

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commodities to the public, *e.g.*, power companies, water companies, telephone companies, and garbage collection companies. See ch. 480-70; -90; -100; -110; & -120 WAC. The common thread of all these utility providers is that a service or commodity is provided to the public which it purchases for a fee. As defined by Webster’s Seventh Collegiate Dictionary, a “utility” is “a service provided by a public utility (as light, power, or water).”

provision throughout its brief. Likewise, water conservation is a mandatory element of every water utility's state-approved water plan, public and private. WAC 246-290-810. The District ignores this regulation, too. (*See generally* Op. Br. at 43-45.)

Thus, the District proves absolutely nothing when it establishes that a purpose of public utility districts is to conserve water resources. That does not make public utility districts any different from other water utilities (municipal or private). All utility districts that provide water are required to develop conservation plans and may participate in the watershed planning process. The twin purposes of providing utility service and conserving the natural resources that allow the utility service to be provided do not convert PUDs into something other than a utility.<sup>3</sup>

The trial court's rationale quoted at length by the District is superfluous and of no consequence here on appeal,<sup>4</sup> but it does serve to frame

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<sup>3</sup> The foregoing demonstrates the error in the rationale provided by Assistant Attorney General Diaz. *See* District Br. at 10-11. Her conclusion was based on the notion that “[c]onservation and planning are not ‘utility services.’” CP 153. Conservation and planning may not be utility “services” inasmuch as they are not delivered to the customer, but they certainly are part of the purpose and function of a utility. It is hard to envision a utility providing utility services without “planning.” And, in this day and age, it is likewise inherent that utility districts must strive to conserve natural resources. Indeed, that has been the charge of public utility districts since 1931.

<sup>4</sup> *Skimming v. Boxer*, 119 Wn. App. 748, 755, 82 P.3d 707 (2004) *citing* *Chelan Cy. Dep. Sher. Ass'n v. County of Chelan*, 109 Wn.2d 282, 294, n.6, 745 P.2d 1

this issue nicely. The trial court stated that the purchase of Peterson Lake was not a component of an existing water utility. “[Peterson Lake] has never been developed in any way, carries with it no water rights whatsoever, and, as of the time of acquisition, as well as today, it is of no value or use other than the conservation of an existing, pristine resource.” Supp. CP 861-862. Factually, as discussed in detail below, we believe the trial court erred in finding that the lake had no value to the District’s water utility. But a legal issue obviates the need to resolve the factual issue: Where in any statute is there authorization given to PUDs to acquire “pristine resources” unrelated to a PUD’s obligations as a utility provider? The short answer is: Nowhere. Unlike agencies like the Department of Natural Resources, the State Parks Commission, counties and cities,<sup>5</sup> PUDs do not have authority to purchase lakes, forests, mountains, or other “pristine resources” for conservation purposes generally. Such an acquisition would be far outside the statutory powers granted to PUDs. Yes, PUDs may be involved in conservation efforts, but only in their role as utility providers.

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(1987)).

<sup>5</sup> See, e.g., ch. 79.70 RCW (DNR authorized to acquire natural area preserves); ch. 79A.15 RCW (State Parks authorized to acquire habitat conservation lands); RCW 36.34.340 (counties and cities authorized to purchase lands for conservation of natural resources).

B. Case Law Cited by the District Does Not Aid Its Position

While the purpose section of the statute can be used to help construe implementing sections of the law, it does not provide authority on its own. The District alleges that our failure to apprise the Court of other cases setting forth this principle constitutes a “glaring omission.” District Br. at 18-19, n.13. Hardly. The first “omitted” case cited is *Whatcom County v. Langlie*, 40 Wn.2d 855, 246 P.2d 836 (1952). There, as in *Moses Lake*, the Court explained that purpose statements are “not operative rules of action,” while also acknowledging (as we have) that they may be used in construing the statute’s operative sections. The District’s citation to *Whatcom County* is welcome because there the Court explained that even though a purpose of the statute at issue was for the State Department of Health to “make full use of all existing public and free facilities and services,” that purpose statement did not create an operative duty for the State to utilize Whatcom County’s public hospital in lieu of using private facilities. *Id.* at 841.

The District then cites *Hartman v. Washington State Game Com’n*, 85 Wn.2d 176, 532 P.2d 614 (1975). That case supports our position, too. There, the agency attempted to stretch its authority of regulating fishing for the purpose of conserving the fishery resource to also allow it to regulate

competition between on-bank and in-river fishers. While the operative section of the statute authorizing the Commission to regulate fishing was vague, the purpose statement clearly limited the Commission to regulation for the purpose of conservation, not arbitrating among different user groups. In our case, if the District could cite to a section of the statute that authorized the District, perhaps in ambiguous terms, to undertake conservation functions independent of its role as a utility, then perhaps *Hartman* would be analogous and the District could point to the purpose statement in support of its position. But, as we have stated repeatedly, the District has not and cannot cite an operative section of the statute to support its claim of powers outside its role as a utility. There is no operative section of the statute that needs to be construed, by reference to the purpose statement or otherwise.

Moreover, *Hartman* is yet another example of the courts refusing to read into a statute agency powers that are not clearly provided. “[A]dministrative agencies are creatures of the Legislature, without inherent or common-law powers and, as such, may exercise only those powers conferred by statute, either expressly or by necessary implication.” *Skagit Surveyors and Engineers, LLC v. Skagit Cy.*, 135 Wn.2d 542, 558, 958 P.2d 962 (1998). Here, the District seeks judicial approval of a vast increase in its

authority, morphing from a utility district to a land conservation agency. There is nothing in the operative words of the statute which support this grandiose view of PUDs' authority. This Court should reject this power grab as have other courts when presented with similar efforts by PUDs in the past. *See, e.g., State ex rel. Public Utility District No. 1 of Skagit Cy. v. Wiley*, 28 Wn.2d 113, 146, 182 P.2d 706 (1947) (PUD seeks “not a liberal, but a revolutionary construction, to carry out purposes and objects for which the Act was not intended”); *Kightlinger v. Clark Cy. PUD*, 119 Wn. App. 501, 81 P.3d 876 (2003) (rejecting PUD claim of authority to operate appliance repair business).

Ironically, the District quotes a passage from *Bayha v. Public Utility District No. 1 of Grays Harbor Cy.*, 2 Wn.2d 85, 97 P.2d 614 (1939). There, the Supreme Court spoke of the “almost unlimited powers” PUDs have “relative to the construction, purchase, etc. **of utilities**, and in the sale of utility revenue bonds to finance such operations.” District Br. at 24, n.17 (emphasis added by District and modified here). Yes, PUDs have “almost unlimited powers.” But those unlimited powers are “relative to” the operation of “utilities.” The legislation provides them no power to operate as a conservation district, purchasing “pristine resources” or undertaking other

activities unrelated to their role as a utility. Because there is no operative section which implements the purpose of conserving natural resources by means other than through careful planning by its utilities, the District's conservation and planning functions are necessarily part of its utility function and, thus, may not be funded by a tax on City of Port Townsend taxpayers who already are paying for their own water utility.

III. THE DISTRICT'S CLAIM THAT ITS WATER RESOURCE PLANNING EFFORTS DO NOT DUPLICATE THE CITY'S IS BOTH LEGALLY IRRELEVANT AND FACTUALLY INCORRECT

The PUD argues that its water resource planning efforts do not duplicate the City of Port Townsend's water resource planning efforts. District Br. at 3. This claim is legally irrelevant. The statutory tax proviso at issue does not require an exact duplication of every specific undertaking. The statute sweeps far more broadly. If a PUD and a municipality have the same utility (*e.g.*, electric, water), then the PUD may not tax inside the municipality. For instance, if both the PUD and the municipality operate water utilities, it does not matter if the PUD provides a free leak detection service to its customers and the city does not. Duplication of individual undertakings is not the statutory test. The issue is whether the utilities are the same, not whether individual undertakings by the utilities are the same.

The District's argument is flawed factually, too. The City, like the District, is involved in watershed planning. *See Op. Br.* at 11, 14-15.

In like vein, the District notes that it serves a different "constituency," than does the City. But if that were a sufficient distinction, then a PUD could operate a water district wholly outside City limits (*i.e.*, serving a different constituency) and tax in-city taxpayers to support its outside-of-city-utility. That is precisely the type of abuse that the tax proviso seeks to avoid.

Nor is it legally relevant whether City taxpayers may benefit from some of the District's water conservation efforts. The District, the City, and a host of other water users are all drawing on the same water resources. To the extent that these multiple water users do a better job of conserving water resources, they all benefit. That is one of the major purposes of the watershed planning statute. The District's customers benefit from the City's water conservation efforts just as the City's customers benefit from the District's efforts. Simply because there are "external" benefits when the District or City (or any other user) conserves resources does not in any way render the District's water conservation efforts as something other than an undertaking of its water utility.

IV. THE DISTRICT ACQUIRED PETERSON LAKE AS PART OF ITS WATER UTILITY FUNCTION

The District argues that Peterson Lake was not purchased to provide a direct water supply to its utility customers. This after-the-fact statement made by the District's employee, Mr. Parker, for litigation purposes – without citation to any supporting document<sup>6</sup> – is soundly contradicted by numerous documents created by the District at the time it was contemplating and actually purchasing the lake. *See Op. Br.* at 19-26. We do not rely on “arguments and innuendos.” *District Br.* at 24. We rely on the District's own contemporaneous documents – many of them. *Id.*

Conclusory *post hoc* rationalizations without any reference to evidentiary facts do not create a genuine issue of fact. CR 56(e) (declarations “must set forth specific facts”); *Guile v. Ballard Community Hospital*, 70 Wn. App. 18, 25, 851 P.2d 689, *rev. den.* 122 Wn.2d 1010 (1993) (conclusory statements inadequate); *Friends and Landowners Opposing Development v. Ecology*, 38 Wn. App. 84, 90, 684 P.2d 765 (1984) (same). But even if Mr. Parker's litigation declaration created an issue as to whether the lake was purchased to provide a direct water supply, that is not a *material* issue (CR 56(c)) because Mr. Parker and the District's brief go on to admit

that the lake was, at minimum, purchased “to conserve water resources in the County and to potentially recharge underground streams and other water sources.” District Br. at 7-8; CP 243-44. Conserving water resources so that the District (and other water users) have adequate water supplies in the future is obviously a part of the District’s water utility functions. *See supra* at 4-5. More specifically, the District’s use of *this* lake to recharge groundwater is explicitly linked by the District itself to its efforts to increase the District’s own water rights. *See Op. Br.* at 17-19, 23-24. The District does not deny this.

Thus, while we do not think Mr. Parker’s *post hoc* statement made for litigation purposes without any citation to the record creates an issue of fact as to whether the District purchased the lake for use as a direct water supply given the volume of contemporaneous documents to the contrary, it is undisputed by the District that, at minimum, it purchased the lake to conserve water in part to augment its efforts to obtain new water rights. Either way, the purchase of Peterson Lake was part of the District’s water utility functions. Thus, the expense of acquiring Peterson Lake could not be charged to City of Port Townsend taxpayers.

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<sup>6</sup> *See* CP 243.

V. THE TAX PROVISIO LIMITATION IS NOT LIMITED TO PROHIBITING USE OF TAX FUNDS FOR THE INITIAL ACQUISITION OF A UTILITY

Statutes are to be construed to avoid absurd results. The District's argument, while linguistically clever, produces an absurd result.

According to the District, a PUD which operates exclusively outside the bounds of a City may impose a tax on City residents to support the utility's outside-of-city utility services. Such a construction makes absolutely no sense.

The construction advanced by the District would apply, not only in the present situation, but also in a situation where a PUD provided only a single utility service, say, water service, and where the city inside the District's boundaries provided an identical water utility service. That is, the District's construction would apply in cases uncluttered by arguments regarding watershed planning and water conservation. Even if a PUD's water utility were involved in none of those activities and simply ran an old-fashioned water utility outside of city limits, the District asserts that the PUD should be allowed to tax inside of city limits.

To reach this absurd conclusion, the District has to leap over several insurmountable hurdles. First, it has to confine the words "pay for" in RCW

54.04.030 to mean only using tax dollars to pay for the initial acquisition of an existing private utility. According to the District, the words “pay for” cannot mean that taxpayer dollars are being used to pay for the District’s operations generally. But that distinction finds no support in the words of the statute. Indeed, courts, like the Legislature, frequently refer to taxes being used to “pay for” various utility services, not just to pay for acquisitions of entire utilities. *See, e.g., Lane v. City of Seattle*, 164 Wn.2d 875, 879-80, 194 P.3d 977 (2008) (issue of which taxpayers or ratepayers will “pay for” fire hydrants); *Des Moines Marine Ass’n v. City of Des Moines*, 124 Wn. App. 282, 290, 100 P.3d 310 (2004) (statutory taxing limitation applies to “nonresidents who do not otherwise **pay for** services” (emphasis supplied)).

Next, the District has to overcome two cases dealing with this specific statute which have referred to the proviso as applying not just to ban the use of these tax dollars for the initial acquisition of a private utility, but also for “general support” and other purposes. *See* District Br. at 32-34 (referring to *PUD No. 1 of Whatcom County v. Superior Court*, 199 Wash. 146, 158-59, 90 P.2d 737 (1939) and *Bayha v. Public Utility District No. 1 of Grays Harbor Cy.*, 2 Wn.2d 85, 97 P.2d 614 (1939)). The District’s claims notwithstanding, the plaintiffs are not asking this Court to read the word

“support” into the statute. It was the Supreme Court, not the plaintiffs, which used the word “support” to describe the statute in *Whatcom County*.

Likewise, in *Bayha*, the court was careful not to limit its description in the scope of the proviso to apply only to the “purchase” of a utility. The District is tripped up by overlooking the significance of the abbreviation “etc.” in that case. The language quoted by the District (thanks to the “etc.” abbreviation), covers more than just the “purchase of utilities.” The *Bayha* court stated: “[The] conclusion is inescapable that the legislature did not intend to limit the power of the commissioners of a public utility district in the purchase, etc. of utilities, as provided in the act . . .” *Id.* (emphasis supplied). In *Bayha*, the Court was concerned with the factual circumstance that arose out of the purchase of a utility. So, understandably, the Court focused on the “purchase” of the utilities. But the Supreme Court, even with the brief “etc.” reference, made clear that the statute applies to more than just the asset purchasing “part” of utilities. Instead, the statute sweeps broadly to prohibit the use of these tax dollars to “pay for” any “part” of a utility. The “part thereof” language is not limited to “initial acquisitions” or “asset acquisition.” It is the District, not the plaintiffs or the Supreme Court, which is attempting to read words into the statute that simply are not there.

VI. THE DISTRICT ADVANCES NO NEW ARGUMENTS  
REGARDING THE SEWER UTILITY TAX

The District raises two defenses regarding its tax charges for its sewer utility. Each duplicates the arguments addressed above regarding its water utility. *See* District Br. at 35. First, the District argues that its sewer utility provides different services to different constituents than does the City's sewer utility. But the issue is not whether the services are "duplicative." The issue is whether both the District and City have a sewer utility. There is no dispute that they both do. Therefore, the District may not tax inside the City for the District's sewer utility.

The District also argues that the tax proviso does not apply because it is limited to initial utility acquisition costs. We have addressed that argument above, too.

VII. LACHES MAY NOT BE USED TO BAR THE CLASS ACTION

The District's laches defense is aimed solely at plaintiff Ted Shoulberg. It is not aimed at plaintiff Charles Haniford nor any other members of the plaintiff class. Therefore, Charles Haniford's claims and the class members' claims stand regardless of how this Court rules on the laches defense.

The laches defense fails against plaintiff Ted Shoulberg because the statute of limitations limits this action to three years prior; the doctrine of laches cannot be employed to bar the action based on the District's argument that it should have been brought 14 years ago. The laches defense against Ted Shoulberg also fails because the District has failed to demonstrate that the balance of equities falls in its favor in this case, particularly with respect to damages.

A. The Doctrine of Laches Generally

Laches is an equitable defense based on the principles of equitable estoppel. *Id.* The purpose of laches is to prevent injustice and hardship. *Brost v. L.A.N.D., Inc.*, 37 Wn. App. 372, 375, 680 P.2d 453 (1984). It should not be employed as:

[a] mere artificial excuse for denying to a litigant that which in equity and good conscience he is fairly entitled to receive, when the assertion of the claim, though tardy, is within the time limited by statute and the rights of no one have been prejudiced by the delay. Like most equitable doctrines, it is to be applied with circumspection and as a means of administering justice. It is not to be employed as a barrier solely for the purpose of defeating meritorious claim, grounded upon the plainest principles of common honesty.

*Brost v. L.A.N.D., Inc.* at 376, quoting *Crodle v. Dodge*, 99 Wash. 121, 131-32, 168 P. 986 (1917) (emphasis omitted).

Laches may be established where the plaintiff (1) knows or reasonably should know of the cause of action, (2) unreasonably delays in commencing the action, and (3) causes damage to the defendant as a result. *Kightlinger v. Public Utility District No. 1 of Clark County*, 119 Wn. App. 501, 512, 81 P.3d 876 (2003), citing *Buell v. City of Bremerton*, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972). Each element must be present. The burden of proof is on the party asserting laches. *Rutter v. Estate of Rutter*, 59 Wn.2d 781, 785, 370 P.2d 862 (1962).

B. Plaintiff Shoulberg Is Not Seeking Relief for Taxes That Were Levied 14 Years Ago

The doctrine of laches should not be employed to bar an action short of the applicable statute of limitations. *Brost v. L.A.N.D., Inc.*, 37 Wn. App. at 375. “A court is generally precluded, absent highly unusual circumstances, from imposing a shorter period under the doctrine of laches than that of the relevant statute of limitations. *Id.* Mere delay, lapse of time, and acquiescence, standing alone, do not bar a claim in these circumstances. *Rutter v. Estate of Rutter*, 59 Wn.2d at 785.

The laches defense was explored in a recent case that is very similar to the matter at bar: *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 94 P.3d 961 (2004). In that case, property owners of vacant lots brought a class

action against the City of Ocean Shores, claiming that the City's water and sewer availability charges constituted illegal taxes and fees. *Id.* at 596-97. The City of Ocean Shores argued that the property owners' claims should be dismissed on the grounds of laches because a prominent class member had knowledge of the claim 19 years prior to filing the action. *Id.* at 609. The City argued that it had suffered damage as a result because the charges had been used to fund facilities for the benefit of the owners. *Id.* at 610.

In *Carrillo*, the time limit for seeking a refund of an illegal tax or fee was determined by RCW 4.16.080, which set the statute of limitations for such claims at three years. *Id.* The Court refused to apply the doctrine of laches to impose a further bar on tax refund claims that were already limited by a three year statute of limitations. *Id.*

Contrary to the District's assertion, the *Carrillo* case is very similar to this matter. Here, the District is arguing that the claim should be dismissed on the grounds of laches because Ted Shoulberg had knowledge of the claim 14 years before filing his claim. The primary relief sought is injunctive relief for future levies. Even as to refunds, the time limit for seeking a refund will likely be determined by ch. 84.69 RCW, which sets the statute of limitations for refund claims at three years. Levies from 14 years ago are not at issue.

Therefore, as in *Carrillo*, the doctrine of laches does not apply to bar the case brought by plaintiff Ted Shoulberg.

C. The Laches Defense Against Ted Shoulberg Fails Because the District Has Failed to Demonstrate Damages Necessary for a Laches Defense

To establish laches, the defendant must show an intervening change of position on the part of the defendant, making it inequitable to enforce the claim. Damage to a defendant can arise either from acquiescence in the act or from a change of conditions. *Carrillo v. Ocean Shores*, 122 Wn.2d at 609.

Nothing that Ted Shoulberg did caused the District to invest money in Peterson Lake. At any time, any property owner in the City of Port Townsend other than Ted Shoulberg could have discovered that the tax was illegal and brought an action against the District. The District could not reasonably rely on Mr. Shoulberg's supposed acquiescence to justify continuing a tax levy of questionable legality.

D. Additional Equitable Considerations Call for Rejection of the Laches Defense

Laches requires balancing equities. The challenged tax is a recurring event that can be challenged at any time by any property owner and, therefore, is not susceptible to a laches defense. The concept of "inexcusable

delay” in the laches defense is inconsistent with the ongoing nature of a recurring illegal tax.

Moreover, a decision applying laches against the entire class would create an injustice to the plaintiff class members. If it were applied to the entire class, every single landowner in the City of Port Townsend would be forever barred from challenging the levy of this illegal tax now and in the future. Surely laches is not meant to allow an illegal tax to continue unchallenged into the unforeseen future by every landowner in the City. The laches defense should be rejected.

#### VIII. THE PLAINTIFFS HAVE SATISFIED THE STATUTORY PREREQUISITES FOR OBTAINING AN ADJUDICATION OF THE LEGALITY OF THE DISTRICT’S TAX

The District contends that the class action claims should be dismissed because plaintiffs cannot satisfy the statutory prerequisites for obtaining tax refunds set forth in RCW 84.69.030. This argument overlooks entirely the prerequisites that property owners must follow prior to obtaining a refund under RCW 84.69. Property owners must obtain a declaratory judgment that the tax is illegal before they can file a claim with the County Treasurer.

RCW 84.69.030 provides a method for obtaining a real property tax refund. To obtain a refund, property owners must file a verified claim within

three years after making the payment sought to be refunded in most cases. RCW 84.69.030 (claim required); RCW 84.69.070 (exception to claim requirement).

Taxes shall be refunded if one of 16 different situations set forth in RCW 84.69.020 is present. For example, a refund is possible if taxes are paid more than once, if they are paid as a result of manifest error, or if they are paid because of clerical error. *Id.*

The ground for a refund that applies in this case is found at RCW 84.69.020(6). That provision states that taxes paid shall be refunded if they were:

Paid under levies or statutes **adjudicated** to be illegal or unconstitutional.

RCW 84.69.020(6) (emphasis supplied). Therefore, in this case, before a property owner may request a refund under RCW 84.69.030, the property owner must litigate the issue to prove that the taxes were paid under levies “adjudicated” to be illegal. That is precisely the process being used here.

If the levies are declared illegal by this Court, then plaintiffs will follow whatever process is necessary for obtaining a refund. In that event, the plaintiffs will request that the trial court allow plaintiffs to obtain refunds pursuant to RCW 84.69.070 rather than requiring every single class member

in the City of Port Townsend to file an individual verified claim with the County Treasurer. But regardless of what claim process is used, plaintiffs are entitled to a declaratory adjudication of the tax's legality at this time.

The District's defense should be rejected for a second, independent reason – it ignores RCW 84.69.070. That statute excuses the need to file a claim in advance of a lawsuit where the tax refund is sought throughout an entire jurisdiction. That statute does not expressly identify a “city” as one of the types of jurisdiction wherein this rule applies; it refers to taxes invalidated throughout a “district,” “county,” or the “state.” But the obvious intent of the legislation is to cover situations exactly like this. While it is not common for a court to read words into a statute, the courts will do so where it is necessary to implement the Legislature's obvious intent. “We avoid a literal reading of a statute if it would result in unlikely, absurd, or strained consequences. The spirit or purpose of an enactment should prevail over the express but inept wording.” *State v. Elgin*, 118 Wn.2d 551, 555, 825 P.2d 314 (1992) (internal citations and quotations omitted). That is precisely the case here. The District can offer absolutely no logical reading of the statute and its legislative intent that would excuse taxpayers from the claim filing requirement where the tax has been held illegal statewide, countywide, or

district-wide, but not citywide. Yet that is the (illogical) construction that the District seeks this Court to adopt.

#### IX. CONCLUSION

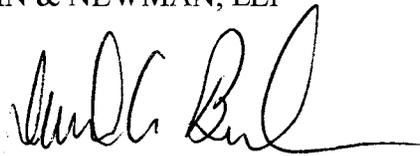
The Court should determine that the District's watershed planning and Peterson Lake expenditures are part of its water utility and that the District's taxing Port Townsend property owners for its water and sewer utilities is illegal. Thereupon, the Court should reverse the trial court's summary judgment ruling; direct entry of summary judgment in favor of the plaintiffs; remand for resolution of class certification and claim processing issues; and rule that RCW 84.69.070 applies in this situation.

Dated this 30<sup>th</sup> day of June, 2011.

Respectfully submitted,

BRICKLIN & NEWMAN, LLP

By:



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Attorneys for Ted Shoulberg and  
Charles Haniford

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

TED SHOULBERG and  
CHARLES HANIFORD,  
individually and on behalf of the  
class of all persons similarly  
situated,

Appellants,

v.

PUBLIC UTILITY DISTRICT  
NO. 1 OF JEFFERSON  
COUNTY, a Washington public  
utility district,

Respondent.

NO. 41545-3-II

DECLARATION OF  
SERVICE

STATE OF WASHINGTON     )  
  )  
COUNTY OF KING         )

ss.

I, PEGGY S. CAHILL, under penalty of perjury under the laws of the  
State of Washington, declare as follows:

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

Reply Brief of Appellants to be served on:

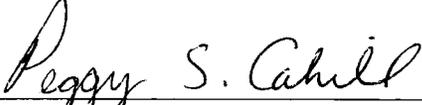
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DATED this 30<sup>th</sup> day of June, 2011, at Seattle, Washington.

  
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PEGGY S. CAHILL

Shoulberg\Appeals\Decsv