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

KITTITAS COUNTY,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Respondent.

**BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION OF COUNTIES**

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I. INTRODUCTION

Washington's 39 counties provide many public health and safety services such as pest control services, flood control and, at issue here, weed control. Counties rely on collecting user charges to fund these essential services.

State law mandates that counties control noxious weeds. Pursuant to chapters 17.04 and/or 17.10 RCW, Washington counties are authorized to operate a noxious weed control program. For nearly 100 years, state law has mandated that the costs of noxious weed abatement be borne by the property owners on whose land the services are provided. RCW 17.04.180 expressly requires "state agencies" such as Respondent Washington State Department of Transportation ("WSDOT") to pay the costs associated with noxious weed control on state land. In this way, the noxious weed statutes are consistent with numerous other statutory schemes through which the state is required to reimburse counties or other municipal corporations for the costs of services rendered on state land.

Despite this express legislative authorization and after decades of compliance, WSDOT abruptly reversed course and announced to Kittitas and other counties that it would no longer pay for noxious weed control provided by counties to WSDOT property. WSDOT now claims that the costs of noxious weed control are unauthorized "special assessments".

WSDOT is wrong. Counties possess both statutory and constitutional authority to recover the costs of noxious weed control. Regardless of whether this payment is characterized as an “assessment” in “lieu of a tax” or as a payment in lieu of a tax (“PILT”), state agencies have been required to pay these costs since 1921. Moreover, the heightened “special benefits” standard WSDOT asserts applies to determining whether the legislature’s authorization is specific enough does not apply here because the County’s noxious weed program is an exercise of its police powers. *See, e.g., N. Pac. Ry. Co. v. Adams County*, 78 Wash. 53, 56-57, 138 P. 307 (1914) (concluding noxious weed laws “are a valid police regulation”). As an exercise of police powers, the “special benefit” analysis does not apply.

In granting summary judgment for WSDOT, the trial court’s order ignored this longstanding authority and set a dangerous precedent. The order not only denies cash-strapped counties needed revenues for statutorily required noxious weed control, but also threatens to undermine other well-established statutory mechanisms for reimbursing counties for services provided on state lands. As such, amicus Washington State Association of Counties (“WSAC”) joins Appellant Kittitas County in asking this Court to reverse.

II. IDENTITY AND INTEREST OF AMICUS

WSAC submits this amicus curiae brief in support of Kittitas County. WSAC is a non-profit association that serves all 39 counties throughout the State of Washington.¹ Its members include elected county commissioners, council members, and executives. WSAC members are constitutionally and statutorily charged with administering the legislative and executive functions of county government. WSAC members do so by providing the public with various programs and services on the local and regional level, including specialized law enforcement, 911 dispatch services, transit programs, solid waste management, water systems, veterans' assistance, and ambulatory services.²

At issue in this appeal is a county's ability to recoup funds spent on essential public health and safety services mandated by the legislature that benefit state-owned lands. As the collective voice for Washington's 39 counties, WSAC has an interest in ensuring that counties receive adequate funding to support those services. Moreover, WSAC has an

¹ *About Us*, WSAC, <http://wsac.org/about-us/> (last visited Feb. 28, 2019).

² *Why Counties Matter*, WSAC (Jan. 5, 2017), <http://www.wsac.org/wp-content/uploads/2017/08/2017-Safe-Livable-Washington2sides-Copy.pdf>; *The Closest Governments to the People: A Complete Reference Guide to Local Government in Washington State*, Municipal Research Services Center (2015), <http://www.mrsc.org/getmedia/1c25ae05-968c-4edd-8039-af0cf958baa7/Closest-Governments-To-The-People.pdf.aspx?ext=.pdf>.

interest in this appeal because the issues presented are not limited to Kittitas County, but ultimately could impact counties throughout the state.

III. STATEMENT OF THE CASE

WSAC adopts the Statement of the Case in Kittitas County's Opening Brief, but adds the following points:

A. **Counties Deliver Critical Services Aimed at Protecting Public Health and Safety Despite Declining Revenues.**

Counties play a critical role in providing services that promote public health and safety.³ Adequately funding these services has become increasingly difficult, however, because county revenues have not kept up with the pace of rising inflation and population growth.⁴ In comparison to cities and the state, county revenue growth lags significantly behind.⁵ Moreover, the difficulty in funding public health and safety services has been exacerbated by Initiative 747, which thwarted a major source of county revenue by imposing a 1% cap on property tax increases.⁶

Part of the counties' economic burden arises from the provision of public health and safety services to the State of Washington. The State

³ *Unfunded Mandates*, WSAC (2019), http://www.wsac.org/wp-content/uploads/2019/01/19LegPri_1.14_Unfunded.pdf.

⁴ *Id.*

⁵ *Id.*

⁶ *Revenue Guide for Washington Counties*, Municipal Research Services Center (Feb. 2019), <http://mrsc.org/getmedia/4865001b-1f63-410a-a5ed-8d1ad8d752f3/Revenue-Guide-For-Washington-Counties.pdf.aspx?ext=.pdf>, at 4.

owns property in every county and receives a variety of county public services as do other property owners.

B. Counties Rely on User Charges to Support Critical Public Health and Safety Programs.

Counties collect user charges for providing public health and safety services on state-owned lands, including:

- Horticultural pest and disease control, ch. 15.09 RCW;
- Agricultural pest control, RCW 17.12.080;
- Diking and sewerage services, RCW 85.08.370;
- Flood control measures, RCW 85.05.390;
- Irrigation services, RCW 87.03.025; and
- Natural resource conservation, RCW 89.08.405.

User charges take a variety of different forms, including regulatory fees, commodity charges, burden offset charges, special assessments, and PILTs.⁷ The purpose of these charges is to mitigate the economic burden created by tax-exempt lands that do not contribute property taxes to a county but which still require public services from county governments.⁸ For instance, the State owns 28% of the over 1.4 million acres that

⁷ See Katie Hoover, *PILT (Payment in Lieu of Taxes): Somewhat Simplified*, Congressional Research Service (Oct. 5, 2017), <https://www.fas.org/sgp/crs/misc/RL31392.pdf> (explaining PILT programs in the federal context).

⁸ See *id.*

comprise Kittitas County. CP 155, 158. User charges ameliorate the burden imposed by these tax-exempt lands by contributing to the costs of county services provided on state-owned lands. *See* CP 397.

C. Counties Are Required to Control Noxious Weeds.

To address the emerging threat of invasive species, *see* CP 331, state law requires counties to develop noxious weed control programs, *see* ch. 17.04 RCW; ch. 17.10 RCW. Counties' local knowledge of the species involved and site location are important in developing effective noxious weed program investigation and enforcement programs. CP 148; *see also* WAC 16-750-110 (noting "noxious weed control is best carried out by strong, adequately funded programs at the local level"). Counties implement noxious weed control through weed boards and weed districts. CP 251-52.

Counties rely on the statutorily mandated payments from WSDOT and other state agencies along with private property owners to fund their noxious weed programs. *See* CP 397. For example, RCW 77.12.203(6) requires the Washington Department of Fish and Wildlife to make payments to counties in lieu of property taxes plus an additional amount for noxious weed services. RCW 79.71.130 requires the same of the Department of Natural Resources. Without contribution from the state,

counties would be forced to shoulder the costs for noxious weed services and other programs on tax-exempt lands. CP 397.

In 2017, WSDOT stopped paying the County for noxious weed services on state-owned lands. CP 42, 44. Before 2017, WSDOT had paid the County for such services. CP 529.

IV. ARGUMENT

A. State Agencies Like WSDOT Must Pay User Charges for County Services on State Lands.

WSDOT urges a strained interpretation of Washington law in order to avoid any obligation to pay for a county's noxious weed services on state-owned land. WSDOT's position is contrary both to legislative authorization for counties to charge state agencies for such services and WSDOT's undisputed history of payment. CP 154. Moreover, adopting WSDOT's interpretation would deprive counties and other local jurisdictions of payment for other important health and safety services. WSDOT's interpretation should be rejected.

Counties collect user charges for providing public services, including on state-owned lands. As the Supreme Court has explained, the term "user charge" is "a broad term" that includes regulatory fees, commodity charges, burden offset charges, special assessments, and PILTs. *See City of Snoqualmie v. King County Executive Dow Constantine*, 187 Wn.2d 289, 300, 386 P.3d 279 (2016) ("*Snoqualmie*").

Washington courts have repeatedly approved counties collecting user charges as reimbursement for providing public services. *Id.* at 292-94 (upholding a PILT as reimbursement for services to a Tribe’s off-reservation hotel); *King County Fire Prot. Dist. No. 16 v. Housing Auth. of King County*, 123 Wn.2d 819, 833, 835, 872 P.2d 516 (1994) (upholding PILT for fire protection service, noting that when “the charge is related to a direct benefit or service, it is generally not considered a tax or assessment”); *Teter v. Clark County*, 104 Wn.2d 227, 234, 704 P.2d 1171 (1985) (approving rates and charges as reimbursement for water management services); *see also Morse v. Wise*, 37 Wn.2d 806, 813, 226 P.2d 214 (1951) (upholding charge for servicing sewer system).

In *Snoqualmie*, the Supreme Court approved the PILT at issue and identified chapters 72.12 and 79.71 RCW as two examples of PILT programs that allow local governments to seek reimbursement for public services provided to state agencies. 187 Wn.2d at 294. In each of these situations, the legislature authorized a PILT because the local government would not have the benefit of property taxes to pay for services rendered to tax-exempt property. That is the same situation at issue here. The WSDOT land at issue is exempt from taxation. Thus, the County receives no property tax revenue to support services relating to removal of noxious

weeds. Instead, the legislature in chapters 17.04 and 17.10 RCW authorized counties to collect user charges in lieu of taxes.

WSDOT offers no principled distinction between the payments authorized by chapters 72.12 and 79.71 RCW and recognized in *Snoqualmie* and chapters 17.04 and 17.10 RCW. Each of these statutes requires state agencies to pay their fair share. Moreover, as noted above, the noxious weed statutes are consistent with numerous other statutory mechanisms that allow counties to seek reimbursement from the state for services provided on state-owned lands. *See e.g.*, RCW 17.12.080 (agricultural pest control); RCW 89.08.405 (natural resource conservation).

B. Counties Have Long Possessed Express Statutory Authority To Collect Payment for Noxious Weed Control.

An examination of the history of RCW 17.04.180 demonstrates that the legislature has required the state to pay the cost of noxious weed control services on state land for nearly 100 years.

In 1921, the legislature authorized counties to create weed districts for the purpose of preventing and exterminating noxious weeds, including on state lands. Laws of 1921, ch. 1, § 1. The cost for such services was spread among property owners in the weed district and collected as a property tax. *Id.* § 5. When state lands were included in a weed district,

the county treasurer was tasked with certifying annually the amount assessed to state land and forwarding that amount to the appropriate state official who would then forward the statement to the State Auditor for eventual payment by the legislature. *Id.* § 7 (“Whenever any state lands ... shall be situated within any weed district organized under the provisions of this act, the county treasurer shall certify ... a statement of the amounts assessed against said lands ... and the Legislature shall provide for the payment of the same”). State lands were assessed “the amount of the tax to which such lands would be liable if the same were in private ownership.” Laws of 1929, ch. 125 § 8. The charge to the state thus was a PILT.

In 1951, the legislature amended chapter 17.04 RCW to change the revenue source funding weed districts from a property tax to an assessment. *See* Laws of 1951, ch. 125 § 1. Specifically, chapter 17.04 RCW was amended to require a weed district to determine the amount of money necessary to carry on its operations, classify the property within the district in proportion to the benefits to be derived from the operations of the district, and “in accordance with such classification [] prorate the cost so determined and [] levy assessments to be collected with the general taxes of the county.” *Id.* The change from a general property tax to a benefits-based assessment did not alter the state’s obligations to make a

payment to the county in the same amount as if the state's lands were privately held. To the contrary, and as relevant here, later amendments to RCW 17.04.180 only clarified that such obligations applied expressly to state highway lands included within weed districts. *See* Laws of 1961, ch. 250, § 4 (if the land is under use as state highway right of way, the statement of amount owed should be sent to director of highways); Laws of 1971, 1st Ex. Sess., ch. 119, § 1 (same); Laws of 1984, ch. 7, § 19 (changing reference to director of highways to “secretary of transportation” and updating titles for other agency heads). It is also significant that the assessment was based on the classification of types of property rather than the specific benefit that inured to each specific piece of property in the weed district.

In 1969, the Legislature authorized an additional county-based program for addressing noxious weeds. Laws of 1969, 1st Ex. Sess., ch. 113, §§ 1-29. (codified at ch. 17.10 RCW). Each county was given authority to activate a noxious weed control board to address control of noxious weeds in each county. *Id.* § 24. The legislature authorized counties to raise the operating costs for a county's weed program through an assessment “in lieu of a tax” based on classifications of types of lands within the county. *Id.* Like the weed districts authorized under RCW 17.04 the assessment in lieu of a tax was not determined by the benefit to

an individual piece of property. Moreover, the legislature provided: “Control of weeds is a benefit to the lands[.]” RCW 17.10.240(1).⁹ It was only if a classification of land had no benefit, not an individual piece of property, that a county could elect to assess a zero amount. *See id.*

In 1991, RCW 17.04.180 was amended again to remove the references to specific state agencies and instead make clear that all statements of assessments owed should be forwarded to the “appropriate state agency” for payment in the amount of the “tax to which the lands would be liable if there were in private ownership.” Laws of 1991, ch. 245, § 1.

In summary, the legislature has specifically authorized counties through weed districts and/or noxious weed control boards to provide services to address the public health and safety issues raised by the presence and spreading of noxious weeds. The legislature has also authorized counties to make assessments in lieu of taxes based on the classifications of lands benefited by weed control. Finally, the legislature has authorized counties to levy assessments to cover the costs for providing weed control services on state-owned lands. As such, WSDOT must reimburse the County for its fair share of those costs.

⁹ In 1997, the legislature removed the word “special” in describing the benefit provided by the control of noxious weeds. Laws of 1997, ch. 353, § 27.

WSDOT ignores these legislative directives and instead argues it owes nothing for the services provided based on a 1984 Attorney General's opinion. WSDOT's Br. at 25 (citing Op. Att'y Gen. ("AGO") No. 1, at *2-3 (1984)). The crux of WSDOT's position seems to be that while a PILT may be authorized under RCW 17.04.180, paying weed district assessments is not. WSDOT's hyper-technical argument puts form over substance and ignores the Supreme Court's directive to "look beyond a charge's official designation and analyze its core nature by focusing on its purpose, design and function in the real world[.]" *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 806, 23 P.3d 477 (2001) (citation omitted).

Moreover, as established above, the legislature has time and again reaffirmed the state's obligation to pay for noxious weed control, regardless of the methodology for the user charge imposed. In other words, although the legislature first established the state's liability for county noxious weed control as a payment in lieu of general property taxes, when the weed districts' funding mechanism was changed in 1951 to a classification-based assessment, the legislature chose not to alter or reduce the state's obligation to pay its fair share for county noxious weed services on state land. WSDOT's concession that RCW 17.04.180

authorizes a PILT is a sufficient basis for the Court to compel WSDOT to pay its fair share here.

C. The “Special Benefits” Requirement Does Not Apply To Counties’ Exercise of Police Powers.

WSDOT argues that chapters 17.04 and 17.10 RCW are “special assessments” and thus subject to a heightened “special benefits” requirement based on a three-part test used by the State Attorney General. WSDOT’s Br. at 16 (citing AGO No. 18, at *7 (1989)). Notwithstanding that no court has adopted that test, WSDOT is wrong that noxious weed control services are a “special assessment” merely because they benefit the land. To the contrary, counties provide numerous benefits through their police powers to both private and state-owned property that are not reimbursed via “special assessments”. Const. art. 11, § 11 (authorizing counties to “make and enforce . . . police, sanitary and other regulations”).

As the Supreme Court has explained, when counties act to protect the health of their inhabitants through their police powers, the “special benefit idea does not enter into the picture at all.” *See Morse*, 37 Wn.2d at 811; *see also Teter*, 104 Wn.2d at 228 (not applying special benefits requirement when county acted in furtherance of valid police power). That the special benefits requirement does not apply to a county’s police power measures makes practical sense. Unlike “special assessments”,

which in almost all cases consist of localized physical improvements, police power measures are typically broad-based public health and safety measures. *See, e.g., Thurston County Rental Owners Ass'n v. Thurston County*, 85 Wn. App. 171, 178-79, 931 P.2d 208 (1997) (upholding county permit fees to fund the monitoring of failing septic systems that contaminate ground and surface water).

Here, Washington courts have recognized noxious weed control services as a valid police power measure. *See, e.g., N. Pac. Ry. Co.*, 78 Wash. at 56-57 (declaring the legislature “may require property owners within the state to cut noxious weeds . . . as a valid police regulation”); *see also Carstens v. De Sellem*, 82 Wash. 643, 650, 144 P. 934 (1914) (recognizing “regulations for eradicating diseases and pests” as a valid police power). Again, WSDOT concedes weed control “bear[s] some relation to the public health and welfare.” WSDOT’s Br. at 21.

Moreover, counties can collect fees as reimbursement for exercising police powers. *See Margola Assocs. v. City of Seattle*, 121 Wn.2d 625, 634, 854 P.2d 23 (1993) (recognizing that municipalities can collect fees “under its general police powers to regulate matters relating to health, safety, and welfare”) (citing Const. art. 11, § 11). Collecting fees for police power measures is particularly appropriate when they “pay the costs of maintaining and operating” those measures. *Teter*, 104 Wn.2d at

234. Here, county weed boards and districts collect assessments in lieu of taxes for weed control services based “on the amount of money necessary” to pay for those services. RCW 17.04.240; RCW 17.10.240(1) (requiring the county weed board to “submit a budget . . . for the operating cost of the county’s weed program”). The assessments “defray the expenses” of providing weed control services on state-owned lands. *Teter*, 104 Wn.2d at 234. As such, counties are permitted to recoup costs for providing such services as a valid exercise of their police powers. *Wedemeyer v. Crouch*, 68 Wash. 14, 14, 122 P. 366 (1912) (upholding “assessing and collecting the cost of destroying” noxious weeds).

Accordingly, the costs incurred by counties for providing noxious weed services on state-owned lands can be assessed as a valid police power measure independent of the “special benefits” analysis urged by WSDOT. Regardless, the legislature has recognized noxious weed control as a benefit to the land. As noted, RCW 17.10.240(1) provides: “Control of weeds is to the benefit of the lands....” Indeed, WSDOT’s argument to the contrary is disingenuous.

D. Refusing to Fund Statutorily Required Noxious Weed Programs Benefiting State Lands Violates RCW 43.09.210(3) and Creates an Unfunded Mandate.

WSDOT’s attempt to escape its obligations cannot be reconciled with RCW 43.09.210(3), which requires a government to pay for services

provided by another government. In other words, the state cannot force counties to provide services on state-owned lands without reimbursement. *Cf. Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 346, 662 P.2d 845 (1983) (noting that the state is constitutionally prohibited from charging “municipal corporations . . . for municipal purposes”). WSDOT is responsible for reimbursing counties for services that the legislature has required the county to provide. *See, e.g., Lane v. City of Seattle*, 164 Wn.2d 875, 889, 194 P.3d 977 (2008) (holding that RCW 43.09.210 required city to pay another for fire hydrant costs).

After decades of paying the statutorily required payments for costs associated with noxious weed control services on state land, WSDOT has now unilaterally declared itself exempt from such payments. To the extent WSDOT’s position is upheld and the legislature refuses to reimburse the counties, the noxious weed control statutes will become an unlawful unfunded mandate. Chapter 43.135 RCW requires that “local governments are provided funds adequate to render those services deemed essential by their citizens” and that the “state does not impose responsibility on local governments for new programs or increased levels of service under existing programs unless the costs thereof are paid by the state[.]” RCW 43.135.010(4)(b), (c). WSDOT’s decision in 2017 to stop

paying the County for noxious weed services, if confirmed by the legislature's refusal to appropriate funds for payment, constitutes the imposition of "responsibility for new programs or increased levels of service under existing programs" without full reimbursement of the state in violation of RCW 43.135.160. Should other agencies follow suit, counties' abilities to manage noxious weeds, as required by state law, will be severely threatened. Moreover, as detailed above, counties provide a host of services on state lands for which similar reimbursement mechanisms are provided by statute. *See* Section III.B, *supra*. Accepting WSDOT's argument here will pave the way for other agencies to unilaterally depart from their obligations to reimburse counties for vital services, to the detriment of the health and safety of Washington residents.

V. CONCLUSION

For nearly a century, chapters 17.04 and 17.10 RCW have provided counties with express statutory authority to recover costs for providing noxious weed services on state-owned lands. These statutes are consistent with counties' well-established powers to recover costs for the provision of other services that promote public health and safety on state lands within their borders. In light of the increasing demands on counties for services coupled with decreasing revenues, it is imperative to safeguard the few available mechanisms for counties to recoup from the

state a portion of their rising costs. WSAC thus joins Kittitas County in respectfully asking this Court to reverse.

RESPECTFULLY SUBMITTED this 1st day of March, 2019.

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PROOF OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, over the age of 21 years, and not a party to this action. On the 1st day of March, 2019, I caused to be served, via the Washington State Appellate Court's Portal System, a true copy of the foregoing document upon the parties listed below:

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