

PM 1-30-09

FILED  
COURT OF APPEALS  
DIVISION II

09 FEB -2 AM 9:54

STATE OF WASHINGTON  
BY                     

DEPUTY

83937-9

No. 379813

Court of Appeals  
DIVISION II  
STATE OF WASHINGTON

**MASON CONSERVATION DISTRICT,**

**APPELLANT,**

v.

**JAMES R. CARY**, individually, and **MARY ALICE CARY**, individually  
and the marital community comprised thereof; **JOHN E. DIEHL**,  
individually and **WILLIAM D. FOX, SR.**, individually;

**RESPONDENTS**

v.

**MASON COUNTY, DEFENDANT.**

**APPELLANT MASON CONSERVATION DISTRICT'S  
REPLY BRIEF**

OWENS DAVIES FRISTOE  
TAYLOR & SCHULTZ, P.S.  
Matthew B. Edwards, WSBA No. 18332  
1115 W. Bay Drive, Ste. 302  
P.O. Box 187  
Olympia, Washington 98507  
(360) 943-8320

**ORIGINAL**

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ARGUMENT .....	1
A.	The trial court erroneously found that the system of assessments specifically authorized by the Legislature amounted to an unconstitutional tax. ....	1
1.	Under <i>Covell</i> , the assessment constitutes a regulatory fee, not a tax. ....	2
2.	Even if the assessment were characterized as a tax, rather than a regulatory fee, Claimants have not established that it is an unconstitutional tax. ....	10
B.	The Court should reject each of the Claimants' statutory challenges to the assessment. ....	13
1.	The Legislature intended to preclude judicial review. ....	13
2.	The Claimants did not timely assert their statutory claims. ....	15
3.	The Mason County Board of County Commissioners' ordinance complies with RCW 89.08.400(3) because it establishes an assessment that does not exceed the maximum allowed rate of \$5.00 per parcel and \$0.10 per acre. ...	17
4.	The Mason County Board of County Commissioners adopted "suitable" classifications. ....	19
5.	Because the Commissioners imposed an assessment for the benefit of the Mason Conservation District, and not for the benefit of Mason County, the ordinance complies with RCW 89.08.400(1). ....	21
6.	Because the ordinance provides funding that inures to the benefit of all assessed property owners located within the Conservation District, the ordinance complies with RCW 89.08.400(2). ....	24
C.	The Claimants' objections to the form of relief ordered by the trial court are not properly before this Court. In any event, the trial court properly limited the relief granted to	

	a refund of the assessments paid by the Claimants under protest.....	25
III.	CONCLUSION.....	28

## TABLE OF AUTHORITIES

### Cases

<i>American Legion Post No. 32 v. The City of Walla Walla</i> , 132 Wn.2d 1, 7, 802 P.2d 784 (1991).....	7
<i>Bilger v. State</i> , 63 Wash. 457, 116 Pac. 19 (1911) .....	13
<i>Boeing Co. v. King County</i> , 75 Wn.2d 160, 165, 449 P.2d 404 (1969).....	11
<i>Cary v. Mason County</i> , 132 Wn. App. 495, 132 P.3d 157 (2006).....	15, 16
<i>Corrillo v. City of Ocean Shores</i> , 122 Wn. App. 592, 94 P.3d 961 (2004)....	26
<i>Covell v. City of Seattle</i> , 127 Wn.2d 874, 905 P.2d 324 (1995).....	1, 2, 6
<i>Heavens v. King County Rural Library Dist.</i> , 66 Wn.2d 558, 404 P.2d 453 (1965).....	4
<i>Hillis Homes v. Snohomish County</i> , 97 Wn.2d 804, 811, 650 P.2d 193 (1982) .....	27
<i>Holmes Harbor Sewer District v. Frontier Bank</i> , 123 Wn. App. 45, 58, 123 P.2d 823 (2005).....	10
<i>Island County v. State</i> , 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998) .....	11
<i>Lutheran Day Case v. Snohomish County</i> , 119 Wn.2d 91, 113, 829 P.2d 746 (1992).....	16
<i>Ohio Valley Water Company v. Ben Avon Burough</i> , 253 U.S. 287, 64 L. Ed. 909, 40 S. Ct. 527 (1920).....	14
<i>Otis Orchards Co. v. Otis Orchards Irrigation Dist. 1</i> , 124 Wash. 510, 513-14, 215 Pac. 23 (1923).....	10
<i>Roberson v. Perez</i> , 156 Wn.2d 33, 41 at ¶ 20, 123 P.3d 844 (2005).....	16
<i>Teter v. Clark County</i> , 104 Wn.2d 227, 704 P.2d 1171 (1985)..	4, 5, 11, 12, 20
<i>Washington Federation of State Employees v. State Personnel Board</i> , 23 Wn. App. 142, 594 P. 2d 1375 (1979).....	15
<i>Washington Public Ports Ass’n v. State, Dept. of Revenue</i> , 148 Wn.2d 637, 62 P.3d 462 (2003).....	4, 5

### Statutes

Chapter 90.72 RCW.....	23
RCW 36.32.330 .....	16
RCW 84.33.010 .....	8
RCW 84.68.020 .....	27

RCW 89.08.220 .....	5, 22
RCW 89.08.220(3).....	22
RCW 89.08.220(4).....	22
RCW 89.08.341 .....	22
RCW 89.08.400 .....	9, 12, 20, 23
RCW 89.08.400(1).....	21, 24
RCW 89.08.400(2).....	14, 21, 24, 25
RCW 89.08.400(3).....	17, 18, 19
RCW 89.08.400(5).....	14

**Other Authorities**

AGO 2006 No. 8 at p. 5 (2006) .....	22
Laws of 1992, Chapter 100.....	23

**Constitutional Provisions**

Washington Const., Art. VII, Sec. 2 .....	12
Washington Const., Art. VII, Sec. 9 .....	12
Washington Const., Art. XI, Sec. 11.....	12

## I. INTRODUCTION

The Mason Conservation District submits this Reply Brief.

As predicted, the Claimants have not defended the grounds on which the Superior Court purported to determine that the assessment at issue in this matter constituted an unconstitutional tax. The Superior Court's decision was in error, and should be reversed.

## II. ARGUMENT

The Conservation District will first address the constitutional issues on which the trial court purported to dispose of this case. The District will then address the Claimants' statutory claims.

- A. The trial court erroneously found that the system of assessments specifically authorized by the Legislature amounted to an unconstitutional tax.

Under the test set forth in *Covell v. Seattle*, the assessments constitute regulatory fees, not taxes. Even if these assessments are properly characterized as taxes, however, they are specifically authorized by the Legislature and imposed in a uniform manner and were therefore properly imposed.

1. Under *Covell*, the assessment constitutes a regulatory fee, not a tax.

The parties agree that the Court should apply the test set forth in *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995) to determine whether the assessment imposed by the Mason County Board of County Commissioners constitutes a regulatory fee or a tax. Pursuant to *Covell*, this Court should consider the following factors in distinguishing between fees and taxes:

- Is “the primary purpose . . . to accomplish desired public benefits which cost money, or [is] the primary purpose . . . to regulate”?
- Is “the money collected allocated . . . only to the authorized . . . purpose”?
- Is there “a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer”?

*Covell*, 127 Wn.2d at 879. Under the *Covell* test, the assessment constitutes a regulatory fee.

a. The assessment “regulates,” satisfying the first *Covell* test.

The first *Covell* factor requires the court to examine whether the assessment was imposed for a regulatory purpose. It was.

The assessment was imposed on property upon which stormwater falls, and from which stormwater (combined with soil or other pollutants) runs onto neighboring properties, causing erosion, sedimentation, and pollution. CP 53 (Bolender Declaration, ¶ 3). Because stormwater runs off of every assessed property, they all contribute to creating the “public burden,” to be addressed by the fund created by the assessment. In addition, the assessment is used to benefit property owners by making targeted conservation services available to them, and by dealing with the cumulative effects of stormwater runoff. CP 54 (Bolender Declaration, ¶ 8). The assessment thus constitutes a regulatory fee, not a tax, under the first *Covell* test.

Claimants assert that the charges are not regulatory because the ordinance passed by the Commissioners “makes no mention of regulation.” Claimants’ Brief at p. 30. This is simply not true. Contrary to what the Claimants suggest, in imposing the charge, the Mason County Board of County Commissioners specifically found, among other things, that the assessment would effectuate the protection of drinking water from non-point pollution sources originating on assessed property, and would provide funding for the provision of targeted services which the Conservation District would

provide to assessed property owners, thereby enhancing the property values of the properties being assessed. CP 64-65. The assessment serves a regulatory purpose.

The Claimants next argue that because RCW 89.08.400 refers to the charge as a “special assessment,” and because the charge does not precisely fit the narrow, technical definition of “special assessment” within the meaning of Wash. Const. Art. 7, Sec. 9 and as described in cases such as *Heavens v. King County Rural Library Dist.*, 66 Wn.2d 558, 563, 404 P.2d 453 (1965), the assessment is invalid. Claimants’ Brief at 31-32.

Again, this is incorrect. The validity of a governmental charge must be determined by its “incidents,” i.e., the function it actually performs not by what it is called. *Washington Public Ports Ass’n v. State, Dept. of Revenue*, 148 Wn.2d 637, 650, 62 P.3d 462 (2003). Here, the assessment serves a regulatory purpose. Therefore, it is a valid regulatory fee.

In its opening brief, the Conservation District pointed out that the Washington Supreme Court has previously affirmed the imposition of a remarkably similar charge as a regulatory fee. *Teter v. Clark County*, 104 Wn.2d 227, 239, 704 P.2d 1171 (1985). The Claimants distinguish *Teter*

based solely on the fact that the charges approved by the Supreme Court in that case were not described in the ordinance enacting them as “special assessments.” See Claimants’ Brief at p. 31. But the assessment’s function, not its name, is what matters. *Washington Public Ports*, supra. The *Teter* court’s determination that such charges in fact are regulatory fees should therefore control here.

In sum, the assessment was imposed for a regulatory purpose.

b. The assessment is allocated only to the authorized purpose, satisfying the second *Covell* factor.

The second *Covell* factor requires the court to examine whether the funds collected were allocated only to the regulatory purposes. They were.

The District segregated the funds collected by the assessment. CP 55 (Bolender Declaration, ¶ 14). The District spent the funds raised by the assessment only to prevent and/or deal with the cumulative impact of stormwater runoff—the only thing which the District is statutorily empowered to do. RCW 89.08.220. Therefore, the assessment qualifies as a regulatory fee under the second *Covell* factor.

The Claimants assert that the ordinance authorizing the imposition of the charge does not explicitly call for the funds raised to be segregated.

Claimants' Brief at p. 35. *Covell* does not require the law authorizing a regulatory fee, on its face, to call for funds to be segregated. 127 Wn.2d at 879, 885. Claimants cite no other authority for their claim that this is required.

Claimants next argue that these funds have been "commingled" because, although spent in order to prevent/address the cumulative impact of stormwater runoff, other District monies have also been spent for the same purpose. Claimants' Brief at p. 35-36. *Covell* requires only that the funds generated by a charge be spent for the purpose for which the charge was imposed. *Covell*, 127 Wn.2d at 879. There is nothing in *Covell* that purports to prohibit the spending of other money for the same purpose.

Finally, Claimants argue that because, subsequent to the passage of the ordinance authorizing these charges, the Conservation District entered into an inter-governmental agreement with the Mason County Department of Public Health, the assessments are thereby somehow rendered unconstitutional. Claimants' Brief at 36. See also Claimants' Brief at 18-21. This argument fails for either of two separate reasons.

First, the validity of the assessments must be determined in light of the conditions that existed at the time the Mason County Board of County Commissioners authorized them. “There is no authority . . . that renders an otherwise constitutionally levied tax unconstitutional merely because it is purportedly utilized for a purpose other than what is required.” *American Legion Post No. 32 v. The City of Walla Walla*, 132 Wn.2d 1, 7, 802 P.2d 784 (1991).

Second, the Conservation District in fact has not expended any of these funds for an improper purpose. It has simply contracted with the County to more efficiently provide those services which the Conservation District is statutorily directed and empowered to provide. See Section B.5 at pp. 21-24, infra.

In sum, under the second *Covell* factor, the assessment constitutes a regulatory fee.

c. There is a “direct relationship” between the stormwater problem and the properties assessed, and a “direct relationship” between the assessment and the services made available to/actions taken to address the effects of stormwater runoff, satisfying the third *Covell* factor.

Finally, there is a “direct relationship” between the stormwater problem and the properties assessed, and a “direct relationship” between the

assessment and the services made available to/actions taken to address the effects of stormwater runoff. The assessment thus is a regulatory fee under the third *Covell* factor.

The assessment applies to all properties except forest lands. By statute, the Legislature has exempted forest lands from paying the assessment, because forest tends to absorb and store, rather than discharge, stormwater. See RCW 84.33.010 (noting that forest lands provide the benefit of “enhancing water supply, minimizing erosion, storm and flood damage . . .”). Therefore, the assessment applies to all properties that tend to contribute to the cumulative problems associated with stormwater runoff. It is not substantially over or under inclusive.

The assessment is used to provide targeted conservation services only to properties that are assessed. CP 54 (Bolender Declaration, ¶ 8). The District also uses assessment funds to deal with the erosion- and pollution-related impacts arising from stormwater that runs off the assessed properties. *Id.* (¶ 6). Therefore, the assessment funds are spent only for purposes directly related to properties which are assessed.

The Claimants argue that the assessments should be more particularized. Claimants' Brief at p. 36. The issue of how particularized the assessment ought to be is an issue within the Legislature's discretion. The Legislature has specifically vested that discretion in the county legislative authority. See RCW 89.08.400. Given the cost of attempting to implement a more particularized system of assessments, and the small amounts involved, the Commissioners acted well within their legislative discretion in approving a flat, per-parcel assessment. See Section B.4 at pp. 19-21 infra.

The Claimants next assert that there is no "direct relationship" because the assessment is "simply a charge imposed for the privilege of living within the district." Claimants' Brief at 37. That is simply not true. Non-exempt property owners pay the assessment, whether they live in the District or not. People who live in the District, but who do not own property, are not charged the assessment.

Finally, the Claimants assert that there is no "direct relationship" because there is no guarantee that a particular property owner will make use of Conservation District services in any particular year. Claimants' Brief at p. 37-38. This Court has specifically held that that is not a requirement:

The value of the right conferred or added, and not the extent to which the owner of the property may take advantage of the right, is the test to determine whether a benefit has been received.

*Holmes Harbor Sewer Dist. v. Frontier Bank*, 123 Wn. App. 45, 58, 123 P.2d 823 (2005), reversed on other grounds, 155 Wn.2d 858, 123 P.2d 823 (2005), quoting *Otis Orchards Co. v. Otis Orchards Irrigation Dist. 1*, 124 Wash. 510, 513-14, 215 Pac. 23 (1923). The Commissioners expressly found, in adopting the assessment, that it would provide a tangible benefit to the properties assessed. CP 64-65.

In sum, the Court should hold that the assessment which the Legislature specifically authorized the Mason County Board of County Commissioners to impose for the benefit of the Mason County Conservation District constitutes a regulatory fee under all three *Covell* factors. The trial court's decision to the contrary should be reversed.

2. Even if the assessment were characterized as a tax, rather than a regulatory fee, Claimants have not established that it is an unconstitutional tax.

Even if the assessment were characterized as a tax, rather than a regulatory fee, Claimants have not established that it is an invalid tax.

The Claimants carry the “heavy burden” to establish, beyond a reasonable doubt, how and why the charge, if characterized as a tax, is invalid. *Island County v. State*, 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998).

The Claimants cite Article VII, Sec. 1 of the Washington Constitution. Claimants’ Brief at 25. That section requires that:

All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax . . . . All real estate shall constitute one class . . . .

Claimants’ then cite a case which holds that, *if* a tax is based upon the value of the property being taxed, then the tax must be imposed at a uniform percentage of such property’s value. *Id.*, citing *Boeing Co. v. King County*, 75 Wn.2d 160, 165, 449 P.2d 404 (1969).

Claimants do not establish, however, that Article VII, Sec. 1 requires that every tax on real property must be based on value. To the contrary, the Supreme Court explicitly held, in *Teter v. Clark County*, 104 Wn.2d 227, 234, 704 P.2d 1171 (1985), that where a County had properly imposed a flat, per-parcel stormwater charge, the charge, as a tax, was uniform and therefore valid.

*Teter* controls on this issue. Claimants have not met their heavy burden of establishing that the assessment is unconstitutional on this basis.

Claimants next cite Washington Const., Art. VII, Sec. 2. Claimants' Brief at 26. That section sets a one percent ceiling on *ad valorem* taxes. This assessment is not an *ad valorem* tax, because it is not based on the value of the property. In any event, Claimants did not offer the slightest evidence to show that the \$5.00 per-parcel charge in fact caused an exceedence of the one percent limitation. Claimants again did not meet their "heavy burden" of showing that the assessment is unconstitutional on this basis.

Claimants next cite Washington Const., Art. XI, Sec. 11. Claimants' Brief at 29. That section deals with the police power. Here, the Mason County Board of County Commissioners imposed the assessment pursuant to the specific authority delegated to it by the Legislature. RCW 89.08.400. Therefore, it is irrelevant whether the County would have had the authority to impose the assessment under its general police power.

Finally, Claimants cite Washington Const., Art. VII, Sec. 9. Claimants' Brief at 6, 20, 27, 31. That section allows the Legislature to vest certain municipal authorities with power "to make local improvements by

special assessment.” This section has no application to counties. *Bilger v. State*, 63 Wash. 457, 116 Pac. 19 (1911). And in any event, the Conservation District has never sought to justify the assessment as a “special assessment for a local improvement” under that section.

In sum, even if the assessment were characterized as a tax, the Claimants have not met their heavy burden of showing that it has been imposed in a manner that violates the Washington constitution. This Court should reverse the decision of the trial court for this second separate, independent reason.

B. The Court should reject each of the Claimants’ statutory challenges to the assessment.

In addition, the Court should reject each of the Claimants’ statutory challenges to the assessment.

1. The Legislature intended to preclude judicial review.

First, the Legislature intended to preclude judicial review of the Claimants’ statutory claims.<sup>1</sup>

---

<sup>1</sup> The Conservation District does not dispute the Court’s jurisdiction to review the constitutionality of the assessment. The District claims only that the Legislature intended to divest the courts of the power to review claims that the county legislative authority acted outside of its legislative discretion in imposing the assessment.

The Legislature has declared that the findings of the commissioners in enacting the assessment shall be final and conclusive. RCW 89.08.400(2). The Legislature has also expressly provided a non-judicial means by which property owners may object to the decision to impose an assessment (by filing a petition objecting to the assessment, which, if signed by 20 percent of the property owners, automatically terminates the assessment. RCW 89.08.400(5)). Thus, the Legislature did not intend that the commissioner's decision to impose the assessment be subject to judicial review.

Citing an old United States Supreme Court case, the Claimants allege that even if this were the Legislature's intent, it would conflict with the due process clause of the United States Constitution. Claimants' Brief at p. 8-9, citing *Ohio Valley Water Company v. Ben Avon Borough*, 253 U.S. 287, 289, 64 L. Ed. 909, 40 S. Ct. 527 (1920). But in the *Ben Avon* case, the Supreme Court held only that, where a regulated entity desired to challenge rates imposed on it by the state as an *unconstitutional* deprivation of property, the court had the power to entertain that constitutionally-rooted claim. In contrast, this Court has specifically held that the Legislature has the power to

deprive the courts of jurisdiction over claims that a governmental body acted contrary to statute or abused its discretion. *Washington Federation of State Employees v. State Personnel Board*, 23 Wn. App. 142, 594 P. 2d 1375 (1979) (statute which made state Personnel Board's legislative decision final precluded judicial review).

In sum, the Legislature intended to preclude judicial review of the statutory claims asserted by the Claimants. The Court should hold that it has no jurisdiction to even consider these claims.

2. The Claimants did not timely assert their statutory claims.

Second, the Claimants did not timely assert their statutory claims.

As the Conservation District noted in its opening brief, this matter was previously before this Court on appeal from the Superior Court's decision dismissing the Claimants' constitutional challenge as untimely. In that prior appeal, this Court, focusing exclusively upon the Claimants' constitutional claim, analogized the claims to a claim for a refund of an unconstitutional tax. *Cary v. Mason County*, 132 Wn. App. 495, 132 P.3d 157 (2006). Utilizing the limitation period applicable to such claims, the Court held that the plaintiffs had timely asserted their constitutional claim. *Id.* at 504.

In its prior decision, the Court did not address or separately consider the plaintiffs' statutory claims. Using the reasoning which the Court articulated, those claims are analogous to any other non-constitutional claim that the county commissioners have acted contrary to law. The Legislature has explicitly required such claims to be brought within 20 days of the pertinent legislative decision. RCW 36.32.330.

Plaintiffs did not file this lawsuit until March 10, 2003, some six months after the Mason County Board of County Commissioners imposed the assessment. *Cary*, 132 Wn. App. at 502. Under the rationale articulated by this Court in its prior decision, the Claimants did not timely assert their statutory claims.<sup>2</sup>

---

<sup>2</sup> The Claimants only response to this argument is to assert that the Court's prior decision is res judicata. Claimants' Brief, p. 11, fn. 2. This is incorrect. Because this matter is before the Court in the same proceeding involving the same parties, the law of the case doctrine, and not the doctrine of res judicata, applies. *Roberson v. Perez*, 156 Wn.2d 33, 41 at ¶ 20, 123 P.3d 844 (2005).

Under the law of the case doctrine once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation. *Id.*, citing *Lutheran Day Case v. Snohomish County*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992). Here, the Conservation District is abiding by the law of the case. It merely seeks to have the Court apply the principle of law it articulated in its earlier decision to the plaintiffs' statutory claims.

Under the principle of law articulated in this Court's prior decision, the Claimants' statutory claims are not timely. The Court should decline to consider any of them for this second separate reason.

3. The Mason County Board of County Commissioners' ordinance complies with RCW 89.08.400(3) because it establishes an assessment that does not exceed the maximum allowed rate of \$5.00 per parcel and \$0.10 per acre.

In any event, the Mason County Board of County Commissioners ordinance complies with RCW 89.08.400(3) because it establishes an assessment that does not exceed the maximum allowed rate of \$5.00 per parcel and \$0.10 per acre.

RCW 89.08.400(3) provides:

An annual assessment rate shall be stated as either uniform annual per acre amount, or an annual flat rate per parcel plus a uniform annual rate per acre amount, for each classification of land. The maximum annual per acre special assessment rate shall not exceed ten cents per acre. The maximum annual per parcel rate shall not exceed five dollars. . . .

This statute contains two requirements. First, assessment rates must be stated as "an annual flat rate per parcel plus a uniform annual rate per acre amount." Here, the ordinance states that the assessment rate to be \$5.00 per

parcel and \$0.00 per acre. CP 65, 97. The Commissioners stated the assessment rate as required by the statute.

Second, RCW 89.08.400(3) sets a maximum assessment rate of \$0.10 per acre and \$5.00 per parcel. The Commissioners imposed an assessment of \$5.00 per parcel. CP 65, 97. Because it set the assessment at a rate less than the maximum permitted by the Legislature, the Commissioners also complied with this requirement.

The Claimants assert that the Court should infer, from the statutory requirement that the assessment rate be stated as an "annual flat rate per parcel plus a uniform annual rate per acre amount," that the Legislature intended to require the setting of a per-acre amount in excess of \$0.00. Claimants' Brief at p. 12. For either of two separate reasons, the Court should reject this argument.

First, it adds a requirement to the statute that simply is not there. The Legislature expressly set a maximum annual per acre amount that the Commissioners could impose. Had the Legislature for some reason intended to require a minimum per-acre rate, it would also have explicitly set that rate.

Second, what sense would it make to construe this statute as requiring a positive per-acre charge, when the imposition of such a charge would simultaneously increase the financial burden imposed on the property owner and reduce the revenue generated by the assessment? The Claimants have not answered that question. They have not, because they cannot.

In sum, if it reaches the merits of the Claimants' statutory claims, the Court should reject the argument that the Commissioners violated RCW 89.08.400(3).

4. The Mason County Board of County Commissioners adopted "suitable" classifications.

Next, the Claimants assert that the Commissioners violated RCW 89.08.400(3). This statute provides:

A system of assessments shall classify lands in the conservation district into suitable classifications according to benefits conferred or to be conferred by the activities of the conservation district, . . . .

The Claimants challenge the assessment imposed by the Mason County Board of County Commissioners on the grounds that the Board did not adopt "suitable" classifications. The determination of what classifications are "suitable" necessarily involves the exercise of a legislative discretion

which the Legislature has specifically entrusted to the county legislative authority. RCW 89.08.400.

Therefore, even if this determination were subject to judicial review, this Court would only be authorized to review the Commissioners' decision to adopt a single classification to determine whether that decision was "arbitrary and capricious." *Teter v. Clark County*, 104 Wn.2d 227, 234, 704 P.2d 1171 (1985). Under this standard, the Claimants have the "heavy burden of proof" of establishing that the Commissioners' decision was willful and unreasoning, without regard for facts and circumstances. *Id.* A legislative determination will be sustained if the court can reasonably conceive of *any* state of facts to justify that determination. *Id.*

The Commissioners were entitled, in the exercise of their legislative discretion, to conclude that the costs of developing a more particularized system of assessment outweighed the benefit that would flow therefrom. Therefore, it was neither "willful nor unreasoning" for the Commissioners to adopt a \$5.00 per-parcel assessment that uniformly applied to all non-exempt parcels located within the conservation district.

Claimants argue that the Commissioners should have also exempted critical areas, such as buffers surrounding wetlands, streams and lakes. Claimants' Brief at p. 17. But the Legislature specifically directed the Board to assess property on a per-parcel basis. RCW 89.08.400(2). Critical areas do not correspond to existing tax parcel boundaries. Therefore, the Board lacked the authority to even consider imposing an assessment along these lines.

In sum, the Claimants have not shown that the Board exercised its legislative discretion in an arbitrary or capricious manner. The Court should reject this claim.

5. Because the Commissioners imposed an assessment for the benefit of the Mason Conservation District, and not for the benefit of Mason County, the ordinance complies with RCW 89.08.400(1).

The Claimants next assert that, because the assessment was allegedly imposed for the benefit of Mason County, and not the Mason Conservation District, it violates RCW 89.08.400(1). The Court should also reject this claim.

RCW 89.08.400(1) provides, in pertinent part:

Special assessments are authorized to be imposed for conservation districts as provided in this section.

Under this statutory scheme, while the county legislative authority has the authority to adopt a system of assessments for the benefit of the conservation district, the county legislative authority has no authority over how the conservation district spends its funds. AGO 2006 No. 8 at p. 5 (2006). The Commissioners had no right to require the Conservation District to enter into an interlocal agreement, and the Conservation District did not consider itself obliged to do so. CP 57 (Bolender Declaration, ¶ 23).

The Conservation District was certainly entitled to do so, however RCW 89.08.220 specifically empowers conservation districts to, among other things:

To carry out preventative and control measures and works of improvement for the conservation of renewal natural resources, within the district . . . .

To cooperate or enter into agreements with, and within the limits of appropriations duly made available to it by law, to furnish financial or other aid to any agency, governmental or otherwise, or any occupier of lands within the district in the carrying on of preventive and control measures and works of improvement for the conservation of renewable natural resources within the district . . . .

See also RCW 89.08.220(3), (4); 89.08.341. Indeed, the Legislature has at times specifically directed counties and conservation districts to cooperate in

this manner, in order to enhance the efficiency with which conservation district services are provided. See Laws of 1992, Chapter 100 (amending Chapter 90.72 RCW) (“The Legislature finds that existing entities, including conservation districts and local health departments, should be used by counties to address the water quality problems affecting the recreational and commercial shellfish harvest”).

Here, the Conservation District and the County entered into an inter-local agreement which specifies that the County is authorized to carry out and bill the Conservation District only for those services which the Conservation District itself is specifically authorized to perform by RCW 89.08.400. CP 105 (Inter-local Agreement, VI, F). As Conservation District Manager Jon Bolender testified in his declaration:

[T]he Conservation District entered into the inter-local agreement simply to enable the District to more cost-efficiently provide conservation services to property owners, by utilizing the capacity, technical expertise and knowledge of the Mason County Department of Public Health staff in areas where Public Health staff were better suited to provide such services. The Conservation District entered into the inter-local agreement because that was the way the Conservation District believed it could most cost-efficiently provide the conservation services it is statutorily empowered and directed to deliver.

Moreover, under the inter-local agreement, the County bills the Conservation District for the services it renders to the District only if and as those conservation services have been provided.

CP 57 (Bolender Declaration, ¶ 24-25).

In sum, the Claimants' challenge to the assessment on the grounds that it was not imposed for the Conservation District is without merit.

6. Because the ordinance provides funding that inures to the benefit of all assessed property owners located within the Conservation District, the ordinance complies with RCW 89.08.400(2).

Finally, because the ordinance provides funding that inures to the benefit of all assessed property owners located within the Conservation District, the ordinance complies with RCW 89.08.400(2).

RCW 89.08.400(2) provides:

After the hearing, the county legislative authority may accept, or modify and accept, the proposed system of assessments, including the number of years during which the special assessments shall be imposed, if it finds both the public interest will be served by the imposition of the special assessments and that the special assessments to be imposed on any land will not exceed the special benefit that the land receives or will receive from the activities of the conservation district. The findings of the county legislative authority shall be final and conclusive.

This statute must be construed in conjunction with RCW 89.08.400(1), which provides, in pertinent part:

Activities and programs to conserve natural resources, including soil and water, are declared to be of special benefit to lands and may be used as the basis upon which special assessments are imposed.

Here, the Mason County Board of County Commissioners expressly found that the public interest would be served by the imposition of the assessment, that all lands being assessed would benefit from the assessment, and that the assessment imposed would not exceed the benefit that the land received or will receive from the activities of the Conservation District. CP 64-65. Pursuant to the statute, these findings "shall be final and conclusive." RCW 89.08.400(2). The Conservation District complied with this statute.

C. The Claimants' objections to the form of relief ordered by the trial court are not properly before this Court. In any event, the trial court properly limited the relief granted to a refund of the assessments paid under protest by the Claimants.

The Claimants' objections to the form of relief ordered by the trial court are not properly before this Court. In any event, the trial court properly limited the relief granted to a refund of the assessments paid under protest by the Claimants.

Claimants challenge the order entered by the trial court after granting summary judgment in which the trial court held that, with respect to prior assessments collected prior to the date of its decision, only the plaintiffs were entitled to relief, and only with respect to years in which they paid the assessment under protest. See CP 12-13.

This issue is not properly before this Court. Although the Claimants filed a notice of discretionary review, they did not file a motion asking the court to grant discretionary review as to this issue. And the order by which this Court granted the Conservation District's motion for discretionary review does not state that this Court also granted review of the trial court's order with respect to remedy.

In any event, the trial court's order was a decision to limit potential monetary relief only to named plaintiffs, and only to taxes paid under protest, was correct. The Claimants' amended complaint requested relief on behalf of only the four named Claimants. CP 155-57. Unlike in the *Corrillo v. City of Ocean Shores*, 122 Wn. App. 592, 94 P.3d 961 (2004), case which the Claimants cite, the Claimants here did not present this matter as a class action.

Moreover, the trial court correctly determined that, in order to obtain a refund, the plaintiffs were obligated to show that they paid the assessment under protest. RCW 84.68.020 requires written protest as a condition precedent to maintenance of a suit for refund of a tax that has been paid. Claimants' theory in this case has consistently been that the assessment constituted an improper property tax.

Claimants' attempt to assert that they are excused from the requirement of establishing payment under protest pursuant to *Hillis Homes v. Snohomish County*, 97 Wn.2d 804, 811, 650 P.2d 193 (1982). *Hillis* is distinguishable for two reasons. First, unlike in *Hillis* where the County had no power to tax except pursuant to Legislative authority, and had no such authority, the Commissioners here acted pursuant to specific legislative authority. Second, in *Hillis*, the county "compelled payment" of the challenged charge by withholding permits until payment was made. Here, the County did nothing to compel the payment of what the Claimants have at all times contended was an improper property tax. *Hillis* is distinguishable for both reasons.

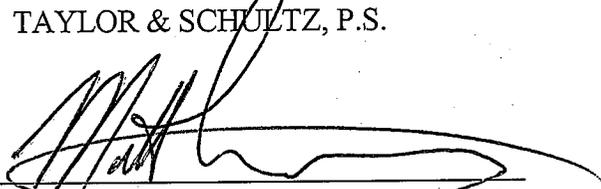
In sum, this issue is not properly before the Court. In any event, the trial court properly limited the relief granted to the plaintiffs only, and to the refund only of assessments paid under protest.

### III. CONCLUSION

Not even the Claimants defend the grounds on which the Superior Court disposed of this case. This Court should reverse the decision of the Superior Court. It should find the assessment in question to have been properly imposed, and remand with instructions that the Claimants' case be dismissed.

DATED this 30 day of January, 2009.

OWENS DAVIES FRISTOE  
TAYLOR & SCHULTZ, P.S.



Matthew B. Edwards, WSBA No. 18332  
Attorneys for Mason Conservation  
District