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SUPREME COURT
STATE OF WASHINGTON

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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.

MASON CONSERVATION DISTRICT'S SUPPLEMENTAL BRIEF

OWENS DAVIES FRISTOE
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TABLE OF CONTENTS

I. INTRODUCTION1

II. QUESTIONS PRESENTED1

III. FACTS3

 A. Statutory Background. 3

 B. The Assessment. 5

 C. The Lawsuit. 6

IV. STANDARD OF REVIEW7

V. ANALYSIS8

 A. The Legislature did not provide for judicial review. 8

 B. The Claimants did not timely assert their claims..... 9

 C. The Board imposed the assessment in compliance with
 the statute. 10

 1. The validity of the assessment is not affected by
 the District's subsequent, independent decision
 to enter into an interlocal agreement with the
 County..... 10

 2. The Board was entitled, in the exercise of its
 legislative discretion, to apply the assessment to
 all non-forested parcels. 12

 3. The Mason County Board of County
 Commissioners had the discretion to set the per-
 acre rate at zero cents per acre. 13

 D. The assessment possesses the "incidents" of a
 regulatory fee, and is therefore valid. 14

VI. CONCLUSION20

TABLE OF AUTHORITIES

Cases

<i>American Legion Post No. 32 v. City of Walla Walla</i> , 116 Wn.2d 1, 7, 802 P.2d 784 (1991)	11
<i>Appeal of Des Moines Sewer Dist., U.L.I.D. No. 29</i> , 97 Wn.2d 227, 229-30, 643 P.2d 436 (1982)	8
<i>Bilger v. State</i> , 63 Wash. 457, 116 Pac. 19 (1911)	15
<i>Brutsche v. City of Kent</i> , 78 Wn. App. 370, 377, 898 P.2d 310, <u>review denied</u> , 128 Wn.2d 1003, 907 P.2d 296 (1995)	9
<i>Cary v. Mason County</i> , 132 Wn. App. 495, 132 P.3d 157 (2006)	6, 7
<i>Covell v. City of Seattle</i> , 127 Wn.2d 874, 905 P.2d 324 (1995)	1, 2, 6, 7, 15, 17
<i>Goetter v. Colville</i> , 82 Wash. 305, 306-07, 144 Pac. 30 (1914)	8
<i>Holmes Harbor Sewer District v. Frontier Bank</i> , 123 Wn. App. 45, 96 P.3d 442 (2004)	17
<i>Hulo v. City of Redmond</i> , 14 Wn. App. 568, 544 P.2d 34 (1975)	8
<i>Island County v. State</i> , 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998)	8
<i>James v. Kitsap County</i> , 154 Wn.2d 574, 115 P.3d 286 (2005)	10
<i>King County Fire Protection Dist. No. 16 v. Housing Auth.</i> , 123 Wn.2d 819, 833 and n. 30, 872 P.2d 516 (1994)	15
<i>Roon v. King County</i> , 24 Wn.2d 519, 526-27, 166 P.2d 165 (1946)	9
<i>Samis Land Co. v. City of Soap Lake</i> , 143 Wn.2d 798, 807, 23 P.3d 477 (2001)	18
<i>Smith v. Spokane County</i> , 89 Wn. App. 340, 348-349, 948 P.2d 1301 (1997), <u>review denied</u> , 135 Wn.2d 1007 (1998)	17
<i>Storedahl Properties, LLC v. Clark County</i> , 143 Wn. App. 489, 178 P.3d 377 (2008)	7, 16, 17
<i>Teter v. Clark County</i> , 104 Wn.2d 227, 704 P.2d 1171 (1981)	12, 16, 17, 20
<i>Thurston County Rental Owners Association v. Thurston County</i> , 85 Wn. App. 171, 931 P.2d 208, <u>review denied</u> , 132 Wn.2d 1010 (1997)	17
<i>Washington Federation of State Employees v. State Personnel Board</i> , 23 Wn. App. 142, 148-49, 594 P.2d 1375 (1979)	9
<i>Washington Public Ports Ass'n v. State, Dept. of Revenue</i> , 148 Wn.2d 637, 650, 62 P.3d 462 (2003)	15

Statutes

Chapter 89.08 RCW.....6
RCW 36.32.3302, 10
RCW 89.08.0103
RCW 89.08.1003
RCW 89.08.1503
RCW 89.08.2203
RCW 89.08.220(4).....5, 11
RCW 89.08.3415, 11
RCW 89.08.4001, 2, 4, 8, 9, 14, 15
RCW 89.08.400(2).....4, 8, 19
RCW 89.08.400(3).....13
RCW 89.08.400(4).....12
RCW 89.08.400(5).....4, 9

I. INTRODUCTION

Acting pursuant to RCW 89.08.400, the Mason County Board of County Commissioners ("Board") imposed an assessment of \$5.00 per parcel on lands located within the Mason Conservation District ("District"). The Claimants asserted the assessment constituted an unconstitutional tax, rather than a valid regulatory fee. As requested by the Claimants, both the trial court and the Court of Appeals utilized the test for distinguishing taxes and regulatory fees set forth in *Covell v. City of Seattle*, 127 Wn.2d 874, 879-90, 905 P.2d 324 (1995). The Court of Appeals held that, under that test, the assessment constituted a fee, not a tax. The Court should affirm the Court of Appeals.

II. QUESTIONS PRESENTED

A. Does RCW 89.08.400, which states that the Board's findings made in imposing the assessment are "final and conclusive," and which explicitly provides aggrieved property owners with only a non-judicial remedy, provide for judicial review?

Answer: No. The Legislature did not intend that the Board's decision to impose a *de minimis* assessment for the benefit of the District be subject to judicial review.

B. Did the Claimants, who filed this lawsuit more than six months after the Board imposed the assessment, timely assert their claims?

Answer: No. Because the most analogous statute, RCW 36.32.330, provides for an appeal period of 20 days, the Claimants' lawsuit was not timely.

C. Did the Board act within its authority by imposing an assessment of \$5.00 per parcel and \$0.00 per acre?

Answer: Yes. Because the Legislature required that the assessment "be stated as" an amount per parcel and an amount per acre, and imposed maximum rates only, the Board acted within its authority.

D. Does the \$5.00 per parcel assessment imposed by the Board pursuant to RCW 89.08.400 constitute a regulatory fee under *Covell v. City of Seattle*, 127 Wn.2d 874, 879-90, 905 P.2d 324 (1995)?

Answer: Yes. Because the assessment is collected from property owners whose properties generate stormwater runoff, because the assessment is used only for the purpose of preventing or addressing the consequences of such runoff, and because there is a direct relationship between the burden created by the stormwater running off an assessed owner's property, the general benefit each property owner receives, and the assessment charged, the assessment constitutes a regulatory fee.

III. FACTS

A. Statutory Background.

The conservation of land, its protection from soil and wind erosion, the prevention of flood and water and sediment damage, and the conservation, development, utilization and disposal of surface water is essential to the health, safety and general welfare of the people of this state. RCW 89.08.010.

To further these ends, the Legislature has authorized the creation of conservation districts, which constitute governmental subdivisions of the state. RCW 89.08.220. See also RCW 89.08.100; RCW 89.08.150.

The Legislature has not granted conservation districts the power to tax. Instead, the Legislature has authorized the local county legislative authority to

impose an assessment for the benefit of a conservation district.
RCW 89.08.400.

The District proposes an assessment to the Board. RCW 89.08.400(2). The Board holds a public hearing, during which the Board may accept, or modify and accept, the proposed assessment. *Id.* In order to impose an assessment, the Board must find both that “the public interest will be served” and that the assessment 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.” *Id.* “[T]he findings of the county legislative authority shall be final and conclusive.” RCW 89.08.400(2).

The Legislature has not provided for judicial review of the Board’s decision to impose an assessment. Instead, the Legislature has provided taxpayers dissatisfied with an assessment with a non-judicial form of relief. If 20 percent of all landowners affected by an assessment file a petition objecting to the assessment, the assessment shall not thereafter be collected. RCW 89.08.400(5).

B. The Assessment.

In July 2002, the Mason Conservation District sent a letter to the Board outlining its requested assessment, and the reasons therefore. CP 59-60. The District requested that the Board levy an assessment of \$5.00 per parcel, plus \$0.07 per acre for all parcels one acre or larger. *Id.*

The Board concluded that the assessment would serve the public interest, and that the lands being assessed would receive benefits from activities funded by the assessment exceeding the assessment. CP 64-65. The Board approved the assessment with one significant modification. CP 61-63. Because it would take many years to recover the cost associated with having the assessor implement a \$0.07 per acre assessment, the Board reduced the requested \$0.07 per acre assessment to \$0.00 per acre. CP 63.

Mason County and the District subsequently entered into an inter-local agreement, as specifically authorized by RCW 89.08.220(4) and RCW 89.08.341. CP 101-107. Pursuant to this agreement, the District agreed to hire Mason County Health Department personnel to carry out certain conservation activities on behalf of the District, for which services the County was to bill the District. *Id.* See also CP 57-58.

C. The Lawsuit.

On March 10, 2003, the Claimants filed this lawsuit, alleging that the assessments had been imposed in violation of Chapter 89.08 RCW and that the assessment constituted an unconstitutional tax. CP 152-154.

The trial court dismissed on the grounds that the Claimants had not timely filed their complaint. The Court of Appeals reversed. *Cary v. Mason County*, 132 Wn. App. 495, 132 P.3d 157 (2006), review denied 159 Wn.2d 1005 (2007). The Court of Appeals held that the Claimants' constitutional claim was analogous to a suit for a refund of the tax, and that because Claimants had filed their lawsuit within the time period applicable to such suits, the claim was timely. 132 Wn. App. at 504. CP 127-144; 66-93.

On remand, the trial court applied the test set out in *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995) for distinguishing between regulatory fees and taxes. The trial court found that the assessment was a tax. CP 28-29. It further found the "tax" illegal, on the basis that the District,

rather than the Board, had imposed it.¹ *Id.* The trial court entered an order enjoining future collection of the assessment. *Id.*

The Court of Appeals reversed. The Court of Appeals also applied the *Covell* test to determine whether the assessment was a regulatory fee or a tax. The Court noted that the assessment fund had been spent "mainly to improve water quality in Mason County, such that the assessment had a regulatory purpose." 152 Wn. App. at 964-65. The District segregated the fund, using it only for the allowed regulatory purpose. *Id.* at 965. And the Court held that there was a sufficiently direct relationship because the District used the fund to provide services to and to address the cumulative impacts of stormwater running off from assessed properties. *Id.* at 965-66. Therefore, the Court of Appeals reversed the trial court.

IV. STANDARD OF REVIEW

The underlying decisions are subject to de novo review. See, e.g., *Storedahl Properties, LLC v. Clark County*, 143 Wn. App. 489, 495 ¶ 10-11, 178 P.3d 377 (2008).

¹ The trial court's reasoning on this point is wholly in error. The Board, not the District, imposed the assessment. Not even the Claimants defend this aspect of the trial court's decision.

The Claimants assert that the assessment which the Board imposed for the benefit of the Mason Conservation District pursuant to RCW 89.08.400 constitutes an unconstitutional tax. Claimants have the “heavy burden” of demonstrating beyond a reasonable doubt that the assessment specifically authorized by the Legislature constitutes an unconstitutional tax. See *Island County v. State*, 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998).

V. ANALYSIS

A. The Legislature did not provide for judicial review.

Washington State has generally adopted the "well settled rule" that there is no inherent right to appeal from a local government's decision in an assessment proceeding. *Hulo v. City of Redmond*, 14 Wn. App. 568, 571, 544 P.2d 34 (1975), citing *Goetter v. Colville*, 82 Wash. 305, 306-07, 144 Pac. 30 (1914), reversed on other grounds, *Appeal of Des Moines Sewer Dist., U.L.I.D. No. 29*, 97 Wn.2d 227, 229-30, 643 P.2d 436 (1982).

The Legislature has explicitly provided that the findings made by the county legislative authority in imposing assessments for the benefit of a conservation district “shall be final and conclusive.” RCW 89.08.400(2). The Legislature thus did not intend for the relatively *de minimis* charge it allowed

the Board to impose to be subject to judicial review. See *Washington Federation of State Employees v. State Personnel Board*, 23 Wn. App. 142, 148-49, 594 P.2d 1375 (1979) (statute which explicitly provided that decision shall be "final" precluded judicial review).

Instead, the Legislature has provided that persons subject to assessment may file a petition with the county legislative authority signed by 20 percent of all land owners affected by the assessment objecting to the assessment, whereupon the assessment shall not thereafter be collected. RCW 89.08.400(5). The Legislature was entitled to limit the Claimants to this remedy. See *Roon v. King County*, 24 Wn.2d 519, 526-27, 166 P.2d 165 (1946) (Legislature entitled to provide limited, exclusive remedy to aggrieved taxpayer).

The Legislature has not authorized judicial review.

B. The Claimants did not timely assert their claims.

Assuming RCW 89.08.400 permits judicial review, it does not specify a time limit for seeking such review. Where there is no express time limit, a court will apply the most analogous limitation period. *Brutsche v. City of Kent*, 78 Wn. App. 370, 377, 898 P.2d 310, review denied, 128 Wn.2d 1003,

907 P.2d 296 (1995). See also *James v. Kitsap County*, 154 Wn.2d 574, 115 P.3d 286 (2005) (21-day limitation period applies to persons asserting constitutional challenge to impact fees on grounds that they really were an unconstitutional tax).

Here, RCW 36.32.330 provides that challenges to any decision of the Board must be filed in Superior Court no later than 20 days of the date of the Board's decision. RCW 36.32.330. See also RCW 36.94.290 (appeal from Board decision on local improvement assessment must be filed within 10 days). Because petitioners did not file this lawsuit until more than 6 months after the Board acted to impose the assessment, petitioners' claims are untimely.

C. The Board imposed the assessment in compliance with the statute.

1. The validity of the assessment is not affected by the District's subsequent, independent decision to enter into an interlocal agreement with the County.

The Board adopted an assessment that created a fund that was paid to the District. CP 55. The Board neither could nor did require the District to expend those funds in any particular manner. AGO 2006 No. 8; CP 57.

The Claimants criticize the District's subsequent decision to enter into an interlocal agreement with Mason County. But, the Legislature has specifically directed and empowered the District to enter into interlocal agreements to facilitate the efficient carrying out of the District's mission for the conservation and renewal of natural resources. RCW 89.08.220(4); RCW 89.08.341. See also Laws of 1992, Ch. 100 (Legislature specifically directs counties and conservation districts to cooperate to address water quality problems arising from stormwater runoff). In making the independent decision to enter into an interlocal agreement with the County, the District did *exactly* what the Legislature has both empowered and directed it to do.

In any event, the Claimants cannot challenge the validity of the assessment by pointing to events occurring after its enactment. *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991) ("There is no authority . . . that renders an otherwise constitutionally levied tax unconstitutional merely because it is purportedly used for a purpose other than what is required.").

The Claimants' argument that the assessment is invalid because the District subsequently entered into an interlocal agreement whereby it paid

some of the revenue generated by the assessment back to the County is without legal merit.

2. The Board was entitled, in the exercise of its legislative discretion, to apply the assessment to all non-forested parcels.

Second, the Board was entitled, in the exercise of its legislative discretion, to apply a flat \$5.00 per-parcel assessment to all non-forested parcels.

The decision as to whether and how to classify lands for purpose of the assessment involves the exercise of legislative discretion. Therefore, if subject to review at all, it is subject for review only to determine if the classification is "arbitrary and capricious," i.e., willful and unreasoning, without regard for facts or circumstances. *Teter v. Clark County*, 104 Wn.2d 227, 234, 704 P.2d 1171 (1985). If a court can conceive of any state of facts to justify such a determination, it must be upheld. *Id.*

Here, RCW 89.08.400(4) provides that the Board's findings in support of its decision to adopt the assessment shall be considered "final and conclusive." Its legislative determination is not subject to review.

In any event, nothing in the statute affirmatively required the Board to adopt any particular classifications. The commissioners, in the exercise of

their legislative discretion, were entitled to conclude that the costs of developing a more particularized system of assessment outweighed the benefit that would flow therefrom.

The Claimants are not entitled to attack the assessment simply because Claimants would have preferred a different classification than that adopted by the Board.

This claim is without merit.

3. The Mason County Board of County Commissioners had the discretion to set the per-acre rate at zero cents per acre.

Finally, the Mason County Board of County Commissioners had the discretion to set the per-acre assessment rate at zero.

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.

RCW 89.08.400(3) (emphasis added).

This statute imposes two requirements. The first is procedural. It requires the Board to state the assessment rate in a certain way. The second is

substantive. The Board cannot impose rates greater than the stated maximums. However, the Legislature did not expressly purport to affirmatively require the Board to impose any minimum rate.

Here, the Board complied with both requirements in enacting its ordinance. The Board stated the assessment rate as being \$5.00 per parcel and \$0.00 per acre. CP 65. And, substantively, the Board set the rate at less than the maximum allowed by the Legislature. *Id.* The Court of Appeals correctly held that the ordinance met the statutory requirements.

D. The assessment possesses the "incidents" of a regulatory fee, and is therefore valid.

RCW 89.08.400, on its face, authorized the Board to impose the assessment. However the charge authorized by RCW 89.08.400 is characterized, the Board acted within the authority delegated to it in imposing it. This fact distinguishes this case from many other "regulatory fee" cases.

The Claimants assert that the charge is invalid because "RCW 89.08.400 is based on the constitutional provision allowing the Legislature to vest municipal authorities with power 'to make local improvements by special assessment.'" Supplemental Brief at p. 12, citing Wash. Const. Art. VII, § 9. This is incorrect. On its face, Art. VII, § 9 applies

only to cities, towns and villages, not counties. See also *Bilger v. State*, 63 Wash. 457, 116 Pac. 19 (1911).

For purpose of constitutional analysis, the Court must classify a charge by looking to the "incidents" of the charge, or the characteristics it actually possesses, and not to what the Legislature calls it. *Washington Public Ports Ass'n v. State, Dept. of Revenue*, 148 Wn.2d 637, 650, 62 P.3d 462 (2003). See also *King County Fire Protection Dist. No. 16 v. Housing Auth.*, 123 Wn.2d 819, 833 and n. 30, 872 P.2d 516 (1994).

Here, under the criteria adopted by this Court in *Covell v. City of Seattle*, the charge authorized by RCW 89.08.400, possesses all the "incidents" of a valid regulatory fee. The assessment was imposed for a regulatory purpose. It is imposed on property from which stormwater runs off, in order to deal with the cumulative effects of that runoff. CP 95. The funds collected are segregated and devoted solely to that regulatory purpose. CP 55. And there is a direct relationship between the fee charged and the burden produced by the fee payer. "[I]t rains everywhere and all parcels . . . benefit [from efforts to address] storm and surface water runoff to prevent flooding, erosion, sedimentation, pollution, and danger to life and property."

Storedahl Properties, LLC v. Clark County, 143 Wn. App. 489, 502-03, 178 P.3d 377 (2008).

In *Teter v. Clark County*, 104 Wn.2d 227, 704 P.2d 1171 (1981), Clark County imposed an assessment upon property owners to recover the cost of establishing and maintaining a system for addressing the cumulative impacts of stormwater which ran off from the property owners' land. 104 Wn.2d at 228-30. The County's assessment included a flat, per-parcel charge imposed upon all residential property owners in the area served. *Id.* at 237. This Court held that the assessment was regulatory.

As in this case, the assessment in *Teter* was imposed for a regulatory purpose—dealing with the negative public impacts of stormwater running off from the assessed parties' property. *Id.* at 232. As in this case, the funds generated were segregated and used solely to fund the cost of preventing and/or dealing with the effects of stormwater runoff. *Id.* at 234. And, as in this case, there was a direct relationship, because the fee-payer received a *general* benefit from the actions taken to address the cumulative impacts of stormwater. *Id.* (emphasis in original), citing cases.

Further, in *Teter*, this Court noted that the assessment imposed by the county charged the “owners of all single-family residences . . . the same rate.” *Id.* at 237. The Court specifically approved the County’s flat per-parcel charge on the grounds that the rate was uniform:

[The county] is [not required] to *measure each* residential lot to ascertain the *exact* amount of impervious surface on each one. Absolute uniformity in rates is not required.

Id. at 238. See also, *Covell*, 127 Wn.2d at 879 (as long as there is a direct relationship between the fee charged and the burden produced by and/or the benefits made available to the fee payer, the governmental entity is NOT required to precisely individualize the fee).²

In sum, Washington courts have consistently held that: (1) where a government imposes a charge upon a group which possesses some common feature or characteristic that creates a “public burden;” (2) the funds are segregated and applied solely to the cost of addressing that burden; and (3) the

² See also *Thurston County Rental Owners Association v. Thurston County*, 85 Wn. App. 171, 931 P.2d 208, review denied, 132 Wn.2d 1010 (1997) (flat annual charge to fund septic inspections and enforce regulations constituted a valid regulatory fee); *Smith v. Spokane County*, 89 Wn. App. 340, 348-349, 948 P.2d 1301 (1997), review denied, 135 Wn.2d 1007 (1998) (flat per-parcel fee used for water quality monitoring and sewage construction); *Holmes Harbor Sewer District v. Frontier Bank*, 123 Wn. App. 45, 96 P.3d 442 (2004), reversed on other grounds, 155 Wn.2d 858, 123 P.2d 823 (2005) (flat per-parcel fee for sewage system); *Storedahl Properties, LLC v. Clark County*, 143 Wn. App. 489, 178 P.3d 377 (2008) (fee used to mitigate effects of storm water discharge).

funds collected do not exceed the cumulative cost of preventing and/or addressing that burden; such charges constitute a valid regulatory fee.

Here, just like in each of the cases cited above, the assessment imposed by the Board for the benefit of the District met the *Covell* criteria for regulatory fees. First, the assessment was imposed for a regulatory purpose. The assessment was imposed to allow the District to carry out its mission of addressing erosion, sedimentation, and pollution problems associated with stormwater runoff. The assessment was imposed upon property owners who own property upon which stormwater falls, and from which stormwater (combined with soil or other pollutants) runs onto neighboring properties, creating the risk of erosion, sedimentation, and pollution. CP 53. All of the assessed properties contribute to creating a “public burden.”

In addition, the assessment was used to benefit the assessed property owners by making targeted conservation services available to them. CP 54. Therefore, the assessment “regulates” the fee payers—by providing them with a targeted service or alleviating a burden to which they contribute—making the assessment a regulatory fee under the first *Covell* factor. See *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 807, 23 P.3d 477 (2001).

Second, the District maintains the funds received from the assessment in a segregated account. CP 55. The District can use these funds only for the specific purposes for which the District was created—to control the threat of erosion, sedimentation and pollution associated with stormwater runoff. *Id.* Therefore, the assessment is regulatory under the second *Covell* factor.

Finally, there is a “direct relationship.” The District makes its services available to all assessed property owners on a nondiscriminatory basis; it provides no services to non-assessed property owners. CP 54. And, as a practical matter, although the properties owned by every assessed property owner each contribute to some degree to the cumulative erosion, sedimentation and pollution problems associated with stormwater runoff, it would be prohibitively expensive for the District to attempt to calculate the precise quantity of the contribution to the “public burden” of stormwater runoff caused by each property. That is why the Legislature has specifically authorized the county legislative authority to authorize this *de minimis* assessment only on a per-parcel and per-acre basis. RCW 89.08.400(2).

In sum, as the Court of Appeals correctly recognized, the assessment in fact possessed the incidents of a regulatory fee, and in fact is a valid regulatory fee.³

VI. CONCLUSION

The Claimants' statutory claims are without merit. The challenged assessment is a valid regulatory fee. The Court should reverse the judgment of the trial court, affirm the Court of Appeals and remand with instructions that the trial court enter a judgment in favor of the Conservation District, dismissing all Claimants' claims.

DATED this 27 day of May, 2010.

OWENS DAVIES FRISTOE
TAYLOR & SCHULTZ, P.S.



Matthew B. Edwards, WSBA #18332

³ Moreover, even if the assessment were characterized as a tax, it does not violate any constitutional requirement applicable to taxes. The Legislature has specifically authorized the levying of this assessment for the purpose of funding the activities of conservation districts. The assessment applies to all property located within the Conservation District. And it applies at a uniform rate of \$5.00 per parcel. See *Teter v. Clark County*, 104 Wn.2d 227, 239-41, 704 P.2d 1171 (1985) (even if considered a tax, flat per-parcel charge imposed to create fund to address impact of stormwater would still pass constitutional muster).

APPENDICES

Chapter 89.08 RCW	A
Declaration of John Bolender	B
<i>Cary v. Mason County</i> , 132 Wn. App. 495, 132 P.3d 157 (2006)	C
<i>Cary v. Mason County</i> , 152 Wn. App. 959, 219 P.3d 952 (2009)	D

89.08.005 Short title. This chapter shall be known and cited as the conservation districts law. [1973 1st ex.s. c 184 § 1; 1961 c 240 § 1; 1939 c 187 § 1; RRS § 10726-1.]

89.08.010 Preamble. It is hereby declared, as a matter of legislative determination:

(1) That the lands of the state of Washington are among the basic assets of the state and that the preservation of these lands is necessary to protect and promote the health, safety, and general welfare of its people; that improper land-use practices have caused and have contributed to, and are now causing and contributing to, a progressively more serious erosion of the lands of this state by wind and water; that the breaking of natural grass, plant and forest cover have interfered with the natural factors of soil stabilization, causing loosening of soil and exhaustion of humus, and developing a soil condition that favors erosion; that the topsoil is being blown and washed off of lands; that there has been an accel-

erated washing of sloping lands; that these processes of erosion by wind and water speed up with removal of absorptive topsoil, causing exposure of less absorptive and less protective but more erosive subsoil; that failure by any land occupier to conserve the soil and control erosion upon his lands may cause a washing and blowing of soil from his lands onto other lands and makes the conservation of soil and control of erosion on such other lands difficult or impossible, and that extensive denuding of land for development creates critical erosion areas that are difficult to effectively regenerate and the resulting sediment causes extensive pollution of streams, ponds, lakes and other waters.

(2) That the consequences of such soil erosion in the form of soil blowing and soil washing are the silting and sedimentation of stream channels, reservoirs, dams, ditches, and harbors, and loading the air with soil particles; the loss of fertile soil material in dust storms; the piling up of soil on lower slopes and its deposit over alluvial plains; the reduction in productivity or outright ruin of rich bottom lands by overwash of poor subsoil material, sand, and gravel swept out of the hills; deterioration of soil and its fertility, deterioration of crops grown thereon, and declining acre yields despite development of scientific processes for increasing such yields; loss of soil and water which causes destruction of food and cover for wildlife; a blowing and washing of soil into streams which silts over spawning beds, and destroys water plants, diminishing the food supply of fish; a diminishing of the underground water reserve, which causes water shortages, intensifies periods of drought, and causes crop failures; an increase in the speed and volume of rainfall run-off, causing severe and increasing floods, which bring suffering, disease, and death; impoverishment of families attempting to farm eroding and eroded lands; damage to roads, highways, railways, buildings, and other property from floods and from dust storms; and losses in navigation, hydroelectric power, municipal water supply, irrigation developments, farming and grazing.

(3) That to conserve soil resources and control and prevent soil erosion and prevent flood water and sediment damages, and further agricultural and nonagricultural phases of the conservation, development, utilization, and disposal of water, it is necessary that land-use practices contributing to soil wastage and soil erosion be discouraged and discontinued, and appropriate soil-conserving land-use practices, and works of improvement for flood prevention of agricultural and nonagricultural phases of the conservation, development, utilization, and disposal of water be adopted and carried out; that among the procedures necessary for widespread adoption, are the carrying on of engineering operations such as the construction of terraces, terrace outlets, check-dams, desilting basins, flood water retarding structures, channel floodways, dikes, ponds, ditches, and the like; the utilization of strip cropping, contour cultivating, and contour furrowing; land irrigation; seeding and planting of waste, sloping, abandoned, or eroded lands to water-conserving and erosion-preventing plants, trees, and grasses; forestation and reforestation; rotation of crops; soil stabilizations with trees, grasses, legumes, and other thick-growing, soil-holding crops, retardation of run-off by increasing absorption of rainfall; and retirement from cultivation of steep, highly erosive areas and areas now badly gullied or otherwise eroded.

(4) Whereas, there is a pressing need for the conservation of renewable resources in all areas of the state, whether urban, suburban, or rural, and that the benefits of resource practices, programs, and projects, as carried out by the state conservation commission and by the conservation districts, should be available to all such areas; therefore, it is hereby declared to be the policy of the legislature to provide for the conservation of the renewable resources of this state, and for the control and prevention of soil erosion, and for the prevention of flood water and sediment damages, and for furthering agricultural and nonagricultural phases of conservation, development, utilization, and disposal of water, and thereby to preserve natural resources, control floods, prevent impairment of dams and reservoirs, assist in maintaining the navigability of rivers and harbors, preserve wildlife, protect the tax base, protect public lands, and protect and promote the health, safety, and general welfare of the people of this state. To this end all incorporated cities and towns heretofore excluded from the boundaries of a conservation district established pursuant to the provisions of the state conservation district law, as amended, may be approved by the conservation commission as being included in and deemed a part of the district upon receiving a petition for annexation signed by the governing authority of the city or town and the conservation district within the exterior boundaries of which it lies in whole or in part or to which it lies closest. [1973 1st ex.s. c 184 § 2; 1939 c 187 § 2; RRS § 10726-2.]

89.08.020 Definitions. Unless the context clearly indicates otherwise, as used in this chapter:

"Commission" and "state conservation commission" means the agency created hereunder. All former references to "state soil and water conservation committee", "state committee" or "committee" shall be deemed to be references to the "state conservation commission";

"District", or "conservation district" means a governmental subdivision of this state and a public body corporate and politic, organized in accordance with the provisions of chapter 184, Laws of 1973 1st ex. sess., for the purposes, with the powers, and subject to the restrictions set forth in this chapter. All districts created under chapter 184, Laws of 1973 1st ex. sess. shall be known as conservation districts and shall have all the powers and duties set out in chapter 184, Laws of 1973 1st ex. sess. All references in chapter 184, Laws of 1973 1st ex. sess. to "districts", or "soil and water conservation districts" shall be deemed to be reference to "conservation districts";

"Board" and "supervisors" mean the board of supervisors of a conservation district;

"Land occupier" or "occupier of land" includes any person, firm, political subdivision, government agency, municipality, public or private corporation, copartnership, association, or any other entity whatsoever which holds title to, or is in possession of, any lands lying within a district organized under the provisions of chapter 184, Laws of 1973 1st ex. sess., whether as owner, lessee, renter, tenant, or otherwise;

"District elector" or "voter" means a registered voter in the county where the district is located who resides within the district boundary or in the area affected by a petition;

"Due notice" means a notice published at least twice, with at least six days between publications, in a publication

of general circulation within the affected area, or if there is no such publication, by posting at a reasonable number of public places within the area, where it is customary to post notices concerning county and municipal affairs. Any hearing held pursuant to due notice may be postponed from time to time without a new notice;

"Renewable natural resources", "natural resources" or "resources" includes land, air, water, vegetation, fish, wildlife, wild rivers, wilderness, natural beauty, scenery and open space;

"Conservation" includes conservation, development, improvement, maintenance, preservation, protection and use, and alleviation of floodwater and sediment damages, and the disposal of excess surface waters.

"Farm and agricultural land" means either (a) land in any contiguous ownership of twenty or more acres devoted primarily to agricultural uses; (b) any parcel of land five acres or more but less than twenty acres devoted primarily to agricultural uses, which has produced a gross income from agricultural uses equivalent to one hundred dollars or more per acre per year for three of the five calendar years preceding the date of application for classification under this chapter; or (c) any parcel of land of less than five acres devoted primarily to agricultural uses which has produced a gross income of one thousand dollars or more per year for three of the five calendar years preceding the date of application for classification under this chapter. Agricultural lands shall also include farm woodlots of less than twenty and more than five acres and the land on which appurtenances necessary to production, preparation or sale of the agricultural products exist in conjunction with the lands producing such products. Agricultural lands shall also include any parcel of land of one to five acres, which is not contiguous, but which otherwise constitutes an integral part of farming operations being conducted on land qualifying under this section as "farm and agricultural lands". [1999 c 305 § 1; 1973 1st ex.s. c 184 § 3; 1961 c 240 § 2; 1955 c 304 § 1; 1939 c 187 § 3; RRS § 10726-3.]

89.08.220 Corporate status and powers of district. A conservation district organized under the provisions of chapter 184, Laws of 1973 1st ex. sess. shall constitute a governmental subdivision of this state, and a public body corporate and politic exercising public powers, but shall not levy taxes or issue bonds and such district, and the supervisors thereof, shall have the following powers, in addition to others granted in other sections of chapter 184, Laws of 1973 1st ex. sess.:

(1) To conduct surveys, investigations, and research relating to the conservation of renewable natural resources and the preventive and control measures and works of improvement needed, to publish the results of such surveys, investigations, or research, and to disseminate information concerning such preventive and control measures and works of improvement: PROVIDED, That in order to avoid duplication of research activities, no district shall initiate any research program except in cooperation with the government of this state or any of its agencies, or with the United States or any of its agencies;

(2) To conduct educational and demonstrational projects on any lands within the district upon obtaining the consent of the occupier of such lands and such necessary rights or interests in such lands as may be required in order to demonstrate by example the means, methods, measures, and works of improvement by which the conservation of renewable natural resources may be carried out;

(3) To carry out preventative and control measures and works of improvement for the conservation of renewable natural resources, within the district including, but not limited to, engineering operations, methods of cultivation, the growing of vegetation, changes in use of lands, and the measures listed in RCW 89.08.010, on any lands within the district upon obtaining the consent of the occupier of such lands and

such necessary rights interests in such lands as may be required;

(4) 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, subject to such conditions as the supervisors may deem necessary to advance the purposes of chapter 184, Laws of 1973 1st ex. sess. For purposes of this subsection only, land occupiers who are also district supervisors are not subject to the provisions of RCW 42.23.030;

(5) To obtain options upon and to acquire in any manner, except by condemnation, by purchase, exchange, lease, gift, bequest, devise, or otherwise, any property, real or personal, or rights or interests therein; to maintain, administer, and improve any properties acquired, to receive income from such properties and to expend such income in carrying out the purposes and provisions of chapter 184, Laws of 1973 1st ex. sess.; and to sell, lease, or otherwise dispose of any of its property or interests therein in furtherance of the purposes and the provisions of chapter 184, Laws of 1973 1st ex. sess.;

(6) To make available, on such terms, as it shall prescribe, to land occupiers within the district, agricultural and engineering machinery and equipment, fertilizer, seeds, seedlings, and such other equipment and material as will assist them to carry on operations upon their lands for the conservation of renewable natural resources;

(7) To prepare and keep current a comprehensive long-range program recommending the conservation of all the renewable natural resources of the district. Such programs shall be directed toward the best use of renewable natural resources and in a manner that will best meet the needs of the district and the state, taking into consideration, where appropriate, such uses as farming, grazing, timber supply, forest, parks, outdoor recreation, potable water supplies for urban and rural areas, water for agriculture, minimal flow, and industrial uses, watershed stabilization, control of soil erosion, retardation of water run-off, flood prevention and control, reservoirs and other water storage, restriction of developments of floodplains, protection of open space and scenery, preservation of natural beauty, protection of fish and wildlife, preservation of wilderness areas and wild rivers, the prevention or reduction of sedimentation and other pollution in rivers and other waters, and such location of highways, schools, housing developments, industries, airports and other facilities and structures as will fit the needs of the state and be consistent with the best uses of the renewable natural resources of the state. The program shall include an inventory of all renewable natural resources in the district, a compilation of current resource needs, projections of future resource requirements, priorities for various resource activities, projected timetables, descriptions of available alternatives, and provisions for coordination with other resource programs.

The district shall also prepare an annual work plan, which shall describe the action programs, services, facilities, materials, working arrangements and estimated funds needed to carry out the parts of the long-range programs that are of the highest priorities.

The districts shall hold public hearings at appropriate times in connection with the preparation of programs and plans, shall give careful consideration to the views expressed and problems revealed in hearings, and shall keep the public informed concerning their programs, plans, and activities. Occupiers of land shall be invited to submit proposals for consideration to such hearings. The districts may supplement such hearings with meetings, referenda and other suitable means to determine the wishes of interested parties and the general public in regard to current and proposed plans and programs of a district. They shall confer with public and private agencies, individually and in groups, to give and obtain information and understanding of the impact of district operations upon agriculture, forestry, water supply and quality, flood control, particular industries, commercial concerns and other public and private interests, both rural and urban.

Each district shall submit to the commission its proposed long-range program and annual work plans for review and comment.

The long-range renewable natural resource program, together with the supplemental annual work plans, developed by each district under the foregoing procedures shall have official status as the authorized program of the district, and it shall be published by the districts as its "renewable resources program". Copies shall be made available by the districts to the appropriate counties, municipalities, special purpose districts and state agencies, and shall be made available in convenient places for examination by public land occupier or private interest concerned. Summaries of the program and selected material therefrom shall be distributed as widely as feasible for public information;

(8) To administer any project or program concerned with the conservation of renewable natural resources located within its boundaries undertaken by any federal, state, or other public agency by entering into a contract or other appropriate administrative arrangement with any agency administering such project or program;

(9) Cooperate with other districts organized under chapter 184, Laws of 1973 1st ex. sess. in the exercise of any of its powers;

(10) To accept donations, gifts, and contributions in money, services, materials, or otherwise, from the United States or any of its agencies, from this state or any of its agencies, or from any other source, and to use or expend such moneys, services, materials, or any contributions in carrying out the purposes of chapter 184, Laws 1973 1st ex. sess.;

(11) To sue and be sued in the name of the district; to have a seal which shall be judicially noticed; have perpetual succession unless terminated as hereinafter provided; to make and execute contracts and other instruments, necessary or convenient to the exercise of its powers; to borrow money and to pledge, mortgage and assign the income of the district and its real or personal property therefor; and to make, amend rules and regulations not inconsistent with chapter 184, Laws of 1973 1st ex. sess. and to carry into effect its purposes;

(12) Any two or more districts may engage in joint activities by agreement between or among them in planning, financing, constructing, operating, maintaining, and administering any program or project concerned with the conservation of renewable natural resources. The districts concerned may make available for purposes of the agreement any funds,

property, personnel, equipment, or services available to them under chapter 184, Laws of 1973 1st ex. sess.;

Any district may enter into such agreements with a district or districts in adjoining states to carry out such purposes if the law in such other states permits the districts in such states to enter into such agreements.

The commission shall have authority to propose, guide, and facilitate the establishment and carrying out of any such agreement;

(13) Every district shall, through public hearings, annual meetings, publications, or other means, keep the general public, agencies and occupiers of land within the district, informed of the works and activities planned and administered by the district, of the purposes these will serve, of the income and expenditures of the district, of the funds borrowed by the district and the purposes for which such funds are expended, and of the results achieved annually by the district; and

(14) The supervisors of conservation districts may designate an area, state, and national association of conservation districts as a coordinating agency in the execution of the duties imposed by this chapter, and to make gifts in the form of dues, quotas, or otherwise to such associations for costs of services rendered, and may support and attend such meetings as may be required to promote and perfect the organization and to effect its purposes. [1999 c 305 § 8; 1973 1st ex.s. c 184 § 23; 1963 c 110 § 1; 1961 c 240 § 13; 1955 c 304 § 23. Prior: (i) 1939 c 187 § 8; RRS § 10726-8. (ii) 1939 c 187 § 13; RRS § 10726-13.]

89.08.341 Intergovernmental cooperation.—Authority. Any agency of the government of this state and any local political subdivision of this state is hereby authorized to make such arrangements with any district, through contract, regulation or other appropriate means, wherever it believes that such arrangements will promote administrative efficiency or economy.

In connection with any such arrangements, any state or local agency or political subdivision of this state is authorized, within the limits of funds available to it; to contribute funds, equipment, property or services to any district; and to collaborate with a district in jointly planning, constructing, financing or operating any work or activity provided for in such arrangements and in the joint acquisition, maintenance and operation of equipment or facilities in connection therewith.

State agencies, the districts, and other local agencies are authorized to make available to each other maps, reports and data in their possession that are useful in the preparation of their respective programs and plans for resource conservation. The districts shall keep the state and local agencies fully informed concerning the status and progress of the preparation of their resource conservation programs and plans.

The state conservation commission and the counties of the state may provide respective conservation districts such administrative funds as will be necessary to carry out the purpose of chapter 184, Laws of 1973 1st ex. sess. [1973 1st ex.s. c 184 § 24.]

89.08.400 Special assessments for natural resource conservation. (1) Special assessments are authorized to be imposed for conservation districts as provided in this section. 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.

(2) Special assessments to finance the activities of a conservation district may be imposed by the county legislative authority of the county in which the conservation district is located for a period or periods each not to exceed ten years in duration.

The supervisors of a conservation district shall hold a public hearing on a proposed system of assessments prior to the first day of August in the year prior to which it is proposed that the initial special assessments be collected. At that public hearing, the supervisors shall gather information and shall alter the proposed system of assessments when appropriate, including the number of years during which it is proposed that the special assessments be imposed.

On or before the first day of August in that year, the supervisors of a conservation district shall file the proposed system of assessments, indicating the years during which it is proposed that the special assessments shall be imposed, and a proposed budget for the succeeding year with the county legislative authority of the county within which the conservation district is located. The county legislative authority shall hold a public hearing on the proposed system of assessments. 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 that 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. Special assessments may be altered during this period on individual parcels in accordance with the system of assessments if land is divided or land uses or other factors change.

Notice of the public hearings held by the supervisors and the county legislative authority shall be posted conspicuously in at least five places throughout the conservation district, and published once a week for two consecutive weeks in a newspaper in general circulation throughout the conservation district, with the date of the last publication at least five days prior to the public hearing.

(3) 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; determine an annual per acre rate of assessment for each classification of land, and indicate the total amount of special assessments proposed to be obtained from each classification of lands. Lands deemed not to receive benefit from the activities of the conservation district shall be placed into a separate classification and shall not be subject to the special assessments. 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, except that for counties with a population of over one million five hundred thousand persons, the maximum annual per parcel rate shall not exceed ten dollars.

Public land, including lands owned or held by the state, shall be subject to special assessments to the same extent as privately owned lands. The procedures provided in chapter 79.44 RCW shall be followed if lands owned or held by the state are subject to the special assessments of a conservation district.

Forest lands used solely for the planting, growing, or harvesting of trees may be subject to special assessments if such lands benefit from the activities of the conservation district, but the per acre rate of special assessment on benefited forest lands shall not exceed one-tenth of the weighted average per acre assessment on all other lands within the conservation district that are subject to its special assessments. The calculation of the weighted average per acre special assessment shall be a ratio calculated as follows: (a) The numerator shall be the total amount of money estimated to be derived from the imposition of per acre special assessments on the nonforest lands in the conservation district; and (b) the denominator shall be the total number of nonforest land acres in the conservation district that receive benefit from the activities of the conservation district and which are subject to the special assessments of the conservation district. No more than ten thousand acres of such forest lands that is both owned by the same person or entity and is located in the same conservation district may be subject to the special assessments that are imposed for that conservation district in any year. Per parcel charges shall not be imposed on forest land parcels. However, in lieu of a per parcel charge, a charge of up to three dollars per forest landowner may be imposed on each owner of forest lands whose forest lands are subject to a per acre rate of assessment.

(4) A conservation district shall prepare an assessment roll that implements the system of assessments approved by the county legislative authority. The special assessments from the assessment roll shall be spread by the county assessor as a separate item on the tax rolls and shall be collected and accounted for with property taxes by the county treasurer. The amount of a special assessment shall constitute a lien against the land that shall be subject to the same conditions as a tax lien, collected by the treasurer in the same manner as delinquent real property taxes, and subject to the same interest rate and penalty as for delinquent property taxes. The county treasurer shall deduct an amount from the collected special assessments, as established by the county legislative authority, to cover the costs incurred by the county assessor and county treasurer in spreading and collecting the special assessments, but not to exceed the actual costs of such work. All remaining funds collected under this section shall be transferred to the conservation district and used by the conservation district in accordance with this section.

(5) The special assessments for a conservation district shall not be spread on the tax rolls and shall not be collected with property tax collections in the following year if, after the system of assessments has been approved by the county legislative authority but prior to the fifteenth day of December in that year, a petition has been filed with the county legislative authority objecting to the imposition of such special assessments, which petition has been signed by at least twenty percent of the owners of land that would be subject to the special assessments to be imposed for a conservation district. [2005 c 466 § 1; 1992 c 70 § 1; 1989 c 18 § 1.]

EXPEDITE
 Hearing is set:
 Date: January 28, 2008
 Time: 9:00 A.M.
 Judge/Calendar: Hon. Leonard W. Costello

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**SUPERIOR COURT OF WASHINGTON
 FOR MASON COUNTY**

**JAMES R. CARY, MARY ALICE CARY, JOHN
 E. HIEHL, and WILLIAM D. FOX, SR.,**
Plaintiffs,

vs.

**MASON COUNTY and MASON
 CONSERVATION DISTRICT,**
Defendants.

NO. 03-2-00196-5
**DECLARATION OF JOHN
 BOLENDER**

1. My name is John Bolender. I am the District Manager for the Mason Conservation District. I have held that position since September 2005. Prior to that, I served on the district Board of Supervisors.

2. The Mason Conservation District is a special use district formed pursuant to Chapter 89.08 RCW for the purpose of carrying out the works and projects described in that chapter, i.e., to prevent and/or address erosion, sedimentation and pollution caused by storm water runoff from assessed properties located within the District.

3. Every assessed property in the District has storm water fall on it and run off, so that every assessed property contributes to the problem of storm water runoff. The area of storm water and storm water runoff is an area subject to fairly extensive governmental regulation.

4. The District uses the assessments voted by the Mason County Board of County Commissioners to assist and facilitate property owners' compliance with these regulations.

DECLARATION OF JOHN BOLENDER- 1

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1 Because it helps to provide for the control of storm water, the services which the Conservation
2 District provides are of a utility to the residents of the District.

3 5. The Mason Conservation District is one of 47 conservation districts that have
4 been formed in this state. The Conservation District was formed in the manner described by
5 state statute in 1956. The formation of the District was approved by a vote of the majority of the
6 voters within the District.

7 6. The mission of the Mason Conservation District is to promote the sustainable use,
8 conservation and restoration of natural resources in our community. The Mason Conservation
9 District provides technical assistance to landowners for the implementation of Best Management
10 Practices to control erosion, sedimentation and pollution associated with storm water. The
11 District carries out measures to protect and conserve natural resources from storm water runoff.
12 And the District conducts educational and demonstration conservation projects to this end.

13 7. The Mason Conservation District often enters into cooperative agreements with
14 governmental and other entities to carry out these activities for the conservation of renewable
15 natural resources within the district.

16 8. The Conservation District makes its services available to all property owners
17 whose properties are assessed on a nondiscriminatory basis, and all assessed property owners
18 have the right to avail themselves of the Conservation District's services. However, the
19 Conservation District is not required to, and does not, make services paid for using assessment
20 funds available to persons or entities owning property that is not assessed, or which is located
21 outside the Conservation District.

22 9. The assessments at issue in this case were approved in 2002. Specifically, in
23 July 2002, the Mason Conservation District sent a letter to the Mason County Board of County
24 Commissioners outlining the assessment requested by the Conservation District. A true copy of
25 this letter is attached to this Declaration as Exhibit A.

26 10. On August 27, 2002, the Mason County Board of County Commissioners held a
27 hearing at which they considered the District's request. At the hearing, County staff submitted a
28 report in which staff recommended that the Commissioners approve the assessment requested by

DECLARATION OF JOHN BOLENDER- 2

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1 the Conservation District with one significant modification. Because it would take several years
2 to recover the administrative costs associated with having the Assessor implement a \$0.07-per-
3 acre assessment, the staff recommended that the Board reduce the requested \$0.07-per-acre
4 assessment to \$0.00 per acre. A true copy of the Health Department's report is attached to this
5 Declaration as Exhibit B.

6 11. The Mason County Board of County Commissioners approved the assessment as
7 modified on August 27, 2002. A true copy of their findings of fact adopted in support of the
8 assessment are attached hereto as Exhibit C.

9 12. The County began collecting the assessment in 2003. The County Treasurer has
10 collected the following amounts for the benefit of the Conservation District since that time.

11 Summary of Assessment Collections

12	2003	\$205,459.63
13	2004	\$233,514.23
14	2005	\$218,419.32
15	2006	\$225,615.00
16	2007	<u>\$229,632.50</u>
		\$1,112,640.68

17 13. The assessments are used by the district for the purposes for which the
18 Conservation District is authorized to expend funds under state law, in particular, to assist
19 assessed property owners dealing with storm water running onto and off of their property, and/or
20 to address the effects of such storm water.

21 14. The District carefully segregates the funds it has received on account of the
22 assessments. All of the funds received as a result of the assessments are kept in a separate
23 account, and used to pay: (1) the fee charged by the county assessor for the cost that the county
24 incurs in spreading the assessment on the tax rolls and collecting the funds, as specifically
25 authorized by RCW 89.08.400(4); (2) for expenditures made by the District in connection with
26 the providing of conservation services to or for the benefit of assessed property owners within
27 the Conservation District.

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DECLARATION OF JOHN BOLENDER- 3

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1 15. The Claimants allege that the Conservation District has failed to segregate or
2 "mingled" funds which the Conservation District has received from the assessment with grant
3 funds the District has received. See Claimant's Motion for Summary Judgment, p. 7,
4 line 31-p. 8, line 4; p. 11, lines 11-20. This is false. As stated above, funds derived from the
5 assessment are kept by the District are segregated in a separate account, and are used only for
6 those limited purposes for which the Legislature has authorized the Conservation District to
7 expend assessed funds.

8 16. In their brief, the Claimants allege that the District uses assessed funds for the
9 purpose of "improving water quality in Hood Canal and parts of Puget Sound." Motion for
10 Summary Judgment, p. 11, lines 15-16. The District does use some funds for this purpose.
11 Sediment and pollution-laden storm water runs off of the properties owned by property owners
12 located within the District. This storm water makes its way into Puget Sound, degrading water
13 quality in the Sound. By acting to improve water quality within Puget Sound in the area affected
14 by sediment and pollution-laden storm water running off of assessed properties, the District is
15 addressing the "public burden" that is caused or contributed to by storm water that runs off of
16 assessed properties. By doing so, the District also provides a corresponding benefit to the
17 property owners, storm water runoff from whose properties is contributing to this common
18 public burden.

19 17. In their brief, the Claimants assert that the District spends 82 percent of its funds
20 for "administration." See Motion for Summary Judgment, p. 12, line 14 at seq. This is
21 completely false. This claim is apparently based on the Claimants' misunderstanding of the
22 records that have been produced by the District and how the District's accounting system
23 captures and categorizes human resource charges.

24 18. In particular, attached to John Diehl's Declaration as Exhibit G are a number of
25 payment vouchers that were produced by the Conservation District at discovery in this matter.
26 Contrary to what the Claimants allege, all of the personnel charges noted on the vouchers are for
27 time spent directly providing services or projects or directly to district residents, not for
28 administrative overhead costs.

DECLARATION OF JOHN BOLENDER- 4

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1 19. The only overhead costs billed by the District and shown on the vouchers are
2 identified under the heading "Project Specific Overhead." These are billed at a rate of 10 percent
3 of the total direct costs.

4 20. The District takes great care to apply very minimal administrative charges to any
5 work or project funded by funds generated from the assessment. The percentage overhead
6 charge by the District is below the standard overhead rate usually and customarily applied in the
7 industry.

8 21. In their brief, the Claimants also attack the District's decision to enter into an
9 inter-local agreement with Mason County. See, e.g., Claimant's Motion for Summary Judgment,
10 p. 2, lines 9-12.

11 22. State law specifically provides the District with authority to enter into such inter-
12 local agreements. RCW 89.08.200(4); RCW 89.08.341.

13 23. Although the Mason County Board of County Commissioners has the authority to
14 authorize and approve assessments for the benefit of the Conservation District, the Mason
15 County Board of County Commissioners has no legal right or authority to dictate or direct how
16 the Conservation District spends its funds. RCW 89.08.400(4). Therefore, the Conservation
17 District was not legally obligated to furnish Mason County any money, or enter into any kind of
18 inter-local agreement with Mason County, as a condition of receiving the assessment.

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

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

DECLARATION OF JOHN BOLENDER- 5

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Mason Conservation District

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July 29, 2002

Mason County Commissioners
411 North Fifth Street
Shelton, WA 98584

Dear Commissioners:

As provided by RCW 89.08.400, the Mason Conservation District Board of Supervisors strongly recommends that the Mason County Board of Commissioners establish a special assessment to provide basic funding for the Mason County Department of Health Services and the Mason Conservation District. This assessment will create a fund dedicated to addressing water resource protection issues within Mason County.

The assessment level will be \$5 per parcel, plus .07 cents per acre for all parcels one acre or larger. We recommend that county officials and staff review potential exemptions based upon legality and cost benefit analysis.

The assessment shall be billed to the taxpayer, by the County Treasurer, on February 15 of the collection year, or on the date of billing of property taxes as determined by the Treasurer. Assessment payments shall be due on the same date as property taxes, first half due on April 30 and the second half due on October 31.

We recommend that penalties be assessed for late payments in accordance with the current county policy regarding late payment of taxes.

For parcels, which are combined after billing, the original amount will still be carried as a receivable and collected. For parcels segregated after billing, the original amount will stay with the parent parcel, or if a parent parcel does not exist, the assessment will be ratably distributed. Cancellations and supplementals that occur after the final roll has been submitted will be considered in the succeeding year.

The Mason Conservation District special assessment will be levied starting in the 2003 collection year and continue for ten years (2012).

Money generated by the assessment will provide funding for the Mason County Department of Health Services to be used for the protection of water quality through the expansion of the Threatened Area Response (TARS) program, community concern response, the identification of potential sources of pollution throughout the county, the implementation of low interest loans (State Revolving Fund) and as match for future grant opportunities.

EXHIBIT A

The Conservation District will utilize their portion of the funds to increase their capability to provide technical assistance to landowners for the implementation of Best Management Practices addressing the potential for non-point pollution arising from animal waste, pesticides and fertilizers and as match for future grants addressing non-point pollution issues within Mason County. The goal is to be able to provide assistance to the residents of Mason County unilaterally rather than selectively as dictated by historical grant funding.

The Mason Conservation District and the Mason County Department of Health Services will present before the Commissioners both a semi-annual interim report of activities and an annual fiscal and operational report.

Attached please find a "System of Assessments" as outlined in RCW 89.08.400.

Respectfully Submitted,



Jim Sims
Chair

Introduction to Hearing on Conservation District Special Assessment for Natural Resource Protection

Part of the reason many people choose to live in Mason County is because of the many natural resources the area has to offer. We enjoy taking advantage of the recreational opportunities afforded to us such as the camping, hiking, fishing, swimming, shellfish harvesting, and boating. Many of us farm our land, whether it's for profit or pleasure, ranging from Christmas trees to herbs or from livestock to aquaculture. We expect that when we turn on a faucet, clean safe drinking water comes out. When we swim, fish, or otherwise use our water we expect to swim without getting sick, and we expect that the fish and shellfish we harvest are safe to eat. The economic impact that water resources have on our county is enormous. In a 1991 Department of Ecology report it was estimated that the revenues lost due to the closure of the recreational shellfish beach at Belfair State Park was at least 1.2 Million dollars/year. The aquaculture industry plays a very important role in the economic well being of the county. I believe that members of the industry are here to speak to that importance, so I will defer to them for comment on this important issue.

Pollution of water can come from many sources. Industrial waste and pollution can be a big contributor along with point and non-point source pollution. Point source pollution comes from a known source. An example of one source in this county would be the outfall of the sewage treatment plant in Shelton. This outfall and other potential point sources of pollution are regulated and monitored by Department of Ecology as part of their permit. Non-point sources of pollution are those that come from a geographical area and may have many contributors (ex. pet and farm waste, septic systems, property runoff that contains fertilizers and chemicals). The Mason County Department of Health Services and the Mason Conservation District have a long history of working together to assist property owners in planning for and reducing non-point source pollution. The Mason Conservation District works with property owners to assist them on land use and implementation of best management practices that help prevent and reduce non-point source pollution. The Mason County Department of Health Services works with homeowners to ensure that septic systems are designed, installed and operated to protect ground and surface water from contamination by fecal coliform bacteria. In geographic areas of high levels of fecal coliform contamination the mission of Mason County Department of Health Services is to identify and remediate individual septic systems that are contributing to pollution. According to RCW 70.05 the commissioners, acting as the Board of Health, have the duty to clean up water pollution, and the local Health Officer through Mason County Department of Health Services has the legal duty to investigate and meaningfully attempt to remedy known water pollution problems.

In 1993, water pollution in the saltwater used for shellfish growing areas had become degraded so significantly that Mason County was required to respond with a plan to clean up the waters. Mason County Department of Health Services was one of the departments tasked in this plan. Between 1993 and 1996 the Department and community groups joined together to plan for addressing water quality issues in their communities. As a part of that plan large funding, large grants and donations were secured and work began in two watersheds, Totten Little Skookum and Lower Hood Canal. Due to a lack a funding, a smaller amount of work was done in North Bay Case Inlet. The Mason Conservation District had grants to assist in the land usage issues in Totten Little Skookum and Lower Hood Canal watersheds, but no grant source of funding to assist in North Bay Case Inlet. These combined efforts led to an improvement in water quality that allowed 500 acres of shellfish beds in Lower Hood Canal to be reopened. At the end of 1996, the Water Quality Department was disbanded because of the inability to secure sufficient funding through grants or sustained funding from the county. The Oakland Bay watershed was the next watershed where surveys were scheduled to begin to identify pollution sources, but no significant work was conducted before the team was disbanded. The State Department of Health has now designated Annas Bay, portions of Oakland Bay, Lower

EXHIBIT B

B-9

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Hood Canal, and North Bay in Case Inlet as threatened due to increasing levels of fecal coliform pollution. Any further pollution will create degradation of water quality in these areas that could result in these areas being declared prohibited to shellfish harvest.

Approximately two years ago Mason County Department of Health Services recognized that water quality problems were increasing and approached the Commissioners about dedicating one staff member to full time water resource protection issues. They responded then and have continued to support this focused intervention. As this one staff has continued to work on pollution source identification projects she has been investigating numerous areas of threatened water quality throughout the county. Many times she has been forced to prioritize significant problem areas to the bottom of the list, and it became apparent to us that one staff person was unable to keep pace with the workload, and citizens of the county were not receiving the services they need and deserve. In recent months newly threatened areas in the north end of Oakland Bay and North Bay in Case Inlet also were identified. The Mason Conservation District has no grant funding that allows them to assist us in identifying and remediating non-point source pollution in these areas. When the seriousness of these threatened areas and the need for additional resources were discussed with the Commissioners they challenged us to identify funding opportunities to support this work. We approached the Mason Conservation District regarding the RCW that allowed them to request an assessment to support natural resource protection. They were willing to partner with us on their assessment and share the revenues to enable us both to have dedicated resources available to respond to the need for natural resource protection in all areas of the county, not just those where grant funds were available for special projects.

The Mason County Department of Health Services and the Mason Conservation District have historically relied on grants to fund special projects due to lack of funding to maintain programs. A grant is awarded only to address an identified severe and significant problem. Grants are awarded for projects, not for the funding of programs. In the grant process proposed projects compete against one another for funding. The current trend shows grant funds drying up and opportunities disappearing as monies are shifted into other areas of the state budget. When staff are funded by a grant, they have to respond to the areas outlined in the grant and work under the guidelines of the grant. In the grant project situation the departments cannot have people in place to respond to where the needs are, unless those needs correspond to an area receiving grant funding. If this assessment is approved it would give both departments the ability to have dedicated staff to work on projects important to the health and safety of the citizens in all areas of the county on a regular basis. This funding would provide the sustainable, long term funding required to have staff working to protect natural resources throughout Mason County.

The Mason County Department of Health Services would add 2 staff, dedicated to water resource protection, as funds became available. Although this level of staffing is not adequate to fully protect our water resources, the 2 new dedicated staff would be able to provide ongoing sustained effort. The Mason County Department of Health Services was recently awarded a one time grant which is being used as an interim measure to hire one staff person dedicated to water quality in the threatened areas including our on-going efforts in North Bay/ Case Inlet and Oakland Bay. This small grant should provide the start up funding to allow staff to work in the threatened areas until assessment revenues would become available if the assessment is passed. The Department of Health Services will continue to write grants to enhance our on-going water resource protection projects and use some of the assessment money as cash match for the 25% match many grants require. We would add additional staff to work on specific projects for the duration of the grant. The Mason Conservation District would dedicate one technical staff to work on projects countywide and have money available to also provide matching funds for grant work.

This partnership between the Mason Conservation District and the Mason County Department of Health Services would be unique in the state. The informal partnership of these two departments in the past has worked well for the citizens of Mason County. The Natural Resource Protection Assessment would make this partnership formal and could be a template for other Health Departments and Conservation Districts throughout the state. One of our goals is to have clean and plentiful water for the citizens of and visitors to Mason County. Our marine water, lakes and rivers will be fishable, swimmable and support healthy ecosystems. Ground water will be a clean source of water so every person will have safe drinking water. All Mason County residents are linked to each of our area's natural resources. We drink our water, eat our fish and shellfish, build houses from our timber, garden and farm in our soil, and enjoy the diversity of our wildlife. The long-term stability of our area's economy, value of our property and preservation of Mason County's character depend on the conservation of what now seems plentiful.

The evaluation of assessment project costs done by Dixie Smith, Mason County Assessor, Lisa Frazer, Mason County Treasurer, and their staff demonstrated that it would cost almost as much or more to do the customized, individualized billing and to collect the 7 cents per acre than the assessment would collect from the proposed per acre fee. The assumptions for these calculations are that each parcel is one acre in size.

1. All non forested lands assessed at 7 cents/acre would bring an approximate assessment of \$6,500. This estimate is on the high side because of our assumption.
2. Forested lands would bring in an approximate assessment of \$1,994.

The costs involved are estimated to be as follows.

1. To reprint the tax statements - \$400-600
2. To reprogram the computer system by Compuserve
 - a. For the \$5 assessment, we have most of the system in place.
 - b. To program the computer to take into account the 7 cents per acre, it would take a 1-time cost of \$8-10,000.
3. It would cost the treasurer \$1,344 annually to perform the additional billings for those per acre assessments

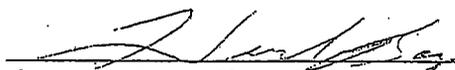
The recommendation is made to the Mason County Board of County Commissioners that the assessment be a flat five dollars on every parcel. We respectfully request that the Mason County Board of Commissioners consider the recommendation from the Mason Conservation District Board of Supervisors to establish a dedicated source of funding for the District and Department as provided by RCW 89.08.400. We recommend the assessment be set at five dollars per parcel with no additional acreage fee assessed.

9. Grant funding is only available after severe water quality degradation has already occurred and most require at least 25% in matching funds. The assessment can provide the matching funds required for specific projects identified by both the Mason Conservation District and Mason County Department of Health Services.
10. Mason County has the responsibility, but not the available resources to fund the investigation of immediate and emerging water quality issues. This assessment will support the public interest of our citizens by providing funds for water quality pollution identification and abatement before pollution adversely impacts our community's health, economy and way of life.

On July 17th and 18th of 2002, the Mason Conservation District in accordance with RCW 89.08.400 conducted two public hearings regarding the special assessment. During the hearings testimony was heard. No participants opposed the assessment. All participants supported the assessment. During the comment period 2 letters in opposition of the assessment were received. On August 27, 2002, in accordance with RCW 89.08.400, the Board of County Commissioners held a public hearing.

FROM THE PRECEEDING FACTS, the Board finds that the proposed assessment will serve the public interest; and that the special assessments to be imposed will not exceed the special benefit the land receives or will receive from activities funded by the assessment. The Board approves the special assessment under the authority of RCW89.08.400 subject to the following modifications and/or conditions:

1. The assessment shall be a five-dollar flat rate on all nonforest land parcels within the boundaries of the Conservation District.
2. The Conservation District and Mason County Department of Health Services must sign a Memorandum of Agreement to carry out these findings.


 Commissioner Herb Baze 8/28/02
 Date


 Commissioner Bob Holter 8-28-02
 Date


 Commissioner Wes Johnson 8/28/02
 Date

(Mason County Board of County Commissioners Hearing August 27, 2002, for adoption of Special Assessment for Natural Resource Conservation RCW 89.08.400)

not on a factual finding as to what might have happened had the debtor notified a noncreditor. As summarized by the Fifth Circuit: “[I]n order for a claim to be reasonably ascertainable, the debtor must have in his possession, at the very least, some specific information that reasonably suggests both the claim for which the debtor may be liable and the entity to whom he would be liable.”⁴²

¶33 Furthermore, decisions such as these should not turn on often disputed scientific studies addressing how *foreseeable* a claim may be under the circumstances of a specific case.⁴³ Nor should a debtor be required to provide actual notice to anyone who potentially could have been affected by their actions.⁴⁴ Instead the test is whether the potential claimant and his claim are reasonably *ascertainable*, meaning the debtor has in his possession “some specific information that reasonably suggests both the claim for which the debtor may be liable and the entity to whom he would be liable.”⁴⁵ Such a rule, when properly applied, balances the interests of potential creditors with “the important goal of prompt and effectual administration and settlement of debtors’ estates” and establishes a workable standard upon which debtors and courts may rely.⁴⁶

¶34 Here, the majority fails to properly apply the reasonably ascertainable test. The majority’s analysis turns on its finding that Todd “knew that members of the Asbestos Workers Union Local No. 7 (Local 7) who had worked at Todd *could reasonably be expected* to suffer asbestos-related diseases for which they *would* file tort claims.”⁴⁷ This “could reasonably be expected”⁴⁸ test applied by the majority is no

⁴² *In re Crystal Oil*, 158 F.3d 291, 297 (5th Cir. 1998).

⁴³ *Chemetron*, 72 F.3d at 348.

⁴⁴ *Chemetron*, 72 F.3d at 347-48.

⁴⁵ *Crystal Oil*, 158 F.3d at 297.

⁴⁶ *Chemetron*, 72 F.3d at 348.

⁴⁷ Majority at 481 (emphasis added).

⁴⁸ Majority at 481.

different than the “reasonably foreseeable”⁴⁹ test rejected in *Chemetron* and is not the “reasonably ascertainable” test which the majority purports to apply.

¶35 While Todd may have been generally aware that there were asbestos related claims for which it may be liable, the undisputed facts of this case reveal that it possessed no specific information of Herring’s identity or his exposure to asbestos. Todd thus did not have in its possession specific information that reasonably suggested it would be liable to Herring for his asbestos related tort claims. Therefore, Herring was an unknown creditor and notice by publication was sufficient.

¶36 For the above reasons, I respectfully dissent.

Review granted at 159 Wn.2d 1004 (2007).

[No. 32753-8-II. Division Two. April 18, 2006.]

JAMES R. CARY ET AL., *Appellants*, v. MASON COUNTY ET AL.,
Respondents.

[1] **Dismissal and Nonsuit — Judgment on Pleadings — Evidence Beyond Pleadings — Effect.** A CR 12(c) judgment on the pleadings will not be reviewed as a CR 56 summary judgment despite the trial court’s consideration of matters outside of the pleadings if those matters are not material to the court’s disposition of the motion.

[2] **Dismissal and Nonsuit — Judgment on Pleadings — Review — In General.** An appellate court reviews a CR 12(c) judgment on the pleadings by examining the pleadings alone to determine whether the claimant can prove any set of facts, consistent with the complaint, that would entitle the claimant to relief. In doing so, the court accepts as true any factual allegations in the complaint.

[3] **Municipal Corporations — Special Assessments — Distinguished From Tax — Test.** The difference between a tax and a special assessment is that a tax is imposed to raise money for the public treasury whereas a special assessment is a distinctive form of user charge by which the cost of a public improvement that increases

⁴⁹ *Chemetron*, 72 F.3d at 347-48.

the value of property is allocated to the owner of that property. A special assessment must relate directly to the cost of the improvement, relate the value of the improvement to the property assessed, and be deposited in a special account for the particular improvement.

[4] **Declaratory Judgment — Timeliness — Reasonable Time — Analogous Periods — Source.** A declaratory judgment action must be commenced within a reasonable time. What constitutes a “reasonable time” is determined by analogy to the time allowed for an appeal of a similar decision as prescribed by statute, court rule, or other applicable provision.

[5] **Declaratory Judgment — Timeliness — Reasonable Time — Analogous Periods — Multiple Periods.** For purposes of determining the time limit for commencing a declaratory judgment action, the longer of two analogous appeal periods applies.

[6] **Limitation of Actions — Municipal Corporations — Special Assessments — Validity — Declaratory Action — Timeliness — Challenged as Invalid Property Tax.** An action for a declaratory judgment that a municipal ordinance imposing a “special assessment” actually establishes an invalid property tax is subject to the limitation period specified by RCW 84.68.060, under which the action is timely if it is commenced any time before “the 30th day of the next succeeding June following the year in which said tax became payable.”

Nature of Action: Several taxpayers sought a declaratory judgment that a local ordinance adopted as a “special assessment” actually constituted an invalid and unconstitutional property tax.

Superior Court: The Superior Court for Mason County, No. 03-2-00196-5, Leonard W. Costello, J., on January 12, 2005, entered a judgment dismissing the action, ruling that the “reasonable time” for challenging the ordinance by a declaratory judgment action was 30 days and that the action was, therefore, time barred because the plaintiffs waited six months to file the action.

Court of Appeals: Holding that the action is analogous to a statutory action to recover any tax levied or assessed and that the action is, therefore, timely because it was brought within the time allowed for tax recovery actions, the court *reverses* the judgment and *remands* the case for further proceedings.

Mary A. Cary, John E. Diehl, James R. Cary, and William D. Fox, Sr., pro se.

Richard G. Phillips, Jr. (of Owens Davies, P.S.), and Gary P. Burlison, Prosecuting Attorney, and T.J. Martin, Deputy, for respondents.

LEXIS Publishing™ Research References

2006 Wash. App. LEXIS 703
Washington Rules of Court Annotated (LexisNexis ed.)
Annotated Revised Code of Washington by LexisNexis

¶1 ARMSTRONG, J. — James R. Cary appeals the trial court’s dismissal of his action for declaratory judgment, arguing that a Mason County ordinance, adopted as a “special assessment,” is actually an invalid and unconstitutional “property tax.” The lower court ruled that the “reasonable time” for challenging the ordinance by a declaratory judgment action was 30 days and that Cary’s action was therefore time barred because he waited six months to file. We disagree, holding that Cary’s action is analogous to actions to recover any tax levied or assessed under RCW 84.68.060. Such actions must be commenced by June 30 of the year following the year the tax became payable. Under that rule, Cary’s complaint was timely; accordingly, we reverse and remand.

FACTS

¶2 On September 3, 2002, Mason County (County) adopted ordinance 121-02, establishing a conservation special assessment under RCW 89.08.400. The text of the ordinance reads:

There shall be an assessment for natural resource conservation as authorized by RCW 89.08.400 in the amount of \$5.00 per non forested land parcel with \$0.00 fee per acre assessed for ten years starting 2003 and continuing through 2012.

Clerk’s Papers (CP) at 49.

C-2

¶3 On March 10, 2003, Cary sued the County, seeking a declaratory judgment that the ordinance was an invalid and unconstitutional property tax in the guise of a special assessment. He filed the action more than six months after the County had adopted the special assessment.

¶4 The County moved for judgment on the pleadings under CR 12(c), arguing that Cary failed to timely file his action under the "reasonable time" for appeals doctrine for challenging local and municipal improvements, which must be brought within 30 days. CP at 33. Cary responded that because he was challenging the ordinance as an unconstitutional tax, the claim should be tested against the time allowed for tax recovery actions, in which case his action was timely. Reasoning that the time limit for a declaratory judgment action is determined by analogy to the time allowed for appeal of a similar decision and finding that the analogous period to apply afforded Cary only 30 days to appeal, the lower court held that Cary's action was untimely.

ANALYSIS

I. Standard of Review

¶5 This appeal arises from the County's motion for judgment on the pleadings. CR 12(c). If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the court will treat the motion as one for summary judgment and dispose of it under CR 56. CR 12(c).

¶6 However, the various documents the parties submitted to the trial court in support of and in opposition to the County's motion (including the ordinance itself and the agreement between Mason Conservation District (District) and Mason County Department of Health Services)¹

¹ On October 22, 2002, the Board of Commissioners approved an agreement between the Department of Health Services and the District. The agreement "addresses the responsibilities and procedures of the Mason Conservation District

are not material to the determination of whether Cary timely filed his complaint. *Cf. N. Coast Enters., Inc. v. Factoria P'ship*, 94 Wn. App. 855, 859, 974 P.2d 1257 (1999) (holding that the information contained in a declaration, a description of negotiations between the parties prior to trial, and other matters were not material to the question of whether the statute of limitations had run for a particular contracts claim). Thus, we examine the pleadings alone "to determine whether the claimant can prove any set of facts, consistent with the complaint, that would entitle the claimant to relief." *Factoria P'ship*, 94 Wn. App. at 861 (citing *City of Moses Lake v. Grant County*, 39 Wn. App. 256, 258, 693 P.2d 140 (1984)). In doing so, we accept as true any factual allegations in the complaint. *City of Moses Lake*, 39 Wn. App. at 258 (citing *Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187 (1977)); *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961-62, 577 P.2d 580 (1978).

II. Taxes, Regulatory Fees, and Assessments

¶7 Generally speaking, "[T]axes are imposed to raise money for the public treasury." *Okeson v. City of Seattle*, 150

and the Mason County Department of Health Services related to the Assessment." CP at 50. The stated "goals" of the agreement are as follows:

Mason Conservation District and Mason County Department of Health Services are entering into this partnership to more effectively and efficiently provide the community with services to improve and maintain water quality and the protection of public health. They will work both independently and jointly to insure that Mason County has healthy water resources for household, recreational, agricultural, and commercial use, as well as fish and wildlife habitat and shellfish production for generations to come. CP at 51. The agreement also states that the "services" provided will consist of, in part, the following:

The Mason Conservation District will utilize its portion of Assessment net revenue to increase its' [sic] capability of providing technical assistance to landowners for the implementation for Best Management Practices and creation of farm plans designed to reduce the potential for non-point pollution. The District will also implement stream habitat improvement projects, provide education and outreach activities, and respond to requests from the community and referrals from the Mason County Department of Health Services. Assessment funds may also be used as matching funds for future grants addressing non-point pollution issues within Mason County.

CP at 51. The agreement also provides that it might be amended at any time by written agreement of the parties.

Wn.2d 540, 551, 78 P.3d 1279 (2003) (citing *Dean v. Lehman*, 143 Wn.2d 12, 25, 18 P.3d 523 (2001)); see also WASH. CONST. art. VII, § 1. Local governments may require payment of "fees" that are "akin to charges for services rendered." *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 602, 94 P.3d 961 (2004) (quoting *Covell v. City of Seattle*, 127 Wn.2d 874, 884, 905 P.2d 324 (1995)); WASH. CONST. art. XI, § 11 (police powers). Similarly, special assessments are "a distinctive form of user charge which allocates the cost of public improvements that increase the value of an asset (property) to the owner of that asset." Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 GONZ. L. REV. 335, 350-51 & n.147 (2002/2003) (discussing article VII, section 9 of the Washington Constitution and noting that the constitutional language enables local governments to "make local improvements by special assessment, or by special taxation of property benefited," which suggests assessments and special taxes are distinct (emphasis added) (quoting WASH. CONST. art. VII, § 9)). As with other user fees, special assessments must "relate directly to the cost of the improvements, relate to the value of the improvements to the property assessed, and be deposited in special accounts for the particular improvements." Spitzer, *supra*, 38 GONZ. L. REV. at 351 (citing *Bellevue Assocs. v. City of Bellevue*, 108 Wn.2d 671, 674-75, 741 P.2d 993 (1987)); see also Philip A. Trautman, *Assessments in Washington*, 40 WASH. L. REV. 100, 118 (1965). Mason County adopted the ordinance in this case under RCW 89.08.400 as a conservation "special assessment." CP at 56.

III. Challenges to Special Assessments under RCW 89.08.400

[4, 5] ¶8 RCW 89.08.400 prescribes no time limit for legal challenges to assessments authorized by statute. The Uniform Declaratory Judgments Act, chapter 7.24 RCW,

includes no timeliness provisions either.² Instead, Washington courts have said that "declaratory judgment actions must be brought within a 'reasonable time.'" *Brutsche v. City of Kent*, 78 Wn. App. 370, 376, 898 P.2d 319 (1995) (quoting *City of Federal Way v. King County*, 62 Wn. App. 530, 536, 815 P.2d 790 (1991)). "What constitutes a reasonable time is determined by analogy to the time allowed for appeal of a *similar decision* as prescribed by statute, rule of court, or other provision." *Brutsche*, 78 Wn. App. at 376-77 (emphasis added) (quoting *City of Federal Way*, 62 Wn. App. at 536-37). In general, when there is more than one analogous appeal period, "the longer of two . . . periods should be applied." *Brutsche*, 78 Wn. App. at 377.

¶19 The County argues that appeal periods for local improvements and other municipal actions typically range from 10 to 30 days. It notes that under RCW 36.94.290, county local improvement assessments must be appealed within 10 days.³ Similarly, under RCW 36.32.330, appeals from decisions of the county commissioners must be appealed within 20 days.⁴ And under RCW 35.43.100, any lawsuit of any kind challenging a municipal local improve-

² A declaratory judgment is the appropriate method to determine questions of construction or validity of a statute or ordinance. RCW 7.24.020.

³ RCW 36.94.290, entitled "Local improvement districts and utility local improvement districts—Appellate review," states in pertinent part:

The decision of the board of county commissioners upon any objections made within the time and in the manner herein prescribed, may be reviewed by the superior court upon an appeal thereto taken in the following manner. Such appeal shall be made by filing written notice of appeal with the clerk of the board of county commissioners and with the clerk of the superior court within ten days after the resolution confirming such assessment roll shall have become published, and such notice shall describe the property and set forth the objections of such appellant to such assessment.

⁴ RCW 36.32.330, entitled "Appeals from board's action," states in pertinent part:

Any person may appeal to the superior court from any decision or order of the board of county commissioners. Such appeal shall be taken within twenty days after the decision or order, and the appellant shall within that time serve notice of appeal on the county commissioners.

ment must be filed and served within 30 days.⁵ These examples, the County states, demonstrate that the 30-day period is the longest analogous period and the correct one to apply.

[6] ¶10 In contrast, Cary argues that the appeal period for actions to recover any tax levied or assessed is also analogous. Under RCW 84.68.060, actions to recover any tax levied or assessed may be commenced until “after the 30th day of the next succeeding June following the year in which said tax became payable.” Cary claims that the tax in this case was not payable until 2003; thus, he had until June 30, 2004, to bring his complaint. He filed his complaint for declaratory judgment on March 10, 2003.

¶11 The County likens this case to *Brutsche*. In *Brutsche*, 73 days after the Kent City Council amended its zoning code, Brutsche filed a declaratory judgment complaint alleging that the amendments were facially unconstitutional, violating due process and equal protection. The trial court granted the city summary judgment, ruling that the action was time barred. *Brutsche*, 78 Wn. App. at 372. On appeal, Brutsche contended that the trial court should have applied a three-year statute of limitations for the equal protection claims as brought under 42 U.S.C. § 1983. *Brutsche*, 78 Wn. App. at 372. Division One of the Court of Appeals affirmed the lower court, concluding that Brutsche did not plead a cause of action under 42 U.S.C. § 1983 and, therefore, the three-year statute of limitations did not apply. Instead, it used the reasonable time-by-analogy

⁵ RCW 35.43.100, entitled “Ordinance—Finality—Limitation upon challenging jurisdiction or authority to proceed,” states in pertinent part:

The council may continue the hearing upon any petition or resolution provided for in this chapter and shall retain jurisdiction thereof until it is finally disposed of. The action and decision of the council as to all matters passed upon by it in relation to any petition or resolution shall be final and conclusive. No lawsuit whatsoever may be maintained challenging the jurisdiction or authority of the council to proceed with the improvement and creating the local improvement district or in any way challenging the validity thereof or any proceedings relating thereto unless that lawsuit is served and filed no later than thirty days after the date of passage of the ordinance ordering the improvement and creating the district or, when applicable, no later than thirty days after the expiration of the thirty-day protest period provided in RCW 35.43.180.

analysis and held that Brutsche’s declaratory judgment action, based on an allegedly invalid statute, was barred by the 30-day statute of limitations governing land use challenges. *Brutsche*, 78 Wn. App. at 372.

¶12 *Brutsche*, however, is distinguishable. Unlike the plaintiff in *Brutsche*, who failed to state a section 1983 claim in the complaint, Cary specifically alleged that the ordinance created a property tax, not a special assessment. In his complaint, he asserted that ordinance 121-02 “imposes a levy on property simply by virtue of ownership of property, without regard to any improvements appurtenant to the property or special benefits conferred on the property.” CP at 42. As a result, he argued, the ordinance “has the earmarks of a property tax, not a special assessment.” CP at 42. Further, he complained that the ordinance “does not ensure . . . any improvements or benefits appurtenant to assessed land.” CP at 42. Moreover, it “does not ensure that any improvements or benefits to assessed land will be substantially more intense than whatever benefits of the District’s activities are conferred on property not subject to the assessment.” CP at 42. And he stated that the County “intended to spend most of the revenues from the assessment for broad public purposes, instead of providing special improvements or benefits to each of the parcels so taxed.” CP at 42. Consistent with these factual allegations, he

⁶ Cary also stated in the amended complaint:

Although the most recent agreement between the County and the District purports to provide financial support for work to specially benefit assessed parcel owners, this agreement, which comes after the constitutionality of the Ordinance was challenged and which may be changed or terminated at any time, is not materially relevant to the constitutionality of the original Ordinance as adopted. Moreover, even though the language of the recent agreement was obviously written to try to defend against the original complaint, it still does not ensure that the assessment would be spent on improvements or benefits appurtenant to assessed land, or that any improvements or benefits conferred on assessed land will be substantially more intense than are conferred on property not subject to the assessment.

CP at 42. “Neither Ordinance 121-02 nor the associated agreement between the County and the Conservation District proposes any land development or change in land use or zoning. . . . The Conservation District is not a local improvement district.” CP at 30.

argued that the appeal period for recovering any tax levied or assessed should govern his action.

¶13 Cary's complaint is clear; he argues that the ordinance is an invalid tax—not a special assessment or a local improvement. Accepting as true Cary's allegations, the action is more analogous to one seeking to recover a tax than to one challenging municipal local improvements. The appeal period for actions to recover any tax levied or assessed at RCW 84.68.060 is longer than the appeal period provided for challenges to local improvements at RCW 35.43.100; thus, RCW 84.68.060 was the analogous appeal period.

¶14 We hold that the trial court erred in ruling that Cary's action was barred by analogy to the 30-day period that limits other actions against the County. Under RCW 84.68.060, Cary had until June 30, 2004, to bring his complaint; he filed before that date. We reverse and remand to the trial court for a decision on the merits.

QUINN-BRINTNALL, C.J., and VAN DEREN, J., concur.

Review denied at 159 Wn.2d 1005 (2007).

[No. 23842-3-III. Division Three. April 20, 2006.]

DAVID L. HORNBACK ET AL., *Appellants*, v. KEN WENTWORTH
ET AL., *Respondents*.

- [1] **Appeal — Findings of Fact — Failure To Assign Error — Effect.** A trial court's unchallenged findings of fact are verities on appeal.
- [2] **Judgment — Reconsideration — Review — Standard of Review.** A trial court's decision to deny a motion for reconsideration is reviewed for an abuse of discretion. A trial court abuses its discretion if it bases its decision on untenable grounds or reasons.
- [3] **Statutes — Application to Facts — Review — Standard of Review.** Whether a statute applies to a particular set of facts is reviewed de novo.
- [4] **Contracts — Rescission — Effect — Discretion of Court.** When a trial court applies the equitable remedy of rescission to a contract

that is no longer legally possible to perform, the equitable unwinding of the contract and adjustment of the parties' gains and losses are matters addressed to the court's discretion.

- [5] **Plats — Statutory Provisions — Violation — Rescission of Sale — Statutory Remedies — Purpose and Role.** The relief granted by RCW 58.17.210 when a contract for the purchase of real property is rescinded because the lot cannot be platted under existing law merely augments the usual panoply of measures that flow from the common law right of rescission. Whether in common law rescission or legislative rescission, the trial court's duty is to exercise equitable discretion in the unwinding process.
- [6] **Vendor and Purchaser — Real Estate Contract — Rescission — Unlawful Division of Land — Remedies — Statutory Remedies — Denial — Validity.** A trial court rescinding a contract for the purchase of real property because the lot cannot be platted under existing law has the discretion not to award rescission remedies under RCW 58.17.210 or a concurrent local ordinance whereby the purchaser "may" recover certain rescission remedies. The court's decision is reviewed only for an abuse of discretion.
- [7] **Equity — Purpose — In General.** The purpose of equity is to do substantial justice.
- [8] **Contracts — Rescission — Effect — Restoration of Status Quo Ante.** The rescission of a contract is an equitable remedy meant to restore the parties insofar as possible to the status quo that existed before the parties entered into the contract.
- [9] **Vendor and Purchaser — Real Estate Contract — Rescission — Unlawful Division of Land — Remedies — Discretion of Court.** A trial court rescinding a contract for the purchase of real property because the lot cannot be platted under existing law does not abuse its discretion in fashioning relief if, in unwinding the contract, the court properly balances the equities between the parties in adjusting their respective gains and losses.
- [10] **Interest — Prejudgment Interest — Review — Standard of Review.** An award of prejudgment interest is reviewed for an abuse of discretion.
- [11] **Equity — Remedies — Preventing Enforcement of Legal Right.** In the interest of substantial justice, equity may prevent the enforcement of a legal right.
- [12] **Vendor and Purchaser — Real Estate Contract — Rescission — Unlawful Division of Land — Remedies — Prejudgment Interest — Accrual Date — Discretion of Court.** A trial court rescinding a contract for the purchase of real property because the lot cannot be platted under existing law has the discretion to award prejudgment interest on restitution of the purchaser's payments to the seller either from the date of each payment or the date rescission

ensured that it did not contain open containers of chemicals that would spill and become hazardous to either the tow truck operator or the officers who subsequently searched the vehicle. Further, leaving such chemicals in Gibson's vehicle, which was parked in a public area, also posed a potential threat to passersby. Accordingly, once Deputy Tjossem confirmed his suspicions that the chemicals he saw were used to manufacture methamphetamine, he entered Gibson's vehicle only to ensure that they were secure. After determining that the chemicals were secure, Deputy Tjossem left them in place. Although exigent circumstances permitted Deputy Tjossem to seize and remove the offending chemicals at the scene, Deputy Tjossem chose not to remove the chemicals for safety reasons, and Gibson's vehicle was towed to a secure impoundment lot where Deputy Fry obtained a warrant to search and seize the chemicals.

¶29 Combining the minimal expectation of privacy that Gibson had in the contents of his vehicle displayed in open view with the exigencies of safety to officers and to the public, we hold that the search was reasonable under the Fourth Amendment. Even though the trial court held that the search was valid under the doctrine of search "incident to arrest" that *Gant* now modifies, we can affirm the trial court on any ground. *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986) ("[A]n appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court."). Thus, we hold that the deputies' initial search of Gibson's vehicle was reasonable under the "open view" exception and exigent circumstances. We also hold that the deputies' observing chemicals used to make methamphetamine during the initial search was sufficient probable cause for the subsequent search warrant.

¶30 A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder

shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

HUNT and QUINN-BRINTNALL, JJ., concur.

[No. 37981-3-II. Division Two. November 9, 2009.]

JAMES R. CARY ET AL., Respondents, v. MASON COUNTY,
Defendant, MASON CONSERVATION DISTRICT, Petitioner.

[1] **Municipal Corporations — Regulatory Fees — Distinguished From Tax — Factors.** Whether a charge imposed by a municipal corporation is a regulatory fee or a tax is determined by considering three factors: (1) whether the primary purpose of the charge is to raise revenue (suggesting a tax) or to regulate (suggesting a regulatory fee); (2) whether the money collected from the charge must be allocated only to the authorized regulatory purpose, in which case the charge is considered to be a fee; and (3) whether there is a direct relationship between the rate charged and a service received or a burden produced by the persons paying the charge. For purposes of the first factor, if the fundamental legislative impetus was to "regulate" the fee payers—by providing them with a targeted service or alleviating a burden to which they contributed—that would suggest that the charge was an incidental "tool of regulation" rather than a tax in disguise. The second factor may be demonstrated where the funds collected under the charge are placed in a segregated account that is used only to fund regulatory activities. With respect to the third factor, if a direct relationship exists between the assessment paid and the services received by the payers, the assessment may be deemed a regulatory fee even though the charge is not individualized according to the benefit accruing to or the burden produced by each fee payer.

[2] **Municipal Corporations — Regulatory Fees — Distinguished From Tax — Purpose — Water Resource Protection.** An assessment levied on property owners to create a fund dedicated to addressing water resource protection issues should be considered a regulatory fee and not a tax if the money collected is spent mainly to improve water quality in the county; the funds the assessment generates are segregated into an account used only for water management, storm water maintenance programs, and education; and the county uses the funds it collects to manage storm water runoff for the benefit of all county residents.

D-1

[3] **Statutes — Construction — Statutory Language — Considered as a Whole — Context — In General.** A court construes a statute by looking at the statute's plain language and ordinary meaning and the applicable legislative enactment as a whole, harmonizing its provisions by reading them in context with related provisions and with the statute as a whole.

[4] **Statutes — Construction — Legislative Intent — Statutory Language — Unambiguous Language.** The legislative intent of an unambiguous statute is discerned from the plain language of the statute alone.

[5] **Counties — Special Assessment — Natural Resource Conservation — Proposed System of Assessment — Findings By County Legislative Authority — Effect.** Under RCW 89.08.400, which authorizes counties to impose special assessments for natural resource conservation purposes, the provision in subsection (2) that "[t]he findings of the county legislative authority shall be final and conclusive" pertains to a county legislative authority's evaluation of a proposed system of assessment and does not pertain to any subsequent ordinance actually imposing an assessment.

[6] **Counties — Special Assessment — Natural Resource Conservation — Proposed System of Assessment — Validity — Declaratory Action — Voter Nullification Provision — Effect.** The voter nullification provision of subsection (5) of RCW 89.08.400, which authorizes counties to impose special assessments for natural resource conservation purposes, does not foreclose a citizen from seeking a judicial declaration as to the validity of a special assessment.

[7] **Appeal — Review — Law of the Case — What Constitutes — In General.** The law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.

[8] **Counties — Special Assessment — Natural Resource Conservation — Per Acre Charge — Necessity — Minimum Charge.** RCW 89.08.400, which authorizes counties to impose special assessments for natural resource conservation purposes, does not require the imposition of a per acre charge in addition to a per parcel charge and does not prevent a per acre charge from being \$0.00.

Nature of Action: Several landowners sought a declaration that a special assessment levied against them to fund water resource protection programs is an unconstitutional property tax.

Superior Court: The Superior Court for Mason County, No. 03-2-00196-5, Leonard W. Costello, J. Pro Tem., on June

25, 2008, entered a summary judgment in favor of the landowners and enjoined the county from collecting any more of the special assessments. The court later granted the plaintiffs' request for clarification in part by awarding retroactive relief to those landowners who had paid the special assessment under protest.

Court of Appeals: Holding that the special assessment constitutes a regulatory fee and not a tax, the court reverses the judgment and remands the case to the superior court with directions to enter a summary judgment in favor of the conservation district.

James R. Cary and Mary A. Cary, pro se.

John E. Diehl, pro se.

William D. Fox Sr., pro se.

Matthew B. Edwards (of Owens Davies Fristoe Taylor & Schultz, PS), for petitioner.

Robert M. McKenna, Attorney General, and Sharonne E. O'Shea, Assistant Attorney General, on behalf of Washington State Conservation Commission, amicus curiae.

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Annotated Revised Code of Washington by LexisNexis

¶1 HOUGHTON, J. — The Mason County Conservation District¹ (District) appeals the trial court's grant of summary judgment in favor of James Cary, Mary Cary, John Diehl, and William Fox, Sr. (Landowners) that invalidated an assessment Mason County (County) levied against landowners within the District. The District argues that the assessment constitutes a fee rather than a tax; but even if the assessment is a tax, it is valid. The Landowners argue

¹The Mason County Conservation District is one of 47 such districts in the state, and it consists of all the land within Mason County with the exception of the city of Shelton. Conservation districts exist to mitigate environmental problems such as erosion, sedimentation, and storm water runoff pollution. RCW 89.08.010.

D-2

on cross appeal that the trial court should refund assessments landowners paid to the County up to the date the Landowners prevailed on summary judgment. We agree with the District that it is a fee and, therefore, reverse and remand.

FACTS

¶2 On July 29, 2002, the District wrote the Mason County Board of Commissioners (Board) to request a special 10-year-long annual assessment of \$5.00 per parcel and \$0.07 per acre for all parcels one acre or larger. The District explained that it intended to "create a fund dedicated to addressing water resource protection issues within Mason County." Clerk's Papers (CP) at 59. The District proposed that the monies the assessment generated go to the Mason County Department of Health Services to fund programs to protect water quality and provide matching funds for future grant opportunities.

¶3 On August 27, the Board held a hearing and considered the District's request. At the hearing, Department of Health Services staff recommended that the Board approve the assessment but charge \$0.00 per acre in lieu of \$0.07 per acre due to the high administrative costs associated with the implementation of a per acre assessment. The Board agreed to the changes, approved the modified assessment, and began collecting the \$5.00 per parcel assessment in 2003. The Board entered findings of fact and codified its decision as Mason County Ordinance 121-02. From 2003 through 2007, the County collected \$1,112,640:68.

¶4 On March 10, 2003, the Landowners sought a declaratory judgment ruling the assessment an unconstitutional property tax, which the trial court ultimately dismissed as untimely. *Cary v. Mason County*, 132 Wn. App. 495, 498, 504, 132 P.3d 157 (2006), review denied, 159 Wn.2d 1005 (2007). The Landowners then appealed and we reversed and remanded, reasoning that because the Landowners alleged the assessment was an invalid property tax,

they made a timely claim under the applicable statute. *Cary*, 132 Wn. App. at 504.

¶5 The Landowners then moved for summary judgment, and the District filed a cross motion for summary judgment. The trial court granted the Landowners' motion and enjoined the County from collecting any more assessments under the ordinance. The trial court gave three bases for its decision. First, after analyzing the three factors in *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995), the trial court determined that the assessment was an unlawful tax because "there is no direct relationship between the fee charged and any services provided [to] parcel owners." CP at 28. Second, it determined that under RCW 89.08.220, a conservation district cannot levy a tax and, therefore, the assessment could not be a legislatively authorized constitutional tax. Third, it found that the ordinance violated RCW 89.08.400(3) because the statute requires a per acre charge to accompany a per parcel charge.

¶6 On March 26, 2008, the Landowners moved for clarification, urging the trial court to grant their request for retroactive relief for taxes paid beginning in 2003. The District opposed this motion on procedural grounds. The District then sought certification to allow for an immediate appeal and asked the trial court to enter a stay of judgment. The trial court granted the Landowners' request for clarification in part by awarding retroactive relief to those property owners who had made their assessment payments under protest. The trial court also granted the request for a stay and certified the matter for appellate review. We granted the District's motion for discretionary review.

ANALYSIS

¶7 The District appeals the trial court's grant of summary judgment. We review summary judgment orders *de novo*. *Quest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007). A trial court properly grants summary judgment when no genuine issues of material fact exist,

thereby entitling the moving party to a judgment as a matter of law. CR 56(c). We draw all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

NATURE OF ASSESSMENT

¶8 The District first contends that the County's assessment is a regulatory fee and not a tax; but even if we determine that it is a tax, it is a constitutional one. The District argues that under *Covell*, the assessment meets the requirements for a valid regulatory fee and the trial court erred in finding no direct relationship between the assessment and benefits it conferred.

[1, 2] ¶9 Under *Covell*, Washington courts apply three factors in weighing whether an assessment amounts to a regulatory fee or a tax: (1) whether the primary purpose is to raise revenue (tax) or regulate (regulatory fee); (2) whether the funds must be allocated to a regulatory purpose (if so, regulatory fee); and (3) whether a direct relationship exists between the assessment charged and the benefit the payer received or the assessment charged and the burden the fee payer produced (if so, regulatory fee). 127 Wn.2d at 879.

¶10 Here, the Board's findings of fact supporting its decision to implement Ordinance 121-02 also support the District's argument that the first factor weighs in favor of treating the assessment as a fee and not a tax. In *Samis Land Co.*, the court explained the first *Covell* factor: "If the fundamental legislative impetus was to 'regulate' the fee payers—by providing them with a targeted service or alleviating a burden to which they contribute—that would suggest that the charge was an incidental 'tool of regulation' rather than a tax in disguise." *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 807, 23 P.3d 477 (2001) (footnotes omitted). The findings state that the District will use the funds to protect water for drinking, recreation,

fishing, and commercial activity. In the Landowners' affidavit submitted at trial, they agreed that "[t]he monies collected under Ordinance 121-02 have been spent mainly to improve water quality in Mason County" and submitted the expense reports in support of that fact. CP at 95. Thus, the first factor weighs in favor of treating the assessment as a regulatory fee.

¶11 The second *Covell* factor, whether the County has allocated the funds for a regulatory purpose, weighs in favor of the District because it segregates the funds the assessment generates into an account used only for water management, storm water maintenance programs, and education. 127 Wn.2d at 879. In *Storedahl*, facing a similar factual situation to the present case, we reasoned that the assessment at issue resembled a fee under the second *Covell* factor because Clark County used the storm water funds for the limited purpose of maintaining storm water infrastructure, educating the public about the effects of storm water, and other similar activities. *Storedahl Props, LLC v. Clark County*, 143 Wn. App. 489, 502-03, 178 P.3d 377, review denied, 164 Wn.2d 1018 (2008). The second *Covell* factor therefore weighs in favor of treating the assessment as a regulatory fee as well.

¶12 With respect to the third factor, we first determine whether a direct relationship exists between the assessment paid and the service the payer received. *Covell*, 127 Wn.2d at 879. If we determine that a direct relationship exists, the assessment "may be deemed a regulatory fee even though the charge is not individualized according to the benefit accruing to each fee payer or the burden produced by the fee payer." *Covell*, 127 Wn.2d at 879.

¶13 In *Storedahl*, we decided that the third *Covell* factor weighed in favor of treating the assessment as a regulatory fee because Clark County used the funds to manage storm water runoff, thereby benefiting the entire county. *Storedahl*, 143 Wn. App. at 505-06. In *Tukwila School District*, Division One found that a direct relationship under the third *Covell* factor existed because "it rains

D-4

everywhere and all parcels within the City benefit from a system that manages the quantity and quality of storm and surface water runoff to prevent flooding, erosion, sedimentation, pollution, and danger to life and property.” *Tukwila Sch. Dist. No. 406 v. City of Tukwila*, 140 Wn. App. 735, 749, 167 P.3d 1167 (2007). Here, the third factor also weighs in favor of treating the assessment as a regulatory fee because the County uses the funds it collects to manage the storm water runoff for the benefit of all county residents. *Covell*, 127 Wn.2d at 879; *Storedahl*, 143 Wn. App. at 505-06. All three *Covell* factors weigh in favor of a fee² and the trial court therefore erred in finding that the assessment constituted a tax rather than a regulatory fee.³

PER ACRE ASSESSMENT

¶14 The District next contends that the Board did not violate RCW 89.08.400(3) by imposing a \$0.00 per acre assessment in addition to its \$5.00 per parcel assessment. The District argues that the legislature precluded judicial review of whether the Board acted outside its discretion in imposing the assessment. The District argues further that the Landowners did not timely file their claim under RCW 36.32.330 and our ruling in the first appeal.

[3-6] ¶15 We look at the statute’s plain language and ordinary meaning and “the applicable legislative enactment as a whole, harmonizing its provisions by reading them in context with related provisions and the statute as a whole.” *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005). When faced with an unambiguous statute, we derive the legislature’s intent from the plain language alone.

² The trial court also erred in finding that the District improperly imposed the “tax” because only the County has the power to levy taxes. As the record shows, it was the County, and not the District, that imposed the fee.

³ Because we hold that the assessment constituted a fee, we do not address the County’s alternative argument that if we were to hold the assessment constituted a tax, it was valid.

Waste Mgmt. of Seattle, Inc., v. Utils. & Transp. Comm’n, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994).

¶16 The District bases its first timeliness argument on the RCW 89.08.400(2) provision that “[t]he findings of the county legislative authority shall be final and conclusive” and the RCW 89.08.400(5) provision allowing for voter nullification of the assessment if 20 percent of the landowners in the affected district to sign a petition objecting to the assessment. Appellant’s Br. at 30.

¶17 RCW 89.08.400(2) provides in relevant part:

The county legislative authority shall hold a public hearing on the proposed system of assessments. 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 that 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.* Special assessments may be altered during this period on individual parcels in accordance with the system of assessments if land is divided or land uses or other factors change.

(Emphasis added.) As the statute makes clear, the District has taken the “final and conclusive” provision out of context and misconstrued the legislature’s intent. Read in the context of the entire statute, the provision states that the Board’s findings of fact become final and conclusive within the meaning of RCW 89.08.400(2), not Ordinance 121-02. Further, the District’s argument that the availability of a voter nullification petition supports its timeliness argument also fails because nothing in the provision addresses judicial review, and the District fails to cite any authority to support the argument. RCW 89.08.400(5).

¶18 The District bases its next timeliness argument on RCW 36.32.330 and argues that because the Landowners did not appeal the Board’s enactment of the ordinance to

D-5

the superior court within 20 days, the matter is time barred. Under RCW 36.32.330, "Any person may appeal to the superior court from any decision or order of the board of county commissioners. Such appeal shall be taken within twenty days after the decision or order, and the appellant shall within that time serve notice of appeal on the county commissioners."

[7] ¶19 Although the Landowners argue that this timeliness issue is res judicata, the District correctly points out that it is the law of the case doctrine and not the closely related res judicata doctrine that applies here. See *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005) ("the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation"). Nonetheless, applying the law of the case doctrine, the Landowners are correct that we have already carefully analyzed the District's timeliness challenges and disagreed with its argument. *Cary*, 132 Wn. App. at 504. Thus, we address the parties' remaining arguments.

[8] ¶20 The District contends that the Board did not violate RCW 89.08.400(3) by imposing a \$0.00 per acre assessment in addition to its \$5.00 per parcel assessment. RCW 89.08.400(3) provides in relevant part as follows:

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, determine an annual per acre rate of assessment for each classification of land, and indicate the total amount of special assessments proposed to be obtained from each classification of lands. Lands deemed not to receive benefit from the activities of the conservation district shall be placed into a separate classification and shall not be subject to the special assessments. *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 maxi-

imum annual per parcel rate shall not exceed five dollars, except that for counties with a population of over one million five hundred thousand persons, the maximum annual per parcel rate shall not exceed ten dollars.

(Emphasis added.) Reviewing the statutory language, the Landowners' argument that the statute requires a per acre charge to accompany a per parcel charge does not persuade us. Even if the Landowners were correct and the statute required the Board to impose a per acre charge, nothing in the language of the statute prevents the per acre charge from being \$0.00. RCW 89.08.400(3). Although the statute does explicitly provide a maximum, it does not similarly provide a minimum. RCW 89.08.400(3). This is because RCW 89.08.400(3) merely describes *how* annual per acre and per parcel assessments must be set forth; it does not require the imposition of a per acre charge in addition to the per parcel charge.

¶21 Thus, the trial court erred by ruling that the Board's decision to assess \$5.00 per parcel plus \$0.00 per acre does not comply with the requirements of RCW 89.08.400(3).⁴

RETROACTIVE RELIEF

¶22 On cross appeal, the Landowners contend that they are entitled to a refund of assessments paid to the County under Ordinance 121-02. At trial, the court granted this relief to those who paid under protest during the assessment period. Because we reverse, we do not grant the Landowners' requested relief.

¶23 Reversed and remanded with instructions to grant the District's cross motion for summary judgment.

BRIDGEWATER and HUNT, JJ., concur.

⁴ Although the Landowners also argue that the ordinance failed to properly classify the land receiving the benefit of the assessment, the fee does not apply to forested land. Confining the assessment to non-forested parcels, which do not absorb storm water in the same manner as forested parcels, implies a classification and thus satisfies the statutory requirement. RCW 89.08.400(3).

CERTIFICATE OF SERVICE

I hereby certify that I deposited a complete copy of the Appellant Mason Conservation District's Supplemental Brief, including this Certificate of Service, in the United States Mail, first class postage prepaid, addressed to the following this 27 day of May, 2010.

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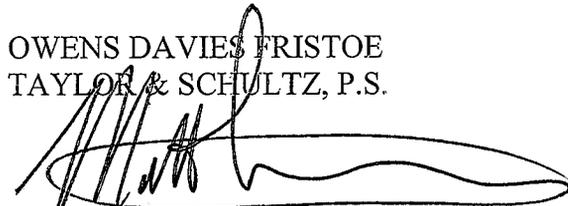
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DATED this 27 day of May, 2010.

OWENS DAVIES FRISTOE
TAYLOR & SCHULTZ, P.S.

A handwritten signature in black ink, appearing to read 'Matthew B. Edwards', is written over a horizontal line. The signature is stylized and somewhat cursive.

Matthew B. Edwards, WSBA #18332