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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JAMES R. CARY, MARY ALICE CARY, JOHN E. DIEHL,
and WILLIAM D. FOX, SR.

Petitioners,

v.

MASON COUNTY and
MASON CONSERVATION DISTRICT

Respondents.

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BRIEF OF AMICUS CURIAE, KING COUNTY

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I. INTRODUCTION

Amicus curiae King County respectfully urges this Court to affirm the Court of Appeals, Division II, holding in *Cary v. Mason County*, 152 Wn.App. 959, 219 P.3d 952 (2009), that the Mason County special assessment is not an unconstitutional tax, but rather is a valid regulatory fee. Alternatively, King County urges this Court to uphold the assessment as a valid special assessment as authorized by the State Legislature. King County concurs with and supports the Brief of *Amicus Curiae* Washington Association of Conservation Districts.

II. INTEREST OF AMICUS CURIAE

The King Conservation District encompasses the vast majority of lands, both incorporated and unincorporated, within King County. Under the authorization provided for in RCW 89.08.400, the King County Council has since 1994 imposed special assessments on behalf of the King Conservation District on, and for the benefit of, properties within the District. These special assessments have ranged in amount beginning in 1994 from \$1.25 per parcel up to a maximum of \$10 per parcel in 2006 through 2012. These special assessments have funded District activities and programs to conserve natural resources for the benefit of all properties within the District. Such programs include habitat protection and

restoration, landowner assistance and best management practices, support of agricultural and rural programs, and natural resource conditions monitoring and evaluation. Each time the King County Council has authorized these special assessments on behalf of the District, it has engaged in careful deliberation over the District's proposed system of assessments and work programs, and has found, as RCW 89.08.400 requires it to, that the public interest will be served by the imposition of the special assessments, and that the special assessments will not exceed the special benefit that the land receives or will receive from the activities of the District.

Similar to the Mason County/Mason Conservation District relationship, King County and the King Conservation District have entered into an interlocal agreement to express a mutually agreed upon set of programs and activities that will promote conservation of renewable resources for the three years (2010-2012) of the current assessment. These programs and activities are available county-wide, except that five of the 39 municipalities in King County have opted to not participate in the District, and so do not receive the direct benefit of District programs. However, unlike the Mason County Ordinance at issue in this case, the King County ordinances authorizing the special assessment for the District

since 2005 have provided for an administrative appeal to any property owners who object to the special assessment on their property. See King County Ordinance No. 16743. To date, not a single property owner has contested the District's special assessment through this administrative process.¹

A second difference between the Mason Conservation District and the King Conservation District special assessment involves the dollar amount and method of assessment used in the two districts. Under RCW 89.08.400(3), the maximum annual per parcel rate for counties with a population of over one million five hundred thousand persons is not to exceed ten dollars. The King Conservation District's assessment roll approved by King County charges \$9.98 per (nonexempt) parcel and an additional one cent for parcels between one and five acres, and two cents for parcels over five acres. Thus the maximum of ten dollars per parcel is not exceeded.

King County, as the entity that imposes the assessment, the King Conservation District, as the entity that is funded by the assessment, and all other counties and conservation districts throughout the State of

¹ While no administrative appeal has ever been filed, King County has been named as a defendant in a class action lawsuit (*Stephen Hammond, et al. v. King County, et al.*, King County Superior Court No. 10-2-16080-9, filed in May, 2010) wherein it is alleged that the King Conservation District assessment is an illegal special assessment, and which seeks return of conservation funds that have already been spent.

Washington whose activities and programs promote the conservation of renewable resources, clearly have an important interest in the outcome of this case.

III. ISSUES PRESENTED FOR REVIEW

A. Should the Court of Appeals holding that the Mason County special assessment is not an unconstitutional tax be affirmed?

B. Does the State Legislature have the power to authorize special assessments to fund the activities and programs of conservation districts?

IV. STATEMENT OF THE CASE

Rather than repeat the substance of statements of the case already before the Court in other filings in this case, King County concurs with and adopts the Statement of the Case provided by *Amicus Curiae* Washington Association of Conservation Districts in this case.

V. ARGUMENT

The Court of Appeals engaged in an analysis based on *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995), to reach the conclusion that the Mason County special assessment constituted a legitimate regulatory fee and was not an unconstitutional tax. While urging this Court to affirm this holding, King County is persuaded that an alternative basis exists for upholding the Mason County assessment, i.e. that it is a valid special assessment as authorized in the conservation

district statute, Chapter 89.08 RCW. *Covell* itself recognized special assessments to be distinct from regulatory fees and taxes. Nearly a century ago this court recognized that the first sentence of Article VII § 9 of the Washington State Constitution regarding "local improvements by special assessment" does not apply to counties, and also acknowledged that this provision does not limit the power of the Legislature to invest counties with special assessment authority. The Legislature's power to enact a statute is unrestrained except where limited by the state and federal constitutions. In this case, the Legislature has authorized the imposition of special assessments in conservation districts, as it has for noxious weeds boards, based on a determination that statutorily authorized conservation programs provide special benefits to properties within the districts. The statutory provision authorizing these special assessments, RCW 89.08.400, is presumed constitutional, as is the Mason County ordinance implementing its provisions. Petitioners have failed to carry their burden of demonstrating beyond a reasonable doubt that either the statute or the ordinance is unconstitutional.

A. The Court of Appeals correctly held that the Mason County special assessment is not an unconstitutional tax.

The Court of Appeals engaged in an analysis based on *Covell* to reach the conclusion that the Mason County special assessment constituted

a legitimate regulatory fee and was not an unconstitutional tax. Utilizing the three factors analysis of *Covell*, the Court of Appeals found that the use of the funds from the assessment to protect water quality was regulatory in nature, that the funds collected were used for this regulatory purpose, and that those properties assessed received the benefit of having their storm water runoff managed. "All three *Covell* factors weigh in favor of a fee [footnote omitted] and the trial court erred in finding that the assessment constituted a tax rather than a regulatory fee." *Cary*, 152 Wn.App. at 966.

In light of the regulatory nature of the uses of the fees collected by Mason County, King County does not disagree with the holding of the Court of Appeals, as between the two options - valid regulatory fee or unlawful tax - presented to the Court through the briefing in this matter. However, *Covell* itself offered an alternative avenue of analysis, as it also considered whether the street utility charge at issue in that case might qualify as a special assessment. The Court found that the funds collected were combined with other funds to pay for improvements all over the city, and so the charge failed to meet the definition that the court utilized for a special assessment. King County urges this Court, based on the arguments *infra*, to uphold the Court of Appeals decision on the basis on which it

reached its decision, but also asks this Court to consider an alternate ground for upholding the Court of Appeals' decision in this case. The Mason County charge is a lawfully imposed special assessment and not an impermissible tax.

B. Article VII § 9 of the Washington State Constitution does not apply to the imposition of special assessments for conservation districts by counties.

Article VII § 9 in its first sentence states:

"The legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of property benefited."

Based on a direct application of this provision's wording, this Court nearly a century ago held that this provision does not apply to counties:

Section 9 of article 7 relates to the power of the corporate authorities of 'cities, towns, and villages' to make local improvements by special assessments. It has no application to 'counties.' and hence any limitation it may place on the powers of the firstnamed municipalities has no application to the second.

Bilger v. State, 63 Wash. 457, 469, 116 P.19 (1911) (emphasis added).

While Article VII § 9 does not authorize counties to utilize special assessments for improvements, this Court has held that this provision does not prohibit the Legislature from conferring the power of special assessment on counties in the formation of diking districts. "We are of the

opinion that the Legislature could have conferred the power upon counties directly", *Hansen et al., Dike Com'rs, v. Hammer, County Auditor*, 15 Wash. 315, 319, 46 P. 332 (1896); "We conclude that we must now hold that this statute [allowing county to form diking district and enforce special assessments] does not violate the provisions of section 9, art. 7 of our Constitution." *Foster v. Commissioners of Cowlitz County*, 100 Wash. 502, 511, 171 P. 539 (1918). Thus this Court has recognized the power of the Legislature, outside the strictures of Article VII § 9, to confer special assessment authority on counties. This is consistent with the long line of cases wherein this Court has affirmed the Legislature's power to enact a statute as unrestrained except where, either expressly or by fair inference, it is prohibited by the state or federal constitutions. *Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 300, 174 P.3d 1142 (2007); *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 248, 88 P.3d 375 (2004).

This principle is of particular importance in the instant case, as the constitutional challenge to the Mason County special assessment is in reality a challenge to the underlying statutory authorization for counties and conservation districts to use special assessments in the first place. *See*

Department of Ecology, 116 Wn.2d 246, 253, 804 P.2d 1241 (1991).²

RCW 89.08.400 of the conservation district statute in plain language authorizes the imposition of special assessments by county legislative authorities to fund the activities and programs of conservation districts.

That is exactly what Mason County did in Ordinance No. 121-02.

C. The Legislature in enacting Chapter 89.08 RCW declared that the conservation of renewable resources brings special benefits to lands within conservation districts.

1. The Legislature made an important policy decision in encouraging all areas of the state to engage in the conservation of renewable resources.

In its Preamble section to Chapter 89.08 RCW, the Legislature made an important policy statement: ". . . it is hereby declared to be the policy of the legislature to provide for the conservation of the renewable resources of this state . . ." RCW 89.08.010(4). In support of this declaration, the Legislature found that 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 resources practices, programs, and projects, as carried out by the state conservation

² "In questioning the validity of the DOE [Department of Ecology] financing plan, the [State Revenue] Committee is really challenging the constitutionality of RCW 39.94's declaration that the plan is not debt." *Id.* at 253. Petitioners are doing the same in the instant case - challenging the Legislature's decision to utilize special assessments as a means of conferring special benefits on all lands within a conservation district.

commission and by the conservation districts, should be available to all such areas . . ." *Id.* (emphasis added). In light of this declaration and finding, the Legislature made it easier for cities and towns to be included within conservation districts, by simple petition from the municipal governing authority to the state conservation commission. In underscoring the need for conservation of renewable resources, the Legislature declared as a matter of policy that all areas of the state should have available the programs and activities of conservation districts that address this need.

2. The Legislature declared that activities and programs to conserve natural resources are of special benefit to lands and may be used as the basis upon which special assessments are imposed.

Having declared its policy, the Legislature authorized the imposition of special assessments for conservation districts on a basis consistent with this policy: "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." RCW 89.08.400(1). The language employed by the Legislature is clear on its face. When a statute's meaning is plain on its face, a court must give effect to that plain meaning as an expression of legislative intent. *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007); *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). Programs and activities to

conserve natural resources are specifically identified as providing special benefit to the lands assessed and are the basis upon which special benefits may be imposed, similar to the assessment for the services provided in *City of Seattle v. Rogers Clothing for Men, Inc.*, 114 Wn.2d 213, 787 P.2d 39 (1990), which this Court upheld as a valid means of providing special benefits. In the instant case, there is no allegation that the funds from the proceeds of the Mason Conservation District assessment are being spent for purposes not authorized by the statute. Improvement of water quality fits squarely within the language of the statute and comports with the declared policy of the Legislature.³

3. The Legislature entrusted to the county legislative authority the determination of whether the special assessment will exceed the special benefit.

The Mason Conservation District special assessment is to be assessed over a ten year period, the statutory maximum, and at \$5.00 per non-forested parcel, also the statutory maximum. RCW 89.08.400(2) and (3). Thus, over a ten year period, a parcel will be assessed \$50. If a parcel is valued at \$50,000, an assessment in any given year will equate to 1/100 of one

³ The Legislature provided a similar method and basis for special assessments in Chapter 17.10 RCW, the Noxious Weeds Statute. In this statute, the Legislature declared that the "[c]ontrol of weeds is a benefit to the lands within any such section." The statute authorizes the county legislative authority to levy an assessment, in lieu of a tax, against the land for the purposes of funding the noxious weeds program. The statute further provides that the assessment rate shall be either uniform per acre in its respective class or a flat rate per parcel rate plus a uniform rate per acre. RCW 17.10.240 (1) and (1)(a) (emphasis added).

percent of its value, and over a ten year period, 1/10 of one percent of its value. Clearly with such *de minimis* amounts and percentages involved, quantifying special benefits parcel by parcel on the basis of access to programs and activities would be very difficult, if not impossible. Quantification of special benefit poses a unique challenge in this context.⁴

In light of the difficulties, and presumably costs, associated with appraising changes in land value through the use of market valuation techniques, the Legislature entrusted to the legislative authorities of counties the task of determining both that the public interest will be served by the imposition of the special assessment 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." 89.08.400(2) (emphasis added). Thus county legislative

⁴ In response to such a challenge, the King Conservation District (KCD) in 2006 sponsored a study that placed a value on ecosystem services. *Special Benefit from Ecosystem Services* by Earth Economics, July 28, 2006. Available at <http://www.kingcd.org/news-special-assessment.htm>. (last visited December 13, 2010). The study concluded that for every dollar of KCD spent in 2005, a return of \$4.22-\$5.95 of value from direct special benefit resulted. The study also concluded that the benefit from the District's activities and programs could not be captured with the current methods for formal appraisal of real estate value, but also noted that in some cases close proximity to healthy ecosystems in public open space increases property values by as much as 8-20 percent. *Id.* Executive Summary, p. 2, Nos. 9 and 13. This is supported by the intuitive notion that property located in an ecosystem that has clean air and water and uncontaminated land is more valuable from a market standpoint than property located in an ecosystem that is known to be contaminated or polluted.

authorities are the final arbiters of the special assessment/special benefit determination.

While not explicit in Mason County Ordinance No. 121-02, such findings are implicit in the imposition of that county's special assessment, since all legally necessary facts justifying the ordinance are presumed to exist. "The challenger [to a regularly enacted ordinance] bears the heavy burden of proving that the ordinance is unconstitutional beyond a reasonable doubt [citations omitted]. In so doing, the challenger must rebut the presumption that all legally necessary facts exist." *Thurston County Rental Owners Association v. Thurston County*, 85 Wn.App 171, 180, 931 P2d 208 (1997).⁵

4. The authorizing statute and ordinance are presumed valid.

RCW 89.08.400, which authorizes counties to impose special assessments on behalf of conservation districts to fund programs and activities of special benefit to the lands assessed within the district, is presumed to be constitutional. Regularly enacted ordinances are presumed constitutional, and a challenger bears the heavy burden of proving that the ordinance is unconstitutional beyond a reasonable doubt. *Brown v. City of*

⁵ In its authorization of the special assessment for KCD in 2010, the King County Council made explicit findings in Ordinance No. 16743 that the services and programs of the District serve the public interest and that the special assessment will not exceed the special benefit.

Yakima, 116 Wn.2d 556, 559, 807 P.2d 353 (1991); *Thurston County*, 85 Wn.App. at 181. " Every presumption will be in favor of the constitutionality of an ordinance." *Silver Shores Mobile Home Park, Inc., v. City of Everett*, 87 Wn.2d 618, 624, 555 P.2d 993 (1976).

In addition to these presumptions of constitutionality, additional presumptions weigh in favor of the Mason County special assessment. As this Court has established, "(i)t is presumed that an improvement is a benefit; that an assessment is no greater than the benefit; that an assessment is equal or ratable to an assessment upon other property similarly situated; and that the assessment is fair." *Abenhaus v. City of Yakima*, 89 Wn.2d 855, 861, 576 P.2d 888 (1978). The fatal flaw in Petitioners' case is that they have not overcome these presumptions. They have not demonstrated that the programs and activities of the Mason Conservation District do not specially benefit their properties in an amount comparable to the special assessment. They have failed to meet their burden. In light of this failure, this Court should uphold the validity and constitutionality of RCW 89.08.400 and Mason County Ordinance No. 121-02.

VI. CONCLUSION

The Court of Appeals was correct in deciding that the Mason County special assessment authorized under RCW 89.08.400 and Mason County Ordinance No. 121-02 is not an unconstitutional tax. In addition to urging this Court to uphold the result reached under a *Covell* analysis, King County respectfully asks this Court to consider the charge as a valid special assessment, within the power of the Legislature to authorize and within the discretion of the Mason County legislative authority to impose. Both the statute authorizing the special assessment and the ordinance imposing the special assessment are presumed constitutional, and the special assessment itself is presumed valid. Petitioners have failed to overcome these presumptions. The assessment should be upheld.

DATED this 13th day of December, 2010.

RESPECTFULLY submitted,

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