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No. 37981-3-II

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

MASON CONSERVATION DISTRICT,

Respondent,

and

MASON COUNTY,

Defendant.

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ANSWER TO AMICUS CURIAE MEMORANDUM
OF EVERGREEN FREEDOM FOUNDATION

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While we agree with most of the amicus curiae memorandum of Evergreen Freedom Foundation (“EFF”), we believe that it goes too far if it asserts that *Covell v. Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995) is not relevant to the validity of the levy.

I. The invalidity of this levy as a special assessment is not a new issue.

The Conservation District’s response to the motion to file the amicus memorandum erroneously asserts that no one has previously raised the issue of whether the levy adopted by Mason County “should be analyzed pursuant [sic] to the criteria applicable to ‘special assessments’ as defined in Art. VII, Sec. 9 of the Washington State Constitution.” Response by Mason Conservation District to Motion to File Amicus Curiae Memorandum at 3.

To the contrary, from the outset we have contended that the levy at issue, though ostensibly a special assessment, was not based on case law and the provision for special assessments in the Washington State Constitution. In our amended complaint filed with the superior court, we said, “Ordinance 121-02, which 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, has the earmarks of a property tax, not a special assessment.” CP 156. In our motion for summary judgment

before the superior court, we developed the distinction between special assessments and taxes, concluding that the levy at issue was an invalid tax, not a valid special assessment:

The most fundamental question in this case is whether the charge at issue, ostensibly an assessment, is actually a tax. If a tax, then it is clearly invalid, for the Legislature has not authorized a tax for natural resource conservation, and local governments may tax only pursuant to specific legislative or constitutional authority . . . Because special assessments and fees are not considered taxes, they are exempt from constitutional restrictions on the power to tax. . . . Special assessments may be seen as another type of user charge. [Hugh D.] Spitzer, ["Taxes vs. Fees: A Curious Confusion," 38 Gonz. L. Rev. 335,] 350-51 [(2002-2003)]. Such assessments are a 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. *Id.*, citing Wash. Const. art. VII, § 9, cited in *Cary et al. v. Mason County et al.*, No. 32753-8-II (2006). . . . [The Ordinance] imposes a levy on property simply by virtue of ownership of property, conspicuously to raise revenues for the County and Conservation District, without any promise of improvements appurtenant to the property or special benefits conferred on the property. As such, it has all the earmarks of an invalid property tax, levied in disregard of the constitutional requirement that property taxes be on an ad valorem basis. . . . It [has] virtually none of the features of an assessment, providing no direct benefits to most of the parcels assessed.

CP 133-135, 137-138, 143.

In our response brief before the court of appeals (at 6), we developed the argument further:

. . . Mason County adopted what amounts to an unconstitutional property tax, instead of a special assessment. In *Covell v. City of Seattle*, the court recognized that a special assessment, even if falling loosely in the category of regulatory fees, may be identified as “a charge imposed on property owners within a limited area to help pay the cost of a local improvement which specially benefits property within that area.” *Covell*, 127 Wn.2d at 889. 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.” Washington Constitution, Art. VII, Sec. 9. Since there are no local improvements described in Ordinance 121-02, and since the funds collected are combined with other funds to pay for staff and programs deemed to have a public benefit, the levy does not fit the definition of a special assessment, and instead has the earmarks of a property tax, being attached to the mere ownership of property, and providing no direct relationship between the levy imposed and any benefits conferred on the property or between the levy imposed and any burden produced by those subject to the levy.

Therefore, the District is mistaken in saying that EFF has introduced a new issue.¹ When EFF contends that the levy adopted under the county ordinance is not a special assessment, and that this may be determined without reliance on the *Covell* case, it does not raise a new issue. EFF has

¹ Ironically, the District appears to have recognized our prior argument on this issue, for in its reply brief before the Court of Appeals, it says, “The Claimants next argue that because RCW 89.08.400 refers to the charge as a “special assessment” within the meaning of Wash. Const. Art. 7, sec. 9 and as described in cases such as *Heavens v. King County Rural library Dist.*, 66 Wn.2d 558, 563, 404 P.2d 453 (1965), the assessment is invalid. Claimants’ brief at 31-32.” Reply Brief at 4.

only reaffirmed what we have asserted, that the levy imposed by Ordinance 121-02 is not really a special assessment, as even the District appears to admit. The amicus memorandum, though differently phrased than our argument, does not raise a new issue.

II. If the levy were valid, it would need to be a special assessment.

EFF's memorandum correctly emphasizes that the levy imposed by Mason County Ordinance 121-02 cannot be valid unless it comprises a special assessment, both because the statute authorizing such levies specifies that they are special assessments and because the ordinance by which the assessment was imposed invokes the statute and refers to the levy as a "special assessment." CP 97. Thus, even if a levy for storm water management might have been adopted by Mason County under the authority of another statute, the levy at issue must be a special assessment if it is valid. If the Legislature had not intended the levy to be a special assessment, it would not have denominated it as such and would not have specified that the county legislative authority must find that the levy on any land "will not exceed the special benefit that the land receives or will receive from the activities of the conservation district." RCW 89.08.400(2).

We would not have thought this point controversial except that the

District has argued that the levy authorized by the statute is not really a special assessment. The District conflates the statute, which is not being challenged, with the local ordinance's levy. The District asserts that EFF's position amounts to "the proposition that this charge must be struck down because the Legislature chose to describe it as an 'assessment.'" Response by Mason Conservation District to Motion to File Amicus Curiae Memorandum at 3, fn. 1. EFF's position actually is that because the statute authorizes only a **special assessment**, any valid local ordinance imposing a charge under RCW 89.08.400 must be a special assessment.

The District claims that this court "had not clearly described and articulated the distinction between [sic] special assessments, regulatory fees, and taxes" at the time of adoption of RCW 89.08.400 (in 1989). *Id.* If *Covell* is seen as the definitive decision distinguishing regulatory fees and taxes, then this statement would be true regarding regulatory fees and taxes. However, the distinction between **special assessments** and **taxes** appears in the Washington Constitution of 1889 and had been extensively discussed long before culminating in a 1965 case, *Heavens v. King Cy. Rural Library Dist.*, 66 Wn.2d 558, 404 P.2d 453:

Special assessments to pay for local public improvements benefiting specific land are of ancient lineage. They have

been held valid for the construction and improvement of streets, curbs, gutters, sidewalks, and for the installation of sanitary and storm sewers, drains, levees, ditches, street lighting, and water mains. Rhyne, Municipal Law 717. All such assessments have one common element: they are for the construction of local improvements that are appurtenant to specific land and bring a benefit substantially more intense than is yielded to the rest of the municipality. The benefit to the land must be actual, physical and material and not merely speculative or conjectural.

In *In re Shilshole Avenue*, 85 Wash. 522, 537, 148 Pac. 781 (1915), the court said:

It is the basic principle and the very life of the doctrine of special assessments that there can be no special assessment to pay for a thing which has conferred no special benefit upon the property assessed. To assess property for a thing which did not benefit it would be pro tanto the taking of private property for a public use without compensation, hence unconstitutional. Though the right to levy special assessments for local improvements is referable solely to the sovereign power of taxation, our state constitution, article 7, § 9, expressly limits its exercise to assessments of property benefitted.

In *In re Jones*, 52 Wn.2d 143, 324 P.2d 259 (1958), the court pointed out that it is "axiomatic that property not specially benefitted by a local improvement may not be assessed." In *In re Schmitz*, 44 Wn.2d 429, 268 P.2d 436 (1954), the court held that the amount of the special benefits attaching to the property by reason of the local improvement is the difference between the fair market value of the property immediately after the special benefits have attached and its fair market value before they have attached.

Heavens at 66 Wn.2d at 563-564.

Thus, special assessments are for the construction of improvements

appurtenant to specific land and bring a benefit substantially more intense than is yielded to property not subject to the special assessment. See *King County Fire Protection Dist. 16 v. Housing Auth.*, 123 Wn.2d 819, 834, 872 P.2d 516 (1994); cited in *Covell*, 127 Wn.2d at 889.

Given this history by which special assessments have been distinguished from other levies, the Legislature must have intended to have its repeated reference to the levies authorized by RCW 89.08.400 as “special assessments” taken literally. Accordingly, since the statute authorizes only a special assessment, if the levy adopted by Mason County is not a special assessment, it is not authorized under the statute.

III. The amicus memorandum does not confuse the levy at issue with those special assessments authorized by the statute.

The Conservation District’s response to the motion to file the amicus memorandum mischaracterizes the issue when it claims that the “one issue” litigated throughout this case has been “whether the assessment which the Washington State Legislature has specifically authorized local legislative authorities to impose for the benefit of conservation districts pursuant to RCW 89.08.400 constitutes a regulatory fee or a tax under the analysis presented by this Court in *Covell v. Seattle*, 127 Wn.2d 875, 905 P.2d 324 (1995).” Response by Mason Conservation District to Motion to File Amicus

Curiae Memorandum at 1-2.

EFF does not claim that the special assessment authorized by the **Legislature** is a really a tax. But EFF agrees with us that the levy adopted by Mason County, though ostensibly under authority of RCW 89.08.400, is a property tax, and not a regulatory fee or any sort of user fee. If the levy adopted under Ordinance 121-02 were a regulatory fee, but not really a special assessment, as the District argues, then it would not have been validly adopted under the authority of RCW 89.08.400. Because not applied on an ad valorem basis, the levy is not only invalid, but also unconstitutional pursuant to Article VII, § 1 of the Washington Constitution, which requires that “all taxes shall be uniform upon the same class of property . . . [and] [a]ll real estate shall constitute one class. . . .”

IV. The *Covell* tests are useful to determine that the levy is a tax, not a special assessment.

We agree with EFF that it is not necessary to employ the *Covell* tests to determine that the levy at issue is not a valid special assessment, since the definition of “special assessment” and its interpretation by this Court, including the manner in which this Court treated separately the question of whether the levy in the *Covell* case was a special assessment, allows determination that the levy at issue is not a special assessment, without

regard to the *Covell* tests.

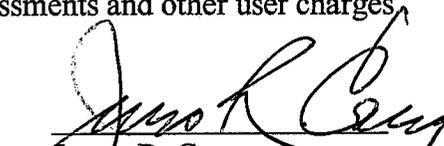
We also agree with EFF that the fundamental error of the Court of Appeals was in supposing that the levy at issue is a regulatory fee providing a direct relationship between the fee charged and the benefit obtained or the burden imposed “because the County uses the funds it collects to manage the storm water runoff for the benefit of all county residents.” Opinion at 6. Plainly, the court did not construe the levy as a special assessment, for it would not have upheld the levy on the basis that there was a benefit to all county residents, regardless of whether they paid the levy, if it had recognized that the levy, if valid, must be a special assessment. Yet, if the levy is not a valid special assessment, and if it has the earmarks of a tax, it is an invalid tax.

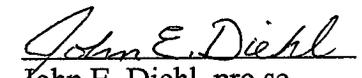
Because it is not necessary to apply the *Covell* tests to reach the conclusion that the levy at issue is not a special assessment, it may be argued that the *Covell* tests do not provide the proper analytic framework. We would prefer to say, however, that passing the *Covell* tests is a necessary but not sufficient condition for a levy to be classified as a special assessment. The *Covell* tests distinguish taxes from all other user fees imposed by government. Yet, as Spitzer points out in his “Taxes vs. Fees: A Curious

Confusion" (at 351), special assessments are not taxes, but rather a distinctive form of user charge. So, even if the levy in question passed the *Covell* tests, it would still need to satisfy the criteria for being a special assessment if it were valid. Still, whether we are correct in our view of the applicability of *Covell*, EFF's argument provides yet another reason for the court to accept review, since review would allow clarification of the relationship between special assessments and other user charges.

Dated: March 5, 2010


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Declaration of Service

I, James R. Cary, under penalty of perjury under the laws of the State of Washington, declare that on this day, I mailed, postage prepaid, faxed, and/or personally delivered the above Response to Amicus Curiae Memorandum of Evergreen Freedom Foundation to the offices of Monty Cobb, Deputy Prosecuting Attorney, P.O. Box 639, Shelton WA 98584; Matthew B. Edwards, Owens Davies PS, 1115 W. Bay Dr. NW, Suite 302, Olympia WA 98502; and Sharonne E. O'Shea, P.O. Box 40117, Olympia WA 98504-0117; and Richard M. Stephens, 1100 NE 8th Street Suite 750, Bellevue WA 98004.

Dated: March 5, 2010

