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No. 379813

Court of Appeals
DIVISION II
STATE OF WASHINGTON

MASON CONSERVATION DISTRICT,

APPELLANT,

v.

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

RESPONDENTS

v.

MASON COUNTY, DEFENDANT.

APPELLANT MASON CONSERVATION DISTRICT'S OPENING BRIEF

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I. INTRODUCTION

Acting pursuant to RCW 89.08.400, the Mason County Board of County Commissioners imposed an assessment of $5.00 per parcel located within the Mason Conservation District for the benefit of the District. The Claimants challenged the assessment.

Utilizing 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), and without explaining the rationale for its decision, the trial court held that the assessment constituted a tax, rather than a fee. Then, acting on the mistaken understanding that the Conservation District, rather than the Board of Commissioners, had imposed the assessment, the trial court held that it was invalid because the Conservation District lacked the authority to impose it.

This Court should reverse the trial court's decision. The assessment constitutes a valid fee, not a tax, under *Covell*. But even if it were a tax, the assessment, which was imposed by the Mason County Board of County Commissioners pursuant to a specific Legislative grant of authority, was valid.

II. QUESTIONS PRESENTED

1. Does the $5.00 per parcel assessment imposed by the Mason County Board of County Commissioners pursuant to RCW 89.08.400 upon all property owners located in the Mason Conservation District constitute a regulatory fee or a tax under the test set forth in *Covell v. City of Seattle*, 127 Wn.2d 874, 879-90, 905 P.2d 324 (1995)?

Answer: Because the assessment is collected from property owners whose properties generated stormwater runoff, because the assessments are 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 from the assessed owner's property, the general benefit each property owner receives, and the assessment charged, the $5.00 per parcel assessment constitutes a regulatory fee.

2. Assuming the assessment is determined to be a tax, did the Claimants carry their "heavy burden" establishing that the tax had been unconstitutionally imposed?

Answer: As provided by statute, the Mason County Board of County Commissioners imposed this assessment, not the Mason Conservation

District. Therefore, the trial court erred in invalidating the assessment on the grounds that the Mason Conservation District imposed it. And, because the assessment was imposed pursuant to specific legislative authorization and in a uniform manner, the Claimants have not shown any other basis for invalidating the assessments, even if they were determined to be a tax.

3. Did the trial court err in concluding that the assessment was invalid because the Mason County Board of County Commissioners chose to impose the assessment at a rate of $5.00 per parcel and $0.00 per acre?

Answer: RCW 89.08.400(3) explicitly authorized the Mason County Board of County Commissioners to set the assessment at any rate less than the statutorily stated maximum. The Board acted within its discretion in imposing an assessment at a rate of $5.00 per parcel and $0.00 per acre, based on its concern that the cost of implementing a higher per-acre assessment would exceed the revenue generated.

III. FACTS

A. Statutory Background.

The people of the state of Washington have declared 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 to be 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 Washington Conservation Commission to create conservation districts, subject to approval by vote of the residents of the area in which the conservation district is located. RCW 89.08.100; RCW 89.08.150. Once formed, a conservation district constitutes a governmental subdivision of the state, and possesses the following powers, among others:

> (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 . . .
>
> (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 preventive 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 or interest in such lands as may be required;

(4) To cooperate or enter into agreement 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;

. . . .

(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. . . .

RCW 89.08.220.

The Legislature has not given conservation districts the power to tax. Instead, the Legislature has specifically authorized the Board of County Commissioners in any county in which a conservation district is located to impose an assessment for the benefit of the conservation district, which assessment the district must use only to finance activities and programs to conserve natural resources:

> 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.

RCW 89.08.400(1).

The Legislature requires an assessment for the benefit of a conservation district to be imposed by a specific procedure. First, the supervisors of the conservation district are to propose a system of assessments to the Board of County Commissioners. RCW 89.08.400(2). The maximum annual per-acre special assessment rate is not to exceed $0.10 per acre, and the maximum annual per-parcel rate is not to exceed $5.00. *Id.*

Then, the Board is to hold a public hearing, during which the Board may accept, or modify and accept, the proposed system of assessments. *Id.* In

order to impose an assessment, the Board must find both that "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." *Id.*

The assessment approved by the Board is to be spread on the County's tax rolls. RCW 89.08.400(4). The cost the county treasurer incurs in collecting the assessment is to be deducted from the amount turned over to the conservation district. *Id.*

There is nothing in the statute permitting the Board of County Commissioners to assess property for the benefit of a conservation district which authorizes judicial review of the Board's action in imposing the assessment. Instead, the Legislature has explicitly provided that "[T]he findings of the county legislative authority shall be final and conclusive." RCW 89.08.400(2).

However, the Legislature has expressly provided those 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 Mason County Commissioners outlining its requested assessment, and the reasons therefore. CP 59-60 (Bolender Declaration, Exhibit A). 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.*

On August 27, 2002, the Mason County Board of County Commissioners held a public hearing at which they considered the District's request. At the hearing, County staff recommended that the Commissioners approve the assessment with one significant modification. CP 61-63 (Bolender Declaration, Exhibit B). Because it would take many years to recover the cost associated with having the assessor implement a $0.07 per acre assessment, staff recommended that the Board reduce the requested $0.07 per acre assessment to $0.00 per acre. CP 63.

The County Commissioners approved the assessment at the rate recommended by the County staff. The Commissioners entered findings of

fact in support of its decision. CP 64-65 (Bolender Declaration, Exhibit C). The Board then concluded that the proposed assessment would serve the public interest, and that the assessment would not exceed the special benefit the lands being assessed would receive from activities funded by the assessment. CP 65.

The County began collecting the assessment in 2003. CP 55 (Bolender Declaration, ¶ 12). Also in 2003, Mason County and the Conservation District 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 Conservation District, for which services the County was to bill the District. *Id.* See also CP 57-58 (Bolender Declaration, ¶¶ 21-26).

C. The Lawsuit.

On March 10, 2003, the Claimants James R. Cary, Mary Alice Cary, John E Diehl, and William D. Fox, Sr. filed this lawsuit. CP 152-154. The Claimants, claiming standing as property owners in Mason County, alleged that the assessment constituted an unconstitutional tax. CP 153 (Amended

Complaint for Declaratory Judgment, ¶ 5). The Claimants also alleged that the assessment had been imposed in violation of various provisions of Chapter 89.08 RCW. CP 153-154 (Amended Complaint, ¶ 6-9).

On July 8, 2004, the trial court granted Mason County's motion to dismiss, ruling that the Claimants had not timely filed their complaint. The Claimants appealed the trial court's decision to the Court of Appeals. On April 18, 2006, this Court published an opinion in which it reversed the dismissal. *Cary v. Mason* County, 132 Wn. App. 495, 132 P.3d 157 (2006). Focusing exclusively upon the Claimants' claims that the assessment constituted an unconstitutional tax, this Court held that the Claimants' claims were most 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, their claim was timely. 132 Wn. App. at 504. The Court remanded the matter for further proceedings. *Id.*

The Claimants then filed a Motion for Summary Judgment, and the defendants filed a Cross-Motion for Summary Judgment. CP 127-144; 66-93. After hearing argument, the court issued a letter decision, which was incorporated into a written Order on Cross Motions for Summary Judgment

filed June 6, 2008. CP 24-29. The court's order: (1) found that there was no "direct relationship" between the assessment and burden produced/benefit received by the assessed property owners, such that the assessment constituted a tax (without in any way explaining how the court made this determination); (2) purported to find that the assessment could not be upheld as a tax, on the grounds that Mason Conservation District did not have the authority to impose such a tax; and (3) noted that the Court would, in the alternative, have held that because the assessment was being imposed at the rate of $0.00 per acre, the assessment violated RCW 89.08.400(2). *Id.* The trial court entered an order enjoining future collection of the assessment. *Id.*

The Mason Conservation District timely filed a Notice of Discretionary Review, and this Court accepted review.

IV. STANDARD OF REVIEW

The facts relevant to this matter are not disputed. Because the issues presented in this matter are legal in nature, and because the trial court disposed of this matter based on a written record in response to cross-motions for summary judgment, the trial court's decision is 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).

The Claimants assert that the assessment which the Mason County Board of County Commissioners 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 assessments specifically authorized by the Legislature constitute an unconstitutional tax. See *Island County v. State*, 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998).

V. ANALYSIS

The Legislature, by statute, has specifically authorized the executive authority of each county to impose assessments for the benefit of conservation districts. The assessment at issue in this case constitutes a valid regulatory fee, not a tax. But even if it were a tax, because the assessment was validly imposed, pursuant to an express grant of authority by the Legislature, in a uniform manner, it is a valid tax.

A. The Court should reject the Claimants' constitutional challenges to the assessment.

The assessment constitutes a valid regulatory fee, not a tax. But even if it were treated as a tax, the assessment, imposed pursuant to a specific Legislative grant of authority in a uniform manner, is valid.

1. The assessment constitutes a valid regulatory fee, not a tax.

First, the assessment constitutes a valid regulatory fee, not a tax.

Local governmental entities may impose taxes only if the Legislature has specifically delegated the authority to them do so, and only in compliance with constitutional limitations applicable to taxation. Regulatory fees, in contrast, are not subject to constitutional limitations applicable to taxes, and thus are presumptively valid.

The Washington Supreme Court set forth the test for determining whether a charge being imposed by a governmental entity constitutes a fee or a tax in *Covell v. City of Seattle*, 127 Wn.2d 874, 879-90, 905 P.2d 324 (1995). Pursuant to *Covell*, this Court should consider the following factors in distinguishing between fees and taxes:

- Is "the primary purpose . . . to accomplish desired public benefits which cost money, or [is] the primary purpose . . . to regulate"?

- Is "the money collected allocated . . . only to the authorized . . . purpose"?

- Is there "a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer"?

Covell, 127 Wn.2d at 879. Under the first factor, if the fundamental legislative impetus is to "regulate" the fee payers—by providing them with a targeted service or alleviating a burden to which they contribute—that suggests the charge is a fee rather than a tax. *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 807, 23 P.3d 477 (2001). Under the third factor, there need only be some "direct relationship" between the fee charged and the burden produced and/or benefit received by the fee payer; the governmental entity is NOT required to individualize the fee according to the benefit available to or the burden produced by the fee-payer. *Covell v. Seattle*, 127 Wn.2d at 879.

Washington courts have on several occasions applied the *Covell* test to assessments very similar to the assessment imposed by the Mason County Board of County Commissioners for the benefit of the Conservation District

in this case. Washington courts examining such assessments have consistently held that assessments like the ones at issue in this case constitute valid fees, not taxes.

For example, in *Teter v. Clark County*, 104 Wn.2d 227, 704 P.2d 1171 (1981), Clark County imposed a system of assessments 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 system of assessments included a flat, per-parcel charge imposed upon all residential property owners in the area served. *Id.* at 237. The Washington Supreme Court held that these assessments were regulatory fees, and not taxes.

First, the court in *Teter* held that the assessments were imposed for a regulatory purpose because the assessments were imposed to pay for the cost of dealing with the negative public impacts of stormwater running off from the assessed parties' property. *Id.* at 232. Second, the court held that the fees were allocated only to that purpose because the fees collected were segregated and used solely to fund the cost of preventing and/or dealing with the effects of stormwater. *Id.* at 234. Third, the court held that there was a direct

relationship between the fee charged and the burden created by the fee-payer's property. Even though all the assessed parties did not necessarily receive any *specific* service, the charges were imposed to deal with the burden created by stormwater running off the fee-payer's property, and 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, the court in *Teter* noted that the system of assessments 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 for each class 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 *some* "direct relationship" between the fee charged and the burden produced and/or the benefits made available to the fee payer, the governmental entity is NOT required to individualize the fee according to the benefit provided to or the burden produced by the fee payer).

Similarly, in *Thurston County Rental Owners Association v. Thurston County*, 85 Wn. App. 171, 931 P.2d 208 (1997), this Court held that a county ordinance requiring septic system operators to pay a flat annual $40.00 fee constituted a valid regulatory fee, rather than a tax. First, the purpose of the fee was regulatory; it was imposed to generate money to address problems caused by septic systems. 85 Wn. App. at 178-79. Second, the fees were segregated, and used solely to enforce the county's septic system regulations and fund inspections of systems. *Id.* at 179. Finally, there was a direct relationship between the fee charged and the burden produced by the fee payer. The funds were spent to address the problems caused by septic systems, and the total cost of the program the county had established to address septic problems exceeded the total amount of money collected by the fees. *Id.*

In *Smith v. Spokane County*, 89 Wn. App. 340, 348-349, 948 P.2d 1301 (1997), Division III similarly upheld a challenge to a flat per-parcel fee imposed by Spokane County on each parcel withdrawing water and each parcel utilizing on-site sewage disposal. The fees had a regulatory purpose because the amounts collected were imposed to raise money to address water

quality and sewage problems. 89 Wn. App. 349-50. The fees collected were segregated from the County's general fund, and used solely for water quality monitoring and sewage construction. *Id.* at 350. Finally, there was a direct relationship between the fees collected and the services provided, because all of those property owners paying the fee owned property that contributed to the water and sewage problem, and all of the properties received a general benefit from the activities conducted using the funds. *Id.* at 351.

In *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),[1] this Court upheld as constitutional a municipal sewer district's imposition of a flat fee upon parcels that had not connected to the sewer system. Applying the *Covell* test, the Court first held that the purpose of the fee was regulatory, because it was imposed pursuant to a comprehensive plan of regulation and because the services provided by the district were available only to the properties assessed by the sewer district. 123 Wn. App. at 53-54. Second, the Court noted that the funds were applied to maintain the entire

[1] The Supreme Court reversed this Court's decision in *Holmes Harbor* on the grounds that the applicable statute did not in fact authorize the charges in question. The Supreme Court did not disturb the Court of Appeals' analysis of the constitutional issues. Here, unlike in *Holmes Harbor*, RCW 89.08.400 does specifically authorize the assessment in question.

sewer system. The Court specifically rejected the argument that the fact that some of the funds were used to pay overhead expenses converted the assessments to a tax, reasoning that: "To 'regulate'—i.e., to provide fee payers with a targeted service or alleviate a burden to which they contribute—necessarily requires an administrative structure with overhead expenses." *Id.* at 55. Third, the Court held that there was a direct relationship because the funds were used to provide benefits that each assessed property <u>had the right to make use of</u>, whether the property owner actually did so or not. *Id.* at 57-58. "The value of the right conferred or added, and not the extent to which the owner of the property may take advantage of the right, is the test to determine whether a benefit has been received." *Id.* at 58, quoting *Otis Orchards Co. v. Otis Orchards Irrigation District 1*, 124 Wash. 510, 513-14, 215 Pac. 23 (1923).

This Court quite recently adhered to the above line of cases in *Storedahl Properties, LLC v. Clark County,* 143 Wn. App. 489, 178 P.3d 377 (2008). In *Storedahl*, Clark County enacted a stormwater management program to mitigate the effects associated with stormwater discharge, and the pollution carried in stormwater discharge. 143 Wn. App. at 492-93. This

Court held that: (1) because the fee was to be used solely for the cost of dealing with the cumulative effects of stormwater runoff, it had a public purpose, *Id.* at 500; (2) the funds collected were segregated and allocated only to that purpose, *Id.* at 502-3; and (3) there was a "direct relationship" because the County used the funds to build facilities to accommodate stormwater runoff, *Id.* at 504. Therefore, the Court of Appeals held that the charge constituted a regulatory fee rather than a tax. *Id.* at 505. *Storedahl* clearly shows that the assessment authorized by RCW 89.08.400 constitutes a regulatory fee, rather than a tax.

In sum, Washington courts have consistently held that: (1) where a government imposes a charge upon a group of people who possess 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 funds collected do not exceed the cumulative cost of preventing and/or addressing that burden; such charges are regulatory fees, not taxes. They are valid, and they are not required to meet any constitutional limitations applicable to taxes.

Here, just like in each of the cases cited above, the assessment imposed by the Board of County Commissioners for the benefit of the Conservation District meets the *Covell* criteria for regulatory fees. First, the assessment was imposed for a regulatory purpose. The assessment was imposed for the benefit of the Conservation District, which the Legislature has empowered to address 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 (Bolender Declaration, ¶ 3). Because stormwater runs off of every assessed property, they all 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 (Bolender Declaration, ¶ 8). 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 fee, rather than a tax, under the first part of the *Covell* test.

Second, the Conservation District maintains the funds received from the assessment in a segregated account. CP 55 (Bolender Declaration, ¶ 14). The District uses these funds for the limited and specific purposes for which the District was created—i.e., to control the threat of erosion, sedimentation and pollution associated with stormwater runoff. *Id.* (Bolender Declaration, ¶ 13-14). Therefore, the assessment is allocated only to the purpose of preventing/addressing the public burdens associated with stormwater runoff, making the charge regulatory under the second *Covell* test.

Finally, there is a "direct relationship." The Conservation District makes its services available to all assessed property owners on a nondiscriminatory basis; it provides no services to property owners located outside the Conservation District. CP 54 (Bolender Declaration, ¶ 8). 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 assessments only on a per-parcel and per-acre basis. RCW 89.08.400(2).

The Claimants' principal response to this analysis is to argue that, although the Conservation District makes its services available to every assessed property owner within the Conservation District, not all property owners will *actually receive* a direct benefit from the conservation service in any particular year, which the Claimants argue makes the assessment a tax rather than a fee. See, e.g., CP 137 (Claimant's Motion for Summary Judgment, p. 8, lines 7-8). The Court should reject this analysis for either of two separate, independent reasons.

First, this argument wholly ignores the fact that under *Covell*, a governmental charge will be considered a fee rather than a tax *either* if it addresses a public burden to which the fee-payer has contributed, *or* if the assessment is used to make a benefit available to the fee-payer. *Covell*, 127 Wn.2d at 879. (emphasis in original). Here, because every assessed property both causes and is threatened by erosion, sedimentation and pollution originating from stormwater running off of adjoining properties, the

assessment serves to address a public burden caused by those who pay the assessment.

Second, Washington courts have only required that there be a direct relationship between the fee charged and the service received in the aggregate "by those who pay the fee." See *Covell*, 127 Wn.2d at 879, citing *Teter*, 104 Wn.2d at 232 (per-parcel fee properly charged to deal with stormwater runoff even though individual parcel owner may not have received any specific service as a result). See also *Thurston County Rental Owners Association*, 85 Wn. App. at 178-79 (annual fee imposed upon septic system operators used to make county services available to such operators, no suggestion that county had to show that every operator had received specific services each year); *Smith v. Spokane County*, 89 Wn. App. at 341 (general benefit sufficient); *Holmes Harbor Sewer District*, 123 Wn. App. at 57-58 (appropriate test is whether right to avail oneself of services was of value, not whether property owner in fact made use of that right in any given year). Such a relationship exists here.

Indeed, in enacting the statutes that created conservation districts as special use districts, the Legislature has specifically declared that: "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 Legislature itself has already made the necessary determination that there is a "direct relationship."

Therefore, under the *Covell* factors, this assessment constitutes a regulatory fee, not a tax. Just as in *Teter*, just as in *Thurston County Rental Association*, just as in *Smith*, just as in *Holmes Harbor*, and just as in *Storedahl*, this assessment does not constitute a tax, and is not subject to constitutional limitations upon the imposition of taxes.

2. Even if the assessment were characterized as a tax, the Court should hold that it was properly imposed and does not violate any constitutional requirement applicable to taxes.

Moreover, even if the assessment were characterized as a tax, the Court should hold that it was properly imposed and does not violate any constitutional requirement applicable to taxes.

The trial court's analysis of this issue was based on a fundamental misunderstanding of the basic facts of this case. The trial court reasoned that if the assessment were considered a tax, the tax was invalid because the

Mason Conservation District lacked the authority to impose it. CP 28 (Trial Court's Letter Opinion at p. 2).

However, the Mason Conservation District did not impose this assessment. The Mason County Board of County Commissioners, following the procedures set forth in RCW 89.08.400, did. CP 55; 64-65 (Bolender Declaration, ¶ 11 and Exhibit C). The Claimants themselves have not, and will not, attempt to defend the reasoning which the trial court employed to reach its decision on this issue.

Instead, in their pleadings below, Claimants raised three challenges to the assessments "as taxes." First, the Claimants argued that: "The Legislature has not authorized a tax for natural resource conservation." CP 133 (Motion for Summary Judgment, p. 4, lines 31-32).

This is simply wrong. In Chapter 89.08 RCW, the Legislature has very specifically authorized the levying of this assessment for the purpose of funding the activities of conservation districts. This express statutory authority distinguishes this case from the facts of the cases which the Claimants cite, all of which involve local governmental entities purporting to impose taxes without legislative authorization, and based solely upon their

general police powers. See *Margola Assocs. v. Seattle*, 121 Wn.2d 625, 854 P.2d 23 (1993) (registration fee imposed upon apartment owners based on city's general police power); *Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 809, 650 P.2d 193 (1982) (fee imposed by Snohomish and San Juan Counties on new residential developments based on county's general police power).

Second, Claimants claimed that the assessment, as a tax, was not uniform within the meaning of Article VII, Section 1 of the Washington State Constitution. CP 134 (Motion for Summary Judgment, p. 5, lines 1-4). That section provides that: "All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax."

Even if it could be characterized as a tax, the County's assessment of $5.00 per parcel would not violate the uniformity requirement. The assessment applies uniformly to all property located within the Conservation District. And it applies at a uniform rate of $5.00 per parcel.

In fact, the Washington Supreme Court has specifically rejected a uniformity claim identical to that asserted by the Claimants. *Teter v. Clark County*, 104 Wn.2d 227, 239-41, 704 P.2d 1171 (1985). In *Teter*, the Court

addressed a system of assessments which assessed single-family residences to fund a stormwater system at a uniform rate of $15.00 per year. 104 Wn.2d at 238. The Court held that, even if the assessment were considered a tax, because the assessment occurred on a standard per-parcel basis, the assessment was uniform:

> All single family residential properties paid the same rate.... The charge imposed is uniform as to each member of each category.... Accordingly, even if the charges are characterized as taxes, they are both statutorily authorized and uniform, and are valid.

104 Wn.2d at 240-241. *Teter* compels the Court to reject the Claimants' Article I, Section 7 claim.

Finally, Claimants insinuated that if the assessment were considered as a tax, it would somehow permit a subversion of the one percent ceiling applicable ad valorem taxes. CP 134 (Motion for Summary Judgment, page 5, lines 9-10). But that constitutional limitation applies only to ad valorem taxes (i.e., taxes based on the value of the property taxed). *Id.* It does not apply to

taxes based on something other than value, such as the per-parcel assessment at issue in this case.[2]

And in any event, Claimants did not attempt to prove that the imposition of the assessment actually caused an exceedence of the one percent limitation. The Claimants thus clearly did not meet their "heavy burden" of proof for invalidating the assessment.

In sum, under *Covell*, the assessment is a legitimate fee, and not a tax. However, even if it were characterized as a tax, the Court should hold that the assessment, because it was specifically authorized by the Legislature, uniformly imposed, and is not based upon the value of the property, has been properly imposed within the limitations applicable to taxes under the Washington State Constitution.

B. The Court should reject the Claimants' statutory challenges to the assessment.

In addition, the Court should reject the Claimant's statutory challenges to the assessment. The Legislature clearly intended to preclude the Claimants from even asserting such a challenge. Claimants did not assert their statutory

[2] Moreover, the Conservation District, a special purpose district, provides services of a utility to assessed property owners, and Article VII, Section 2 specifically exempts public utility district assessments from the one percent limitation. CP 53-54 (Bolender Declaration, ¶ 4).

challenge in a timely fashion. The Mason County Board of County Commissioners had the discretion to impose the assessment at the rate of $5.00 per parcel and $0.00 per acre. And, even if the Claimants were somehow to prevail on this challenge, the proper remedy would be to remand to the Mason County Board of County Commissioners for the imposition of a higher rate, not penalize the completely innocent Conservation District.

1. Because the Legislature has explicitly provided that the decision made by the county legislative authority "shall be final and conclusive," and because the Legislature has provided that the remedy of persons subject to assessment is to file a petition with the county legislative authority, the Court should hold that it has no authority to consider the Claimants' statutory claims.

Because the Legislature has explicitly provided that the decision made by the county legislative authority "shall be final and conclusive," and because the Legislature has provided that the remedy of persons subject to assessment is to file a petition with the county legislative authority, the Court should hold that it has no authority to consider the Claimants' statutory claims.

The Legislature has explicitly provided that the decisions 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 has also provided that the remedy of persons subject to assessment who believe that the assessment is excessive is to 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 Court should hold that the Legislature has not authorized the Claimants to seek judicial review of their statutory claims. The Court should therefore reject **all** of the petitioners' statutory claims on this basis.

2. The Court should reject the Claimants' statutory claims on the grounds that the Claimants did not timely assert them.

Second, even if the Court were to hold that the Claimants have the right to seek judicial relief with respect to their claims that the assessment was somehow imposed in violation of the statute authorizing the assessment, the Court should hold that the Claimants did not timely assert such claims.

This issue was previously before this Court. *Cary v. Mason County*, 132 Wn. App. 495, 132 P.3d 157 (2006). In its prior decision, this Court,

focusing upon the petitioners' claim for a declaratory judgment that the assessments constituted an unconstitutional tax, held that the claimants had asserted those claims in a timely manner because they had filed their lawsuit within the time period applicable to the filing of a suit for a refund of a tax. 132 Wn. App. at 504.

In reaching its decision, this Court did not address petitioner's statutory claims. Employing the logic used by the Court in its decision, those claims would appear to be analogous to appeals from any other decision of the Board of Commissioners, which by statute have to be filed in Superior Court within 20 days of the date of the Board's decision. RCW 36.32.330. Because petitioners did not file this lawsuit until within the 20-day period after the Mason County Board of County Commissioners acted to impose the assessment, petitioners' statutory claims would be time barred.

The Court should reject Claimants' statutory claims for this second, independent reason.

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

Third, under the express terms of the applicable statute, the Mason County Board of County Commissioners had the discretion to set the per-acre rate at zero.

RCW 89.08.400(3) explicitly authorizes the County Commissioners, in setting assessments for the benefit of the Conservation District, to set an annual assessment rate at any rate less than the specified maximum:

> 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).

Here, the Conservation District requested that the Board set the assessment at the rate of $5.00 per parcel plus $0.07 per acre. CP 59-60 (Bolender Declaration, Exhibit A). However, because the cost of implementing a per-acre assessment exceeded the revenues derived from the per-acre assessment, the Board of County Commissioners decided to impose an assessment at the lesser rate of $5.00 per parcel and $0.00 per acre:

> 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 a $0.00 fee per acre assessed for ten years starting 2003 and continuing through 2012.

CP 61-65 (Bolender Declaration, Exhibit B and C).

In so acting, the Board complied with the statute. The Board stated the annual assessment rate at an annual flat-rate per-parcel, plus a uniform annual rate per-acre amount, at rates which did not exceed the statutory maximums.

Claimants argue that the Commissioners had the discretion to impose any positive per-acre rate, but lacked the discretion to impose a $0.00 per-acre rate. In other words, Claimants argue that the Legislature permitted the Commissioners to charge $5.00 per parcel plus $0.01 (or $0.0001, or $0.000001) per acre, but prohibited the Commissioners from charging $5.00 per parcel and $0.00 per acre.

The Claimants did not support this argument by citation to any legal authority. Therefore, the trial court should not have, and this Court should not, even consider this argument. *State v. Logan*, 102 Wn. App. 907, 911 n. 1, 10 P.3d 504 (2000).

In addition to being completely unsupported by any legal authority, this argument defies common sense. The statute requires the cost of spreading

an assessment upon the tax rolls to be borne by the conservation district. RCW 89.08.400(4). Here, the County Commissioners set the per-acre rate based on their determination that the cost associated with spreading a per-acre assessment upon the tax rolls would exceed the revenue collected. CP 63. The Court should not interpret the statute so as to require the County Commissioners to impose a per-acre rate, when doing so would both increase the cost on those being assessed and decrease the revenue generated for the Conservation District.

RCW 89.08.400(3) permitted the County Commissioners to state the annual assessment rate as "an annual flat rate per-parcel plus a uniform annual rate per-acre amount." The County Commissioners complied with the plain language of the statute. The Court should reject the Claimant's claim on this basis.

4. Even if there were a violation, the proper remedy would be to remand to the Commissioners to set an appropriate rate, not to retroactively deny the Conservation District its needed funds.

Finally, even if there were a violation, the proper remedy would be to remand to the Commissioners to set an appropriate rate, not to retroactively deny the Conservation District its needed funds.

The Legislature has articulated a strong public policy in favor of efforts to prevent erosion and to deal with the cumulative impact of stormwater runoff. RCW 89.08.010. In support of that public policy, the Legislature has specifically authorized the Mason County Board of County Commissioners to impose an assessment at a rate substantially greater than that which the Board actually imposed here. RCW 89.08.400.

Moreover, the Conservation District, the intended beneficiary of the assessment, is a wholly innocent party. It requested the Mason County Board of County Commissioners to impose the assessment at a rate which the Claimants concede is consistent with the statute. CP 59-60. It was the Board which chose to impose a $0.00 per-acre rate—for the common-sense reason that doing so would cost the ratepayers less, while generating more net revenue for the Conservation District. CP 63.

Under the unique facts of this case—where the Claimants' argument is the assessment violated the statute because those being assessed have not been charged enough—the proper remedy would be to remand to the Mason County Board of County Commissioners with instructions to impose a positive per-acre assessment. It is not to invalidate the assessment already

collected, so as to strip the wholly innocent Conservation District of the assessment which the Mason County Board of County Commissioners indisputably had the substantive power to impose, on the existence of which the Conservation District has relied, and which the Conservation District has largely already spent in conformance with the public policy of preventing the cumulative impacts of stormwater runoff.

In sum: (1) the Legislature intended to preclude the Claimants from asserting any statutory claim; (2) the Claimants did not timely assert such claims; (3) the Mason County Board of County Commissioners in fact set the assessment within the limits specified by the Legislature; and (4) the proper remedy, if the Claimants were to somehow prevail, is to remand to the Mason County Board of County Commissioners, not to invalidate the past assessment.

VI. CONCLUSION

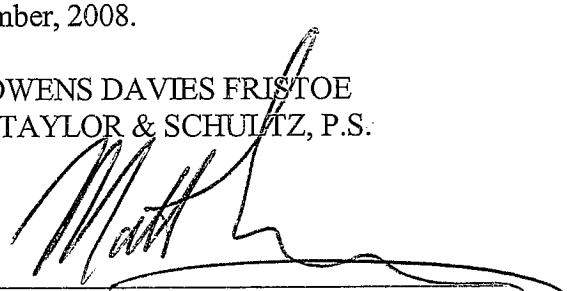
The Court should hold that the challenged assessment is a valid regulatory fee, and not a tax. But even if the Court concludes it constitutes a tax, Claimants have not met their heavy burden of showing, beyond a reasonable doubt, that it is an unconstitutional tax. And Claimants' statutory

claim that the Conservation District had to set a positive per-acre rate is, for any of the reasons set forth above, without merit.

The Court should reverse the judgment of the trial court and remand with instructions that the trial court enter a judgment in favor of the Conservation District, dismissing all the Claimants' claims.

DATED this 7th day of November, 2008.

OWENS DAVIES FRISTOE
TAYLOR & SCHULTZ, P.S.



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APPENDICES

Appendix A	Chapter 89.80 RCW (selected excerpts)
Appendix B	Declaration of John Bolender
Appendix C	Trial Court Decision

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 or 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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PAT SWARTOS, CO. CLERK

BY _____ DEPUTY

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.

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

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

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

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

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

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

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

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

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

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

Summary of Assessment Collections

2003	$205,459.63
2004	$233,514.23
2005	$218,419.32
2006	$225.615.00
2007	$229,632.50
	$1,112.640.68

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

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

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

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

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

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

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

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

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

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

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

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

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

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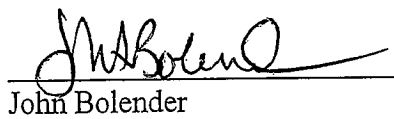
26. In other words, the Conservation District has, by the inter-local agreement, simply "hired" Mason County staff to deliver the conservation services the Conservation District is authorized to deliver in a manner similar to which the Conservation District might hire a contractor or an employee.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 16th day of January, 2008 at Olympia, Washington.



John Bolender

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Mason Conservation District
S.E. 1051 Highway 3 • Suite G • Shelton, WA 98584
Phone: (360) 427-9436 • FAX: (360) 427-4396

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,

/S/

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

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 forrested lands assessed at 7 cents/acre would bring an approximate assessment of $6,500. This is estimate is on the high side because of our assumption.
2. Forrested 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.

Mason County Board of County Commissioners
Public Hearing – August 27, 2002

Finding of Fact: **Proposed Special Assessment for Natural Resource Conservation; RCW 89.08.400**

I. This is a request for adoption of a special assessment for natural resource conservation as defined by RCW 89.08.400.

II. RCW 89.08.400 states in part, "the county legislative authority may accept, or modify and accept, the proposed system of assessments, including the number of years during which the special assessment 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." The findings are as follows:

1. The Board of Commissioners has a responsibility to the residents of Mason County to provide for the prevention, control and abatement of nuisances detrimental to public health. This assessment and the partnership proposed would secure a constant source of funding for these services.

2. The assessment will provide increased protection of drinking water from non-point pollution sources.

3. By providing a constant source of funding the assessment will enable both Mason Conservation District and Mason County Department of Health Services to provide increased response to citizen concerns in all areas of the county.

4. Public interest will be served by protection of recreational opportunities, which include: swimming, fishing, shellfish harvesting, and boating.

5. The proposed programs would provide the community with increased awareness of their role as individuals in protection and conservation of natural resources in our county.

6. The public interest of Mason County property owners, residents and visitors is served by protection of water resources. Maintaining clean water for drinking, recreation, and commercial activities works to build a healthy community and economy.

7. Property values are enhanced when there is greater confidence in safe drinking water and surface water.

8. The Board of Commissioners acknowledges that grants are one source of revenue to fund water quality projects. However, grant funding is not sustainable, predictable, or free. It is, therefore in the public interest to create a sustainable source of funding for water quality issues.

EXHIBIT C

B-12 000064

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.

8/28/02

Commissioner Herb Baze **Date**

8-28-02

Commissioner Bob Holter **Date**

8/28/02

Commissioner Wes Johnson **Date**

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

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**SUPERIOR COURT OF WASHINGTON
FOR MASON COUNTY**

JAMES R. CARY, MARY ALICE CARY, JOHN E. DIEHL, and WILLIAM D. FOX, SR., Plaintiffs, vs. **MASON COUNTY and MASON CONSERVATION DISTRICT,** Defendants.	**NO. 03-2-00196-5** **ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

This matter came regularly on for hearing on Monday, January 28, 2008 before the Honorable Judge Costello sitting as a visiting Mason County Superior Court judge. The Plaintiffs, James R. Cary, Mary Alice Cary, John E. Diehl and William D. Fox, Sr., appeared pro se. The Defendant Mason County appeared through T.J. Martin of the Mason County Prosecutor's Office. The Defendant Mason Conservation District appeared through Matthew B. Edwards of Owens Davies, P.S.

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The Court considered the following pleadings:

1. Plaintiff's Motion for Summary Judgment
2. Affidavit of John E. Diehl
3. Mason Conservation District's Response to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment
4. Declaration of John Bolender

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5. Defendant Mason County's Response in Support of Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment

6. Diehl's Reply to Conservation District's Response Brief

7. Statement of Additional Authority

In addition, the Court considered the oral argument of Mr. Diehl and of counsel.

The Court issued a letter opinion dated March 11, 2008, a copy of which is attached hereto and incorporated by reference herein.

Based on the foregoing, the Court orders as follows:

1. Plaintiffs' Motion for Summary Judgment is GRANTED

2. Defendants' Cross Motion for Summary Judgment is DENIED;

3. The Defendants are ENJOINED from collecting any special assessment or charges pursuant to Chapter 89.08 RCW.

DATED this 30 day of May, 2008.

Judge

PRESENTED BY, RIGHT TO APPEAL RESERVED

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

APPROVED AS TO FORM ONLY; RIGHT TO APPEAL RESERVED

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The Superior Court of the State of Washington

County of Kitsap

DEPARTMENT No. 1
LEONARD W. COSTELLO, JUDGE

614 DIVISION STREET
PORT ORCHARD, WASHINGTON 98366
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March 11, 2008

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Re: *James R. Cary and Mary Alice Cary, et al v. Mason County, et al*
Mason County Superior Court Cause #03-2-00196-5

Counsel and Parties:

I have reviewed the pleadings, declarations and what I perceive to the applicable case law and statutes regarding the above-referenced case. Each side has filed summary judgment motions. The operable facts are not in dispute and at the argument on the motions on January 28, 2008, there were no disputes regarding the factual posture of the proceeding. Simply stated, the essential issue before the Court in which the parties have come to opposite conclusions on is whether or not Ordinance 121-02 constitutes an invalid tax. The Plaintiffs argue that the ordinance imposes a property tax and does not comply with constitutional limitations on taxation. The Defendants argue that the ordinance imposes a valid regulatory fee or, in the alternative, if considered a tax it is constitutional because it is imposed pursuant specific authority granted by the legislature and is being uniformly applied at a rate of $5.00 per parcel.

Covell v. City of Seattle, 127 Wn.2d 874, 905 P.2d 324 (1995) sets forth a framework for distinguishing between a fee and a tax. Pursuant to *Covell*, the

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Court will consider the following:

1. Is the primary purpose to accomplish desired public benefits which cost money or is the primary purpose to pay for a regulatory scheme, a particular benefit conferred or mitigation of a burden cost. If it is to raise revenue, then it is likely a tax. If it is to regulate by providing fee payers with target services or alleviating a burden to which they contribute, the it is likely a fee.

2. Is the money collected or allocated only to an authorized purpose. If yes, then likely it is a fee.

3. Is there a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer. If there is a relationship then it is likely a fee even if it the charge is not individualized according to the benefit accruing to each fee payer or the burden produced by the fee payer.

The Court must look beyond the official designation of the charge and analyze its core nature by focusing on its purpose, design and function in the real world. *Samis Land Co. v. Soap Lake*, 143 Wn.2d 798 (2001). In determining whether a charge imposed by a municipal ordinance is a regulatory fee or a tax, a court shall look a the overall plan of regulation of which the ordinance is part rather than viewing the ordinance in isolation. *Id* at 809.

Analysis of the third element persuades this Court that the district's charge is an unlawful tax rather than a regulatory fee. The Court is persuaded that the district charge is not regulatory fee since there is no direct relationship between the fee charged and any services provided or between the fee charged and any burden produced by parcel owners. The Court further concludes that pursuant to RCW 89.08.220 which provides that "a conservation district 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." This statutory prohibition against the conservation district levying taxes precludes any argument that this charge could be considered a legislative authorized and constitutional tax.

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Additionally, it appears to this Court that the ordinance as enacted violates the terms of RCW 89.08.400(3) which requires that if a per parcel charge is adopted a per acre charge must be made as well.

The Plaintiffs' motion summary judgment should be granted and the Defendants should be enjoined from collecting any special assessment or charges thereunder.

I will sign an order in conformity with this letter ruling upon presentation.

Very truly yours,

Leonard W. Costello, Judge

LWC/SLS

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