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DIVISION II

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STATE OF WASHINGTON
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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.

**REPLY BRIEF IN SUPPORT OF
MOTION FOR DISCRETIONARY REVIEW**

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

ORIGINAL

I. INTRODUCTION

Mason Conservation District submits this reply brief in support of its Motion for Discretionary Review.

II. ARGUMENT

A. The Court of Appeals should accept discretionary review because the trial court has certified its decision for immediate review.

The Legislature has specified a procedure by which a conservation district can ask a county to make an assessment for the district. RCW 89.08.400. Acting pursuant to that statute, the Mason Conservation District requested that the Mason County Board of County Commissioners impose an assessment for the benefit of the Conservation District. Appendix E (Bolender Declaration, Exhibit A). The Conservation District proposed to devote the assessment to the very limited and specific uses—preventing and dealing with the effects of stormwater runoff—for which such districts may be formed. *Id.*

The Mason County Board of County Commissioners, following the procedures set forth in the statute, entered Findings and Conclusions. Appendix E (Bolender Declaration, Exhibit C). By statute, the Board's findings are "final and conclusive." RCW 89.08.400(2). Based on those

findings, the Commissioners authorized an assessment at the uniform rate of \$5.00 per parcel. *Id.*

The Washington Supreme Court, in *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995), has set forth three factors by which a court is to determine whether an assessment like this one is to be treated as a regulatory fee, or a tax. Under the *Covell* test, if the assessment is found to be a regulatory fee, it is valid. However, if the assessment is found to be a tax, then it is valid only if imposed in a manner consistent with constitutional limitations on taxation.

The trial court held that, under *Covell*, there was no direct relationship between the assessment imposed on those who pay the fee and the burden they produce or the service which they receive. Appendix I (Trial Court's Letter Opinion, p. 2). The trial court did not attempt to explain or articulate how or why it made this determination. *Id.* Therefore, the trial court held that the assessment was a tax. *Id.*

But, recognizing the importance and closeness of the issue, the trial court certified its decision for immediate appellate review under RAP 2.3(b)(4):

The Court hereby CERTIFIES, pursuant to RAP 2.3(b)(4), with respect to the order on cross motions for summary judgment entered on June 6, 2008, that said Order involves a controlling question of laws to which there is a substantial ground for a difference of opinion, and immediate review of the Order may materially advance the ultimate termination of the litigation.

Appendix J.

The trial court's decision invalidates a statute adopted by the Legislature, which has been in effect for a long period of time, and which provides the primary method of funding, not only for the Mason Conservation District, but for Conservation Districts throughout the state. The trial court's decision is contrary to the decision reached in the many cases which the district cited to it. *Teter v. Clark County*, 104 Wn.2d 227, 704 P.2d 1171 (1981); *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); *Thurston County Rental Owners Association v. Thurston County*, 85 Wn. App. 171, 931 P.2d 208 (1997); *Smith v. Spokane County*, 89 Wn. App. 340, 348-349, 948 P.2d 1301 (1997). Indeed, Plaintiffs do not dispute that the trial court's decision conflicts with a decision that this Court issued the same day as the trial court issued its letter opinion. *Storedahl Properties*,

LLC v. Clark County, 143 Wn. App. 489, 178 P.3d 377 (2008). The Court of Appeals should accept discretionary review.

B. The trial court committed an obvious error rendering other proceedings useless.

In addition, the Court of Appeals should accept discretionary review of the trial court's decision because the trial court committed an obvious error rendering further proceedings useless.

In its letter opinion, the trial court, having found that the assessment constituted a tax, held that the "tax" was invalid because the Conservation District has no authority, itself, to impose it. Appendix I (Trial Court's Letter Opinion, p. 2) citing RCW 89.08.220.

In so ruling, the trial court made a basic factual error. The trial court apparently assumed that the Conservation District imposed the assessment. The Conservation District did not impose the assessment. The Mason County Board of County Commissioners did. Appendix E (Bolender Declaration, Exhibit C). The plaintiffs do not attempt to defend the reasoning by which the trial court disposed of this issue.

The plaintiffs instead attempt to defend the trial court's decision on grounds which the trial court did not reach. Plaintiffs claim that the \$5.00 per

parcel assessment adopted by the Mason County Board of County Commissioners pursuant to RCW 89.08.400 violates the constitutional requirement that property taxes be levied uniformly. Response to Plaintiffs' Brief, pp. 5-6.

The plaintiffs cite exactly one case in support of their claim, *Boeing Co. v. King County*, 75 Wn.2d 160, 449 P.2d 404 (1969). That case stands for the proposition that *if* a property tax is an *ad valorem* tax (i.e., one based on the value of the property being taxed), it must be based on a uniform valuation and be imposed at a uniform rate. But, *Boeing* does not hold that property taxes may only be imposed on an *ad valorem* basis.

In fact, the Washington Supreme Court has specifically affirmed the authority of the government to impose a property tax on a uniform, per-parcel basis. *Teter v. Clark County*, 104 Wn.2d 227, 240, 704 P.2d 1171 (1981) (stormwater charge imposed on a per-parcel basis, even if considered a tax, held to be consistent with uniformity requirement of Const. Art. 7, § 1). Pursuant to *Teter*, the Legislature clearly had the discretion to empower counties to authorize the imposition of a nominal, uniform, per-parcel charge

for the purpose of preventing and addressing the cumulative impacts caused by stormwater that runs off the parcels taxed.

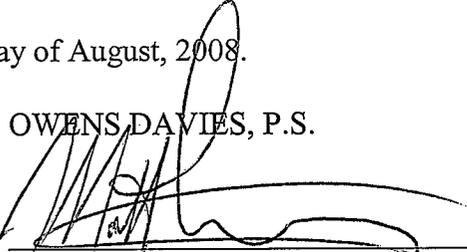
In sum, even if the assessment could properly be characterized as a tax, the trial court committed clear error in invalidating the assessment. Had it not made this error, the trial court would have been required to grant the Conservation District's Motion for Summary Judgment and dismiss the Plaintiff's claims, rendering further proceedings useless. The Court of Appeals should accept discretionary review for this second, independent reason.

III. CONCLUSION

The Court of Appeals should accept discretionary review of the trial court's decision.

DATED this 13 day of August, 2008.

OWENS DAVIES, P.S.



Matthew B. Edwards, WSBA #18332
Attorneys for Mason Conservation District