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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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

Respondents/Cross-Appellants,

v.

MASON CONSERVATION DISTRICT,

Appellant/Cross-Respondent,

and

MASON COUNTY,

Defendant.

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RESPONDENTS'/CROSS-APPELLANTS' RESPONSE  
TO CONSERVATION COMMISSION AMICUS BRIEF

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## **A. Introduction**

In its amicus curiae brief, the Conservation Commission (“Commission”) argues forcefully that Mason County (“County”) adopted an invalid ‘special assessment’ in its Ordinance 121-02 (“Ordinance”). Of course, Respondents/Cross-Appellants (hereafter “Cary,” as denominated by this court in its opinion in *Cary et al. v. Mason County et al.*, 132 Wn.App. 495 (2006)), who have challenged this levy for the past seven years, agree. However, the bulk of the Commission’s brief is devoted to addressing an issue not before this Court, viz., whether the statute granting authority to counties to impose conservation assessments is constitutional.

## **B. Ordinance 121-02 is invalid because noncompliant with the statutory authority invoked in adopting it.**

The Commission agrees that the Ordinance, nominally adopted pursuant to RCW 89.08.400 in September 2002, was invalid at least for the reason that it failed to comply with a statutory requirement: that if a per parcel charge is adopted, there must also be a per acre charge. RCW 89.08.400(3). The Commission does not address three of the four ways in which the ordinance is noncompliant with the statute, and so these other ways will not be addressed in this response, except to ask that this Court not neglect to address them.

If this Court were to determine that the ordinance is invalid, but only on the basis that it lacks a per acre charge, it would encourage the County to make only a minor change in its ordinance, obliging Cary to file yet another case to test its validity. It would not serve the public interest or judicial economy to allow a virtual clone of the present case to be generated by a ruling on only one of the issues before this Court. The trial court ruled that the levy was an unconstitutional property tax, not a special assessment. This case will not be truly resolved until this Court rules on the basic question of whether the revenue-raising scheme purported to be a special assessment is really an unconstitutional property tax.

**C. The Commission has misunderstood the constitutional arguments before this Court.**

**1. Contrary to the Commission's brief, Cary has not challenged the constitutionality of RCW 89.08.400.**

Cary has challenged the constitutionality of the ordinance adopted by the County, but not the statute authorizing adoption of conservation assessments. The Commission errs when it argues that Cary "effectively" challenges the validity of RCW 89.08.400. Commission brief at 11-12. Whether a particular enactment invoking RCW 89.08.400 as authority is valid or constitutional depends upon the language of the enacting ordinance and the facts and circumstances surrounding it. The trial court in this case

has found that the ordinance is actually a tax, not a special assessment, for failing to satisfy the third of the three *Covell* criteria, viz., that there be 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.<sup>1</sup> CP at 49.

The trial court's finding should stand if not found arbitrary or lacking substantial evidence. In any event, Cary does not need to show, nor did he attempt to show, that all county adoptions of ordinances imposing

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<sup>1</sup> In *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995), the court used three criteria, often cited in subsequent cases, to distinguish between a tax and what may be loosely termed a regulatory fee: (1) If the primary purpose is to accomplish desired public benefits that cost money, as distinct from paying for a regulatory scheme, then it is likely a tax; (2) if the money is collected or allocated only to an authorized purpose, then it is likely a tax; and (3) if there is 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, then it is likely a fee, but otherwise it is likely a tax.

conservation assessments are taxes. He only showed that the ordinance in question imposed a tax on property, which, because it was not applied on an ad valorem basis, violated state constitutional restrictions.

**2. Contrary to the Commission's brief, Cary does not assert that the public advantages associated with Ordinance 121-02 invalidate the assessment.**

The Commission's brief claims that Cary has asserted that the public advantages associated with Ordinance 121-02 invalidate the assessment. Commission brief at 14. The Commission misrepresents Cary's position. Cary would agree that the assessment was intended to provide, as the Commission brief puts it, certain "public advantages." Commission brief at 14. But Cary did not argue that the intention of providing public advantages invalidates the ordinance; instead, he contended that because the intent was **primarily** to provide public advantages, with negligible or no benefits to many assessed parcels, the levy in reality was not a special assessment, but a property tax – and a tax that is unconstitutional because not levied on an ad valorem basis.

**3. The statutory language making the county findings "final and conclusive" does not make the levy in question immune to constitutional challenge.**

As Cary pointed out in his brief at 8, he did not need to challenge the

enumerated findings adopted by the County commissioners to demonstrate that the enactment was contrary to law, both in failing to comply with the statutory requirements and by imposing an unconstitutional tax in the guise of a special assessment. The findings assert only public benefits, not special benefits to assessed property that substantially exceed whatever benefits are received by non-assessed property or by persons who reside within or near to the Conservation District, but whose property is not assessed or who do not own real property. If the asserted benefits may be said to benefit parcels assessed, they benefit these parcels only indirectly, and so do not even claim 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. See CP at 64-65.<sup>2</sup>

However, even if the findings did assert these necessary conditions

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<sup>2</sup> While the findings conclude with an inference that the assessment to be imposed will not exceed the special benefit the land receives or will receive from activities funded by the assessment, the inference is a non sequitur, for none of the ten findings of fact even assert a special benefit for assessed parcels. CP at 64-65.

for the levy to be construed as a special assessment instead of a tax, they would be final and conclusive only insofar as they would preclude further administrative or legislative review by the county. They would not preclude judicial review. If the statute were construed as denying courts the authority to review county findings, then no matter how arbitrary, capricious, or even dishonest the findings might be, they would need to be regarded as verities, and such a conclusion is constitutionally unacceptable. It is settled law, as Cary observed in his brief, that the legislative branch cannot immunize its taxes, assessments, or user fees from judicial review. The state must provide a fair opportunity for submitting any such levy "to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment." *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 289, 64 L. Ed. 909, 40 S. Ct. 527(1920); cited in *State ex Rel. Pac. T. & T. Co. v. D. P. S.*, 19 Wn. (2d) 200, 218 (1943); emphasis added.

**4. Whatever services may be conceived as 'improvements,' the levy at issue does not provide tangible and nonspeculative services to all parcels assessed, and so is not truly a special assessment.**

Even by the broadest construction, farm plans are not available to all assessed parcels; nor are septic maintenance services. The parcels belonging

to three of the four Plaintiffs in this action, like many others assessed, are small lots, about 1/7 of an acre in area, served by sewers and a sewage treatment facility. Septic tanks are not allowed under the restrictive covenants that govern the development where these Plaintiffs reside. Covenants also prevent livestock from being kept on these parcels and even limit vegetation removal.

It is not only small parcels served by sewers that are not improved by the alleged 'special assessment.' Vacant land, at least if not used for farming, obtains no direct benefit. Nor is land, whatever the size of parcel, within the two unincorporated Urban Growth Areas ("UGAs") in Mason County.<sup>3</sup> The Allyn UGA, for example, is served by sewers, and so parcels within the UGA receive no direct benefit from whatever septic maintenance and service arrangements are made by the County and the District with revenues from the 'special assessment.' Within Allyn's commercially zoned areas, some parcels have little or no land surface unpaved. Obviously, such parcels are not suitable for farm plans. (The Belfair UGA is in the process of constructing sewers and a sewage treatment facility.)

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<sup>3</sup> The levy also originally applied to Mason County's one incorporated UGA, the City of Shelton, until Shelton opted out of the Conservation District as a result of the levy.

So, while Cary does not dispute that owners of property obtaining farm plans or septic services would receive special benefits under the assessment, his property and many other properties subject to the levy do not.

**D. Ordinance 121-02 imposes an unconstitutional tax, not a user fee.**

An important analysis of the distinction between taxes and fees – cited by this Court in its previous consideration of this case – observes that special assessments are user fees:

Conceptually, [special assessments] are not taxes at all. They are, rather, a distinctive form of user charge which allocates the cost of public improvements that increase the value of an asset (property) to the owner of that asset. Like other user fees, the amount of special assessments must relate directly to the cost of the improvements, relate to the value of the improvements to the property assessed, and be deposited in special accounts for the particular improvements.

Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 GONZ. L. REV. 335, 350-51 (2002/2003); cited in *Cary v. Mason County*, 132 Wn. App. at 500 (2006).

Given that Ordinance 121-02 imposes a flat levy of \$5.00 annually on mere ownership of property, unrelated to the cost of improvements, and ensures no direct benefits to property so assessed, it is a property tax, not a user fee. Given that it is not assessed on an ad valorem basis, it is unconstitutional.

As a booster and practically a lobbyist for local conservation districts, the Commission appears to have no interest in whether ordinances adopting conservation assessments actually provide special benefits to assessed property, as distinct from providing public benefits that in theory provide indirect benefits to all property, whether or not assessed. The Commission's brief conspicuously avoids considering the *Covell* criteria, and so overlooks the distinction between user fees and taxes. Instead, from the Commission's viewpoint, local legislative approval appears to be the end of any question about the constitutionality of an ordinance adopting a conservation assessment. Thereafter, no evidence is considered sufficient to show that the assessment is really a property tax. Showing that there is no increase in the market value of property subject to the special assessment is deemed immaterial. See WAC 135-100-020, definition of "special benefits to lands." Nor does the Commission, either in its brief or its chapter of the Administrative Code devoted to special assessments for natural resource conservation (Chapter 135-100 WAC), give any hint of what would comprise sufficient evidence to show that monies collected under a levy for conservation assessments were so unrestricted in their use as to constitute an illicit property tax. So long as they are spent in some way related to

conservation of renewable natural resources, they appear to measure up to the Commission's standards. It does not matter to the Commission whether 'assessments' on some properties are used to subsidize farm plans or other services to other properties.

The result, if this Court were to ignore the *Covell* criteria and simply find that the ordinance failed to comply with one statutory requirement, would be to provide a kind of template encouraging the Legislature to authorize counties to add to their revenues with so-called 'special assessments' that would be used to fund an array of services that hopefully serve the public interest, yet provide no or negligible special benefit to assessed parcels. If benefits to water quality in Puget Sound are viewed as providing direct benefits to inland property owners – and so are used to justify special assessments for inland property – then what is to prevent any county from using special assessments to fund virtually any activity supposed to have a public benefit? Might not the offices of county prosecutors, treasurers, auditors, and sheriffs be next in line to take advantage of such a loophole? Our State Constitution limits the amount of property taxes (Article VII, Section 2) and prescribes uniformity (Article VII, Section 1). The courts need to be vigilant to prevent evasions of these constitutional protections.

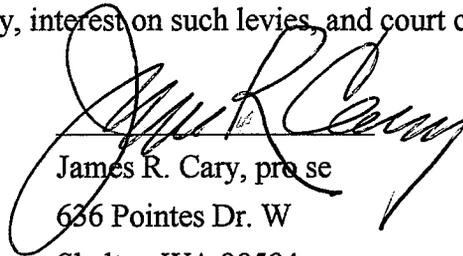
## **E. Conclusion**

The problem with the levy at issue is not simply that it fails to assess a uniform annual rate per acre in addition to an annual flat amount per parcel. Ordinance 121-02 also fails to classify lands into suitable classifications according to benefits conferred or to be conferred by the activities of the conservation district, as required by RCW 89.08.400(3). The levy is not confined to providing funds to finance activities of the district pursuant to RCW 89.08.400(1), but instead diverts 2/3 of the net amount collected to a county department. And contrary to RCW 89.08.400(2), it fails to provide special benefits to most of the assessed parcels equivalent to the amount assessed. As such, it does not meet the test of *Covell v. City of Seattle*, in which the court recognized that a special assessment may be identified as "a charge imposed on property owners within a limited area to help pay the cost of a local improvement which specially benefits property within that area." *Covell*, 127 Wn.2d at 889. Because, as the trial court found, such benefits to much of the assessed property as may ensue are indirect, the levy is actually a tax, not a special assessment.

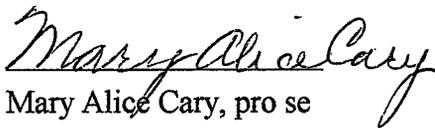
Because the County did not comply with the requirements for imposing a conservation special assessment, and because the levy adopted is

essentially an unconstitutional property tax even though ostensibly a special assessment, it is invalid. Not only should collection of the levy be enjoined, but Plaintiffs should be granted the relief they sought, to receive refund of the levies they were compelled to pay, interest on such levies, and court costs.

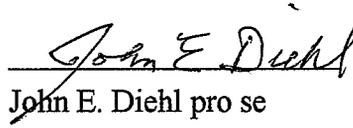
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**Declaration of Service**

I, John E. Diehl, under penalty of perjury under the laws of the State of Washington, declare that on this day, I mailed, postage prepaid, the above Respondents'/Cross-Petitioners' Response to Amicus Brief to the offices of Monty Cobb, Deputy Prosecuting Attorney, P.O. Box 639, Shelton WA 98584; Matthew B. Edwards, Owens Davies PS, 1115 W. Bay Dr. NW, Suite 302, Olympia WA 98502; and Sharonne E. O'Shea, P.O. Box 40117, Olympia WA 98504-0117.

Dated: October 6, 2009

*John E. Diehl*

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