

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

NO. 70453-2-I

ELLIOTT BAY MARINA,

Appellant,

v.

CITY OF SEATTLE, a municipal corporation,

Respondent,

and

STATE OF WASHINGTON and KING COUNTY,

Respondents.

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DIVISION ONE
COURT OF APPEALS
STATE OF WASHINGTON
70453-2-I

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY	1
II. ASSIGNMENT OF ERROR.....	4
III. ISSUES FOR REVIEW	4
IV. STATEMENT OF THE CASE.....	5
A. The Elliott Bay Marina	5
B. King County’s Magnolia Trunk Line	6
C. The Marina’s Connection to Metro’s South Magnolia Trunk Line	8
D. Metro and the City Cooperate but Operate Distinct Sewer Systems	11
E. The City’s Wastewater Charges	13
F. Procedural History	15
V. ARGUMENT	15
A. Standard of Review.....	15
B. The City’s System Rate Charge is an Unconstitutional Tax on Elliott Bay Marina	16
1. The primary purpose of the System Rate charge is to finance the City’s sewer system.....	18
2. The City’s System Rate is not allocated exclusively to regulating the entity or activity being assessed.....	22

3.	There is no direct relationship between the System Rate and the service received, or burden created, by the Marina	24
C.	The City Should Be Required to Refund the System Rate Charges Paid by Elliott Bay Marina	27
VI.	CONCLUSION	27

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Cases</u>	
<i>Atherton Condominium Apartment Owners Ass'n Bd. of Directors v. Blume Development Co.</i> , 115 Wn.2d 506, 799 P.2d 250 (1990).....	16
<i>Belas v. Kiga</i> , 135 Wn.2d 913, 959 P.2d 1037 (1998).....	16
<i>Boeing Co. v. King County</i> , 75 Wn.2d 160, 449 P.2d 404 (1969).....	17
<i>Campbell v. Reed</i> , 124 Wn. App. 349, 139 P.3d 419 (2006).....	15
<i>Carrillo v. City of Ocean Shores</i> , 122 Wn. App. 592, 94 P.3d 961 (2004).....	21, 23, 27
<i>Covell v. City of Seattle</i> , 127 Wn.2d 874, 905 P.2d 324 (1995).....	passim
<i>Henderson Homes, Inc. v. City of Bothell</i> , 124 Wn.2d 240, 877 P.2d 176 (1994).....	27
<i>King County Fire Protection Districts #16, #36, and #40 v. Housing Authority of King County</i> , 123 Wn.2d 819, 872 P.2d 516 (1994).....	20
<i>Ret. Pub. Employees Council of Wash. v. Charles</i> , 148 Wn.2d 602, 62 P.3d 470 (2003).....	15
<i>Samis Land Co. v. City of Soap Lake</i> , 143 Wn.2d 798, 23 P.3d 477 (2001).....	passim

<i>Teter v. Clark County</i> , 104 Wn.2d 227, 704 P.2d 1171 (1985).....	19, 20
<i>Tukwila School District No. 406 v. City of Tukwila</i> , 140 Wn. App. 735, 167 P.3d 1167 (2007).....	25
<i>Weden v. San Juan County</i> , 135 Wn.2d 678, 958 P.2d 273 (1998).....	16
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 656 P.2d 1030 (1982).....	16
<u>Washington State Constitution</u>	
Wash. Const. art. VII, § 1	17
<u>Municipal Code</u>	
SMC 21.28.030	21
SMC 21.28.040.B	13
SMC 21.28.040.B.1	14
SMC 21.28.040.B.2	14, 19, 21

I. INTRODUCTION AND SUMMARY

This case asks whether the City of Seattle is imposing an illegal tax against the Elliott Bay Marina by charging the Marina a monthly “System Rate” over and above the “Treatment Rate” charged for the treatment and discharge of the Marina’s sewage.

Prior to the Marina’s construction in 1990, King County Metro’s South Magnolia trunk line – an 18-inch sewage line – ran along the base of Magnolia Bluff at the north end of Elliott Bay. The trunk line occupied an easement over the Marina property. Due to landslides originating along the Magnolia Bluff, the old trunk line had a long history of breakage resulting in the release of raw sewage into Elliott Bay. During environmental review of the proposed Marina, it was decided that the best method to prevent future breaks would be to relocate the trunk line and add a significant amount of fill at the base of the bluffs to prevent future landslides. In 1987 the Marina entered into an agreement with Metro to stabilize the bluff and relocate the trunk line through the Marina property – largely at the Marina’s expense. In exchange for reconstructing and protecting the trunk line, the Marina was allowed to connect its facility directly to Metro’s trunk line. As a result, all of the Marina’s sewage and stormwater discharge goes directly into Metro’s trunk line

where it is then transferred to Metro's West Point treatment facility. None of the Marina's sewage or stormwater enters the City of Seattle's sewage system.

Metro and the City of Seattle cooperate together through a 1961 Basic Agreement to provide sewage service to City residents. Under the Basic Agreement the City is charged with owning and operating a system of local side sewer lines and collection pipes that collect sewage from residences and businesses within the City. The City then discharges that sewage into Metro's system of larger trunk or interceptor lines where the sewage is then delivered to Metro's treatment facility. Pursuant to the Basic Agreement, Metro does not charge individual customers directly for sewage treatment and disposal. Instead, the City is obligated under the Basic Agreement to charge City residents a sufficient amount to pay for Metro's treatment.

The City of Seattle sends a monthly bill to Elliott Bay Marina for wastewater services. Pursuant to City Code, the City's wastewater charges – the amount the City charges each customer within the City – is composed of two components – the "Treatment Rate" and the "System Rate." The Treatment Rate is the amount necessary to cover the cost of Metro's treatment, interception and disposal services. This is the cost that

the City is required to collect under the Basic Agreement to reimburse Metro. The Treatment Rate is approximately 67% of the total wastewater charge. Because the Marina discharges into and burdens Metro's system, the Marina does not dispute payments for the Treatment Rate.

The remaining wastewater component is the "System Rate." The System Rate is designated as the rate required to pay the cost of carrying and discharging wastewater and stormwater "into the City sewerage system." Because the Marina does not discharge into, or in any way burden, the City's sewerage system, the Marina disputes payment of the "System Rate" as an illegal tax.

In order to determine whether a charge is an allowed regulatory fee or an unconstitutional tax, Washington courts apply the three-part test described in *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995). The reviewing court first considers whether the primary purpose of the legislation in question is to "regulate" the fee payers or to collect revenue to finance broad-based public improvements that cost money. Second, the court determines whether or not the money collected from the fees is segregated and allocated exclusively to "regulat[ing] the entity or activity being assessed." Third, the court must ascertain whether a direct relationship exists between the rate charged and either a service received

by the fee payers or a burden to which they contribute. The charge must pass all three tests to be deemed a valid regulatory fee.

Because the Marina discharges directly into King County Metro's system and does not use or burden the City's system, the City's "System Rate" does nothing to regulate the Marina, but instead is simply a method for the City to charge the Marina to pay for the City's separate system. The System Rate fails all three *Covell* tests. The Elliott Bay Marina seeks a declaratory ruling that the City's imposition of the System Rate is an illegal tax against the Marina. The Marina also seeks injunctive relief requiring the City to refund all of the System Rate taxes imposed against the Marina between June 2009 and the present.

II. ASSIGNMENT OF ERROR

The trial court erred in granting the City of Seattle's motion for summary judgment and dismissing Elliott Bay Marina's complaint.

III. ISSUES FOR REVIEW

1. The first *Covell* test requires a determination of whether the primary purpose of the fee is to regulate the fee payers. Elliott Bay Marina is not connected to, and does not burden or use, the City of Seattle's sewer system. Because the City's System Rate does not regulate Elliott Bay Marina, is it an unconstitutional tax?

2. The second *Covell* test requires a determination of whether the money collected from the fees is segregated and allocated exclusively to "regulat[ing] the entity or activity being assessed." Because the City's

System Rate does not regulate Elliott Bay Marina, is it an unconstitutional tax?

3. The third *Covell* test requires a determination of whether there is a direct relationship between the rate charged and either a service received by the fee payers or a burden to which they contribute. Elliott Bay Marina is not connected to and does not burden or use the City of Seattle's sewer system. Because there is no direct relationship between the City's System Rate and a service received or a burden imposed by the Marina, is the System Rate an unconstitutional tax?

IV. STATEMENT OF THE CASE

A. The Elliott Bay Marina

The Elliott Bay Marina is a privately-owned public marina located on the north shore of Elliott Bay, at the base of Magnolia Bluff and just west of Smith Cove and Piers 90 and 91 within the City of Seattle.

CP 79-80, ¶ 2; CP 84, 86. The Marina opened in 1991 after an almost 10-year permitting process. With 1,200 slips, the Marina is one of the largest saltwater marinas in the United States. In addition to moorage, the Marina also houses its administrative offices, the Seattle Yacht Club, the Elliott Bay Fuel Dock, and the Palisades and Maggie Bluffs restaurants. CP 80, ¶ 4. Elliott Bay Marina is certified with five stars, the highest rating, under the nationally recognized, third-party EnviroStars certification program. CP 80, ¶ 7; CP 99-101.

The Marina operates a mobile pump-out vessel and offers a stationary sanitary pump-out station to ensure that all sewage from vessels

moored at or using the Marina is collected and discharged directly into the Marina's sanitary sewer system. The Marina's sewer system also connects to and collects sewage from all of the Marina's onshore facilities, including its restaurants. The Marina's sewage is collected into a single pump station where it is then pumped directly into King County's 18-inch South Magnolia interceptor or trunk line. CP 80, ¶ 5; CP 88-90. Metro's trunk line runs through the Marina property in an easement. CP 80, ¶ 6; CP 92-97; CP 904.¹

The Marina's direct connection to Metro's system stems from a unique historical relationship. A brief overview follows.

B. King County's Magnolia Trunk Line

King County Metro provides sewage treatment services to 17 cities and 17 local sewer utilities in King, Snohomish, and Pierce Counties. The cities and local utilities own and operate independent collection systems, which include pipelines and pump stations, to collect and carry wastewater flows in their service areas to Metro's regional system for treatment and disposal. CP 5, ¶ 11; CP 11, ¶ 11. King County Metro independently

¹ CP 904 is an aerial photograph prepared by the City of Seattle using its GIS mapping system. See CP 901. The photo shows the location of Elliott Bay Marina and identifies it as connecting directly to Metro's South Magnolia Trunk line.

owns and operates the regional treatment plants, pipelines, pump stations and other related facilities. *Id.*, ¶ 12.

Historically, there were no sewer lines serving the south side of Magnolia Bluff or the vicinity of what is now Elliott Bay Marina prior to 1956. Instead, raw sewage was directly discharged from several locations into Elliott Bay. CP 116-119. In 1958 King County voters approved a ballot measure establishing the Municipality of Metropolitan Seattle (“Metro”). CP 121. Metro’s first major action was to adopt a comprehensive sewage plan that included the construction of a series of “interceptor” or “trunk” lines designed to collect and transfer sewage to regional wastewater treatment facilities. The plan included construction of a sewage trunk line running adjacent to the north shore of Elliott Bay, turning north in the vicinity of Piers 90-91 and connecting to a new wastewater treatment facility at West Point adjacent to what was then Fort Lawton. CP 125-126, 128-130. The plan also included construction of the 18-inch diameter South Magnolia “interceptor” or “trunk” line that ran along the base of Magnolia Bluff in the vicinity of what is now Elliott Bay Marina.

The South Magnolia trunk line was constructed by Metro in 1966. CP 132. Unfortunately, because the original South Magnolia trunk line

was located at the base of an active “rotational block” landslide on Magnolia Bluff, the line was prone to breakage. Sewer line breaks occurred in 1973, 1974, three times in 1982 and twice in 1983, each time spilling raw sewage into Elliott Bay and creating a public health risk. CP 44-46, 48-59. The original trunk line was also difficult to maintain because of beach access and tidal restrictions. *Id.*

C. The Marina’s Connection to Metro’s South Magnolia Trunk Line

In approximately 1980 the Elliott Bay Marina Group proposed construction of the Elliott Bay Small Craft Harbor (the “Marina”). The Marina was proposed for the base of Magnolia Bluff on Elliott Bay, roughly between Smith Cove Park on the east and 30th Avenue West on the west. CP 40, ¶ 2. As part of the Marina’s application, the City of Seattle prepared an Environmental Impact Statement (“EIS”) as required by the State Environmental Policy Act. CP 40, ¶ 3; CP 44-46, 48-59.

During the course of the application process, the Marina worked with Metro and conducted a geotechnical study of Magnolia Bluff in order to understand the cause and potential remedy for the long history of landslides. Metro was concerned because of the history of landslide breaking its South Magnolia trunk line. CP 40, ¶ 4; CP 50-53. The results of the Marina’s study, as well as separate studies prepared by Metro and

adjacent property owners, concluded that the solution to the deep-seated landslide was to construct a substantial intertidal fill at the base of the Bluff. The purpose of the fill would be to create a counter-weight at the base of the rotating block preventing further movement. CP 40, ¶ 5; CP 50-53.

As a result of the analysis, the Marina design included relocation of the South Magnolia trunk line farther away from the Bluff and then addition of approximately 30 feet of fill along the base of the bluff. The addition of the fill and relocation of the trunk line was identified in the Marina EIS process as mitigation for the Marina hooking up directly to Metro's South Magnolia trunk line and discharging sewage from its commercial facilities and boats. CP 40-41, ¶ 6; CP 45-46. Metro estimated at the time that relocation of the trunk line would cost in excess of \$500,000. As a condition of its approval, the Marina was required to share in the cost of relocating the trunk line. CP 40-41, ¶ 6; CP 57-59.

In December 1987, the Elliott Bay Marina Group entered into an agreement with Metro for the relocation of the South Magnolia trunk line. CP 41, ¶ 7; CP 61-67. Under the agreement the Marina agreed to construct a new trunk sewer line consistent with Metro's plans. The Marina also agreed to provide a new easement to Metro for the new

relocated trunk line. Under the agreement, the Marina paid for the construction of the new trunk line, including the costs for upgraded strength pipe sufficient to withstand the load of the newly placed fill. Metro agreed to reimburse the Marina for one-half of the cost of the labor, equipment and construction costs. Metro was not required to reimburse the Marina for the increased pipe strength or for the new manholes designed to serve the Marina itself. The Marina's share of the costs for relocating the trunk line was approximately \$350,000.00. CP 41, ¶ 7.

By 1990 the Marina and Metro finalized plans for relocating the Magnolia trunk line and burying it under approximately 30 feet of fill that was to become the Marina's parking lot, offices and commercial buildings. CP 41, ¶ 8, CP 60-71. On March 25, 1991, and consistent with the mitigation discussed in the City-prepared EIS and permitting process, the Marina officially requested authorization to directly connect the Marina's sewer system to the relocated Metro trunk line. CP 41-42, ¶ 9; CP 70-73. Metro granted authorization for the direct connection on March 26, 1991. CP 42, ¶ 10.

D. Metro and the City Cooperate but Operate Distinct Sewer Systems

The City argued below that there was no distinction between King County's Metro System² and the City's sewer system – that they were indeed a joint system. The evidence, however, demonstrates otherwise.

In 1961 Metro and the City entered into an “Agreement for Sewage Disposal” (“Basic Agreement”). CP 134-156.³ Under the terms of the Basic Agreement, after July 1, 1962, the City agreed to collect and deliver all of its sewage and industrial waste to the Metro system and Metro agreed to accept the waste for treatment. CP 135 (Section 2). In addition to agreeing to accept the City's sewage, Metro also agreed to “construct, acquire or otherwise secure the right to use all facilities required for the disposal of sewage delivered to Metro...” and to “perform all services required for the maintenance, operation, repair, replacement or improvement...” of the Metro system. CP 137 (Section 4). Pursuant to the Basic Agreement, Metro took over sewage facilities previously owned by the City, including, for example, the City's “North Trunk” line. CP 142-144 (Section 9).

² In 1994, pursuant to a U.S. District Court ruling that the structure of Metro was unconstitutional, King County assumed all rights, powers, functions and obligations of Metro.

³ The Basic Agreement was amended in 1992, CP 158-166, but remains in effect.

Thus, in summary, under the agreement the Metro sewer system includes the treatment facilities as well as all “trunk” and “interceptor lines” extending into each tributary or natural drainage area. The City is then charged with owning and operating the smaller “local collection” system of pipes connecting individual users to the Metro system. *Id.* The City collects sewage from throughout the City and then discharges it into Metro’s larger trunk lines for transfer to Metro’s treatment plants.

Pursuant to the Basic Agreement, the City and Metro also agreed to a single system for billing customers. Metro does not bill individual property owners for sewer service. Instead, the City of Seattle makes payments to the County for wastewater treatment services. CP 137-141; CP 14, ¶ 15. In turn, the City is obligated to collect sewer charges sufficient to pay the Metro treatment charges. CP 141 (Section 5.6); CP 14, ¶ 16.

In addition to the clear contractual separation between the Metro sewer system and Seattle’s sewer system, perhaps a stronger example of the separation between the two systems is demonstrated by the City’s own connection to the South Magnolia trunk line. In March 1987, the City and Metro entered into a separate agreement for “joint use” of the 18-inch South Magnolia trunk line that Metro had constructed in 1966. CP

168-170. Under the “Joint Use Agreement,” the City was granted authority to make direct local side sewer connections to the South Magnolia trunk line. The City was charged the equivalent of constructing its own 8-inch collector line. *Id.* While the City was authorized to connect into the South Magnolia trunk line, the trunk line remained Metro’s responsibility – the City accepted “no responsibility for the operation or maintenance of the trunk Sewer...” *Id.*

The Joint Use Agreement did not affect or change the underlying “Basic Agreement” between the City and Metro. In essence, under the Joint Use Agreement, the City was authorized, for a fee, to use a portion of the capacity of the South Magnolia trunk line as if it were its own local collector. But the trunk line remains a part of Metro’s system. While the City is allowed to pay to use it, the City expressly disavows any obligation to operate or maintain the South Magnolia trunk line.

E. The City’s Wastewater Charges

Consistent with the 1961 Basic Agreement, the City of Seattle sends a monthly bill to Elliott Bay Marina for wastewater services. CP 81, ¶¶ 8-9; CP 104-105. Pursuant to City Code, the wastewater charge is divided into two components – the “Treatment Rate” and the System Rate. SMC 21.28.040.B. The Treatment Rate is the amount necessary to cover

“the cost of wastewater treatment, interception and disposal services ... and associated costs.” SMC 21.28.040.B.1. This is the cost required under the Basic Agreement to reimburse Metro for treatment. CP 139-141. The Treatment Rate is currently 67 percent of the sewer service payments made by the Marina to the City. CP 81, ¶ 9; CP 104-105. This payment is then paid to King County Metro for treatment. CP 14, ¶ 17. The Marina does not contest the Treatment Rate charged by the City of Seattle. CP 81, ¶ 9.

The remaining 33 percent of the wastewater charge billed to the Marina is deemed the System Rate and goes to the City for the City’s expenses. CP 14, ¶ 18. The System Rate is defined by City Code as “the rate required to pay the cost of carrying and discharging all wastewater and any wastewater funded-share of stormwater *into the City sewerage system* as presently maintained and operated and as may be added to, improved and extended.” SMC 21.28.040.B.2 (emphasis added). Because the Marina does not discharge into the City’s sewerage system, but instead discharges directly into Metro’s South Magnolia trunk line, the Marina contests the System Rate charged by the City. CP 81, ¶ 9.

Between June 26, 2009 and the end of December 2012, the Marina paid \$95,257.37 to the City for System Rate charges. The Marina has

continued to pay System Rate charges in 2013. CP 81, ¶¶ 10-11; CP 106-111.

F. Procedural History

On June 6, 2012, the Elliott Bay Marina filed a Complaint for Declaratory Judgment and Injunctive Relief in the King County Superior Court. CP 3-11. After briefing and argument, on May 13, 2013, King County Superior Court Judge Monica Benton granted the City's Motion for summary judgment dismissing the Marina's claims. Because the court's original order did not accurately identify the documents filed for review, an Amended Order was entered on May 30, 2013. CP 922-924. This appeal followed. CP 925-929.

V. ARGUMENT

A. Standard of Review

This court reviews the trial court's decision on summary judgment *de novo*. *Campbell v. Reed*, 124 Wn. App. 349, 356, 139 P.3d 419 (2006); *Ret. Pub. Employees Council of Wash. v. Charles*, 148 Wn.2d 602, 612, 62 P.3d 470 (2003). Summary judgment is appropriate only if the pleadings, affidavits, depositions and admissions on file demonstrate the absence of any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The

burden is on the moving party to establish the material facts necessary to support the requested judgment and to demonstrate the absence of a genuine dispute of material fact. *Atherton Condominium Apartment Owners Ass'n Bd. of Directors v. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The Court must consider all of the facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party – in this case, Elliott Bay Marina. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

Because this case challenges the constitutionality of the City of Seattle's System Rate as applied to Elliott Bay Marina, review is *de novo*. Municipal ordinances are presumed constitutional. *Weden v. San Juan County*, 135 Wn.2d 678, 690, 958 P.2d 273 (1998). To rebut the presumption of constitutionality, the plaintiff must demonstrate that the legislation cannot reasonably be construed consistent with constitutional mandates. *Belas v. Kiga*, 135 Wn.2d 913, 920, 959 P.2d 1037 (1998).

B. The City's System Rate Charge is an Unconstitutional Tax on Elliott Bay Marina

A tax levied against a property owner resulting unavoidably from ownership of the property and used for the general public benefit is a property tax and, unless imposed in a uniform manner based on the value of the property, it is unconstitutional. *Covell*, 127 Wn.2d at 890; *Samis*

Land Co. v. City of Soap Lake, 143 Wn.2d 798, 814-815, 23 P.3d 477 (2001); Wash. Const. art. VII, § 1.⁴ “Tax uniformity requires both an equal tax rate and equality in valuing the property taxed.” *Boeing Co. v. King County*, 75 Wn.2d 160, 165, 449 P.2d 404 (1969). There is no reasonable dispute that the City’s System Rate charges are not assessed in a uniform manner based on property value. The question therefore becomes whether the System Rate charges are a valid regulatory fee.

In order to determine whether a charge is an allowed regulatory fee or an unconstitutional tax, Washington courts apply the three-part *Covell* test. 127 Wn.2d at 879. First, the Court must consider whether the primary purpose of the legislation in question is to “regulate” the fee payers or to collect revenue to finance broad-based public improvements that cost money. Second, the Court must determine whether or not the money collected from the fees is segregated and allocated exclusively to “regulat[ing] the entity or activity being assessed.” Third, the Court must ascertain whether a direct relationship exists between the rate charged and either a service received by the fee payers or a burden to which they contribute. *Covell*, 127 Wn.2d at 879; *Samis*, 143 Wn.2d at 806. The

⁴ Wash. Const. art. VII, § 1 provides that “[a]ll taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax... All real estate shall constitute one class... .”

charge must pass all three factors to be deemed a valid regulatory fee. Failing any of the three tests mandates a finding that the charge is an unconstitutional tax. *Covell*, 127 Wn.2d at 885 (even though funds in *Covell* met the second test and were segregated for a specific purpose, that factor alone was not dispositive).

1. The primary purpose of the System Rate charge is to finance the City's sewer system

The first *Covell* test requires an examination of the primary purpose of the law establishing Seattle's wastewater charges. If the primary purpose is to "regulate" the fee payers, the charge may be considered an allowed regulatory fee. If the primary purpose, however, is to collect revenue to finance broad-based public improvements that cost money, then the charge may be considered a tax. Here, there is no reasonable dispute that the purpose of the System Rate component of the wastewater charges is to collect revenue to run the City's wastewater and drainage program in its entirety. The System Rate charge does nothing to "regulate" users that are not connected to the City's sewerage system.

On its face, the City Code provision defining the System Rate confirms that it is "the rate required to pay the cost of carrying and discharging all wastewater and any wastewater funded-share of stormwater

into the City sewerage system as presently maintained and operated and as may be added to, improved and extended.” SMC 21.28.040.B.2 (emphasis added). As explained further in Seattle Public Utilities’ (“SPU”) Drainage and Wastewater Fund 2011-2012 Rate Study (June, 2010), p. 3, SPU uses drainage and wastewater funds it collects in order to finance “the acquisition, operation and maintenance of *Seattle’s drainage and wastewater system.*” CP 178 (emphasis added).⁵

In short, the purpose of the System Rate component is to collect revenue to fund operation and maintenance of the City’s wastewater system. There is nothing “regulatory” about the System Rate component of the wastewater charge. The System Rate charge certainly does not regulate Elliott Bay Marina since Elliott Bay Marina does not discharge into, contribute to, or burden the City’s sewerage system.

Because the Marina does not contribute to the City’s sewerage system, this case starkly contrasts with decisions upholding fees as regulatory. For example, in *Teter v. Clark County*, 104 Wn.2d 227, 232-236, 704 P.2d 1171 (1985), the Court upheld charges for maintaining

⁵ SPU also uses these funds for programs that are not directly related to the wastewater collection system. Indeed, the 2011/2012 budget included the expansion or addition of several new programs including “Street Sweeping for Fats, Oils and Grease, NPDES requirements, flow monitoring for capacity-deficient areas, Water Resource Inventory Area (“WRIA”) programs and General Fund Reductions.” CP 184.

the County's stormwater control facilities as regulatory fees after finding specifically that all of the entities assessed with the fee actually contributed surface water runoff within the boundaries of the utility. Similarly, in *King County Fire Protection Districts #16, #36, and #40 v. Housing Authority of King County*, 123 Wn.2d 819, 833-834, 872 P.2d 516 (1994), the Court upheld fire and emergency services levies as regulatory and "akin to charges for services rendered" after noting specifically that the levies did not apply where an entity maintained its own acceptable fire protection services and where the amount charged could be challenged by individual property owners. *See also, Covell*, 127 Wn.2d 884-885.

But here, unlike *Teter*, by discharging directly into Metro's trunk line the Marina does not contribute to Seattle's sewerage system. And unlike *King County Fire*, the Marina does not have the option to opt out of paying the System Rate.

This case is far closer to the situation in *Samis*, where the Supreme Court invalidated the assessment of a "standby charge" imposed by the City of Soap Lake on vacant unimproved land that abutted, but was not connected to, city water and sewer lines. The City of Soap Lake argued that its "standby charge" was enacted "as a small part of its overall effort to improve the *regulation* of its city-wide water-sewer system for the

general protection of its citizens' health, welfare, and safety" *Id.* at 808 (emphasis in original). The court rejected the City's argument, finding that: "*nowhere* in that "overall plan" is there a reference to *any* utility service or burden applicable to the properties being charged here." *Id.* at 809 (emphasis in original). *See also, Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 604-606, 94 P.3d 961 (2004) (holding that water and sewer charges assessed against owners of vacant lots not connected to the City's water and sewer system were unconstitutional taxes).

Similarly, while SMC 21.28.040.B.2 and SMC 21.28.030 authorized the collection of the System Rate, this assessment is defined as "the rate required to pay the cost of carrying and discharging all wastewater and any wastewater funded-share of stormwater *into the City sewerage system* as presently maintained and operated and as may be added to, improved and extended." SMC 21.28.040.B.2 (emphasis added). But because the Marina does not burden the City sewerage system, or contribute to the need for additions or improvements thereto, the fee, as applied to the Marina, is not regulatory, but purely for raising revenue.

The City's System Rate component of its wastewater charges fails the first *Covell* test and is therefore an unconstitutional tax.

2. The City's System Rate is not allocated exclusively to regulating the entity or activity being assessed

The second *Covell* test requires an examination of whether or not the money collected from the fees is segregated and allocated exclusively to “regulat[ing] the entity or activity being assessed.” While the City does segregate its funds collected through its wastewater charges into the Drainage and Wastewater fund, once collected, the money in the fund is used for operation and maintenance of the City’s wastewater collection system.

As the Supreme Court explained in *Samis*, in response to the City of Soap Lake’s argument that the vacant lot charges were allocated to the overall water and sewage system:

simply because charges are allocated to some “broad category” of important public services does not necessarily mean they are “regulatory fees.” The second *Covell* factor requires that “regulatory fees” be “used to regulate the entity or activity *being assessed*.” Here, the only entities being assessed the charge in question are properties subject to no identifiable utility-related “regulatory” activity. The more than \$46,000 that the City has collected from *Samis* since 1990 under SLMC 13.08.175 has been allocated to maintaining and improving the city-wide utility system, “regulating” an entirely *distinct* group to

which the standby charge does not apply, namely, entities connected to the city utility system. Samis has thus shown that, under the exclusive allocation test, the standby charge more closely resembles a tax than a fee.

Samis, 143 Wn.2d at 810.

Similarly, in *Carrillo*, Division II of the Court of Appeals addressed whether the City of Ocean Shore's water and sewer "availability charges" were an unconstitutional tax when charged against vacant lots that were not connected to the City's water or sewer system. In addressing the second *Covell* factor, the court held that the charges assessed against unconnected owners:

are not segregated and used only for services targeted to those owners required to pay the fee. Nor has the City articulated how the assessed property owners are regulated by these availability charges. Thus, the second factor points to the charges being taxes, not fees.

Carrillo, 122 Wn. App. at 606.

Here, the System Rate component of the wastewater charge that has been assessed against Elliott Bay Marina has gone into the general Drainage and Wastewater fund for operation of the City's sewer and wastewater system. If anything, the funds regulate only those entities that

discharge into the City's system. As with the vacant lots in *Samis*, Elliott Bay Marina is entirely distinct from entities that actually discharge into the City of Seattle's wastewater system. But because Elliott Bay Marina discharges directly into King County Metro's system and does not use the City's sewerage system, or contribute to the City's wastewater issues, the funds are not used to "regulate" the entity or activity being assessed.

The City's System Rate component of its wastewater charges fails the second *Covell* test and is therefore an unconstitutional tax.

3. There is no direct relationship between the System Rate and the service received, or burden created, by the Marina

The third *Covell* test requires a determination of whether a direct relationship exists between the rate charged and either a service received by the fee payers or a burden to which they contribute. *Covell*, 127 Wn.2d at 879; *Samis*, 143 Wn.2d at 811. "If no such relationship exists, then the charge is probably a tax in fee's clothing." In the case of Elliott Bay Marina, neither relationship exists. The Marina does not receive a service from the City's sewerage system. Nor does the Marina contribute a burden to the City's sewerage system.

The Marina's situation is distinct from recent decisions upholding stormwater charges as regulatory fees. For example, in *Tukwila School*

District No. 406 v. City of Tukwila, 140 Wn. App. 735, 167 P.3d 1167 (2007), Division I upheld the City's imposition of storm and surface water charges to the school district based on the percentage of developed surface area per acre owned by the district within the service area. As the court explained with regard to the third *Covell* test, "[s]o long as the rate is reasonable based on usage – i.e., the amount of the property owner's contribution to the problem – the fee is directly related to the service provided." *Id.* at 750.

But again here, unlike *Tukwila*, the Marina does not contribute to Seattle's sewer system. There is no relationship between the System Rate charged and the Marina's contribution to the problem.

Nor is it sufficient for the City to claim a general benefit and responsibility to the City as a whole. As the Supreme Court explained in

Samis:

Soap Lake argues that the standby charge is justified as payment for the general benefit of living in a community with "a financially viable, efficient and operable water/sewer system" as well as the enhancement of the value and marketability of properties where connection to city water and sewer lines is readily "available." We find such arguments untenable under *Covell*. While the Seattle properties at issue in *Covell* also stood to benefit from public spending of residential

street utility charges on the construction, operation, preservation, and expansion of abutting streets, nearby transportation infrastructure, and city-wide public transit systems, we held that “the direct relationship between the charges and the benefits received [or burden imposed] by those who pay them is missing.” Indeed, *most* public expenditures have the effect of enhancing the value and marketability of nearby real estate. However, stretching the “direct relationship” test to include such indirect enhancements would render the third *Covell* test meaningless as a guide for distinguishing fees from taxes. While our case law is clear that a “charge may be deemed a regulatory fee even though the charge is not individualized according to the benefit accruing to each fee payer or the burden produced by the fee payer,” here there is neither an identifiable service being received by the fee payers nor a burden to which they contribute to which the City’s annual \$60 charge has any direct relationship.

Samis, 143 Wn.2d at 813-14.

Because Elliott Bay Marina discharges directly into King County Metro’s system and does not use Seattle’s sewerage system, it neither contributes to Seattle’s system nor receives a direct benefit from Seattle’s system. Thus, there is no direct relationship between the rate charged Elliott Bay Marina for the System Rate component of the City’s

wastewater charge and either the service received or the burden to which Elliott Bay Marina contributes.

Because the System Rate portion of the wastewater charges fails the third *Covell* test, it is an illegal tax and not an allowed regulatory fee.

C. The City Should Be Required to Refund the System Rate Charges Paid by Elliott Bay Marina

Because the City's charge of its System Rate to Elliott Bay Marina is an unconstitutional tax, the remedy is a refund of the amount paid. *See, e.g., Covell*, 127 Wn.2d at 892; *Carrillo*, 122 Wn. App. at 620. In general, the time limit for seeking a refund of an illegal tax is three years. *See, Carrillo*, 122 Wn. App. at 610, *citing Henderson Homes, Inc. v. City of Bothell*, 124 Wn.2d 240, 248, 877 P.2d 176 (1994).

Elliott Bay Marina is seeking a refund of the System Rate charges, with interest, paid after June 8, 2009 (three years before the filing of the Complaint). Between June 26, 2009 and the end of December 2012, the Marina has paid \$95,257.37 to the City for System Rate charges. The Marina has continued to pay System Rate charges in 2013. CP 81, ¶¶ 10-11; CP 106-111.

VI. CONCLUSION

For the foregoing reasons, the Court should reverse the superior court's decision granting summary judgment and declare that the City's

System Rate charges against Elliott Bay Marina are an illegal tax and should be reimbursed in full, with interest.

Dated this 16th day of August, 2013.

Respectfully submitted,

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Seattle Municipal Code

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Title 21 - UTILITIES

Subtitle II - Sewers

Chapter 21.28 - WASTEWATER RATES AND CHARGES

21.28.030 Rates and charges—Purpose.

The public health, safety, and welfare require that the City fix and collect wastewater rates and charges measured by water consumption and impose the same upon premises in the City for the carrying and discharge of all wastewater and drainage into the municipal sewerage system of the City as presently maintained and operated, together with additions and improvements thereto and extensions thereof, and for the payment of charges of King County Department of Natural Resources (herein called "King County" and formerly Municipality of Metropolitan Seattle ("Metro")) and of Southwest Suburban Sewer District (herein called "Southwest Suburban") for wastewater interception, treatment, and disposal, which sewerage utility rates and charges are fixed in the Seattle Municipal Code; provided that the local improvement district method of providing for the construction of sewers and trunk sewers to serve abutting property shall be continued in the manner provided by law.

Seattle Municipal Code

Information retrieved August 16, 2013 11:21 AM

Title 21 - UTILITIES

Subtitle II - Sewers

Chapter 21.28 - WASTEWATER RATES AND CHARGES

21.28.040 Wastewater volume charge.

A. There is hereby imposed upon all premises for which Seattle Public Utilities provides wastewater services and on which water is consumed a wastewater volume charge for wastewater services. The wastewater volume charge shall be calculated in accordance with this SMC Chapter 21.28 and shall be based on the measured volume of water from all sources consumed on the premises, except that there shall be a minimum wastewater volume charge for one (1) CCF per month to cover billing and general administrative costs. The following premises shall be exempt from the wastewater volume charge:

1. Premises which are not connected and not required under SMC Section 21.16.040 (Section 3 of Ordinance 97016) to be connected to the public sewer system;
2. Premises, the owner, agent, lessee, or occupant of which has not been notified in accordance with SMC Section 21.16.040 (Section 4 of Ordinance 97016) to connect to the public sewer system.

B. The wastewater volume rate shall be the sum of the treatment rate and the system rate, as follows:

1. Treatment rate: The "treatment rate" shall be the rate required to pay the wastewater share of "treatment cost" which is the cost of wastewater treatment, interception and disposal services and any associated costs required to meet Drainage and Wastewater Fund financial policies. The treatment rate shall be the amount obtained when (a) the projected wastewater treatment cost is divided by (b) the projected billed wastewater consumption, each for the next calendar year, and the result is multiplied by 116.9 percent to cover the costs of taxes and low income rate assistance. The projected treatment cost shall be the treatment cost anticipated for the upcoming calendar year, which may include an adjustment to reflect the difference, whether positive or negative, between the total expected treatment cost for the current year and the total wastewater volume charge revenues attributable to the treatment rate expected for the current year. The treatment rate is designed to pass through cost changes driven by King County and may be adjusted by ordinance at any time in response to such charges.
2. System rate: The "system rate" shall be the rate required to pay the cost of carrying and discharging all wastewater and any wastewater funded-share of stormwater into the City sewerage system, as presently maintained and operated and as may be added to, improved and extended.

3. The wastewater volume rate per CCF shall be in accordance with the following schedule:

	Effective Jan. 1, 2012	Effective Jan. 1, 2013	Effective Jan. 1, 2014	Effective Jan. 1, 2015
Treatment Rate	\$6.94	\$7.69	\$7.69	\$7.69
System Rate	\$3.74	\$3.96	\$4.06	\$4.15
Wastewater Volume Rate	\$10.68	\$11.65	\$11.75	\$11.84

C. For so long as any franchise fee is imposed by the City of Shoreline on The City of Seattle's operation of its sewer system in the City of Shoreline, the wastewater volume charge imposed on premises within the City of Shoreline shall include a City of Shoreline franchise charge of Two Dollars and Thirty-one Cents (\$2.31) per month.