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

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NO. 70453-2-I

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ELLIOTT BAY MARINA,

Appellant,

v.

CITY OF SEATTLE, a municipal corporation,

Respondent,

and

STATE OF WASHINGTON and KING COUNTY,

Respondents.

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

The City's Response rests almost entirely on the fiction that instead of distinctly owned sewerage systems there is truly only a "single comprehensive" system apparently owned and operated jointly by the City and King County. The City's argument is without basis in fact.

The 1961 Agreement for Sewage Disposal ("Basic Agreement") between the City and King County makes clear that there are two distinct systems. The "Metropolitan Sewerage System" (owned by King County) and the "Local Sewerage Facilities" (owned by the City "for collection of sewage to be delivered to the Metropolitan Sewerage System."). Similarly, City Code, defines into two distinct components of the City's wastewater charge – 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 money paid to King County for treatment. The remaining 33 percent of the wastewater charge is deemed the "System Rate." The System Rate 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... .*"

SMC 21.28.040.B.2 (emphasis added). There is simply no evidence to support the City's creation of a single comprehensive system.

Because the Marina discharges directly into King County Metro's system and does not use or burden the City's sewerage system, the City's System Rate does nothing to regulate the Marina. Instead the City's imposition of the System Rate charge on the Marina serves only to subsidize those entities that actually do burden and benefit from the City's system. The System Rate fails all three *Covell* factors. 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. REPLY TO THE CITY'S STATEMENT OF THE CASE**

### **A. The 1961 Basic Agreement Establishes Two Distinct Sewerage Systems**

The City does not dispute the critical fact that the Marina discharges directly to King County's South Magnolia Trunk line and completely bypasses the City's sewerage system. Instead, a significant portion of the City's response is premised on the fiction that the City and King County operate a "single comprehensive system." Resp. Br. at 6, 18-21. While the City asserts that the Basic Agreement provides for a "single

comprehensive system” it does not provide a single reference within the Basic Agreement to this effect. *Id.* Indeed, the City cites no factual evidence in support of its assertion.

Certainly nothing on the face of the Basis Agreement identifies a “single comprehensive system.” CP 134-156. To the contrary, the Basic Agreement is a contract that defines the obligations of King County and the City to maintain and operate two separate and distinct sewerage systems. Indeed, the Basic Agreement defines two systems – the “Metropolitan Sewerage System” (owned by King County) and the “Local Sewerage Facilities” (owned by the City “for collection of sewage to be delivered to the Metropolitan Sewerage System.”) Basic Agreement, Section 1 (CP 135-136).<sup>1</sup> Under the plain terms of the Agreement, operation, maintenance and control of the two systems lie with the distinct owners.<sup>2</sup>

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<sup>1</sup> *See also* Basic Agreement, Section 2, CP 136 (City agrees to deliver sewage it collects to the Metro System and Metro agrees to accept); Section 3, CP 136-137, (Metro commits to construct, maintain, operate, repair, replace and improve all facilities necessary to dispose of sewage delivered to the Metro system); Section 6, CP 141, (each “participant”, including the City, commits to construction, maintenance, and operation of the Local Sewerage Facilities).

<sup>2</sup> This is further supported by the 1987 “Joint Use Agreement” for the South Magnolia trunk line where the City is allowed to use a portion of the line but the City accepted “no responsibility for the operation or maintenance of the trunk Sewer...” CP 168-170.

City Code similarly recognizes that there are two distinct rates and uses for the money collected. 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 money paid to King County for treatment. The remaining 33 percent of the wastewater charge is deemed the “System Rate.” The System Rate 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... .*” SMC 21.28.040.B.2 (emphasis added).

Finally, the City’s own GIS mapping system identifies and distinguishes between County-owned sewer pipes and City-owned sewer pipes. CB 901-902 (Declaration of Holly Brandt, ¶¶ 2-3). The City’s GIS maps show clearly that the Elliott Bay Marina “Direct Connects to South Magnolia Trunk.” CP 904. The GIS map similarly identifies the trunk line as the “KC South Magnolia Trunk” and a “KC Mainline” and distinct from City-owned “DWW” (drainage and wastewater) mainlines. *Id.*

In short, there simply is no factual support in the record supporting the City's assertion that there is a "single comprehensive system."<sup>3</sup>

**B. The 1987 Joint Use Agreement Did Not Convert Ownership of the King County's South Magnolia Trunk Line to the City**

The City implies that because of its 1987 Joint Use Agreement allowing for the use of a portion of King County's South Magnolia Trunk Line that the Marina's sewage may actually be passing through the City's sewerage system. Resp. Br. at 7. Again, there is no evidence in the record to support this implication. Under the "Joint Use Agreement," the City was granted authority to make direct local side sewer connections to the South Magnolia trunk line. CP 168-170. 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.*<sup>4</sup>

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<sup>3</sup> King County certainly does not appear to believe that there is a "single comprehensive system." For example, at the time King County authorized the Marina to connect to its South Magnolia Interceptor the County informed the Marina that it should notify the City "so they can have an operator at *their* local pump station controlling the flows *from their system into the Metro system.*" CP 78. (Emphasis added).

<sup>4</sup> In essence, the City's use of a portion of King County's trunk line is factually no different than the Marina's. Both entities bypass "collectors" and instead discharge directly into the trunk line by agreement of King County.

**C. The Marina's Connection to King County's Magnolia Trunk Line is Consistent with the Basis Agreement**

The City also implies that the Marina's direct connection to King County South Magnolia Trunk Line was not allowed under the 1961 Basic Agreement. Resp. Br. at 6.<sup>5</sup> While it is true that the Basic Agreement prohibits King County from directly accepting sewage from entities within the City without the City's authority, the City ignores that it indeed granted written permission for the Marina to connect directly to Metro's trunk line. As the City later admits, "In December 1990, the City's Department of Construction and Land Use (DCLU) approved EBM's water and sewer plan, which provided for EBM's sanitary sewers to be connected to the Magnolia trunk line ..." Resp. Br. at 9. There was no impropriety in the Marina's direct connection.

But the City's approval of the connection does not mean that the Marina somehow began using the City's sewerage system. The City speculates, without any factual support, that it "could" have refused the connection and required the Marina to connect to City's system or construct a "very long side sewer instead." Resp. Br. at 9. The City's

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<sup>5</sup> The City emphasizes, without explanation, its statement that Section 2 of the basic agreement requires written authorization from the City prior to Metro accepting sewage from anyone other than the City.

speculation fails for at least two reasons. First, the City ignores that its authority to demand construction of a new side sewer is limited by SMC 21.16.040.A to where the existing sewer is within 300 feet of the development. There is no evidence that the City maintained a sanitary or combined sewer within 300 feet of the Marina in 1986.

Second, and more importantly, the City ignores that the Marina's approval for a direct connection was part of an underling agreement that required the Marina, at its own significant expense, to move and protect Metro's Magnolia trunk line – a move that even the Environmental Impact Statement ("EIS") prepared by the City recognized was a benefit for public health and the environment. CP 39-42, ¶ 7 (Kaiser Dec.); CP 44-59 (Draft and Final EIS Excerpts); CP 61-64 (Agreement for Relocation). The Marina's consent to assist King County with protecting its trunk line, and the City's consent to allow the Marina to directly connect to the trunk line, did not convert the Marina to a "user" of the City's sewerage system.

**D. The City's Assertions that the Marina Benefits from or Burdens Seattle's Sewerage System are Not Supported**

**1. The Marina's use of sub-meters does not justify imposition of the City's System Rate**

The City's assertion that the Marina "receives the benefits of SPU wastewater services" because it was allowed to install and use "sub-

meters” is without support. Resp. Br. at 10. It is true that by using sub-meters the Marina is able to reduce its wastewater bill to account for wastewater that is not actually discharged into King County’s system. The City, however, ignores: (1) that the authority to install sub-meters is based on the original 1961 Agreement<sup>6</sup> and City Code (SMC 21.28.090.A.1); (2) that the Marina was required to purchase the submeters; and (3) that the Marina was required to pay a surcharge to the City for the initial review, inspections, and billing initiation. CP 869-874.

**2. The Marina does not contribute to the City’s CSOs**

The City also implies that the Marina somehow uses, contributes to, or burdens the City’s combined sewage overflow (“CSO”) system. Resp. Br. at 12-13. The City points specifically to a CSO to the east of Interbay basin. But as is clear on Figure 1-1 of the 2010 CSO Reduction Plan Amendment, CP 319, the closest CSOs to the Marina are CSO 64 which serves western Magnolia and CSO 68 which serves Interbay. The Marina does not discharge surface water into either of these basins. Nor does the Marina discharge to either CSO. The Marina does not contribute to or burden the City’s CSO program.

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<sup>6</sup> CP 137-138, 1961 Agreement Section 5.1, provides that that the City’s calculation for sewage rates must be based on water meter records, but that the consumption may “be adjusted to exclude water which does not enter the sanitary facilities of a customer.”

**E. Additional Key Material Facts are Not Disputed**

While the City attempts to create dispute by rewriting the 1961 Basis Agreement and create a “single comprehensive system,” other key material facts are not disputed. For example, the City does not dispute:

- the material facts surrounding Elliott Bay Marina’s unique situation, including its cooperation with King County to relocate and protect the South Magnolia trunk line;
- that King County’s approval, with the City’s consent, of the Marina’s direct connection to the King County’s South Magnolia Trunk line;
- that by discharging directly into King County’s trunk line, the Marina does not discharge any of its sewage into the City owned and operated sewerage system;
- that between June 26, 2009 and March 25, 2013, the Marina has paid \$101,198.64 to the City for System Rate charges. CP 81, ¶¶ 10-11; CP 106-111.

**III. REPLY ARGUMENT**

**A. The Marina is Not Mounting a Rate Challenge**

The City’s first argument, that the Marina is not challenging an unconstitutional tax but instead mounting a rate challenge, necessarily

fails. The City's argument is premised entirely on the City's unsupported fiction that there is a single comprehensive sewer system. Resp. Br. at 17-19. As discussed above, under the 1961 Basic Agreement the City and King County operate separate systems. While the City is charged under the agreement with billing customers, City Code expressly divides the wastewater rate into two separate components -- the "Treatment Rate" and the "System Rate." SMC 21.28.040.B. The Marina is not challenging the specific rate charged either by King County for Treatment or the rate that the City charges those that burden or benefit from the City's system. Instead, because the Marina does not discharge into, burden, or receive benefit from the City sewerage system the Marina challenges the City's imposition of the System Charge on the Marina. This is not a "rate challenge, but a challenge to the constitutionality of the charge.

**B. Utility Charges are Not Per-Se Valid Fees**

The City's Response, at 22-24, asserts that "as a general matter, *use-based* utility fees are not taxes." (Emphasis added). While the City's general assertion may be true, the City ignores its own words -- that the fees must be "use based." Indeed, the City only notes in passing the equally black letter corollary -- that if utility rates "must be paid regardless of the quantity used, *or whether any is used* ... such a rate is a tax."

Eugene McQuillen, *The Law of Municipal Corporation*, 3<sup>rd</sup> Ed. Rev., § 35:69 (2006) (emphasis added).

Similarly, while the City cites *Twitchell v. City of Spokane*, 55 Wash. 86, 89, 104 P. 150 (1909), it ignores what the Court actually stated. As the Court explained “ ‘[w]ater rates paid by *consumers* are in no sense taxes, but nothing more than the price paid for water *as a commodity*. The obligation to pay *for the use of water* rests either on express or implied contract on the part of *the consumer* to make compensation for water *which he has applied for and received.*’ ” (emphases added) quoting 30 *The American and English Encyclopaedia of Law* 422 (2d ed. 1905). The obvious corollary is that if the water rates are being charged to someone that does not consume or use water and did not apply for nor receive water, the fee is a tax.

Here, even though the Marina does not use, burden or contribute to the City’s sewerage system, the City is requiring the Marina to pay the System Rate charge over and above the costs of treatment. Such a rate is a tax. *Id. Compare Storedahl Properties, LLC v. Clark County*, 143 Wn. App. 489, 498-506, 178 P.3d 377 (2008) (upholding County’s Clean Water Charge (“CWC”) as a regulatory fee where CWC was used to regulate stormwater impacts and Storedahl’s property contributed stormwater

runoff within the service area) *with Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 807-811, 23 P.3d 477 (2001) (sewer and water charge for uninhabited lots deemed an unconstitutional tax where lots did not receive water service and did not burden sewer system).

**C. Application of the *Covell* Factors Confirms That the City's Imposition of its System Rate Charge on the Marina is an Unconstitutional Tax**

The parties agree that whether a charge is a tax or regulatory fee depends on the three factors set out in *Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995). The charge must pass all three factors to be deemed a valid regulatory fee. *Covell*, 127 Wn.2d at 885 (even though funds were segregated for a specific purpose that factor alone was not dispositive). Because the City's System Rate fails all three factors when applied to the Marina, it is an unconstitutional tax.

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

The first *Covell* factor requires a determination of whether the primary purpose of the charge is to accomplish desired public health benefits that cost money or if the purpose is to regulate. *Covell* 127 Wn.2d at 879; *Samis*, 143 Wn.2d at 806; *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 603, 94 P.3d 961 (2004). The sole stated purpose of the City's System Rate is 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 wastewater into the City sewerage system, the System Rate performs no regulatory function in relationship to the Marina. The primary purpose for collecting the System Rate from the Marina is to collect funds to subsidize the City’s actual customers.

Unlike the Marina’s situation, in each of the cases cited by the City, the party challenging the fee either received a benefit from the fee or burdened the system that was being charged for. *See, Teter v. Clark County*, 104 Wn.2d 227, 234-236, 704 P.2d 1171 (1985) (charge for storm water control facility appropriate where appellants’ property was within and contributed stormwater to the basin); *Smith v. Spokane County*, 89 Wn. App. 340, 350-51, 948 P.2d 1301 (1997) (fee for water withdrawal and septic discharge over aquifer protection area appropriate where appellant directly benefited by receiving groundwater from aquifer); *Thurston County Rental Owners Ass’n v. Thurston County* 85 Wn. App. 171, 178-179, 931 P.2d 208 (1997) (fee for monitoring and protection of

groundwater appropriate where appellant was seeking permit for septic system); *Tukwila School Dist. No. 406 v. City of Tukwilla*, 140 Wn. App. 735, 745-747, 167 P.3d 1167 (2007) (storm and surface water charge was appropriate in order to relieve a burden created by property owners, including the appellant) whose impervious surfaces contribute directly to runoff and pollution problems); *Storedahl* 143 Wn. App. at 498-506 (County's clean water charge appropriated where it was used to regulate stormwater impacts and the appellant's property contributed stormwater runoff within the service area).

Instead, this case is almost identical to the situation in *Samis*. In *Samis* the Court concluded that the City of Soap Lake's "standby charge" for properties abutting, but not connected to, the water or sewer system was an illegal tax under the first *Covell* factor because there was simply no "utility service or burden applicable to the properties being charged." *Samis*, 143 Wn.2d at 809. While the System Rate may regulate those discharging into the City's sewerage system, the Marina receives no service and imposes no burden on the City's sewerage system. *See also, Carrillo*, 122 Wn. App. at 604-606 (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).

**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.” *Covell*, 127 Wn.2d at 886. Again, because the Marina does not discharge into or burden the City’s sewerage system, this situation is really no different than the situation in *Samis*. The more than \$100,000.00 that the City has collected from the Marina since June 2009 has been allocated to the costs of operating and maintaining the “City sewerage system,” SMC 21.28.040.B.2, “regulating an entirely *distinct* group” from the Marina – namely dischargers that *are* connected to the City’s sewerage system. *Samis*, 143 Wn.2d at 810-11.

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

The third *Covell* factor examines 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. “If no such relationship exists, then the charge is probably a tax in fee’s clothing.” *Samis*, 143 Wn.2d at 811. In the case of the Marina, neither

relationship exists. Other than receiving a monthly bill for water and wastewater charges, 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.

**D. Equitable Estoppel is Not Applicable to Defend an Illegal Tax**

It is well established that actions against local governments to recover illegal taxes are treated as actions under an implied contract. *See Corwin Inc. Co. v. White*, 166 Wash. 195, 6 P. 332 (1929); *Adams Cy. v. Ritzville State Bank*, 154 Wash. 140, 144, 281 P. 332 (1929). *See also, Robinson v. City of Seattle*, 119 Wn.2d 34, 83-84, 830 P.2d 318, 346 (1992). It is also well established that equitable estoppel is not available as a defense against an illegal contract. *See Finch v. Matthews*, 74 Wn.2d 161, 169, 443 P.2d 833, 838-39 (1968); *Vedder v. Spellman*, 78 Wn.2d 834, 837, 480 P.2d 207, 209 (1971).<sup>7</sup>

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<sup>7</sup> Even if equitable estoppel were an available defense, equitable estoppel is not favored, and the party asserting estoppel must prove each of its elements by clear, cogent, and convincing evidence. *Mercer v. State*, 48 Wn. App. 496, 500, 739 P.2d 703, *review denied*, 108 Wn.2d 1037 (1987). For the same reasons explained by the court in *Carrillo v. City of Ocean Shores*, because "payment under protest" of a tax is not required for a refund of an illegal tax, the City cannot demonstrate an "admission, statement, or act" that is inconsistent with the Marina's claim that the City's System Rate is an illegal tax. 122 Wn. App. at 610-612.

#### IV. 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. The Marina should be reimbursed in full, with interest, for the period between June 26, 2009 and the present.

Dated this 20<sup>th</sup> day of December, 2013.

Respectfully submitted,

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