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COURT OF APPEALS
TACOMA, WA
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NO. 34798-9-II

IN THE COURT OF APPEALS

STATE OF WASHINGTON

DIVISION II

PAUL W. POST,
REX WILLIAMS and FRANCES WILLIAMS (husband and wife),
and GERALD PAULSON and CAROL PAULSON (husband and wife)

Appellants,

v.

CITY OF TACOMA

Respondent.

APPELLANTS' BRIEF

ORIGINAL

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A. ASSIGNMENTS OF ERROR.

ASSIGNMENTS OF ERROR:

1. The trial court erred in determining that TMC 12.08.530 creates an “in-kind” service authorized by the exclusion from the requirements of RCW 35.92.021 and/or RCW 35.67.025.
2. The trial court erred in determining that providing surface water drainage from city streets is a proprietary function rather than a governmental function.
3. The trial court erred in determining the primary purpose of the City charging adjacent property owners for city street-created runoff was to regulate the property owners’ activities rather than raise revenue.
4. The trial court erred in determining the charges to property owners for surface water runoff created by city streets were allocated for the authorized regulatory purpose.
5. The trial court erred in determining that there is a direct relationship or nexus between the regulatory fee charged and the service received by those who pay the fee.
6. The trial court erred by finding the facts leading to the enactment of TMC 12.08.530 are presumed conclusive and cannot be challenged.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

1. DO RCW 35.92.021 AND/OR RCW 35.67.025 AUTHORIZE THE CITY TO DECLARE MAINTENANCE OF THE STREETS AS AN “IN KIND” SERVICE BY EXCLUDING CITY STREETS FROM SURFACE WATER CHARGES UNDER TMC 12.08.530? (Assignment of Error No. 1)
- 2(a-e) ARE THE CHARGES IMPOSED UPON THE PRIVATE PROPERTY OWNERS BY THE CITY OF TACOMA FOR STORM DRAINAGE CREATED BY CITY STREETS IN REALITY A TAX THAT MAY BE IMPOSED ONLY PURSUANT TO EXPRESS TAXING AUTHORITY? (Assignment of Error Nos. 2, 3, 4, and 5)

- (b) IS PROVIDING SURFACE WATER DRAINAGE FROM CITY STREETS A GOVERNMENTAL FUNCTION? (Assignment of Error No. 2)
 - (c) IS THE PRIMARY PURPOSE OF THE CITY CHARGING ADJACENT PROPERTY OWNERS FOR CITY STREET-CREATED RUNOFF TO RAISE REVENUE RATHER THAN REGULATE THE PROPERTY OWNERS' ACTIVITIES? (Assignment of Error No. 3)
 - (d) ARE THE CHARGES TO PROPERTY OWNERS FOR SURFACE WATER RUNOFF CREATED BY CITY STREETS ALLOCATED FOR AN AUTHORIZED REGULATORY PURPOSE? (Assignment of Error No. 4)
 - (e) IS THERE A DIRECT RELATIONSHIP OR NEXUS BETWEEN THE REGULATORY FEE CHARGED AND THE SERVICE RECEIVED BY THOSE WHO PAY THE FEE? (Assignment of Error No. 5)
3. IS THE CITY CORRECT IN ITS CLAIM THAT THE PRESUMPTION OF THE FACTS DETERMINED BY THE CITY ORDINANCE IS CONCLUSIVE AND THEREFORE CANNOT BE CHALLENGED? (Assignment of Error No. 6)
 4. ARE APPELLANTS ENTITLED TO ATTORNEY'S FEES UNDER THE COMMON FUND DOCTRINE?

B. STATEMENT OF THE CASE.

Plaintiffs/Appellants brought an action against the City of Tacoma for injunction and declaratory relief to require the City to pay its proportionate share of surface and storm water runoff as required by RCW 35.67.025 and/or RCW 35.92.021 and to reimburse class members for charges created by an unconstitutional ordinance. The city streets create a substantial portion

of the burden of storm and surface water runoff that must be disposed of by the Municipal Sewer System (CP 316). The City of Tacoma passed TMC 12.08.530 stating that city streets, roads, alleys and right of ways provide storm and surface water services to properties located in the City of a value equal to the reasonable charges the City would otherwise have to pay for the runoff created by the streets, roads, and alleys.

The effect of TMC 12.08.530 imposes upon the owners of the multiple individual properties the entire burden of the cost of disposing of the storm and surface waters created by public streets and right of ways. Said charges are passed on as fees. The history of TMC 12.08.530 provided by the City shows that the City (after unsuccessfully attempting storm bond issues in 1972 and 1976 to repair a deteriorating storm drainage system (CP 65)) passed a resolution creating a storm sewer utility (CP 62-65; CP 205-209). (CP 211-234). As a result of said resolution, the City passed Ordinance No. 21638, which created a surface water and storm drainage utility (CP 235 - 238) on April 3, 1979. Said resolution specifically stated there was no estimated cost of creating the system. (CP 237). Ordinance No. 21632 was passed at the same time to regulate in part the storm and surface water disposal. (CP 239-277). Rates were determined by establishing a user type rate structure based upon the type of land use and the area of the property for

which the charge was being determined. (CP 191-195). As can be seen in the consultant's review of the rate study, no mention was made of the storm and surface water runoff created by the city right of ways. TMC 12.08.530 was subsequently passed by the City for the purpose of paying for the burden to the storm and surface water system created by the city streets. (CP 131-132; City's memorandum of authorities).

The City moved for summary judgment asking the court to dismiss all claims brought by Plaintiffs/Appellants. Plaintiffs/Appellants moved for summary judgment declaring the charges to Plaintiffs/Appellants for the City's portion of the runoff an unconstitutional tax.

Judge Frank Cuthbertson granted the City's motion and denied Plaintiffs'/Appellants' motion in its decision dated February 10, 2006, and denied Plaintiffs'/Appellants' motion for reconsideration on March 10, 2006. The court determined the charges imposed by the City are regulatory fees and not unconstitutional taxes. The court further determined TMC 12.080.530 does not create an unconstitutional tax and is an in kind benefit contemplated by RCW 35.92.021 and/or RCW 35.67.025.

C. ARGUMENT.

1. THE STATE STATUTES DO NOT AUTHORIZE THE CITY TO DECLARE MAINTENANCE OF THE STREETS AS AN IN KIND SERVICE BY EXCLUDING CITY STREETS FROM STORM AND SURFACE WATER CHARGES.

RCW 35.92.021 states as follows:

Except as otherwise provided in RCW 90.03.525, any public entity and public property, including the state of Washington and state property, shall be subject to rates and charges for storm water control facilities to the same extent private persons and private property are subject to such rates and charges that are imposed by cities and towns pursuant to RCW 35.92.020. *In setting these rates and charges, consideration may be made of in kind services such as stream improvements or donation of property.*

(RCW 35.67.025 states identical language except reference to RCW 35.67.020 is made.)

Neither the City nor Plaintiff provided cases that define or give examples of in kind services that are or are not in compliance with the statute.

Even if the Court were to determine that the charges being imposed by the City of Tacoma for the maintenance of the City streets by increasing the Environmental Services Division (the utility created by the City to dispose of storm and surface water, hereinafter “ESD”) rates to all rate payers was a fee and not a tax, RCW 35.92.021 and/or RCW 35.67.025 do not authorize the declaration of the maintenance of the streets as an in kind service. As stated in the case of *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003), ordinances and statutes providing for government functions are very restrictive in the powers that they allow to be inferred from those statutes. See *Okeson v. City of Seattle* at 549.

If it was the intent of the legislature to include an in kind service of this nature, it would have been a simple matter to state the same along with stream improvements and donation of property. Street maintenance would be the largest conceivable in kind service. It doesn't seem to be within the realm of possibility that the legislature would have omitted such an allowance from the authority granted in the statute if they had intended to include the same as an in kind service.

The statute would have to be extraordinarily construed to transpose the type of in kind service that can be exchanged for charges for storm drainage runoff created by the city streets. Such a statutory construction would be a liberal inference in deed. It is doubtful the state legislature would not have recognized that such an in kind service in lieu of a regulatory fee would be a tax and therefore in violation of the Washington State Constitution, Article VII, Section 1. TMC 12.08.530 is in deed in violation of the authority given to it by statute. To say that providing streets to benefit the utility is comparable to making stream repairs or donating property to the utility is an extraordinary stretch. The exclusion of the city streets by TMC 12.08.530 does not comply with the "in kind" provision of RCW 35.92.021 and/or RCW 35.67.025.

2. THE CHARGES IMPOSED ON ESD RATE PAYORS FOR DRAINAGE CREATED BY CITY STREETS IS A TAX RATHER THAN A REGULATORY FEE.

(a) The City's ordinance must comply with four elements in order to have its surface water charges for city streets to be considered a fee. A number of cases develop the steps in which the court must determine whether or not the charges imposed by Defendant City are fees or taxes. *Covell v. City of Seattle*, 127 Wn.App. 874, 905 P.2d 324 (1995); *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 23 P.3d 477 (2001); *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003); *Carrillo v. City of Ocean Shores*, 122 Wn.App. 592, 94 P.3d 961 (2004). *Okeson v. City of Seattle* is especially helpful in that it develops the steps and methodology in answering the questions around the first issue. *Okeson* involved the attempts by the City of Seattle to pass on the electrical costs in maintaining the street lights within the city limits of Seattle to the city light utility rate payors. Likewise, in this case, the City of Tacoma is attempting to pass on the cost of disposing of storm drainage created by the city streets to the rate payors of the Environmental Services Division of the Public Works Department of the City of Tacoma. The first step in answering whether the cost for the disposing of the storm drainage created by the city streets may be passed on to the rate payors, is to determine whether providing drainage for storm and surface water runoff created by the city streets is a governmental or proprietary function of the government. If the service provided is governmental in

nature, the charge is a tax and a determination must be made whether the tax was lawfully imposed. If the charges are determined to be for the benefit of individual properties and are therefore proprietary in nature, the City must pass three additional factors to determine that the charges are a fee. See Covell and Okeson, supra.

(b) PROVIDING METHODS FOR DISPOSING OF STORM AND SURFACE WATER RUNOFF CREATED BY CITY STREETS IS A GOVERNMENTAL FUNCTION.

The function of the City to provide surface water drainage for city streets is a benefit to the public in general and therefore “governmental” in nature. To start out the analysis, it is important to note that the cases cited above provide that where governmental functions are involved, ordinances and statutes are more strictly construed and implied powers are less likely to be allowed. See Okeson at 549. In determining whether or not the service provided by the City in disposing of the storm water created by the city streets is governmental or proprietary, it must first be determined if the services are for the common good of all. *Okeson* defines a governmental function as one that is for the common good of all. By transforming the street into a drainage benefit and paying for that by assessing a charge to rate payors by dividing its runoff cost amongst all rate payors is in essence making the rate payors pay for street maintenance that is already paid for by tax dollars. Maybe the

biggest issue as to whether the function being provided is governmental or proprietary is whether the rate payor can control the amount he is paying for the service. See *Covell* and *Okeson*, supra. If the service is proprietary, it is a business that the government engages in and may regulate. The rate payor can reduce the amount s/he has to pay by decreasing the service needed. However, the rate payor cannot reduce the pay for that portion of the city provided benefit because that is controlled by the amount of runoff created by the city street. They cannot control how much of the city street borders their property. They cannot control the type of surface the city has on its streets. If the court determines that disposal of the runoff created by the city streets is a general governmental function, then the question whether the costs imposed are a fee or a tax is answered in favor of a tax. If the costs are a tax, then the question must be asked whether the tax was lawfully imposed.

The Plaintiffs/Appellants do not contest that providing storm drainage facilities to handle runoff from private properties is proprietary in nature. However, there can be no question that the same function of handling runoff from public properties (city streets) is governmental in nature. We are talking about the streets' benefit to the utility. TMC 12.08.530 has the City providing streets that benefit property owners. The streets are provided for the common good. The fact the City declares that the streets benefit private

property owners runoff belies the fact said streets were created for governmental purposes as stated in *Covell v. City of Seattle*, supra and *Okeson v. City of Seattle*, supra. The court in *Covell* and *Okeson* stated that streets were created for the common good of all. The *Okeson* court also found that street lights provided a special benefit to adjacent property owners. Would the city be able to charge for the benefit they perceive the utility is receiving? Obviously it would not. *Okeson* showed that providing street lights is a governmental function. The fact that it incidentally benefited adjacent properties made no difference. Providing streets is also a governmental function. The fact it incidentally benefits adjacent properties makes no difference.

There can be no question that providing and maintaining streets, roads, alleys, and right of ways is a governmental function because they operate for the benefit of the general public and not for the comfort and use of the individual utility customers. *Okeson v. City of Seattle*, supra. The utility customers have no control over the provision or the use of the streets. They cannot interfere with cars traveling the streets nor can they dictate any conditions over which the City may do repairs on the streets in front of the rate payer's property. Hence, while the storm and surface utility (ESD) itself provides a proprietary function of government, the maintenance of the streets

and disposing of city-created surface water runoff is a governmental function.

There can be little argument of the governmental nature of the service provided in maintaining the streets, which includes managing storm and surface drainage created by the streets. As a result, it is necessary to go on to the next element as dictated by the *Covell* and *Okeson* cases.

Since providing storm and surface drainage for runoff created by City streets is a governmental function, it must be determined whether TMC 12.08.530 imposes a tax or fee to pay for those costs. Generally, taxes are imposed to raise money for the public treasury. *Dean v. Lehman*, 143 Wn.2d 12, 18 P.3d 523 (2001); Washington Constitution, Article VII, Section 1; *State v. Case*, 39 Wn. 177, 81 P. 554 (1905). *Okeson v. Seattle*, supra at 550.

A local government does not have the authority to impose a tax without the statutory or constitutional authority. *Covell v. City of Seattle*, supra; *Okeson v. City of Seattle* at 551. Charges for the regulation of an activity are fees and are not subject to constitutional restraints. *Samis Land Co. v. City of Soap Lake*, supra; *Dean v. Lehman*, supra. Charges that are related to the direct benefit or service are generally not considered a tax. *King County Fire Protection District v. King County Housing Authority*, 123 Wn.2d 819, 872 P.2d 516 (1994). The correct classification of a charge as a tax or a fee is critical. “There is ... an inherent danger that legislative bodies might

constitutional constraints ... by levying charges that while officially labeled regulatory fees in fact possess all the basic attributes of a tax.” *Okeson*, supra at 552; and *Samis Land Co.*, supra at 805. “A city could then avoid the constitutional limitation by simply charging its citizens a ‘fire department fee’ or a ‘police fee’ or as in this case a “street maintenance fee.” The City relies on the activity being charged to property owners as being proprietary. It therefore does not claim a tax was lawfully imposed.

If the benefit being charged to property owners is determined to be proprietary, the City must pass all of the following three factors for the charge to be a fee instead of a tax. The courts in *Covell* and *Okeson* outlined the three-part test to determine if an ordinance involves a tax or fee.

- (c) THE PRIMARY PURPOSE OF THE CITY CHARGING ADJACENT PROPERTY OWNERS FOR CITY STREET-CREATED RUNOFF IS TO RAISE REVENUE RATHER THAN REGULATE THE PROPERTY OWNERS’ ACTIVITIES.

The first question of the three-part test is whether the primary purpose of the City is to raise revenue or to regulate property owners’ activity. The court in *Covell* quoted the case of *Hillis Homes, Inc., v. City Snohomish County*, 97 Wn.2d 804, 650 P.2d 193 (1982), “Whether the primary purpose of the ‘county’ or ‘city’ is to accomplish desired public benefits which cost money or whether the primary purpose is to regulate” is the first question to

be determined whether a charge is a fee or a tax. At issue in *Hillis* was the validity of a county ordinance that imposed a charge on new subdivisions to pay for the services such as parks, schools, roads and fire protection. The *Hillis* court stated that the terms of the ordinance clearly provided that the fees were to be applied to offset the cost of providing specified services and made no provision for the regulation of residential developments. The so called fees were determined to be a tax in fees' clothing.

The fees saved by excluding the city streets from the "charges authorized appear to be a new way to raise revenue to accomplish a desired public benefit, better streets" or just more money for the public fund. *Covell*, supra at 886. The court in *Okeson* found that the unlawful purpose was "to free up revenue for the city."

Likewise in this case, the City provides only in its ordinance that the benefit of the city streets is equal to the burden created by the property owners of the City of Tacoma. Obviously the City is offsetting the cost of maintaining the streets by imposing the additional fee upon the property owners. There is no regulatory purpose because the storm and surface water drainage created by the ESD customers has no relationship to the amount of storm and surface water drainage created by the city streets. It is obvious the primary purpose of the City is to "accomplish a desired public benefit, which

costs money” as struck down in *Hillis*. The ordinance makes no provision for regulating property owners’ use of city streets for draining storm or surface water. If the City were to directly create a separate fee by ESD for street-created runoff, there could be no question *Okeson* would apply and private property owners would be paying a fee for a public benefit. The City is merely trying to do through the back door what it cannot do through the front door.

The primary effect of TMC 12.08.530 is that the City doesn’t have to pay the fees for street-created surface water drainage. Therefore, it saves revenue for the general fund, which can only be created by tax revenue. This can be seen from the fact the City passed the ordinance only after the City could not raise revenue by passing bonds. In other words, the City understood its obligation to pay its proportionate share of expenses in maintaining the storm and surface water runoff system when it passed TMC 12.08.530. In doing so, the City created a fiction that the benefit to private property owners’ surface and storm water runoff created by city streets (paid by taxpayers from the general fund or bonds) is equal to the burden created by said streets.

The question that really should be asked is, “Where is the money the City is not paying for the burden created by the city streets going?” The only

answer is the general fund. Revenues are being raised at the same time that no regulatory purpose (specific benefit to property owners) is being served.

What the City of Seattle attempted to do in *Covell v. City of Seattle* was to assess a residential street utility charge upon all the property owners of the City of Seattle. The court in *Covell* stated that a direct charge to property owners may not be charged for the City's constructing, maintaining, operating, and preserving its streets. The primary purpose of the Seattle ordinance was to raise funds to pay for maintenance of its streets. The court also said that the repair of streets is a non-regulatory purpose. *Covell v. City of Seattle* at 888. Said charges would be a tax. See *Covell* at 876. Like in *Covell* and *Hillis*, the primary purpose of TMC 12.08.530 is to reduce its cost in maintaining the storm drainage system created by storm and surface water runoff from its streets and right of ways, i.e., it is a method to pass on its costs of maintaining city streets. The City has therefore failed Part One of the threefold test.

- (d) THE CHARGES TO PROPERTY OWNERS FOR SURFACE WATER RUNOFF CREATED BY CITY STREETS IS NOT ALLOCATED FOR AN AUTHORIZED REGULATORY PURPOSE.

The second factor in determining whether the ordinance involved a tax or a fee is that the money raised by the increased rates must be allocated for the authorized regulatory purpose to qualify as a regulatory fee. In this case, like in *Okeson*, the rate increase charged to the ESD rate payors apparently is used to pay for storm and surface water drainage. However, in the second element in determining whether or not an ordinance involves a tax or fee, the charge not only has to be allocated for the specific purpose, but it also must serve a regulatory purpose. *Okeson*, supra at 553. As stated in *Okeson* regarding the street light funds, all the funds could be deposited into special accounts and it would not necessarily turn taxes into fees. In the case at hand, the costs do not regulate the activity and therefore are not allocated for an authorized regulatory purpose. The fees that are being deposited into the ESD fund to manage storm drainage in the City of Tacoma are paying for the storm drainage created by the city streets. That cannot be argued to be an authorized regulatory purpose. Depositing those funds created by the additional fee to the members of the Plaintiff/Appellant Class is simply a clever device by which taxes are being disguised as fees. Since the authorized purpose is not regulatory in nature, the City has failed Part Two.

Since the charge is in reality a tax, Plaintiff/Appellant Class are challenging the validity of the ordinance and whether the City was authorized to impose the tax. TMC 12.08.530 is not in compliance with the requirements of imposition of a tax found in Article VII, Section 1 of the Washington State Constitution and is therefore an unlawfully imposed tax.

- (e) THERE IS NO DIRECT RELATIONSHIP OR NEXUS BETWEEN THE REGULATORY FEE CHARGED AND THE SERVICE RECEIVED BY THOSE WHO PAY THE FEE.

The third factor in determining whether charges to the rate payors of ESD are taxes or fees is whether the charges have a direct relationship to the service being received by the maintenance of the streets. TMC 12.08.530 merely states, "all such City streets, roads, alleys, and right of ways provide storm and surface water sewerage to the City by collecting and transporting storm and surface waters from multiple individual properties to storm sewers of a value equal to a reasonable charge that would otherwise be charged by the City." The City's own documents show that as of 1983, most of the City's major trunk lines and facilities were in place (CP 86). The inference in that statement is that ongoing maintenance will be comparatively small. The benefit provided by past costs is not likely to continue past 1983. The ordinance doesn't even pretend to allocate those costs to how much water those properties discharge upon the city streets. The ordinance merely states

that the benefit of maintaining its streets benefits the storm drainage of all properties. Much like *Okeson* where Seattle charged extra electrical rates for the provision of street lights, even though the City was unable to determine how much street light each property owner used, the City does not even attempt to determine an allocation as to how many streets are in front of a particular property owner or how much runoff comes from each property is benefited by the runoff discharged onto the city streets. In other words, the benefit of those city streets to the private property owners' storm drainage cannot be determined. The City cannot claim even by ordinance that every property creates storm or surface water that is benefited by the city streets. Nor can it say that the runoff created by the city streets corresponds in any way to the runoff created by the individual private properties adjacent to those streets. All property owners are ESD customers who pay the increased rates regardless of their individual use of the streets for storm and surface water drainage or in spite of how much storm and surface water drainage runoff is created by the city streets near their property. Nowhere in the City's documents is there an assessment or a claim of an assessment of either the benefit or the burden created by the city street as it applies to adjacent property. (CP 60-106 and CP 147-283). However, considerable effort was spent on assessing the calculation of storm drainage charges on individual

privately owned properties. (CP 202-209 and CP 191-201).

The City claimed Plaintiffs/Appellants misunderstand the City's duty to collect and transport storm drainage. It says the duty also involves managing flooding, erosion, and pollutants and control water quality. However, it doesn't matter what duty is being fulfilled, the payment is the same, based upon square footage and degree of impervious surface on the adjacent property. The problem is that the additional fees paid by the rate payors are in reality paying back the City for a public benefit that is paid for by taxes. This is very much like the availability charges disallowed in *Samis Land Co.*, supra, and *Carrillo*, supra. The payment must be made even where there is comparatively very little street frontage. The City claimed the rate payors pay according to the burden created by their property. But the burden created by the streets in front of their property has no relationship to the burden created by their property. The City has failed Part Three because there is no direct relationship to the benefit being provided by the maintenance of the streets to the burden created by those same streets.

In summary, elements one, two and three as stated in *Covell* and *Okeson* clearly indicate the charge the City is passing on as a fee is in reality is a tax.

(f) An analysis of the cases that determine if the statute or ordinance were taxes is helpful in analyzing the issues in this case. Covell v. City of Seattle, 127 Wn.2d 874, 905 P.2d 324 (1995): The case of *Covell* involved the imposition of a residential street utility charge. The statutory authority for the charge was RCW 82.80.040, which authorized cities to establish street utilities and charge all property owners in the City of Seattle for the cost of constructing, operating, and preserving the city streets. The charges imposed on the residents of the City of Seattle could only be used for transportation purposes including the operation and preservation of the streets, construction of the streets, and developing public transit. The City of Seattle passed its ordinance in 1992 setting the charge. The court in *Covell* determined the charge was a tax in violation of Article VII, Section 1 of the Washington State Constitution. The reasoning was that the state legislature provided for no justification for the per-housing unit charge. The charges were adopted on the recommendation of the mayor and the council staff. The court further determined there was no way to conclude that street utility charges are “akin to charges for services rendered.” They were not individually determined and there was nothing the property owner could do to avoid the imposition of the charge.

Likewise in the case at hand, the state legislature in RCW 35.92.021

and/or RCW 35.67.025 provided no justification for allowing the exception to the City paying for storm drainage it creates by providing in kind services.

The State gave two examples of in kind services, which did not include maintaining the public streets for the purpose of transporting storm drainage from adjacent properties. There is no way to conclude that the charges divided amongst the City of Tacoma property owners are akin to charges for services rendered. Those charges are not individually determined and cannot be avoided by the property owners.

Samis Land Co. v. City of Soap Lake, 143 Wn.2d 798, 23 P.3d 477

(2001): The case of *Samis Land Co.*, supra, involved a “standby charge” imposed by the City of Soap Lake by ordinance on vacant, unimproved land that abutted city water and sewage lines. The issue in the case was whether the charge was a regulatory fee or tax. The trial court determined that it was not a tax, but a fee for benefits received. The Supreme Court held the charge was a tax. In determining it was a tax, the court held it had to look beyond the official designation of the nature of the charge and analyze the core nature by focusing on its purpose, design and function in the real world. They went on to say the primary purpose of the standby charge was to generate additional revenues to finance broad based public improvements and not to regulate those entities paying the standby charge. The court went on to say

the provisions of the ordinance dealt exclusively with revenue collection and nowhere in the city's overall plan was the reference to a utility service or burden that was applicable to the particular properties being charged. They further held the money was allocated to maintaining and improving the city wide utility system, thus regulating entirely the distinct group to which standby charges did not apply, e.g. the entities connection to the city utility system. The charges in that case were imposed by the local government and allocated to a broad category of public service. This allocation did not mean the charges were regulatory fees as opposed to taxes. They also held that there was no direct relationship between the standby charge on the one hand or the service received by the fee payors. The court went on to say as a result the charge is a tax.

Likewise in this case, the charges that would normally be incurred by the City for the storm drainage produced by the city streets is based upon the nature of the land abutting the streets and not by the nature of the streets themselves.

In *Samis Land Co.*, upon finding the charge was a tax and not a regulatory fee, the tax was determined to be unconstitutional as it was not levied uniformly based upon the constitutionally required value of the property.

Okeson v. City of Seattle, 150 Wn.2d 540, 78 P.3d 1279 (2003): The case of *Okeson* involves an ordinance that required the cost of providing street lights to the electric utilities rate payors. The Supreme Court determined the provision of street lights was a governmental function, the ordinance imposed a tax rather than a regulatory fee, and the ordinance did not comply with the constitutional requirements for the imposition of a tax. The state attempted to amend the statute to make the tax imposed by ordinance proper. The Supreme Court ruled the statute still did not make the imposition of the tax proper. In determining the ordinance imposed a tax, it determined that the city ordinance's purpose was to free up revenue for city purposes and there was no relationship between the rate payors' use of the street lights and the fee imposed. Likewise in the present case, the purpose of the ordinance was not to regulate the provision of storm drainage created by ESD rate payors but to instead free up revenue for city purposes.

In addition, *Okeson* held for a statute to authorize a city to incorporate a cost of the street lights into the general rate structure of their electric utility it would have to specifically convert the provision of street lights from a governmental function into a proprietary function. The statute involved in *Okeson* (RCW 35.92.050) did not do so.

Likewise in this case, RCW 35.92.021 and/or RCW 35.67.025 require the City to pay its proportionate share of storm drainage created by City streets. Merely stating that credit can be given to the City by providing in kind services did not transfer or convert the provision of streets as a transporter of storm drainage from a governmental function into a proprietary function. The City seems to be saying the reason why the Seattle city ordinance was struck down was that no part of the street light charges bore a direct relationship with individual property owners. The *Okeson* case does not say this. The maintenance of street lights was but part of the electrical rates. The *Okeson* case states street lights provide a public benefit. Likewise, the cost of maintaining the city streets also is for the benefit of the public. Just because the city streets produce only a part of the storm water runoff does not mean that that part is not for the benefit of the public. No where in any of the cases holding that city ordinances are for the benefit of the public does it require the entirety of the activity be for public benefit. Plaintiffs/Appellants only want the City to pay for its portion of the services being provided to it by ESD utility.

Carrillo v. City of Ocean Shores, 122 Wn.App. 592, 94 P.3d 961 (2004): The case of *Carillo* involved that city's passing an ordinance requiring owners of unimproved property to pay the required water and sewer

“availability charges.” The Court of Appeals used the three-part test of *Covell* and held the primary purpose of the charge was to generate revenue to the city’s combined utility fund and was therefore a tax and not a regulatory fee. In the present case, the primary purpose of the City’s ordinance is to free up revenue from the City’s general fund.

City’s Presumptions.

3. THE CITY IS INCORRECT IN ITS CLAIM THAT THE PRESUMPTION OF THE FACTS DETERMINED BY THE CITY ORDINANCE IS CONCLUSIVE AND THEREFORE CANNOT BE CHALLENGED.

For several reasons, the presumption does not apply to the present analysis. The conclusive presumption only relates to the legislative bodies declaration of an emergency. If the court determines there is an emergency, the court still looks to the act to determine whether the act is constitutional. All the cases involving emergency expenditure of funds had a limit in authorized expenditure. This case has no limit and it has no end. Plaintiff is challenging the City’s conclusion that there was a never-ending emergency in existence when TMC 12.08.530 or its predecessor was passed. A factual background supporting the need for the ordinance included two efforts by the City to pass bonds and the failure of those efforts were cited as a reason for passing the ordinance. As can be seen by the City’s own statement such an emergency no longer existed in 1983. (CP 86).

The City cited *Tacoma v. Luvene*, 118 Wn.2d 826, 827 P.2d 1374 (1992), a drug loitering ordinance (drug activity emergency), to support its position that the facts stated in TMC 12.08.530 are presumed conclusive. Said presumption involves the City's finding that the benefit created by city streets to adjacent property owners is equal to burden to the storm and surface water system created by the city streets. The presumption is misplaced for several reasons. First, all of the cases involving the presumption involve short-term emergencies. The fact presumed in *Luvene* was an emergency. The analysis of the ordinance's constitutionality was the same. The fact presumed was dicta and unnecessary to the case. *State ex rel. Hamilton v. Martin*, 173 Wash. 249, 257 (1933), a depression induced poverty case (emergency), is a lead case. The State passed a bond of \$10,000,000 without going through a referendum. The emergency created a one-time short-term need for the funds. The cases of *Clean v. City of Spokane*, 133 Wash.2d 455, 947 P.2d 1169 (1997) and *Clean v. State*, 130 Wn.2d 782, 928 P.2d 1054 (1997) involve an emergency just as *Tacoma v. Luvene*, supra, and *State ex rel. Hamilton v. Martin*, supra. Appellants are not challenging the presumption only the application of the presumption to the facts of this case.

4. APPELLANTS ARE ENTITLED TO ATTORNEY'S FEES UNDER THE COMMON FUND DOCTRINE.

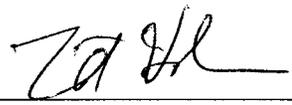
Plaintiffs/Appellants have sought a refund of utility charges paid by Tacoma residents. If the Court reverses the trial court's decision awarding the City summary judgment, it should order a refund of the utility charges paid and allow attorney's fees pursuant to the common fund doctrine. *Covell v. City of Seattle*, supra.

D. CONCLUSION.

Appellant requests this Court to reverse the trial court's determination that Respondent's charges for city street-created surface and storm water runoff are fees for proprietary services be reversed and that said charges be declared an unconstitutional tax. Appellants further ask that the in kind service created by TMC 12.08.530 be determined to not be in compliance with the requirements of RCW 35.92.021 and/or RCW 35.67.025. Appellants also request that the Court determine the class members are entitled to a refund of improperly imposed charges.

Respectfully submitted,

DATED: July ¹⁵~~14~~, 2006 EVERETT HOLUM, P.S.

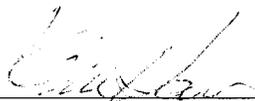
By: 
Everett Holum, WSB #700
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herein and do so based on personal knowledge.

On July 25, 2006, I caused to be mailed one true and correct copy of Appellant's Brief and Declaration of Kim Hann by placing said documents in a sealed envelope and depositing the same in the United States Mail at Tacoma, Washington, with postage prepaid thereon, to *Ms. Debra E. Casparian 747 Market Street, Rm. 1120 Tacoma, WA 98402-3767*. See attached copy of postmarked envelope, which is incorporated herein by reference.

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

DATED at Tacoma, Washington, on July 25, 2006.



Kim Hann

