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A. Assignments of Error

Assignment of Error: 1. The decision of the superior court for which review is sought, although correctly invalidating the Mason County (“County”) ‘special assessment’ at issue, fails to grant retroactive relief except in limited circumstances.

Issues Pertaining to Assignments of Error: 1. When an assessment is invalidated, whether as unconstitutional or as not compliant with the authorizing statute, are plaintiffs entitled to retroactive relief in the form of a refund of amounts paid?

B. Statement of the Case

Mason County Ordinance 121-02 (“Ordinance”), nominally adopted pursuant to RCW 89.08.400 in September 2002, imposed a flat \$5.00 per parcel so-called ‘conservation special assessment’ on certain land in Mason Conservation District (“District”).¹ CP at 97. Contrary to the claim made in the District’s framing of the first of the questions it presents on appeal

¹ At the time of adoption the boundaries of the District were the same as those of the county. However, the City of Shelton, as the only incorporated community in the county, viewing the levy as inappropriate to the needs of its residents, soon withdrew from the District under provisions of RCW 89.08.185, a privilege not available to property owners in the unincorporated areas of the county. See CP at 142-143.

(District brief at 2), the ‘assessment’ was not imposed on all property owners in the District, since owners of forested property, Federally owned property, and “Government held trust land for Indians” were exempt, quite apart from the exemption residents of Shelton secured for themselves by opting out. CP at 113. The levy applies only to private citizens who own nonforested land in unincorporated parts of the County.

Pursuant to RCW 89.08.400(2), the ‘assessment’ was supposed “to finance the activities of a conservation district.” However, the levy had to be approved by the county commissioners, who secured an “intergovernmental” agreement with the District by which about two thirds of the net amounts collected would actually fund activities of the county’s Department of Health Services. CP at 98, 105. At the time of adoption, a county commissioner was quoted in the *Shelton-Mason County Journal* as touting the levy as “a way to deal with a thorny budget problem” and as “an excellent way for the county to maintain its water quality department.” CP at 112.

The assessment was originally advertised as (1) funding “technical assistance to the residents of Mason County who do not reside in areas which are included in current grants,” (2) providing matching funds “when applying for additional grants,” and (3) funding programs and staff of the County’s

Environmental Health Department. CP at 109. The District advertised its services as available without charge to all District residents, whether landowners paying the assessment or not. *Id.* The Ordinance promised no local improvements. CP at 97. Even where the original agreement between the District and the County held out the possibility of providing a benefit to some assessed parcels, such as the farm plans the District proposed to develop for eligible farms, no parcel assessed was assured of any benefit. Even parcels eligible for farm plans might not receive them, since there was no assurance that funds would be adequate to provide plans for all property where plans might be requested. Instead, as the District and County themselves argued, their programs were intended primarily to improve water quality, particularly in parts of Puget Sound and Hood Canal, thus providing a public benefit. CP at 61-65,125-126.

Although the District now tries to characterize the County's action as designed to regulate stormwater, neither the Ordinance nor the initial intergovernmental agreement mentions stormwater. CP at 97-100. It is mentioned only peripherally in the revised agreement between the District and the County, devised six months after Plaintiffs filed their complaint. CP at 101-107.

Respondents and Cross-appellants Cary, Diehl, and Fox (“Plaintiffs”) challenged the Ordinance in a complaint for declaratory judgment. Although Plaintiffs filed their complaint for declaratory judgment in March 2003, before the first ‘assessments’ were collected, the county challenged the timeliness of the filing and moved for dismissal of the case by the trial court. When the trial court agreed to dismiss, Plaintiffs appealed. This court reversed, finding Plaintiff’s complaint timely, holding that Plaintiffs had until June 30, 2004, to bring their complaint, and that they filed before that date. *Cary et al. v. Mason County et al.*, 132 Wn.App. 495 (2006) (“Cary”).

On remand, motions for summary judgment were filed by both sides. Plaintiffs argued that the Ordinance fails to comply with statutory requirements and creates a levy that is essentially an unconstitutional property tax. The trial court agreed, finding no direct relationship between the fee charged and any services provided or between the fee charged and any burden produced by parcel owners. The levy thereby failed the third of the three criteria set forth in *Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995) used to distinguish regulatory fees and assessments from taxes. CP at 49. The court did not address the other *Covell* criteria, and did not reach the issues regarding whether the Ordinance complied with the

statute, except to say that it also appeared to the court that the Ordinance violated RCW 89.08.400(3), which requires that if a per parcel charge is adopted, there must also be a per acre charge. CP at 50. The court enjoined future collection of the levy, but denied refund to Plaintiffs of amounts already paid unless paid under protest pursuant to RCW 84.68.020. CP at 25;16, 19. The court then stayed enforcement until completion of appellate review. CP at 16, 19.

Because this court's review is de novo, Plaintiffs here advance again all their arguments for invalidating the Ordinance, both those addressed by the trial court and those not, as well as reasons for granting retroactive relief.

C. Summary of Argument

Because RCW 89.08.400 was the statute invoked by the County in adopting Ordinance 121-02, it is by this statute that the levy's validity must be tested. RCW 89.08.400 requires that any assessment that includes an annual flat amount per parcel shall also include a uniform annual rate per acre for each classification of land; shall classify lands into suitable classifications according to benefits conferred or to be conferred by the activities of the conservation district; shall provide funding to finance activities of the district, not the county; and shall provide special benefits to

most of the assessed parcels equivalent to the amount assessed. Ordinance 121-02 satisfies none of these requirements.

Moreover, by its casual if not cavalier disregard for statutory requirements, Mason County adopted what amounts to an unconstitutional property tax, instead of a special assessment. In *Covell v. City of Seattle*, the court recognized that a special assessment, even if falling loosely in the category of regulatory fees, may be identified as “a charge imposed on property owners within a limited area to help pay the cost of a local improvement which specially benefits property within that area.” *Covell*, 127 Wn.2d at 889. RCW 89.08.400 is based on the constitutional provision allowing the Legislature to vest municipal authorities with power “to make local improvements by special assessment.” Washington Constitution, Art. VII, Sec. 9. Since there are no local improvements described in Ordinance 121-02, and since the funds collected are combined with other funds to pay for staff and programs deemed to have a public benefit, the levy does not fit the definition of a special assessment, and instead has the earmarks of a property tax, being attached to the mere ownership of property, and providing no direct relationship between the levy imposed and any benefits conferred on the property or between the levy imposed and any burden

produced by those subject to the levy. If the distinction between an assessment and a tax is to be preserved, then courts must continue to insist that assessments provide a special benefit to the parcels assessed not available to the public at large.

Because the County did not comply with the requirements for imposing a conservation special assessment, and because the levy adopted is essentially an unconstitutional property tax even though ostensibly a special assessment, it is invalid. Not only should collection of the levy be enjoined, but Plaintiffs should be granted the relief they sought, to receive refund of the levies they were compelled to pay.

D. Argument

1. Judicial review of statutory compliance is allowed when a county's claim of authorization to impose a levy rests on statutory compliance.

In its appeal, the District raises a jurisdictional objection, citing RCW 89.08.400(2), which provides that the county legislative authority's findings "shall be final and conclusive," regarding whether the public interest will be served by imposition of the assessment and whether the special assessment to be imposed on any land exceeds the special benefit the land receives or will receive from the activities of the conservation district. The District

argues that this language leaves no room for judicial review of such action by the county legislative authority. District brief at 30-31.

The District misrepresents the statute as declaring the “decision” of the county legislative authority to be “final and conclusive.” District brief at 30. Actually, RCW 89.08.400(2) states, “The **findings** of the county legislative authority shall be final and conclusive” (Emphasis added). Plaintiffs do not need to challenge the enumerated findings adopted at the time of adoption of the special assessment to demonstrate that the enactment was contrary to law, both in failing to comply with the statutory requirements and by imposing an unconstitutional tax in the guise of a special assessment. See CP at 64-65.

Indeed, if the statute were construed as denying courts the authority to review statutory compliance by counties regarding the special assessments authorized by RCW 89.08.400, then the statute would be unconstitutional, for such construction entails supposing that property, i.e., the amount of the levy, may be confiscated from property owners without opportunity for judicial review. It is settled law that the legislative branch cannot immunize its taxes, assessments, or user fees from judicial review:

In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity

for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment.

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 289, 64 L. Ed. 909, 40 S. Ct. 527 (1920); cited in *State ex Rel. Pac. T. & T. Co. v. D. P. S.*, 19 Wn. (2d) 200, 218 (1943). In challenging Ordinance 121-02, Plaintiffs were challenging the levy they have been obliged to pay under it, and which amounts to confiscation if the Ordinance is invalid.

If a local government makes an arbitrary and capricious finding, it may be final in the sense that it is not subject to further administrative review under the local government's internal appeal procedures. But that is not to concede that a court may not review any such finding to determine whether it is arbitrary or capricious and to invalidate such finding or the ensuing legislative action if it determines that such action was contrary to law. No person or agency of government is above the law.

The District argues that the provisions in RCW 89.08.400(5) allowing a petition of at least 20 percent of the owners of land subject to a conservation assessment to nullify the levy were intended as a remedy in lieu of judicial review. District brief at 31. The District presents no evidence of such intent. Moreover, it is obvious that a procedure requiring the collection

of so many signatures by December 15 in the year that the levy is adopted, as required by RCW 89.08.400(5), is no substitute for judicial review if there is a legal question of whether the ordinance imposing the levy complies with the statute.

Given that an interpretation of the statute denying judicial review to conservation assessments would be an unconstitutional denial of due process, the reference to “final and conclusive” findings must, if possible, be interpreted differently:

It is a well settled rule that, where a statute is open to two constructions, one of which will render it constitutional, and the other unconstitutional, the former construction, and not the latter, is to be adopted.

Poolman v. Langdon, 94 Wash. 448, 457, 162 Pac. 578 (1917); cited in *State ex rel. Campbell v. Case*, 182 Wash. 334, 341, 47 P. 2d 24 (1935) and *State v. Marchand*, 37 Wn. App. 741, 684 P.2d 1306 (1984).

The words “final and conclusive” may be construed as imposing no unconstitutional restriction if they are construed as referring to review within the county legislative branch.

Although the trial court did not explicitly address this question, when the instant case was before this Court on a procedural issue, the court concluded that Plaintiffs had properly brought their action as a complaint for

declaratory judgment and remanded the case to the trial court for a decision on the merits. *Cary*, 132 Wn.App. 495. The jurisdictional objection is only a red herring aimed at diverting attention from the failure of the Ordinance to comply with the statute.²

2. Contrary to RCW 89.08.400(3), Ordinance 121-02 fails to set a uniform annual rate per acre amount above the annual flat rate per parcel for each classification of land.

RCW 89.08.400(3) allows an option when an assessment for the use of a conservation district is levied:

An annual assessment rate shall be stated as either uniform annual per acre amount, or an annual flat rate per parcel plus a uniform annual rate per acre amount, for each classification of land. The maximum annual per acre special assessment rate shall not exceed ten cents per acre. The maximum annual per parcel rate shall not exceed five dollars, except that for counties with a population of over one million five hundred thousand persons, the maximum annual per parcel rate shall not exceed ten dollars.

Mason County did not adopt a uniform annual per acre amount. Yet, neither did it adopt “an annual flat rate per parcel plus a uniform annual rate per acre amount, for each classification of land.” The text of the Ordinance reads:

² The District also raises a second jurisdictional issue by arguing (in its brief at 31) that Petitioners’ challenges based on statutory non-compliance are untimely. Yet, based on this court’s previous review of the question of timeliness, this matter is plainly *res judicata*.

There shall be an assessment for natural resource conservation as authorized by RCW 89.08.400 in the amount of \$5.00 per non forested land parcel with \$0.00 fee per acre assessed for ten years starting 2003 and continuing through 2012.

CP at 97.

The Ordinance is invalid because it fails to set a uniform annual rate per acre amount for each classification of land in addition to the annual flat rate per parcel, as required by RCW 89.08.400(3). The County's "\$0.00 fee per acre" is no amount at all. If the Legislature had not intended to require an amount greater than zero dollars per acre as an additional assessment if a county chose to impose a flat rate per parcel, it might have specified that the levy allowed under the statute **may** be stated as an annual flat rate per parcel and **may** also include an additional assessment based on acreage. It would **not** have said that the levy "shall be" (if not simply a uniform annual amount per acre) "an annual flat rate per parcel **plus** a uniform annual rate per acre amount" (emphasis added).³

³ It is a moot point how low the rate might be set and still comply with the law. The District's claim – in its brief at 34 – that on Plaintiff's view the rate might be set as low as \$0.000001 per acre, a rate that, through rounding, apparently would produce no revenue, is not before the court. If it were, Plaintiffs would argue that such a rate, designed to produce no revenue from this source, would also be contrary to legislative intent.

The County's attempt to represent no assessment based on acreage as fulfilling the requirement for an assessment rate on acreage is an obvious subterfuge aimed at evading legislative intent. Under the District's interpretation of this language, the requirement for an additional amount beyond the annual flat rate becomes optional. District brief at 33. In effect, the District is arguing that the phrase "plus a uniform annual rate per acre amount" is superfluous or perhaps more precisely ought to have been rephrased as "plus, **at its option**, a uniform annual rate per acre amount."

This notion adds a proviso not found in the statute, changing a requirement into an option, and flies in the face of a basic principle of statutory construction, viz., that whenever possible, a statute should be interpreted so that no portion of it is superfluous, void, or insignificant. *Snow's Mobile Homes, Inc. v. Morgan*, 80 Wn.2d 283, 288, 494 P.2d 216 (1972); *Des Moines v. Hemenway*, 73 Wn.2d 130, 135, 437 P.2d 171 (1968); cited in *Hayes v. Yount*, 87 Wn.2d 280, 290, 552 P.2d 1038 (1976). The fact that no court has previously interpreted this statutory language does not preclude this court from providing interpretation based on principles of

statutory construction.⁴

Even though the county commissioners may have had reasons for not wanting to impose a rate per acre that was high enough to cover the expenses of collection, they were not free to wink at the law. The County could not lawfully disregard, whether for reasons of economy or political expedience, the statutory requirement.

3. Contrary to RCW 89.08.400(3), the Ordinance fails to classify lands in the conservation district into suitable classifications according to benefits conferred or to be conferred by the activities of the conservation district.

RCW 89.08.400(3) also provides:

A system of assessments shall classify lands in the conservation district into suitable classifications according to benefits conferred or to be conferred by the activities of the

⁴ On the basis of a footnote in *State v. Logan*, 102 Wn.App. 907, 911 n.1 (2000), the District argues that the court should ignore any argument not supported by citation. District brief at 34. The footnote in question cites *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) (Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.) This is a far cry from the claim that no argument may be advanced without cited authority. In any case, the authority in question here is the statute itself. Courts have a basic responsibility to interpret the law and to resolve questions about its meaning. This case, apparently the first calling for interpretation of RCW 89.08.400, is a case of first impression, where there is no controlling case law relating to its interpretation (except that pertaining to principles of statutory construction).

conservation district, determine an annual per acre rate of assessment for each classification of land, and indicate the total amount of special assessments proposed to be obtained from each classification of lands. Lands deemed not to receive benefit from the activities of the conservation district shall be placed into a separate classification and shall not be subject to the special assessments.

The Ordinance is invalid because, in violation of RCW 89.08.400(3), it fails to classify lands in the District into suitable classifications according to benefits conferred or to be conferred. At the outset, the District asserted its intent to confer special benefits to some land that would not be available to other assessed land. For example, the District announced that the assessment would be used in part to fund farm plans. CP at 99, 109. Yet, no distinction was made in the Ordinance between land that would be benefited by farm plans and the many parcels that could not receive such benefits, given that they were too small or too covered with impermeable surfaces to be eligible for farm plans, no matter how leniently “farm” is defined. By lumping all parcels into a single category, ignoring the differences in benefits available to different parcels, the Ordinance failed to employ suitable classifications according to the benefits to be conferred.

The County’s adopted findings make no reference to suitable classifications and do not include a finding that states or entails that a single

category of lands is appropriate because all lands in such category receive equivalent benefits. CP at 64-65. Although nothing in the statute requires that multiple classifications result from an effort to classify lands according to the benefits to be conferred, the County reached no finding to justify lumping all land into a single category.

The District argued that the absence of any classification scheme in the Ordinance or accompanying findings might be tolerated because the Legislature has declared that activities and programs to conserve natural resources are a special benefit to lands. CP at 80. Yet, even if one supposed that all land subject to the levy would receive some benefit from it, it does not follow that all land belongs in the same category based on the benefits to be conferred. The District's commitment to provide some farm plans obviously created a category of parcels that would receive benefits substantially greater than those parcels that received no such benefits. No distinction was made in the Ordinance between land to be benefited by farm plans and land that could not or would not receive such benefits, ignoring the explicit statutory requirement that all land subject to the levy be classified according to the benefits to be conferred.

Even if one were to suppose that the levy was intended as a regulatory

fee to control stormwater runoff problems, it would still be erroneous for all land to be lumped into the same category. Contrary to the District's unsubstantiated assertion (District brief at 21), it is obviously false that every parcel contributes to problems of storm water runoff. Undeveloped land is generally recognized to be part of the solution, not part of the problem regarding storm water runoff. Under the State's Growth Management Act, critical areas such as wetlands, streams, and lakes are generally protected by a buffer of undeveloped and relatively undisturbed land. Mason County has included such provisions in its Resource Ordinance. MCC 17.01.070.E (buffers on wetlands) and .110.D (buffers on fish and wildlife conservation areas).⁵

In any event, since the statute requires classification of property according to benefits to be conferred, not according to the extent that the parcel is responsible for problems, parcels may not be categorized according to the extent that they are the cause of problems for purposes of satisfying the classification requirements of the statute. The Ordinance fails to address the

⁵ This court should not need to reach the question of whether every parcel contributes to the problems associated with storm water runoff. If it does, then this question would need to be resolved at trial, not through summary judgment.

classification requirements of the statute.

4. Contrary to RCW 89.08.400(1), the Ordinance creates a levy primarily providing revenues to Mason County, not for the activities of Mason Conservation District.

RCW 89.08.400(1) authorizes counties to impose a special assessment “for conservation districts.” The statute does not suggest that the Legislature intended that counties might levy such assessments for their own programs.

On October 22, 2002, the County Board of Commissioners approved an Agreement between the County Department of Health Services and the District by which 66.5% of net revenue collected (after deducting collection fees charged by Mason County) would be diverted from the Mason Conservation District to the County's Environmental Health Department, for the broad public purposes of providing more services to improve and maintain water quality and to protect public health. CP at 98-100. This revenue sharing was characterized as a “partnership proposed [to] secure a constant source of funding for these services [providing for the “prevention, control and abatement of nuisances detrimental to public health”].” CP at 64. In adopting findings of fact, the county commissioners conditioned implementation of the Ordinance on signing of “a Memorandum of

Agreement” between the District and Mason County Department of Health Services. CP at 65. In effect, the County told the District that it would only “carry out” the assessment if the District agreed to the County’s terms for distribution of the revenues. Id.

While RCW 89.08.341 authorizes intergovernmental agreements, assessments for conservation districts pursuant to RCW 89.08.400 are not authorized in behalf of any other local political subdivision of this state, or for any activities other than those of the District. The potential for a conflict of interest if this were allowed was recognized in a recent Attorney General’s Opinion, which considered whether a county might modify a conservation district’s proposal to require conservation assessments to fund programs favored by the county, “even if that overrides the funding priorities of the district.” AGO 2006 No. 8 at 5; See excerpt attached as Appendix A. The AGO points out that such intrusion of county interests does not appear to be what the Legislature contemplated when it created the possibility of special assessments for conservation districts:

The expressed legislative purpose of the county’s power to modify the districts’s proposal is to ensure that an elected body different than the district board reviews the assessments for public interest and proportionality reasons. RCW 89.08.400(2). There is no indication in the statute that the conservation district assessments were intended to provide a

county with the authority to raise revenue to fund programs favored by the county in contrast to those determined by the district.

Id. While the AGO allows that a district and county may consult with each other to determine if it is possible to reach agreement about district budget priorities, a ‘partnership’ by which a county dictates that two thirds of the revenues shall be used for one of its own departments cannot be conceived as consistent with the Legislative intent.

Moreover, the ‘partnership’ concept conflicts with the notion that special assessments are to confer special benefits on assessed land and not on land or persons not assessed (a concept that will be discussed in more detail below in Section D.5). The County committed itself to “provide increased response to citizen concern in all areas of the county.” CP at 64, Finding 3. It did not limit its services to the parcels on which the conservation assessment is levied. Given that some land was not assessed and that residents who do not own land were also not assessed, but that both would be entitled to “increased response to citizen concern in all areas of the county,” the County was evidently aiming to use its share of the levy to address what were conceived to be public concerns, ignoring the restriction of Art. VII, Sec. 9, of Washington’s State Constitution, that special

assessments should confer improvements on assessed land. Even if one were to suppose that the District would restrict its services to assessed property, the revenues going to the County and being spent for broad public purposes belie the basic premise that a special assessment is to confer special benefits for and only for property subject to the levy.⁶ CP at 54, ¶ 8.

5. Contrary to RCW 89.08.400(2), the Ordinance fails to confer special benefits to most of the assessed parcels equivalent to the amount assessed.

RCW 89.08.400(2) provides that the county legislative authority may impose a system of assessments for a conservation district, “if it finds that both the public interest will be served by the imposition of the special assessments and that the special assessments to be imposed on any land will not exceed the special benefit that the land receives or will receive from the activities of the conservation district.” Yet, the Ordinance allows a levy on parcels where no discernable special benefit appurtenant to the land assessed is obtained. The text of the Ordinance states only that it is for “natural

⁶ Moreover, the District’s claim is contradicted by a publication of the District itself, which in a newsletter stated, “All District services are available without charge to District residents,” thereby apparently extending all services to non-owners of land as well as land owners whose land is exempt from the assessment. CP at 109.

resource conservation,” giving no hint that it will provide improvements or any special benefits appurtenant to the land assessed. CP at 97. The stated “goals” of the Ordinance are contained in the Intergovernmental Agreement adopted by the County Board of Commissioners on October 22, 2002:

Mason Conservation District and Mason County Department of Health Services are entering into this partnership to more effectively and efficiently provide the community with services to improve and maintain water quality and the protection of public health. They will work both independently and jointly to insure that Mason County has healthy water resources for household, recreational, agricultural, and commercial use, as well as fish and wildlife habitat and shellfish production for generations to come.

CP at 99. The agreement also states that the 'services' provided will consist of, in part, the following:

The Mason Conservation District will utilize its portion of Assessment net revenue to increase its' [sic] capability of providing technical assistance to landowners for the implementation for Best Management Practices and creation of farm plans designed to reduce the potential for non-point pollution. The District will also implement stream habitat improvement projects, provide education and outreach activities, and respond to requests from the community and referrals from the Mason County Department of Health Services. Assessment funds may also be used as matching funds for future grants addressing non-point pollution issues within Mason County.

The Mason County Department of Health Services will provide environmental services as needed to include, but not limited to, responding quickly to early indicators of degraded

water quality and the protection of water quality. The Department will provide increased response to citizen's [sic] concerns and identification and remediation of potential sources of pollution through Mason County. The Department will implement low interest loans (State Revolving Fund), as well as utilizing funds to provide matching funds for future grants to further the efforts of water resource protection within Mason County.

Id. With the exceptions of farm plans, low interest loans from the State Revolving Fund, and stream habitat improvements, none of which are available to all assessed parcels, or promised to **any** parcel, the funds generated by the levy would not confer a special benefit on any parcel.

Instead, the levy funds appear aimed at supporting a range of activities deemed in the public interest, but not providing a direct and discernable benefit to most of the properties assessed. The intergovernmental agreement establishes a "partnership" by which the parties will work "both independently and jointly" to provide "healthy water resources." While achieving such a goal would be in the public interest, members of the public at large benefit if this goal is achieved, regardless of whether they own any land or, if land owners, have property subject to the assessment. The special assessment confers no identifiable, tangible special benefits directly to the properties charged.

Repeatedly, the District refers to the recipients of benefits as persons,

not as parcels of land. Instead of a parcel being benefited through added value, the District conceives of benefits as services to property owners or residents of the District. See, e.g., District brief at 22-23; CP at 80, 82, 88, 89. But if the District regards the special assessment as just another source of revenues to fund services to owners and residents, then it loses sight of the distinction between conferring benefits on assessed land, characteristic of a special assessment, and conferring benefits on persons who own or occupy land in the District, for which it may be entitled to charge user fees, but for which a special assessment is inapplicable. Granted that there needs to be only a direct relationship between the levy and the special benefit conferred, and not necessarily an individualized charge based on exactly the benefit conferred, if there is no identifiable benefit for the land, as distinct from a service provided to the owner, or if the benefit is not directly related to the levy and is perhaps wildly disproportionate – so that, for example, someone owning ten parcels pays ten times as much as someone owning one parcel, even though the owner of ten parcels may receive only 1/100 of the services offered to the latter and his tenants, as occupants of a single parcel – then the levy can no longer be called a special assessment. But it was adopted as a special assessment pursuant to RCW 89.08.400, and is not authorized by the

statute if the result is not a special assessment in law.

6. Ordinance 101-02 is an unconstitutional property tax.

The most basic question in this case is whether the charge at issue, ostensibly an assessment, is actually a property tax. If a property tax, then it is clearly invalid, for the Legislature has not authorized any tax for natural resource conservation, and local governments may tax only pursuant to specific legislative or constitutional authority. *Margola Assocs. v. Seattle*, 121 Wn.2d 625, 634, 854 P.2d 23 (1993); *Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 809, 650 P.2d 193 (1982) (*Hillis Homes I*). Moreover, if a property tax, the charge is plainly unconstitutional, for it imposes a flat levy without regard to the value of the property charged, and Art. VII, Sec. 1, of the Washington Constitution requires that "[a]ll taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax [and] [a]ll real estate shall constitute one class" This requirement for uniformity implies 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).

Tax uniformity is "the highest and most important of all requirements applicable to taxation under our system." *Inter Island Tel. Co. v. San Juan*

County, 125 Wn.2d 332, 334, 883 P.2d 1380 (1994). This constitutional requirement – together with the requirement of Art. VII, Sec. 2, setting a one percent ceiling on ad valorem taxes – must not be subverted by taxes in some other guise if these constitutional protections are to be preserved. See *Belas v. Kiga*, 135 Wn.2d 913, 922 (1998).

Because special assessments and fees are not considered taxes, they are exempt from constitutional restrictions on the power to tax. There is thus an inherent danger that legislative bodies may try to circumvent constitutional constraints, such as the all-important tax uniformity requirement or the one percent ceiling, by levying charges they label as an ‘assessment’ or ‘fee,’ but which in fact possesses all the basic attributes of a tax. See *Samis Land Co. v. Soap Lake*, 143 Wn.2d 798, 805 (2001). Unless the distinction between fees and taxes is maintained in the law, “virtually all of what now are considered ‘taxes’ could be transmuted into ‘user fees’ by the simple expedient of dividing what are generally accepted as taxes into constituent parts, e.g., a ‘police fee.’” *Covell*, 127 Wn.2d at 888 (quoting *United States v. City of Huntington*, 999 F.2d 71, 74 (4th Cir. 1993), cert. denied, 510 U.S. 1109 (1994)).

a. Special assessments, as distinct from taxes, provide for improvements to assessed property.

Special assessments may be seen as a type of user charge. Hugh D. Spitzer, "Taxes vs. Fees: A Curious Confusion," 38 Gonz. L. Rev. 335, 350-51 (2002-3). They are a form of user charge which allocates the cost of public improvements that increase the value of an asset (property) to the owner of that asset. *Id.*, citing Wash. Const. Art. VII, Sec. 9. In other words, a special assessment is a charge imposed on property owners within a limited area to help pay the cost of a local improvement which specially benefits property within that area. C. Dallas Sands, Michael Libonati, John Martinez, Local Government Law § 24.01, at 24-2 (1995); see also *King County Fire Protection Dist. 16 v. Housing Auth.*, 123 Wn.2d 819, 834, 872 P.2d 516 (1994) (special assessments are for the construction of improvements appurtenant to specific land and bring a benefit substantially more intense than is yielded to the rest of the city); cited in *Covell*, 127 Wn.2d at 889. The benefit to the land must be actual, physical and material and not merely speculative or conjectural. *Heavens v. King Cy. Rural Library Dist.*, 66 Wn.2d 558, 563, 404 P.2d 453 (1965).

As with other user fees, special assessments must "relate directly to the cost of the improvements, relate to the value of the improvements to the

property assessed, and be deposited in special accounts for the particular improvements.” Spitzer, 38 Gonz. L. Rev. at 351 (citing *Bellevue Assocs. v. City of Bellevue*, 108 Wn.2d 671, 674-75, 741 P.2d 993 (1987)); see also Philip A. Trautman, “Assessments in Washington,” 40 Wash. L. Rev. 100, 118 (1965).

In contrast, “[T]axes are imposed to raise money for the public treasury.” *Okeson v. City of Seattle*, 150 Wn.2d 540, 551, 78 P.3d 1279 (2003) (citing *Dean v. Lehman*, 143 Wn.2d 12, 25, 18 P.3d 523 (2001)); see also Wash. Const. art. VII, Sec. 1. It is characteristic of taxes that there is no connection between the person who bears the burden of a tax dollar and on what it is spent. Taxes, as the principal means of financing government expenditures, are compulsory payments that do not necessarily bear any direct relationship between to the benefits of government goods and services received. David N. Hyman, *Public Finance: A Contemporary Application of Theory to Policy* 23 (3d ed. 1990); cited in Spitzer, 38 Gonz. L. Rev. at 337.

In Washington case law, taxes have been contrasted to “regulatory fees,” at least since *Hillis Homes I*, 97 Wn.2d 804. This bifurcation has been criticized as simplistic, on the ground that both taxes and regulatory fees are designed to raise money and that “regulatory fees” are best construed as

limited to charges for handling of permit or license applications, or to pay for inspection and control of the payer's activities. Spitzer, 38 Gonz. L. Rev. at 351 et seq. However, when contrasted to taxes, "regulatory fees" may be seen as a type of user charge that local governments may impose to obtain payment for services rendered or goods provided. See *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 602, 94 P.3d 961 (2004) (citing *Covell*, 127 Wn.2d at 884); Wash. Const. art. XI, Sec. 11 (police powers); Spitzer, 38 Gonz. L. Rev. at 364.

Whether a charge imposed by a governmental entity is a tax or a "regulatory fee" in the broadest sense depends upon three factors identified in the leading case on this point, *Covell v. Seattle*, 127 Wn.2d at 879:

[W]hether 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. . . . If the primary purpose of the charges is to raise revenue, rather than to regulate, then the charges are a tax.

The second factor which this court considers is whether the money collected must be allocated only to the authorized regulatory purpose. . . .

The last inquiry is whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer. . . .

Thus, special assessments, as distinct from taxes, provide exclusively for

improvements to assessed property, are not designed to raise revenue for broad public purposes, and manifest a direct connection between the assessment charged and the improvements conferred on property subject to the assessment.

b. The levy created by the Ordinance is facially an invalid and unconstitutional tax.

Applying the first of the three *Covell* factors to the present case, it is evident on its face that the primary purpose of Ordinance 121-02 is to accomplish desired public benefits that cost money, not to regulate. In setting an annual \$5.00 per parcel special levy, two thirds of which was assigned to a County department for its work, the evident primary purpose was to raise revenue. There is no regulatory purpose. The Ordinance makes no mention of regulation. Not even if “regulatory purpose” is taken to include collection of fees to pay the cost of public improvements or benefits that increase the value of the property charged is there any regulatory purpose, for the Ordinance does not ensure any such improvements or benefits.

If the public interest in natural resource conservation is benefited, such a benefit accrues to the public at large, to both land owners and those who are not, to both those land owners who are subject to the levy and to those who are not. The benefits, if any, to property subject to the levy, are

indirect, and there is nothing in the Ordinance to suggest that such benefits are aimed at increasing the value of the property charged.

The District tries to analogize the levy at issue here with charges imposed by a water utility operated by Clark County and the City of Vancouver in *Teter v. Clark County*, 104 Wn.2d 227, 704 P.2d 1171 (1985). District brief at 15-16. The court there upheld such charges as exercises of the police power by the city, under RCW 35.67.010, and by the county, under RCW 36.89.080, in creating a storm and surface water utility. The charges were found **not** to be special assessments, for which local improvements are required by Art. VII, Sec. 9 of the Washington Constitution. *Teter* is inapposite for several reasons.

First, the statute on which the County relied in imposing a conservation assessment is explicit in defining the levy allowed as a special assessment supposed to confer a special benefit, not as a charge allowed to municipalities under their police powers. The County claimed authority to adopt a conservation assessment only under RCW 89.08.400. CP at 97. The same authority is claimed in the Finding of Fact adopted at the time the Ordinance was approved. CP at 64-65. Even if one supposes that the County might have adopted some other levy under different authority, the question

in this case is whether the County acted properly under the authority of RCW 89.08.400, not whether it might have created a utility and imposed charges pursuant to RCW 36.89, as Clark County did in *Teter*.

Second, the levy for the District cannot reasonably be construed as exercise of police power. Nothing in the statutes gives conservation districts police powers. They have no regulatory authority. RCW 89.08.220. Indeed, the District itself has been emphatic in disavowing any police or regulatory authority. CP at 109.

Third, the court in *Teter* expressly contrasted the charges it approved, which did not confer special benefits on the property charged, with special assessments, pointing out that a special assessment “may only be charged against property which is specially benefited by the project,” citing *Heavens v. King Cy. Rural Library Dist.*, 66 Wn.2d at 563. *Teter*, 104 Wn.2d at 230.

The other cases cited in the District’s effort to rewrite history are inapposite for reasons similar to those that make *Teter* inapposite. The maintenance fees for owners of septic systems in *Thurston County Rental Owners Association v. Thurston County*, 85 Wn.App. 171 (1997), were plainly not authorized as special assessments, and certainly not under authority of RCW 89.08.400.

The fees collected in *Smith v. Spokane County*, 89 Wn.App. 340 (1997) did not purport to be special assessments, to confer special benefits on assessed property, or to be in any way connected with conservation assessments. They were charges to water and sewer customers within a designated aquifer protection area, pursuant to RCW 36.36.

The District argues that the assessments at issue here are for a regulatory purpose, claiming that the assessment serves to address a public burden arising from stormwater runoff, which it alleges every assessed property causes. District brief at 21. Even if one ignores the fact that conservation districts have been granted no regulatory powers and the fact that the levy was adopted under authority of RCW 89.08.400, which allows special assessments, not regulatory charges, this claim is without merit.

Except in the context of this litigation, neither the District nor the County claimed that the assessment had a regulatory purpose. Instead, as discussed above, the levy was touted as a means of addressing a “thorny” budget problem. The levy was designed to generate funds for the County and the District for their various programs to serve broad public purposes. Mutatis mutandis, what was said in the *Covell* case, where the court found that Seattle's residential street utility charge could not be regarded as a fee,

may be said here: “[T]he revenue to be collected bears no relationship to the regulation of street traffic, but is to generate funds for the nonregulatory function of repairing streets.” *Covell*, 127 Wn.2d at 888. Similarly, the revenue collected for the District bears no relationship to the regulation of pollution or any other regulatory function, since the District has none, and its public educational efforts and assistance to farmers are obviously not regulatory in nature.

As for the notion that the assessment is a kind of charge for services rendered, the assessments are not individually determined and cannot be avoided. Thus, under the reasoning of *Covell*, 127 Wn.2d at 884-85 and *King County Fire Protection Dist. 16 v. Housing Auth.*, 123 Wn.2d 819, cited in *Covell* at 884, the assessments constitute taxes, and are **not** primarily tools of regulation.

As for the second *Covell* factor, given that there is no regulatory purpose, it follows that the money collected is not allocated only for an authorized regulatory purpose. If the revenues are not for an authorized regulatory purpose, then money collected is a tax:

Given the absence of a regulatory purpose, it is insignificant that the funds collected are to be expended "for transportation purposes only" (a broad category indeed). This court found that depositing charges into a special fund was not enough to

transform a tax into a fee in *Hillis Homes I*, 97 Wn.2d 804 (1982).

Covell, 127 Wn.2d at 879. Similarly, given the absence of a regulatory purpose under the authorizing statute, it is insignificant that the funds collected under Ordinance 121-02 were to be expended “for natural resource conservation purposes only.”

Moreover, even if one were to suppose that “natural resource conservation” is a regulatory purpose, the Ordinance does not specify that money collected must be allocated **only** to an authorized regulatory purpose. The *Covell* court concluded that segregation of fees for a specific purpose is an essential ingredient in determining whether charges constitute a fee or a tax. *Covell*, 127 Wn.2d at 885. Yet, the Ordinance does not call for segregation of funds, or ban commingling of funds collected through the levy from other funds used for general public purposes.

Instead, funds have been commingled.⁷ Moreover, two thirds of the revenues from the levy go to an agency that has different purposes and different statutory authority than the District. The County’s Findings of Fact

⁷ See CP 114-126 and discussion under section D.6.c below. The fact that the amounts received have been accounted for separately from other **revenues** does not mean that funds have not been commingled in making **expenditures**.

point to the proposed uses of its share of the levy revenues as primarily a means of augmenting funds available to its Department of Health Services. See CP at 64-65, esp. ¶ 3, 8, 9, and 10.

Finally, under the third *Covell* factor, there is no direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer. The charge is imposed without regard to any benefits conferred on the parcels against which it is levied. The charge imposed is the same for every parcel not exempted, without regard to whether the parcel is developed or vacant (unless it is forest land), whether the parcel has a kind of development of concern given the aim of resource conservation, e.g. whether the development relies on onsite sewage disposal or not, or whether the parcel is near or far from surface water that appears to be a focus of concern for the County and District. The owner of a small, vacant parcel pays just as much as the owner of a large parcel developed with a community septic system serving a multitude of residences. Undeveloped land is charged just as much as land extensively developed with a high proportion of impermeable surfaces. Because the amount any taxpayer is obliged to pay depends only on the number of parcels he owns, the owner of 100 parcels pays 100 times as

much as the owner of one parcel, though neither may benefit from any local improvements provided by the Ordinance.

As in the street utility payments considered in *Covell*, the levy under Ordinance 121-02 is simply a charge imposed for the privilege of living within the District. Most of the revenues from the levy were intended to provide better service for the public at large, which includes those who are exempt from the levy because either they do not own property or own property not subject to the levy. Accordingly, the relationship between the charge and the benefits accruing to those paying them is only tangential. See *Covell*, 127 Wn.2d at 888-89. Therefore, the Ordinance fails to meet the test of any of the three *Covell* factors.

On the other hand, the Ordinance imposes compulsory payments that do not bear any direct relationship to the benefits of government goods and services received. It imposes a levy on property simply by virtue of ownership of property.⁸ It aims to raise revenues for the County and District, without any promise of improvements appurtenant to the property or special

⁸ The levy is thereby distinguishable from excise taxes, which are levied against the exercise of particular aspects of ownership. See, e.g., *Covell*, 127 Wn.2d at 890-91; *P. Lorillard Co. v. City of Seattle*, 83 Wn.2d 586, 590-9, 521 P.2d 208 (1974); *High Tide Seafoods v. State*, 106 Wn.2d 695, 700, 725 P.2d 411(1986).

benefits conferred on the property.

In *Covell*, the court concluded that because there were no specific improvements described in the Seattle ordinance, and because the funds collected were combined with other funds to pay for street improvements all over the city, the street utility failed to meet the special assessment definition. *Covell*, 127 Wn.2d at 889. In the present case, even though the levy in question is nominally a special assessment, and even though the Legislature apparently intended that it fulfill the requirements of a special assessment, as adopted and implemented it is a tax. There are no specific improvements described in Ordinance 121-02, and it was expressly intended to provide matching funds for grants for public benefits. As such, it has the earmarks of a property tax, levied in disregard of the constitutional requirement that property taxes be on an ad valorem basis.

c. As applied, the levy created by Ordinance 121-01 is an invalid and unconstitutional tax.

It should not be necessary for the court to reach the question of whether the Ordinance is unconstitutional as applied. If the Ordinance is unconstitutional on its face, then no evidence as to its application will make it valid. Yet, even if for the sake of argument one assumes that the Ordinance is valid on its face, there is reason to find it invalid and unconstitutional as

applied.

The original agreement between the County and the District set broad goals to serve the public interest, not to benefit directly the parcels assessed. Various services were promised if requested, but not assured or directed to any particular parcels. CP at 98-100. On September 25, 2003, more than six months after the original complaint in this lawsuit was served, the County and District changed the original agreement, creating a Joint Board to administer “any joint and cooperative undertaking.” CP at 107. Instead of simply specifying that 66.5% of the net proceeds from the levy would be distributed to the County’s Department of Health Services, the second agreement authorizes the County to bill for “up to” 66.5% of the levy. CP at 105. The County also agreed, in view of the lawsuit, to be responsible for any court-ordered refunds. CP at 106.⁹

The second agreement lists what are claimed to be “special benefits” provided by the County and District. The agreement states that the County is to provide “educational opportunities,” such as answering questions and

⁹ Notably, both agreements provide that they may be amended or terminated at any time by agreement of the parties. CP at 99,105. Thus, even if, at a given time, the Ordinance appeared to conform to the statutory requirements, there would be no assurance that it would continue to so conform.

investigating complaints by property owners subject to the levy. CP at 103. Where requested by ten assessed landowners, and where the County “reasonably believes that twenty landowners will be in attendance,” the County shall provide “a workshop on protection of groundwater and surface water.” Id. Yet, these are not direct benefits to the parcels charged. They are not benefits to the property, as distinct from the property owners. Under *Covell’s* analysis of services, it is not enough to identify one that could potentially be received someday. See *Covell*, 127 Wn.2d at 879 (“service received by those who pay the fee”) (emphasis added). *Samis Land*, 143 Wn.2d at 813, n.52.

The second agreement also provides that the County shall perform dye testing of septic systems of assessed parcels within the district “which are reasonably believed to pose a high priority health hazard to other assessed parcels within the district.” CP at 103. Clearly, if a benefit to a parcel at all (as distinct from being a public benefit) this is not a benefit enjoyed by every parcel assessed, nor a promise that even one parcel will receive such a service. Similarly, the agreement provides for limited “ambient water quality monitoring of lakes, rivers, streams, and groundwater under, nearby, or adjacent to parcels subject to the Assessment and

investigation if the monitoring identifies potential pollutants.” Id. But this provision does not directly benefit any parcel, does not assure monitoring on or near any particular parcel, and does not ensure any improved water quality even if pollutants are identified.

The second agreement also tentatively provides, “consistent with budgetary limitations,” that the County “may help” with “restoration plans” if sewer or water lines break on parcels subject to the ‘assessment.’ Id. While potentially benefiting parcels so affected, it is obviously not a service or improvement actually received, but at most “one that could potentially be received someday, ” and clearly not available to all assessed parcels. Consequently, it lacks the characteristics of a special assessment. See *Samis Land*, 143 Wn.2d at 813, n.52. With similar conditional limits, the County proposed to “help with site remediation” where a parcel is deemed to “have a high likelihood of becoming contaminated” and poses a “high priority health and environmental hazard.” Depending on the amount and kind of “help,” which is unspecified, this could be a boon to the owner. Yet, like the conditional promise of help with restoration plans, it is not a promise that any particular parcel will receive any help or, more specifically, any help that would add to the value of the property. At most, in the terms of *Samis Land*,

it is aid that could potentially be received someday, not a benefit actually received by assessed parcels.

Under the second agreement, the County is also allowed to use “Assessment dollars” to match grant monies “for the purpose of providing programs or activities for the conservation, protection or enhancement of soil or water resources and which provide a special benefit to parcels which are assessed.” CP at 104. Yet, grants from state agencies necessarily will be for public purposes, not to directly benefit particular assessed parcels. Thus, this provision is inconsistent with the segregation of funds to ensure that funds collected are used only to provide the special benefits to assessed parcels, essential if the charge is to be construed as an assessment instead of a tax.

As the financial records of the County and the District show, funds collected from the assessment have been commingled with funds from grants for broad natural conservation purposes and with grants for improving water quality in Hood Canal and parts of Puget Sound, thereby spending funds from the conservation assessment on programs that provide no direct benefit to the parcels assessed, especially those not in the immediate vicinity of these bodies of water. See CP 114-126. In any event, this provision does not assure receipt of a benefit by any parcel, but only holds out the possibility that one

may be provided someday.

Financial records showing how the funds collected from the levy were actually spent show that they were used to pay personnel and to provide equipment for broad-based programs aimed generally at addressing broad public goals, not to provide special benefits to each parcel charged. For example, \$3,595.96 out of total expenditures of \$4,074.57 from the District's share of the funds in October 2006 – the most recent month for which data is available – went to salaries and benefits for personnel. CP at 114. Of the amount that went for personnel, \$2,957.25, or 82%, went for administration. Id. This percentage was also the average for the year through October. CP at 141-142; 114-123. Thus, either administrative costs consumed most of the funds nominally spent to provide special benefits to assessed parcels, or the funds spent for administration cover other programs administered by the District, in which case the second *Covell* factor, requiring that money collected must be allocated **only** to the authorized regulatory purpose, is not satisfied. Since it makes no sense to suppose that 4/5 or more of expenditures for programs supposedly to provide special benefits to assessed parcels would be consumed by administrative costs, one must infer that funds raised by the levy were spent for administration of a variety of programs.

Accordingly, under the second *Covell* factor, funds from the levy were not used exclusively to provide special benefits to assessed property. The funds were used for general administrative expenses, and so were treated like tax revenues, available for any activities of the District in need of funding.

For its part, the County used its share of the levy to make up shortfalls in funding for programs partly funded from other sources. Programs partly funded by grants from the Department of Ecology and Department of Health were also funded with monies from the levy. CP 124-126. The County used its share primarily to address water quality problems in parts of Puget Sound and Hood Canal. *Id.* These efforts may have served a public purpose, but obviously did not provide direct benefits to assessed parcels. The County failed to segregate funds collected through the levy from other funds conspicuously used for broad public purposes.

To the extent that assessed parcels may be said to have benefited from programs designed to serve broad public purposes, so also did non-assessed parcels benefit. Forest land benefited as much as vacant non-forested land. Yet, Classified or Designated Forestland, Current Use Timber, Federally owned property, and “Government held trust land for Indians” are all exempt. CP at 113. The County’s share was not spent to provide special

goods or services directly benefiting the parcels on which the levy was imposed.

In sum, the second agreement provides for a variety of public services, and promises no direct benefit to any parcel, or any assurance that the assessment will be spent on improvements or benefits appurtenant to assessed land. Even if parcels with residential or commercial development might be construed as receiving a benefit from programs of natural resource conservation aimed at improving the quality of life in the community, the charge is imposed also on entirely undeveloped land, provided that it is deemed “non forested,” even though such land receives no service and does not contribute to any shared burden that might be imputed to developed land. See *Samis Land*, 143 Wn.2d at 812, n. 43. Instead, the charge is, without regard to use, an absolute and unavoidable demand against property or the ownership of property. See *Black v. State*, 67 Wn.2d 97, 99, 406 P.2d 761 (1965). As such, the Ordinance imposes a tax, not an assessment, and is unconstitutional as applied under the uniformity requirements of Art. VII, Sec 1.

7. Relief to Plaintiffs should include refund of ‘assessments’ paid.

This court recently addressed the question of whether plaintiffs who

show they have been subject to an unconstitutional charge that amounts to a property tax are entitled to retroactive relief. The City of Ocean Shores required owners of vacant lots within the city limits to pay water and sewer "availability charges," although their properties were not connected to the city's water and sewer systems. The owners of these vacant lots sued the city, claiming the charges were unconstitutional property taxes and not permissible regulatory fees. The trial court granted the owners summary judgment. *Carrillo v. City of Ocean Shores*, 122 Wn. App. at 597.

With both the "availability charges" adopted by Ocean Shores and the "conservation special assessment" adopted by Mason County, the levies were ostensibly not taxes, but were found to be property taxes in disguise. In affirming the decision of the trial court in *Carrillo*, this court found that landowners who paid the unauthorized charges were entitled to recover the charges paid plus interest for the period at issue. *Carrillo*, 122 Wn. App. at 620.

Federal cases, applied by the Washington Supreme Court, have dealt with the general question of when an illegal tax may not only be enjoined to prevent future collection (prospective application), but also when retroactive relief is warranted. The threshold factor needed to limit application of a

determination of invalidity to future collection is a finding that a court's decision established a new principle of law, overruling past precedent on which litigants may have relied. *Carrillo*, 122 Wn. App. at 613, citing *National Can Corp. v. Department of Revenue*, 109 Wn.2d 878 , 882, 749 P.2d 1286, *cert. denied*, 486 U.S. 1040 (1988).

In *Carrillo* the trial court was found to have correctly ruled that no new principle of law was established and, therefore, that the City did not meet the threshold factor to limit collection only prospectively. *Carrillo*, 122 Wn. App. at 614. The situation is the same here. The applicable standards for deciding whether the conservation assessment is a permissible regulatory fee or an impermissible tax were set out in 1995 in *Covell*. The decision in the present case is not based on pronouncements of new law, but was based on earlier precedent, including *Covell* (1995) and *Samis Land* (2001).

Equity does not favor limiting application to future collection. No third parties would suffer an unfair and substantial hardship upon retroactive application of the court's decision. Nor is retroactivity unfair to the County or the District. It would be inequitable to allow collection and retention of the levy under a scheme judicially determined to be unconstitutional.

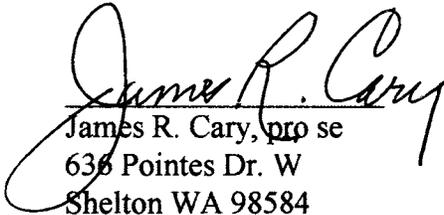
It would be unreasonable to expect those challenging the

conservation special assessment to protest it as a tax when it was not adopted as a tax or characterized as a tax in the statute authorizing adoption of a special assessment. Moreover, "payment under protest" of a tax is not required for a refund of an illegal tax, unless required by statute. See *Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 811, 650 P.2d 193 (1982) (*Hillis Homes I*); cited in *Carrillo*, 122 Wn. App. at 611. No statute requires that assessments adopted pursuant to RCW 89.08.400 be paid under protest to be eligible for refund of the levy, if it is proven unlawful or unconstitutional.

E. Conclusion

The trial court correctly ruled that the 'assessment' was not compliant with the authorizing statute, and was instead an unconstitutional property tax. Its judgment should be affirmed, except that plaintiffs should be awarded refund of 'assessments' paid, as well as interest on the amounts paid, together with court costs.

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Declaration of Service

I, John E. Diehl, under penalty of perjury under the laws of the State of Washington, declare that on December 8, 2008, I mailed, postage prepaid, the above Respondents'/Cross-Petitioners' Response Brief to the offices of

~~██████████~~ Matthew B. Edwards, Owens Davies PS, 1115 W. Bay Dr. NW, Suite 302, Olympia WA 98502.

Dated: December 8, 2008

John E. Diehl

I, James A. Cary, under penalty of perjury under the laws of the state of Washington, declare that on Dec. 8, 2008, I ~~██████████~~ personally served the above Response Brief on the Office of the County Prosecutor, to Monty Cobb, Deputy Prosecuting Attorney, 521 N 4th Ave., Suite A, Shelton WA 98584.

dated December 8, 2008 James R. Cary

Appendix A

forth in the following example. A conservation district submits to a county a system of assessments that specifies a \$10 total assessment that contains two parts—a \$4 per parcel assessment for Activity A and a \$6 per parcel assessment for Activity B. It is difficult to apply the interpretation of RCW 89.08.400 set forth above to these circumstances. For example, in response to this submission, a county could modify the district's proposal and approve a revised system of assessments that authorizes an assessment of \$2 for Activity A and \$8 for Activity B. On the one hand, the county has no authority to modify the proposed budget and thus could not revise the district's policy judgment as to how much to allocate to Activity A and how much to Activity B. On the other hand, the county does have authority to revise the "system of assessments", which could include the specific amount to assess against each parcel. This problem could be avoided by formatting the district's proposal in such a way that the actual budget can be separated from the "system of assessments".

We can comment on this example in two respects. First, RCW 89.08.400(2) requires that the county legislative body hold a hearing on "the proposed system of assessments". This is a reference to the district's proposal. The county must therefore hold a hearing on the district's proposal and determine whether it serves the public interest and whether assessments will exceed the benefits the land will receive from the district, as those benefits are described in the district's proposed budget. The county does not comply with RCW 89.08.400(2) if the county holds a hearing only on the county's proposal and conducts no hearing on the district's proposal.

Our second comment is that if the county approves an \$8 per parcel assessment for Activity B, that means the county has determined that Activity B serves a public purpose and that the benefit to the assessed land for Activity B is at least \$8 per parcel. If Activity B confers an \$8 per parcel benefit, the district's proposal of \$6 per parcel also meets RCW 89.08.400's threshold for approval; yet the county did not accept the district's proposal even though it met the statutory threshold. This example shows how a county could modify the district's proposal to require the district's assessments to fund programs favored by the county, even if that overrides the funding priorities of the district. This does not appear to be what the Legislature contemplated when it granted assessment authority to conservation districts. The expressed legislative purpose of the county's power to modify the district's proposal is to ensure that an elected body different than the district board reviews the assessments for public interest and proportionality reasons. RCW 89.08.400(2). There is no indication in the statute that the conservation district assessments were intended to provide a county with the authority to raise revenue to fund programs favored by the county in contrast to those determined by the district.^[4]

3) If a county legislative body is entitled to make changes, what obligation, if any, does a conservation district have to accept changes made by a county legislative authority to a proposed system of assessments?

[original page 7] 4) What options and obligations does a conservation district have if it does not agree with the final system of assessments imposed by a county legislative body?

We reiterate that the county's power to modify a conservation district's proposal applies only to the proposed system of assessments and does not apply to a conservation district's proposed budget. Our answers to questions 3 and 4 are therefore limited to county-imposed changes to the land classification, the annual assessment rate, the total amount of assessments per classification, and the duration of the assessment.^[5]

We will answer your question using the following examples. One example of a change that a county legislative body could potentially make is to modify the rate of assessment. One part of the county's analysis under RCW 89.08.400(2) is to consider whether the assessments will exceed the special benefit that the land will receive. A county might conclude that a proposed \$10 per parcel assessment is too high. Instead, the county might determine that the benefit to be received by each parcel from the district is more fairly valued at \$5 per parcel and modify the assessment accordingly. In such a situation, the law requires the conservation district to impose a \$5 special assessment, since