ORIGINAL

42587-4-II

NO. 85438-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LILY A. BANKS, MARK A. BERGE and BARBARA BERGE, husband and wife, LEE GOTTI, EDWARD H. LILLEY SR., KENNETH D. SHAW III and SANDRA A. SHAW, husband and wife, and that class of persons and entities similarly situated,

Appellants,

v.

CITY OF OCEAN SHORES, a municipal corporation,

Respondent.

BRIEF OF APPELLANTS

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I. INTRODUCTION

This class action seeks a declaratory judgment as to the legality of the City of Ocean Shores stormwater charge. The charge is imposed on all real estate parcels in Ocean Shores, whether developed or not, and without regard to whether the lots generate stormwater runoff or the amount of runoff. The charge is not a fee for providing storm sewers to drain stormwater runoff. Nor is it a regulatory fee imposed on land use activities that generate runoff. Instead, it is a compulsory charge imposed on the ownership of land or, in other words, a tax on real property.

Plaintiffs maintain that the Ocean Shores charge is both statutorily and constitutionally invalid. It is statutorily invalid because it does not meet the requirements for either a storm sewer utility fee or a stormwater regulatory fee. It is constitutionally invalid because it infringes the Tax Uniformity Clause (Const. art. VII, § 1), the one-percent limitation on non-voter approved tax levies (Const. art. VII, § 2) and the Legislature's constitutional control over local taxation (Const. art. XI, § 12).

Municipalities may not impose stormwater fees on the mere ownership of land. Rather, stormwater fees are proper only (1) where a city furnishes storm sewers that drain surface and stormwater runoff from customers' property, or (2) where the fee is imposed on activities that disrupt natural drainage so that it charges those activities with the costs of

mitigating the damage they cause. The Ocean Shores stormwater charge satisfies neither of these requirements. It is invalid as a matter of law.

II. ASSIGNMENTS OF ERROR AND ISSUES

Assignments of Error

1. The trial court erred in entering judgment for the City of Ocean Shores.

2. The trial court and jury erred in failing to determine that the Ocean Shore's stormwater charge is a tax on real property.

3. The trial court erred in entering judgment as a matter of law, dismissing plaintiffs' claim that the Ocean Shores stormwater charge exceeds the statutory authority granted by RCW 35.67.020 and RCW 35.92.020.

4. The trial court erred in determining as a matter of law that RCW 35.67.020 and RCW 35.92.020 authorize a city to charge a mandatory storm sewer fee based on lot ownership where the vast majority of lots generate no surface and storm water to be drained by surface and storm water sewers.

5. The trial court erred in determining that roadside ditches and culverts and fresh waterways that drain groundwater from a high water table provide a surface and storm sewer utility service.

6. The trial court erred in ruling that cities need not comply with RCW 90.03.500 when imposing stormwater fees based on stormwater burdens created by property owners.

7. The trial court erred in barring the testimony of Professor Neil Bruce regarding the substantive nature of the City's stormwater charge.

8. The trial court erred in barring evidence that the City's outfall weir, which determines the surface elevation of the fresh waterways, is the only human controlled cause of drainage problems in Ocean Shores.

9. The trial court erred in barring evidence that the function of the stormwater charge is to shift the cost of maintaining the roadside ditches and culverts from the tax-supported Street Fund to a proprietary Stormwater Utility Fund so that the cost can be paid with fees rather than taxes.

10. The trial court erred in failing to properly instruct the jury regarding what constitutes a tax and the standard for distinguishing taxes from fees under Washington law.

Issues Pertaining to Assignments of Error

1. Is the Ocean Shores stormwater charge in substance an absolute and unavoidable tax on property that must comply with the Tax Uniformity Clause (Const. art. VII, § 1), the one-percent levy limitation (Const. art. VII, § 2), and the requirement for express legislative tax authority (Const. art. XI, § 12)? (Assignments 1, 2)

2. May a city impose a storm sewer utility fee on developed and undeveloped property alike, without regard to whether the city furnishes storm sewer service or whether the properties charged generate stormwater runoff? (Assignments 1, 2, 3, 4, 5)

3. Do RCW 35.67.020 and 35.92.020 authorize mandatory fees based on property ownership to fund the maintenance of street drainage ditches and culverts and fresh waterways? (Assignments 3, 4, 5)

4. Does the authority under RCW 35.67.020 and RCW 35.92.020 to operate surface and storm sewer utilities include the authority to charge a stormwater utility fee based on lot ownership for managing the water table elevation in the city? (Assignment 5)

5. May a city impose a stormwater fee that is not based on any action by property owners that disrupts natural drainage or generates surface or storm water runoff, but instead is based simply on lot size or as a per lot charge, such that owners who do nothing to alter natural drainage conditions pay the same rate as owners of developed parcels who do? (Assignments 4, 5, 6)

6. May a city transfer the cost of maintaining roadside ditches and culverts that are necessary for adequate street drainage to a

"stormwater utility" and fund that cost with mandatory "stormwater" charges imposed on lot ownership? (Assignments 2, 4, 5).

7. Did the trial court improperly exclude the testimony of plaintiffs' public finance expert who would have testified to the substantive economic nature of the Ocean Shores charge? (Assignment 7).

8. Were plaintiffs improperly denied the opportunity to show that the City's decision to replace the developer's original variable weir (which could regulate the water table elevation by controlling the elevation of water in the lakes and canals) with a fixed weir is the only human cause of drainage and flooding problems the City? (Assignment 8).

9. Were plaintiffs improperly denied the opportunity to show that the function of the Ocean Shores "stormwater utility" was not to provide a utility service to lot owners, but instead, to shift the cost of maintaining roadside ditches and culverts from the tax-supported Street Fund to a proprietary Stormwater Utility Fund so that the cost could be charged as a utility fee rather than a tax? (Assignment 9).

10. Did the trial court fail to properly instruct the jury regarding the definition of a tax and the legal standards for distinguishing taxes from fees under Washington law? (Assignments 10).

III. STATEMENT OF THE CASE

A. Facts

The Ocean Shores Stormwater Charge

The City of Ocean Shores imposes a stormwater charge on all real estate parcels in the city. Appendix 1 (Ocean Shores Municipal Code OSMC § 13.20.020).[1] During the time period relevant to this lawsuit

[1] Ocean Shores' ordinances are published on the City's website at: http://oceanshores.fileprosite.com/Documents/DocumentList.aspx?ID=51. The city code is published at: http://www.codepublishing.com/wa/oceanshores.html. Pursuant to ER 201, plaintiffs request that the Court take judicial notice of the ordinances and city code.

(December 2000 to the present),[2] the charge has been structured in two ways. From 2000 until 2002 it was a per-lot charge based on the lot's zoning and use, with special size classifications for multi-lot parcels and fractional lots. Appendix 2 (Ocean Shores Ord. No. 705 § 3). Under this fee structure, lots zoned for residential use were charged a flat per-lot fee, regardless of lot size or whether the lot was improved or undeveloped. For commercial parcels, the charge was approximately 38 percent greater on developed lots than undeveloped lots. In 2002, the fee was changed to one based strictly on lot size. Under this new structure, the charge is based solely on lot size, without regard to development status or zoning (commercial or residential). Appendix 3 (Ord. No. 743). Neither of these rate structures apportions the charge based on impervious surface or any other measure of the amount of stormwater generated by the lot owner.

The City created its stormwater utility in 1980. Ord. No. 296. Revenues from the charge are used to maintain the City's roadside ditches, culverts and fresh waterways, with the bulk of the funds used to maintain the roadside ditches and culverts. RP 89-90, 549. Prior to creation of the

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[2] Under the applicable three-year statute of limitations, plaintiffs seek refunds of the illegal charges paid since December 2000. *See Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 190, 157 P.3d 847 (2007). The stormwater charge was initially imposed in 1980 by Ord. No. 301(Ex. 233), at the same time as the City imposed water and sewer "availability charges" under Ord. No. 300. The latter were struck down as unconstitutional taxes in *Carrillo v. City of Ocean Shores*, 122 Wn.App. 592, 94 P.3d 961 (2004).

stormwater utility, those maintenance costs were budgeted in the City's tax-supported Street Fund. *See* Ord. Nos. 123, at 7; 148 at 7; 173 at 5; 220 at 4; 232 at 7.

The History and Geography of Ocean Shores

Ocean Shores is situated on the Point Brown Peninsula, a sandy spit which forms the northern entry into Grays Harbor. In 1960 the Ocean Shores Investment Corporation purchased the peninsula (then a cattle ranch) to develop a new recreational community. Over the next decade, the developer began platting the land, constructing roads, installing utilities, dredging an interconnected network of lakes and canals throughout the peninsula and selling lots.[3] The City of Ocean Shores was incorporated in 1970 and took over responsibility for maintaining the public roads, rights-of-way, and waterways from Grays Harbor County.

The lakes and canals in Ocean Shores provide freshwater amenities and facilitate drainage throughout the peninsula. RP 176, 329-330, 418-419. Their surface elevation is controlled by an outfall weir located at the south end of the Grand Canal where freshwater drainage flows over the weir and into North Bay.[4] Appendix 4, Ex. 206 (Engineers Rpt) at 2;

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[3] For a short history of Ocean Shores, *see* "Humble Beginnings" at http://www.oceanshores.com/os. Plaintiffs request that the Court take judicial notice of this uncontested historical background.

[4] The weir is a dam that impounds fresh water, raising the surface elevation of the lakes and canals to the weir crest before releasing the overflow into North Bay.

RP 170, 371, 412, 468, 548. The surface elevation of the lakes and canals determines the water table elevation throughout the peninsula. RP 396-397, 407. The original developer installed an adjustable weir at this outlet to regulate the surface elevation of the lakes and canals and thereby control the water table elevation. CP 134 at ¶¶ 14-15; CP 150 at ¶ 16; CP 320 at ¶ 13. However, the original outfall structure began to deteriorate in the 1970's, and in 1980, a replacement structure was installed for the City, which included a new weir in a "U" configuration with a longer crest and greater hydraulic capacity, but it was no longer adjustable. CP 320 at ¶ 17. With this fixed weir, the surface elevation of the lakes and canals cannot be lowered below the weir crest (approximately 5.5 feet above mean sea level). CP 320 at Ex. A; RP 371.

Drainage Conditions in Ocean Shores

Ocean Shores does not suffer the stormwater drainage problems faced by other Western Washington cities, where development has disrupted natural drainage and caused damaging increases in stormwater runoff. The Point Brown Peninsula is composed of sandy, porous soil that readily absorbs rainfall – provided that the ground is not saturated. Ex. 206; RP 166, 168-69, 292-93, 326-327, 465-466. The drainage problems that occur in Ocean Shores are caused by the City's high seasonal rainfall, its flat topography and its shallow water table – all

factors that are beyond the control of lot owners and unrelated to actions taken by lot owners. Ex. 206; RP 21, 163, 293-294, 327, 333, 466-467, 502. During prolonged periods of heavy rain, the water table rises to or near the surface, and groundwater expresses into the roadside ditches and culverts. RP 190, 294-295, 401. Because of the flat topography, the accumulating waters are slow to drain RP 163-164, 404, and the overflow can flood roadways and pond on adjoining properties. RP 374-375. This can disrupt use of roadways and damage roadbeds, but there is no evidence of material damage to private property. Ex. 27, RP 161, 374-375.

B. Procedural Background

This action was filed in December 2003. In 2006, the trial court heard cross-motions for summary judgment, and in February and March 2007 it issued a memorandum decision and letter ruling on reconsideration that largely rejected both sides' motions. CP 160 and 164. The court did, however, grant partial summary judgment to the City, ruling that the statutory requirements for charges imposed under RCW 90.03.500 do not apply to the City's stormwater charge. *Id.* The trial court rejected plaintiffs' repeated requests for reconsideration of that ruling and refused to consider a second motion for summary judgment that plaintiffs filed in January 2010. CP 268C, 268B and 289.

The case was tried to a jury in October 2010. Prior to trial, the court granted the City's Motion *in Limine* to exclude the expert testimony of Professor Neil Bruce and granted in part the City's Motion *in Limine* to exclude evidence and argument regarding the outfall design. CP 405. At trial, the court sustained the City's objection to evidence of the City's pre-1980 budget ordinances which show that before creation of the stormwater utility in 1980, street drainage maintenance was paid from the City's tax-supported Street Fund. RP 111-112, 145-147.

At the close of plaintiffs' case in chief, the trial court granted the City's CR 50 Motion, dismissing plaintiff's claim that the stormwater charge exceeds the City's statutory authority. CP 407; RP 623. The court submitted the question of whether the stormwater charge is an unconstitutional tax to the jury. RP 614-615, 660-661. The court refused plaintiffs' proposed instruction regarding the definition of a tax and the legal test for distinguishing a tax from a fee. *Compare* CP 399 (Instruct. 7) *with* CP 415 (Plaintiffs' Proposed Instruct. 7); RP 644. The jury found that the charge is a regulatory fee rather than a tax, and the court entered judgment accordingly, dismissing plaintiffs' lawsuit. CP 401, 408.

IV. SUMMARY OF ARGUMENT

The central question in this appeal is this: What is the true nature of the Ocean Shores stormwater charge? There are just three possibilities:

- The charge is a storm sewer utility fee imposed under RCW 35.92.020 and/or RCW 35.67.020 (Appendix 5) as the *quid pro quo* for storm sewer service furnished by the City; or
- It is a stormwater mitigation fee imposed under RCW 90.03.500. to pay for facilities that mitigate damages from increased runoff caused by disruptions to natural drainage; or
- It is a tax on the real estate lots in the City.[5]

The Ocean Shores charge is not a storm sewer utility fee or a stormwater mitigation fee – it is a tax. It is an absolute, unavoidable charge imposed on real property to pay for government services that benefit the public.

The stormwater charge cannot be a utility fee because it is not the *quid pro quo* for storm sewer utility service. The City does not furnish storm sewer utility service in return for payment of the fee. Most lots in Ocean Shores do not generate any stormwater runoff at all. Instead, the rainfall percolates naturally into the sandy soil. Natural infiltration, however, is not a storm sewer service for which the City can charge a storm sewer fee. Nor does draining street runoff and elevated groundwater provide a surface and storm sewer utility service. These are public benefits to be financed with general revenues, not proprietary

[5] The key statutes relevant to this appeal are included in Appendix 5.

services furnished to individual lot owners in exchange for payment of a sewer utility fee.[6]

Nor is the City's charge a stormwater regulatory fee. RCW 90.03.500 authorizes local governments to impose stormwater fees on "activities" that disrupt natural drainage and cause harmful increases in stormwater runoff. Revenues from such fees must be used to mitigate the damage caused by disruptions to natural drainage. These fees regulate stormwater discharge by imposing the cost of mitigation on the activities that cause drainage problems. The Ocean Shores charge, however, is not imposed on activities that disrupt natural drainage or increase runoff, and the proceeds do not pay for mitigating the adverse impacts of increased runoff. It, therefore, does not comply with RCW 90.03.500.

Stormwater fees under RCW 90.03.500 are designed to make development pay its own way. But a compulsory charge based upon lot ownership (rather than upon activities that cause damage) does the very opposite. It allows mitigation cost to be shifted to innocent lot owners who do *nothing* to cause drainage problems. The decision below permits just such fees. It would allow cities to shift stormwater mitigation costs

[6] Ironically, the City has exempted the streets themselves from the charge, even though they are the primary generator of stormwater runoff in Ocean Shores. OSMC § 13.20.030; RP 126-127, 168, 176.

from those who cause damage to innocent owners who don't, thereby undermining the very purpose of RCW 90.03.500.

The Ocean Shores stormwater charge is not a valid utility fee or a valid regulatory fee – it is a tax. It is an "absolute and unavoidable demand" against property. That is a property tax. *Covell v. City of Seattle*, 127 Wn.2d 874, 890, 905 P.2d 324 (1995). It is a regressive tax that violates tax uniformity, improperly circumvents the constitutional one-percent levy limitation, and undermines the Legislature's constitutional control over local taxation. Therefore, plaintiffs request that the Court reverse the trial court and rule the Ocean Shores stormwater charge invalid.

V. STANDARD OF REVIEW

The material facts regarding the statutory and constitutional validity of the City's stormwater charge are not disputed. There is no dispute that drainage problems in Ocean Shores are caused by seasonal heavy rains, flat topography and a shallow water table. There is no dispute that drainage problems arise because of the accumulation of elevated groundwater and street runoff in the roadside ditches, not because of runoff from privately-owned lots. There is no dispute about how the City uses the fee revenues. Rather, the dispute in this case involves the legal inferences and conclusions to be drawn from these facts. These are

questions of law that the Court reviews *de novo*. *Okeson v. City of Seattle*, 150 Wn.2d 540, 548-549, 78 P.3d 1279 (2003) (*Okeson I*). ("The issues in this case pertain to constitutional limitations and statutory authority, and so are issues of law to be determined *de novo* by this court.").[7] In making these determinations, substance controls over form. No deference is afforded to how the charge is labeled by the City in determining whether it is a legitimate fee or an invalid tax. *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 806, 23 P.3d 477 (2001). The trial court's evidentiary rulings are reviewed under the abuse of discretion standard. *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662, 935 P.2d 555 (1997).

VI. ARGUMENT

A. The Ocean Shores Stormwater Charge Is a Tax on Real Property.

A tax is "a forced contribution of wealth to meet the public needs of a government." *Local 587 v. State*, 142 Wn.2d 183, 219, 11 P.3d 762 (2000). A property tax is an "absolute and unavoidable demand against property or the ownership of property." *Covell v. City of Seattle*, 127 Wn.2d at 890. The Ocean Shores stormwater charge is just such a tax. It is a compulsory charge imposed on each lot in the city. The revenues are

[7] *See also, State v. Clausing*, 147 Wn.2d 620, 628-629, 56 P.3d 550 (2002); *Kim v. Lee*, 145 Wn.2d 79, 86, 31 P.3d 665 (2001); *Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Authority*, 44 Cal.4th 431, 449-450, 187 P.3d 37 (2008).

used to pay for maintaining and improving street drainage and fresh waterways, community assets that are available to and benefit the general public, not just those who pay the charge. And, because it is a mandatory exaction based on lot ownership, the charge has no regulatory purpose or effect. The charge thus meets the strictest definition of what constitutes a tax on real property. That alone is dispositive of this appeal.

B. The Roadside Ditches and Culverts Are Integral Components of the Public Streets and, under *Covell,* Their Maintenance Cannot Be Funded with a Proprietary Utility Fee.

The vast majority of the funds collected through the stormwater charge are used to maintain the City's roadside ditches. RP 89-90, 549. This, however, is ordinary street maintenance. *See* Ex. 27 (Appendix 6); RP 161, 225-229, 237-239; *Sigurdson v. City of Seattle*, 48 Wn.2d 155, 159, 292 P.2d 214 (1956) (Maintaining street drainage systems is "ancillary to the function of maintaining the streets."). Cities have a ministerial duty to maintain their streets (including the street drainage systems) in a reasonably safe and suitable condition for the benefit of the general public. *Ruff v. County of King*, 125 Wn.2d 697, 704, 887 P.2d 886 (1995).[8] Maintaining street drainage is an integral aspect of street maintenance. It is not a separate utility service provided to lot owners.

[8] *See also Island County v. Mackie*, 36 Wn.App. 385, 393, 675 P.2d 607 (1984); *Yarrow First Associates v. Town of Clyde Hill*, 66 Wn.2d 371, 375, 403 P.2d 49 (1965) ("Streets are dedicated to the public use. They pertain to the exercise of a

The Ocean Shores' ditches and culverts are typical for street drainage facilities for the coastal environment. RP 212-216. The City's own expert admitted that if those facilities were maintained at an adequate level to prevent flooding of the roads, damage to roadbeds and dangerous accumulations of water in the roadside ditches, that would "pretty much prevent other damages." RP 485-486. When the City was incorporated in 1970, it assumed the governmental duty to maintain the roadside ditches and culverts in "a reasonably safe and suitable condition." Simply fulfilling that duty does not provide a separate utility service to lot owners.

In *Covell v. City of Seattle*, the Court held that cities cannot shift street maintenance costs to proprietary street utilities. Cities cannot evade that holding by dividing up *street maintenance* into its components (drainage, paving, streetlights, etc.) and imposing separate "*fees*" for some or all of the parts. If that were allowed, "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...." *Samis*, 143 Wn.2d at 806. A city can no more shift its responsibility (and cost) for street drainage to a storm sewer utility than it

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governmental function.") (citations omitted); *Kelly v. Gifford*, 63 Wn.2d 221, 223, 386 P.2d 415 (1963); *Ronkosky v. City of Tacoma*, 71 Wash. 148, 153, 128 P. 2 (1912).

could shift responsibility for the streets themselves to a street utility. The Court rejected the street utility scheme in *Covell*, and Ocean Shores' stormwater scheme is equally invalid.

C. The Ocean Shores Stormwater Charge Is Not a Valid Storm Sewer Utility Fee or Regulatory Fee.

The trial court ruled that RCW 35.67.020 and 35.92.020 authorize cities to charge stormwater fees to property owners without regard to whether the owners receive any specific storm sewer service or do anything to generate stormwater runoff. That was error. While cities have authority to charge storm sewer utility fees for furnishing sewers to drain storm and surface water from customer lots, they do not have authority to impose compulsory storm sewer fees based on nothing more than lot ownership. Nor may cities impose regulatory fees simply because it rains. A regulatory fee must regulate. A charge on ownership regulates nothing. It simply taxes real property.

1. The Stormwater Charge Is Not a Utility Service Fee Authorized by RCW 35.92.020 or RCW 35.67.020.

In granting the City's Motion for Judgment as a Matter of Law, the trial court accepted the City's argument that draining elevated groundwater furnishes a storm and surface water sewer utility service to every lot in Ocean Shores. The gist of the City's argument is that there is no meaningful distinction between surface and storm water and

groundwater. After all, the water all comes from rainfall, and if drainage is needed, a city *must* have authority under RCW 35.67 and 35.92 to pay the cost. *See* RP 588-589. This argument, however, assumes the very thing it seeks to prove.

The City's argument equates "storm and surface water" with "groundwater" and "drainage ditches and culverts" with "storm sewer utility service." The terms, however, are not synonymous. Storm and surface water is not groundwater, and not all drainage ditches and culverts provide storm sewer utility service. To charge a utility fee, a city must furnish a storm sewer utility service. Ocean Shores does not do so.

a. Groundwater is not surface or stormwater and draining groundwater is not a storm sewer utility service.

RCW 36.67.020 and 36.92.020 authorize cities to operate storm sewer systems that drain stormwater runoff generated by urban development. These statutes do not provide a mechanism to fund street drainage, water table management or drainage of elevated groundwater.

Groundwater is not storm and surface water. The legal regimes for storm and surface water and groundwater are entirely distinct. Groundwater is water that has percolated into the ground. *See, e.g.* RCW 90.44.035(3); *Wilkening v. State*, 54 Wn.2d 692, 344 P.2d 204 (1959). Storm and surface water, on the other hand, is "the *runoff* from

natural precipitation such as rain, snow melt, and other surface drainage." *Tukwila School Dist. No. 406 v. City of Tukwila*, 140 Wn.App. 735, 738, 167 P.3d 1167 (2007) (emphasis added). Stormwater is water that has not percolated into the soil to become groundwater.[9] It is the runoff created by human alteration of the natural landscape. The Legislature authorized cities to operate storm sewer utilities to drain that runoff. It did not authorize cities to impose mandatory fees on lot ownership to pay for street drainage or managing groundwater elevations.

There are statutorily prescribed methods to fund drainage improvements that control groundwater. For example, cities may impose drainage improvement assessments to pay for draining groundwater where the drainage specially benefits the properties charged. *See* RCW 85.06.015 and .230. Cities also may use general revenues to fund drainage facilities and services that benefit the public. But there are strict regulatory requirements that apply if draining groundwater impacts

[9] *See e.g.*, WAC 173-218-030 ("'Storm water' means the portion of precipitation that does *not naturally percolate into the ground* or evaporate, but flows via overland flow, interflow, pipes and other features of a storm water drainage system into a defined surface water body, or a constructed treatment, evaporation, or infiltration facility") (emphasis added); 40 CFR 122.26(b)(13) ("'Storm water' means storm water runoff, snow melt runoff, and surface runoff and drainage."). *See also, Phillips v. King County*, 136 Wn.2d 946, 957-958, 968 P.2d 871 (1998); *Pruitt v. Douglas County*, 116 Wn.App. 547, 554, 66 P.3d 1111 (2003).

wetlands.[10] Ocean Shores may indeed maintain drainage facilities to manage the elevation of the water table under the City, but to do so it must obtain proper permits and use a proper funding source to pay the cost.

Municipalities are limited to those powers expressly granted and to powers "necessarily or fairly implied in or incident to the powers expressly granted, and also those essential to the declared objects and purposes of the corporation." *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 374, 89 P.3d 217, 225 (2004). If there is doubt as to whether the power is granted, it must be denied. *Id.* The roadside ditches and culverts in Ocean Shores protect the streets from street runoff and elevated groundwater. While maintaining adequate street drainage to prevent flooding and roadbed damage is an important governmental function, it does not provide a storm sewer utility service to owners of adjoining properties.

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[10] The City's characterization of the roadside ditches and culverts as facilities primarily for draining lots is the very opposite of how it represented them to the Corp of Engineers for purposes of the permit requirements of the Clean Water Act, 33 U.S.C. chap. 26. Work on ditches that impact wetlands requires a § 404 permit from the Army Corp of Engineers. However, maintenance of street drainage facilities is exempt from the permit requirement as maintenance of drainage associated with "transportation structures." 33 CFR 323.4(a)(2). The City told the Corp of Engineers that its roadside ditch maintenance was exempt as maintenance work on "transportation structures." Ex. 33. At trial in this case, it claimed the very opposite: that the primary purpose of the ditches is to drain adjoining properties, not streets. The City is talking out of both sides of its mouth.

b. The roadside ditches and culverts do not furnish a proprietary utility service.

RCW 35.67.020 and 35.92.020 authorize cities to operate sewer utility systems that furnish sanitary and/or storm sewer service. The statutory authority for storm sewers is no different than for sanitary sewers. "Storm and surface water sewers" are simply included in the definition of a "system of sewerage" which a city may operate as a utility.[11] RCW 35.67.010 (Appendix 5)

Sewer utilities, like other municipal utilities, are proprietary businesses that sell commodities or services, just like privately-owned utilities. 12 McQuillin, MUNICIPAL CORPORATIONS § 35.55 (2006) ("Where a municipality owns its own water, electric or other utility plant, it has the right to charge consumers who make use of its services, just as does a privately operated public utility.").[12] Whether it is a storm sewer or

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[11] The statutory authority for storm sewer utilities was added in two steps. In 1955 the Legislature first authorized cities to furnish "combined sanitary sewage disposal and storm or surface water sewers." Laws 1955, ch. 266 § 2. Then, in 1965, the Legislature extended this to add authority for stand alone "storm or surface water sewers." Laws 1965, ch. 110, § 1.

[12] *See also Burns v. City of Seattle*, 161 Wn.2d 129, 150, 164 P.3d 475 (2007); *POWER v Utilities and Transp. Comm.*, 104 Wn.2d 798, 825, 711 P.2d 319 (1985) (utilities charge for services rendered, just like doctors and lawyers); 64 C.J.S. *Municipal Corporations* § 1538 *Charges for Use or Consumption*; C. Phillips, THE REGULATION OF PUBLIC UTILITIES, 3-4 (1988); Gov't Finance Officers Assoc., CATALOG OF PUBLIC FEES & CHARGES, vii (1992); Advisory Comm'n on Intergovt'l Relations, LOCAL REVENUE DIVERSIFICATION –USER CHARGES, 3-5 (Oct. 1987)).

sanitary sewer, a municipal sewer utility must furnish sewer service to its customers in order to charge a utility fee in return.[13]

The drainage ditches and culverts in Ocean Shores do not drain surface and storm water from private lots. With immaterial exceptions, the rainfall in Ocean Shores infiltrates directly into the ground without the aid of any sewer service furnished by the City.[14] On undeveloped lots, the rain infiltrates naturally. On developed lots, the same result is generally achieved either by natural infiltration or with owner-installed infiltration systems. RP 156-157, 297, 366-367, 542. In neither case is surface or stormwater drained from lot owners' property by city sewers.[15] Ocean Shores cannot charge lot owners a storm sewer fee for sewer service that it does not provide.

In a recent series of decisions involving the Seattle municipal utilities, this Court examined the distinction between proprietary utility

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[13] *See* RCW 35.92.020 and 35.67.020. *Cf. Holmes Harbor Sewer Dist. v. Holmes Harbor Home Bldg. LLC.*, 155 Wn.2d 858, 865, 123 P.3d 823 (2005) (Sewer district must *furnish* sewer service to have statutory authority to charge sewer fee. Unconnected lots cannot be charged.). The same principle applies to all municipal utilities, water, sewer, garbage, power, etc.

[14] RP 155-158, 293, 465-466.

[15] It is undisputed that the roadside ditches and culverts primarily drain road runoff and elevated groundwater. Some commercial lots hook their stormwater drains directly into city culverts or drain runoff directly into the City's ditches. There also may be some incidental runoff from residential properties. But that is irrelevant to the legality of the City's charge which is imposed on all lots based solely on lot ownership.

services – which may be funded through utility rates – and governmental functions which are to be funded with general governmental revenues, such as taxes. Maintaining this distinction is crucial to preserving the constitutional structure for municipal finance and taxation. The Ocean Shores stormwater charge does not qualify as a proprietary sewer utility fee under these decisions.

In the first case in this series, *Okeson v. City of Seattle (Okeson I)*, 150 Wn.2d 540, 78 P.3d 1279 (2003), the Court considered whether street lighting is a proprietary utility service that can be funded with electricity rates charged to City Light customers. The Court ruled that it could not:

> Providing streetlights ... is a governmental function because they operate for the benefit of the general public, and not for the "comfort and use" of individual customers. City Light customers have no control over the provision or use of streetlights. Hence, while the electric utility itself is a proprietary function of government, the maintenance of streetlights is a governmental function.

150 Wn.2d at 550-551. Four years later, in *Okeson v. City of Seattle (Okeson III)*, 159 Wn.2d 436, 150 P.3d 556 (2007), the Court adhered to this same distinction in concluding that City Light could not use electric utility rate revenue to pay outside entities to reduce their own greenhouse gas emissions.[16] Why? Because the benefit of reduced CO_2 emissions

[16] *Okeson II* is a Court of Appeals decision holding that City Light may use rate revenue to buy art for its own facilities but not for other facilities

from outside entities is a public benefit shared by all, not a cost attributable to furnishing electricity for the comfort and use of individual ratepayers or a benefit that was enjoyed only by ratepayers. The benefit of reduced CO_2, like the benefit of streetlights, was a public benefit to be paid for with general revenues, not by charging higher utility rates.

Finally, in *Lane v. City of Seattle*, 164 Wn.2d 875, 194 P.3d 977 (2008), the Court again applied the same principle in deciding that fire hydrants furnish a governmental service to the public that is to be paid for with governmental revenues, rather than a utility service that can be funded with a proprietary utility fee. The Court concluded that fire hydrants, in this regard, are indistinguishable from streetlights. 164 Wn.2d at 883 ("All benefit by having water available to put out fires ... hydrants are very much like streetlights. As in *Okeson I*, the charge here is a tax."). *See also* AGO 2001 No. 1.

Under the reasoning of these cases, the roadside ditches and culverts in Ocean Shores do not furnish a proprietary utility service, and the lakes and canals are even further removed from doing so. These are all community assets that provide benefits to the general public, not a sewer plant that furnishes sewer service for the "individual comfort and

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or for the benefit of the general public. *Okeson v. City of Seattle*, 130 Wn.App. 814, 125 P.3d 172 (2005). This, too, is consistent with *Okeson I.*

use" of customers who pay "only for their own usage." Owners have no control over the "provision or use" of the ditches, culverts or waterways. Nor does payment of the stormwater charge bestow a benefit on the lot owners that is not shared by other members of the public. *National Cable Television Assn. v. U.S.*, 415 U.S. 336, 340-341, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974) (Fee may be charged where public agency furnishes service that "bestows a benefit on the applicant, not shared by other members of society."). Rather, the stormwater charge is a tax that pays for maintaining facilities and amenities that "operate for the benefit of the general public," just like roads, street lighting, and fire hydrants. These public assets serve governmental functions that are to be funded with governmental revenues (such as taxes) rather than a propriety user fee.

c. The roadside ditches, culverts and fresh waterways are public goods provided for the common good, not private goods for individual use and consumption.

The distinction that the Court has drawn in *Okeson I*, *Okeson III* and *Lane* between governmental and proprietary functions is the same distinction that public finance scholars draw between "public goods" and "private goods." Public goods are goods and services that promote the common good, but which cannot be effectively provided by the private marketplace. And, because markets will not adequately furnish public

goods, they are often supplied by government and financed with compulsory taxation. Thus, "[i]f the proceeds of a charge go to support the provision of public goods, this suggests that the charge is a tax." J. A. Hoerner "*What's a Tax, Anyway*?" Tax Notes 379 (April 24, 1989.[17]

The characteristics that distinguish public goods from private goods also distinguish governmental functions which serve the general public from proprietary utility services which serve the "comfort and use" of individual customers "paying only for their own usage." *Okeson III*, 159 Wn.2d at 449. The distinguishing characteristics of public goods and services are that they are "non-excludable" and "non-rival". A service is "non-excludable" if it is impractical to deny service to those who don't pay. For example, a lighthouse provides a non-excludable service because any boat that sees its beacon receives the benefit, and there is no practical way to exclude those who don't pay from receiving the benefit or service. A service is "non-rival" if one person's use of the service does not reduce the ability of others to enjoy the benefit as well. A lighthouse provides a

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[17] City streets, streetlights, fire hydrants, and national defense are common examples of public goods. Private goods, in contrast, are excludable and rival. For example, a person desiring an ice cream cone must pay to buy it, and only he/she gets the pleasure of consuming it. The public goods/private goods distinction is explained in a wide variety of economics and public finance texts.

non-rival service because the benefit received by one ship does not reduce the benefit available to others.

The roadside ditches and culverts and the fresh waterways in Ocean Shores are public goods. *See* Ex. 1 to CP 303 and CP 131. They are non-excludable because all who enjoy the roads, the lakes and canals or use tap water receive their benefit whether they pay the stormwater fee or not. They are non-rival, as well, because one person's enjoyment of unflooded streets or clean waterways does not reduce the enjoyment of others.

Public goods cannot be reliably funded with proprietary user fees because "free riders" who do not voluntarily pay get the benefit whether they pay or not. Compulsory taxation, therefore, is used for those public goods that government deems necessary. A mandatory charge that pays for public goods is necessarily a tax, because it is "a forced contribution of wealth to meet the public needs of a government." *Local 587 v. State*, 142 Wn.2d at 219. The Ocean Shores stormwater charge is just such a tax.

2. The Ocean Shores Stormwater Charge Is Not a Stormwater Regulatory Fee Authorized by RCW 90.03.500.

The only alternative source of statutory authority for the Ocean Shores stormwater charge is RCW 90.03.500, which authorizes local governments to impose stormwater mitigation fees on "activities" that

disrupt natural drainage and cause harmful increases in the accumulation or flow of surface and storm waters. Revenues from these charges must be used for facilities and improvements that alleviate damage caused by the increased runoff. *Id.* The Ocean Shores stormwater charge is not authorized under this statute, however, because it is not imposed on activities that disrupt natural drainage and its proceeds are not used to fund facilities that alleviate damage caused by such disruptions.

a. On-site infiltration of rainfall is not a burden created by lot owners for which the City can charge a stormwater regulatory fee.

The City claims that its charge is a valid regulatory fee because lot owners "burden" the City's roadside ditches, culverts and waterways in proportion to the amount of rain that falls on their property. Ord. 743 § 1.11. But rainfall and on-site infiltration are not legally cognizable burdens created by lot owners for which the City can charge a stormwater fee under RCW 90.03.500.

Rainfall is a natural condition, not a burden caused by lot owners. A stormwater mitigation fee under RCW 90.03.500 must be directed at human "*activities*" that disrupt natural drainage and "*cause*" damaging increases in runoff.[18] The purpose of such fees is to hold those who

[18] The regulatory concern with storm and surface water is the damaging effects of increased runoff from human activities, not the natural rise in the water table

disrupt natural drainage financially responsible for the damage they cause. Imposing a stormwater charge on innocent lot owners who do nothing to disrupt natural drainage contradicts the very purpose of such fees. That is what happens in Ocean Shores.

The vast majority of lot owners in Ocean Shores do nothing to disrupt natural drainage or generate runoff. They do not *cause* the rain, the peninsula's flat topography, or the shallow water table. They do not cause runoff. They do not create a burden that requires mitigation.[19] The water table rises because it rains, not because of anything done by the lot owners. The City's stormwater charge does not regulate stormwater discharge or impose mitigation costs to those who cause damage. It just taxes real property to pay for maintaining roadside ditches, culverts and fresh waterways that benefit the public at large.

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caused by rainfall infiltrating the soil.
http://www.ecy.wa.gov/programs/wq/stormwater/index.html

"Stormwater is rain and snow melt that runs off surfaces such as rooftops, paved streets, highways, and parking lots. As water runs off these surfaces, it can pick up pollution such as: oil, fertilizers, pesticides, soil, trash, and animal waste. From here, the water might flow directly into a local stream, bay, or lake. Or, it may go into a storm drain and continue through storm pipes until it is released untreated into a local waterway.

In addition, the large impervious surfaces in urban areas increase the quantity of peak flows of runoff, which in turn cause hydrologic impacts such as scoured streambeds channels, instream sedimentation and loss of habitat. Furthermore, because of the volume of runoff discharges, mass loads of pollutants in stormwater can be significant."

[19] Indeed, natural on-site infiltration *benefits* the City because it provides clean water to recharge the shallow aquifer from which the City draws water supplies.

b. The Ocean Shores stormwater charge is inconsistent with general law.

Local governments are subordinate to the Legislature and have no power to adopt measures that are inconsistent with the general law of the state. Const. art. XI, § 11; *Chemical Bank v. WPPSS*, 99 Wn.2d 772, 793, 666 P.2d 329 (1983). The Legislature has authorized cities to charge storm sewer utility fees (RCW 35.92.020 and 35.67.020) on customers who receive storm sewer utility service and to impose stormwater regulatory fees on those who cause damaging disruptions to natural drainage. RCW 90.03.500. These statutes allocate costs to those who receive sewer service or cause damaging increases in runoff. The Ocean Shores charge is directly at odds with these statutes because it allocates substantial costs to innocent lot owners who receive no utility service and who do nothing to disrupt natural drainage or increase runoff.[20]

D. The Stormwater Charge Violates the Constitutional Limitations on the Tax Powers of Local Government

1. The stormwater charge is an invalid tax under the *Covell* standards.

In *Covell v. City of Seattle,* the Court set out a three-pronged test to distinguish taxes from fees: (1) Is the charge imposed to raise revenue or

[20] The major effect of the Ocean Shores charge is to increase the tax on undeveloped lots relative to developed lots because the charge is apportioned on a per-lot or lot size basis rather than on value. This regressive tax structure allows the City to export a substantial portion of its tax burden to the non-resident, non-voting owners of undeveloped lots.

to regulate? (2) Are the revenues used for a proper regulatory purpose? and (3) Is there a direct relationship between the charge and a benefit received or a burden created by the person charged? 127 Wn.2d 879. Judged by these standards, the Ocean Shores stormwater charge is a tax. It is imposed to raise revenue, not to regulate. The proceeds are not used for a regulatory purpose. And, the charge is not apportioned based on any burden created by lot owners or any direct service benefit furnished to lot owners. Rather, the charge taxes lot owners to pay for public goods that serve the general public. There is no evidence from which a court or jury could determine otherwise.

a. The purpose of the stormwater charge is to raise revenue, not to regulate.

The sole purpose of the Ocean Shores stormwater charge is to raise revenue for maintaining and improving the ditches, culverts and fresh waterways, shifting these costs from the City's general tax-supported budget to a separate fee-supported utility fund. This cost shift is indistinguishable from the cost shift that was struck down in *Okeson I*, where the Court held that: "the shifting of the [streetlight] cost from Seattle's general budget to the City Light ratepayers was a revenue-raising ploy for the city's general budget, and not a means of regulating streetlight

usage...." 150 Wn.2d at 554.[21] Here, as in *Okeson I,* the stormwater charge is a revenue-raising ploy, not a means of regulating stormwater.

The Ocean Shores charge serves no regulatory purpose. It does not regulate stormwater discharge or discourage harmful stormwater practices. It does not impose mitigation costs on those who engage in damage causing activities. It simply taxes lot owners because it rains.

A regulatory fee must have some regulatory purpose or effect. *Samis*, 143 Wn.2d at 806 (a regulatory fee is "used to regulate the entity or activity being assessed."); *Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 810, 650 P.2d 193 (1982)(charge is a tax where the primary purpose is to raise money for "desired public benefits which cost money" rather than to regulate the activity assessed.). An absolute, unavoidable charge against property (such as the Ocean Shores charge) cannot regulate because it contains no regulatory incentives and it cannot be avoided. It is a tax, regardless of how it is labeled.

A stormwater fee may be regulatory if it applies to activities that disrupt natural drainage and increase runoff. In *Covell,* for example, the Court explained that the stormwater fee in *Teter v. Clark County*, 104

[21] *See also Covell*, 127 Wn.2d at 884 (Street utility fee was a tax *inter alia* because it was imposed "on property owners to help raise revenue to cover preexisting costs of street maintenance and improvement."). The Ocean Shores charge raises revenue to pay street drainage maintenance costs that were previously paid from the City's tax-supported Street Fund.

Wn.2d 227, 704 P.2d 1171 (1985) was a valid regulatory fee because it was apportioned based on impervious surface and the county "had a reasonable basis to conclude there was a contribution to *increased surface water runoff* in the basin from the fee payer's property." *Covell,* 127 Wn.2d at 882 (emphasis added). In *Tukwila School Dist. No. 406 v. City of Tukwila*, the Court of Appeals applied the same reasoning, upholding a stormwater fee where it was based on the amount of runoff-generating impervious surface area created by the property owner. 140 Wn.App. at 746-747. The Ocean Shores charge, however, is not based on impervious surface area or any other measure of runoff-generating activity. Rather, it is imposed indiscriminately on all lot owners alike, including owners of unimproved lots who have done nothing that requires regulation. This is pure revenue raising, which makes the charge a tax.

b. The stormwater charge is not dedicated to a regulatory purpose.

The second prong of the *Covell* test asks whether the revenues have been diverted from a proper regulatory purpose. Plaintiffs do not claim that the City has diverted the stormwater charge to uses other than maintaining the roadside ditches, culverts, lakes, canals and outfall. However, plaintiffs strongly dispute whether these expenditures are for a valid regulatory purpose. This is the same circumstance that was

presented in *Okeson I,* where there was no dispute that the electricity rate revenues were used for street lighting, but there was a fervent dispute as to whether streetlights served a regulatory purpose. The Court concluded that the second *Covell* factor was not helpful in determining the nature of the charge because did not point clearly toward tax or fee. *See Okeson I,* 150 Wn.2d at 553. The same is true here.

c. There is no direct relationship between the stormwater charge and either a burden created by lot owners or a benefit received by lot owners.

The third prong of the *Covell* test asks whether there is a direct relationship between the charge imposed and either a burden created or a benefit received by the fee payers. This test also indicates that the Ocean Shores charge is a tax.

(1) Lot owners do not create stormwater burdens.

The City's theory is that lot owners burden the City because it rains on their property. Ord. 743 §§ 1.11 & 1.12. But rainfall is a natural condition, not a burden created by the lot owner. Owners cannot be charged a regulatory fee for natural conditions that are beyond their control.

The rationale of this prong of the *Covell* test is the same as the rationale that underlies RCW 90.03.500. That is, when someone engages

in conduct that imposes burdens on the public or on other innocent parties, government may use its regulatory police power to make that person bear the financial consequences of his actions. But rainfall is not caused by lot owners. Lot owners have no power to control the rain. Charging for rainfall is like charging a fee for streetlights on the theory that property owners cause darkness, or charging a global warming fee based on lot size on the theory that lot owners cause global warming because the sun's heat is proportional to lot size. The theory is absurd.

Lot owners pay the stormwater charge because they own property, not because they cause a burden that requires regulation. There is no direct relationship between the charge and any burden they create.

(2) There is no direct relationship between the stormwater charge and a benefit or service to lot owners.

The City argues that the roadside ditches and culverts and fresh waterways provide various benefits to lot owners. They promote public health and safety by keeping roads open for emergency vehicles and general access to properties. Ex. 206; RP 373-374, 555. They help limit dangerously deep ponding of water in roadside ditches. RP 238, 326, 339. The lakes and canals provide a public amenity and waterfront for adjoining lots. RP 23, 329, 367-368, 417-418. Maintaining an elevated water table protects the freshwater aquifer under the City (which is used

for domestic water supplies) from salt water contamination. RP 371-372, 458-459. The weir and tidegates prevent salt water from entering the lakes and canals, preserving the freshwater environment and isolating the freshwater bodies from tidal fluctuations that would erode shorelines. RP 418, 458. These benefits, however, are primarily general public benefits. They are not direct benefits furnished to specific lot owners in exchange for their payment of the stormwater charge. They are not limited to lot owners or proportional to the stormwater charge, whether structured as a per-lot charge or lot area charge. The stormwater charge is not apportioned according to relative benefit.[22] Rather, whether in its pre-2002 or post-2002 form, the charge is simply an arbitrary tax imposed on all lots to raise funds for public drainage and fresh waterway maintenance.

It takes more to prove a direct benefit than merely showing that fee payers share in common benefits funded with the charge. That standard would do nothing to distinguish taxes from fees. The core function of taxation is to fund facilities and services for the common welfare. To show a direct benefit that justifies a fee, there must be more: *i.e.*, a clear proportional relationship between the fee and the benefit conferred;

[22] The pre-2002 charge was a fixed per-lot charge for categories of lots. The post 2002 charge is apportioned solely on lot area on the theory that rainfall creates a burden on the city that is proportionate to lot size. Neither of these schemes reflects any attempt to apportion the charge based on relative benefit.

something "akin to charges for services rendered." *Covell*, 127 Wn.2d 884.

Applying the direct benefit standard, this Court has repeatedly rejected formulaic mandates, such as the Ocean Shores charge, where the fee amount is unrelated to service usage. For example, in *Covell,* the street utility charge was a fixed, per-dwelling fee for street maintenance. Although city residents clearly shared a common benefit from street maintenance, that was not enough. The charge was judged a tax because it did not relate to a direct service benefit that could be individually determined or avoided.[23] In *Okeson I,* streetlights provided a common benefit that was shared by ratepayers, but the charge was judged a tax because "it is impossible to quantify how much streetlight a person uses" and, in any event, the charge was not apportioned based on street light usage. "[A]ll ... customers pay an increased rate, regardless of the amount of their individual usage of streetlights." 150 Wn.2d at 554. In *Arborwood Idaho, L.L.C.*, the per-household ambulance charge was deemed a tax because the same rate applied to all households "regardless of actual use of ambulance service." 151 Wn.2d 359, 373, 89 P.3d 217

[23] 127 Wn.2d at 884-885: "There is no way to conclude that the street utility charges are 'akin to charges for services rendered.' They are not individually determined and cannot be avoided."

(2004). In *Lane v. City of Seattle,* the rate charged for fire hydrants was a tax because "ratepayers pay the same fixed hydrant cost whether they use the hydrants or not ...." 164 Wn.2d at 883. And, in *Carrillo v. City of Ocean Shores*, the court indicated that the "potential, and likely erratic" relationship between the contested water and sewer "availability fees" and any benefit or burden to or from undeveloped lots was insufficient to establish a direct relationship. 122 Wn.App. at 607.

The Ocean Shores stormwater charge is similarly invalid. Like these other charges, it lacks the direct, proportional relationship necessary to meet the direct benefit test. The charge does not pay for any direct service provided to lot owners. Lot owners do not receive any measurable service benefit from to the roadside ditches and culverts, let alone a benefit that is proportional to the charge imposed. On most lots there is no service at all because the rain naturally percolates into the ground on site. The charge is not individually determined and cannot be avoided. And, because drainage conditions and concerns vary from lot to lot throughout the City, there is no correlation between the fees imposed and drainage benefits received by individual lot owners.[24]

[24] For example, year-round residents who live or drive in flood prone areas during the rainy season plainly benefit more from the drainage facilities than non-resident owners of undeveloped lots, yet the City's fee structure makes no attempt to measure or apportion the charge based on actual drainage benefits.

With respect to the lakes and canals, the City presented no evidence or theory as to how or why maintaining them and preventing salt water intrusion provides benefits that are proportional to lot size or benefits that are equal for each lot, regardless of size or development status.[25] Nor did the City explain how the benefits could be proportionate to both the pre-2002 fee formula and the post-2002 fee formula. In fact, the charge is unrelated to any meaningful measure of benefit, and there is no evidence from which a court or jury could conclude otherwise.

Like the streets themselves (*Covell)*, streetlights (*Okeson I*), and fire hydrants (*Lane*), the ditches and culverts and fresh waterways in Ocean Shores are street-related improvements and public amenities that benefit the general public rather than targeted benefits to lot owners who pay the charge. That indicates that the stormwater charge is a tax.

2. The Ocean Shores Charge Violates Tax Uniformity.

This Court has long recognized that "uniformity is the highest and most important of all requirements applicable to taxation under our system." *Samis,* 143 Wn.2d at 805 n 13. Tax uniformity requires both an equal rate of tax, and equality in valuing the property taxed, so that the tax

[25] The same is true with respect to preventing saltwater contamination of the City's freshwater aquifer. Preventing aquifer contamination obviously benefits water utility customers. It might even be a proper cost to include in water rates. It is not, however, a direct benefit to owners of undeveloped lots or a benefit that is proportional to lot size.

burden is fairly apportioned based on the relative value of the property taxed. *Covell,* 127 Wn.2d at 878. "It is self-evident that a property tax of a certain sum imposed on particular property without regard to value violates the rule as to equality and uniformity where the value of such property varies." Cooley, TAXATION § 297 at 620. The Ocean Shores charge violates uniformity because it is a regressive tax, whether apportioned on a per-lot basis or by lot area.[26]

If the Ocean Shores charge is permitted, there will be no meaningful limit to property-based mandates that violate tax uniformity. If street drainage and fresh waterways can be financed with mandatory charges on property without complying with the Tax Uniformity Clause, why not streetlights? fire hydrants? streets? police services? fire protection services? flood protection? libraries? schools? Under the City's theory, one could readily devise a rationale to fund virtually all of these public services with mandatory fees. This Court has correctly rejected that approach in the past, and it should do so here, as well.

The purpose of the Tax Uniformity Clause is to assure that all taxable real property, regardless of use or ownership, is taxed at a uniform

[26] Per-lot and lot area taxes are regressive because high value lots and improved lots pay the same charge as undeveloped or low value lots. A million dollar mansion pays the same charge as an unbuildable vacant lot of equal size.

rate so that all owners contribute ratably to the cost of government based on property value. That purpose will be thwarted if cities can circumvent the uniformity requirement simply by denominating their taxes as "fees." If mandatory exactions based on property ownership are exempted from the Uniformity Clause, there will be no practical limit on the ability of local governments to evade the uniformity requirement simply by labeling their taxes as fees.

3. The Stormwater Charge Contravenes the One Percent Levy Limitation.

The stormwater charge also undermines the constitutional limitation on tax levies in Const. art. VII, § 2. That provision requires voter approval when the aggregate tax levy exceeds 1% of property value. Because fees do not require voter approval, this restriction, too, would be nullified if local governments were free to impose unlimited mandates against property by simply labeling them as "fees" rather than taxes.

4. The Stormwater Charge Undermines Legislative Control of Local Taxing Power.

Cities have no inherent power to tax. They have only the tax powers that are expressly delegated to them by the Legislature. Const. art. XI, § 12; *Great Northern Railway Co. v. Glover*, 194 Wash. 146, 158, 77 P.2d 598 (1938). This important constitutional principle helps avoid inefficient, Balkanized, local taxation and limits abuse of the tax power by

local officials.[27] However, if local officials can circumvent legislative control of taxation through taxes disguised as mandatory fees, the Legislature's ability to control abuse will be substantially diminished. Both prudence and a decent respect for constitutional principle counsel against granting municipalities over-expansive fee-setting authority.

E. The Trial Court Gave Erroneous Instructions to the Jury for Distinguishing Taxes from Fees.

While plaintiffs strongly maintain that determining the nature and constitutionality of a government charge is a legal issue, if that task is to be given to a jury, jurors are at least entitled to proper instructions for distinguishing taxes from fees. They are entitled to know that a defining characteristic of a tax is that it is a payment compelled by sovereign power, and that a fee, in contrast, is a price paid as the *quid pro quo* for a service rendered to fee payers that is not shared by non-fee payers or a charge imposed to regulate conduct. They are entitled to know that a fee based on a burden is proper only if the fee payer does something that produces a burden. Without proper guidance as to what distinguishes taxes from fees, it is difficult to know what jurors thought they were

[27] One such abuse, illustrated by the Ocean Shores charge, is the practice of "exporting" the local tax burden to non-voting, non-resident property owners. Absent statutory or constitutional restraint, local officials are tempted to shift the property tax burden from higher-value developed lots (more likely owned by local voters) to undeveloped lots (more likely owned by non-residents).

deciding in this case. Plaintiffs proposed an instruction that would provide the jury with proper guidance. The trial court, however, refused that instruction. *Compare* CP 399 (Instruction 7) *with* CP 415 (Plaintiffs' Proposed Instruction 7). The result was prejudicial error. *Barrett v. Lucky Seven Saloon, Inc*, 152 Wn.2d 259, 266, 96 P.3d 386 (2004).

F. The Trial Court Abused Its Discretion in Excluding Highly Relevant Evidence.

1. The trial court erred in excluding Professor Neil Bruce's testimony regarding the substantive nature of the Ocean Shores stormwater charge.

The trial court granted the City's motion *in limine* to exclude Professor Neil Bruce, an economist and public finance scholar, whom plaintiffs sought to call to testify regarding the substantive nature of the City's stormwater charge. CP 405 at 2-3. The trial court refused this testimony because, in its view, the economic principles to which Prof. Bruce would testify are irrelevant to how the law distinguishes taxes and fees and, therefore, his testimony would only confuse the jury. Suppl. RP at 36-37. That was a clear abuse of discretion.

Excluding a witness in advance of trial is proper only if the proposed testimony is "clearly inadmissible ... and if the evidence is so prejudicial in its nature that the moving party should be spared the necessity of calling attention to it by objecting when it is offered during

the trial." *Fenimore v. Donald M. Drake Const. Co.*, 87 Wn.2d 85, 91, 549 P.2d 483 (1976). There was no basis for the trial court's conclusion that Dr. Bruce's testimony would be inadmissible or that it would be prejudicial to the City to allow plaintiffs to offer his testimony at trial.

Tax policy has profound impacts on society's economic welfare. How taxes are distinguished from fees has broad ramifications for how government is financed. Taxes and fees are to be distinguished based on economic substance, not artificial legal constructs. *Samis*, 143 Wn.2d at 806. *Cf. Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 281, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) (commerce clause application to be based on substance not "legal terminology"). It would be irresponsible for courts or juries to turn a blind eye to economic and public finance principles in setting the legal standards for distinguishing taxes from fees. The trial court's view that economic substance has nothing to do with the distinction between taxes and fees is bad policy and bad law.

The principles of economics and public finance to which Prof. Bruce would testify provide important insights for distinguishing taxes from fees. Those principles are legislative facts that this Court can, and should, consider in determining the character of the Ocean Shores

charge.[28] As discussed, *supra* 24-26, this Court's recent decisions have tracked closely the distinction drawn by economists between public and private goods. That effort to align the legal test for distinguishing taxes and fees with economic substance is commendable. But if the task of distinguishing taxes from fees is to be given to juries, then jurors too should have the benefit of the insights offered by economic science in making their decision. While courts may have the *power* to disregard science, judges should have the wisdom not to abuse that power.

Public finance is a study of how government "carries out its functions through spending and regulatory programs, and the tax policies the government uses to raise the revenue it needs to finance its programs." Bruce, PUBLIC FINANCE AND THE AMERICAN ECONOMY at 46 (2nd ed. 2002). Prof. Bruce's proposed testimony is relevant to determining the "real world" nature of the Ocean Shores charge. *See* Appendix 7 (Ex. 1 to CP 303); CP 131). That testimony would not have confused the jury. Rather, it would have helped jurors understand the substantive characteristic of regulatory fees, proprietary fees, and taxes. It would have assisted the jury in understanding the nature of the benefits provided by

[28] Legislative facts are "social, economic, and scientific facts that 'simply supply premises in the process of legal reasoning.'" *Wyman v. Wallace*, 94 Wn.2d 99, 102, 615 P.2d 452 (1980).

the ditches, culverts and waterways and the nature of the funding mechanisms available to finance them.

Professor Bruce's proposed testimony is fully consistent with Washington law. *Id.* The trial court applied an incorrect legal standard in rejecting that testimony. That error requires reversal. *State v. Ray*, 116 Wn.2d 531, 543, 806 P.2d 1220 (1991).

2. The Trial Court Erroneously Excluded Plaintiffs' Evidence Regarding the City's Responsibility for the High Water Table in Ocean Shores.

Drainage problems occur in Ocean Shores when the water table approaches the ground surface. The water table elevation is determined by the high seasonal rainfall, flat topography and the surface elevation of the lakes and canals. The only one of these factors that is subject to human control is the surface elevation of the lakes and canals, and it is the City, not lot owners, that controls that elevation.

The original developers of Ocean Shores understood that the weir elevation at the end of the Grand Canal would control the peninsula's water table elevation, and they installed an adjustable weir to allow that elevation to be managed. CP 134 at ¶¶ 14-15. In 1980, the City replaced that variable weir with a fixed weir which eliminated this control mechanism. Plaintiffs' engineering and hydrogeological experts would have testified that the fixed elevation set by the new weir and its lack of

adjustability are substantially responsible for the high groundwater levels and consequent flooding. CP 150 at 14; Suppl. RP at 44-46. That evidence is clearly relevant to show that lot owners do not cause drainage burdens for which a stormwater fee can be imposed.

The trial court barred plaintiffs from presenting evidence or argument that drainage problems in Ocean Shores are caused by the City rather than lot owners. CP 405 at 2-3. That was error. If anything other than natural conditions is responsible for the City's drainage problems, it is the City's fixed weir, and plaintiffs were entitled to introduce evidence and argument to prove that point.

3. The trial court erroneously barred evidence that the purpose of the stormwater charge was to shift street maintenance costs from the tax-supported Street Fund to a new proprietary fund.

In *Okeson I,* the Court ruled that bundling streetlight costs into electricity rates was invalid because "the shifting of the cost from Seattle's general budget to the City Light ratepayers was a revenue-raising ploy for the city's general budget, and not a means of regulating streetlight usage." 150 Wn.2d at 554. Plaintiffs sought to introduce evidence that the same is true for the Ocean Shores stormwater charge, but the trial court erroneously barred that evidence. RP 111-112, 142-147.

Prior to creation of the alleged "stormwater utility" in 1980, Ocean Shores paid the cost of maintaining street drainage facilities from its tax-supported Street Fund.[29] The stormwater utility shifted these costs to stormwater utility ratepayers. Plaintiffs offered the City's pre-stormwater utility budget ordinances to prove this fact.[30] Under *Okeson I,* this evidence was highly relevant to show the cost-shifting purpose of the charge. The trial court's refusal to allow this evidence was erroneous and prejudicial.

VII. CONCLUSION

In a July 1854 essay Abraham Lincoln wrote: "Why ... should we have government? Why not each individual take to himself the whole fruit of his labor, without having any of it taxed away?" He answered his own question, saying: "The legitimate object of government is to do for the people whatever they need to have done, but which they can not do, at all, or can not do, so well, for themselves - in their separate and individual

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[29] *See* Ocean Shores Ord. Nos. 123, at 7; 148 at 7; 173 at 5; 220 at 4; 232 at 7.

[30] *See* Appendix 8 (Ex. 21, excerpts from BARS Manual). The pre-1980 costs for maintenance of street drainage facilities were charged to the Street Fund Account No. 542.40, which covers expenditures for "[t]he costs of maintenance and repair of [street] drainage systems from point of interception within the right-of-way to the point of outfall." The BARS Manual contains the mandatory system of accounts prescribed by the State Auditor for cities under RCW 43.09.200.

capacities ...." As was his knack, Lincoln here captured in a few words both the essential function of government and the nature of taxation.

In the words of Lincoln, taxes are imposed to do for the people what they cannot do, or do so well, for themselves. In the terminology used by this Court, taxes fund the governmental functions that government provides for the general public benefit. In the terminology used by economists and public finance scholars, these functions are public goods – goods that will not be adequately provided by individuals or the private marketplace. As Lincoln noted, compulsory taxes are necessary to pay for public goods.

The Ocean Shores stormwater charge is not a *quid pro quo* for a utility service. Before the City created the stormwater utility, the rain fell on the ground and percolated into the sandy soil. After the City created the stormwater utility, the rain falls on the ground and percolates into the soil. Nothing has changed! The City provides no utility service. It cannot charge a storm sewer utility fee for nothing.

However labeled, a mandatory charge that pays for commodities or services for the general public benefit is an exercise of the power of taxation. The stormwater charge taxes lot owners to pay for maintaining the roadside ditches, culverts, lakes and canals because those are public goods that will not be provided by individuals or through market

transactions. These public assets cannot be funded with user fees because "free riders" will get the benefit whether they pay or not. They are non-excludable public goods that must be support with compulsory taxation.

In order to promote tax fairness, control abuse and assure citizens a direct voice in the level of taxation imposed, our constitution imposes limits on the exercise of the tax power. It is the Court's function to protect these constitutional safeguards, not to undermine them by opening loopholes for their evasion. Plaintiffs request that the Court reverse the judgment of the trial court, declare the City's stormwater charge invalid and remand for the administration of refunds of the charges collected.

Respectfully submitted this ___ day of _____, 2011.

William C. Severson, WSBA # 5816
1001 Fourth Avenue Suite 4400
Seattle, WA 98154-1192
Tele: (206) 838-4191
Fax: (206) 389-1708

DECLARATION OF SERVICE

ORIGINAL

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the date below signed, I caused true and correct copies of the following:

- **Appellants Brief**

to be served on counsel of record for defendant in the manner indicated below:

Mark S. Filipini (mark.filipini@klgates.com)
Daniel Hurley (daniel.hurley@klgates.com)
Thomas E. Kelly, Jr. (thomas.kelly@klgates.com)
K & L Gates
925 Fourth Avenue, Suite 2900
Seattle, Washington 98104
Via U.S. Mail and email attachment

DATED AT SEATTLE, WASHINGTON, this ___ day of _____, 20__.

_____

BANKS et al. v. CITY OF OCEAN SHORES
SUPREME COURT NO. 85438-6

APPELLANTS BRIEF

TABLE OF APPENDICES

Appendix 1

Ocean Shores Municipal Code 13.20.020

Ocean Shores Municipal Code

13.20.020 Rates and charges.

A. Effective on and after October 1, 2002, the rates and charges for use of the stormwater system shall be $0.0003250 per square foot per month for owners of all land within the ordinary high-tide line.

B. The penalty for delinquency, if storm and surface water charges are not paid within twenty days from the date of the billing, shall be imposed in accordance with Section 13.06.350.

(Ord. 743 § 4, 2002: Ord. 740 § 3.1, 2002: Ord. 725 § 3, 2001: Ord. 705 § 3, 2000: Ord. 675 § 4, 2000: Ord. 666 § 3, 1999: Ord. 576 § 3, 1995: Ord. 550 § 2, 1993: Ord. 519 § 1, 1991; Ord. 305 § 2, 1980: Ord. 301 § 2, 1980)

Appendix 2

Ocean Shores Ordinance No. 705 § 3

CITY OF OCEAN SHORES, WASHINGTON

ORDINANCE NO. 705

AN ORDINANCE OF THE CITY OF OCEAN SHORES, WASHINGTON RELATING TO MUNICIPAL FINANCE, REENACTING ORDINANCE NOS. 666, 667, and 671 AND AMENDING SECTIONS 13.12.060, .061, .062, .070, .071, and 13.20.020, and 13.26.030, .031, .040, and .041, OCEAN SHORES MUNICIPAL CODE, ALL RELATING TO WATER SYSTEM, SEWER SYSTEM, STORM AND SURFACE WATER SYSTEM RATES AND CHARGES.

THE CITY COUNCIL OF THE CITY OF OCEAN SHORES, WASHINGTON DOES HEREBY ORDAIN, AS FOLLOWS:

Section 1. RECITALS AND FINDINGS.

1.1 The City of Ocean Shores ("City") owns and operates a Waterworks Utility, including a water system, sewer system, and storm and surface water system ("Utility"), including both local and regional facilities.

1.2 The City has financed the acquisition and improvement of local and regional Utility facilities with the proceeds of its revenue bonds.

1.3 The facilities and services provided by the Utility are critical to the health, welfare and safety of the citizens of the City and the neighboring community served by the Utility.

1.4 The City also provides numerous services in addition to its Utility services. Those services are funded from taxes.

1.5 The continuing validity of the revenue streams supporting the Utility and general City services is vital to the health, safety, and welfare of the citizens of Ocean Shores.

1.6 The City taxes, rates, and assessments currently in effect that are reenacted herein are not being increased, but are being reenacted to ensure their continuing validity in light of the passage of Initiative 722.

Section 2. WATER RATES AND CHARGES. Ocean Shores Municipal Code Sections 13.12.060 and .070 are reenacted and amended and sections .080, .100, .105, .110, and .115 are reenacted as follows:

2.1 13.12.060 Water rates for lots connected to the water system.

E. Such a reduction in water rates and charges shall take effect on the first day of the month following the receipt of a written request from the residential customer together with copies of their Internal Revenue Tax Forms as detailed in subsection C of this section.

F. An approved application for reduction in water rates under the provisions of this section shall be valid for a term of twelve months. No sooner than thirty days before, nor later than thirty days after the expiration of that term, the residential customer may reapply for an additional twelve-month term. The process for the submission, review and approval of that renewal shall be the same as for the initial application.

G. The reduction in rates contemplated under this section shall only be available to single family residential customers and shall not be valid for other multifamily structures such as apartments, boarding houses, or other similar commercial customers.

(Ord. 666 § 2.7, 1999: Ord. 627 § 5, 1997: Ord. 552 § 11, 1993)

Section 3. STORM AND SURFACE WATER RATES AND CHARGES. Section 13.20.020 Ocean Shores Municipal Code is reenacted and amended as follows:

13.20.020 Rates and charges.

The rates and charges set forth in this chapter shall be considered uniform rates and charges for the following uniform rates per class of customers or service furnished by the system. On and after January 1, 2000, and for each and every succeeding year after 2000, the rates shall be as follows:

Customer Classification	2000	2001	2002	2003
Residential	$9.33	$9.56	$9.80	$10.04
Developed Commercial	$12.88	$13.19	$13.52	$13.86
Residential 1½ Lots	$14.00	$14.34	$14.70	$15.06
Residential Tri 1/3 Lots	$3.08	$3.15	$3.23	$3.31
Commercial 1½ Lots	$19.31	$19.79	$20.29	$20.78
Commercial 2½ Lots	$23.33	$23.90	$24.50	$25.10
Undeveloped Commercial	$9.33	$9.56	$9.80	$10.04

The City Manager or his designee shall determine the quantity of the storm and surface water drainage from lots that are dedicated to a substantially undeveloped state by virtue of being public parks, recreational area, other undeveloped publicly owned land, or open space designated under RCW Chapter 84.34.

A. For purposes of computing storm and surface water rates under this section, the land use designation as residential or commercial shall be the principal activity on the premises as determined by the superintendent of the system. For rate purposes, developed and undeveloped residential lots shall be deemed a single class. Developed lots are those for

which any city or county permit or application for real estate improvement activity (including, but not limited to driveway, septic, building and electrical improvements and water meter installation) has been issued, should have been issued or would now be required if the development occurred under present City regulations.

(Ord. 666 § 3, 1999: Ord. 576 § 3, 1995: Ord. 550 § 2, 1993: Ord. 519 § 1, 1991; Ord. 305 § 2, 1980: Ord. 301 § 2, 1980)

Section 4. **SEWER RATES AND CHARGES.** Sections 13.26.030, .040, and .060 Ocean Shores Municipal Code are reenacted and amended as follows:

4.1 13.26.030 Sewer rates for connected lots.

The rates and charges for sewer service to lots are fixed and established as follows:

A. Rates.

The monthly charges effective January 1 of each year shown below, are as follows:

	2000	From and after Jan 1, 2001
1. Flat Rate Services - $/Unit/Mo		
Residential	$13.76	$29.15
Motel/Hotels/Apts/Condos: Type 1	$14.45	$30.81
2. Service Charge - $/Unit/Mo		
Commercial/Other	$13.76	$29.15
Motel/Hotels/Apts/Condos: Type 2	$13.76	$29.15
3. Volume Charge- per cubic foot		
Commercial/Other	$.0320	$.0684
Motel/Hotels/Apts/Condos: Type 2	$.0150	$.03276

B. Sewer Rates Standards and Policies.

1. Residential: is a flat rate per month; the residential rate applies to single-family dwellings.

2. Commercial: is a flat rate per month as set forth in Section A2, plus a volume charge per cubic foot of water consumption as set forth in Section A3.

3. MOTELS: TYPE 1 . . . Motels, hotels, apartments, rooming houses, lodging houses and condominiums providing a rental or lease of more than thirty days

Availability Charge - $/Lot/Mo.	2000	2001	2002	2003
	$8.04	0	0	0

5.3.3 Section 13.26.042 of the Ocean Shores Municipal Code is hereby reenacted and reads as follows:

13.26.042 Reimbursement Surcharge. A surcharge of $14.41 is added to each monthly sewer bill to all customers of the sewer system, for the twelve month period beginning January 1, 2001, or in such year thereafter as is necessary to provide revenue to the system to pay any adverse judgment invalidating availability charges set forth in OSMC 13.26.040.

(Ord. 666 § 5.3, 1999)

Section 6. **SPECIAL ASSESSMENTS.** City Ordinance No. 671, confirming assessments in LID No. 98-01 is hereby reenacted, approved, and confirmed, as are the assessments confirmed therein.

Section 7. **TAXES.** City Ordinance No. 6667, levying property taxes in the City, is hereby reenacted, approved and confirmed, as are the taxes levied thereby.

Section 8. **EFFECTIVE DATE.** This Ordinance shall take effect five days after publication; the rates specified herein are effective as of the dates specified in this Ordinance in the case of certain current rates that are reenacted herein, retroactive to January 1, 2000.

Section 9. **SEVERABILITY.** If any term or provision of this Ordinance shall, to any extent, be held invalid or unenforceable, the remaining terms and provisions of this Ordinance shall not be affected thereby, but each remaining term and provision shall be valid and enforceable to the fullest extent permitted by law.

PASSED this 22nd day of NOVEMBER, 2000.

Peter B. Jordan, Mayor

ATTEST:

Diane J. Houston, City Clerk

Approved as to form:

Jo-Ellen Thomas, City Attorney

Appendix 3

Ocean Shores Ordinance No. 743

CITY OF OCEAN SHORES, WASHINGTON

ORDINANCE NO. 743

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF OCEAN SHORES, WASHINGTON, ADDING A NEW CHAPTER TO TITLE 13 AND REENACTING AND AMENDING SECTION 13.20.020, REPEALING SECTION 13.20.060, AND AMENDING SECTION 8.32.020 OF THE OCEAN SHORES MUNICIPAL CODE; AND ESTABLISHING AN EFFECTIVE DATE; ALL RELATING TO THE REGULATION OF STORM AND SURFACE WATER, TO THE CONSTRUCTION, OPERATION AND MAINTENANCE OF A STORMWATER SYSTEM, AND TO RATES AND CHARGES FOR THE USE OF SUCH SYSTEM.

THE CITY COUNCIL OF THE CITY OF OCEAN SHORES, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. RECITALS AND FINDINGS.

1.1 The City of Ocean Shores (the "City") is authorized to own and operate a stormwater utility, and to impose charges therefor, pursuant to RCW 35.67.010 - .020 and RCW 35.92.020.

1.2 The City owns and operates a Waterworks Utility, including a water system, sewer system, and storm and surface water system ("Utility"), including both local and regional facilities.

1.3 The City has established a comprehensive system of regulation of storm and surface water pursuant to Article XI, Section 11 of the Washington State Constitution and Chapter 35.67 RCW as set forth in Chapters 13.16 and 13.20 of the Ocean Shores Municipal Code.

1.4 The City has constructed, maintained and operated certain facilities (the "Stormwater System" or "System") to alleviate threats posed by uncontrolled storm and surface water to public health, safety and welfare in the City. Such threats include, among other things, potential contamination of drinking water wells; all manner of threats posed by flooding; and potential contamination of public beaches and food fish habitat.

1.5 The regulation of storm and surface water through the continued operation, maintenance and improvement of the Stormwater System is necessary in order to adequately protect the public health, safety and welfare of City residents and property owners.

1.6 The 2001 Stormwater Manual for Western Washington prepared by the Washington Department of Ecology provides, among other things, development standards that are appropriate for use given the particular hydrology of the City. The adoption and enforcement of the development regulations set forth in this manual, together with the City-specific standards to be set forth in a future ordinance, will assist in proper regulation of storm and surface water.

1.7 Costs currently associated with regulating storm and surface water sufficiently to provide a reasonable level of protection against groundwater contamination, flooding and other threats to the public health, safety and welfare total approximately $750,000 on an annual basis.

1.8 The rates set forth in this Ordinance have been designed to cover the costs of storm and surface water regulation but no other costs and it is no longer necessary to require the annual transfer provided for pursuant to Section 13.20.060 of the Ocean Shores Municipal Code.

1.9 The revenues to be generated by the rates set forth in this Ordinance will be used solely for purposes of the Stormwater System.

1.10 The City has considered the following factors in establishing classifications of customers:

(a) Whether there is a difference in cost of service and facilities to the various customers;

(b) Location of customers within or outside the City;

(c) Whether there is a significant difference in cost of maintenance, operation, repair, and replacement of the various parts of the system;

(d) Whether there is any difference in the character of the service and facilities furnished to various customers;

(e) The quantity and quality of the stormwater delivered to the system from various customers and the time of its delivery;

(f) The achievement of water conservation and water quality goals and the discouragement of wasteful water use practices;

(g) Capital contributions made to the system, including but not limited to, assessments; and

(h) Similarities and differences in the management of storm and surface water in Ocean Shores and in other Washington cities.

1.11 After consideration of currently available information regarding the foregoing factors, which information has been provided in certain scientific studies and in advice from qualified engineering, financial and legal professionals, as designated in the Council Resolution Regarding Storm and Surface Water Regulation dated August 26, 2002, the council finds the following facts to be true:

(a) All parcels within the City are hydraulically connected to the Stormwater System because all land within the ordinary high tide line (which is also the vegetation line) drains to the Stormwater System via groundwater, surface water, or both.

(b) Due to the unusual hydrogeology of Ocean Shores, the only significant difference in cost of service and facilities to the various customers is the size of the customer's property.

(c) There is no difference in the burdens placed upon the Stormwater System by developed and undeveloped parcels because all precipitation falling on the City (within the vegetation line that marks the high tide line) is transported to the stormwater system and handled by the stormwater system prior to discharge to the ocean.

(d) All customers are located within the City.

(e) There are no significant differences in the cost of maintenance, operation, repair, and replacement of the various parts of the System serving various customers.

(f) All customers receive the same character of stormwater service and the stormwater generated on their properties utilizes the same or substantially similar facilities regardless of location or development status, in part due to the City's requirements for pretreatment of stormwater collected from large impervious surfaces.

(g) All customers, regardless of location or development status, deliver stormwater to the System in substantially the same quantity, and with the same timing, on a per-square-foot basis.

(h) Based on currently available information, it appears that all customers, regardless of location or development status, deliver stormwater to the System with substantially the same water quality characteristics. However, if the Council should in the future determine that certain parcels burden the System more or less than others due to differences in water quality, the Council may determine to establish different rate classifications to recognize any such differences in burdens on the System.

(i) Through its pretreatment program, the City has achieved the water quality goal of substantially eliminating pollutants from stormwater before it reaches the Stormwater System from those commercial properties that utilize pretreatment.

(j) Design, operation and management of the Stormwater System does not have a significant nexus with the discouragement of wasteful water use practices.

(k) The rate structure set forth below does not include a capital component; however, the council may by ordinance revise such rates in the future to include a capital component.

(l) The management of storm and surface water in Ocean Shores is different from the management of storm and surface water in many other Washington cities in that in many other cities, developed properties place a greater burden on the system than undeveloped properties because elsewhere, precipitation that enters directly into groundwater is not subsequently conducted into a City's storm and surface water system.

1.12 The Council further finds that the per-square-foot charges set forth in this Ordinance reflect the costs of a property owner's use of the Stormwater System because all parcels use the System, and all use it similarly.

1.13 The Council further finds that the per-square-foot charges set forth in this Ordinance reasonably reflect the expenses that the City incurs on account of various customers.

1.14 Through Ordinance No. 576 the Council found that costs associated with the maintenance and repair of the Stormwater System appear to be approximately the same among developed residential lots and undeveloped residential and undeveloped commercial lots, that the amount of water generated by such lots is approximately the same, and the impact of surface and storm water generated by those classes of lots on the Stormwater System is not significantly different; and further found that equalizing rates among such classes of lots would remedy inequity between rates for those classes of lots; and such findings remain true with the clarification that developed commercial lots appear to be approximately the same as other lots with respect to maintenance an repair costs, amounts of water generated, and impacts upon the System.

1.15 The Council recognizes that work is in progress to prepare a comprehensive update to the system plan for the Stormwater System. The Council intends to consider whether further changes to Chapters 13.16 and 13.20 of the Ocean Shores Municipal Code are warranted based on the results of this update.

Section 2. DEVELOPMENT REGULATIONS.

2.1 A new Chapter is added to Title 13 of the Ocean Shores Municipal Code to read as follows:

13.17.010 Adoption of Ecology Stormwater Manual.
The City Council accepts, approves, specifies, certifies, adopts and incorporates by reference the development regulations set forth in the 2001 Stormwater Manual for Western Washington prepared by the Washington Department of Ecology (the "Ecology Stormwater Manual") as the stormwater regulations for development within the City. All persons within the City shall be required to comply with the provisions of the Ecology Stormwater Manual that are applicable to locations with the hydraulic, geologic and built-environment features of Ocean Shores.

13.17.020 Interpretation and Application of Ecology Stormwater Manual; Dispute Resolution.
All questions or disputes regarding the applicability or interpretation of the provisions of the Ecology Stormwater Manual shall be resolved by the City Manager or designee. Any appeal from the decision of the City Manager shall be to the city hearing examiner.

13.17.030 Adoption of Additional Regulations.
The Council may by Ordinance adopt such further regulations as it deems appropriate upon completion of the pending update to the stormwater system plan.

13.17.040 Copies on file.
A copy of the stormwater regulations adopted in Section 13.17.010 are now and shall remain on file in the office of the city clerk.

13.17.050 Nuisance; Penalties for Violation.
Failure to comply with subsection .010 of this chapter shall constitute a public nuisance within the meaning of Chapter 8.32 of the Ocean Shores Municipal Code and shall be fully actionable pursuant to chapter 8.32.

Section 3. AMENDMENT OF CODE SECTION 8.32.020.

3.1 A new subsection X is added to Section 8.32.020 of the Municipal Code to read as follows:
8.32.020 Types of nuisances--Authority to abate.
Each of the following conditions is declared to constitute a public nuisance and whenever the enforcement officer determines that any of these conditions exist upon any premises or in any body of water including, but not limited to, lakes, canals, creeks, streams, drainage ways or wetlands, upon either public or private lands, the enforcement officer may require or provide for the abatement thereof pursuant to this chapter:

X. The failure to comply with the stormwater regulations set forth in chapter 13.17.010 of the municipal code.

Section 4. RATES AND CHARGES.

4.1 Section 13.20.020 of the Ocean Shores Municipal Code and Ordinance 705 § 3 are each amended to read as follows:

13.20.020 Rates and charges.

A. Effective on and after October 1, 2002, the rates and charges for use of the stormwater system shall be $0.0003250 per square foot per month for owners of all land within the ordinary high-tide line.

B. The penalty for delinquency, if storm and surface water charges are not paid within twenty days from the date of the billing, shall be imposed in accordance with Section 13.06.350.

Section 5. REPEAL OF TRANSFER OF FUNDS FOR STORMWATER SYSTEM PURPOSES. Section 13.20.060 of the Municipal Code and Section 5 of Ordinance 550 are hereby repealed.

Section 6. EFFECTIVE DATE. This Ordinance shall take effect five days after publication or on October 1, 2002 whichever comes last; the rates specified herein are effective as of the dates specified in this Ordinance.

Section 7. SEVERABILITY. If any term or provision of this Ordinance shall, to any extent, be held invalid or unenforceable, the remaining terms and provisions of this Ordinance shall not be affected thereby, but each remaining term and provision shall be valid and enforceable to the fullest extent permitted by law.

THIS ORDINANCE PASSED AND ADOPTED by the City Council of the City of Ocean Shores, Washington, at a regular open public meeting on this 9th day of September, 2002.

Terry Veitz, Mayor

ATTEST:

Diane J. Houston, City Clerk

APPROVED AS TO FORM:

Jo-Ellen Thomas, City Attorney

Appendix 4

Engineer's Report on Ocean Shores Drainage System

CITY OF OCEAN SHORES
August 5, 2002

ENGINEER'S REPORT
STORMDRAIN SYSTEM

This report has been prepared by the City Engineer and Public Works staff in connection with the current on going review of the regulation and management of storm and surface water , and its consideration of what, if any, changes should be implemented on a near term basis, and what work should be done on a long term basis. In the preparation of this report, staff has reviewed and analyzed all documents referenced in the report. In addition, staff has considered information contained in many published reports and recent communications with the staff at the Department of Ecology.

The storm drain system of the City of Ocean Shores provides the bulk of the facilities used to control storm and surface waters. This system is comprised of drainage ditches that were excavated during the construction of the roadways by the Developer(s) of the community over a number of years beginning in the mid-1960's. Since there are 120 miles of roadways, there are approximately 240 miles of ditches. Because of the very flat topography of the City, careful design and construction were required to assure that the roadways and properties drained as well as possible. A portion of the street system has four lane main arterials oriented North – South and several of the four lane main collectors oriented East – West, with drainage swales in the medians. However, the majority of the streets are two lane, asphalt surface, with drainage ditches on both sides. There are a few areas where the stormwater seldom ponds because of adequate percolation, proximity to open waterways, or elevation above the waterways. The City archives contain copies of many of the original design drawings of the Project Engineer, which illustrate the extent to which the subdivision of and access to the properties were dependent on an adequate drainage system.

Approximately 12,000 residential and commercial lots were subdivided by the Developer(s). The complete roadway system and nearly all the water distribution system were constructed prior to the mid 1980's. The residential lots were all nearly the same size, averaging approximately 7000 square feet (sqft). The commercial lots were of various size, with several tracts larger than 10 acres. An evaluation of the current zoning map shows that approximately 97,443,720 sqft of single family residential lots, 12,675,960 sqft of multi-family lots, 5,793,480 sqft of commercial lots, 1,283,278 sqft of private recreational, and 83,577,727 sqft of publicly owned property are served by the existing storm drainage system. The publicly owned property includes City and State owned lands. There is also approximately 188, 615 sqft of property in the City, adjacent to Division 22, which is owned by Coast Oyster Company.

The attached zoning map illustrates the extent of development in the City, with the aforementioned ownership, or land use, also shown.

Lying next to the Pacific Ocean, the City experiences an average of approximately six feet of precipitation annually. Seldom does it snow, thus, rainfall accumulations are considerable. The annual rainfall accumulated amounts to approximately eleven billion gallons of water, the vast majority of which flows along the roadways, through drainage swales and actually through the very porous sandy soils to the fresh waterways of the City. These waterways form the bottom of the natural hydraulic gradient for the properties that drain away from the saltwater. On all areas of the City, which drain to the waterways, the natural hydraulic gradient is above the elevation of the waterways. The only area of the City in which the gradient lies below the waterways is the area surrounding the domestic water wells near the water treatment plant. That condition only exists during the few summer months when withdrawal amounts exceed the rainfall necessary to recharge. With that limited exception, all precipitation that falls on the portion of the City that lies within the line of ordinary high tide, which is also recognized as the line of vegetation in many locations, enters the drainage system of the City.

During most of the summer, early fall and late spring, the water table falls due to the lack of rainfall. The ditches are dry, yet the water continues to flow through the sands toward the lowest point on the gradient.

As of this writing, water continues to drain from the unplatted dune lands on the western boundary of the City. When the rains return in the late fall, winter and early spring, to the extent that the rainfall exceeds the drainage rate, the water table rises everywhere. All the platted properties in the City contribute to the total water accumulated, except those which have become flooded by the ocean in Division 20. When the hydraulic gradient intercepts the open ditches, the water accumulates in the ditches. Any other similarly low point in the topography will also experience flooding. If the ditch bottom is adequately sloped, the water will move toward the closest flat area of the hydraulic gradient.

The bottom of the hydraulic gradient is the fresh waterway system. The elevation of the fresh waterways is controlled by an overflow weir at the tide gates at the south end of the Grand Canal, which is the primary interface of water flowing to the ocean. The tidal influence through the weir and gates is minimal, except when extremely high tides and/or surface swell limit the flow through the gates such that they do not open, or the outflow is restricted. In these cases, large rainfall amounts accumulate in the fresh waterways for as much as 20 hours, and have backed runoff up-gradient into the system of ditches. Several times since 1990, the backwater effect has extended north of the City, raising water levels in the Oyehut drainage.

When the City was first incorporated, a stormwater utility was not created. Maintenance of the drainage system was done only as necessary by the limited staff with limited financial resources. A utility was not created until 1980, when City Council authorized the creation and transferred the drainage facilities to the Utility from the City. A list of the pertinent drainage ordinances, which have been passed by previous City Councils, is included in the attached Draft Resolution.

The maintenance and operation of a well-functioning storm drain system is essential to protection of the public health and safety in the City. The ordinance that enabled the drainage utility was adopted to identify and fund the recognized need to control the effects caused by the accumulation of precipitation as a result of the property subdivision, the construction of the roadways and land development. Absent the drainage system, a number of hazards would be present. Flooding of the roadways and platted properties would be more frequent and severe. Life safety and even access to all the properties would be threatened if emergency vehicles were diverted, or stopped, by flooded roadways. Standing water and its attendant health risks would be more common. The potential health risk to the domestic water system from flooded septic systems has been well recognized in the City.

The storm drain system collects the rainfall along the roadways and in the connected drainage swales throughout the City. The attached map illustrates the direction of flow for each segment of the collection system. This map was prepared by City staff based on the archived drawings, detailed topographic surveys and visual observations during larger rainfall events.

The City undertook the first Comprehensive Drainage Plan in 1989. The completed Plan was presented to and adopted by the City Council in 1990. That Plan, completed by the consulting firm of Kramer, Chin and Mayo in Seattle, proposed a Capital Improvement Plan consisting of drainage basin outfall piping to convey the five year frequency of recurrence peak rainfall intensity from each basin to the associated outfall surface waterway. More aggressive maintenance of the system ditch components was stressed, since the peak flow design criteria requires routing through the maze of ditches. The document recognized that an effective alternative plan could include replacing the ditches with a perforated pipe to collect runoff and effectively create an artificial lowering of the hydraulic gradient along each roadway. Over a period of several days the water table of the entire area could be lowered.

The alternative plan takes advantage of the fact that most sands in the community have approximately thirty (30) percent void space. For every vertical foot of dry sand, three to four inches of water can be stored in the void space between sand particles. A five gallon bucket of compacted dry sand will also hold 1.5 gallons of water without overflowing. As long as the surface areas are not sealed, the sands also have a moderate permeability, three plus inches per day, meaning that the water flows well through the sands, given an adequate head differential.

Several components of that Plan were completed in the early 1990's. The City started cleaning ditches to enhance drainage. At several locations where storm water compromised roadways and individual

structures, outfall piping was installed. The medians of several of the divided roadways, which experienced severe flooding because the hydraulic capacity of the swales was inadequate, had perforated piping installed, with a geotextile wrap, as deep as possible to optimize the capacity. The existing ditches in the medians were filled around the pipes with beach sand to hide the water where normal flooding would have filled the swales. Within two years, the salt had been flushed from the beach sand, and grass was introduced to enhance the visual image.

Since the mid-1990's City Staff has continued to use published isopluvial data for the design criteria for parking lots and pipe sizing. The Ocean Shores peninsula 2 year frequency of recurrence, 24 hour duration, storm results in 3-3.5 inches of rainfall, and the 100 year, 24 hour, storm produces 5-5.5 inches of rainfall. Translated to in-situ storage, the volume necessary to absorb the 2 hour storm requires a foot of dry sand, and the 100 year storm requires approximately 18 inches of dry sand.

The successful installation of perforated piping to convey stormwater in the medians prompted the City to expand the program in the mid-1990's. Not only could the water table be effectively lowered, the existing ditches could be filled with clean sand hiding the areas where standing water previously caused hazards. Also, the conversion to buried pipes, instead of ditches, reduced the annual maintenance considerably. Thus, since 1994, the City has continued to budget maintenance monies for conversion of the storm drainage ditches to enclosed pipes. The basis for priority of the conversion efforts has been, and will continue to be, those situations that compromise life, safety and welfare of the residents, visitors and other facilities. Commercial parking lots are required to infiltrate on-site the entire runoff from a rainfall event, or install adequate treatment prior to entering the surface waters. Residential construction is advised to raise foundations such that the top of the foundation is at least 12 inches above the road crown, or approximately 20 inches above the high water mark in the ditch in front of the structure.

The mid 1990's also saw the City embark on a course to clean-up the fresh waterways of the City by installing sanitary sewer systems to eliminate septic system effluent from the City. The DUCK LAKE PHASE I study of the fresh waterways identified a eutrophic situation caused primarily by an over abundance of nutrients, nitrogen and phosphorous, in the waterways. The study identified septic leachate carried by stormwater to the waterways as approximately seventy (70%) percent of the nutrient problem.

Several major construction projects, funded by assessments against properties depending on benefit received, were completed resulting in a $50 million investment to construct sewerage collection and treatment systems. The connection of all sewage sources will remove a substantial nutrient loading from the shallow groundwater. The sewer system is now nearly completed; and, by the year 2004 all septic systems in the City should be removed. Although there remains a significant volume of biological wastewater loading in the ground, increased vegetative growth and rainfall, to flush the nutrients from the ground and groundwater, will help restore the surface waters of the City to a more pristine and natural appearance.

The Phase I study also identified several other water quality problem areas in the City. In the mid-1990's Councils wisely identified the necessary funding to correct the problems through stormwater utility rates. To date, two of the projects identified have been constructed: one, in the waterway known as Bass Canal; and a second, at the upstream end of the Grand Canal, where surface flows from the north end of the City and from areas north of the City, form the headwater of the Canal. An aeration system was installed on the Bass Canal to prove the effectiveness of increased dissolved oxygen to provide additional water clarity. A biofiltration wetland was constructed in the Grand Canal, with the aid of an EPA grant, to reduce nutrient loading.

The Federal EPA and State Department of Ecology have used the results of the Phase I study to evaluate the pollution in the Duck Lake system, particularly with respect to total phosphorous, and somewhat less to total nitrogen. A Total Maximum Daily Load (TMDL) evaluation was started in 2001, when the waterway was included, as one of the 666 projects statewide, on the EPA 303d list. The City Staff and Council members have met with Ecology to discuss the terms of the evaluation and the recommended goals for water quality. The goals spelled out in the Phase I study to reduce nutrient loading are achievable; however, the effect of the removal of the septic effluent is not yet known. The Phase I study allowed that

up to ten years might be required to flush the septic effect from the sands and waterways. The significant financial investment in the sewer system, the need to treat rainfall runoff to the betterment of living conditions, and the intent of successive Councils to improve the quality of the fresh waterways in the City dictates a renewed effort to attack the drainage problems wisely. Both scientific and financial aspects must be addressed.

A plan to replace existing ditches with more hydraulically efficient piping and less maintenance costs and, to provide the regulatory authority for conveyance and water quality has prompted a revision of the 1990 COMPREHENSIVE DRAINAGE PLAN. An extensive effort was started in the fall of 2000 to measure the factors that control the flow of water through the sands, from raindrop to saltwater. Instrumentation intended to provide the necessary data was installed at several locations; however, Mother Nature did not co-operate. Rainfall during the winter months was abnormally low, resulting in very little useable information. By mid-winter the lack of rainfall prompted a secession of the data gathering efforts to preserve budgeted moneys. By late summer when the data gathering should have again started, financial requirements and concerns about whether collection of such data would prove valuable changed the direction of the staff's efforts. Instead, the staff has reviewed, for possible adoption, a State Stormwater Manual. The document is a ten year effort, and was completed and published in August 2001 by the Department of Ecology with input from five advisory committees and after the issuance of two public review drafts.

The document, which was originally written for the Puget Sound area, has been expanded to include all areas of the State. The Manual will be used by Ecology to represent the latest developments in the management of urban stormwater. To date, the Manual does not have the status of an enforceable regulation; but adoption by the City Council of the attached draft ordinance, with more pertinent and exact design details specific to Ocean Shores that will be developed from the on going study, will provide regulatory authority presently lacking.

Staff has reviewed the Manual at length; and , although voluminous, the document does present a regulatory framework that contains design criteria, construction requirements and Best Management Practices that are appropriate to all specific environments found in Ocean Shores. Interestingly enough, the Manual recommends design based on the 6 month frequency of recurrence, 24 hour storm, which if considered on successive days is equal to the 100 year storm. Adoption of the Manual will bring the City's regulatory position in line with many other portions of the State, and will save the City approximately $50,000 that was to be spent writing a useable document. Procedures identified by the Manual parallel existing unwritten practices in the City. Adoption of the Manual will support the City's effort to avoid the imposition of future regulatory requirements from outside agencies.

Appendix 5

RCW 35.67.020, 35.92.020 and 90.03.500

RCW 35.67.010
Definitions — "System of sewerage," "public utility."

A "system of sewerage" means and may include any or all of the following:

(1) Sanitary sewage collection, treatment, and/or disposal facilities and services, on-site or off-site sanitary sewerage facilities, inspection services and maintenance services for public or private on-site systems, or any other means of sewage treatment and disposal approved by the city;

(2) Combined sanitary sewage disposal and storm or surface water sewers;

(3) Storm or surface water sewers;

(4) Outfalls for storm drainage or sanitary sewage and works, plants, and facilities for storm drainage or sanitary sewage treatment and disposal, and rights and interests in property relating to the system;

(5) Combined water and sewerage systems;

(6) Point and nonpoint water pollution monitoring programs that are directly related to the sewerage facilities and programs operated by a city or town;

(7) Public restroom and sanitary facilities; and

(8) Any combination of or part of any or all of such facilities.

The words "public utility" when used in this chapter has the same meaning as the words "system of sewerage."

[1997 c 447 § 7; 1965 c 110 § 1; 1965 c 7 § 35.67.010. Prior: 1955 c 266 § 2; prior: 1941 c 193 § 1, part; Rem. Supp. 1941 § 9354-4, part.]

Notes:

Finding -- Purpose -- 1997 c 447: See note following RCW 70.05.074.

RCW 35.92.020
Authority to acquire and operate sewerage and solid waste handling systems, plants, sites, or facilities — Classification of services and facilities for rates — Assistance for low-income persons.

(1) A city or town may construct, condemn and purchase, purchase, acquire, add to, alter, maintain, and operate systems, plants, sites, or other facilities of sewerage as defined in RCW 35.67.010, or solid waste handling as defined by RCW 70.95.030. A city or town shall have full authority to manage, regulate, operate, control, and, except as provided in subsection (3) of this section, to fix the price of service and facilities of those systems, plants, sites, or other facilities within and without the limits of the city or town.

(2) Subject to subsection (3) of this section, the rates charged shall be uniform for the same class of customers or service and facilities. In classifying customers served or service and facilities furnished by a system or systems of sewerage, the legislative authority of the city or town may in its discretion consider any or all of the following factors:

(a) The difference in cost of service and facilities to customers;

(b) The location of customers within and without the city or town;

(c) The difference in cost of maintenance, operation, repair, and replacement of the parts of the system;

(d) The different character of the service and facilities furnished to customers;

(e) The quantity and quality of the sewage delivered and the time of its delivery;

(f) Capital contributions made to the systems, plants, sites, or other facilities, including but not limited to, assessments;

(g) The nonprofit public benefit status, as defined in RCW 24.03.490, of the land user; and

(h) Any other factors that present a reasonable difference as a ground for distinction.

(3) The rate a city or town may charge under this section for storm or surface water sewer systems or the portion of the rate allocable to the storm or surface water sewer system of combined sanitary sewage and storm or surface water sewer systems shall be reduced by a minimum of ten percent for any new or remodeled commercial building that utilizes a permissive rainwater harvesting system. Rainwater harvesting systems shall be properly sized to utilize the available roof surface of the building. The jurisdiction shall consider rate reductions in excess of ten percent dependent upon the amount of rainwater harvested.

(4) Rates or charges for on-site inspection and maintenance services may not be imposed under this chapter on the development, construction, or reconstruction of property.

(5) A city or town may provide assistance to aid low-income persons in connection with services provided under this chapter.

(6) Under this chapter, after July 1, 1998, any requirements for pumping the septic tank of an on-site sewage system should be based, among other things, on actual measurement of accumulation of sludge and scum by a trained inspector, trained owner's agent, or trained owner. Training must occur in a program approved by the state board of health or by a local health officer.

(7) Before adopting on-site inspection and maintenance utility services, or incorporating residences into an on-site inspection and maintenance or sewer utility under this chapter, notification must be provided, prior to the applicable public hearing, to all residences within the proposed service area that have on-site systems permitted by the local health officer. The notice must clearly state that the residence is within the proposed service area and must provide information on estimated rates or charges that may be imposed for the service.

(8) A city or town shall not provide on-site sewage system inspection, pumping services, or other maintenance or repair services under this section using city or town employees unless the on-site system is connected by a publicly owned collection system to the city or town's sewerage system, and the on-site system represents the first step in the sewage disposal process. Nothing in this section shall affect the authority of state or local health officers to carry out their responsibilities under any other applicable law.

[2003 c 394 § 2; 1997 c 447 § 9; 1995 c 124 § 5; 1989 c 399 § 6; 1985 c 445 § 5; 1965 c 7 § 35.92.020. Prior: 1959 c 90 § 7; 1957 c 288 § 3; 1957 c 209 § 3; prior: 1947 c 214 § 1, part; 1933 c 163 § 1, part; 1931 c 53 § 1, part; 1923 c 173 § 1, part; 1913 c 45 § 1, part; 1909 c 150 § 1, part; 1899 c 128 § 1, part; 1897 c 112 § 1, part; 1893 c 8 § 1, part; 1890 p 520 § 1, part; Rem. Supp. 1947 § 9488, part. Formerly RCW 80.40.020.]

Notes:

Finding -- Purpose -- 1997 c 447: See note following RCW 70.05.074.

Banks et al. v. City of Ocean Shores
Supreme Ct # 85438-6
Appendix 5 - Stormwater Statutes

RCW 35.67.020
Authority to construct system and fix rates and charges — Classification of services and facilities — Assistance for low-income persons.

(1) Every city and town may construct, condemn and purchase, acquire, add to, maintain, conduct, and operate systems of sewerage and systems and plants for refuse collection and disposal together with additions, extensions, and betterments thereto, within and without its limits. Every city and town has full jurisdiction and authority to manage, regulate, and control them and, except as provided in subsection (3) of this section, to fix, alter, regulate, and control the rates and charges for their use.

(2) Subject to subsection (3) of this section, the rates charged under this section must be uniform for the same class of customers or service and facilities furnished. In classifying customers served or service and facilities furnished by such system of sewerage, the city or town legislative body may in its discretion consider any or all of the following factors:

(a) The difference in cost of service and facilities to the various customers;

(b) The location of the various customers within and without the city or town;

(c) The difference in cost of maintenance, operation, repair, and replacement of the various parts of the system;

(d) The different character of the service and facilities furnished various customers;

(e) The quantity and quality of the sewage delivered and the time of its delivery;

(f) The achievement of water conservation goals and the discouragement of wasteful water use practices;

(g) Capital contributions made to the system, including but not limited to, assessments;

(h) The nonprofit public benefit status, as defined in RCW 24.03.490, of the land user; and

(i) Any other matters which present a reasonable difference as a ground for distinction.

(3) The rate a city or town may charge under this section for storm or surface water sewer systems or the portion of the rate allocable to the storm or surface water sewer system of combined sanitary sewage and storm or surface water sewer systems shall be reduced by a minimum of ten percent for any new or remodeled commercial building that utilizes a permissive rainwater harvesting system. Rainwater harvesting systems shall be properly sized to utilize the available roof surface of the building. The jurisdiction shall consider rate reductions in excess of ten percent dependent upon the amount of rainwater harvested.

(4) Rates or charges for on-site inspection and maintenance services may not be imposed under this chapter on the development, construction, or reconstruction of property.

(5) A city or town may provide assistance to aid low-income persons in connection with services provided under this chapter.

(6) Under this chapter, after July 1, 1998, any requirements for pumping the septic tank of an on-site sewage system should be based, among other things, on actual measurement of accumulation of sludge and scum by a trained inspector, trained owner's agent, or trained owner. Training must occur in a program approved by the state board of health or by a local health officer.

(7) Before adopting on-site inspection and maintenance utility services, or incorporating residences into an on-site inspection and maintenance or sewer utility under this chapter, notification must be provided, prior to the applicable public hearing, to all residences within the proposed service area that have on-site systems permitted by the local health officer. The notice must clearly state that the residence is within the proposed service area and must provide information on estimated rates or charges that may be imposed for the service.

(8) A city or town shall not provide on-site sewage system inspection, pumping services, or other maintenance or repair services under this section using city or town employees unless the on-site system is connected by a publicly owned collection system to the city or town's sewerage system, and the on-site system represents the first step in the sewage disposal process. Nothing in this section shall affect the authority of state or local health officers to carry out their responsibilities under any other applicable law.

[2003 c 394 § 1; 1997 c 447 § 8; 1995 c 124 § 3; 1991 c 347 § 17; 1965 c 7 § 35.67.020. Prior: 1959 c 90 § 1; 1955 c 266 § 3; prior: 1941 c 193 § 1, part; Rem. Supp. 1941 § 9354-4, part.]

Notes:

Finding -- Purpose -- 1997 c 447: See note following RCW 70.05.074.

Purposes -- 1991 c 347: See note following RCW 90.42.005.

Severability -- 1991 c 347: See RCW 90.42.906.

Banks et al. v. City of Ocean Shores
Supreme Ct # 85438-6
Appendix 5 - Stormwater Statutes

RCW 90.03.500
Storm water control facilities — Imposition of rates and charges — Legislative findings.

The legislature finds that increasing the surface water or storm water accumulation on or flow over real property, beyond that which naturally occurs on the real property, may cause severe damage to the real property and limit the gainful use or enjoyment of the real property, resulting in a tort, nuisance, or taking. The damage can arise from activities increasing the point or nonpoint flow of surface water or storm water over the real property, or altering or interrupting the natural drainage from the real property. The legislature finds that it is in the public interest to permit the construction and operation of public improvements to lessen the damage. The legislature further finds that it is in the public interest to provide for the equitable imposition of special assessments, rates, and charges to fund such improvements. This shall include the imposition of special assessments, rates, and charges on real property to fund that reasonable portion of the public improvements that alleviate the damage arising from activities that are the proximate cause of the damage on other real property. Except as otherwise provided in RCW 90.03.525, these special assessments, rates, and charges may be imposed on any publicly-owned, including state-owned, real property that causes such damage.

[1986 c 278 § 62; 1983 c 315 § 8.]

Notes:

Severability -- 1986 c 278: See note following RCW 36.01.010.

Severability -- 1983 c 315: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1983 c 315 § 26.]

Flood control zone districts -- Storm water control improvements: Chapter 86.15 RCW.

Public property subject to rates and charges for storm water control facilities: RCW 35.67.025, 35.92.021, 36.89.085, and 36.94.145.

Appendix 6

Published Road Drainage Maintenance Standards

STREET & HIGHWAY MAINTENANCE MANUAL

American Public Works Association

CHAPTER 6

MAINTENANCE OF DRAINAGE FACILITIES

6.1 Introduction

Drainage facilities perform the function of removal of water from the street or highway section and the protection of the facility from the effects of the water. These drainage facilities include drop inlets, storm sewers, culverts, underdrains, ditches, slope protection, and erosion control devices.

6.1.1 Maintenance Problems

Typical drainage maintenance problems that effect streets are ponding of water that softens the subgrade, secondary ditches along the permanent edge that erode the material that supports the pavement edge, and breaks in sewers that lead to erosion of pavement supporting material. The three most important factors in permanence of the street system are drainage, drainage, and drainage. With few exceptions, water is always the enemy of the public works department. Water, if not removed quickly under strict control, will lower the supporting ability of the subgrade material that supports the pavement or will simply wash it away. When water is prevented from saturating the subgrade either through correction by underdrains or prevention by a properly functioning drainage system, the investment made in the street is protected against premature loss. It is not unusual that certain elements of the drainage system are under control of departments other than that which maintains the streets. It is important that the maintenance of the drainage facilities does not suffer through this division of responsibility. It is incumbent upon the street department to ensure that this work is performed.

Water must be kept under control if erosion is to be prevented. When water is allowed to run over bare earth, it carries some of the material with it. Low runoff volumes can be accommodated with vegetation and its consequent low maintenance while heavier concentrations and increased velocities will dictate a higher type of control with its increased cost of maintenance.

6.1.2 Maintenance Functions

These include the following:

- Keep water courses free from accumulations of debris and vegetation and storm sewers free of silt, sand, and debris.
- Correct malfunctioning parts of the systems. Settlements and breaks are the most common types of failure. One of the most difficult tasks is to keep erosion to a minimum.

- Anticipate problems and make minor modifications. The need for extensive modifications should be brought to the attention of the superintendent.

The maintenance of curbs and gutters are discussed in Chapter 8 "Street Appurtenances," and their inclusion there instead of in this chapter does not lessen their importance in the control of water.

6.2 Inspection

Drainage inspections should be made quarterly, and during and after each major storm to confirm that satisfatory conditions exist, or to evaluate the need for cleanup and repair.

The best time to look at drainage facilities is during a storm. It is easy then to see where water ponds and where drainage facilities are over-flowing. Often there is no gainful work to be performed at this time, so men are available for this inspection. It is felt in some cities that the same individual should always inspect the same city drainage area. In this way, the inspector can spot any changes that might have occurred. The inspector should be alert to any pavement cracks or settlements that appear after a severe storm even if these defects are small as they may be evidence of a erosion caused by a break in the pipes.

A record of the inspection should be kept with any deficiencies referenced by street name and house number.

6.3 Storm Sewers

Storm sewers move the water collected from catch basins and drop inlets to the natural water courses.

The maintenance involved in storm sewer maintenance is the removal of any sand, silt, or debris and the maintenance of a tight seal at each pipe joint. There are occasions where abrasive material is present in the water (or some chemical that has a deleterious effect on the pipe) that causes the pipe material to be worn away. This necessitates relining the pipe to preserve the integrity of the pipe.

When storm sewers do not take the storm water, they may be of inadequate size; but more probably, they are partially clogged. Water flushing and heavy duty

vacuum equipment can remove some partial clogs. Storm sewers can be cleaned by inserting a rodding machine (heavy duty sewer snake) in one manhole and running it through to the next manhole. A line is attached and the tool is pulled back through to the first manhole.

A cable machine is placed at each manhole, and the cable from the drum of the first machine is attached to the line, and then it is pulled through to the opposite end. A torpedo shaped cleaning bucket is hung from the cable on the second machine. The cable is then attached to the bottom of the cleaning bucket making it the connecting link between the cables of the two machines. A sheave is suspended from each machine and braced directly over the center of the pipe to facilitate changing the direction of the cable. As the first machine pulls the bucket through the sewer, the jaws of the bucket automatically open as it meets resistance. The first machine continues pulling the bucket through the material until it is full. When the direction of the cable pull is reversed to retrieve the bucket, the jaws close to retain the material and form the bottom of the bucket. A laborer in the manhole empties the bucket when it reaches the manhole. The traditional cleaning machines can be used with various bucket sizes depending upon the diameter of the pipe and the amount of material that must be removed.

6.4 Culverts

Culverts are openings under a roadway which permit the natural flow of water from one side of the roadway to the other. They may be constructed of corrugated metal or reinforced concrete.

Culverts must be kept free of obstructions. Sand or sediment deposits should be removed as soon as possible. During storms, critical areas should be patrolled and the inlets kept free of debris. Exhibit 6-1, "Plugged Culvert," illustrates a culvert inlet plugged with sand. Inlet and outlet channels should be kept in alignment and vegetation should be controlled in order to prevent any significant restriction of flow.

Scour around footings, cutoff walls, and headwalls is repaired by replacing the eroded material in kind or by filling the void with riprap or sacked concrete. In an emergency a bituminous mix may be used.

Culverts may become clogged if the flow-line grade prevents self-cleaning. A permanent correction is to relay the pipe on a steeper grade, but this is not always possible. The alternative is to clean the pipe frequently.

Small culverts may be cleaned by flushing away debris with water pressure. A water truck equipped with a pump and hose attachment is used to direct the stream from the hose into the outlet end of the culvert. Thus, the water dislodges and washes away debris and sand. An alternate method of cleaning small culverts is to use mobile heavy duty industrial vacuum equipment.

cement, 2 parts sand, and 1/5 part hydrated lime with sufficient water to produce a plastic mix. Sand must be well graded and of such size that all will pass a No. 8 sieve.

EXHIBIT 6-2 PLUGGED BOX CULVERT

Reinforced concrete box culverts require little maintenance, but they should be inspected annually for cracks, bottom erosion and undermining. Undermining is the result of high outlet velocities. Correction of undermining usually requires adding an energy dissipator. This problem should be brought to the attention of the superintendent.

6.5 Ditches

Ditches divert water away from roadways to locations where the water can flow without causing erosion or ponding. Ditches may be unlined or lined with portland cement concrete (pcc), gunite, masonry, or bituminous concrete. Ditches must be kept free of silt, debris, or any other material that restricts the flow of water. Exhibit 6-3, "Lined Ditch," illustrates a lined ditch that needs cleaning.

The flow lines of unlined roadside ditches are maintained by motorized equipment supplemented with hand work. A pass is made with a motor grader

EXHIBIT 6-3 LINED DITCH

having the blade positioned about 120 degrees to the direction of travel and with the blade set approximately to the slope between the outside edge of the shoulder and the ditch flow line. This removes unwanted material from the ditch and deposits it in a windrow near the edge of shoulder.

Then this material is loaded into a dump truck with a rubber-tired, front-end loader or by hand shovels, and it is hauled to a disposal site. Hand work will be required to remove unwanted material at locations inaccessible to the motor grader, e.g., near pipe culverts.

Large roadside ditches are sometimes located at an elevation well below the roadway and not accessible to a motor grader. These may be reached with a truck mounted hydraulic excavator operated from the shoulder. In this situation unwanted material is placed directly into a dump truck and hauled away. The equipment operator should exercise care to prevent undercutting the flow line grade. Such undercutting would result in undesirable ponding.

Interceptor ditches on slopes, and along excavation or embankment benches, and outlet ditches from culverts may require hand cleaning by using shovels and wheelbarrows.

Joint separation is a common problem associated with concrete lined ditches. If not immediately repaired, erosion occurs under the lining, causing it to crack

and sometimes drop. Joints are sealed with hot rubber asphalt. Heating kettles, for hot rubber asphalt compound, should be the double-jacketed, oil bath type to avoid damage to the compound by overheating. Before any compound is used, joints and cracks should be cleaned. Enough sealing material should be placed to fill the crack. When filling deep cracks, the cooled sealer may shrink and additional sealer must be added to fill the joint so the sealer is flush with the surface. Once water gets under the concrete or asphalt, gutter deterioration is rapid, so frequent inspection is vital and fast repair a necessity if the investment is to be protected.

Ditch erosion is the loss of soil caused by rapid flow of water. It is controlled by paving the ditch with bituminious asphalt aggregate mix, placement of masonry, grouting rock or by constructing wash checks. Since erosion is serious, any case of erosion should be reported to the superintendent.

Ditches lined with bituminous material oxidize or weather rapidly and should be sprayed with asphalt emulsion.

Since erosion is one of the major problems with ditches, the growth of vegetation is encouraged. The vegetation may be maintained by adjoining property owners, but more often must be maintained by the public works agency. One of the major problems when vegetation is used to control erosion in ditches is the control of weeds.

Weeds become a major problem in turf when the grass loses its vigor and density and cannot compete with them. Clover and knotweed may take possession in areas where nitrogen levels are low. Crabgrass is a serious pest in many areas where high summer temperatures check the growth of grass. Weed encroachment is often the result and not the primary cause of poor turf. Weed eradication often will not result in permanent improvement unless conditions which weakened the turf are corrected.

The best weed control chemicals available are often nitrogen, phosphorus and potassium (i.e. fertilizers) applied in the correct amounts, at the proper times, and in the correct ratio. A healthy turf will compete with and drive out most weeds. Turf specialists the world over agree that the best weed control is a dense vigorous growth of grass. Herbicide chemicals, however, do have a place in any turf maintenance program.

Weeds in the right-of-way are unsightly, and most of them can be eliminated by a good program of spraying and mowing. It has been observed that a good program of spraying the entire right-of-way for three consecutive years will eliminate most of the weeds, except possibly for small areas of weeds that may require spot spraying. A good mowing program goes hand-in-hand with a good spraying program in elimination of weeds before they go to seed.

Where weeds have been destroyed and short grasses cover the unsurfaced areas of the roadway, the mowing expense can be reduced and the local agency will still have a neat, well kept right-of-way. Certain steep slopes are not to be mowed, so these must be sprayed to control weed growth.

Weed spraying should not be done on new seeding, except to kill noxious weeds and then only by spot spraying. The spraying of new seeding will kill out the desirable legumes and young grass. New seeding should be at least three years old before an overall spray is given, so if the area is weedy, the area should be mowed instead of sprayed.

There are many different formulations of herbicides under many different trade names. Many of these are special purpose herbicides which may or may not have application in highway maintenance. Also, the present stress on ecology is producing a rapidly changing picture of the effects of pesticides on the environment.

The superintendent should be constantly monitoring products, equipment and the findings of ecologists, and should at various times recommend chemicals and equipment for test or general usage. Before any new chemical is tried by field forces, the superintendent should be consulted.

The sequence of repair for ditches is as follows:

- Set up work area traffic control devices;
- Remove unwanted material from ditch with motor grader, backhoe, or hydraulic excavator;
- Load unwanted material into dump truck with front end loader or by hand;
- Haul and dispose of unwanted material;
- Remove dirt from work area by using power broom; and
- Pick up all work area traffic control devices.

6.6 Stormwater Inlets

Stormwater inlet structures are designed to intercept water in gutters and drainage courses. They also act as settling basins to collect heavy solids, and they prevent debris from entering culvert systems. Mobile heavy duty industrial vacuum equipment is used to clean sediments from catch basins.

Grates on catch basins are used to prevent large objects and debris from entering the system. Frequent inspections during run-off periods are required because debris such as pieces of cardboard, newspapers, or flat metal can prevent water from entering the catch basin. Grates are usually designed to be placed with bars parallel to the flow. However, they can be turned perpendicular to the curb and sized so that they do not allow bicycle tires to drop in the opening.

Large catch basins constructed without a grate may collect large quantities of rock. This rock may be removed by lowering a clam or backhoe bucket into the catch basin. Hand work will be required to load the bucket. The loaded bucket is lifted from the catch basin and the rock is dumped into a truck and hauled to a disposal site. Muck may be removed by an orange peel bucket. Material in the barrel of culvert leading from a catch basin should be removed in the manner described under Section 6.4, "Culverts."

Maintenance Manual

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Washington State
Department of Transportation
Maintenance & Operations

Chapter 4 Drainage

General

Water, either liquid or frozen, is the greatest natural destructive element that affects state highways.

Controlling water on the right of way requires a drainage system that effectively responds to the immediate environment. A typical highway drainage system includes ditches of all types, gutters, drains, culverts, storm sewers, and other miscellaneous drainage structures.

The system is designed and constructed to collect and remove water from the highway right of way. It must be properly maintained to:

- Permit the maximum use of the roadway
- Prevent damage to the highway structure
- Protect natural resources
- Protect abutting property from physical damage.

Maintain and preserve drainage facilities as nearly as possible in the condition and at the capacity for which they were originally designed and constructed.

Inspect the entire drainage system at least twice a year and correct deficiencies. Additional inspections may be required during heavy storms and periods of high runoff in order to determine the effectiveness of the system. Observe and record high water marks. Look for conditions that threaten damage to the drainage facility or the highway.

Maintenance personnel must be continually alert to assure that all natural water course channels crossing the right of way remain open.

Drainage from Abutting Properties

Storm water is the only effluent allowed to be discharged upon the highway right of way. State law "RCW 47.44" allows persons and entities who have been issued utility franchises or permits to encroach on or cross highway right of way to install and maintain the item for which the permit was granted.

Population growth, urban sprawl, and numerous new regulations restrict how maintenance crews can maintain surface and subsurface drainage systems. Regulations that may affect drainage maintenance:

- Endangered species act
- Storm water management
- Wetlands preservation
- Growth management
- Shorelines
- Irrigation limitations

It is important that the Department not allow abutting property owners to discharge water onto the highway right of way without obtaining a permit. Property owners may obtain permits by applying at the WSDOT Area or Region office. Drainage design engineers and maintenance staff review potential drainage impacts from the abutting property to the highway right of way. The property owner may be required to mitigate water quality and/or quantity impacts to obtain a permit.

Maintenance personnel who routinely patrol a roadway section must be trained in the basic knowledge of what types of direct drainage and sheet flow from abutting property may require a permit. These include new:

- Commercial developments such as shopping centers
- Subdivisions
- Industrial development
- Automobile wrecking yards
- Dairy and other intensive farming activities

Maintenance personnel should report land use changes they observe to their supervisor. The supervisor will forward this information to the appropriate reviewer.

Ditches and Gutters

Open ditches should be routinely checked and maintained to the line, grade, depth and cross section to which they were constructed. Where practical, non-standard ditches should be modified to produce a relatively flat, shallow ditch to enhance motorist safety.

Vegetation in ditches often helps prevent erosion and treats storm water. Remove vegetation only when flow is blocked or excess sediments have accumulated. Remove vegetation using "best management practices" that minimize erosion and sediment escape to water bodies.

Excessive erosion of drainage ditches must be controlled or repaired. Ditch linings of loose or grouted rock and concrete or other energy dissipation methods can control erosion. However, these linings need be checked frequently and repaired as necessary.

Keep ditches and gutters free of litter and debris. Repair all cracks and breaks as necessary.

Be especially careful when chemicals are used for brush and grass control in open ditches. Herbicides must be carefully controlled so as not to contaminate water or to transfer and concentrate chemicals in adjacent areas where environmental damage may result. Always follow product application instructions.

Be alert for diversion ditches on top of cut slopes that prevent slope erosion by intercepting surface drainage. Diversion ditches must be maintained to retain their diversion shape and capability.

Surplus material that results from ditch cleaning can often be used for widening. Material placed into the adjacent portions of the highway or disposal areas must not obstruct or impair other roadside drainage areas. Do not use material that may cause sedimentation problems to water bodies. Take care to avoid causing erosion problems or loose unstable fills. Don't use non-porous materials such as clay. They can become unstable when wet and trap water in the existing fill. If there is doubt about using such surplus material contact the Region Soils Engineer for assistance.

Don't blade ditch cleanings across roadway surfaces. Dirt and debris remaining on the pavement after ditch cleaning operations must be swept from the pavement.

Avoid undercutting the roadway back slope or in slope. Undercutting weakens the slope and will cause damaging slip-outs and other forms of slope erosion.

Rockfall Ditches and Slope Benches

Keep rock fall ditches and slope benches clean. Large amounts of slough or rock fall and other slide material that effectively block the ditch or bench should be removed as soon as possible after they occur.

Dry Wells

Dry wells accommodate the drainage flow in certain areas where:

- Natural outfalls for a drainage system were not available.
- Their use reduces the need for or size of downstream facilities.

These dry wells should be inspected periodically. Replace the drain rock if storm water no longer percolates into the soil.

Culverts

A culvert is a conduit or pipe used as an artificial channel under a roadway or embankment to maintain flow from a natural channel or drainage ditch. Inspect all culverts at least twice a year. Keep them clean and in good operating condition.

Changes in the up stream watershed due to logging, land development activities, farming practices, forest fires, etc., may increase water run off, sedimentation and debris. With these conditions more frequent inspections, particularly after periods of high runoff, are necessary to enable maintenance personnel to take corrective measures if damage has occurred. During storms and floods, critical areas need to be inspected and the culvert inlets kept clear.

Repair and replace badly worn or broken culverts to minimize the possibility of damage to the roadbed by water saturating the fill material.

Culverts with 50 percent or more constriction should be flushed or otherwise cleaned to restore the culvert's original capacity. (Use BMP's to minimize fish impacts when doing this work.) Some of the larger culverts in flowing streams are designed for construction below the stream bed, to accommodate fish life. In these cases, the culvert should also be cleared of obstructions that may be detrimental to the passage of fish.

Check culverts for scour around the inlet and outlet. Repair scoured areas with rip-rap or some other protection if necessary. In some cases standing water is desirable at the inlet end of the culvert to settle out sediment. Vegetation at culvert ends can be controlled by residual herbicides or mechanical means. Controlled burning of vegetation at culvert ends is a feasible alternative at some locations. Whatever method of vegetation control utilized needs to be accompanied by erosion and sediment control features/practices.

Pavement markings that show the location of culverts should be renewed annually. These markings are critical for quickly locating culverts for both emergency and routine maintenance. Pavement markings of more permanent materials, such as thermoplastics, are encouraged.

Automatic Pumps

Automatic pumps, sumps, and pipes at underpass structures or draining depressed sections of highway must be kept in good operating condition at all times. Each installation must be inspected on a routine basis, at least once per week. Inspections should include the electrical, ventilation, greasing and drainage systems.

Under Drains

Under drains are often constructed in the sub-grade to intercept subsurface water from springs and seepage water from the surface or percolating from below. Control of this water is essential to ensure the stability of the sub-grade upon which the highway is constructed.

Inspect under drains on the same schedule as culverts. Keep their outlets open and clean. Choked under drains can be cleaned by high pressure flushing with water or flexible sewer rods. In cases where roots effectively block the drainage, the use of herbicides may be indicated. Whatever method of cleaning is used, consideration for erosion and sediment control is needed.

Storm Sewers

In many areas underground pipe systems are necessary to carry storm runoff normally handled by ditches. Storm sewers are often used in long, depressed highways or along curbed sections on city streets. Water carried by the system is generally collected through inlets, catch basins, or manholes and carried by pipe to an out fall on a natural waterway.

Clogged pipes can often be cleaned with high-pressure water jets. But, if tree roots or broken pipes are causing the clogging, more service will be required. Flexible rotary cutters will remove roots intruding into a pipe.

Broken pipes may be repaired by jacking an insert liner into the failed location. Otherwise, the failed pipe may have to be excavated and relayed to repair it. Whatever method of cleaning is selected, consideration for erosion and sediment control is needed. In no case can debris or sediment be allowed to enter a water body.

Manholes are generally used where there is a change in profile or alignment and also at strategic points in long, straight sections in order to provide access for cleaning the conduit.

Periodically inspect and clean inlets, catch basins, and manholes using a vacuum truck or manual cleaning methods. Conduct inspections during storms to ensure that the inlet grates are not becoming clogged with water-born debris. Schedule sweeping operations to help prevent the accumulation of leaves, paper, or other clogging debris.

When pavement is overlaid by contract or maintenance work crews be sure that the manhole covers are flush with the finished pavement elevations.

AASHTO Manual

American Association of State
Highway and Transportation Officials

2.1.4 Roadway Drainage Maintenance

A consistent program of inspection and maintenance is necessary for highway drainage systems to operate efficiently. In earlier times, most emphasis was placed on surface drainage. Now it is necessary to consider subsurface drainage in inspection and maintenance planning [16, 17].

Drainage systems for highways are designed to limit water damage to the roadway by controlling or directing the free flow of water over, under, or adjacent to the highway and to control the movement of water through the pavement's structural support where necessary. Factors considered in the design and development of highway drainage systems include rainfall patterns in the region; soil and vegetation characteristics in the area; land use and development patterns in the area; the water table in the area and its fluctuations; contour and topographic relief in the area; hydraulic energy of the water as it moves through the highway right of way; and frictional resistance to water flow along the flow path.

Roadway drainage maintenance focuses on retaining the intended design efficiency of the drainage system and on adapting the existing drainage system to accommodate environmental changes to the degree possible with minor changes. (Major changes in the drainage system imply a new drainage design and an associated construction or reconstruction project.) Maintenance activity that contributes to an effective, efficient roadway drainage system includes the following:

- Cleaning roadside ditches to provide a uniform flow line and consistent channel shape.
- Removing trees and other debris from natural water courses or ditches if they may restrict flood flows or become dislodged and accumulate against bridges and culverts, blocking water flow and creating the potential for washing out the structure.
- Correcting minor defects in the drainage system, such as by sealing cracks in pavements and culvert walls; repairing scour around bridge piers and abutments; stabilizing channel banks in the vicinity of bridges; regrading eroded foreslopes or backslopes to their original condition; and replacing small culverts at side road entrances and field entrances that have been damaged, restricting water flow.
- Anticipating drainage system changes by observing changes in roadway performance or in the drainage environment surrounding the roadway that suggest some future need for modified drainage. For instance, continued problems with roadway settling or pavement breakup following a wet season may suggest that subsurface drainage problems are the root cause; erosion around the downstream end of a culvert may be a sign of a crack or leak in the culvert barrel that is allowing water to pipe around the outside of the culvert during flood flow; or standing water in roadside ditches or property adjacent to the roadway resulting from wetland development may be an indication that overland drainage flow across the highway is becoming slower and the water table is rising.

Following major storms, flooding damage to the roadway system will frequently spur a reassessment of roadway drainage system maintenance. While it is appropriate to determine the extent to which diversion ditch maintenance at the top of a highway cut may have contributed to an earth slide or a rock slide or the extent to which lack of riprap material around a bridge may have contributed to excessive scouring around bridge piers and abutments, etc., it is important that engineers with expertise in hydraulics and hydrology participate in the assessment of storm damage associated with drainage. The storm may have been of such a duration, intensity, or area coverage to have grossly exceeded the original drainage design parameters. Perhaps the appropriate maintenance response is only an emergency repair until a new drainage design can produce a reconstruction that can handle a greater intensity storm.

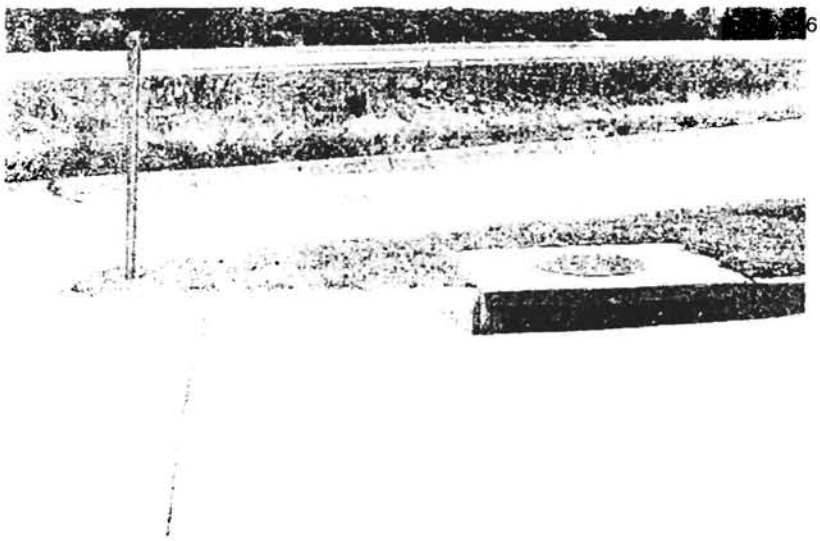
As the control of surface and subsurface drainage has become more complex [illegible] water detention regulations, wetlands preservation regulations, agricultural irrigation regulations, and agricultural drainage regulations, it is important that the highway agency not allow abutting property owners to discharge water from the abutting property onto the highway right of way without processing a permit to do so. During the permitting process, drainage design engineers and maintenance engineers will review the impact of drainage from abutting property onto the highway right of way. Maintenance personnel who routinely patrol a roadway section should be trained in basic knowledge of which types of drainage from abutting property to the highway are permissible and which require a permit so that they are prepared to report any drainage activities that may need to be reviewed.

Good roadway drainage maintenance has a significant positive effect on roadway safety. Well-maintained foreslopes allow vehicles leaving the traveled lanes to be brought under control with minimum damage. Roadside ditches that are cleaned to prevent standing water minimize the possibility that a vehicle falling into the ditch after a storm will result in a drowning hazard for the driver or passengers. Embankment slopes and culvert ends that are well maintained minimize the potential to trip a vehicle that runs off the road and passes over the culvert end. Good maintenance patrol inspection of roadway drainage will identify culvert end sections or inlets that are potential hazards to vehicles and report these features to the engineering sections responsible for a redesign, mitigating the hazard.

Roadway drainage maintenance has to be scheduled considering the local climate demands, the availability of equipment in the context of other equipment demands, and the availability of personnel in the context of other maintenance activities. Generally, the most efficient time to perform roadway drainage maintenance is in advance of the rainy season. However, the change from the winter season to the rainy season may be a short, abrupt time interval. In such climates, it may be more effective to conduct roadway drainage maintenance in the dry season as a preventive maintenance strategy for future rainy seasons. As much as possible, roadway drainage maintenance should be performed with power equipment. If the roadway design and construction has produced a difficult drainage maintenance environment (limited space from which to operate power equipment, slopes too steep for safe equipment operation, etc.), this situation should be documented by maintenance engineers and forwarded to the design engineers, enabling future projects to produce roadways that can be efficiently and effectively maintained.

2.1.4.1 Maintenance of Roadway Surface Drainage

Curbs and Gutters: Curbs and gutters that direct or control the overland flow of water to ditches or inlets should be monitored for debris accumulation (sediment or trash) after storms. In areas where sand or other fine material is used in winter snow and ice operations, these areas should be inspected for debris accumulation shortly after the end of the snow and ice season. Curbs that have been damaged or broken due to snowplowing need to be repaired as soon as it is practical to do so. In moderate climates, curbs and gutters need to be observed for failure as a result of settling or subsiding material in back of or underneath the curb and gutter section. Any breaks in a curb and gutter line attributable to settling need to be repaired as soon as it is practical to do so. [in]



Well-maintained curb and gutter with storm sewer inlet

Shoulder Inlets and Side Drains: Open ditches or pipes that direct surface water flow from the roadway into a roadside ditch or natural water course need to be inspected regularly during the rainy season to ensure that they are free of debris and silt deposits. They should also be observed to determine that they operate efficiently so no water backup occurs. Inspections for water backup can usually be performed by driving along the roadway, but they need to be done during a rainstorm. Shoulder inlets and side drains should be checked for broken pipe sections, leaks into the surrounding soil that can contribute to erosion, and excessive waterway scour at the outlet. In the case of a paved ditch, all cracks need to be sealed to prevent undermining that can lead to structural collapse.

Interceptor Ditches, Diversion Ditches, and Bench-Cut Slope Channels: These drainage features intercept the natural overland flow of water and carry it to adjacent fields, detention basins, or a less disruptive ditch or channel entrance. Check for silt deposits or erosion of the ditch cross section and profile. Correct conditions that could cause ponding in the ditch, because this may contribute to slope instability. Avoid unnecessarily breaking the sod surface of a grassed interceptor in maintaining the cross section or provide treatments to minimize any erosion of the ditch until the grass can regenerate the sod (e.g., silt fences, biodegradable mats, etc.).

Check Dams and Berms: Check dams and earth berms are most often used in roadside ditches and medians. They impound water runoff and act as settling basins for sediment, reducing erosion and silt deposits off the highway right of way while construction or major grading maintenance is underway and until seeding and vegetation can be established [18]. If the removal of check dams, berms, and silt fences is the responsibility of maintenance, the area needs to be inspected periodically to determine when the drainage surface is ready to withstand normal storm water flow without the temporary structures.

Roadside Ditches: These ditches will be open unless they cross under a side road, a driveway, or a walkway. Roadside ditches should be maintained as near as practical to the alignment, grade profile, depth, and cross section to which they were originally designed and constructed or as subsequently reconstructed. At periodic intervals, the roadside ditches should be inspected for and cleaned of fallen rock, heavy vegetation, sediment creating ponding, and

other debris that may restrict design drainage flows. In rural areas near urban areas that have restrictive recycling policies, the roadside ditches need to be patrolled for dumpings of yard waste and other trash items. Ditches with debris that may impede proper water flow or represent a hazard to errant vehicles should be cleaned as soon as it is practical to do so. If any debris is encountered that is suspected of containing chemical or toxic materials, do not attempt to clear the debris until a properly qualified person has made an environmental safety determination.

Chutes, Flumes, Spillways, and Slope Drains: All paved or metal troughs (and pipes) carrying a rapid flow of water from a collector drain, a ditch into a roadside channel, or a natural water course should have good contact with the supporting material underneath, especially at the entrance, to prevent uplift and erosion. Open cracks should be sealed and settlement should be corrected. Patch and repair breaks and eroded areas with materials resistant to repeat failures. Open chutes may be an obstacle for roadside mowing operations; however, vegetation needs to be controlled around ditch paving and other drainage structures for hydraulic efficiency. Drainage structure aprons and other hydraulic energy-dissipating devices need to be inspected at regular intervals for damage and for erosion from failure to perform as intended. Substantial erosion around an energy-dissipation structure should be reviewed by an engineer with hydraulic engineering expertise to determine if the existing structure needs to be replaced with an improved design.

Natural Water Courses and Bank Protection: These are rivers, streams, gullies, arroyos, etc. that have continuous or intermittent stream flow and may include floodway channels within the highway right of way. The approach and exit to bridges and other major drainage structures in the channel should be kept clear of rubbish, brush, and other debris [19]. The actual channel must not be allowed to silt in, reducing the required design waterway opening and perhaps requiring dredging. Bank scouring on either side of a bridge can usually be minimized by adjusting the channel alignment to be as nearly straight through the bridge as possible. However, minimizing bank scouring may also require channel bank riprap, jetties, or other stabilization methods. Maintenance of the natural water course through private property is ordinarily the property owner's responsibility; however, highway agencies are more frequently being expected to contribute to such maintenance because the highway structure contributes to the hydraulic energy creating the maintenance problem. Bank stabilization and bank erosion control methods may include rock or stone slope protection (riprap), grouted riprap, sacked concrete riprap, concrete slope paving, gunite slope paving, pile revetments, jetties, retards, jackstraws, tetrahedrons, retaining walls, and cribs. Serious bank or water course erosion should be evaluated by an engineer with expertise in hydraulic engineering and geotechnical engineering to maximize the potential for successful bank stabilization. In emergency flooding operations, sandbags, temporary earthen dams, dikes, or levees may be necessary to protect the roadway or bridge from failure. (See chapter 3 for greater detail on these maintenance methods.)

Appendix 7

Neil Bruce Declaration

Re: Nature of Stormwater Charge

HONORABLE CAROL MURPHY

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

LILY A. BANKS; MARC A. BERGE and BARBARA BERGE, husband and wife; LEE GOTTI; EDWARD H. LILLEY SR; KENNETH D. SHAW III and SANDRA A. SHAW, husband and wife; and that class of persons and entities similarly situated, Plaintiffs, v. CITY OF OCEAN SHORES, a Washington municipal corporation, Defendant.	No. 03-2-01811-9 CLASS ACTION DECLARATION OF NEIL BRUCE

I, NEIL BRUCE, hereby declare as follows:

1. I am Professor of Economics in the Department of Economics at the University of Washington, Seattle, Washington. My educational and professional qualifications and experience are outlined in my *curriculum vitae,* a copy of which is attached as Exhibit I to this Declaration.

2. I base this declaration on the facts stated in the following:

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Exhibit 2

a. The Declarations of John Gow dated January 11 2006, May 16 2006 and September 15 2006;

b. The Declaration of Kenneth E. Lanfear dated January 12 2006; by Kenneth E. Lanfear in support of defendant's summary judgment; and

c. The Declarations of Bruce J. Dodds dated March 17 2006, May 30 2006, and November 22 2006.

3. Based on the facts as stated in the above Declarations, I conclude that the economic substance of the Ocean Shores storm-water charge is a tax on real property in the city.

A. The purpose of the storm-water charge is to raise revenue to finance the provision of a public or community service. Public goods provide collective benefits rather than individual benefits and are funded by taxes.

4. I concur fully with the Declaration of Professor Halvorsen dated April 4, 2006, that the drainage facilities described in the declarations provide services that are predominantly, if not wholly,[1] for the benefit of the community in general, rather than the individual benefit of the lot owners who pay the storm-water charge. In economic terms, the

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[1] My only qualifications to "wholly" are that part of the function of the weir at the end of the Grand Canal is to maintain the water table at a high enough level to protect the City's potable drinking water supply from salt water intrusion and to stabilize the shorelines of the lakes and canals. The weir does so by damming the outflow of water from the lakes and canals and maintaining it at a relatively fixed elevation. To the extent that the negative impacts of this drainage restriction is part of the cost of providing potable water (a commodity that is sold by the City's Waterworks for the individual benefit of water customers), the cost of mitigating those impacts could appropriately be factored into the user fee paid by water customers. Similarly, to the extent that the weir provides a "special benefit" to waterfront lot owners, it may be that some portion of its cost could be apportioned as a benefit assessment to the water front lots. However, maintaining the water level of the lakes and canals for the recreational, environmental and aesthetic benefits available to the public in general provides a community or public benefit in the economic sense.

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services provided are non-rival and non-excludable, which are the classic attributes of "public goods." In simple terms, the benefits of a public good are collective, not individual. Because public goods provide collective benefits and it is not practical to deny the benefits to any individual, financing them by a price mechanism is not possible. Rather, such services must be financed by compulsory taxation.

5. In this regard, based on John Gow's description of the functioning of the storm-water system, the services provided by those facilities provide a collective benefit, and are no different than other public goods, such as the Seattle seawall, flood control projects, the levees in the City of New Orleans, or public streets or street lights in any city. Although Dr. Gow attempts to frame the benefits of the system as individual benefits accruing to lot owners, they in fact are not.

6. Dr. Gow contradicts any possible assertion that the benefits of the system are individual when he states "Without the Stormwater System, I believe the City could not function, or even exist, as it is currently built. Rather, it would be uninhabitable." (Gow 5/20/06 para. 29) I can think of no more dramatic example of a statement of a collective benefit. Similarly, the downtown waterfront of the City of Seattle could not exist without the sea wall, nor the City of New Orleans without the levees retaining the Mississippi river. That is why the Seattle sea wall, the levees of New Orleans, and the City of Ocean Shores storm-water system are public goods and compulsory charges levied for construction and maintenance of such facilities are taxes used to pay for these collective public benefits.

B. The Storm-water charge is not a public utility fee.

7. In the broadest sense, a tax is any compulsory charge levied for the support of the purposes of government. However, not all revenues raised by government are taxes.

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Governments also provide goods and services that are paid for by voluntary payments from those who choose to purchase the goods or services. Municipally-owned public utilities provide a clear example where government provides a good or service for the individual benefit of the utility customer, rather than the collective benefit of the community. Public utility services are commonly provided either by government-owned enterprises or by government- regulated enterprises because the utility service typically can be provided by only one seller, giving rise to natural monopoly, which necessitates either public ownership or a regulated private firm. Fees charged by public utilities, however, are based the individual benefits received by the utility customers who request service. As such, they are not considered taxes, any more than is tuition at state universities.

8. The Ocean Shores storm-water charge is not a public utility fee because the City does not provide an individual benefit or service to those customers who choose to receive service. Rather, it is a mandatory charge that all lot owners must pay that is used to finance the maintenance of facilities that provide a collective benefit to the community.

C. The Storm-water charge is not a regulatory imposition or Pigovian tax.

9. Another type of charge made by government is one imposed on those activities of persons or firms which impose burdens on other members of the community or the community as a whole. In these circumstances, governments may levy compulsory charges to regulate and/or mitigate the negative impacts of the activities.[2] Whether one calls such a compulsory charge a "tax" or "regulatory fee" is only a matter of nomenclature, not substance. The important distinction is that, by whatever name, these charges are not imposed

[2] In economic terms, these burdens are referred to as "negative externalities."

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for the purpose of raising revenue to finance public goods nor to fund the costs of government, but for the purpose of regulating private activity.

10. Dr. Gow asserts that the storm-water charge is a regulatory fee that is imposed based on the amount of "burden" that each lot imposes on the City's storm-water system because the storm-water system is burdened in proportion to the amount of rain falling on the lots. But the simple geometric truism that rain falls in proportion to lot size does not convert the storm-water charge into a regulatory fee.

11. Regulatory fees or Pigovian taxes are imposed to regulate and/or mitigate the negative impacts of human activities that create burdens on others or on society in general. A mandatory charge on property that is measured by an unalterable natural characteristic of the property is a tax on the property, not a regulatory fee or Pigovian tax. Based on its economic substance, the Ocean Shores storm-water charge is emphatically NOT a regulatory fee or Pigovian tax. It does not regulate any private activity. This so-called storm-water charge does not depend on actions taken by lots owners that change the degree to which rainwater infiltrates their property, nor on any other action that might disrupt the natural drainage of rainwater. The storm-water charge applies equally to developed and undeveloped properties alike.

D. Conclusion

12. The conclusion of this declaration is that compulsory charges against land areas for the purpose of raising revenue to supply and maintain public goods that provide community benefits are property taxes. In public finance and economics, a tax based on the ownership of property is deemed a property tax. Because the so-called "storm-water charge"

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levied by the City of Ocean Shores is used to fund community public goods and services and is based on the ownership of property, it is in economic substance a property tax.

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

DATED this 28 day of April, 2010.

Neil Bruce

Neil Bruce, Declarant

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Appendix 8

Excerpts from BARS Manual

EXPENDITURE/USE ACCOUNTS
Account Definitions

(540) TRANSPORTATION (Summary Account)

This is a major class of services provided by the local government for the safe and adequate flow of vehicles and pedestrians.

(541) ROAD AND STREET PRESERVATION (Summary Account)

For purposes of accounting and reporting under BARS, the costs of performing those specialized maintenance activities that serve to extend the originally estimated life of each type of roadway, roadway structure, and facility but do not increase its traffic flow capacity or efficiency. This account should not include maintenance or construction.

541.10 **ENGINEERING.** The costs of engineering associated directly with a preservation project.

541.30 **ROADWAY.** The costs of preserving the roadway prism.

541.40 **DRAINAGE.** The costs of preserving drainage systems from the point of interception within the right-of-way to the point of outfall.

541.50 **STRUCTURES.** The costs of preservation activities on bridges (structures 20 feet and over), tunnels, sea walls, irrigation canal crossings, livestock crossings, and other structures, including the operation of air pollution control devices in tunnels and traffic control during preservation activities.

541.60 **TRAFFIC AND PEDESTRIAN SERVICES.** The costs of preservation of roadway facilities and services. NOTE: For traffic policing expenditures use account 521.70.

541.61 **SIDEWALKS**
541.62 **SPECIAL PURPOSE PATHS.** For details see Part 3, Chapter 10, Interpretation 9.
541.63 **PARKING FACILITIES.** The costs of preservation activities related to parking facilities.

541.90 **PRESERVATION ADMINISTRATION AND OVERHEAD.** Supervisory operations. Also includes general services that can be directly associated with the preservation functions of the department.

(542) ROAD AND STREET MAINTENANCE (Summary Account)

For purposes of accounting and reporting under BARS, the costs of performing those activities that ensure that the right-of-way and each type of roadway, roadway structure and facilities remain, as nearly as practical, in its original, as-constructed condition or its subsequently improved condition, and the operation of roadway facilities and services to provide satisfactory and safe motor vehicle transportation. This account should not include preservation or construction.

542.10 **ENGINEERING.** The costs of engineering associated directly with a maintenance project.

EXPENDITURE/USE ACCOUNTS
Account Definitions

542.30 **ROADWAY.** The costs of maintaining the roadway prism.

542.40 **DRAINAGE.** The costs of maintenance and repair of drainage systems from the point of interception within the right-of-way to the point of outfall.

542.50 **STRUCTURES.** The costs of maintenance on bridges (structures 20 feet and over), tunnels, sea walls, irrigation canal crossings and livestock crossings and other structures, including the operation of air pollution control devices in tunnels and traffic control during maintenance operations.

542.60 **TRAFFIC AND PEDESTRIAN SERVICES.** The costs of operation and maintenance of roadway facility and services. Note: For traffic policing expenditures use account 521.70.

542.61 **SIDEWALKS**

542.62 **SPECIAL PURPOSE PATHS.** For details see Part 3, Chapter 10, Interpretation 9.

542.63 **STREET LIGHTING.** The costs of operating, painting, replacing and repairing of road/street lighting systems. Does not include the lighting of parks or other ornamental lighting.

542.64 **TRAFFIC CONTROL DEVICES.** The costs of painting, repairing and replacing guardrails, signs, pavement markings and pavement stripes; operating, painting, replacing and repairing traffic signals and control systems; supervising, operating, maintaining and repairing weighing stations; and maintaining, repairing and replacing right-of-way fences when the damages result from public use of the roadway, or when maintenance is the responsibility of the department by agreement.

542.65 **PARKING FACILITIES.** The costs of operating, maintaining and repairing parking facilities and parking meters.

542.66 **SNOW AND ICE CONTROL.** The costs of all operations to reduce traffic hazards resulting from snow and ice.

542.67 **STREET CLEANING.** The costs of cleaning the road/street surface by flushing, washing or sweeping by machine or by hand, and the collection and disposal of sweepings, leaves, rocks and storm debris, except that associated with snow and ice control.

542.70 **ROADSIDE.** The costs of maintaining that portion of the right-of-way beyond the outside edge of the shoulder or the outside edge of the curb when no shoulder exists, including medians. Also include temporary signs and traffic control during maintenance operations.

542.80 **ANCILLARY OPERATIONS.** The costs of maintenance and operations that are not normally associated with the street or road department function but are performed by street or road departments in some localities because of unique geographical or organizational situations.

542.90 **MAINTENANCE ADMINISTRATION AND OVERHEAD.** Supervisory operations. Also includes general services that can be directly associated with the maintenance function of the department.

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Banks et al. v. City of Ocean Shores, Supreme Court No. 85438-6

Attached for filing is **Appellants Brief Appellants Brief.**

The appendix to the brief is more than 25 pages and is being mailed separately.

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