FILED
Court of Appeals
Division II
State of Washington
2/24/2023 2:48 PM

No. 57502-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, a Washington Non-Profit Trade Association and SOUNDBUILT HOMES, LLC, a Washington Limited Liability Company,
Appellants,

v.

THE STATE OF WASHINGTON and THURSTON COUNTY AUDITOR, MARY HALL, in her official capacity,
Respondent.

BRIEF OF APPELLANTS

Attorneys for Appellants Building Industry Association of Washington and Soundbuilt Homes, LLC

Jackson Wilder Maynard, Jr., WSBA # 43481
300 Deschutes Way SW Suite 300, Tumwater, WA 98501
Phone (360) 352-7800, Fax (360) 352-7801
JacksonM@biaw.com

Ashli Raye Tagoai, WSBA # 58883
300 Deschutes Way SW Suite 300, Tumwater, WA 98501
Phone (360) 352-7800, Fax (360) 352-7801
AshliT@biaw.com

Table of Contents

I. INTRODUCTION……1

II. ASSIGNMENTS OF ERROR……2

III. STATEMENT OF THE CASE……3

IV. ARGUMENT……...7

A. The court reviews summary judgment decisions *de novo*. 7

B. The trial court erred in ruling as a matter of law that the Document Recording Surcharges are not property taxes that violate the uniformity requirement of Article VII, § 1 of the Washington State Constitution……7

1. The Document Recording Surcharges are unconstitutional property taxes because they are an unavoidable and absolute demand upon property paid when documents are required to be recorded by state law. …….....9

2. The Document Recording Surcharges are also an absolute and unavoidable demand upon real property because Washington State is a "race-notice" state.....12

3. The Document Recording Surcharges are not excise taxes. 14

4. The Document Recording Surcharges are not valid fees. 16

C. The trial court erred in ruling as a matter of law that the Document Recording Surcharges do not violate

the requirements of Article VII, § 5 of the Washington State Constitution. 29

D. The trial court erred in determining that the challenge to the Document Recording Surcharges was not an "as-applied challenge" in addition to a facial challenge. 31

V. CONCLUSION……..….33

Table of Authorities

Cases

Arborwood Idaho, L.L.C. v. City of Kennewick,
151 Wn.2d at 367 (2004)..... passim

Black v. State,
67 Wn.2d 97, 99 (1965)..... 10

City of Seattle v. Evans,
184 Wash.2d 856 (2015) 32

City of Snoqualmie v. King Cnty. Executive Dow Constantine,
187 Wash.2d 289, 301 (2016)..... 18, 19, 28

Covell v. City of Seattle,
127 Wash.2d 874 at 878 (1995) ..... passim

Galvis v. State, Dept. of Transp.,
140 Wash.App. 693, 167 P.3d 584 (Div. 2, 2007)..... 32

Hillis Homes, Inc. v. Snohomish Cnty.,
97 Wn.2d 804, 809 (1982)..... 17

In re Estate of Bracken,
175 Wash.2d 549, 290 P.3d 99 (2012)..... 30

Jensen v. Henneford,
185 Wn. 209, 217, (1936)..... 8, 9, 15

King Cnty. v. King Cnty. Water Districts Nos. 20, 45, 49, 90, 111, 119, 125,
194 Wn.2d 830, 843 (2019) 24

Lakehaven Water & Sewer Dist. v. City of Fed. Way,
195 Wn.2d 742 (2020)..... 17

Ley v. Clark County Public Transportation Benefit Area,
197 Wash.App. 17, 386 P.3d 1128 (2016)..... 30

Okeson v. City of Seattle,
150 Wn.2d 540, 552–53 (2003)..... passim

Paganelli v. Swendsen,
50 Wn.2d 304, 308 (1957)..... 13

Ramey v. Knorr,
130 Wn.App. 672, 685 (2005)..... 7

Samis Land Co. v. City of Soap Lake,
143 Wn.2d 798 (2001)..... passim

Smith v. Spokane Cnty,
89 Wn. App. 340 (1997)..... 25

State ex rel. Nettleton v. Case,
39 Wn. 177, 182 (1905)..... 8

Storedahl Properties, LLC v. Clark Cnty.,
143 Wn.App. 489, 500 (2008)..... 23, 26, 27

Thurston County Rental Owners Ass'n v. Thurston County,
85 Wn.App. 171, 178–79 20

Tukwila Sch. Dist. No. 406 v. City of Tukwila,
140 Wn.App. 735, 750 (2007)..... 28

Welch Foods, Inc. v. Benton County,
136 Wash.App. 314, 148 P.3d 1092 (2006)..... 8

Statutes

RCW 36.22.010 3
RCW 36.22.178 4
RCW 36.22.179 4
RCW 36.22.1791 5
RCW 36.22.240 5
RCW 65.04.030 ..... 3, 10, 11, 22
RCW 65.08.070 ..... 4, 12, 13
RCW 82.08 14
RCW 82.08.150 14
RCW 82.24.020 14

Other Authorities

CP 10 6
CP 14-17 7
CP 309 32
CP 319-321 7
CP 321-329 7
CP 4-37 6
CP 4-7, 61, 63-65 5
CP 5, 62 6
CP 5, 67 ..... 4, 6
CP 5, 92 33
CP 7, 61, 64 5
CP 7-9, 63-65 4
CP 8 5
Engrossed Second Substitute H.B. 1277, 67th Leg., Reg. Sess. (Wash. 2021) 1
Off. of Fin. Mgmt., Washington State and Local Government Revenue Sources, Fiscal Year 2020, https://ofm.wa.gov/washington-data-research/statewide-data/washington-trends/revenue-expenditures-trends/state-local-government-revenue-sources 9
Tr. at 13 32
Tr. at 25 32

Constitutional Provisions

Article II, § 19 7

Article II, § 37 7
Article VII, § 1 ..... 7, 8, 10, 12
Article VII, § 2 2
Article VII, § 5 ..... passim
Article VII, §§ 1 and 5 ..... 1, 6, 33
Article XI, § 11 17

I. INTRODUCTION

The Building Industry Association of Washington ("BIAW") and Soundbuilt Homes, LLC ("Soundbuilt") (or collectively, "Appellants") appeal the trial court's order granting summary judgment in favor of the State of Washington. Appellants challenge $185.50 in surcharges that are assessed by county auditors for documents required by law to be filed that are common in the homebuilding industry ("Document Recording Surcharges"). These Surcharges have been gradually increased over the years - most recently by $100 in 2021 via Engrossed Second Substitute H.B. 1277, 67th Leg., Reg. Sess. (Wash. 2021) ("HB 1277"). They are unconstitutional because they are nonuniform property taxes constituting an "absolute and unavoidable demand on the ownership of property" and do not comply with Article VII, §§ 1 and 5 of the Washington State Constitution. The trial court erred in adopting the State's argument that the Surcharges are not property taxes because the

recording of documents with an auditor is "voluntary" – even though state law requires it. This Court should reverse the trial court decision and rule the Document Recording Surcharges are void, unconstitutional, and unenforceable as a matter of law.

II. ASSIGNMENTS OF ERROR

1. Did the Thurston County Superior Court err in ruling as a matter of law that the Document Recording Surcharges are not unconstitutional nonuniform property taxes that violate Article VII, § 2 of the Washington State Constitution?[1]
2. Did the Thurston County Superior Court err in ruling as a matter of law that the Document Recording Surcharges comply with Article VII, § 5 of the Washington State Constitution?

[1] The triple negative is necessary because the State declined to take a position in briefing or argument on whether the Document Recording Surcharges were valid fees or excise taxes, but only maintained that they were "not property taxes." CP 175 n.2.

3. Did the trial court err in ruling that the lawsuit in this matter was not an "as-applied" challenge?

III. STATEMENT OF THE CASE

Washington State law requires the collection of surcharges by the county auditor for the recording of certain written instruments. Specifically, RCW 36.22.010 states that it is the county auditor's duty to, "be recorder of deeds and other instruments in writing which by law are to be filed and recorded." One of the primary instruments that the county auditor is required to record is a conveyance, which would include: deeds, grants and transfers of real property, mortgages and releases of mortgages of real estate, instruments or agreements relating to community or separate property, powers of attorney to convey real estate, and leases which have been acknowledged or proved. *See* RCW 65.04.030.

Moreover, the county auditor is required to record, "all such other papers or writing as are required by law to be recorded

and such as are required by law to be filed." *Id*. Under the Washington State Recording Act, all conveyances need to be recorded to document chain-of-title, establish priority of ownership interests, and put others on notice of ownership. *See* RCW 65.08.070. Within the homebuilding industry, such documents are commonly required to be filed during residential construction. CP 5, 67.

In addition to any taxes or fees charged by the auditor for the recording of documents, the State also charges several Document Recording Surcharges that fund programs related to affordable housing. CP 7-9, 63-65. These Surcharges have been increased gradually over the years. *Id.* For example, property owners, including homebuilders, were required to pay the following charges for each document recorded:

- A $13 "affordable housing for all" surcharge. *See* RCW 36.22.178.
- A $62 surcharge for local homeless housing services. *See* RCW 36.22.179.

- An $8 surcharge for local homeless housing and assistance. *See* RCW 36.22.1791.
- A $2.50 surcharge for developing housing supply and affordability reports and for maintenance and operation costs of permanent supportive housing and affordable housing. *See* RCW 36.22.240.

In 2021, HB 1277 passed and increased the Surcharges by $100 and funded, according to its title, "eviction prevention and housing stability services." CP 7, 61, 64.

With the implementation of HB 1277, it now costs property owners $185.50 to record each document, and numerous documents are required to be recorded in the course of building a single-family home. CP 4-7, 61, 63-65. Appellants do not contest that affordable or subsidized housing and other related services may be important programs. CP 8. Unfortunately, in light of the fact that our state is in a housing affordability crisis, the unconstitutional Surcharges addressed in this suit that fund these programs do nothing but increase the cost

of single-family homes. CP 5, 62. Ironically, the homebuilders who work to alleviate the affordable housing supply shortage are footing the bill for the state of the housing market. CP 10.

Two organizations impacted by these fees filed suit on November 2, 2021 – after the most recent surcharge increase in HB 1277 had taken effect. The first, BIAW, is a non-profit trade association that promotes the interests of Washington homebuilders. CP 5, 62. The vast majority of its nearly 8,000 members are residential contractors who construct single-family homes and pay Document Recording Surcharges for filing conveyances in their normal course of business. CP 5, 67. The second, Soundbuilt, is a limited liability company based in Washington State. CP 5, 62. A representative of Soundbuilt paid the Document Recording Surcharges on October 29, 2021. *Id.*

The lawsuit challenged the constitutionality of the Surcharges as violative of Article VII, §§ 1 and 5 of the Washington State Constitution. CP 4-37. The suit also alleged that HB 1277 violated the single subject requirement of Article

II, § 19, and failed to set forth in full the statute amended as required in Article II, § 37 of the Washington State Constitution.[2] CP 14-17. Following a hearing on cross-motions for summary judgement, the trial court ruled in favor of the State. CP 319-321. Appellants subsequently appealed. CP 321-329.

IV. ARGUMENT

A. The court reviews summary judgment decisions *de novo*.

The standard of review for a summary judgment order is *de novo*, applying the same inquiry as the trial court, and viewing the facts and reasonable inferences in the light most favorable to the nonmoving party. *Ramey v. Knorr*, 130 Wn.App. 672, 685 (2005).

B. The trial court erred in ruling as a matter of law that the Document Recording Surcharges are not property taxes that violate the uniformity requirement of Article VII, § 1 of the Washington State Constitution.

Article VII of the Washington State Constitution addresses

[2] The Article II claims regarding HB 1277 are not the subject of this appeal.

taxation and revenue. The Washington State Constitution in Article VII, § 1 provides that "all taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only." Tax uniformity is the highest and most important of all requirements applicable to taxation under Washington's system. *Welch Foods, Inc. v. Benton County* 136 Wash.App. 314, 148 P.3d 1092 (2006).

In considering whether a particular charge is a property tax subject to the uniformity requirement, courts must recall "[t]he character of a tax is determined by its incidents, not by its name." *Jensen v. Henneford*, 185 Wn. 209, 217, (1936) (citations omitted).

Taxes are defined as "burdens or charges imposed by legislative authority on persons or property, to raise money for public purposes, or, more briefly, an imposition for the supply of the public treasury." *State ex rel. Nettleton v. Case*, 39 Wn. 177, 182 (1905). There exist two basic categories of taxes in

Washington: property taxes and excise taxes. Property taxes are the oldest form of taxation in Washington and are one of the largest single revenue sources for many local governments. *See* Off. of Fin. Mgmt., Washington State and Local Government Revenue Sources, Fiscal Year 2020, https://ofm.wa.gov/washington-data-research/statewide-data/washington-trends/revenue-expenditures-trends/state-local-government-revenue-sources (last updated October 20, 2022).

1. The Document Recording Surcharges are unconstitutional property taxes because they are an unavoidable and absolute demand upon property paid when documents are required to be recorded by state law.

A nonuniform charge that is imposed as an absolute and unavoidable demand against real property is always a property tax even if it is labelled and presented by the legislature as a "fee." *Jensen*, 185 Wn. at 217 (1936) (holding that the character of a tax is determined by its incidents, not by its name). This distinction is of special importance because the Washington

State Constitution requires property taxes to be imposed in a uniform manner based on the value of property. *Covell v. City of Seattle,* 127 Wash.2d 874 at 878 (1995).

The Document Recording Surcharges violate Article VII, § 1 of the Washington State Constitution because they are set at $185.50 without regard to the value of property represented in the recorded conveyance. *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798 (2001). Thus, the issue is whether the Surcharges create an obligation to pay based upon the member's voluntary action of filing a conveyance, or if they are an absolute and unavoidable demand on the ownership of property. *Covell* at 890 (citing *Black v. State*, 67 Wn.2d 97, 99 (1965)).

Here, state law clearly requires certain documents associated with property ownership and commonly used in the homebuilding industry to be recorded or filed. RCW 65.04.030 provides:

> Instruments to be recorded or filed. The auditor or recording officer must, upon the payment of the fees as required in RCW 36.18.010 for the same, acknowledge receipt therefor in

writing or printed form and record in large and well bound books, or by photographic, photomechanical, electronic format, or other approved process, the following:

(1) Deeds, grants and transfers of real property, mortgages and releases of mortgages of real estate, instruments or agreements relating to community or separate property, powers of attorney to convey real estate, and leases which have been acknowledged or proved: PROVIDED, That deeds, contracts and mortgages of real estate described by lot and block and addition or plat, shall not be filed or recorded until the plat of such addition has been filed and made a matter of record;

(2) Patents to lands and receivers' receipts, whether for mineral, timber, homestead or preemption claims or cash entries;

(3) All such other papers or writing as are required by law to be recorded and such as are required by law to be filed.

The statute clearly lists documents constituting conveyances at issue in this case in subsection (1). Even if that were not clear enough, there is a catch-all provision in subsection (3) that generally requires to be recorded "[a]ll such other papers or writing as are required by law to be recorded and such as are required by law to be filed." RCW 65.04.030. Because state law requires them to be filed and because they are necessary to exercise property rights, such as the right to transfer or sell, they constitute an absolute and unavoidable demand upon real property. Because they are not charged uniformly, they violate

Article VII, § 1 of the Washington State Constitution.

2. The Document Recording Surcharges are also an absolute and unavoidable demand upon real property because Washington State is a "race-notice" state.

The Document Recording Surcharges are also an absolute and unavoidable demand against real property because Washington is a race-notice state and a property owner must record his or her deed in order to protect his or her interest from subsequent purchasers. RCW 65.08.070(1). Of important note is that the recording statute is titled, "Real property conveyances to be recorded," which immediately implies that every written instrument by which any interest in real property is created, transferred, mortgaged, or assigned, must be recorded. *Id*.

To be clear, a conveyance need not be recorded in order to be legally binding on the parties to the transaction described in the document itself. For example, an unrecorded, written, and properly executed deed transferring ownership of a single-family

home from a builder to an owner gives the owner legal title to the property without recording.

However, in Washington, an unrecorded conveyance is void against any subsequent purchaser or mortgagor of the same real property whose conveyance is first recorded. RCW 65.08.070(1). Thus, if two people have an interest in the same property, the first person to record will likely prevail in an action to quiet title. Moreover, the only way that a person who fails to record can prevail in a quiet-title action against a bona fide purchaser who did record is by proving that the recording purchaser had actual, constructive, or inquiry notice of the non-recorder's prior interest. *Paganelli v. Swendsen*, 50 Wn.2d 304, 308 (1957). It is the act of recording that puts subsequent bona fide purchasers on notice of a prior interest. Thus, Washington State's race-notice statute reinforce the absolute and unavoidable demand on real property that the Document Recording Surcharges entail.

3. The Document Recording Surcharges are not excise taxes.

The Surcharges at issue in this case are clearly not excise taxes. An excise tax is an indirect tax levied on a voluntary transaction, occupation, or the exercise of a taxable privilege, rather than a tax that applies as an absolute and unavoidable charge against property or persons. *Covell* at 889 (internal cites omitted). Common examples include sales and use taxes, various business taxes, license fees, and taxes on inheritances. In Washington, excise taxes on transactions are typically levied on the sale of specified goods or services like cigarettes, gasoline, or alcohol, on sales transactions only occurring wholly within the state, and are measured based on gross value or volume. *See*, e.g., RCW 82.08.150 (liquor); RCW 82.24.020 (cigarettes); *see* generally RCW 82.08 (retail sales taxes). None of those features are present here.

Generally, courts apply a two-pronged test for determining whether a charge is a property tax or an excise tax: an assessment

is a valid excise tax if (1) the obligation to pay an excise tax is based upon the voluntary action of the person taxed in performing the act, enjoying the privilege, or engaging in the occupation which is the subject of the excise tax, and (2) the element of absolute and unavoidable demand is lacking. *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d at 367 (2004). Again, whether a charge is absolute and unavoidable is determined by how it functions in practice, not merely by its form or label. *Jensen* at 610.

As argued above, recording a conveyance of real property in Washington is not avoidable nor voluntary because recording is the primary way in which an owner notifies the public of his or her ownership and establishes ownership priority against subsequent purchasers. Specifically, recording a deed is the only way in which a property owner can prevail in an action to quiet title. Therefore, the Document Recording Surcharges are not excise taxes.

4. The Document Recording Surcharges are not valid fees.

The Surcharges at issue in this case cannot be legitimately claimed to be regulatory fees. In order to determine whether a particular charge is a tax or a fee, Courts should apply the *Covell* three-prong test: (1) whether the primary purpose of the legislation in question is to regulate the fee payers or to collect revenue to finance broad-based public improvements that cost money; (2) whether the money collected from the fees is allocated exclusively to regulating the entity or activity being assessed; and (3) whether a direct relationship exists between the rate charged and either a service received by the fee payers or a burden to which they contribute. *Covell v. City of Seattle*, 127 Wn.2d 874, 891 (1995); *See also Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359 (2004).

The tax versus fee analysis is rooted in the state constitution: courts have found that it is vital in order to prevent legislative bodies from illicitly imposing charges in the name of

fees that are, in fact, taxes in disguise. *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 371 (2004) (internal cites omitted). While the legislature and local officials possess broad, inherent authority under the police power to impose fees associated with regulatory activities, they possess only the tax authority expressly granted by the state constitution. Wash. Const. Article VII, § 5; *Id*. Article XI, § 11; *See also Hillis Homes, Inc. v. Snohomish Cnty*., 97 Wn.2d 804, 809 (1982), abrogated by *Lakehaven Water & Sewer Dist. v. City of Fed. Way*, 195 Wn.2d 742 (2020). There exists an implicit danger that legislative bodies may circumvent constitutional constraints, as did occur with the Surcharges at issue here, by levying charges that, while officially labeled "fees," possess all of the basic attributes of a tax. *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 805 (2001). The following is the application of the three-prong test to the Document Recording Surcharges, which demonstrates that they are not fees.

a. The Document Recording Surcharges are not valid Fees. They fail the three-prong test first developed in *Covell v. City of Seattle* for analysis in "tax versus fee" decisions.

The three-part *Covell* test, *supra*, and discussed more fully below, is utilized in determining whether a charge involves a tax or a fee. *Covell* at 891. Put more recently and simply in *City of Snoqualmie v. King Cnty. Executive Dow Constantine*, to determine whether a governmental charge is a tax depends upon (1) the purpose of the cost, (2) where the money raised is spent, and (3) whether people pay the cost because they use the service. 187 Wash.2d 289, 301 (2016).

Based upon the *Covell* analysis as set forth below, these Surcharges are taxes because their purpose is to raise revenue. The proceeds do not fund a regulatory purpose, nor do they cover costs associated with document recording, and the relationship between the Surcharge payer and the alleged burden is highly attenuated. Consistent with *Covell*, this Court must strike down the unconstitutional tax.

b. The Document Recording Surcharges are not valid fees because the purpose is to raise revenue and not to regulate.

The first *Covell* factor courts consider when determining whether a charge imposed is a valid fee or an invalid tax is the purpose of the cost. *Constantine* at 301. Courts look to whether the primary purpose of the legislation in question is to regulate the fee payers or to collect revenue to finance broad-based public improvements. *Samis Land Co.* at 798.

If the primary purpose of the charge is to raise revenue for general governmental purposes or to raise revenue used for the desired public benefit, then the fee is more akin to a tax. *Okeson v. City of Seattle*, 150 Wn.2d 540, 552–53 (2003); *See also Arborwood Idaho, L.L.C.* at 371. If the primary purpose is to regulate the fee payers by providing them with a targeted service or alleviating a burden to which they contribute, then the charge is a valid fee not subject to constitutional taxation constraints. *Arborwood Idaho, L.L.C.* at 371; *see also Okeson* at 551.

Put another way, if the surcharge compensates the government for the cost of providing a benefit or the cost of regulating or mitigating a burden created by the fee payer, it is not a tax. These nontax charges by a governmental entity can include "a wide assortment of utility customer fees, utility connection fees, garbage collection fees, local storm water facility fees, user fees, permit fees, parking fees, registration fees, filing fees, and license fees." *Okeson* at 552 (citing *Samis*, 143 Wn.2d at 805). However, to remain in the fee category, a surcharge cannot generate revenue beyond what is required to compensate for the service provided or the burden created. *Id*., *See also Thurston County Rental Owners Ass'n v. Thurston County*, 85 Wn.App. 171, 178–79, review denied, (1997) (holding that the County's imposition of permit fees for the construction of septic systems was a valid regulatory fee as the fees functioned as part of a plan to regulate septic systems).

The characterization of a surcharge relies on a determination of the primary purpose of the charge as derived

from the language of the authorizing and implementing legislation. *Covell* at 886. It is a misnomer to simply ask whether the charges raise revenue, because both taxes and regulatory fees raise revenue. What is important is the purpose behind the money raised. A tax raises revenue for public welfare, while a regulatory fee raises money to pay for or regulate the service enjoyed by the payer (or to pay for or regulate the burden contributed to by the payer). *Okeson* at 552–53.

The Document Recording Surcharges clearly raise revenue for a desired public benefit. For example, HB 1277 states the purpose of the additional Surcharge of $100 collected by a county auditor for each document recorded is to provide for an additional revenue source for eviction prevention and housing stability services. Under the first prong of the *Covell* test, the Document Recording Surcharges are unconstitutional taxes because the purpose of the Surcharges is to collect revenue for broad based public benefits, aligning it with other charges previously struck down by the courts as invalid taxes for the

same reason. *See Okeson* 150 Wn.2d 540 (the court held ordinance was a tax rather than a regulatory fee where the purpose of city ordinance shifting the cost of streetlights from city's general funds to electric utility's ratepayers in order to free up revenue for city – not to regulate provision of streetlights); *See also Samis Land Co.*, 143 Wn.2d 798 (the court held "standby charge" imposed by city ordinance on vacant, unimproved land that abutted city water and sewer lines was invalid nonuniform property tax, rather than valid regulatory fee, where the primary purpose of standby charge was to generate revenue for desired public benefits).

The Surcharges also distribute costs associated with housing stability services among the payers, who likely receive no direct benefit from those services and do not create a direct burden themselves. RCW 65.04.030; *See also Arborwood Idaho, L.L.C.*, 151 Wn.2d 359 (holding flat monthly ambulance service charge was an unauthorized tax despite attempts to categorize the charge as fee for a direct service as ordinance lacked an overall

plan for regulating emergency and ambulance services); Compare with *Storedahl Properties, LLC v. Clark Cnty.*, 143 Wn.App. 489, 500 (2008) (upholding clean water charge applied to certain properties with impervious surface where the purpose of the charge was to fund the expense of regulating storm water impacts, operating storm water control facilities, and the expense of developing any such facilities). Thus, the first prong of the *Covell* test demonstrates that the Surcharges are a tax.

c. The Document Recording Surcharges are not valid fees because the proceeds do not fund a regulatory purpose, nor do they cover costs associated with document recording, and are instead spent on unrelated housing program goals.

Under the second *Covell* factor, the Document Recording Surcharges are a tax because the revenue generated by the Surcharges is not allocated to any purpose related to document recording. The second factor courts consider in determining the categorization of a governmental charge is where the money is spent. *Lane v. City of Seattle*, 164 Wn.2d 875, 882 (2008). If the

money must be allocated only to the authorized purpose, the charge is considered a fee. *Samis*, 143 Wn.2d at 809; *See also Okeson* at 553. The second *Covell* factor requires the revenue raised by the surcharge be allocated for the authorized regulatory purpose in order to qualify as a regulatory fee. *Lane* at 981.

A charge is likely a tax if the government deposits the money into a general fund rather than into "a special fund for a particular purpose." *King Cnty. v. King Cnty. Water Districts Nos. 20, 45, 49, 90, 111, 119, 125,* 194 Wn.2d 830, 843 (2019). However, courts recognized that if the revenues generated by a fee greatly exceed the proper costs associated with the purpose of the fee or the services rendered, then the fee is more like a tax. *Samis Land Co.* at 811.

As the court importantly noted in *Okeson*, "if the costs imposed do not regulate the activity, then the increased rates would, by definition, not be allocated for an authorized 'regulatory' purpose. They would simply be a clever device by which taxes are guised as fees by virtue of the account in which

they are deposited." 150 Wn.2d at 553 (holding ordinance shifting the cost associated with streetlights from the city's general budget to the Seattle City Light ratepayers was a revenue-raising ploy for the city's general budget, and not a means of regulating streetlight usage, even though the revenues collected as part of the electricity rate remained only in a specific streetlight fund).

In *Arborwood*, the court noted that where the ambulance charge exclusively funded the operation, maintenance, and capital needs of the emergency medical and ambulance service, the charges were more likely to represent a fee than a tax under the second *Covell* factor. 151 Wn.2d 359, 372-373 (despite second factor indicating a fee rather than a tax, court concluded that the ambulance charges assessed by Kennewick constitute an unauthorized tax); *See* e.g. *Smith v. Spokane Cnty*, 89 Wn. App. 340 (1997) (money generated by county through aquifer protection area fees constituted permissible regulatory fee because the funds were primarily on sewer construction directly

related to protection of aquifer and for related administrative expenses) *See also* e.g. *Storedahl Properties, LLC v. Clark Cnty*, 143 Wn. App. 489 (2008) (holding that under the second *Covell* prong, clean water charge more closely resembles a regulatory fee than a tax because the funds were used only for expenses associated with storm water impacts and county was required to place any excess funds into a capital facilities fund for development of new storm water facilities).

The revenue raised by the Document Recording Surcharges allocates funds to purposes entirely unrelated to the municipal service of document recording. These Document Recording Surcharges disguised as taxes and the allocation of those funds to specific accounts does not make them fees. Like the charges in *Okeson*, this is a clear revenue-raising ploy to shift the costs of housing programs and services to Surcharge payers.

For example, while twenty percent of the funds generated from the Document Recording Surcharges in HB 1277 are allocated to the "affordable housing for all account" for

operations, maintenance, and service costs for permanent supportive housing, that is not exclusive allocation nor is the purpose of those administrative costs related to the service used by the payer. This contrasts *Arborwood* and *Storedahl,* where the revenue generated from the fees for government services either provided a public benefit or paid for regulatory actions that minimized or eliminated the harm caused by the regulated activity. Under the second *Covell* factor, these Document Recording Surcharges are taxes because the money is spent on programs unrelated to the Surcharge payer and not on any service engaged in by the payer.

d. The Document Recording Surcharges are not valid fees because the relationship between the Surcharge payer and the alleged burden is highly attenuated.

These Document Recording Surcharges are taxes because there is no demonstrated direct relationship between the Surcharge payer and the societal burden of homelessness and housing instability. For the third *Covell* factor, courts ascertain

whether a direct relationship exists between the rate charged and either a service received by the fee payers or a burden to which they contribute. *Arborwood* at 371. If no such relationship exists, then the charge is probably a tax falsely labeled as a fee. *Samis Land Co.* at 811.

If, however, a direct relationship is demonstrated, then "the charge may be deemed a regulatory fee even though the charge is not individualized according to the benefit accruing to each fee payer or the burden produced by the fee payer." *Id*. Where a direct relationship is present, "only a practical basis for the rates is required, not mathematical precision." *Id*.; *See also Tukwila Sch. Dist. No. 406 v. City of Tukwila*, 140 Wn.App. 735, 750 (2007) ("So long as the rate is reasonably based on usage—i.e., the amount of the property owner's contribution to the problem—the fee is directly related to the service provided").

Put simply, the analysis focuses upon whether people pay the cost because they use the service. *Constantine* at 301. Where the charge is related to a direct benefit or service, it is generally

not considered a tax. *Okeson* at 551–52. In order for the charge to not be a tax, there must be an identifiable service received by the fee payers or a burden to which they contribute. *Samis* at 814.

Here, there is no demonstrated direct relationship between the Surcharge payer and the societal burden of homelessness and housing instability. An obligation to fund housing stability services does not arise from the act of filing a document. The legislature failed to establish how the legally required recording of instruments, often as part of the process of increasing housing supply, in any way burdens, impacts, or contributes to the state's need to provide housing programs and related services. Therefore, based upon the *Covell* analysis as set forth above, these Document Recording Surcharges are unconstitutional taxes.

C. The trial court erred in ruling as a matter of law that the Document Recording Surcharges do not violate the requirements of Article VII, § 5 of the Washington State Constitution.

The trial court also erred in ruling that the Document Recording Surcharges do not violate Article VII, § 5 of the Washington State Constitution, which provides that "[n]o tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied." This Court has defined the "state distinctly" requirement of the tax purpose provision of the state constitution is directed to the relationship between the tax and the purpose of the tax. *Ley v. Clark County Public Transportation Benefit Area* 197 Wash.App. 17, 386 P.3d 1128 (2016). A tax statute must be construed most strongly against the taxing power and in favor of the taxpayer, consistent with the state constitution's requirement that every law imposing a tax shall state distinctly the object of the same to which only it shall be applied. *In re Estate of Bracken,* 175 Wash.2d 549, 290 P.3d 99 (2012).

In *Lane v. City of Seattle*, the State Supreme Court struck down a charge imposed by municipal water utility on taxpayers

to pay for the cost of fire hydrants. After undergoing the tax versus fee analysis in *Covell*, the court determined that the charge was an invalid tax and struck it down under Article VII, § 5, reasoning that the purpose of the charge was to increase revenue, the money went to a hydrant fund, but ratepayers paid the same fixed amount whether they used the hydrants or not. *Lane v. City of Seattle* 164 Wash.2d 875, 194 P.3d 977 (2008). Similarly, the purpose of the Document Recording Surcharges is to raise revenue, and although those funds go to programs related to affordable housing, homebuilders pay the recording Surcharges at the same fixed amount unrelated to whether they are constructing subsidized housing. For reasons outlined in *Lane*, this Court should also strike down the Document Recording Surcharges.

D. The trial court erred in determining that the challenge to the Document Recording Surcharges was not an "as-applied challenge" in addition to a facial challenge.

At argument on the cross-motions, the court inquired

whether the challenge in the suit was as-applied or a facial challenge, and counsel for the Appellants argued that it was both. Tr. at 13. This is significant because the State in briefing had argued that the case constituted a facial challenge. CP 309. To prevail on a facial challenge to a statute, the challenging party must show that no set of circumstances exists in which the statute, as currently written, can be constitutionally applied. *Galvis v. State, Dept. of Transp.* 140 Wash.App. 693, 167 P.3d 584 (Div. 2, 2007). In its oral ruling from the bench following argument on the cross motions, the Court concluded that the suit was a facial challenge. Tr. at 25. This was not correct.

An "as-applied challenge" to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional. *City of Seattle v. Evans*, 184 Wash.2d 856 (2015). To prevail on a challenge to the constitutionality of a statute as applied, the party must show a violation of a constitutional right. Here, the pleadings clearly

state that Soundbuilt paid the Document Recording Surcharges which had been imposed. CP 5, 92. This was not only a preemptive challenge based purely on the language of the statutes, but one as applied to the actual context of the actions of a homebuilder. Moreover, that homebuilder had a constitutional right not to pay Surcharges that violate Article VII, §§ 1 and 5 of the Washington State Constitution. The trial court thus erred in applying the heavier burden of a facial challenge to Appellants' claims.

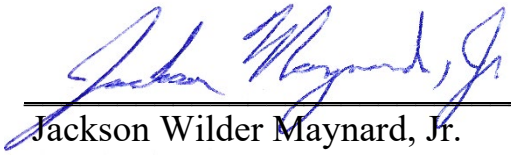
V. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's ruling in favor of the State, strike down the Document Recording Surcharges, and rule that they are unconstitutional, void, and unenforceable.

RAP 18.17(b) CERTIFICATE OF COMPLIANCE

This document contains 5,558 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated February 24, 2023.



Jackson Wilder Maynard, Jr.
General Counsel
WSBA No. 43481
Building Industry Association of Washington
300 Deschutes Way SW, Suite 300
Tumwater, WA 98501
(360) 352-7800

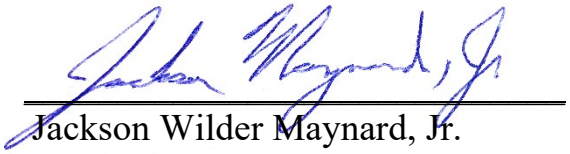
Ashli Raye Tagoai
Associate General Counsel
WSBA No. 58883
Building Industry Association of Washington
300 Deschutes Way SW, Suite 300
Tumwater, WA 98501
(360) 352-7800

Counsel for Appellants BIAW and Soundbuilt

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing **Brief of Appellants** to be served on counsel for all other parties in this matter via this Court's e-filing platform.

Dated February 24, 2023.



Jackson Wilder Maynard, Jr.
General Counsel
WSBA No. 43481
Building Industry Association of Washington
300 Deschutes Way SW, Suite 300
Tumwater, WA 98501
(360) 352-7800

Ashli Raye Tagoai
Associate General Counsel
WSBA No. 58883
Building Industry Association of Washington
300 Deschutes Way SW, Suite 300
Tumwater, WA 98501
(360) 352-7800

Counsel for Appellants BIAW and Soundbuilt

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

February 24, 2023 - 2:48 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	57502-7
Appellate Court Case Title:	Building Industry Association of WA, et al, Appellants v. State of Washington, et al, Respondents
Superior Court Case Number:	21-2-01850-9

The following documents have been uploaded:

- 575027_Briefs_20230224144334D2266906_2386.pdf
  This File Contains:
  Briefs - Appellants
  The Original File Name was 230224Brief of AppellantFINALTOFILEcorrected.pdf

A copy of the uploaded files will be sent to:

- PAOAppeals@co.thurston.wa.us
- SGOOlyEF@atg.wa.gov
- alicia.young@atg.wa.gov
- ashlit@biaw.com
- paigej@biaw.com
- peter.gonick@atg.wa.gov
- petrice@co.thurston.wa.us

Comments:

Signature block corrected per letter from Clerk

Sender Name: Jackson Maynard - Email: jacksonm@biaw.com
Address:
300 DESCHUTES WAY SW STE 300
TUMWATER, WA, 98501-7719
Phone: 360-352-7800 - Extension 108

Note: The Filing Id is 20230224144334D2266906