

No. 83937-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JAMES R. CARY, MARY ALICE CARY, JOHN E. DIEHL,
and WILLIAM D. FOX, SR.,

Petitioners,

v.

MASON CONSERVATION DISTRICT,

Respondent,

and

MASON COUNTY,

Defendant.

**EVERGREEN FREEDOM FOUNDATION'S
AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 2

A. Statutory scheme 2

 1. Substantive requirements of RCW 89.08.400 3

 2. Enactment, collection, and use of conservation special assessments. 4

B. Mason County Ordinance 121-02 and the conservation district charge. 5

ARGUMENT 6

A. The Conservation district charge is not a valid special assessment. 6

 1. Constitutional requirements for special assessments. 7

 2. The conservation district charge fails to meet the constitutional criteria for a special assessment. 9

 3. The conservation district charge fails to meet the criteria of RCW 89.08.400. 11

B. The Conservation district charge is not a valid regulatory fee. 12

 1. The conservation district charge was expressly promulgated as a special assessment. 13

 2. Under Covell, the conservation district charge cannot be categorized as a fee. 14

C. The conservation district charge is an unconstitutional property tax. 16

D. Invalid property taxes are subject to a three-year statute of limitations17

E. RCW 89.08.400 does not and cannot bar judicial review in this case.....18

CONCLUSION.....20

TABLE OF AUTHORITIES

CASES

<i>Adams County v. Ritzville State Bank,</i> 154 Wash. 140 (1929).....	18
<i>Ankeny v. City of Spokane,</i> 92 Wash. 549 (1916).....	8, 9
<i>Arborwood Idaho, LLC v. City of Kennewick,</i> 151 Wn.2d 359 (2004).....	1, 14, 15, 17
<i>Austin v. City of Seattle,</i> 2 Wash. 667 (1891).....	7
<i>Bellevue Associates v. City of Bellevue,</i> 108 Wn.2d 671 (1987).....	8, 9
<i>Berglund v. City of Tacoma,</i> 70 Wn.2d 475 (1967).....	7
<i>Blanchard v. Golden Age Brewing Co.,</i> 188 Wash. 396 (1936).....	19, 20
<i>Carrillo v. City of Ocean Shores,</i> 122 Wn. App. 592 (2004).....	18
<i>Cary v. Mason County,</i> 152 Wn. App. 959 (2009).....	2, 15, 16, 19
<i>City of Seattle v. Rogers Clothing for Men, Inc.,</i> 114 Wn.2d 213 (1990).....	8, 9
<i>Covell v. City of Seattle,</i> 127 Wn.2d 874 (1995).....	<i>passim</i>
<i>Harbour Village Apartments v. City of Mukilteo,</i> 139 Wn.2d 603 (1999).....	1, 13
<i>Heavens v. King County Rural Library District,</i> 66 Wn.2d 558 (1965).....	<i>passim</i>
<i>Henderson Homes, Inc. v. City of Bothell,</i> 124 Wn.2d 240 (1994).....	18
<i>Jensen v. Henneford,</i> 185 Wash. 209 (1936).....	13

<i>In re Jones</i> , 52 Wn.2d 143 (1958).....	9
<i>In re Taylor Ave. Assessment</i> , 149 Wash. 214 (1928).....	8
<i>Lane v. City of Seattle</i> , 164 Wn.2d 875 (2008).....	1, 15, 17, 18
<i>Okeson v. City of Seattle</i> , 150 Wn.2d 540 (2003).....	<i>passim</i>
<i>Samis Land Co. v. City of Soap Lake</i> , 143 Wn.2d 798, 804 (2001).....	1, 14, 15, 16
<i>Scott Paper Co. v. City of Anacortes</i> , 90 Wn.2d 19 (1978).....	20
<i>State ex rel. Pacific Tel. & Tel. Co. v. Dep't of Public Service</i> , 19 Wn.2d 200 (1943).....	20
<i>Teter v. Clark County</i> , 104 Wn2d 227 (1985)	16

CONSTITUTIONAL PROVISIONS

WASH. CONST. art. VII, § 1	17
WASH. CONST. art. VII, § 5	17
WASH. CONST. art. VII, § 9	2, 7

ORDINANCES, REGULATIONS & STATUTES

Mason County Ord. No. 121-02 (Sept. 3, 2002).....	<i>passim</i>
WAC 135-100-080.....	11
RCW 89.08.185	5
RCW 89.08.220	3
RCW 89.08.400	<i>passim</i>
RCW 89.08.410	3

OTHER AUTHORITIES

Att’y Gen. Op. 2006 No. 8	12
Eugene McQuillin, 14 MUNICIPAL CORPORATIONS § 38.11 (3d rev. ed. 1987).....	8, 9
Hugh Spitzer, <i>Taxes vs. Fees: A Curious Confusion</i> , 38 GONZ. L. REV. 335 (2002-03).....	14
Philip Trautman, <i>Assessments in Washington</i> , 40 WASH. L. REV. 100 (1965).....	8

INTRODUCTION

This *pro se* lawsuit calls upon this Court to once again to enforce the constitutional strictures applicable to different types of governmental financial charges. Following this Court's seminal decision in *Covell v. City of Seattle*,¹ the Court has been presented with a series of purported regulatory fees that it found to be unconstitutional taxes in substance.² The underlying thrust of all of these decisions was to uphold "the fundamental constitutional constraints on governmental taxation authority," which are more stringent than the constraints on fees.³

This case puts a new spin on this line of cases. The charge at issue here—expressly enacted as a "special assessment" by Mason County for the benefit of the Mason Conservation District—does not fall neatly within the tax/fee dichotomy set forth in *Covell* and its progeny. This is because a proper special assessment is neither a tax nor a fee—at least not as those terms are generally used in this Court's jurisprudence. Rather, a special assessment is a distinct type of governmental charge of "ancient lineage" that has its own requirements, limitations, and constitutional

¹ 127 Wn.2d 874 (1995).

² See, e.g., *Lane v. City of Seattle*, 164 Wn.2d 875 (2008); *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359 (2004); *Okeson v. City of Seattle*, 150 Wn.2d 540 (2003); *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798 (2001); *Harbour Village Apartments v. City of Mukilteo*, 139 Wn.2d 603 (1999).

³ *Samis Land Co.*, 143 Wn.2d at 805.

underpinnings.⁴ Despite this, the Court of Appeals—following the contentions of the Conservation District—upheld the charge at issue here (hereinafter “conservation district charge”) as a valid regulatory fee under *Covell*.⁵

The Court of Appeals’ decision conflicts with this Court’s jurisprudence in several respects and should be reversed. The decision significantly blurs the distinctions between special assessments, taxes, and fees set forth in the Washington Constitution and this Court’s case law, and eviscerates the constitutional restrictions placed on the imposition of special assessments and local taxes. As is explained more fully below, this Court should find that the conservation district charge fails to meet the requirements for a valid tax, fee, or special assessment, but instead is an invalid property tax. The Court should further hold that Petitioners’ claims in this matter are subject to judicial review and are not barred by the statute of limitations.

BACKGROUND

A. Statutory scheme.

Chapter 89.08 RCW provides for the creation, powers, and funding

⁴ See *Heavens v. King County Rural Library Dist.*, 66 Wn.2d 558, 563 (1965); WASH. CONST. art. VII, § 9.

⁵ See *Cary v. Mason County*, 152 Wn. App. 959, 964-66 (2009).

of conservation districts. Conservation districts are special purpose districts that are generally empowered to engage in activities related to the conservation of renewable natural resources.⁶ A conservation district may be funded by state grant,⁷ or, per RCW 89.08.400, by local special assessment.

1. Substantive requirements of RCW 89.08.400.

This case focuses upon RCW 89.08.400 and a Mason County ordinance enacted pursuant to that statute. Under the statute, a conservation district may propose a system of special assessments to the legislative authority of the county in which the district is located.⁸ The proposed assessment must

[1] classify lands in the conservation district into suitable classifications according to benefits conferred or to be conferred by the activities of the conservation district,

[2] determine an annual per acre rate of assessment for each classification of land, and

[3] indicate the total amount of special assessments proposed to be obtained from each classification of lands.^[9]

In turn, the annual assessment rate or rates must be “stated as either

⁶ See RCW 89.08.220 (describing powers of conservation districts).

⁷ See RCW 89.08.410 (describing state grant process).

⁸ RCW 89.08.400(2).

⁹ RCW 89.08.400(3) (line breaks and numbers added). In this vein, the statute expressly contains special rules for forest lands “used solely for the planting, growing, or harvesting of trees.” *Id.*

uniform annual per acre amount, or an annual flat rate per parcel *plus* a uniform annual rate per acre amount, for each classification of land.”¹⁰ A per acre rate may not exceed ten cents per acre, and a per parcel rate may not exceed five dollars per parcel.¹¹

2. Enactment, collection, and use of conservation special assessments.

Once the district presents its proposal, the county legislative authority may accept or modify and accept the proposal so long as

it finds that both the public interest will be served by the imposition of the special assessments and that the special assessments to be imposed on any land will not exceed the special benefit that the land receives or will receive from the activities of the conservation district.¹²

The legislative authority’s findings on these points are “final and conclusive.”¹³

Once approved, the assessment is to be “collected and accounted for with property taxes by the county treasurer.”¹⁴ Moreover, “the amount of a special assessment shall constitute a lien against the land that shall be subject to the same conditions as a tax lien, collected by the treasurer in

¹⁰ *Id.* (emphasis added).

¹¹ *Id.* The maximum per parcel rate in King County is ten dollars per acre. *Id.* (higher maximum per parcel rate in counties with a population of 1.5 million or greater).

¹² RCW 89.08.400(2).

¹³ *Id.*

¹⁴ RCW 89.08.400(4).

the same manner as delinquent real property taxes, and subject to the same interest rate and penalty as for delinquent property taxes.”¹⁵ The treasurer may deduct an amount from the collected assessments to cover the county’s actual costs of spreading and collecting the assessments.¹⁶ Otherwise, “[a]ll remaining funds collected under this section shall be transferred to the conservation district and used by the conservation district in accordance with this section.”¹⁷

B. Mason County Ordinance 121-02 and the conservation district charge.

The Mason Conservation District covers the entirety of Mason County outside the City of Shelton.¹⁸ In 2002, acting in part to solve its own “thorny budget problem,”¹⁹ the County enacted Ordinance 121-02 pursuant to RCW 89.08.400 and imposed a purported conservation district special assessment:

There shall be an assessment for natural resource conservation as authorized by RCW 89.08.400 in the amount of \$5.00 per non forested land parcel with \$0.00 fee per acre assessed for ten years starting 2003 and continuing through 2012.^[20]

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See CP 108, 142-43. Shelton opted out of the Conservation District pursuant to RCW 89.08.185 after the conservation district charge was imposed.

¹⁹ CP 112.

²⁰ CP 97 (reproducing Mason County Ord. No. 121-02 (Sept. 3, 2002)); see also CP 59-60 (letter from Mason Conservation District to Mason County Board of Commissioners

Thus, the conservation district charge is essentially imposed on all “non forested” private land in Mason County outside the City of Shelton. Two-thirds of the revenue generated by the conservation district charge (after administrative expenses) is transferred to the County’s health department; the other third is retained by the District.²¹

The revenue retained by the District funds water resource protection programs and activities across the County. These programs include citizen training and education, septic and water quality testing, and investigation of pollution complaints.²² Services are available upon request and without charge.²³

ARGUMENT

A. The Conservation district charge is not a valid special assessment.

As just noted, Mason County Ordinance 121-02 expressly purports to impose a conservation special assessment pursuant to RCW 89.08.400. However, the charge imposed by Ordinance 121-02 fails to comply with

requesting assessment “[a]s provided by RCW 89.08.400.”), 64-65 (Board of Commissioners’ findings of fact pursuant to RCW 89.08.400).

²¹ See CP 98.

²² See CP 103-05 (listing specific activities and services funded by conservation district charge); see also CP 59-60 (goal of charge “is to be able to provide assistance to the residents of Mason County unilaterally” across the County, rather than selectively).

²³ See CP 108-10.

both the constitutional requirements applicable to special assessments generally, and to the particular statutory requirements of RCW 89.08.400.

1. Constitutional requirements for special assessments.

Most governmental financial charges can be denominated as a tax or a fee under this Court's *Covell* framework. Not all governmental charges fall into the tax/fee dichotomy, however. One exception to the dichotomy is the special assessment. This Court has long been clear that a special assessment is neither a tax nor a fee and, as such, is not subject to analysis under the *Covell* framework.²⁴ Instead, a special assessment is a distinct type of governmental charge of "ancient lineage" that must be measured against its own requirements, limitations, and constitutional underpinnings.²⁵

In general, special assessments "support the construction of local improvements that are appurtenant to specific property and bring a benefit to that property substantially more intense than is conferred on other

²⁴ See *Okeson*, 150 Wn.2d at 554-55 (distinguishing challenged street lighting charge from charges authorized under special assessment statute); *Covell*, 127 Wn.2d at 889 (analyzing whether challenged street utility charge was a valid special assessment outside of the tax/fee framework); *Berglund v. City of Tacoma*, 70 Wn.2d 475, 477 (1967) ("Special assessments . . . are not deemed taxes."); *Austin v. City of Seattle*, 2 Wash. 667, 668-69 (1891) ("taxes" do not include "assessments"). *But see* Br. of Am. Cur. Rental Housing Ass'n of Puget Sound, pp. 8-9 (citing several cases for the proposition that "[s]pecial assessments are a peculiar species of taxation").

²⁵ See *Heavens*, 66 Wn.2d at 563; WASH. CONST. art. VII, § 9.

property” in the jurisdiction.²⁶ Traditionally, these improvements have been capital improvements such as local extensions of water and sewer lines.²⁷ More recently, the Court has held that some specially targeted services may also support a special assessment.²⁸

This Court has addressed the requirements for and limitations on special assessments in a long line of cases. Perhaps most importantly, the improvement underlying a special assessment “must confer a special benefit on the property sought to be specially charged with its creation and maintenance, over and above that conferred generally upon property within the municipality.”²⁹ Thus, “it is not proper to include in an assessment district property which receives only general benefits.”³⁰ The “benefit to the land must be actual, physical and material, not merely speculative or conjectural.”³¹ A corollary to all of this is the principle that

²⁶ *Bellevue Associates v. City of Bellevue*, 108 Wn.2d 671, 674-75 (1987); *accord Heavens*, 66 Wn.2d at 563.

²⁷ See Philip Trautman, *Assessments in Washington*, 40 WASH. L. REV. 100, 108 (1965).

²⁸ See *City of Seattle v. Rogers Clothing for Men, Inc.*, 114 Wn.2d 213, 223-28 (1990) (upholding assessments on downtown businesses for advertising and maintenance services).

²⁹ *Okeson*, 150 Wn.2d at 555 n.3 (quoting *Ankeny v. City of Spokane*, 92 Wash. 549, 560 (1916)); see also *Rogers*, 114 Wn.2d at 226 (quoting Eugene McQuillin, 14 MUNICIPAL CORPORATIONS § 38.11 (3d rev. ed. 1987)): “Laws recognize a distinction between public improvements which benefit the entire community and those local in their nature which benefit particular real property or limited areas. . . . [I]f [an improvement’s] primary purpose and effect are to benefit the public, it is not a local improvement, although it may incidentally benefit property in a particular locality.”

³⁰ *In re Taylor Ave. Assessment*, 149 Wash. 214, 219 (1928).

³¹ *Heavens*, 66 Wn.2d at 563; see also *Bellevue Associates*, 108 Wn.2d at 675 (same).

“property not specially benefited by a local improvement cannot be assessed” at all.³²

2. The conservation district charge fails to meet the constitutional criteria for a special assessment.

The conservation district charge fails to meet these criteria in at least two ways. First, and most obviously, the benefits conferred in exchange for the conservation district charge are not local in nature—no property receives any benefit “substantially more intense than is conferred on other property” in the jurisdiction.³³ Rather, the benefits consist of general governmental services that aren’t necessarily related to any particular property such as citizen training and education, septic and water quality testing, and investigation of pollution complaints.³⁴ Moreover, these services are available to just about anyone in the County upon request and without charge.³⁵

This Court’s decision in *Heavens v. King County Rural Library District*³⁶ helps illustrate this point. In that case, the library district created

³² *Heavens*, 66 Wn.2d at 563 (quoting *In re Jones*, 52 Wn.2d 143, 145 (1958)).

³³ *Bellevue Associates*, 108 Wn.2d at 674-75; accord *Heavens*, 66 Wn.2d at 563. See also *Okeson*, 150 Wn.2d at 555 n.3 (quoting *Ankeny*, 92 Wash. at 560); *Rogers*, 114 Wn.2d at 226 (quoting *McQuillin*, *supra*, § 38.11).

³⁴ See CP 103-05 (listing specific activities and services funded by conservation district charge); see also CP 59-60 (goal of charge “is to be able to provide assistance to the residents of Mason County unilaterally” across the County, rather than selectively).

³⁵ See CP 108-10.

³⁶ 66 Wn.2d 558 (1965).

a local improvement district that covered all of King County north of the City of Seattle between Puget Sound and Lake Washington—an area that the Court noted was “extensive.”³⁷ The library district sought to fund the construction of a new library at the geographic center of the local improvement district by imposing a special assessment on the LID.³⁸ The Court held this was improper insofar as the new library did “not confer any peculiar or special benefit upon the land to be subjected to an LID special assessment.”³⁹ Rather, the library was “for the benefit of the members of the whole community individually and collectively who may be served by it.”⁴⁰

In addition, the county ordinance makes no attempt to classify properties according to the benefits conferred. Instead, each parcel—regardless of its size, impervious surface coverage, or other characteristics—is simply assessed a flat, \$5.00-per-parcel charge. Thus, a five-acre paved parking lot is treated exactly the same as a pristine, two-acre meadow. Both the general principles underlying special assessments and the authorizing statute forbid this.

³⁷ *Id.* at 561.

³⁸ *Id.* at 561-62.

³⁹ *Id.* at 565.

⁴⁰ *Id.*

3. The conservation district charge fails to meet the criteria of RCW 89.08.400.

In addition to violating the constitutional criteria applicable to all special assessments, the conservation district charge also fails to meet the criteria of its underlying statute, RCW 89.08.400.

RCW 89.08.400(3) provides that “[a] system of assessments shall classify lands in the conservation district into suitable classifications according to benefits conferred or to be conferred by the activities of the conservation district,” and that “[a]n annual assessment rate shall be stated as *either* uniform annual per acre amount, *or* an annual flat rate per parcel *plus* a uniform annual rate per acre amount, for each classification of land.” (Emphasis added). The requirement of a per-acre amount makes sense, inasmuch as it (to some degree) helps correlate the amount assessed with the benefit conferred. Here, however, the County expressly rejected any per-acre amount.⁴¹ This violates the plain language of the statute—as noted by the Attorney General in his amicus brief to the Court of Appeals below⁴²—as well as the State Conservation Commission’s interpretive regulations.⁴³

⁴¹ CP 59-60, 63, 97.

⁴² See Am. Cur. Br. of Wash. State Conservation Comm’n, Wash. Ct. App. No. 37981-3-II, pp. 3-9 (Sept. 11, 2009).

⁴³ See WAC 135-100-080 (“**The uniform per-acre amount must be greater than zero cents per acre and cannot exceed ten cents per acre.**” (emphasis added)).

Beyond this, RCW 89.08.400(4) requires that all special assessment funds, after administrative costs, “shall be transferred to the conservation district and used by the conservation district in accordance with this section.” (Emphasis added). Yet the record is clear that the charge was enacted, at least in part, to help solve the *County’s* (rather than the Conservation District’s) “thorny budget problem,”⁴⁴ and fully two-thirds of the collected monies are immediately transferred from the District to the County per the terms of County Ordinance 121-02.⁴⁵ To say that the District has “used” these transferred monies is to deprive that term of any real meaning⁴⁶—something this Court’s principles of statutory construction forbid.

Because Mason County Ordinance 121-02 and the conservation district charge do not comply with the constitutional criteria for special assessments or the statutory criteria for conservation special assessments, the Court should find the ordinance and charge invalid.

B. The Conservation district charge is not a valid regulatory fee.

Perhaps recognizing that the conservation district charge does not meet the criteria for a special assessment, the District insists that the

⁴⁴ CP 112

⁴⁵ See CP 98.

⁴⁶ See also Att’y Gen. Op. 2006 No. 8, at 1 (“Conservation district special assessments are . . . not available for use by the county for other purposes.”)

charge can be sustained as a regulatory fee.⁴⁷ This argument fails for at least two reasons.

1. The conservation district charge was expressly promulgated as a special assessment.

First, it contravenes the express language of Ordinance 121-02, which promulgated the conservation district charge as a special assessment pursuant to RCW 89.08.400. The District contends, however, that this label is not determinative, that the proper classification of the charge is determined by its “incidents,” not its name.⁴⁸

This argument displays a great deal of chutzpah, insofar as it removes a basic principle of this Court’s tax/fee jurisprudence from its context and stands it on its head. In prior cases, the Court has rejected a local government’s attempt to shield a financial charge from judicial scrutiny based on the label the government gave the charge.⁴⁹ It is quite another matter, however, for a government to expressly promulgate a charge as one type of charge, and then to later claim that it is something else. The Court should reject such gamesmanship.

⁴⁷ See, e.g., *Mason Conservation District’s Supp. Br.*, pp. 14-20.

⁴⁸ *Id.*, p. 15.

⁴⁹ See, e.g., *Harbour Village*, 139 Wn.2d at 607 (quoting *Jensen v. Henneford*, 185 Wash. 209, 217 (1936) for the proposition that “[t]he character of a tax is determined by its incidents, not by its name.”)

2. Under *Covell*, the conservation district charge cannot be categorized as a fee.

Moreover, even if one assumes that the *Covell* framework should be applied here, a faithful application of this Court's precedents compels the conclusion that the conservation district charge is not a valid fee.

Under *Covell* and its progeny, most governmental financial charges may be categorized as taxes or fees. "Taxes . . . are compulsory payments that do not necessarily bear any direct relationship to the benefits of government goods and services received," and may be used for any legitimate governmental purpose.⁵⁰ Because of this, taxes are subject to an array of constitutional limitations.⁵¹ Moreover, local governments lack inherent authority to tax; rather, such authority must be expressly granted by the constitution or statute.⁵² On the other hand, "[l]ocal governments have authority under their general article XI, section 11 police power" to impose fees akin to charges for services rendered,⁵³ generally free from the constitutional constraints applicable to taxes. Because of the looser restrictions on fees, the Court has developed three criteria to determine whether a charge is a valid fee, or is an invalid tax

⁵⁰ Hugh Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 GONZ. L. REV. 335, 337-39 (2002-03).

⁵¹ *Id.* at 340-41 (discussing various constitutional limitations).

⁵² See *Arborwood Idaho*, 151 Wn.2d at 366.

⁵³ *Samis Land Co.*, 143 Wn.2d at 804.

masquerading in fees' clothing.

The conservation district charge fails the first and third *Covell* criteria.⁵⁴ The first criterion asks whether the primary purpose of the charge is to raise money (in which case the charge is likely a tax) or whether it is to regulate the activities of those paying the charge by providing them with a service in exchange (in which case it is likely a fee). The Court of Appeals held that the conservation district charge is a fee because it was to be used for various water resource conservation activities and services.⁵⁵ But, contrary to this Court's case law, this analysis completely fails to address whether the payers of the charge are using or benefiting from these services, nor does it differentiate the extent to which various payers are using or benefiting from these services.⁵⁶

Similarly, the third criterion asks whether a "direct relationship" exists between the charge either a service received by the payer or a burden to which they contribute. "If no such relationship exists, then the

⁵⁴ *Id.* at 806 (listing *Covell* criteria).

⁵⁵ See *Cary*, 152 Wn. App. at 964-65.

⁵⁶ See *Lane*, 164 Wn.2d at 880, 883 (primary purpose of hydrant charge on water ratepayers was to raise revenue where charge did not regulate hydrant or water usage); *Arborwood Idaho*, 151 Wn.2d at 362-63, 371 (primary purpose of citywide ambulance service charge was to raise revenue because charge did not regulate use of the service); *Okeson*, 150 Wn.2d at 552-53 (primary purpose of street lighting charge was to raise revenue where there was no relationship between payer's electricity consumption and amount of energy used by street lights); *Covell*, 127 Wn.2d at 881 (primary purpose of street utility charge was to raise revenue because authorizing ordinances made no attempt to regulate residential housing or street usage).

charge is probably a tax in fee's clothing."⁵⁷ The Court of Appeals held that the conservation district charge is a fee because the County uses the funds "to manage storm water run off for the benefit of all county residents."⁵⁸ The mere fact that a charge is used for the benefit of all is not a sufficient basis to conclude that a charge is a fee. Indeed, that fact cuts against the conclusion that the charge is a fee; *taxes* are generally used to fund programs for the benefit of all residents of a jurisdiction. The question is whether the charge, and the amount of the charge, bears a direct relationship to the payer's use of the service funded by the charge (or to the payer's contribution to the burden alleviated by the charge). It simply is not believable that a flat rate charge on Mason County property owners—completely unattached to the size or character of the property—is directly related to any benefit conferred or burden alleviated by the charge.⁵⁹

C. The conservation district charge is an unconstitutional property tax.

Given all of the above, the true nature of charge imposed by

⁵⁷ *Samis Land Co.*, 143 Wn.2d at 811.

⁵⁸ *Cary*, 152 Wn. App. at 965-66 (emphasis added).

⁵⁹ The flat rate nature of the charge on all properties distinguishes this case from *Teter v. Clark County*, 104 Wn.2d 227 (1985), upon which the District heavily relies. In *Teter*, properties were divided into different classifications (residential, commercial, industrial, etc.) depending on their storm water impacts, and different rates were applied to each classification. *Id.* at 237-38. It should also be noted that *Teter* predates *Covell* and this Court's modern tax/fee jurisprudence.

Ordinance 121-02 becomes clear: it is a non-uniform, statutorily unauthorized—and thus unconstitutional—property tax.⁶⁰ The charge is a flat, \$5.00 per parcel charge imposed on the mere ownership of property. As such, it is a property tax not uniformly based on each parcel's value and is unconstitutional under article VII, section 1 of the Washington Constitution.⁶¹ Moreover, the charge was promulgated pursuant to a statute that contains no grant of taxing authority,⁶² and pursuant to an ordinance that nowhere describes the charge as a tax. As such, the charge violates the state constitution's command 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."⁶³

D. Invalid property taxes are subject to a three-year statute of limitations.

The Conservation District also asserts that Petitioners' claims are subject to a twenty-day statute of limitations and thus barred.⁶⁴ The District is incorrect.

⁶⁰ *But see Heavens*, 66 Wn.2d at 564 (observing that invalid special assessment was a taking of property under Fourteenth Amendment).

⁶¹ *See, e.g., Arborwood Idaho*, 151 Wn.2d 359. *See also* CP 110 (Conservation District newsletter noting that "[i]f you pay property taxes, you are likely to pay the assessment.")

⁶² Indeed, RCW 89.08.220 expressly states that conservation district may not levy taxes.

⁶³ WASH. CONST. art. VII, § 5. *See also, e.g., Lane*, 164 Wn.2d at 884 (charge that is a tax in substance must be declared a tax in enacting legislation to be valid); *Okeson*, 150 Wn.2d at 556.

⁶⁴ *See* Mason Conservation District's Supp. Br., pp. 9-10.

It well established that the statute of limitations for a challenge to an unconstitutional tax is three-years:

[T]he correct time limit for seeking a refund of an illegal tax or fee is determined by RCW 4.16.080. Under that statute, suits for refund of illegal taxes ‘are actions arising out of implied liabilities to repay money unlawfully received.’ . . . The statute of limitations for such claims is three years.”^{65]}

As such, Petitioners’ claims—which were filed less than a year after the enactment of Ordinance 121-02—are timely.⁶⁶

Moreover, a cursory review of the statute upon which the District relies, RCW 36.32.330, and its interpreting case law reveals that the statute is inapposite here. RCW 36.32.330 expressly governs “appeal[s]” from county commissioner “decision[s] or order[s],” often (if not exclusively) issued in an adjudicative or other special context, and not constitutional challenges to ordinances such as Ordinance 121-02. Accordingly, the District’s statute of limitations argument should be rejected.

E. RCW 89.08.400 does not and cannot bar judicial review in this case.

Finally, the Conservation District argues that the Court is

⁶⁵ *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 610 (quoting *Henderson Homes, Inc. v. City of Bothell*, 124 Wn.2d 240, 248 (1994) and *Adams County v. Ritzville State Bank*, 154 Wash. 140, 144 (1929)). See also *Lane*, 164 Wn.2d at 881.

⁶⁶ Moreover, even if Petitioners’ claims had been filed more than three years after enactment of the ordinance, this would only serve to curtail their recovery, and would not

precluded from reviewing any of this by RCW 89.08.400(2), which provides that the County's findings regarding special benefits are "final and conclusive."⁶⁷ However, as the Court of Appeals recognized below, the scope of this provision is rather limited, and only applies to certain factual findings made under the statute.⁶⁸

Moreover, neither petitioners nor amicus question whether the conservation district charge will exceed the benefit to any *particular* parcel. Rather, both question the fundamental validity of the County's entire scheme. Special assessments must be based on intensive, localized benefits and measured in some proportion to the benefits conferred. The conservation district charge violates these principles, inasmuch as it is based on generalized, county-wide governmental services and is in no way correlated to the benefits conferred, given its flat, per-parcel nature.

The *Heavens* Court recognized that a challenge that raises such fundamental constitutional questions is not subject to the same statutory strictures as a run-of-the-mill, individual challenge to an excessive assessment on a particular parcel.⁶⁹ Indeed, inasmuch as the fundamental

bar their claims in their entirety.

⁶⁷ See Mason Conservation District's Supp. Br., pp. 8-9.

⁶⁸ See *Cary*, 152 Wn. App. at 967.

⁶⁹ 66 Wn.2d at 562-63.

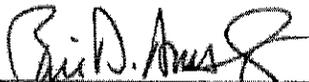
requirements of a special assessment are of constitutional magnitude,⁷⁰ it is plain that the Legislature may not statutorily deprive the Court of its ability to review the constitutional validity of a purported special assessment and its enacting ordinance.⁷¹

CONCLUSION

For the reasons stated above, EFF urges the Court to reverse the Court of Appeals and find both Ordinance 121-02 and the conservation district charge to be an invalid property tax.

RESPECTFULLY SUBMITTED this 14th day of December, 2010.

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⁷⁰ See WASH. CONST. art. VII, § 9.

⁷¹ See, e.g.,

- *Scott Paper Co. v. City of Anacortes*, 90 Wn.2d 19, 33 (1978): “The construction of the constitution is a judicial function. As such it is exclusively the function of the courts under Const. art. 4, s 1. The legislature has no power to define the meaning of a constitutional provision.” (citing collected cases);
- *State ex rel. Pacific Tel. & Tel. Co. v. Department of Public Service*, 19 Wn.2d 200, 218 (1943): “The power of the courts to determine constitutional questions cannot be limited by statutes constituting rate making authorities, or by statutes purporting to regulate judicial consideration of the orders of such statutory authorities. . . . In determining whether a rate fixed by a regulatory body is fair or confiscatory, neither the findings nor conclusions of the department are binding upon the courts.”; and
- *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 415 (1936): “Any legislation, therefore, the purpose or effect of which is to divest, in whole or in part, a constitutional court of its constitutional powers, is void as being an encroachment by the legislative department upon the judicial department.”