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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

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BRIEF OF AMICUS CURIAE RENTAL HOUSING
ASSOCIATION OF PUGET SOUND

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I. INTRODUCTION

The Rental Housing Association of Puget Sound (“RHA”) represents over 4400 rental residential property owners who are committed to providing cost effective housing solutions through market-based rental housing. Taxes and other governmental charges are one of the largest operating expenses for rental housing. Therefore, RHA strongly supports fair tax policies that preserve Washington’s constitutional safeguards against discriminatory and excessive taxation of real property. These include the tax uniformity clause, Const. art. VII, § 1, which requires uniform, proportional taxation of real property and the one percent levy limitation, Const. art. VII, § 2, which requires voter approval when the aggregate tax levy exceeds one percent of property value. This Court’s decisions recognize that these constitutional protections are put at risk if clear distinctions are not maintained between the property taxes which are safeguarded by these protections and other government charges which are not.¹ RHA submits this amicus brief because the decision below clouds those distinctions by confusing special assessments with

¹ See *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 805, 23 P.3d 477, (2001); *Covell v. City of Seattle*, 127 Wn.2d 874, 888, 905 P.2d 324 (1995).

regulatory fees and applying an incorrect analytic framework for evaluating the legality of the disputed conservation assessments.

The Court's recent jurisprudence in this area has focused on distinguishing taxes from various types of governmental fees, applying the three-prong test enunciated in *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995), to make this distinction. This appeal, however, raises different concerns. The charges at issue in this appeal are special assessments, not fees. The relevant questions are whether the assessments comply with RCW 89.08.400 and with the constitutional requirements for special assessments. The *Covell* tests do not apply in resolving these questions.

The *Covell* tests were developed to distinguish taxes imposed under the tax power from regulatory fees imposed under the police power. *Covell*, 127 Wn.2d at 878. Special assessments however, are not regulatory fees. They are a peculiar form of taxation, one that is subject to its own rules and limitations, not the rules and limitations that apply to general property taxes or to police power regulatory fees.

In its decision below, the Court of Appeals evaluated the validity of the conservation assessments using the *Covell* standards. That was error. The error was perhaps inadvertently invited by the *pro se* plaintiffs who claim that the conservation assessments are invalid because they do

not meet the *Covell* standards. However, that erroneous framing of the issue is not binding in this appeal because the Court's first obligation is to adhere to the law, and it has the inherent discretion to address issues not raised by the parties if necessary for a proper decision.²

The opinion below applies the wrong legal analysis for determining the legality of a special assessment and, if left standing, will confuse and undermine this Court's effort to clearly delineate the statutory and constitutional framework for evaluating the legality of governmental charges. It should be reversed.

II. ISSUES OF CONCERN TO AMICUS CURIAE

1. Does the three-prong *Covell* test apply to determine the validity of a conservation district assessment levied under RCW 89.08.400?

2. Do the activities and programs funded with the conservation assessments levied by Mason County Ordinance No. 121-02 specially benefit the properties assessed?

² These issues must be considered to properly decide the case. Therefore, if the Court deems it necessary, the parties should be provided an opportunity to more directly address the issues. RAP 12.1(b). *State ex rel. Washington State Public Disclosure Com'n v. Washington Educ. Ass'n*, 156 Wn.2d 543, 567, 130 P.3d 352 (2006); *Optimer Intern., Inc. v. RP Bellevue, LLC*, 151 Wn.App. 954, 962, 214 P.3d 954 (2009).

III. FACTS AND PROCEDURAL BACKGROUND

On July 29, 2002, the Mason Conservation District requested the Mason County Board of Commissioners to levy special assessments under RCW 89.08.400 to “create a fund dedicated to addressing water resource protection issues within Mason County.” CP 59-60. The District proposed allocating a portion of the assessment proceeds to fund the County’s Threatened Area Response program and community concern response, to identify potential pollution sources, to implement low interest rate loans, and to provide matching funds for future grant opportunities. It also proposed using the District’s share of the assessment proceeds to provide technical assistance to property owners regarding water pollution issues and as matching funds for other grant funding opportunities. *Id.*

The county commissioners responded to the District’s request by levying a special assessment of \$5.00 per parcel on all non-forest lands in Mason County. Mason County Ordinance No. 121-02. CP 97. The levy ordinance was based on findings of fact which recited, among other things: the importance to the public of promoting clean water in Mason County, the desirability of establishing a secure funding source for clean water programs, and that the assessed parcels would receive special benefits that equaled or exceeded the assessment amounts. CP 64-65.

RCW 89.08.400 authorizes counties to make special assessments for conservation district programs that specially benefit the properties assessed. It statute provides two options for apportioning the assessments: either uniform per-acre assessments, or a flat rate per parcel plus a uniform per-acre rate. RCW 89.08.400(3). Both of these options factor lot size into the assessment amount. However, in order to avoid the administrative cost of apportioning the conservation assessments by lot size, Mason County imposed flat \$5.00 per-parcel assessments.

Plaintiffs filed this lawsuit in March 2003, seeking a declaratory ruling regarding the validity of the conservation district assessments. On summary judgment, the trial court ruled for the plaintiffs, holding that: (1) the assessments are unconstitutional property taxes under *Covell v. City of Seattle, supra*; (2) the taxes are not authorized by RCW 89.08.220; and (3) the assessments violate RCW 89.08.400(3) because they are not apportioned according to lot size as that statute requires. *See Cary v. Mason County*, 152 Wn.App. 959, 963, 219 P.3d 952 (2009). The Court of Appeals reversed, holding that: (1) the conservation assessments constitute valid regulatory fees under *Covell*; and (2) RCW 89.08.400(3) does not prohibit flat per-parcel assessments with no adjustment for lot size. *Cary*, 152 Wn.App. at 966. On April 27, 2010 this Court granted Plaintiffs' Petition for Review.

IV. ARGUMENT

A. **The Mason Conservation District Has Statutory Authority to Impose Special Benefit Assessments – Not Regulatory Fees.**

The Court of Appeals decision upholding the conservation assessments as regulatory fees under *Covell* misconceives both the nature of special assessments and the revenue raising authority of conservation districts under RCW ch. 89.08.

Conservation districts are established to promote and encourage conservation. The legislature has specified the funding sources that conservation districts may use to finance their activities. These include: appropriations from the state (RCW 89.08.220(4)); income from property sales and operations (RCW 89.08.220(5) & (6)); grants and donations (RCW 89.08.220(10)); and special assessments (RCW 89.08.400).³ The legislature has not, however, given conservation districts the power to impose regulatory fees.

It is axiomatic that municipal corporations are limited to those powers which are statutorily granted, either expressly or by necessary and fair implication. *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 374-375, 89 P.3d 217 (2004) (municipal corporations are limited to “those powers expressly granted and to powers necessary or

³ As explained *infra* at 7-11, special assessments are not regulatory fees.

fairly implied in or incident to the power expressly granted, and also those essential to the declared objects and purposes of the corporation”).

Moreover, under the doctrine of *expressio unius est exclusion alterius*, an express grant of authority to raise funds from prescribed sources implicitly denies districts the authority to resort to other funding sources, such as mandatory regulatory fees. *Adams v. King County*, 164 Wn.2d 640, 650, 192 P.3d 891, 896 (2008) (under *expressio unius est exclusion alterius* omissions are deemed to be exclusions). In other words, conservation districts are to finance their activities from their statutorily authorized funding sources, not with unauthorized regulatory fees. *Cf. Arborwood Idaho, L.L.C.*, 151 Wn.2d at 375 (express statutory authority to fund ambulance operations with excise tax does not imply power to impose a “utility” fee to finance ambulance service).

B. The *Covell* Tests Do Not Apply in Determining the Validity of Special Assessments.

1. Special Assessments Are Referable to the Tax Power, not the Police Power.

This Court developed the three-prong *Covell* test to assist in distinguishing taxes imposed under the tax power from fees imposed under the police power. *Covell*, 127 Wn.2d at 878. That distinction, however, is irrelevant here because special assessments are imposed under the tax power not the police power. Special assessments are not

regulatory or proprietary fees. Rather, they are a form of taxation that can be used to fund public improvements and services that provide special benefits to discrete properties, over and above the benefits provided to the general public. The basic theory of special assessments is that:

Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for state and municipal purposes and governed by principles that do not apply generally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefitted, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made upon the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sums they are required to pay. This is the idea that underlies all these levies.

Illinois Cent. R. Co. v. City of Decatur, 147 U.S. 190, 198-199, 13 S.Ct.

293 (1893) (*quoting* COOLEY ON TAXATION, p. 416).⁴ Special

⁴ See also, 64 C.J.S. MUNICIPAL CORPORATIONS § 1117; *State v. De Graff*, 143 Wash. 326, 328-329, 255 P. 371 (1927) (“the levy and collection of local improvement assessments is a branch of the sovereign power of taxation”); *Malette v. City of Spokane*, 77 Wash. 205, 222-223, 137 P. 496 (1913)(the power to levy special assessments “is referable solely to the sovereign power of

assessments are thus a form of taxation. Their validity is determined by the standards applicable to special assessments (not by the *Covell* standards which distinguish taxes from fees). The special assessment standards include:

(1) "The improvement [or service] must be of a public nature, as contradistinguished from one purely private...." *Ankeny v. City of Spokane*, 92 Wash. 549, 552, 159 P. 806 (1916).

(2) "The benefit to the land assessed must be actual . . . and not merely speculative or conjectural." *Pierce County v. Taxpayers of Lakes Dist.*, 70 Wn.2d 375, 378, 423 P.2d 67 (1967).

(3) "Property can only be assessed if specially benefited, and it is not proper to include in an assessment district property which receives only general benefits." *In re Taylor Ave. Assessment*, 149 Wash. 214, 219, 270 P. 827 (1928). See also, *Carlisle v. Columbia Irr. Dist.*, 168 Wn.2d 555, 569, 229 P.3d 761 (2010).

(4) The benefits provided to the property (measured by the value increase provided by the service or improvement) must be equal to or greater than the assessment. *Bellevue Associates v. City of Bellevue*,

taxation."); *In re Harrison Street*, 74 Wash. 187, 188, 133 P. 8 (1913) (power to levy special assessment "derived by the municipality under its sovereign power of taxation").

108 Wn.2d 671, 675, 741 P.2d 993 (1987); *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 248, 119 P.3d 325 (2005).

(5) The assessments must be distributed over the assessed properties with substantial equality and in proportion to the relative benefits received. *Spokane v. Kraft*, 82 Wash. 238, 243, 144 P. 286 (1914).

These are the standards that determine the validity of a special assessment, not the *Covell* tests.

2. Special Assessments Are Imposed to Raise Revenue not to Regulate.

The inapplicability of the *Covell* standards to special assessments is apparent from the very first of the *Covell* tests, which distinguishes charges imposed to raise revenue (taxes) from charges imposed for regulatory purposes (regulatory fees). *Covell*, 127 Wn.2d at 888. That distinction, however, is irrelevant to the validity of a special assessment because special assessments are designed and imposed to raise revenue, not to regulate. Both general property taxes and special assessments are forms of taxation. They differ in how the tax burden is distributed, but both are imposed to raise revenue to pay for facilities or services that benefit the public. Thus, the first prong of *Covell* does nothing to distinguish a tax from a special assessment, and attempting to utilize that

test to determine the validity of a special assessment will muddle the distinction between general taxes and special assessments as well as the distinction between taxes and regulatory fees.⁵

C. The Court of Appeals Applied the Wrong Framework for Evaluating the Legality of the Conservation Assessments.

The Court of Appeals applied the wrong analytic framework for judging the validity of the Mason Conservation District special assessments. Conservation districts have authority to undertake programs and activities that promote conservation within the district, but they do not have police power authority to regulate property owners within their borders or to charge regulatory fees. If the conservation programs and activities provide a special benefit to properties in the district, they may be funded through special benefit assessments, but not with regulatory fees. The issue for decision, then, is whether the assessments are valid special assessments, not whether the assessments are valid regulatory fees.

Much of the confusion over application of the *Covell* tests derives from *Covell's* use of the term “regulatory fee” to include both proprietary fees and true regulatory fees. *See Covell*, 127 Wn.2d at 878 n.1. This has

⁵ While there are close similarities between the second and third *Covell* tests and requirements for valid special assessments, those similarities do not convert *Covell* into an all-purpose test for distinguishing general taxes from other government charges. The standards for special assessments are distinct from the standards for regulatory fees, proprietary fees and other forms of taxation.

led to using “regulate” to mean “providing a fee payer with a targeted service.” See e.g., *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 807, 23 P.3d 477 (2001). But that is not what regulate means and, as the decision below illustrates, using regulate in this manner causes ongoing confusion over what distinguishes taxes from fees.⁶ See *Cary v. Mason County*, 152 Wn.App. at 964.

The Court’s more recent opinions recognize the distinction between proprietary fees and true regulatory fees. See e.g., *Burns v. City of Seattle*, 161 Wn.2d 129, 147-151, 164 P.3d 475 (2007)(taxes and regulatory fees are imposed under municipality’s sovereign powers as opposed to its proprietary authority); *Okeson v. City of Seattle*, 150 Wn.2d 540, 557, 78 P.3d 1279 (2003)(proprietary charges are imposed for providing service to individual users, e.g., water, sewer, power, etc., not services for the general public). This distinction is significant. Proprietary fees (or “user fees”) are not based on government’s police power authority to regulate. Rather, they are based on the rights of the government entity as a proprietor of the instrumentalities used in providing the service or commodity. *Emerson College v. City of Boston*,

⁶ Regulate means “To fix, establish, or control; to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws.” BLACK’S LAW DICTIONARY (Rev’d 4th ed.). See also, *City of Tacoma v. Keisel*, 68 Wash. 685, 691, 124 P. 137 (1912).

391 Mass. 415, 462 N.E.2d 1098, 1105 (1984)(regulatory fees are based on the government's power to regulate business or activities; proprietary fees are based on rights of a governmental entity as proprietor of instrumentalities used in providing commodity or service); *Hawaii Insurers Council v. Lingle*, 120 Hawaii 51, 201 P.3d 564, 573 (2008). Distinguishing clearly between proprietary fees and regulatory fees will help avoid confusion in distinguishing among the various types of governmental charges that exist. In particular, it will avoid the confusing use of "regulate" to mean "providing a targeted service" because it is proprietary fees, not regulatory fees, that provide the fee payer with a "targeted service."

"Regulatory fees (including licensing and inspection fees), are founded on the police power to regulate particular businesses or activities." *Emerson College*, 462 N.E.2d at 1105. A regulatory fee "may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. Or, it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses." *Shea v. Boston Edison Co.*, 431 Mass. 251, 727 N.E.2d 41, 47-48 (2000).

Proprietary fees, on the other hand, are not imposed to regulate or control.⁷ Instead, a proprietary fee is the *quid pro quo* paid to obtain a service or commodity offered for sale by a government entity. *Okeson v. City of Seattle*, 150 Wn.2d at 550 (consumers pay a proprietary fee to purchase a service or commodity furnished for their individual “comfort and use”). Further clarifying this distinction between proprietary fees and regulatory fees will help avoid confusion in classifying and evaluating the legality of all government charges.⁸

Here, for example, the conservation assessments are not proprietary fees because the assessments are simply compulsory charges on lot ownership. Lot owners do not purchase a service or commodity for their individual “comfort and use” by paying the assessments. Nor do they receive a direct service or benefit in exchange for paying the

⁷ For this reason, the regulatory versus revenue raising prong of Covell is not helpful for distinguishing a proprietary fee from a tax. Proprietary fees are distinguished from taxes because they are based on the rights of the government entity as the proprietor of the instrumentalities used in providing the service or commodity (rather than the sovereign police power) and because the service or commodity is provided for the “comfort and use” of individual customers purchasing for their own use, rather as a generally available public benefit.

⁸ Regulatory fees are imposed to regulate. Proprietary fees are proper when government provides a commodity or service to customers for their individual comfort and use. However, when government provides what economists and public finance scholars refer to as “public goods,” *i.e.*, goods and services that serve the public at large, the cost must be paid with taxes because public goods and services, by their nature, cannot be funded through voluntary market transactions or user fees. *See e.g.*, Neil Bruce, PUBLIC FINANCE AND THE AMERICAN ECONOMY 553 (2nd ed. 2001); Joseph Stiglitz, PRINCIPLES OF MICROECONOMICS, 157-159 (2nd ed., 1997).

assessments. Instead, the assessments fund programs and services that benefit the general public, especially those who participate in programs funded with the assessment proceeds.

Nor are the assessments regulatory fees imposed under the sovereign police power, because conservation districts have no power to impose regulatory fees and because the assessments do not regulate the activities of lot owners or pay for programs that regulate lot owners. Rather, the assessments are mandatory exactions on lot ownership that are used to promote public health and conservation. This is taxation. The only question is whether the tax is valid. If the charge is not a valid special assessment, it is an invalid tax on property.⁹

D. The Activities and Programs Funded under Mason County Ordinance No. 121-02 Do Not Specially Benefit the Properties Assessed.

Special assessments must provide special benefits that enhance property value in proportion to the assessments. *Tiffany Family Trust Corp.*, 155 Wn.2d at 231. Assessments must be logically related to, and cannot exceed, the special benefit amount. *Id.* And, the services or improvements funded with a special assessment must provide a benefit to

⁹ A mandatory charge on property is a property tax. If the assessments are not valid as special assessments, they are invalid property taxes because (1) conservation districts have no power to levy general taxes, and (2) the assessments are not apportioned uniformly as required by the uniformity clause, Const, art. VII, § 1. *Covell*, 127 Wn.2d at 878.

the property assessed that is substantially more intense than that yielded to the rest of the community. *Heavens v. King County Rural Library Dist.*, 66, Wn.2d 558, 563, 404 P.2d 453 (1965). The Mason Conservation District assessments fail to meet these requirements.

Here, as in *Heavens*, the services funded are legitimate and laudable, but they are not services undertaken “primarily to enhance the value of real estate.” *Id.* at 566. Rather, it appears that the assessments are being used to fund general governmental services that should be supported with general revenues. Because those services do not specially benefit the assessed properties, or provide a benefit that is proportional to the assessment amount (*i.e.*, a substantially equal benefit for every parcel, regardless of lot size), the assessments are invalid.¹⁰

E. The Court Should Decline the Conservation District’s Invitation to Rewrite Mason County Ordinance No. 121-02.

The District argues that the Court should treat the conservation assessments as regulatory fees because that is the way the case was argued below and because the assessments should be judged based on their substantive characteristics and incidents, not their name. *See* Mason Conservation District’s Suppl. Br. at 14-20; District’s Response to Amicus

¹⁰ The assessments are also invalid because they do not comply with RCW 89.08.400(3). *See* amicus brief of the Washington State Conservation Commission.

Brief of Evergreen Freedom Foundation at 3-5. But regardless of how it was argued below, the case must be decided on the facts and applicable law, not on the parties' erroneous framing of the issues. Ord. No. 121-02 imposes special assessments, not regulatory fees. It is not the Court's function to rewrite that Ordinance to convert the assessments imposed by that ordinance into some other type of charge.

The authorities that the District cites to support its argument that the Court should disregard the express terms of Ord. No. 121-02 and convert the conservation assessments into regulatory fees by judicial fiat are inapposite. In all of those cases, the Court upheld fees and taxes that were imposed under express statutory authority.¹¹ Conservation districts, in contrast, have no express statutory authority to impose regulatory fees. There is a world of difference between, on one hand, looking to substance to strike down what is in substance an unconstitutional tax and, on the other hand, judicially rewriting an ordinance to try to devise a fee that

¹¹ In *Teter v. Clark County*, 104 Wn.2d 227, 704 P.2d 1171 (1985) the Court sustain charges that were imposed as stormwater mitigation fees under RCW ch. 35.67 and RCW 36.89.080, rejecting the property owner's claim that the charges were, in substance, invalid special assessments. In *Washington Public Ports Association v. Department of Revenue*, 148 Wn.2d 637, 62 P.3d 462 (2003), the Court upheld leasehold excise taxes imposed under RCW ch. 82.29A, rejecting the taxpayer's claim that that taxes were, in substance, unconstitutional property taxes. In *King County Fire Protection Districts Nos. 16, 36 and 40 v. Housing Authority of King County*, 123 Wn.2d 819; 872 P.2d 516 (1994) the Court sustained fire protection charges authorized by RCW 52.30.020 against a claim that the charges were invalid taxes. In none of these cases did the Court rewrite an invalid statute or ordinance to create a valid fee or tax.

would pass statutory and constitutional muster. The Court cannot assume the legislative function of drafting statutes or ordinances, even if the District would have it do so.¹² *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999)(court resists the temptation to rewrite an unambiguous statute to suit our notions of what is good public policy).

V. CONCLUSION

The Court of Appeals opinion below should be reversed because it erroneously applied the three-prong *Covell* test to evaluate the validity of special assessments. The *Covell* tests do not apply to determine the validity of special benefit assessments. Whether the Mason Conservation District assessments are valid depends on (1) whether the assessments comply with RCW 89.08.400 and (2) whether the assessments satisfy the constitutional requirements for special benefit assessments. The assessments fail these requirements.

The trial court's decision that the conservation assessments are not authorized by RCW 89.08.220 and that the assessments violate RCW 89.08.400(3) was correct. Therefore, the decision of the Court of

¹² Moreover, to accomplish the legislative revisions that the District desires, the Court would not only have to revise Ord. 121-02 to convert the special assessments into regulatory charges, it would also have to rewrite RCW 89.08.220 to authorize conservation districts to impose regulatory charges. Even then, the \$5.00 per lot charge would not qualify as a constitutionally valid proprietary fee or regulatory fee.

Appeals should be reversed and the trial court decision should be reinstated.

Respectfully submitted this ____ day of _____, 2010.

William C. Severson, WSBA # 5816
Attorney for Amicus Curiae Rental
Housing Association of Puget Sound

CERTIFICATE OF SERVICE

I hereby certify- that I deposited copies of the accompanying Motion for Leave to File Amicus Curiae Brief and Amicus Curiae Brief of the Rental Housing Association of Puget Sound, including this Certificate of Service, in the United States Mail, first class postage prepaid, addressed to the following:

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Dated this ____ day of December, 2010.

William C. Severson, WSBA # 5816

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From: Severson, Bill [<mailto:bill@seversonlaw.com>]
Sent: Wednesday, December 01, 2010 4:08 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Cary v. Mason Conservation District, Supreme Court No. 83937-9

RE: JAMES CARY, et al., Petitioners, v. MASON CONSERVATION DISTRICT, Respondent, v. MASON COUNTY,
Defendant. Supreme Court Case No. 83937-9

Please accept the electronic filing of the Motion of Rental Housing Association of Puget Sound for Leave to File Amicus Curiae Brief and Brief of Amicus Curiae Rental Housing Association of Puget Sound in the above referenced appeal. Copies of both documents are attached.

Sincerely,
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