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FILED  
COURT OF APPEALS  
DIVISION II

No. 37981-3-II

09 DEC -7 AM 10:07

SUPREME COURT  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON  
BY JW  
DEPUTY

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

Petitioners,

v.

MASON CONSERVATION DISTRICT,

Respondent,

and

MASON COUNTY,

Defendant.

FILED  
DEC - 9 2009  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
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PETITION FOR REVIEW

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### **A. Identity of Petitioners**

James R. and Mary Alice Cary, John E. Diehl, and William D. Fox, Sr., ask this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

### **B. Court of Appeals Decision**

Published Opinion in *James R. Cary et al. v. Mason Conservation District and Mason County*, No. 37981-3-II, filed November 9, 2009. A copy of the decision is in the Appendix at pages A-1 through A-10.

### **C. Issues Presented for Review**

This case presents several issues that grew out of an attempt by Mason County (“County”) to solve what it saw as a “thorny budget problem” by imposing a conservation assessment on all parcels in the county deemed non-forested. The levy ostensibly was adopted for the benefit of the local conservation district pursuant to RCW 89.08.400,<sup>1</sup> but actually served primarily to provide revenues for the County’s environmental health department, allowing it to add staff, apparently to address water quality problems associated with septic systems and other non-point sources of pollution. Petitioners, who own vacant land or land served by sewers and a

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<sup>1</sup> RCW 89.08.400 is in the Appendix at pages B-1 through B-3.

sewage treatment plant, challenged Ordinance 121-02, by which the conservation assessment was levied.<sup>2</sup> The conservation district, which gets about one third of the net revenues from the levy, has defended the assessment as a regulatory fee intended for storm water management. Hence, these issues:

1. Given that RCW 89.08.400(3) provides that if an annual assessment rate is not stated as an annual per acre amount, it shall be stated as “an annual flat rate per parcel plus a uniform annual rate per acre amount,” is a levy valid that collects only an annual flat rate per parcel amount?

2. Given that RCW 89.08.400(2) provides that conservation assessments are “to finance the activities of the conservation district,” is a levy valid that primarily benefits the county that approves the levy?

3. Is a special assessment valid when adopted under authority of RCW 89.08.400, but without including, as required by RCW 89.08.400(3), “suitable classifications according to benefits conferred or to be conferred by the activities of the conservation district, [determination of] an annual per acre rate of assessment for each classification of land, and [indication of] the

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<sup>2</sup> Ordinance 121-02 is in the Appendix at page C-1.

total amount of special assessments proposed to be obtained from each classification of lands”?

4. Are the special assessments authorized under RCW 89.08.400 valid if they fail to ensure direct special benefits to all the parcels subject to the levy?

5. Given that Ordinance 121-02 imposes a flat per parcel levy on mere ownership of property, without either the trial court or the Court of Appeals finding any direct relationship between the levy paid and benefits conferred or burden created, is it actually an unconstitutional property tax?

6. If the levy imposed by Ordinance 121-02 is invalid, are Petitioners entitled to refund with interest of the amounts they have paid since 2002?

#### **D. Statement of the Case**

Mason County Ordinance 121-02, ostensibly adopted pursuant to RCW 89.08.400 in September 2002, imposed a flat \$5.00 per parcel so-called ‘conservation special assessment’ on certain land in Mason Conservation District (“District”). CP at 97; Appendix at C-1. Owners of “forested property,” Federally owned property, and “Government held trust land for Indians” were exempt. Residents of Shelton, the only incorporated city in the county, secured an exemption for themselves by opting out of the

District.<sup>3</sup> CP at 113. Consequently, the levy applies only to nonforested land in unincorporated parts of the County.

Pursuant to RCW 89.08.400(2), the ‘assessment’ was supposed “to finance the activities of a conservation district.” However, the levy had to be approved by the County commissioners, who secured an “intergovernmental” agreement with the District by which 66.5% of the net amounts collected would actually fund activities of the County’s Department of Health Services.<sup>4</sup> CP at 98, 105. At the time of adoption, a County commissioner was quoted in the *Shelton-Mason County Journal* as touting the levy as “a way to deal with a thorny budget problem” and as “an excellent way for the county to maintain its water quality department.” CP at 112.

The assessment was originally justified as providing funding to hire two additional staff members for the County’s Department of Health

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<sup>3</sup> At the time of adoption the boundaries of the District were the same as those of the County. However, the City of Shelton, as the County’s only incorporated community, viewing the levy as inappropriate to the needs of its residents, soon withdrew from the District under provisions of RCW 89.08.185, a privilege not available to property owners in the County’s unincorporated areas. See CP at 142-143.

<sup>4</sup> The Court of Appeals appears confused as to the allocation of the revenues from the levy, saying that the District “proposed that the monies the assessment generated go to the Mason County Department of Health Services . . . ,” when in reality the arrangement was that the District would retain about one third of the funds generated for its own use. See Appendix at A-2.

Services. CP at 62. The primary concern was to address non-point sources of pollution, such as septic systems, pet and farm waste, and property runoff that contains fertilizers and chemicals. See CP at 61. Some of the County's share would be used to provide matching funds "when applying for additional grants." CP at 109. The District stated that its services, "available without charge to all District residents," would be expanded by its share of the revenues "to provide technical assistance to the residents of Mason County who do not reside in areas which are included in current grants." Id.

The ordinance promised no local improvements. CP at 97; Appendix at C-1. Even where the original agreement between the District and the County held out the possibility of providing a benefit to some assessed parcels, such as the farm plans the District proposed to develop for eligible farms, no parcel assessed was ensured any direct benefit. Even parcels eligible for farm plans might not receive them, for they were not ensured that funds would be adequate to provide plans for all property where plans might be requested. Instead, as the District and County themselves argued, their programs were intended primarily to improve water quality, particularly in parts of Puget Sound and Hood Canal, thus providing a public benefit. CP at 61-65, 125-126.

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

When Petitioners filed a complaint for declaratory judgment in March 2003, the County challenged the timeliness of the filing. When the trial court agreed to dismiss, Petitioners appealed. The Court of Appeals reversed, finding Petitioners' complaint timely. *Cary et al. v. Mason County et al.*, 132 Wn.App. 495 (2006).

On remand, both sides filed motions for summary judgment. Applying the well-known tests of *Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995), the trial court found no direct relationship between the fee charged and any services provided or between the fee charged and any burden produced by parcel owners, concluding that the levy was an unlawful property tax, not a regulatory fee. CP at 49. The court also ruled that the Ordinance violated RCW 89.08.400(3), which requires that if a per parcel charge is adopted, there must also be a per acre charge. CP at 50. The

court enjoined future collection of the levy, but denied refund to Petitioners of amounts already paid unless paid under protest pursuant to RCW 84.68.020. CP at 16, 19, and 25. The court then stayed enforcement until completion of appellate review. CP at 16, 19.

Mason Conservation District was granted discretionary review by the Court of Appeals, Division II, which reversed the decision of the trial court. Appendix at A1 through A-10.

#### **E. Argument Why Review Should Be Accepted**

##### **1. The decision of the Court of Appeals conflicts with *Covell v. City of Seattle*.**

###### **a. The decision conflicts with the definition in *Covell* of “special assessment.”**

Ordinance 121-02 was expressly adopted as “an assessment for natural resource conservation as authorized by RCW 89.08.400 . . .” CP at 97; Appendix at C-1. The finding adopted by the Mason County Board of Commissioners at the time of adoption refers to the levy as a “special assessment” and to the only statutory authority as RCW 89.08.400. CP at 64-65. Further, RCW 89.08.400 does not authorize anything but a special assessment. In short, if the levy as adopted is authorized at all, it is authorized only as a special assessment pursuant to RCW 89.08.400. So, if

the levy is not a special assessment, the Court of Appeals erred in upholding its validity.

In *Covell*, the court recognized that a special assessment, even if loosely categorized as a regulatory fee, may be identified more specifically as “a charge imposed on property owners within a limited area to help pay the cost of a local improvement which specially benefits property within that area.” *Covell*, 127 Wn.2d at 889.

Yet, Ordinance 121-02 does not impose a charge to help pay the cost of a local improvement that specially benefits property subject to the charge. No improvements are promised by the ordinance, and putative benefits to water quality, said by the Court of Appeals to benefit “all county residents,” cannot be said to provide **special** benefits to property subject to the charge. See Appendix at A-6.

As described in the statement of the case above, not all county residents or even all county property owners pay the charge. Owners of forest land are exempt, and so are all property owners within the City of Shelton. Owners of vacant parcels pay the charge, even though their property, assuming that it contains no impermeable surfaces, does not contribute to storm water runoff management problems any more than the forest land. If

every resident is believed to benefit, then owners of vacant forest land benefit as much as the owners of other vacant land, but only the latter pay the charge. If the charge specially benefited that property subject to the charge, then there would be special benefits to property outside the city limits not ascribable to property within the city limits. But none was identified by either the Court of Appeals or the trial court.

In *Covell*, the court concluded that because there were no specific improvements described in the Seattle ordinance, and because the funds collected were combined with other funds to pay for street improvements all over the city, the street utility failed to meet the special assessment definition. *Covell*, 127 Wn.2d at 889. But there are no specific improvements described in Ordinance 121-02, and it was expressly intended to provide matching funds for grants for public benefits. See CP at 109.

**b. The Court of Appeals has blurred the distinction between taxes and regulatory fees.**

The Court of Appeals appears to have accepted the District's claim that the levy is not really a special assessment, but instead is a regulatory fee similar to the storm water charge in *Storedahl Props. v. Clark County*, 143 Wn. App. 489 (2008), adopted under a local government's general police power (Washington Constitution, Art. XI, § 11).

Even if it were supposed that the Mason County conservation assessment might be construed simply as an exercise of a county's general police power, it fails the *Covell* tests as a species of regulatory fee. Washington courts consistently apply three widely recognized factors originally set forth in *Covell* to decide whether a charge is a regulatory fee or a tax: (1) whether the primary purpose is to raise revenue (tax) or to regulate (regulatory fee), (2) whether the money collected must be allocated only to the authorized regulatory purpose, and (3) whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer. *City of Lakewood v. Pierce County*, 106 Wn. App. 63, 75, 23 P.3d 1 (2001); cited in *Storedahl Props. v. Clark County*, 143 Wn. App. 489 (2008).

Regarding the first *Covell* factor, as a Mason County Commissioner remarked at the time, the levy was to solve a "thorny" budget problem: it was to raise money, not to regulate. As for the second factor, even if one supposed that there was a regulatory purpose behind the money that went to the County, about one third of the net revenues went to a nonregulatory agency, the Conservation District, for such efforts as encouraging development of farm plans. However benign, such plans are not part of a

regulatory scheme. Conservation districts lack regulatory authority. RCW 89.08.220. Indeed, the District itself has been emphatic in disavowing any police or regulatory authority. CP at 109.

Most important, the levy is for a flat amount per parcel and bears no direct relationship to either the benefits provided to those who pay the fee or the burden they impose on government. The Court of Appeals compares the conservation assessment to the charges for storm water management approved in *Storedahl Props. v. Clark County*, 143 Wn. App. 489 (2008) and *Tukwila Sch. Dist. No. 406 v. City of Tukwila*, 140 Wn.App. 734, 167 P.3d 1167 (2007). Appendix at A-6. Unlike *Storedahl*, where Clark County set rates that varied according to the services furnished, the benefits received, and the character, use and storm water runoff characteristics of the land, Mason County's ordinance has only one rate for all land assessed, regardless of size, services rendered, benefits received, or storm water runoff characteristics of the land. Unlike *Tukwila*, where the City of Tukwila imposed a service charge on land based on the percentage of developed surface area per acre, Mason County has only one charge, unrelated to

surface runoff or developed surface area.<sup>5</sup>

Apparently, some properties, such as those that might receive farm plans, were expected to receive special benefits. But no parcel was ensured a farm plan or any other special benefit, and under *Covell's* analysis of services, it is not enough to identify one that could potentially be received someday. See *Covell*, 127 Wn.2d at 879 (“service received by those who pay the fee”) (emphasis added). *Samis Land Co. v. Soap Lake*, 143 Wn.2d 798, 813, n. 52 (2001). A user fee is not like a lottery ticket; it must provide more than a chance for a benefit.

In discussing the third *Covell* factor, the Court of Appeals does not actually conclude that funds generated by Ordinance 121-02 produce direct benefits for those on whom the levy is imposed. Instead, by likening the levy to entirely different charges in *Storedahl* and *Tukwila* (and neglecting to

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<sup>5</sup> The Court of Appeals quotes only part of the *Tukwila* discussion of the third *Covell* factor: “it rains everywhere and all parcels within the City benefit from a system that manages the quantity and quality of storm and surface water runoff to prevent flooding, erosion, sedimentation, pollution, and danger to life and property.” Appendix at A-6. What is omitted distinguishes *Tukwila* from the instant case: “While there is certainly an overall public benefit, the fees assessed are still based on the amount and rate of runoff a parcel of property generates. . . . 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.” *Tukwila Sch. Dist. No. 406 v. City of Tukwila*, 140 Wn.App. at 749.

recognize that the levy was supposed to be for the conservation district, not the county), the Court of Appeals misapplied the *Covell* criteria, concluding that the third factor weighs in favor of treating the levy as a regulatory fee “because the County uses the funds it collects to manage the storm water runoff for the benefit of all county residents.” Appendix at A-6.

While it appears that the Court of Appeals supposed that there was a relationship between storm water management problems and any nonforested parcel subject to the levy, no distinction is drawn, either in the ordinance or the court’s opinion, between vacant land without impermeable surfaces and developed land with varying amounts of impermeable surface. Granted that there need be only a rough proportionality between the amount levied and the amount of runoff from a parcel, the court ignores the obvious fact that vacant land without impermeable surfaces is part of the solution to storm water management problems, not part of the problem, and yet gets taxed the same amount as a parcel entirely covered by impermeable surfaces. While it may be that all county residents benefit from storm water management programs, the benefits from an effort to minimize silt-laden runoff from reaching, say, Hood Canal, are at best indirect to those many parcels at a distance from this surface water.

The Court of Appeal's decision blurs the basic distinction drawn in *Covell* between fees and taxes, a distinction not only essential to *Covell*, but also to all those cases that have built upon *Covell*. Although ostensibly applying the *Covell* factors, the Court of Appeals has undercut them. The court should determine whether it wishes to reconsider *Covell* or to reaffirm what it said there and in *Samis Land Co. v. Soap Lake*, 143 Wn.2d at 813-814:

While the Seattle properties at issue in *Covell* also stood to benefit from public spending of residential street utility charges . . . , we held that "the direct relationship between the charges and the benefits received [or burden imposed] by those who pay them is missing." Indeed, most public expenditures have the effect of enhancing the value and marketability of nearby real estate. However, stretching the "direct relationship" to include such indirect enhancements would render the third *Covell* test meaningless as a guide for distinguishing fees from taxes.

If regulatory fees, instead of taxes, may be used to fund programs that are alleged to benefit everyone, then many government programs intended to serve the general welfare may have their revenues increased, regardless of constitutional restrictions, by property taxes in the guise of 'regulatory fees.' Unless the distinction between fees and taxes is maintained in law, "virtually all of what now are considered 'taxes' could be transmuted into 'user fees' by the simple expedient of dividing what are generally accepted as taxes into

constituent parts, e.g., a ‘police fee.’” *Covell*, 127 Wn.2d at 888 (quoting *United States v. City of Huntington*, 999 F.2d 71, 74 (4<sup>th</sup> Cir. 1993), cert. denied, 510 U.S. 1109 (1994)).

**2. A significant question of law under the Constitution of the State of Washington is involved.**

RCW 89.08.400 is based on the constitutional provision allowing the Legislature to vest municipal authorities with power “to make local improvements by special assessment,” which requires that special assessments should confer improvements on assessed land. Washington Constitution, Art. VII, § 9. Special assessments may be seen as a type of user charge. Hugh D. Spitzer, “Taxes vs. Fees: A Curious Confusion,” 38 *Gonz. L. Rev.* 335, 350-51 (2002-3). They are a form of user charge which allocates the cost of public improvements that increase the value of an asset (property) to the owner of that asset. *Id.* In other words, a special assessment is a charge imposed on property owners within a limited area to help pay the cost of a local improvement which specially benefits property within that area. C. Dallas Sands, Michael Libonati, John Martinez, *Local Government Law* § 24.01, at 24-2 (1995); see also *King County Fire Protection Dist. 16 v. Housing Auth.*, 123 Wn.2d 819, 834, 872 P.2d 516 (1994) (special assessments are for the construction of improvements appurtenant to specific

land and bring a benefit substantially more intense than is yielded to the rest of the city); cited in *Covell*, 127 Wn.2d at 889. The benefit to the land must be actual, physical and material and not merely speculative or conjectural. *Heavens v. King Cy. Rural Library Dist.*, 66 Wn.2d 558, 563, 404 P.2d 453 (1965).

If, as Petitioners contend, the concept of a special assessment has been misunderstood in this case, with the result that the contested levy amounts to a property tax, it runs afoul the constitutional provision (Art. VII, § 1) requiring that “[a]ll taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax [and] [a]ll real estate shall constitute one class . . . .” This requirement for uniformity implies both an equal tax rate and equality in valuing the property taxed. *Boeing Co. v. King County*, 75 Wn.2d 160, 165, 449 P.2d 404 (1969).

Tax uniformity is “the highest and most important of all requirements applicable to taxation under our system.” *Inter Island Tel. Co. v. San Juan County*, 125 Wn.2d 332, 334, 883 P.2d 1380 (1994). This constitutional requirement – together with the requirement of Art. VII, § 2, setting a one percent ceiling on ad valorem taxes – must not be subverted by taxes in some other guise if these constitutional protections are to be preserved. See *Belas*

*v. Kiga*, 135 Wn.2d 913, 922 (1998). Thus, this case involves a significant question of law under the Constitution of the State of Washington.

**3. The petition involves an issue of substantial public interest that should be determined by the Supreme Court.**

This case is especially significant not only because of the implied challenge to the *Covell* factors found in the Court of Appeals decision, but also because it represents a case of first impression regarding the statutory provision for conservation assessments. A number of counties have now adopted conservation assessments. The State Conservation Commission has adopted regulations to help implement such assessments.

By holding that Mason County's ordinance is compliant with the statute, the Court of Appeals upheld a subterfuge by which the County evaded the requirement that if it adopted a flat per parcel charge, it must also adopt a per acre charge. Mason County's charge was stated as "\$0.00 per acre," or no charge at all per acre. CP at 97; Appendix at C-1. Common sense and the Conservation Commission agree that the legislative intent was to give some weight to size, so that larger parcels pay a larger amount. WAC 135-100-080 interprets RCW 89.08.400(3) to mean that a "uniform per-acre

amount must be greater than zero cents per acre . . . .”<sup>6</sup> Unless the Court of Appeals decision is reversed, the Conservation Commission will need to amend the Administrative Code.

Ordinance 121-02 also defies the statutory restriction in RCW 89.08.400(3) that “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, determine an annual per acre rate of assessment for each classification of land, and indicate the total amount of special assessments proposed to be obtained from each classification of lands,” since it fails to include **any** system of classification according to benefits conferred or to be conferred by the activities of the conservation district, **any** annual per acre rate of assessment for each classification of land, or **any** indication of the total amount of special assessments proposed to be obtained from each classification of lands.

The larger question, however, is whether a statute allowing for a

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<sup>6</sup> While the ordinance at issue antedates the Commission’s rule, the latter reflects the Commission’s interpretation, and as such is entitled to deference in the court’s interpretation of the statute. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 594, 90 P.3d 659 (2004). The Commission filed an amicus curiae brief with the Court of Appeals, urging that the court find the Mason County ordinance invalid on the basis of its failure to adopt a per acre charge.

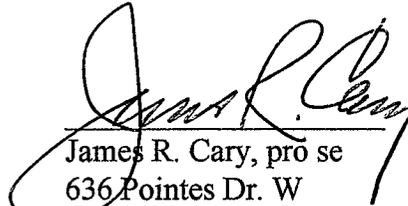
special assessment may be subverted, so that a flat per parcel fee is charged, and perhaps partly used for activities that might be undertaken and financed through exercise of a county's police powers, but which bear little resemblance to the assessment envisioned in the statute. The Court of Appeals took a statute meant to fund special benefits that may be provided by conservation districts and transformed it into a regulatory fee mainly to raise revenues for staffing of the County's Department of Health Services.

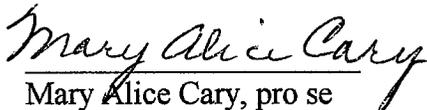
#### **F. Conclusion**

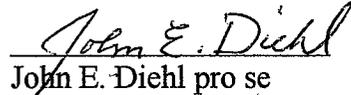
The court should consider whether the levy at issue is invalid on both statutory and constitutional grounds. The ordinance adopting the levy does not appear compliant with the statute authorizing it. Given that it was adopted as a special assessment it would appear to need to satisfy the definition of a special assessment in *Covell*, and yet does not. Given that it was supposed to be for a non-regulatory agency, the Conservation District, and that there is not a direct relationship between the fee levied and the benefits received or burden imposed, it appears that the levy is not regulatory. The ordinance imposes a charge on the mere ownership of property. Accordingly, the fee appears to be a property tax, and unconstitutional because not levied on an ad valorem basis. Consequently,

the decision of the Court of Appeals should be reversed, collection of the levy should be enjoined, and Petitioners should be granted the relief they sought, to receive refund of the levies they were compelled to pay, interest on such levies, and court costs.

Dated: December 4, 2009

  
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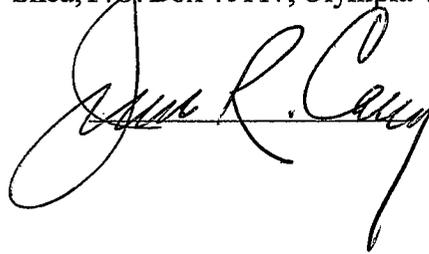
  
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**Declaration of Service**

I, James R. Cary, under penalty of perjury under the laws of the State of Washington, declare that on this day, I mailed, postage prepaid, or personally delivered the above Petition for Review to the offices of Monty Cobb, Deputy Prosecuting Attorney, P.O. Box 639, Shelton WA 98584; Matthew B. Edwards, Owens Davies PS, 1115 W. Bay Dr. NW, Suite 302, Olympia WA 98502; and Sharonne E. O'Shea, P.O. Box 40117, Olympia WA 98504-0117.

Dated: December 4, 2009



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BY DEPUTY

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STATE OF WASHINGTON

BY \_\_\_\_\_  
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

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

Respondents and  
Cross Appellants,

v.

MASON COUNTY,

Defendant,

and MASON CONSERVATION DISTRICT,

Appellant and  
Cross Respondent.

No. 37981-3-II

PUBLISHED OPINION

HOUGHTON, P.J. — The Mason County Conservation District<sup>1</sup> (District) appeals the trial court's grant of summary judgment in favor of James Cary, Mary Cary, John Diehl, and William Fox, Sr. (Landowners) that invalidated an assessment Mason County (County) levied against landowners within the District. The District argues that the assessment constitutes a fee rather than a tax; but even if the assessment is a tax, it is valid. The Landowners argue on cross appeal that the trial court should refund assessments landowners paid to the County up to the date the

<sup>1</sup> The Mason County Conservation District is one of 47 such districts in the state, and it consists of all the land within Mason County with the exception of the city of Shelton. Conservation districts exist to mitigate environmental problems such as erosion, sedimentation, and storm water runoff pollution. RCW 89.08.010.

Landowners prevailed on summary judgment. We agree with the District that it is a fee and, therefore, reverse and remand.

#### FACTS

On July 29, 2002, the District wrote the Mason County Board of Commissioners (Board) to request a special 10-year-long annual assessment of \$5.00 per parcel and \$0.07 per acre for all parcels one acre or larger. The District explained that it intended to “create a fund dedicated to addressing water resource protection issues within Mason County.” Clerk’s Papers (CP) at 59. The District proposed that the monies the assessment generated go to the Mason County Department of Health Services to fund programs to protect water quality and provide matching funds for future grant opportunities.

On August 27, the Board held a hearing and considered the District’s request. At the hearing, Department of Health Services staff recommended that the Board approve the assessment but charge \$0.00 per acre in lieu of \$0.07 per acre due to the high administrative costs associated with the implementation of a per acre assessment. The Board agreed to the changes, approved the modified assessment, and began collecting the \$5.00 per parcel assessment in 2003. The Board entered findings of fact and codified its decision as Mason County Ordinance 121-02. From 2003 through 2007, the County collected \$1,112,640.68.

On March 10, 2003, the Landowners sought a declaratory judgment ruling the assessment an unconstitutional property tax, which the trial court ultimately dismissed as untimely. *Cary v. Mason County*, 132 Wn. App. 495, 498, 504, 132 P.3d 157 (2006), *review denied*, 159 Wn.2d 1005 (2007). The Landowners then appealed and we reversed and remanded, reasoning that

because the Landowners alleged the assessment was an invalid property tax, they made a timely claim under the applicable statute. *Cary*, 132 Wn. App. at 504.

The Landowners then moved for summary judgment, and the District filed a cross-motion for summary judgment. The trial court granted the Landowners' motion and enjoined the County from collecting any more assessments under the ordinance. The trial court gave three bases for its decision. First, after analyzing the three factors in *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995), the trial court determined that the assessment was an unlawful tax because "there is no direct relationship between the fee charged and any services provided . . . [to] parcel owners." CP at 28. Second, it determined that under RCW 89.08.220, a conservation district cannot levy a tax and, therefore, the assessment could not be a legislatively authorized constitutional tax. Third, it found that the ordinance violated RCW 89.08.400(3) because the statute requires a per acre charge to accompany a per parcel charge.

On March 26, 2008, the Landowners moved for clarification, urging the trial court to grant their request for retroactive relief for taxes paid beginning in 2003. The District opposed this motion on procedural grounds. The District then sought certification to allow for an immediate appeal and asked the trial court to enter a stay of judgment. The trial court granted the Landowners' request for clarification in part by awarding retroactive relief to those property owners who had made their assessment payments under protest. The trial court also granted the request for a stay and certified the matter for appellate review. We granted the District's motion for discretionary review.

## ANALYSIS

The District appeals the trial court's grant of summary judgment. We review summary judgment orders de novo. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 358, 166 P.3d 667 (2007). A trial court properly grants summary judgment when no genuine issues of material fact exist, thereby entitling the moving party to a judgment as a matter of law. CR 56(c). We draw all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

### NATURE OF ASSESSMENT

The District first contends that the County's assessment is a regulatory fee and not a tax; but even if we determine that it is a tax, it is a constitutional one. The District argues that under *Covell*, the assessment meets the requirements for a valid regulatory fee and the trial court erred in finding no direct relationship between the assessment and benefits it conferred.

Under *Covell*, Washington courts apply three factors in weighing whether an assessment amounts to a regulatory fee or a tax: (1) whether the primary purpose is to raise revenue (tax) or regulate (regulatory fee); (2) whether the funds must be allocated to a regulatory purpose (if so, regulatory fee); and (3) whether a direct relationship exists between the assessment charged and the benefit the payer received or the assessment charged and the burden the fee payer produced (if so, regulatory fee). 127 Wn.2d at 879.

Here, the Board's findings of fact supporting its decision to implement Ordinance 121-02 also support the District's argument that the first factor weighs in favor of treating the assessment as a fee and not a tax. In *Samis Land Co.*, the court explained the first *Covell* factor: "If the fundamental legislative impetus was to 'regulate' the fee payers -- by providing them with

a targeted service or alleviating a burden to which they contribute -- that would suggest that the charge was an incidental 'tool of regulation' rather than a tax in disguise." *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 807, 23 P.3d 477 (2001) (footnotes omitted). The findings state that the District will use the funds to protect water for drinking, recreation, fishing, and commercial activity. In the Landowners' affidavit submitted at trial, they agreed that "[t]he monies collected under Ordinance 121-02 have been spent mainly to improve water quality in Mason County" and submitted the expense reports in support of that fact. CP at 95. Thus, the first factor weighs in favor of treating the assessment as a regulatory fee.

The second *Covell* factor, whether the County has allocated the funds for a regulatory purpose, weighs in favor of the District because it segregates the funds the assessment generates into an account used only for water management, storm water maintenance programs, and education. 127 Wn.2d at 879. In *Storedahl*, facing a similar factual situation to the present case, we reasoned that the assessment at issue resembled a fee under the second *Covell* factor because Clark County used the storm water funds for the limited purpose of maintaining storm water infrastructure, educating the public about the effects of storm water, and other similar activities. *Storedahl Props., LLC v. Clark County*, 143 Wn. App. 489, 502-03, 178 P.3d 377, review denied, 164 Wn.2d 1018 (2008). The second *Covell* factor therefore weighs in favor of treating the assessment as a regulatory fee as well.

With respect to the third factor, we first determine whether a direct relationship exists between the assessment paid and the service the payer received. *Covell*, 127 Wn.2d at 879. If we determine that a direct relationship exists, the assessment "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.” *Covell*, 127 Wn.2d at 879.

In *Storedahl*, we decided that the third *Covell* factor weighed in favor of treating the assessment as a regulatory fee because Clark County used the funds to manage storm water runoff, thereby benefitting the entire county. *Storedahl*, 143 Wn. App. at 505-06. In *Tukwila School District*, Division One found that a direct relationship under the third *Covell* factor existed because “it rains everywhere and all parcels within the City benefit from a system that manages the quantity and quality of storm and surface water runoff to prevent flooding, erosion, sedimentation, pollution, and danger to life and property.” *Tukwila Sch. Dist. No. 406 v. City of Tukwila*, 140 Wn. App. 735, 749, 167 P.3d 1167 (2007). Here, the third factor also weighs in favor of treating the assessment as a regulatory fee because the County uses the funds it collects to manage the storm water runoff for the benefit of all county residents. *Covell*, 127 Wn.2d at 879; *Storedahl*, 143 Wn. App. at 505-06. All three *Covell* factors weigh in favor of a fee<sup>2</sup> and the trial court therefore erred in finding that the assessment constituted a tax rather than a regulatory fee.<sup>3</sup>

#### PER ACRE ASSESSMENT

The District next contends that the Board did not violate RCW 89.08.400(3) by imposing a \$0.00 per acre assessment in addition to its \$5.00 per parcel assessment. The District argues that the legislature precluded judicial review of whether the Board acted outside its discretion in

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<sup>2</sup> The trial court also erred in finding that the District improperly imposed the “tax” because only the County has the power to levy taxes. As the record shows, it was the County, and not the District, that imposed the fee.

<sup>3</sup> Because we hold that the assessment constituted a fee, we do not address the County’s alternative argument that if we were to hold the assessment constituted a tax, it was valid.

imposing the assessment. The District argues further that the Landowners did not timely file their claim under RCW 36.32.330 and our ruling in the first appeal.

We look at the statute's plain language and ordinary meaning and "the applicable legislative enactment as a whole, harmonizing its provisions by reading them in context with related provisions and the statute as a whole." *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005). When faced with an unambiguous statute, we derive the legislature's intent from the plain language alone. *Waste Mgmt. of Seattle, Inc., v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994).

The District bases its first timeliness argument on the RCW 89.08.400(2) provision that "[t]he findings of the county legislative authority shall be final and conclusive" and the RCW 89.08.400(5) provision allowing for voter nullification of the assessment if 20 per cent of the landowners in the affected district to sign a petition objecting to the assessment. Appellant's Br. at 30.

RCW 89.08.400(2) provides in relevant part:

The county legislative authority shall hold a public hearing on the proposed system of assessments. After the hearing, the county legislative authority may accept, or modify and accept, the proposed system of assessments, including the number of years during which the special assessments shall be imposed, if it finds that both the public interest will be served by the imposition of the special assessments and that the special assessments to be imposed on any land will not exceed the special benefit that the land receives or will receive from the activities of the conservation district. *The findings of the county legislative authority shall be final and conclusive.* Special assessments may be altered during this period on individual parcels in accordance with the system of assessments if land is divided or land uses or other factors change.

(Emphasis added.) As the statute makes clear, the District has taken the "final and conclusive" provision out of context and misconstrued the legislature's intent. Read in the context of the

entire statute, the provision states that the Board's findings of fact become final and conclusive within the meaning of RCW 89.08.400(2), not Ordinance 121-02. Further, the District's argument that the availability of a voter nullification petition supports its timeliness argument also fails because nothing in the provision addresses judicial review, and the District fails to cite any authority to support the argument. RCW 89.08.400(5).

The District bases its next timeliness argument on RCW 36.32.330 and argues that because the Landowners did not appeal the Board's enactment of the ordinance to the superior court within 20 days, the matter is time barred. Under RCW 36.32.330, "Any person may appeal to the superior court from any decision or order of the board of county commissioners. Such appeal shall be taken within twenty days after the decision or order, and the appellant shall within that time serve notice of appeal on the county commissioners."

Although the Landowners argue that this timeliness issue is res judicata, the District correctly points out that it is the law of the case doctrine and not the closely related res judicata doctrine that applies here. *See Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005) ("the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation"). Nonetheless, applying the law of the case doctrine, the Landowners are correct that we have already carefully analyzed the District's timeliness challenges and disagreed with its argument. *Cary*, 132 Wn. App. at 504. Thus, we address the parties' remaining arguments.

The District contends that the Board did not violate RCW 89.08.400(3) by imposing a \$0.00 per acre assessment in addition to its \$5.00 per parcel assessment. RCW 89.08.400(3) provides in relevant part as follows:

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, determine an annual per acre rate of assessment for each classification of land, and indicate the total amount of special assessments proposed to be obtained from each classification of lands. Lands deemed not to receive benefit from the activities of the conservation district shall be placed into a separate classification and shall not be subject to the special assessments. *An annual assessment rate shall be stated as either uniform annual per acre amount, or an annual flat rate per parcel plus a uniform annual rate per acre amount, for each classification of land. The maximum annual per acre special assessment rate shall not exceed ten cents per acre.* The maximum annual per parcel rate shall not exceed five dollars, except that for counties with a population of over one million five hundred thousand persons, the maximum annual per parcel rate shall not exceed ten dollars.

(Emphasis added.) Reviewing the statutory language, the Landowners' argument that the statute requires a per acre charge to accompany a per parcel charge does not persuade us. Even if the Landowners were correct and the statute required the Board to impose a per acre charge, nothing in the language of the statute prevents the per acre charge from being \$0.00. RCW 89.08.400(3). Although the statute does explicitly provide a maximum, it does not similarly provide a minimum. RCW 89.08.400(3). This is because RCW 89.08.400(3) merely describes *how* annual per acre and per parcel assessments must be set forth; it does not require the imposition of a per acre charge in addition to the per parcel charge.

Thus, the trial court erred by ruling that the Board's decision to assess \$5.00 per parcel plus \$0.00 per acre does not comply with the requirements of RCW 89.08.400(3).<sup>4</sup>

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<sup>4</sup> Although the Landowners also argue that the ordinance failed to properly classify the land receiving the benefit of the assessment, the fee does not apply to forested land. Confining the assessment to non-forested parcels, which do not absorb storm water in the same manner as forested parcels, implies a classification and thus satisfies the statutory requirement. RCW 89.08.400(3).

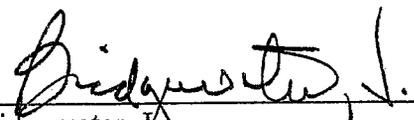
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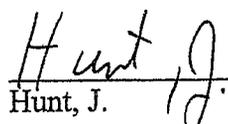
On cross appeal, the Landowners contend that they are entitled to a refund of assessments paid to the County under Ordinance 121-02. At trial, the court granted this relief to those who paid under protest during the assessment period. Because we reverse, we do not grant the Landowners' requested relief.

Reversed and remanded with instructions to grant the District's cross motion for summary judgment.

  
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Houghton, P.J.

We concur:

  
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Bridgewater, J.

  
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Hunt, J.

## **Appendix B: RCW 89.08.400**

### **Special assessments for natural resource conservation.**

(1) Special assessments are authorized to be imposed for conservation districts as provided in this section. Activities and programs to conserve natural resources, including soil and water, are declared to be of special benefit to lands and may be used as the basis upon which special assessments are imposed.

(2) Special assessments to finance the activities of a conservation district may be imposed by the county legislative authority of the county in which the conservation district is located for a period or periods each not to exceed ten years in duration.

The supervisors of a conservation district shall hold a public hearing on a proposed system of assessments prior to the first day of August in the year prior to which it is proposed that the initial special assessments be collected. At that public hearing, the supervisors shall gather information and shall alter the proposed system of assessments when appropriate, including the number of years during which it is proposed that the special assessments be imposed.

On or before the first day of August in that year, the supervisors of a conservation district shall file the proposed system of assessments, indicating the years during which it is proposed that the special assessments shall be imposed, and a proposed budget for the succeeding year with the county legislative authority of the county within which the conservation district is located. The county legislative authority shall hold a public hearing on the proposed system of assessments. After the hearing, the county legislative authority may accept, or modify and accept, the proposed system of assessments, including the number of years during which the special assessments shall be imposed, if it finds that both the public interest will be served by the imposition of the special assessments and that the special assessments to be imposed on any land will not exceed the special benefit that the land receives or will receive from the activities of the conservation district. The findings of the county legislative authority shall be final and conclusive. Special assessments may be altered during this period on individual parcels in accordance with the system of assessments if land is divided or land uses or other factors change.

Notice of the public hearings held by the supervisors and the county legislative authority shall be posted conspicuously in at least five places throughout the conservation district, and published once a week for two consecutive weeks in a newspaper in general circulation throughout the conservation district, with the date of the last publication at least five days prior to the public hearing.

(3) 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, determine an annual per acre rate of assessment for each classification of land, and indicate the total amount of special assessments proposed to be obtained from each classification of lands. Lands deemed not to receive benefit from the activities of the conservation district shall be placed into a separate classification and shall not be subject to the special assessments. An annual assessment rate shall be stated as either uniform annual per acre amount, or an annual flat rate per parcel plus a uniform annual rate per acre amount, for each classification of land. The maximum annual per acre special assessment rate shall not exceed ten cents per acre. The maximum annual per parcel rate shall not exceed five dollars, except that for counties with a population of over one million five hundred thousand persons, the maximum annual per parcel rate shall not exceed ten dollars.

Public land, including lands owned or held by the state, shall be subject to special assessments to the same extent as privately owned lands. The procedures provided in chapter 79.44 RCW shall be followed if lands owned or held by the state are subject to the special assessments of a conservation district.

Forest lands used solely for the planting, growing, or harvesting of trees may be subject to special assessments if such lands benefit from the activities of the conservation district, but the per acre rate of special assessment on benefited forest lands shall not exceed one-tenth of the weighted average per acre assessment on all other lands within the conservation district that are subject to its special assessments. The calculation of the weighted average per acre special assessment shall be a ratio calculated as follows: (a) The numerator shall be the total amount of money estimated to be derived from the imposition of per acre special assessments on the nonforest lands in the

conservation district; and (b) the denominator shall be the total number of nonforest land acres in the conservation district that receive benefit from the activities of the conservation district and which are subject to the special assessments of the conservation district. No more than ten thousand acres of such forest lands that is both owned by the same person or entity and is located in the same conservation district may be subject to the special assessments that are imposed for that conservation district in any year. Per parcel charges shall not be imposed on forest land parcels. However, in lieu of a per parcel charge, a charge of up to three dollars per forest landowner may be imposed on each owner of forest lands whose forest lands are subject to a per acre rate of assessment.

(4) A conservation district shall prepare an assessment roll that implements the system of assessments approved by the county legislative authority. The special assessments from the assessment roll shall be spread by the county assessor as a separate item on the tax rolls and shall be collected and accounted for with property taxes by the county treasurer. 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 the same manner as delinquent real property taxes, and subject to the same interest rate and penalty as for delinquent property taxes. The county treasurer shall deduct an amount from the collected special assessments, as established by the county legislative authority, to cover the costs incurred by the county assessor and county treasurer in spreading and collecting the special assessments, but not to exceed the actual costs of such work. All remaining funds collected under this section shall be transferred to the conservation district and used by the conservation district in accordance with this section.

(5) The special assessments for a conservation district shall not be spread on the tax rolls and shall not be collected with property tax collections in the following year if, after the system of assessments has been approved by the county legislative authority but prior to the fifteenth day of December in that year, a petition has been filed with the county legislative authority objecting to the imposition of such special assessments, which petition has been signed by at least twenty percent of the owners of land that would be subject to the special assessments to be imposed for a conservation district.

*Appendix C*  
ORDINANCE NO. 121-02

An ORDINANCE declaring the intention of the Board of County Commissioners to accept with modification the recommendations of the Mason Conservation District Supervisors to establish a special assessment.

WHEREAS the Mason Conservation District is authorized by RCW 89.08.400 to request a special assessment be imposed for the Conservation District; and

WHEREAS the Mason Conservation District held two public hearings on the proposed system of assessments on July 17, 2002 and July 18, 2002; and

WHEREAS the Mason Conservation District presented the proposed system of assessments to Mason County Commissioners on July 29, 2002; and

WHEREAS the Mason County Board of Commissioners held a public hearing on August 27, 2002 on the proposed system of assessments;

**NOW, THEREFORE, BE IT RESOLVED** by the Board of County Commissioners for Mason County as follows:

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.

ADOPTED this 3<sup>rd</sup> day of September, 2002.

BOARD OF COUNTY COMMISSIONERS  
MASON COUNTY, WASHINGTON

*Wesley E. Johnson*  
Wesley E. Johnson, Chairperson

*Herb Baze*  
Herb Baze, Commissioner

*Bob Holter*  
Bob Holter, Commissioner

ATTEST:

*Rebecca S. Rogers*  
Rebecca S. Rogers  
Clerk of the Board

C: Auditor/Accounting  
Assessor  
Landowners  
Treasurer