

X

83937-9

No. 37981-3-II

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.

FILED
JAN 26 2010
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
[Signature]

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2010 JAN 25 AM 8:00
BY RONALD R. CARPENTER
CLERK

REPLY TO ANSWER TO PETITION FOR REVIEW

James R. Cary, pro se
Mary Alice Cary, pro se
636 Pointes Dr. W.
Shelton WA 98584
360-427-1488

John E. Diehl, pro se
679 Pointes Dr. W.
Shelton WA 98584
360-426-3709

William D. Fox, Sr., pro se
50 W. Sentry Dr.
Shelton WA 98584
360-426-1059

In its answer, delinquent under RAP 13.4(d), to our petition for review, Mason Conservation District ("District") seeks review of issues not raised in the petition for review. Our reply addresses these new issues of law and fact. To the extent that they are legitimate issues, they underscore the reasons why there are issues of substantial public interest in this case that should be determined by the Supreme Court. So egregiously erroneous are some of the factual claims as to raise questions about counsel's compliance with RPC 3.3

B. New issues of fact

1. In an apparent attempt to show that Mason County did not skim off 2/3 of the net revenues from the assessment for its own department of environmental health, the District alleges that it was not until 2003, "well after the assessments were imposed," that Mason County and Mason Conservation District entered into an inter-local agreement. Answer at 5. Actually, the County and District entered an "intergovernmental agreement" that allocated 66.5% of the net revenue to the County's Department of Health Services on October 17, 2002. CP 98-100. It was only after Petitioners filed a complaint for declaratory judgment in March 2003 that the County and District signed a second agreement in September 2003, reaffirming that

66.5% of net revenues would go to the County (CP 105), but attempting to present the agreement in a manner less obviously in violation of RCW 89.08.400.

2. The District alleges that the trial court held that the conservation assessment “had been improperly imposed because the Mason Conservation District did not have the authority to impose a tax.” Answer at 6. Actually, the trial court held that the assessment was improperly imposed because it concluded that “the district’s charge is an unlawful tax rather than a regulatory fee.”¹ CP 49. The court reached this conclusion by applying the third of the factors stated in *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995). The trial court ruled that “the district charge is not a regulatory fee since there is no direct relationship between the fee charged and services provided or between the fee charged and any burden produced by parcel owners.” Id. The court also found the levy invalid because not in compliance with the statutory requirement of RCW 89.08.400(3), “which requires that if a per parcel charge is adopted a per acre charge must be made

¹ The court did not find that the District itself imposed the levy at issue. In fact, the court addressed an argument of the District by noting that RCW 89.08.220 specifically prohibits a conservation district from levying taxes. CP 49.

as well.” CP 50.

3. The District alleges that a per acre charge would “exceed the revenues thereby generated.” Answer at 8. Actually, the only basis for this was a rough calculation by the County treasurer and auditor that absurdly assumed that each parcel consisted of only one acre. CP 63 (also attached as B-11 to the District’s answer). This calculation also assumed an assessment of 7 cents per acre (or parcel), less than the amount of 10 cents per acre allowed under the statute. *Id.* Regardless of whether the per acre charge generates much revenue, it clearly represents an effort by the legislature to require a degree of proportionality in the assessment amounts, so that larger parcels, which presumably pose larger issues of soil conservation and erosion, would contribute more according to their size.

4. The District alleges that the County did not purport to condition the granting of assessments upon the District’s entering into an agreement with the county to share the proceeds. Answer at 9. Actually, Mason County did include such a condition: “The Conservation District and Mason County Department of Health Services must sign a Memorandum of Agreement to carry out these findings.” CP 69 (and attached as B-13 to the District’s answer). Because the split of revenues had been negotiated and announced

in advance, this was the County's attempt to ensure that the District kept its part of the bargain.

5. The District alleges that the statute describing the charge the local legislative authority is authorized to impose for the benefit of the conservation district was not adopted until 1949, and that the fact that the statute describes the charge as a special assessment should not be taken literally, because Washington courts "had not yet distinguished . . . between 'special assessments' and 'regulatory fees.'" Answer at 12-13. Actually, the statute in question, RCW 89.08.400 was adopted through SHB 1192 in 1989. The concept of a special assessment is constitutionally based, originally included in Art. VII, Sec. 9 in 1889. In Washington case law, taxes have been contrasted to "regulatory fees," at least since *Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 650 P.2d 193 (1982), although the leading case, *Covell v. City of Seattle*, was decided in 1995. (Conservation districts were not themselves established until 1973, when they were given the charge to conserve soil resources, control and prevent soil erosion, and prevent flood and sediment damage by encouraging soil conserving land use practices, but without regulatory authority.)

6. The District alleges that Petitioners did not claim, prior to the

Petition for Review, that the contested levy must satisfy the criteria for “special assessments” authorized by Wash. Const. Art. VII, Sec.9, and that therefore, the court should not consider such a claim now. Answer at 12.

Actually, Petitioners addressed this question in their brief before the Court of Appeals:

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.*, citing Wash. Const. Art. VII, Sec. 9. 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.

Response Brief at 27.

C. New issues of law

1. The District argues that the court lacks jurisdiction, based on the fact that there is no explicit provision for judicial review in the statute, and the fact that the statute states that the findings of the county legislative

authority shall be final and conclusive. RCW 89.08.400(2) and Answer at 10-11. This is a remarkable assertion, and certainly deserving of the court's attention, for if taken seriously, it implies that the legislature may by fiat make a levy immune to judicial review.

Indeed, if the statute were construed as denying courts the authority to review statutory compliance by counties regarding the special assessments authorized by RCW 89.08.400, then the statute would be unconstitutional, for such construction entails supposing that property, i.e., the amount of the levy, may be confiscated from property owners without opportunity for judicial review. It is settled law that the legislative branch cannot immunize its taxes, assessments, or user fees from judicial review:

In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment.

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 289, 64 L. Ed. 909, 40 S. Ct. 527 (1920); cited in *State ex Rel. Pac. T. & T. Co. v. D. P. S.*, 19 Wn. (2d) 200, 218 (1943). In challenging Ordinance 121-02, Plaintiffs were challenging the levy they have been obliged to pay under it, and which amounts to confiscation if the Ordinance is invalid.

If a local government makes an arbitrary and capricious finding, it may be final in the sense that it is not subject to further administrative review under the local government's internal appeal procedures. But that is not to concede that a court may not review any such finding to determine whether it is arbitrary or capricious and to invalidate such finding or the ensuing legislative action if it determines that such action was contrary to law. No person or agency of government is above the law.

Given that an interpretation of the statute denying judicial review to conservation assessments would be an unconstitutional denial of due process, the reference to "final and conclusive" findings must, if possible, be interpreted differently:

It is a well settled rule that, where a statute is open to two constructions, one of which will render it constitutional, and the other unconstitutional, the former construction, and not the latter, is to be adopted.

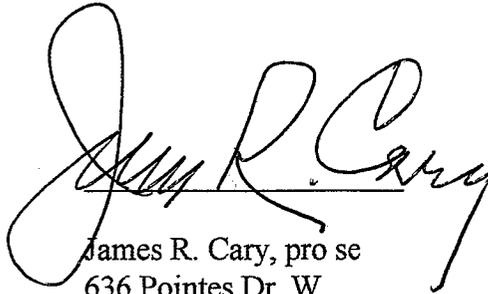
Poolman v. Langdon, 94 Wash. 448, 457, 162 Pac. 578 (1917); cited in *State ex rel. Campbell v. Case*, 182 Wash. 334, 341, 47 P. 2d 24 (1935) and *State v. Marchand*, 37 Wn. App. 741, 684 P.2d 1306 (1984).

The words "final and conclusive" may be construed as imposing no unconstitutional restriction if they are understood as simply referring to review within the county legislative branch. It should be noted that the

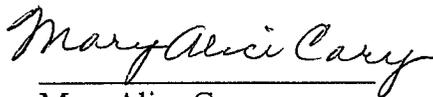
statutory language refers to “findings,” not to decisions as analyzed in *Washington Federal of State Employees v. State Personnel Board*, 23 Wn. App. 142, 594 P.2d 1375 (1979). Petitioners do not need to challenge the enumerated findings of the Mason County Commissioners to demonstrate that the enactment was contrary to law, both in failing to comply with the statutory requirements and by imposing an unconstitutional tax in the guise of a special assessment. See CP at 64-65.

2. The District also argues that Petitioners’ statutory claims were not timely asserted. This involves a tortured attempt to separate the timeliness of an appeal into two components, statutory claims and constitutional claims. The District cites no authority to suggest that an appeal may be partly timely, e.g., timely regarding constitutional claims, but untimely regarding statutory claims. The Court of Appeals correctly held that under the law of the case doctrine, the District’s timeliness challenges had already been carefully analyzed and decided in *Cary et al. v. Mason County et al.*, 132 Wn.App. 495 (2006), in which the Court reversed a dismissal of the case on the basis of timeliness. 152 Wn. App. at ___, (Appendix A to Petition for Review at A-8).

Dated: January 25, 2010



James R. Cary, pro se
636 Pointes Dr. W
Shelton WA 98584
360-427-1488



Mary Alice Cary, pro se
636 Pointes Dr. W
Shelton WA 98584
360-427-1488



John E. Diehl pro se
679 Pointes Dr. W.
Shelton WA 98584
360-426-3709

William D. Fox, Sr. by John E. Diehl, with his permission
William D. Fox, Sr., pro se
50 W. Sentry Dr.
Shelton WA 98584
360-426-1059

Declaration of Service

I, John E. Diehl, under penalty of perjury under the laws of the State of Washington, declare that on this day, I mailed, postage prepaid, faxed, and/or personally delivered the above Reply to Answer to 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: January 25, 2010

