

No. 67755-1-I

DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

CITIZENS IN SUPPORT OF USELESS BAY COMMUNITY, a  
Washington nonprofit corporation, and ROBERT and JUDITH  
WINQUIST, husband and wife and their marital community,

Respondents,

v.

ISLAND COUNTY, a Washington State Municipal Corporation; DIKING  
DISTRICT NO. 1 OF ISLAND COUNTY, an Island County Diking  
District; DAVID M. MATTENS in his capacity as Island County  
Assessor; LINDA E. RIFFE in her capacity as Island County Treasurer;  
SHEILA CRIDER in her capacity as Island County Auditor; and  
USELESS BAY GOLF AND COUNTY CLUB, INC., a Washington  
nonprofit corporation,

Appellants.

APPELLANT DIKING DISTRICT NO. 1 OF ISLAND COUNTY'S  
APPELLATE BRIEF

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ORIGINAL

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## **I. INTRODUCTION**

Diking District No. 1 of Island County appeals two of the trial court's rulings, both of which were based on the erroneous legal conclusion that the adoption of an assessment method for use throughout the District was a quasi-judicial decision, when it was actually legislative in nature.

First, the trial court erred in issuing a writ of review regarding the District's adoption of an assessment method. The writ of review process applies only to judicial or quasi-judicial decisions, not to legislative decisions such as the adoption of an assessment method to use throughout the District.

Second, the trial court erred in ruling on summary judgment that the District's invalid attempt to modify its assessment method constituted an abandonment of the existing assessment method. Under longstanding Washington law, if an attempt to modify the assessment method was invalid, it was a legal nullity, leaving the existing assessment method unaffected.

## **II. STATEMENT OF THE ISSUES**

A. Whether it is error to issue a writ of review regarding a diking district's legislative act of adopting or modifying an assessment method?

B. When a diking district's attempt to modify its

assessment method is found invalid, is the attempted modification ineffective for all purposes, so the previous, properly adopted assessment method remains in effect?

### **III. STATEMENT OF THE CASE**

#### **A. Factual Background**

Diking District No. 1 of Island County was created by the Island County Board of Commissioners in 1914 to protect approximately 460 acres of land through a system of dikes and related facilities. CP 152. The District added a system of drainage in 1931, which has been upgraded over the years, including relocating the drainage outfall/tide gate structure in 1944. *Id.* Initially, the Sunlight Beach parcels now owned by members of Citizens in Support of Useless Bay Community (“CSUBC”) were almost entirely vacant. *Id.* Over the years, however, the Sunlight Beach properties were developed into a beachfront residential community with very high property and improvement valuations. *Id.*

In 1960, the District elected to begin measuring the benefit to the properties in the benefited area protected by its diking system on the basis of the true and fair value of the properties, as permitted by RCW Chapter 85.18, rather than assessing properties on a per-acre basis. CP 153. Then, in 1986, the District adopted the same method for drainage assessments, and also began assessing

the Sunlight Beach properties owned by members of CSUBC for drainage. CP 152-161. (Prior to 1986, these particular properties were assessed only for diking improvements.) The District, therefore, has used the RCW 85.18 assessment method for diking improvements since 1960, and for drainage assessments since 1986.

In 1995, the District made two modifications to its assessments. CP 30. First, it clarified how it would assess properties that were only partially within the benefited area. *Id.* Second, it increased its estimate of the value of undeveloped land. *Id.* (Ironically, this second modification resulted in lower assessments for owners of developed property, such as the members of CSUBC.)

In 2006, the District passed a resolution to operate under RCW 85.38, which Island County had suggested would facilitate the County's collection of past-due assessments on the District's behalf. *See* CP 30. No assessments were ever made under RCW 85.38, however, as the District had adequate funds on hand to cover its expenses for several years at that time. *See id.* Finally, in 2008, the District reconsidered its decision to operate under RCW 85.38, and adopted a resolution to revert back to RCW 85.18, CP 30, which governed the only method it has ever used for diking assessments since 1960, and for combined diking and drainage assessments since 1986.

## B. Procedural History

CSUBC commenced the first of its three<sup>1</sup> actions against the Diking District in Island County Superior Court under Cause No. 09-2-00845-5. CP 716-725. In that action, CSUBC sought judicial review of various decisions made by the District many years before: the 2004 decision to add a pump to increase the capacity of the District's existing drainage system; the 2004 decision to enter into a contract with Island County and a local golf course; the 1986 decision to assess certain properties for drainage system improvements; and the 1986 determination that the base benefits conferred on the same properties for diking and drainage improvements were equal to the properties' true and fair value. *Id.*

The trial court properly declined to issue a writ of review regarding the District's decisions to add a pump or enter into a contract, because such decisions were administrative in nature and not subject to judicial review. CP 470. The trial court also properly ruled that the District's 1986 resolution to operate under RCW 85.18 for purposes of diking and drainage assessments would not be further reviewed, because the 1986 resolution and its implementation complied with all statutory requirements. *Id.* The trial court did, however, issue a statutory writ of review regarding

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<sup>1</sup> CSUBC's first and second actions are the subjects of these consolidated appeals. CSUBC's third action, which challenges the validity of the District's 2011 adoption of assessments for 2012, is still pending in Island County Superior Court.

the District's modification of the assessment method in 1995 (regarding properties only partially within the benefited area and the value of undeveloped land) and the District's 2006 and 2008 resolutions regarding which statute to operate under. *Id.*

After the viability of its assessments as modified and clarified in 1995 were called into doubt by the first action, the District adopted a resolution in 2010 to revert to the unmodified RCW 85.18 assessment method used prior to 1995, which the trial court had already ruled was properly adopted and implemented throughout the District in 1986. That 2010 resolution was the subject of CSUBC's second action in Island County Superior Court, under Cause No. 10-2-00754-1.

Eventually, the Diking District and CSUBC filed cross-motions for summary judgment in both actions. CP 299-303. The trial court denied the District's motion for partial summary judgment and granted CSUBC's motion for summary judgment. CP 24-28. This appeal followed.

## **VI. SUMMARY OF ARGUMENT**

A diking district's adoption of an assessment method applicable to all protected properties within the district is a legislative function, not a quasi-judicial one. That type of legislative decision is not subject to review through the writ of review process, so the trial court erred in ordering the issuance of a

writ of review relating to the Diking District's adoption or modification of an assessment method.

Furthermore, even if the adoption of an assessment method was reviewable, the trial court erred in ruling that an invalid attempt to modify the assessment method constituted an abandonment of the existing assessment method, which had been used for all properties and improvements within the District since 1986. Under longstanding Washington law, if the attempt to modify the assessment method was invalid, it was a legal nullity, leaving the existing assessment method unaffected.

## V. ARGUMENT

### A. The standard of review on appeal is *de novo*.

On appeal from summary judgment, the standard of review is *de novo*, with the reviewing court performing the same inquiry as the trial court. *Herron v. Tribune Pub. Co., Inc.*, 108 Wn.2d 162, 169, 736 P.2d 249, 255 (1987). To the extent any factual issues are presented, the reviewing court must consider the evidence in the light most favorable to the nonmoving party, and summary judgment upheld only if reasonable persons could reach only one conclusion. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 833, 100 P.3d 791, 793 (2004).

**B. Adoption of an assessment method is legislative in nature, not judicial.**

The trial court's denial of the District's motion for partial summary judgment (and grant of CSUBC's motion for summary judgment) was based on an erroneous legal conclusion that the District's adoption of an assessment method is judicial in character. "The levying of a special assessment is a legislative act," *Joint Indep. Sch. Dist. No. 287 v. City of Brooklyn Park*, 256 N.W.2d 512, 516 (Minn. 1977), so Washington's longstanding rule that invalid legislation is a legal nullity applies to this case.

Specifically, the trial court erred by conflating the distinct functions of adopting an assessment method for use throughout the District, which is legislative in nature, and the application of that assessment method to a particular property, which is quasi-judicial. This is evident from the broad statement in the trial court's letter-ruling that the "Diking District's actions in assessing properties for special benefits were not legislative, but rather judicial in nature." CP 31.

The trial court's confusion on this issue was understandable, because the various activities of a diking district can be legislative, administrative (*i.e.*, executive), or quasi-judicial in nature. It is the nature of the activity, rather than the type of board or agency performing it, that determines whether the activity is legislative or judicial. *Floyd v. Dep't of Labor & Indus.*, 44 Wn.2d 560, 571, 269 P.2d

563, 569 (1954).

Generally, broad policy enactments, such as what assessment method to use, are legislative. See 5 E. McQuillin, *The Law of Municipal Corporations*, § 16.55 (3d ed.) at 213 (“The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it.”) (quoted approvingly in *Durocher v. King County*, 80 Wn.2d 139, 153, 492 P.2d 547 (1972)). Only the more specific decisions about how to *apply* the assessment method to a particular property are quasi-judicial.

A classic statement of the distinction between these two types of functions was made by the U.S. Supreme Court in *Prentiss v. Atlantic Coast Line Co.*: “A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. . . . Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.” 211 U.S. 210, 29 S. Ct. 67, 69, 53 L. Ed. 150 (1908) (quoted approvingly in *Floyd*, 44 Wn.2d at 571, 269 P.2d at 569).

Washington courts have developed a four-part test for determining whether an agency’s decision is quasi-judicial: (1)

whether a court could have been charged in the first instance with making the agency's decision; (2) whether the decision is one which historically has been performed by courts; (3) whether the decision involves the application of existing law to past or present facts for the purpose of declaring or enforcing liability; and (4) whether the decision resembles those that are the ordinary business of courts as opposed to those of legislators or administrators. *Williams v. Seattle Sch. Dist. No. 1*, 97 Wn.2d 215, 218-19, 643 P.2d 426, 429 (1982); see also *Floyd*, 44 Wn.2d at 571, 269 P.2d at 568-69; *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 821 P.2d 1204 (1992) (finding amendment of zoning ordinance was legislative rather than quasi-judicial in nature, and was not subject to judicial review through a writ of certiorari process).

The Diking District's adoption of an assessment method does not meet any part of this test. A court could not have been responsible for selecting which of the optional assessment methods to use throughout the District, nor have courts historically performed that function. Unlike the subsequent determination regarding the amount to assess a particular property, the adoption of the assessment method to be applied throughout the district does not involve the application of existing law to facts for the purpose of declaring or enforcing liability. (Courts historically have reviewed whether the amount assessed against a particular

property under the existing assessment method was proper, of course, but only that discrete function is quasi-judicial in nature.) Finally, selection from among several alternative assessment methods looks more like what legislators do than what courts do. Application of the four-part test shows that adoption of an assessment method is not a quasi-judicial function.

Because the trial court's order for issuance of a writ of review and its denial of the District's motion for partial summary judgment were based on an erroneous legal conclusion that the adoption of an assessment method is judicial in character, those decisions should be reversed.

**C. A statutory writ of review should not have issued regarding the Diking District's adoption of an assessment method, since that was a legislative or administrative act, not a quasi-judicial one.**

A statutory writ of review<sup>2</sup> may be issued when a tribunal, board, or officer, "exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law." RCW 7.16.040.

By the plain terms of RCW 7.16.040, the writ of review

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<sup>2</sup> A statutory "writ of certiorari" is also called a "writ of review." RCW 7.16.030.

process only applies to agency decisions that are “judicial functions.” *See also Williams*, 97 Wn.2d at 218, 643 P.2d at 429 (“The writ of certiorari is available only for review of actions ‘judicial’ in nature.”). As discussed above, adoption of an assessment method is not judicial in nature, so no writ of review should ever have issued. Indeed, even decisions about whether certain properties are benefited by diking and drainage systems are more akin to a governmental zoning function rather than a judicial function. *See Kerr-Belmark Const. Co. v. City Council of City of Marysville*, 36 Wn. App. 370, 674 P.2d 684 (1984) (city’s resolution reducing sewer utility service area, based on the operational capacity of its sewer lagoon, was an exercise of administrative discretion and not reviewable by a statutory writ of certiorari).

Since the writ of review process should only be used to review agency actions that are judicial in nature, the trial court erred in ordering issuance of a writ regarding the District’s adoption of an assessment method, which is legislative in nature.

**D. An invalid legislative act is a legal nullity, leaving the existing law unchanged.**

Invalid legislation is a “nullity” and is “as inoperative as if it had never been passed.” *Boeing Co. v. State*, 74 Wn.2d 82, 88, 442 P.2d 970, 974 (1968). Accordingly, invalid or ineffective legislation leaves the law as it stood prior to its attempted enactment. *Boeing*, 74 Wn.2d at 89, 42 P.2d at 974.

It would not make sense to treat ineffective legislation as a repeal of existing law while invalidating the replacement provisions, since that would leave gaping holes in the law. As the Washington Supreme Court has explained, under such circumstances, the “earlier law was repealed only to clear the decks and give the new act unobstructed operation and effect.” *Texas Co. v. Cohn*, 8 Wn.2d 360, 364, 112 P.2d 522, 525 (1941).

This general principle applies at both the state and local level. *See Palermo at Lakeland, LLC v. City of Bonney Lake*, 147 Wn. App. 64, 86, 193 P.3d 168, 178 (2008) (applying rule to municipal ordinance changing amount developer was charged for connecting to city’s water system). Furthermore, the principle has specifically been applied in the context of taxes and municipal charges. *See, e.g., Palermo*, 147 Wn. App. at 86, 193 P.3d at 178 (charge for connecting to city’s water system); *Texas Co. v. Cohn*, 8 Wn.2d 360, 364, 112 P.2d 522, 525 (1941) (fuel oil tax); *Bank of Fairfield v. Spokane County*, 173 Wash. 145, 172, 22 P.2d 646, 655 (1933) (unconstitutional 1929 bank taxation act had no effect on preexisting 1925 taxation act).

**E. If the District’s attempts to modify its assessment method were invalid, the attempts were ineffective for all purposes, so the previous, properly adopted assessment method remains in effect.**

The trial court found that the District in 1986 had properly adopted and implemented a uniform assessment method diking

and drainage for all properties within the District. (This was the same assessment method that has been used for diking assessments since 1960). If the District's attempts to modify the assessment method in 1995<sup>3</sup> or to operate under a different statute from 2006 to 2008<sup>4</sup> were invalid, those resolutions were ineffective for all purposes, leaving the prior assessment method unchanged.

The Court should reverse the trial court and rule as a matter of law that the RCW 85.18 assessment method properly adopted and implemented for all properties in the District in 1986 continues in effect. Any contrary ruling would not only invalidate the 1986 resolution and assessment method but also previous resolutions, as there would be no logical reason to stop with the 1986 resolution. This is precisely what the principal of "nullity" seeks to avoid and the reason why Washington courts have consistently applied this principle to a wide range of invalid legislation, including taxes and municipal water charges. Holding that an invalid attempt to adopt a new assessment method constitutes an abandonment of the existing assessment scheme would completely undermine the extensive system of special purpose districts that protect property and make beneficial improvements throughout the state.

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<sup>3</sup> None of the current board members were on the board in 1995.

<sup>4</sup> As discussed on the Statement of the Case section, no assessments were actually made from 2006 through 2008, so only RCW 85.18 has been used for assessments since 1986.

## VI. CONCLUSION

The trial court should not have ordered issuance of a statutory writ of review, because the adoption of an assessment method is a legislative function that is not subject to review by the writ process. The Court should reverse the trial court and order that the writs of review issued in these consolidated cases be canceled and quashed.

Even if the trial court could apply the writ of review process, it erred in ruling that an invalid attempt to modify the assessment method constituted an abandonment of the existing assessment method. In 1986, the District properly adopted a uniform diking and drainage assessment method that had already been in use for diking assessments used for most properties since 1960. If the District's attempts, years later, to modify that assessment method were ineffective, then as a matter of law and logic, the attempted modifications were ineffective for all purposes, leaving the prior assessment method unchanged. The Court should reverse the trial court and rule as a matter of law that, if the District's subsequent attempts to modify the assessment method were invalid, then the RCW 85.18 assessment method properly adopted in 1986 for use throughout the District remained in effect.

RESPECTFULLY SUBMITTED this January 20, 2012.

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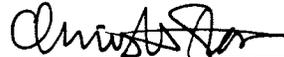
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