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No. 72345-6-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

SATWANT SINGH and DHALI WAL REAL ESTATE, LLC,

Appellants,

v.

COVINGTON WATER DISTRICT, A Washington Municipal Agency,

Respondent.

BRIEF

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And Dhaliwal Real Estate, LLC:

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I. INTRODUCTION

Appellants, Satwant Singh and Dhaliwal Real Estate, LLC, owned real property in Covington Washington. The real property is contained within the boundaries of Respondent, Covington Water District. To develop the real property Appellants had to obtain a Water Availability Certificate (herein “WAL”) and enter an System Extension Agreement. These required Incremental Connection Charges which Appellants paid, totaling \$74,800.00. The WAL and SEA required that the Incremental Connection Charges were non-refundable and despite Appellants not connecting to the system, Respondent has retained the \$74,800.00.

II. ASSIGNMENT OF ERROR

a. Assignment of Error

The trial court erred when it granted summary judgment in favor of Respondent and dismissed Appellants’ claims for refund of the Incremental Connection Charges. Specifically, the trial court improperly held that despite Appellants never actually connecting to the system, Respondent gets to retain all Incremental Connection Charges.

b. Issues Pertaining to Assignment of Error

1. Whether the trial court erred in concluding that the

Incremental Connection Charges are non-refundable and therefore Respondent gets to retain those funds?

**III. STATEMENT OF THE CASE AND PROCEDURE
RELEVANT TO REVIEW**

a. Factual Background

Appellants were owners of real property located in Covington, Washington. Respondent is a municipal agency which has exclusive control over distribution of water to parts of Covington. The real property of Appellants is contained within those boundaries.

In 2005, Appellants approached the City of Covington about developing the property. As a condition to this process, Appellants were required to verify water availability for the property. As the only available water source, Appellants approached Respondent, which verified sufficient water was available for Appellants development and it issued a WAL in August, 2005 (herein "WAL"). (CP 195-200).

The WAL Application Form provided the terms for issuance of the WAL, which were non-negotiable. One requirement was for Appellants to pay \$100.00 per "Equivalent Residential Unit" (herein "ERU"). Appellants paid for 30 lots, or \$3,000.00, upon applying for the WAL. Per the WAL, the ERU incremental payment towards final connection charges was non-refundable. The ERU changed during the

process and eventually settled on 31 lots (CP 202).

In 2007, Appellants moved forward with the development and entered into a SEA, which was signed in January, 2008 (CP 204-210). Again, there were no options for Appellants to negotiate the terms of the SEA. Appellants paid the required \$15,500.00 in incremental connection charges upon entry (\$500.00 per ERU). Appellants had paid \$9,700.00 in WAL deposits at this point. The incremental connection charges and WAL payment would be credited towards final connection charges to Respondent's system. (CP202-210)

In 2008, the market dropped, putting a stop to development by Appellants. In 2009, Appellants again attempted to move forward with the development, signing a new SEA and, in April, 2009 (CP 212-217), paid an additional \$15,500.00 in incremental connection charges. (CP 202)

In 2010, per the SEA requirements, an additional \$1,000.00 per ERU was paid, totaling \$31,000.00. After the 2010 extension was signed, Respondent amended its policies and lowered the requirement for extensions to \$100.00 per ERU (CP 219). Appellants paid for another extension in 2011 of \$3,100.00. (CP 202)

The total paid by Appellants was \$74,800.00. The amount paid between the parties is not in dispute (CP 202).

The project was terminated in late 2011 when funding was not available for Appellants to proceed with the project. The property has since been foreclosed. (CP 192, #14)

During the process, Appellants worked with Respondent to meet all the requirements to connect to the water system. Engineering was completed to extend the system to the property; all required charges and fees were paid; and all non-negotiable Agreements signed. An additional payment by Appellants was a “Developer Receivable Account.” This account was used to pay the actual costs of Respondent. When the project was terminated, Appellants received a refund of \$2,516.25 after all of Respondent’s costs were paid. (CP 202)

Throughout the process, Respondent never informed Appellants of any additional projects or actions taken because of Appellants new development. Specifically, no communications were made about extra costs tied to the S.E. Wax Road/180th Avenue SE Improvement Project because of Appellants development. The S.E. Wax Road/180th Avenue SE Improvement Project had been in the process from before January, 2002. Appellants were never informed that water rights were obtained from Howard Hanson Dam because of its development. Appellants were only informed that water was available to support 31 units, before the S.E. Wax Road/180th Avenue SE Improvement Project was completed,

and that replacement piping would have to be installed along 268th Avenue. (CP 192 #16-18)

The improvements to be made along 268th have not been completed by Respondent or any other third parties (CP 192 #19). Other than the costs paid for by the “Developer Receivable Account,” Respondent expended no other funds as a result of this project. (CP 192 #13)

Respondent’s use of the funds was to pay for capital improvement projects. However, because the funds were kept in a general account, no actual accounting can be provided by Respondent of use of the funds. (CP 181, lines 4-10).

b. Procedural History

Appellants filed this lawsuit for declaratory judgment against respondent on September 20, 2013 (CP 1-4). Respondent moved for summary judgment (CP 15-38). Appellants responded to the motion (CP 155-167).

On July 29, 2014, the trial court granted Respondent’s motion for summary judgment (CP 226-228). No verbal or written ruling was made by the trial court to supplement the granting of summary judgment.

IV. LEGAL AUTHORITY AND ARGUMENT

The issue is not whether the SEA is unenforceable but whether a provision within the SEA is enforceable; specifically, that the Incremental Connection Charges to be used for final connection charges is non-refundable when final connection never occurs.

a. Powers

RCW 57.08.005 (11) provides the powers of a district which include fixing of rates and charges and charging such reasonable connection charges “in order that those property owners shall bear their equitable share of the cost of the system.” In other words, when a property owner actually connects, they are purchasing an interest of the already existing system and reimbursing the district for paying up the costs to install infrastructure making the water available. The statute also provides for how this is calculated.

Respondent adds the requirement that the payment of the Incremental Connection Charge is “non-refundable,” even if connection never occurs (CP 195, section #5, CP 205 section #3, CP 213 section #3). Do RCW 57.08.005 and RCW 57.22.010 grant the power to a District to add additional criteria not

specifically addressed in the statutes?

RCW 57.22.010 provides that a district can condition connection to ensure full compliance (subsection 5) and require provisions of sufficient security to “ensure completion” (subsection 6). In this matter, does making the Incremental Connection Charge “non-refundable” achieve the purposes of RCW 57.22.010 or is this beyond the powers of a district?

The requirement of payment of an Incremental Connection Charge is reasonable and not disputed. If work actually started, requiring a District to complete the project, then the Incremental Connection Charge should be used as “sufficient security.”

In this case, no actual work started (CP 192 #12). The statute implies that work has to have already started, therefore completion is necessary. If the extension along 268th had started and Respondent was required to have to complete it, then the Incremental Connection Charge should be used for that purpose; as “sufficient security.”

Respondent used the funds for “capital improvements” (CP 180 lines 4-10). Using the funds towards this purpose does not ensure full compliance or completion of the project.

The statute does not state that the funds could be used for

other purposes but it does not say it could not either. RCW 57.22 is titled “Contracts for System Extensions.” Nothing within RCW 57.22 indicates that the funds can be used for any other purpose but connection or extension tied to a specific project. This statute grants the authority to districts to make sure they have sufficient security and use those funds to complete the work in necessary.

Respondent would like the court to believe that it had expended resources already and these funds should be used to reimburse those resources (CP 31, line 6-9). Therefore, since the statute does not prohibit using these funds elsewhere it can add this requirement. This is misleading.

First, no new facilities were built, no new water rights were obtained, and no new infrastructure was installed as a result of Appellants’ development. Appellants approached Respondent and stated it had 31 units it wanted to connect. Respondent verified its system could support the connection. Nothing new was added to make sure sufficient water was available for Appellants. No new resources were expended by Respondent. Respondent had expended resources to make it available when the WAL was requested. When connection actually occurred it would be reimbursed those funds. Respondent did not use the funds for that

purpose. It used them to fund future capital improvements (CP 31, lines 18-20). This, despite the statute stating that the funds are calculated and to be used to reimburse the district the “equitable share of the cost of the system.” RCW 57.08.005(11)

Next, the statute has to do with connection and ensuring a district is not left holding the bag. Sufficient security is to be provided that if a district is forced to complete an extension or development, it does not have to use its own funds for that purpose. In this case, Respondent did not have to expend any funds as a result of Appellants’ development stopping. Instead, by simply adding “non-refundable,” Respondent received a nice windfall of \$74,800.00 for doing nothing.

Last, no actual work has been completed by Respondent. The same piece of land is still undeveloped. Since the 31 units were not connected, Respondent’s system was not used, leaving that capacity available for other parties to connect. Respondent even admits in its interrogatory answers that funds were used for capital improvements, not connection charges. (CP 181, lines 4-10).

Another way to view the “non-refundable” provision is that it is a penalty. RCW 57.22.010 and 57.08.005 provide authority

for Districts to enter into contracts for extensions of its system. It provides for “provisions of sufficient security” to ensure completion of a project once it is started. It does not provide for the right to charge a penalty.

Whatever the basis for adding the “non-refundable” language, it does not matter. Respondent does not have the power to use the funds for any purpose except as provided by statute. In this case, the funds could be used to complete the development and connect if necessary. Obviously, it is not necessary, because over three years has passed and Respondent has not had to expend any funds to complete Appellants project, requiring use of the Incremental Connection Charges.

b. Arbitrary/Capricious/Unreasonable

Action of a governmental body cannot be arbitrary, capricious, or unreasonable. “Arbitrary and Capricious means ‘willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.’” *Gehr v. South Puget Sound Community College*, 155 Wash. App. 527, 534, 228 P.3d 823, 826 (2010). Respondent’s requirement that the Incremental Connection Charge is “non-refundable” is “unreasonable.”

Appellants wanted to develop real property located within

Respondent's boundaries. In order to do so, Appellants had no choice but to comply with all conditions of Respondent as no other options were available for water. This is because Respondent has exclusive control over development within its boundaries under the Public Water System Coordination Act (RCW 70.116). This monopoly puts Respondent in a position that it does not have to negotiate.

Appellants concede that Respondent has authority to put reasonable conditions on connecting to its system. Reasonable conditions could include replacement of existing pipes to larger capacity or even that "sufficient surety" exists that if the project is abandoned after commencement, those funds can be used to complete the project.

It is unreasonable to have a "non-refundable" provision to either force the project to be completed or penalize the owner. This does not take into account factors preventing a developer from proceeding with the project. Respondent knowingly adds this provision without regard to various factors that may prevent a developer from moving forward with a project, such as no funding. Especially when no harm comes to Respondent by Appellants not proceeding at the point it stopped.

c. Duty to Serve/Monopoly/Proprietary

Respondent has a "duty to serve" its customers. The "duty to serve" is to meet minimum standards of water quality. It does not mean

that a District has a duty to use its monopolistic powers to try and take funds from any other source it can under the guise its customers should not have to carry the burden.

The Duty to Serve is controlled by RCW 43.20.260. This statute does not require a District to take measures to provide water. A District only has to allow connection to a party if it can show:

“(1) Its service can be available in a timely and reasonable manner; (2) the municipal water supplier has sufficient water rights to provide the service; (3) the municipal water supplier has sufficient capacity to serve the water in a safe and reliable manner as determined by the department of health; and (4) it is consistent with the requirements of any comprehensive plans or development regulations adopted”

If the water was not available, Respondent could have easily rejected the request for a WAL. This is why moratoriums exist. Instead, Respondent used its powers as a government to include non-negotiable terms in the SEA and claim it should keep the Incremental Connection Charges as a “duty to serve” its customers, using the funds for “capital improvements.” (CP 181,lines 4-10). It should be noted that it does not state anywhere in the SEA or 57.22 that the funds can be used for anything other than Connection Charges.

Governmental bodies can act in a proprietary capacity in business-like ventures. This is not a business-like venture. It is

governmental; the Public Water System Coordination Act (RCW 70.116) assigned boundaries giving Respondent exclusive control over distribution of water within its boundaries.

If it truly was business-like, third parties could come and offer water services within the boundaries. Giving Respondent “monopoly” control over the water does not create an open free market for the service to be provided. Proprietary is, for example, the bidding process. Terms are provided and anyone can bid. That is open and two-way. Here, the terms of the SEA are, take it, or leave it.

Respondent, in its Motion for Summary Judgment contends that Incremental Connection Charges should be used for constructing new water facilities. Respondent states, “If the District is required to treat the incremental connection charge payments as refundable deposits, the District would be prohibited from using those funds to construct new water facilities necessary to fulfill the District’s duty to serve.” (CP page 19, lines 9-11). Respondent adds, “For legitimate policy reasons, the District has determined that it is more equitable to its existing customers to use connection charge revenues received as development occurs, including incremental connection charge payments, to pay for a significant portion of the necessary improvements.” (CP pages 19-

20, lines 20-1).

After reading this the old saying, “do not count your chickens before the egg hatches” comes to mind. Until the connection actually occurs new water facilities are not necessary. For example, in this matter, Appellants were going to connect 31 units. They did not, so, those 31 units are still available for other connections. No new facilities are needed because the system has not been reduced.

If Appellants had connected, it would have paid its share of the costs (RCW 57.08.005). Once connected, Appellants would have contributed towards its fair share of the burden. Making sure that the fair share of the burden is paid by Appellants after connection, would have been Respondent’s duty to its customers. Instead, Respondent would like to keep the funds, without providing anything in return, and claim it has a right to keep these funds under the guise of “Duty to Serve.”

d. Fee/Tax

Is a “non-refundable incremental connection charge” a fee or is it a tax/penalty? Part of it is a fee (ie. the incremental charge), and part of it is a tax/penalty; the “non-refundable” language).

In *Samis Land Co. v. City of Soap Lake*, the Court applied the three part test established in *Covell* to determine if a charge is a fee or a

tax (*Covell v. City of Seattle*, 127 Wash 2d 874, 905 P. 2d 324 (1995)).

Samis is an applicable case because the City of Soap Lake was attempting to charge property owners for the availability of water even if the property was not connected. *Samis Land Co. v. City of Soap Lake* 143 Wash. 2d 798, 23 p.3d 477 (2001). In this case, Respondent is attempting to make an Incremental Connection Charge non-refundable simply because it already built structure and has made water available.

The three part test of *Samis* is:

1. “Whether the primary purpose of the legislation in question is to regulate the fee payers or to collect revenue to finance broad-based public improvements that cost money;”
2. “Whether or not the money collected from the fees is segregated and allocated exclusively to regulating the entity or activity being assessed;” or
3. “Whether a direct relationship exists between the rate charged and either a serve received by the fee payers or a burden to which they contribute” *Id.* at 806.

The “non-refundable incremental connection charge” needs to be looked at in parts: 1. Incremental connection charge and 2. Non-refundable.

Under the first part of the test, it is conceded that the incremental connection charge is a charge. However, that is not what happened to the

funds. The funds were unilaterally transferred to broad-based public improvements under the “non-refundable” language based on Respondent’s position (ie. to obtain water and build facilities). Even if the funds were kept to make sure the work was completed, the work has not been completed. Initially the “incremental connection charge” was a charge. Had Appellants completed the development, the funds would have been used towards the actual connection charges and applied as payment towards its “equitable share of the cost of the system” (RCW 57.08.005(11)). When the development stopped, it converted to a tax (or penalty) on Appellants for not connecting.

The second part questions what the funds are used for. *Samis* explains, “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” *Id.* at 807. RCW 57.08.005 (11) states that the funds were a “charge to connect to the district’s system.” If Appellants had, in-fact, connected, then it would be a fee/charge because it was paying for their “equitable share of the cost of the system” RCW 57.08.005(11).

In summary judgment, Respondent’s position was that the burden of creating new infrastructure and obtaining water rights should not be on

its customers (CP 34, lines 1-3). That right does not shift the costs to those that are not connected. This argument, which has been refuted by the Courts, is simply an “availability” charge, which makes it illegal. *Samis* is similar in attempting to enforce a similar “charge.”

In *Samis*, the City of Soap Lake was attempting to apply a “standby charge” upon vacant, unconnected land. After analysis of the *Covell* Test, the court held that the “charge is a property tax and that, because it is not assessed uniformly according to the respective values of the properties within the class, it violates article VII, section 1 of the Washington Constitution.” *Samis* at 801.

Applying the wrong reasoning of *Samis* to this case, (because the water and facilities are available to all property located within Respondent’s boundaries), Respondent should be able to assess an “incremental connection charge” to those real properties within its boundaries not connected but someday could. After all, the burden should not be on those already connected! This is an “availability” charge, or tax, in disguise.

The third analysis looks at, again, how the funds are allocated. If the funds were used for an actual service received, then it would remain a fee. No service was received by Appellants as they never actually connected. However, Respondent contends it should keep the funds

because of the “burden” on its customers (CP 34, lines 1-4). The very use of the word “burden” by Respondent verifies that it is a tax.

Appellants do not dispute that an “incremental connection charge” can be and should be charged when a party seeks to connect to the system. It is also not disputed that if work had, in fact, commenced, leaving the Respondent having to complete the work, then the funds could be used to “complete” the part affecting Respondent or its customers under RCW 57.22.010. The “non-refundable” language is the tax. Remove that language and the requirements of RCW 57.22.010 can still be met. No authority under RCW 57.08.005, 57.22.010, or any other statute, exists for such a tax. Therefore, it should be rejected.

e. Public Policy

The test to determine if something is against public policy is whether the contract is a “tendency to evil,’ be against public good, or to be injurious to the public.” *Viking Properties, Inc. v. Holm* 155 WN 2d 112, 126, 118 P.3d 322 (2005).

Allowing for a District to have the power to add provisions to non-negotiable contracts will deter developers, keeping the burden on customers. It also allows terms to keep funds that have not been earned.

Contracts require offer, acceptance, and consideration. This

provision allows a District to receive a benefit without providing any consideration. The only consideration provided by Respondent was review and providing of the agreements. However, this was all paid through the "Developer Receivable Account." There is no consideration for \$74,800.00. The contract terms for these funds were that Appellants connect and, in return, pay for the share of the costs. Appellants paid alright, but did not receive consideration in return. Put another way, this is illusory as Respondent had to provide nothing. The public would not want the government, providing exclusive services, to include harsh non-negotiable terms, leaving a party with no choice but to accept. Especially in this case when the property cannot be moved to a different provider.

f. Windfall/Third Party Developer

It is clear that a connection charge is for the purpose of paying for one's share of the system, and up to 10 years thereafter (RCW 57.08.005(11)). This is dictated by statute. Respondent, with the non-refundable provision, is simply trying to say it has a right to keep this money for improper reasons.

The reality is, Respondent wants to keep money it has done nothing for. It becomes a windfall when the next developer to come along pays the same thing. This is the case. In the Declaration of Brian Borgstadt (CP 57, #23), he explains that a new developer is developing

the same property. That developer has applied for and received a WAL. If it connects, it will pay the connection charge. With some inflation increases, this developer will pay the same as Appellants. After all, it is the same piece of land.

Respondent will have the developer install the same pipes at the developer's cost and pay the same connection charge. Now Respondent gets that money, plus keeping the \$74,800.00 it collected from Appellants without having to expend anything. Appellants lose \$74,800.00 and do not even get a share of the system. They receive nothing for this money. Respondent gets to double up on the same project for the same items in its exclusive boundaries.

V. CONCLUSION

Respondent, as a governmental unit acting in a governmental capacity, does not have the power to make Incremental Connection Charges "non-refundable." Once the project is abandoned, by keeping the funds Respondent effectively assesses an illegal tax/fee/penalty. This does not serve public policy. If the trial court's ruling is upheld, Appellants will suffer damages of \$74,800.00 while Respondents would receive a nice windfall, without providing anything.

In light of the foregoing, Appellants request that this court

reverse the dismissal and reinstate this case against Respondents
subject to its ruling herein.

DATED this 25th day of November, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2014, copies of the following document:

1. Appellants' Brief

was served on counsel at the following address via first class mail, postage prepaid, facsimile and e-mail:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 25th day of November, 2014, at Kent, Washington.



Brian J. Hanis