

NO. 88108-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LILY A. BANKS, MARC A. BERGE and BARBARA
BERGE, husband and wife, LEE GOTTI, EDWARD H.
LILLEY SR., KENNETH D. SHAW III and SANDRA
A. SHAW, husband and wife, and that class of persons
and entities similarly situated,

Petitioners,

v.

CITY OF OCEAN SHORES, a municipal corporation,

Respondent.

AMICUS CURIAE MEMORANDUM
OF THE TAX FOUNDATION
IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

The Tax Foundation supports the petition for review in this case. The petitioners ask this Court to decide whether a city's mandatory charge is a permissible fee or an illegal tax. The frequency of such cases, both in Washington and nationally, demonstrates the importance of the distinction. The issue recurs because municipalities wish to exceed the limits of their taxing authority through tax-like charges denominated as fees.

Taxation is government's power to raise revenues to advance the common good. As Justice Holmes famously put it, "Taxes are what we pay for civilized society" *Compañia General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100, 48 S. Ct. 100, 72 L. Ed. 177 (1927) (Holmes, J., dissenting). But taxation also has a dark side. Justice Marshall pointed out the harsh reality that "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431, 4 L. Ed. 579 (1819). If left unchecked, the taxing power can be abused in a myriad of ways limited only by the human imagination. Consequently, we limit the power of taxation and assign to the courts the task of enforcing those limits. Justice Holmes summed this up in equally memorable terms: "The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223, 48 S. Ct. 451, 72 L. Ed. 857 (1928) (Holmes, J., dissenting).

Taxation is inherently coercive. It relies on compulsion, not on the beneficence of taxpayers. Individual taxpayers need not agree to the tax or receive fair compensation for the tax they pay. Rather, they must pay because payment is demanded by sovereign authority. Because taxation is so coercive – and so readily subject to abuse – the framers of Washington’s constitution placed constraints on its exercise in order to limit opportunities for misuse. They restricted who can exercise the power of taxation (Const. art. VII, § 9), how the tax burden is to be distributed (Const. art. VII, § 1), and at what point tax officials must obtain the direct consent of voters to impose a higher level of taxation (Const. art. VII, § 2). These safeguards were established for the purpose of limiting the discretionary authority of legislative officials. The responsibility for enforcing these limitations is vested in the courts. Const. art. IV, § 6.

The Tax Foundation has long opposed legislative efforts to evade constitutional safeguards by re-labeling as “fees” what are, in substance, taxes. Such word games undermine both public confidence in the rectitude of government and the protections against abusive taxation embodied in the constitution. The Court of Appeals in the decision below failed to preserve and protect these important constitutional principles.

The Tax Foundation’s concerns are not diminished by the fact that the Court of Appeals did not publish its decision. While GR 14.1 prohibits citation of the decision in subsequent Washington cases, this does not mean

that the Court of Appeals decision has no significance beyond the city limits of Ocean Shores. This case involves a highly specialized area of law where there are high stakes and limited authority. Washington practitioners in this area of law will be aware of the Court of Appeals decision and will necessarily consider it when advising on the legality of such arrangements. This Court should accept review to correct the erroneous decision of the Court of Appeals.

II. ARGUMENT

A. An exaction based on land ownership is a tax on land.

Taxes fund collective benefits that cannot be provided effectively, if at all, through market transactions. Abraham Lincoln put this nicely:

Why, then, should we have government? Why not each individual take to himself the whole fruit of his labor, without having any of it taxed away, in services, corn, or money? . . . The legitimate object of government is “to do for the people what needs to be done, but which they can not, by individual effort, do at all, or do so well, for themselves.”

II John G. Nicolay & John Hay, COMPLETE WORKS OF ABRAHAM LINCOLN 182-83 (Lamb Publishing 1905) (1894).

These collective benefits – public goods to an economist – are funded by government through taxation because:

The difficulty with public goods is that consumption cannot generally be prevented for nonpayment. Once the good is produced, no one can be selectively excluded from enjoying its benefits.

K. Case, ECONOMICS AND TAX POLICY 120 (1986). The market will not adequately supply public goods because the benefit cannot practically be limited to those who choose to pay. As result, a great measure of their benefit goes to “free riders” who can enjoy the benefit without paying. Taxation solves this problem by eliminating choice and compelling payment to support the public goods that society deems necessary. The choice of what public goods to provide and in what amount is made through the political process rather than by individuals “voting” their individual preferences in the marketplace.

The public drainage facilities in Ocean Shores are public goods. Their use and benefit cannot be rationed by price. Owners, renters, businesses, employees and visitors all benefit in varying degrees from the city drainage facilities. The cost of maintaining the facilities cannot be paid through a price mechanism in which the beneficiaries voluntarily pay a price to receive service because there is no way to withhold benefits from those who choose not to pay. Free riders would receive the same benefit as those who pay.¹

When government imposes a mandatory charge on land to pay for such public goods, it is exercising the power of taxation. This has long

¹ There also is no practical way to measure the amount of benefit to any particular individual. For example, the benefit of unflooded streets to a resident who suffers a heart attack and needs unflooded streets to get prompt medical attention would be far greater than the benefit to a non-resident owner of an unimproved lot who only visits the city during summer. Yet Ocean Shores imposes a charge based on land ownership that has no relationship to relative benefit.

been understood. “Taxes are justified by the expenses necessary for the conferring of common benefits. It is not possible to make particular payments conform to particular benefits nor to the cost thereof.” V. Custis, THE STATE TAX SYSTEM OF WASHINGTON 131 (1916). An absolute, unavoidable charge on land is a tax on land. The Ocean Shores stormwater charge is just such a tax. If the constitutional requirements for taxes on land can be evaded through the name game employed here, it will undermine the constitution’s safeguards against tax abuse.

B. The Ocean Shores stormwater charge is neither a fee for services rendered nor a regulatory fee.

Contrary to the decision of the Court of Appeals, an absolute, unavoidable exaction against land is a tax, not a fee. Such a charge cannot be a fee paid in exchange for services because its imposition does not depend on any particularized service being rendered in return. Nor can it be a regulatory fee because it regulates nothing.

The factors cited by the Court of Appeals for classifying the Ocean Shores stormwater charge as a fee are not valid. The Court of Appeals concluded that a charge can be classified as a regulatory fee if the adopting ordinance recites that the proceeds will be used to “regulate” something, here to regulate the flow of stormwater. *Banks v. City of Ocean Shores*, No. 42587-4-II, slip op. at 16-17. But funding public drainage facilities for the common good is the function of taxation, not a regulatory fee. The Ocean

Shores charge does not regulate those who pay or their activities. It just taxes land to pay for maintaining a public good.

The Court of Appeals declared that the charge is a fee because the City responds to drainage complaints and because all lots benefit from facilities that help preserve access to and usability of the lots and prevent or lessen flooding. *Banks*, slip op. at 17-18. But these are just the type of shared benefits that are common to virtually all public facilities that are funded through taxation. Roads, for example, preserve access to and usability of property. Fire and police protection reduce risks of damage or harm to all lots in a city. Responding to complaints about clogged drainage ditches is no different than when fire and police departments respond to calls for aid or when street crews respond to complaints about potholes. See *Covell v. City of Seattle*, 127 Wn.2d 874, 890, 905 P.2d 324 (1995). These are not grounds for declaring that the stormwater charge is a fee rather than a tax.

Roadside ditches and culverts form the great bulk of the public drainage facilities in Ocean Shores. Ex. 206 at p. 2. It is well established that the general public is the intended beneficiary of this infrastructure.²

² *DiBlasi v. City of Seattle*, 136 Wn.2d 865, 882, 969 P.2d 10 (1998) (streets and street drainage are maintained for the general public, not adjoining property owners); *Sigurdson v. City of Seattle*, 48 Wn.2d 155, 159, 292 P.2d 214 (1956) (maintaining street drainage systems is “ancillary to the function of maintaining the streets”); *Yarrow First Associates v. Town of Clyde Hill*, 66 Wn.2d 371, 375, 403 P.2d 49 (1965) (“Streets are dedicated to the public use.... They pertain to the exercise of a governmental function.”).

There is no dispute that these ditches drain runoff from the roads or that they were originally installed and maintained as auxiliary improvements for the streets. Their chief function is to control roadway flooding and limit damage to roadbeds.³ The ditches and culverts also drain elevated groundwater when the water table rises. That, too, is a public benefit shared in common. It is not a direct service benefit that adjoining lot owners can choose to purchase.

Land owners do not cause the water table to rise and they are not responsible for containing natural surface or groundwater flows. Under Washington's common enemy doctrine, so long as the land owner does not artificially collect and discharge water onto the land of others, the responsibility for drainage falls on the owner whose land is threatened, not on the owner where the rainfall landed. *Phillips v. King County*, 136 Wn.2d 946, 958, 968 P.2d 871 (1998). The vast majority of land owners in Ocean Shore do nothing to create drainage burdens on the City. Charging them a fee for owning land does not regulate their stormwater discharge. It taxes their land to pay for public goods.

Since land owners do not create drainage burdens, it cannot be argued that the stormwater charge is proportional to a burden they create.

³ Paradoxically, the only lands not charged the fee are the roads themselves which are the prime beneficiaries of the roadside ditches. Ocean Shores Municipal Code § 13.20.030.

The charge does not regulate land owners. Instead, it taxes land for the public benefit.

C. The Court of Appeals decision undermines the constitutional safeguards against tax abuse.

Tax uniformity is the “highest and most important principle” of taxation. *Inter Island Tel. Co. v. San Juan County*, 125 Wn.2d 332, 334, 883 P.2d 1380 (1994). The tax uniformity clause of the Washington Constitution (Const. art. VII, § 1) requires that property of the same class be taxed at an equal and uniform rate so that citizens contribute ratably to the cost of government. This salutary principle promotes both fairness and efficiency in taxation. It constrains the predictable efforts of interest groups to attempt to shift the tax burden to others. It minimizes the unfairness and welfare loss occasioned by discriminatory taxation. If cities can render this provision a nullity simply by asserting that what is actually a tax on land is in their view a regulatory fee, nothing stands in the way of comparable charges for police, fire, schools, and so on. That approach guts the uniformity clause.

The constitution’s framers placed the power of taxation with the state legislature which can define and limit what taxes local officials may levy. But if local government can levy taxes in the guise of regulatory fees, the intended legislative control over local taxation will be thwarted. The same will be true for the one-percent levy limitation (Const. art. VII, § 2)

because that limitation does not apply to fees. The approach adopted by the Court of Appeals undermines all of these constitutional requirements.

As this Court has recognized, “sharp distinctions between fees and taxes” must be maintained to preserve the constitution’s tax safeguards. *Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 805-06, 23 P.3d 477 (2001). Inconsistent and contradictory decisions frustrate this goal and breed uncertainty, conflict and further litigation. Clear standards, based on principle and logic, preserve constitutional values and minimize wasteful litigation. *See, e.g., State v. Valdez*, 167 Wn.2d 761, 774-75, 224 P.3d 751 (2009) (courts must be wary of wandering from fundamental principles and reasoned analysis when interpreting constitution).

III. CONCLUSION

The framers of the Washington Constitution were prudently concerned with the potential for abuse of the tax power. They erected constitutional standards that dictate where the tax power resides, how the property tax burden is to be distributed, and the level of taxation can be imposed against property without voter approval. The Court of Appeals decision approves the City’s violation all of these constitutional safeguards and gives encouragement to government entities throughout the state and elsewhere that they, too, can impose mandatory exactions against property without complying with either the statutory or constitutional requirements for taxation. That message undercuts constitutional principles and will

inevitably lead to further confusion, conflict and litigation. The Tax Foundation, therefore, urges the Court to accept review and reverse the decision of the Court of Appeals.

DATED this 15th day of January, 2013.

Respectfully submitted,

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