IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LILY A. BANKS; MARK 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, Appellants, v. CITY OF OCEAN SHORES, a Washington municipal corporation, Respondent.	No. 42587-4-II UNPUBLISHED OPINION

Johanson, J. — Class representatives of Ocean Shores property owners, including Lily A. Banks (Banks),[1] appeal a jury's verdict that Ocean Shores's storm water utility charge was a regulatory fee. Banks argues that (1) the relevant statutes do not authorize the storm water charge, (2) the storm water charge is a property tax disguised as a regulatory fee, (3) the storm water charge violates constitutional protections on property tax, (4) the trial court improperly instructed the jury on distinguishing a tax from a fee, and (5) the trial court erred by excluding

[1] Lily A. Banks, Mark A. Berge, Barbara Berge, Lee Gotti, Edward H. Lilley Sr., Kenneth D. Shaw III, and Sandra Shaw are representatives of the class of similarly situated individuals and entities.

certain witness testimony and written evidence. We conclude that the statutes authorize the storm water charge, that substantial evidence supports the jury's verdict, that the trial court properly instructed the jury, and that the trial court did not otherwise err. Because we uphold the jury's verdict that the charge is a regulatory fee, we do not reach the question of whether the charge, as a tax, violates the constitution. Accordingly, we affirm.

FACTS

I. Ocean Shores Geography and Development

Ocean Shores is a city located on the Point Brown Peninsula; situated only a few feet above the saltwater of Grays Harbor. During the fall and winter's prolonged heavy rain, the shallow water table may rise to meet or exceed the city's flat land surface.

Beneath the city, the porous, sandy soil extends to a depth of about 100 feet. When the ground is not saturated, the porous soil readily absorbs very heavy rainfall. In addition to vertical absorption, the sandy ground also facilitates lateral, underground water movement. This is because after the vertically absorbed rainwater reaches a less permeable soil material, the absorbed rainwater (groundwater) begins moving laterally through the sandy soil underneath neighboring parcels. Before private development, the absorbed rainwater expressed itself from the ground, forming ponds and wetlands.

A private developer purchased the peninsula in the early 1960s. He dredged the existing lakes and canals, using the fill to build up the peninsula. He also excavated a series of artificial lakes and canals. Additionally, the developer plotted and excavated a network of drainage ditches running alongside the roads and across private property. Because paving roadways reduced the

exposed surface area of the porous sandy soil and because roadways are particularly susceptible to flooding, the need for ditches intensified with development. Underneath the roads, the developer designed culverts to connect the ditches to spill points into the artificial lakes and canals. At the southern end of the biggest artificial canal (Grand Canal), the developer "punched through" an outlet to the ocean through the bay estuary and installed an adjustable outfall weir. The weir maintains the water table in the lakes and canals and prevents saltwater from contaminating the freshwater wells within the system.

The lakes and canals provide the amenity of waterfront property; they also improve ground drainage in a manner similar to that occurring when a farmer constructs ditches to drain low-lying land. The ditches, culverts, and weir function as part of the drainage system. The city of Ocean Shores (City) incorporated in 1970 and took over maintenance responsibilities and improvement projects for the ditches, culverts, canals, and weir. The City budgeted for these maintenance costs through a tax-supported street fund.

II. The Stormwater Utility Charge

In 1980, the City created the storm water utility. Ord. No. 296. From 2000 until 2002, the City collected a per-lot fee from real property owners based on the lot's zoning and use. Ord. No. 705 § 3. From residential property owners, the City collected a flat per-lot amount regardless of developments or improvements. Ord. No. 705 § 3.

In 2002, the City changed the structure of the storm water utility charge, opting for a per-square-foot basis for calculating the amount. From 2002 to the present, "the rates and charges for use of the stormwater system shall be $0.0003250 per square foot per month for owners of all

land within the ordinary high-tide line." Ord. 743 § 4. The ordinance claims authority under RCW 35.67.10 through .20 and RCW 35.92.020 and states the purpose for the storm water utility charge as:

> The regulation of storm and surface water through the continued operation, maintenance and improvement of the Stormwater System is necessary in order to adequately protect the public health, safety and welfare of City residents and property owners.

Ord. 743 § 1.5; Ex. 237.

The City segregates the revenue from the storm water utility charge into a separate account. The City uses the revenue to maintain and improve the storm water system, including the ditches, culverts, catch basins, and outfall weir. Additionally, the City uses the revenue to respond to residents who report clogged ditches or standing water in their lots.

III. Procedure

In December 2003, Banks, as part of a class action, sought a declaratory judgment that the storm and surface water charges were unlawful, and she also sought a refund, injunction, and other relief. Banks alleged that the City's current and prior storm and surface water charges (collectively, storm water charges) are invalid because they do not comply with statutory requirements for municipal storm water utility charges; they exceed the City's statutory authority to impose those charges; and they are unconstitutional taxes on real estate.

The City moved for partial summary judgment on Banks's statutory and constitutional claims. Banks responded with a summary judgment cross motion on her constitutional and statutory claims. Banks alleged that the storm water charge was unconstitutional, claiming that

the City did not have a storm water system and that the ditches' primary function was to drain water from the roads.

In a memorandum decision, the trial court concluded that RCW 90.03.500 did not contain an implied limitation on the City's power to set storm water charges. But, the trial court also noted:

> I see competing conclusions from the facts throughout this case. Looking at the entire drainage flow, there are issues from the beginning when the rain strikes the ground to the end when the water spills out of the city's drainage. I am not able to draw my own conclusions without overstepping my limits in summary judgment.

Clerk's Papers (CP) at 128. The trial court concluded that because the court would have to evaluate the evidence and assess the credibility and substance of the witnesses, summary judgment was inappropriate. After the trial court denied summary judgment, Banks filed a motion for reconsideration, which the trial court denied.

Before trial, the court excluded expert testimony from an economist, Dr. Neil Bruce, as irrelevant, prejudicial, and unhelpful to the jury. Banks argued that the jury needed to decide not only the drainage conditions but also whether the storm water charge is a tax or a regulatory fee. The trial court excluded the economist's testimony, reasoning that this testimony would have "a huge potential to confuse the jury" because the jury must answer whether the storm water charge is a tax or fee based on the law. Verbatim Report of Proceedings (VRP) (Sept. 24, 2010) at 36.

The trial court conditionally excluded testimony criticizing the design of the 1980 replacement weir because the present case consisted of Banks's challenge to the City's money collection, not to the City's decisions regarding the 1980 weir repair. The trial court held:

> [A]ny argument that the problem here is the City's creation . . . cannot be made without a specific showing that it is relevant, and that showing would have to be made in a hearing outside the presence of the jury.

VRP (Sept. 24, 2010) at 51. Banks did not make a subsequent offer of proof.

Early in the trial, Banks moved to admit a document from 1974 as evidence that before the City's storm water utility, the City paid for street drainage from a tax supported fund. The trial court refused to admit the document because it was not relevant, lacked foundation, was potentially confusing to the jury, and was duplicative. Banks explained that she intended this document to be part of a series of 1970s documents to show that the City had a pattern for paying for street drainage from the City's general funds. Banks stated she would make an offer of proof concerning these proposed documents. The trial court asked the parties to confer outside the jury's presence before proposing an exhibit or making an offer of proof. Banks asked if it could make an offer of proof and move for admission of the series of 1970 documents and the trial court responded that counsel should first confer together during the break. Upon returning from that break, Banks did not renew her request to make an offer of proof.

After Banks presented her case in chief, the City moved for judgment as a matter of law dismissing Banks's claim that the storm water charge exceeds the City's statutory authority under chapters 35.67 and 35.92 RCW. The trial court granted the City's CR 50 motion and dismissed Banks's statutory claim.

Banks objected to jury instructions 6, 7, and 8. Regarding jury instructions 7 and 8, Banks stated:

> We think that the [tax] definition doesn't adequately reflect the compulsory nature of—of a tax and the—that might cause some confusion among the jury.

5 VRP at 644. The trial court explained that it denied Banks's proposed jury instruction 7 and 8 because it was difficult to understand Banks's proposed language. The court also stated that if those instructions defined a "tax," they should also define a "regulatory fee." 5 VRP at 645. The trial court said that it had prepared the jury instructions mindful that the jury would consider a constitutional issue and reminded the parties that the jury was considering a constitutional challenge because one of the parties had demanded a jury trial "quite some time ago." 5 VRP at 649. The trial court continued:

> [T]he parties agree that this is a jury trial and questions that will be addressed by the jury, although there is agreement as I understand it by counsel, that depending on how the jury decides these issues there may be additional legal issues for the Court to address.
>
> Is that accurate, counsel?

5 VRP at 649-50. Both counsel affirmed that the trial court understood correctly.

The trial court provided the jury instructions to the jury. Jury instruction 7 provided:

> Plaintiffs claim that the storm and surface water charge imposed under Ocean Shores Ordinance No. 705 is a tax. The City of Oceans Shores claims that the charge is a regulatory fee. In order to prove their claim with respect to the Ordinance, Plaintiffs have the burden of proving that the charge imposed by the ordinance is a tax rather than a regulatory fee.
>
> A tax raises revenue for the general public welfare. A regulatory fee raises revenue to pay for a service for those who pay, or to pay for a burden created by those who pay.
>
> You are to determine whether the charge is a tax or a regulatory fee, based upon the following three factors:
>
> (1) whether the primary purpose of the charge is to raise revenue or to pay for a regulatory scheme, a particular benefit conferred, or mitigation of a burden caused;
>
> (2) whether the money collected must be allocated only to the authorized regulatory purpose; and
>
> (3) whether there is a direct relationship between the charge and the service received by those who pay the charge, or between the charge and the burden

produced by the charge payer.

CP at 46. Jury instruction 8 was identical, except that the trial court gave jury instruction 7 in connection with Ordinance 705 and jury instruction 8 in connection with Ordinance 743. Jury instruction 9 referenced jury instructions 7 and 8 and told the jury:

> [I]f you find that the primary purpose of the charge was to raise money for services to the general public, that suggests the charge is a tax. If you find that the primary purpose of the charge is to pay for a regulatory scheme that applies to lot owners, a benefit conferred to lot owners, or mitigation of a burden caused by lot owners, that suggests the charge is a regulatory fee. In making this determination, the language of the ordinance is instructive but not controlling.

CP at 48. Jury instruction 10 referenced the second factor in jury instructions 7 and 8 and told the jury:

> [I]f you find that the money collected is allocated only to the authorized regulatory purpose, that suggests the charge is a regulatory fee. If you find that the money collected is not allocated only to the authorized regulatory purpose, that suggests the charge is a tax.

CP at 49. Jury instruction 11 referenced the third factor in instructions 7 and 8 and told the jury:

> [I]f you find that there is a direct relationship between the charge and the service received by those who pay the charge, or between the charge and the burden produced by the charged payer, that suggests the charge is a regulatory fee. As long as a direct relationship exists, the charge need not be individualized according to the benefit accruing to each charge payer or the burden produced by the charge payer. If you find that there is no direct relationship between the charge and the service received by those who pay the charge or between the charge and the burden produced by the charge payer, that suggest the charge is a tax.

CP at 50.

The jury unanimously determined that the storm water charge was a regulatory fee and not a tax. Banks appeals.

ANALYSIS

Banks argues that (1) the relevant statutes do not authorize the storm water charge, (2) the storm water charge is a property tax rather than a regulatory fee, (3) the property tax violates constitutional protections, (4) the trial court erroneously instructed the jury about distinguishing a tax from a fee, and (5) the trial court erroneously excluded highly relevant witness testimony and written evidence. We disagree with each of Banks's arguments.

I. Statutory Authority

Banks argues that the relevant statutes do not authorize the City to impose the storm water charge because the charge is neither a valid sewage service fee nor a valid regulatory fee. Based on the plain language of the statute, we disagree.

We review de novo the trial court's judgment as a matter of law dismissing Banks's claim that the storm water charge exceeds the City's statutory authority under chapters 35.67 and 35.92 RCW. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 530-31, 70 P.3d 126 (2003). We apply the same standard the trial court used in granting a CR 50 motion, which is that the court properly grants a motion for judgment as a matter of law "'when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.'" *Davis*, 149 Wn.2d at 531 (quoting *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997)).

Interpreting statutes and municipal ordinances is a question of law and the party challenging an ordinance bears the burden of establishing its unconstitutionality. *Tukwila Sch. Dist. No. 406 v. City of Tukwila*, 140 Wn. App. 735, 743, 167 P.3d 1167 (2007). We presume

that municipal ordinances, like statutes, are constitutional, and we interpret ordinances in a manner that upholds their constitutionality if possible. *Tukwila*, 140 Wn. App. at 743. If a statute is clear on its face, we derive its meaning from the statute's plain language alone. *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002).

A. RCW 35.67.020 and RCW 35.92.020 Authorize Sewage Systems Utility Charges

Banks argues that RCW 35.67.020 and RCW 35.92.020 do not authorize the City's storm water charges, which involve draining water from streets, water table management, and draining elevated groundwater.[2] Banks distinguishes *storm water* runoff from *groundwater*, which is storm water that has percolated into the soil, and argues that the statutes authorize sewer systems only as they pertain to storm water runoff.

RCW 35.67.020(1) authorizes cities and towns to acquire and operate sewer systems. RCW 35.92.020(1) authorizes cities and towns to acquire and operate systems, plants, sites, or other facilities of sewerage as defined in RCW 35.67.010, which defines a "system of sewerage" to include "storm or surface waters."[3]

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[2] Banks also argues that RCW 90.03.500 does not authorize the City's storm water charges, but because the City does not rely on RCW 90.03.500 for its authority, we do not consider that argument.

[3] RCW 35.67.010 authorizes:

> (1) Sanitary sewage collection, treatment, and/or disposal facilities and services, on-site or off-site sanitary sewerage facilities, inspection services and maintenance services for public or private on-site systems, or any other means of sewage treatment and disposal approved by the city;
>
> (2) Combined sanitary sewage disposal and storm or surface water sewers;
>
> (3) Storm or surface water sewers;
>
> (4) Outfalls for storm drainage or sanitary sewage and works, plants, and facilities for storm drainage or sanitary sewage treatment and disposal, and rights and interests in property relating to the system;
>
> (5) Combined water and sewerage systems;
>
> (6) Point and nonpoint water pollution monitoring programs that are directly related to the sewerage facilities and programs operated by a city or town;
>
> (7) Public restroom and sanitary facilities; and
>
> (8) Any combination of or part of any or all of such facilities.
>
> The words "public utility" when used in this chapter has the same meaning

Examining the statute's plain language, RCW 35.67.010 does not include the word "runoff." Nor do any of the applicable statutory provisions imply that storm water runoff does not include rainwater, which percolates into the ground. Instead, the statutes repeatedly use the phrase "storm or surface water" using the disjunctive "or" to encompass the varied nature of rainwater drainage concerns. Were we to conclude that RCW 35.67.010 pertains to only surface water "runoff" and does not encompass the absorbed rainwater/groundwater that moves laterally underneath neighboring parcels, that conclusion would render superfluous the statutory language "storm or surface water." *City of Seattle v. Williams*, 128 Wn.2d 341, 349, 908 P.2d 359 (1995).

Banks incorrectly relies on "runoff" language from *Tukwila School District* to argue that RCW 35.67.020 and RCW 35.92.020 do not authorize a storm water charge that involves water that has percolated into the soil to become groundwater. In *Tukwila*, Division One of this court stated:

> Storm and surface water is the runoff from natural precipitation such as rain, snow melt, and other surface drainage.

Tukwila, 140 Wn. App. at 738-39. But Banks overlooks that in the same paragraph Division One stated:

> There are two categories of storm water: point sources which can be traced to a single, identifiable location like a factory or refinery; and non-point sources (NPS) comprised of diffuse sources of water which pick up and carry pollutants *while moving over and through the ground.*

Tukwila, 140 Wn. App. at 738 (emphasis added). Additionally, *Tukwila* specifically discussed the Washington Pollution Disclosure Act of 1971, which implemented the federal Water Pollution

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as the words "system of sewerage."

Control Act,[4] and is not at issue here. Similarly, Banks argues that RCW 90.44.035[5] defines groundwater, drawing a clear distinction between groundwater and surface water. But the definition provided in RCW 90.44.035 pertains to the regulation of beneficial public groundwaters (well water), which is not at issue here, and the statute includes limiting language that the definitions provided are for "purposes of this chapter." RCW 90.44.035.

We reject Banks's statutory arguments and conclude that the plain language of chapter 35.67 RCW authorizes Washington cities and towns to acquire and operate sewer systems that manage storm water drainage whether the rainwater flows over the surface or beneath it.

B. Stormwater Charges Need Not Be Strictly Proprietary

Banks argues that RCW 35.67.020 and RCW 35.92.020 authorize sewer utilities only as a proprietary business selling commodities or services for the "individual comfort and use" of customers who pay "only for their own usage." Br. of Appellant at 23-24. We conclude that the statutes authorize storm water charges, which need not be strictly proprietary to be valid.

Our Supreme Court examined whether chapter 35.67 RCW provided municipalities with authority for only proprietary utility services:

> The whole concept underlying [RCW 35.67] et seq., is different from that of the local improvement district plan. Under these statutes, the city acts pursuant to the police power granted to it to provide sewer service to protect the health of its

[4] 33 U.S.C §§ 1251-1387.

[5] RCW 90.44.035 states:

> (3) "Groundwaters" means all waters that exist beneath the land surface or beneath the bed of any stream, lake or reservoir, or other body of surface water within the boundaries of this state, whatever may be the geological formation or structure in which such water stands or flows, percolates or otherwise moves. There is a recognized distinction between natural groundwater and artificially stored groundwater.

> inhabitants and to defray the expense by making service charges. The special benefit idea does not enter into the picture at all. We have examined the cases cited by appellants . . . They are of no aid in the solution of the problem now before us, as they involve assessments according to special benefits where improvements were being made pursuant to statutes providing therefor.

Teter v. Clark County, 104 Wn.2d 227, 231, 704 P.2d 1171 (1985) (quoting *Morse v. Wise*, 37 Wn.2d 806, 810-11, 226 P.2d 214 (1951)).

Unlike a proprietary function, when fees involve a governmental function under a city's police power, neither the statute nor the case law limits the city to collecting fees only for discrete, direct services. *Tukwila*, 140 Wn. App. at 748 n.35 (case law does not support an interpretation of RCW 35.67.020 that limits regulatory fees to charges for discrete, direct services). We conclude, as in *Teter*, that RCW 35.67.020 and RCW 35.92.020 authorize the storm water charges as a governmental function, which need not provide discrete, individual benefit.

II. *Covell* Three-Prong Test

Banks argues that under the factors set out in *Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995), the storm water utility charge is an unlawful property tax rather than a regulatory fee. Banks argues that the storm water charge is an invalid real property tax because the City (1) imposes the charge to raise revenue, (2) does not use the proceeds for a regulatory purpose, and (3) neither apportions a burden created by property owners nor provides a direct service benefiting those owners. The City responds that (1) the storm water utility ordinance expressly states a regulatory purpose; (2) Banks concedes that the City uses the proceeds only to maintain ditches, culverts, lakes, canals, and outfall; and (3) each lot benefits from the storm water

utility system. We agree with the City.

A. Standard Of Review

The parties disagree regarding the standard of review for Banks's claim that the storm water utility charge is an unlawful tax disguised as a regulatory fee. Banks argues that we review issues of law de novo regardless of procedural posture. The City responds that because Banks appeals from a jury verdict, we review for substantial evidence. We agree with the City.

One of the cornerstones of our system of jurisprudence is that a jury determines questions of fact and the court determines and declares all matters of law. *State v. Ballard*, 394 S.W.2d 336, 340 (Mo. 1965). The unusual procedural posture here dictates that we review the jury's determinations for sufficiency of the evidence.

Before trial, the City moved for partial summary judgment on Banks's statutory and constitutional claims, and Banks responded with a summary judgment cross motion, claiming that the City did not have a storm system and that the ditches' primary function was to drain water from the roads. The trial court concluded that because that question requires a fact finder to evaluate the evidence and assess the credibility and substance of the witnesses, summary judgment was inappropriate. Banks did not appeal the trial court's denial of summary judgment.

The City requested that a jury determine the factual disputes, including whether the City had a storm system and whether the ditches' primary function was to drain water from the roads.[6] Banks did not object or seek an interlocutory appeal of this approach; neither did Banks seek a directed verdict at the close of her case. The parties did not submit interrogatories to the jury to make specific factual findings. Instead, the parties asked the jury to resolve the factual disputes

[6] Although not in our record, the parties clarified this fact during oral argument.

and then decide whether the storm water charge was a tax or a regulatory fee. Before submitting this question to the jury, the trial court asked the parties whether they agreed to the jury's consideration of the issue and both parties affirmed that they did.

On appeal, Banks did not assign error to the trial court's denial of summary judgment or its submittal of the tax versus fee issue to the jury.[7] Yet now, Banks argues that the trial court erroneously gave the legal "tax versus fee" issue to the jury and seeks de novo review. Reply Br. of Appellant at 3.

"'When a trial court denies summary judgment due to factual disputes, . . . and a trial is subsequently held on the issue, the losing party must appeal from the sufficiency of the evidence presented at trial.'" *Winbun v. Moore*, 143 Wn.2d 206, 213, 18 P.3d 576 (2001) (quoting *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 35 n.9, 864 P.2d 921 (1993)). On review of a jury's verdict:

> "*[T]he reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered.*"

Burnside v. Simpson Paper Co., 123 Wn.2d 93, 108, 864 P.2d 937 (1994) (quoting *State v. O'Connell*, 83 Wn.2d 797, 839, 523 P.2d 872 (1974)). The sufficiency of the evidence standard is that the "'record must contain a sufficient quantity of evidence to persuade a rational, fair-minded person of the truth of the premise in question.'" *Winbun*, 143 Wn.2d at 213 (quoting *Canron, Inc. v. Fed. Ins. Co.*, 82 Wn. App. 480, 486, 918 P.2d 937 (1996), *review denied*, 131

[7] A determination that taxes are invalid or unconstitutional occurs in a second step to the analysis. *Teter*, 104 Wn.2d at 240. Here, the parties agreed that had the jury determined the storm water fees were a tax, then the trial court would have considered whether the tax met constitutional requirements.

Wn.2d 1002 (1997)).

B. Three Factors

Washington courts consistently apply three widely recognized factors originally set forth in *Covell* to distinguish between a regulatory fee and a tax. We ask (1) whether the primary purpose is to raise revenue (tax) or to regulate (regulatory fee); (2) whether the money collected must be allocated to only the authorized regulatory purpose (if so, regulatory fee); and (3) whether a direct relationship exists between the fee charged and the benefit the payer received or between the fee charged and the burden the fee payer produced (if so, regulatory fee). *Covell*, 127 Wn.2d at 879. The fact finder may resolve factual disputes underlying the question whether the registration fee is a tax or a regulatory fee. *Margola Assocs. v. City of Seattle*, 121 Wn.2d 625, 630, 854 P.2d 23 (1993). The resolution of these facts determining whether the storm water charge was a tax or fee is precisely what the jury instructions provided.

1. Primary purpose of charge is to regulate or raise revenue

Banks argues that the purpose of the City's storm water charge is not to regulate but to raise revenue for maintaining and improving the ditches, culverts, and waterways. The City responds that Ordinance 743 expressly states its regulatory purpose as protecting the health and safety of the City residents and property owners by "the regulation of storm and surface water through the continued operation, maintenance and improvement of the Stormwater System." Br. of Resp't at 26. We agree with the City.

Here, the storm water ordinance expressly includes a regulatory purpose:

> The regulation of storm and surface water through the continued operation, maintenance and improvement of the Stormwater System is necessary in order to adequately protect the public health, safety and welfare of City residents and property owners.

Ord. 743 § 1.5; Ex. 237. We conclude this language is sufficient evidence to support the jury's conclusion that the primary purpose of the City's storm water utility is regulatory and therefore, it satisfies the first *Covell* factor.

2. Allocation of funds to authorized regulatory purpose

The second *Covell* factor, whether the City has allocated the funds for a regulatory purpose, weighs completely in the City's favor. The City segregates the revenue from the storm water utility charge into a separate account. The City uses that revenue to maintain and improve the storm water system, including the ditches, culverts, catch basins, outfall weir, and to respond to residents reporting clogged ditches or standing water in their lots. *Covell*, 127 Wn.2d at 879.

Banks does not dispute that the City uses the storm water charge to maintain and improve the ditches, culverts, and waterways. Rather, Banks argues that maintaining and improving the ditches, culverts, and waterways is not a regulatory purpose. Having concluded above that RCW 35.67.020 and RCW 35.92.020 authorize the storm water charges, there is sufficient evidence to support the jury's conclusion that the City allocates the funds only to the regulatory purpose.

3. Direct relationship

The third factor is 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. *Covell*, 127 Wn.2d at 879. Here, the evidence showed that the storm system collects water from rainfall from all lots in the city, both via surface and subsurface flows. This process not only evacuates water from current storms, it also creates critical space in the soil for

the next rainfall event. By lowering the water table under each lot after rainfall events, all city lots benefit because the drainage system preserves access to and usability of the lots. The system also prevents or lessens flooding from other lots. In addition, the City responds to lot owners who call the City about drainage problems on their lots. We conclude that sufficient evidence supports the jury's verdict and the third *Covell* factor.

Banks also argues that the City does not apportion the storm water charge according to the relative benefit received from that charge. But "only a *practical* basis for the rates is required, not mathematical precision." *Teter*, 104 Wn.2d at 238. Here, sufficient evidence supports the conclusion that the rate has a practical basis: (1) rain falls uniformly; (2) both developed and undeveloped property contribute water from rainfall into the system; and (3) the larger the lot size, the greater its water contribution to the system. Thus, the City appropriately bases the storm water fee on lot size.

All three *Covell* factors weigh in favor of a fee and substantial evidence supports the jury's verdict that the storm water charge constituted a regulatory fee rather than a tax. Accordingly, we need not address Bank's argument that the storm water charge violates Washington's tax uniformity requirement or the City's argument that we should remand the issue to the trial court rather than reach the constitutional argument.

III. Jury Instructions

Banks argues that the trial court gave erroneous jury instructions that failed to distinguish taxes from fees. Banks's jury instruction argument fails both on the merits and because he fails to provide legal authority.

We examine jury instructions de novo. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000). A jury instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party. *Cox*, 141 Wn.2d at 442. We review jury instructions guided by the principle that jury instructions are sufficient if "'they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.'" *Cox*, 141 Wn.2d at 442 (quoting *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995)). But the trial court has discretion to determine whether to give a particular instruction to the jury. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). Thus, we review a trial court's refusal to give a requested instruction only for abuse of discretion. *Stiley*, 130 Wn.2d at 498.

Banks unsuccessfully proposed the following language for jury instruction 7:

> A tax is an enforced contribution of money, assessed or charged by authority of sovereign government for the benefit of the state or the legal taxing authorities. It is not a debt or contract in the ordinary sense, but it is an exaction in the strictest sense of the word.

CP at 338. On appeal, Banks includes no legal authority to support a claim that the trial court deficiently instructed the jury because the instructions did not include the concept that the defining characteristic of a tax is a compulsory payment to a sovereign power.

Here, the trial court's jury instructions[8] mirrored the *Covell* factors and provided the correct legal test. *Covell*, 127 Wn.2d at 879. Therefore, we reject Banks's inadequate argument regarding jury instruction(s). "'[T]his court will not review issues for which inadequate argument

[8] Although Banks refers only to jury instruction 7, jury instructions 7 and 8 are identical, except that each instruction attaches to a specific municipal ordinance.

has been briefed or only passing treatment has been made.'" *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 416, 120 P.3d 56 (2005) (quoting *State v. Thomas*, 150 Wn.2d 821, 868–69, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)).

IV. Excluded Evidence

Banks further argues that the trial court abused its discretion by excluding highly relevant evidence, including (1) an economist's testimony distinguishing taxes from fees, (2) evidence of the City's responsibility for the high water table, and (3) evidence that the storm water charge shifted street maintenance costs from its previous tax-supported funding. The City responds that the trial court properly excluded irrelevant, prejudicial evidence and that Banks failed to preserve its evidentiary arguments regarding (1) the City's replacement of the outfall design, and (2) the City's street drainage funding before the storm water ordinance. We agree with the City.

We review a trial court's decisions regarding the admissibility of evidence under an abuse of discretion standard. *State v. Vreen*, 143 Wn.2d 923, 932, 26 P.3d 236 (2001). We review a trial court's evaluation of relevance under ER 401 and its balancing of probative value against its prejudicial effect or potential to mislead under ER 403 with a great deal of deference, using a "'manifest abuse of discretion'" standard of review. *Vreen*, 143 Wn.2d at 932 (quoting *State v. Luvene*, 127 Wn.2d 690, 707, 903 P.2d 960 (1995)).

A. Economist's Testimony

Banks argues that the trial court abused its discretion by excluding highly relevant expert testimony from an economist about how to distinguish taxes from fees. Banks relies on *Samis*

Land Co. v. City of Soap Lake, 143 Wn.2d 798, 806, 23 P.3d 477 (2001), for her argument that taxes and fees must be "distinguished based on economic substance, not artificial legal constructs." Br. of Appellant at 43. But the *Samis* court merely stated:

> Courts must . . . look beyond a charge's official designation and analyze its core nature by focusing on its purpose, design and function in the real world.

Samis, 143 Wn.2d at 806. The *Samis* court then identifies the *Covell* test as offering the proper analysis. *Samis*, 143 Wn.2d at 806.

Here, the jury had the task of determining whether the storm water charge is a tax or fee based on the evidence it was presented. The trial court excluded expert testimony from an economist because it had "a huge potential to confuse the jury." VRP (Sept. 24, 2010) at 36. Banks fails to show why the economist's testimony would do anything other than confuse and distract the jury from the *Covell* test. Because of the potential for juror confusion, we conclude that no "'manifest abuse of discretion'" occurred when the trial court excluded the economist's testimony. *Vreen*, 143 Wn.2d at 932 (quoting *Luvene*, 127 Wn.2d at 707).

B. Evidence Regarding Weir Repair

Banks argues that the trial court abused its discretion by excluding evidence of the City's responsibility for the high water table. Banks, however, failed to preserve this issue for appeal.

Before trial, the court determined that testimony regarding the City's repair of the weir in 1980 was irrelevant because the present case consisted of Banks's challenge to the collection of money, not a challenge to the City's decisions regarding the weir repair. The trial court conditionally excluded that evidence stating:

> [A]ny argument that the problem here is the City's creation . . . cannot be made without a specific showing that it is relevant, and that showing would have to be made in a hearing outside the presence of the jury.

VRP (Sept. 24, 2010) at 51. Banks never made that offer of proof during the trial yet now

challenges the trial court's exclusion of this evidence. Because Banks had the duty to make an adequate offer of proof to the trial court, yet failed to do so, Banks has failed to preserve this issue for appeal. *Sturgeon v. Celotex Corp*., 52 Wn. App. 609, 617-18, 762 P.2d 1156 (1988).

C. Evidence Regarding City's Prior Funding

Banks argues that the trial court abused its discretion by excluding evidence that the storm water charge shifted street maintenance costs from general tax-supported funds. We disagree.

Initially, the trial court refused to admit a 1974 document because it lacked relevance, lacked foundation, was potentially confusing to the jury, and was duplicative of admitted evidence showing the shift in the collection of monies. Banks asked to make an offer of proof to show a pattern of street drainage funding with the City's general funds, but Banks did not renew that offer after the trial court asked the parties to confer together first.

Here, it is unclear whether Banks objects to the exclusion of the single document or the series of documents, but if the latter, Banks has failed to preserve the alleged error for appeal by failing to make a subsequent offer of proof. *Sturgeon*, 52 Wn. App. at 617-18. Additionally, contrary to appellate rules, Banks has not provided the text of the 1974 document so that we might consider it. RAP 10.4(c). Finally, the trial court did not abuse its discretion by excluding duplicative evidence, which could not have materially affected the trial's outcome. *Vreen*, 143 Wn.2d at 932.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Van Deren, J.

Worswick, C.J.