No. 48028-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

ENID DUNCAN, ET AL.,

Appellant,

v.

CITY OF EDGEWOOD,

Respondent.

BRIEF OF RESPONDENT CITY OF EDGEWOOD

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GLOSSARY

"AR" – Administrative Record of the City of Edgewood in this Reassessment Proceeding. Page numbers refer to the six (6) digit number following the tag "REF2014".

"Appellants" – Docken Appellants and Stokes Appellants.

"City" – Respondent City of Edgewood, Pierce County, Washington.

"Council" or "City Council" – The City Council of the City of Edgewood, Pierce County, Washington.

"Docken Appellants" – Appellants Eric Docken, Docken Properties, LP; Enid and Edward Duncan; James and Patricia Schmidt; Darlene Masters; AKA The Brickhouse, LLC; and Suelo Marina, LLC.

"Docken Br." – "Opening Brief of Petitioners Eric Docken, Docken Properties, LP; Enid and Edward Duncan; James and Patricia Schmidt; Darlene Masters; AKA The Brickhouse, LLC; Suelo Marina, LLC" (Jan. 20, 2016).

"*Hasit*" – *Hasit LLC v. City of Edgewood (Local Improvement Dist. #1)*, 179 Wn. App. 917, 320 P.3d 163, (2014).

"LID" – Local improvement district.

"LID #1" – Local Improvement District No. 1, City of Edgewood, Pierce County, Washington.

"Stokes Appellants" – Appellants 1999 Stokes Family LLC and Eldean Rempel as Trustee for Revocable Trust Agreement of Ray E. Rempel and Eldean B. Rempel dated December 12, 2006, a trust, and Tina Rempel.

"Stokes Br." – "Appellants Stokes and Rempel's Opening Brief" (Jan. 20, 2016).

1. INTRODUCTION

> *"We hold ... that, except for the oversized pipes, the City [of Edgewood] did not err in assessing the entire cost of the improvements against the LID property owners; that the City's appraisal did not err by taking recent zoning amendments into account; and that the City showed that the mass appraisal method more fairly reflected special benefits than would the zone and termini method."*
>
> -*Hasit v. City of Edgewood* (2014)[1]

> *"Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous."*
>
> -Docken Brief (quoting *Hasit*)[2]

This case presents a straight-forward application of the "law of the case" doctrine. In *Hasit LLC v. City of Edgewood (Local Improvement District No. 1)*, this Court of Appeals upheld the City of Edgewood's special assessment methodology and dismissed similar claims the Appellants bring in this reassessment proceeding. The City followed this Court's precise roadmap regarding oversizing costs, notice, the admissibility of evidence in the assessment process, and applicable evidentiary standards. To the extent the City went above and beyond this Court's mandate in *Hasit* by undertaking further, parcel-specific appraisals to reconfirm special benefit, it did not commit error. *Hasit* controls.

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[1] 179 Wn. App. 917, 960, 320 P.3d 163 (2014)
[2] *See* Docken Br. at 22 (quoting *Hasit*, 179 Wn. App. at 935).

With respect to Appellants' remaining claims, it is true that cities must follow a number of procedural steps to form LIDs and then finance through special assessments the improvements that benefit private properties. Appellants seek to misdirect the Court, however, by reciting peripheral statutes and case law irrelevant to their claims.[3] Appellants' rambling about the Council's reliance on a statutory "presumption" of benefit, for example, simply does not apply. The City did not base LID #1's preliminary or final assessments on a presumption of benefit, but rather on expert appraisal evidence. This Court upheld that appraisal's methodology in *Hasit*.

Ultimately, this reassessment proceeding is about owners of ten parcels, valued at over $10 million, paying their fair share of LID financing debt for new sewer improvements that substantially increased their properties' values. Because Appellants ultimately present only alternative opinions regarding *amount* of benefit, as Docken Appellants aptly note in the quote above, the Council's "action taken after due consideration is not arbitrary and capricious" and should be upheld.

The City respectfully requests this Court affirm the reassessments and dismiss this Appeal.

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[3] Given the straightforward nature of this Appeal, the City apologies for the length of this brief (made necessary to respond to Appellants' over length briefing and numerous assignments) and for its repetition of briefing presented below (as this Appeal is de novo of the Superior Court's Judgment and Order of Dismissal).

2. RESPONSE TO ASSIGNMENTS OF ERROR

The Edgewood City Council did not err in confirming LID #1's reassessment roll, and the Superior Court did not err in affirming the City Council. The City of Edgewood restates the assignments of error asserted by Appellants[4] and the issues relating to those assignments as follows:

2.1 Law of the Case. Under the law of the case doctrine, an appellate holding enunciating a principle of law is followed in subsequent stages of the same litigation. This Appeal arises out of LID #1's subsequent reassessment proceedings following this Court's holdings in *Hasit*, including affirmance of the Macaulay appraisal's special assessment methodology. Should this Court again affirm the Macaulay appraisal's special assessment methodology under the law of the case doctrine?

2.2 LID Standards of Review. Under the "fundamentally wrong basis" standard, courts affirm LID special assessments that do not suffer from fundamental flaws necessitating nullification of the entire LID. Under the "arbitrary and capricious" standard, courts affirm city council decisions that consider the facts and circumstances surrounding a special assessment even if the court might believe that decision is "erroneous." This Court affirmed LID #1's special assessment methodology (absent oversizing) in *Hasit*, and the City Council considered in its subsequent reassessment decision the facts and circumstances presented by all parties. Should this Court affirm LID #1's reassessments under these well-established standards of review?

[Docken Appellants' issues I.1-I.2, I.2.a-I.2.g, and I.3-I.6; and Stokes Appellants' issue]

[4] Stokes Appellants have not argued their assignment of error II.B. The assignment is waived. *Wigton v. Gordon*, 3 Wn. App. 648, 650, 477 P.2d 32 (1970) ("because this assignment of error was not argued in appellant's brief, it is regarded as waived or abandoned....").

3. RESTATEMENT OF THE CASE

3.1 Identity of Appellants.

In *Hasit*, this Court annulled assessments for eleven parcels (out of 161 total LID #1 parcels) owned by nine ownership groups. AR at 1-2.[5] One of the nine *Hasit* appellants did not remain active in this matter. AR at 10. Of the remaining eight owners, only the following seven ownership groups representing ten parcels have appealed their reassessments:

Seven Property Ownership Groups	Ten LID Parcels
Edward and Enid Duncan	2
1999 Stokes Family LLC	27
Suelo Marina LLC	31
Eldean Rempel as Trustee for the Revocable Trust Agreement of Ray E. Rempel and Eldean B. Rempel dated December 26, 2006 and Tina Rempel	68
James and Patricia Schmidt & Darlene Masters	71 & 79
AKA The Brickhouse LLC	128
Docken Properties LP	131, 133 & 140

3.2 The Purpose of Local Improvement Districts.

Cities often construct capital improvements that, in addition to benefiting the community as a whole, specially benefit individual properties (i.e., increase their fair market value). Cities use financing tools called "local improvement districts" to assist property owners in paying

[5] A glossary of terms is provided following the Table of Contents above.

for some or all of the improvement's costs that provide special benefits. Owners pay back the LID by prepaying the entire special assessment or by paying installments over a period of years on LID financing debt for the remaining assessments (bonds). *See, e.g.*, RCW 35.43.040 (examples of permitted improvements); RCW 35.44.020 (costs to be included); RCW 35.49.010 (prepayment); RCW 35.49.020 (installments).

3.3 History of LID #1.

Responding to formal petitions by property owners representing over 70% of the LID's area, the City formed LID #1 in October 2008 to finance a modern wastewater collection system. AR at 1, 240. The property owners requested the LID and the sewer improvements in order to enhance their properties' future development potential. AR at 240. The sewer improvements were completed in March 2011, making feasible additional permitted uses on properties within the LID and allowing property owners to more intensely develop their properties. AR at 1, 21; *Hasit LLC v. City of Edgewood (Local Improvement Dist. #1)*, 179 Wn. App. 917, 942, 320 P.3d 163 (2014) ("zoning changes directly influenced the value of the properties **with sewer**, and the appraiser properly considered them for that purpose.... [T]he absence of a sewer system precluded owners from developing their properties even to the maximum density permitted by the old zoning regulation.") (emphasis added).

After the system was built, the City Council confirmed the assessment roll, assessing LID costs to owners of 161 specially-benefitted parcels, including the costs to "oversize" the system in anticipation of future development outside of LID #1. AR at 1. Nine owners of eleven parcels appealed their assessments. AR at 1-2; *Hasit*, 179 Wn. App. at 932. Ultimately, this Division of the Court of Appeals annulled the assessments on those eleven parcels. *Hasit*, 179 Wn. App. 917.

This Court declined, however, to annul the assessments on the other parcels within LID #1, all of which remain valid. *Hasit*, 179 Wn. App. at 959. In affirming the remaining 150 assessments, this Court held that the City's appraisal method "more fairly reflected special benefits" than other methods and that, "except for the oversized pipes, the City did not err in assessing the entire cost of the improvements against the LID property owners." *Hasit*, 179 Wn. App. at 960.

3.4 The City Reassessed Appellants' Properties According to this Court's Order in *Hasit*.

With respect to the annulled assessments, this Court provided a roadmap for the City to properly reassess the parcels, directing the City to:

1. Exclude the costs for the oversizing portion of the sewer improvements that benefitted only future users outside of LID #1 (*Hasit*, 179 Wn. App. at 941);

2. Provide property owners with notice that is timely and that does not improperly limit the type of evidence owners are allowed to

present when challenging an assessment (*Hasit*, 179 Wn. App. at 945, 958);

3. Review protests that do not necessarily present expert appraisal evidence (*Hasit*, 179 Wn. App. at 945-47); and

4. Apply a standard of proof for evaluating property owner protests that is less exacting than the "fundamentally wrong basis" or the "arbitrary or capricious" standards that the superior court is directed to apply on appeal (*Hasit*, 179 Wn. App. at 949).

The City has now reassessed the parcels in accordance with this Court's order—the law of the case.

3.4.1 The reassessments excluded oversizing costs.

After this Court annulled the assessments, the City commissioned an updated special benefit study and independent evaluations regarding oversizing costs. AR at 10, 117-177, 3095-3362. Based in part on these materials, the City recommended reducing the assessment on the parcels by a combined $408,557 to eliminate the inclusion of oversizing costs and to adjust for other factors, such as usable area, wetlands, other critical areas and stormwater challenges, and the conditions of existing improvements. AR at 10-12. The City Council confirmed this reduction in the final assessment roll. AR at 2. The record does not contain contested evidence to the contrary. The City is therefore in compliance with this Court's order with respect to oversizing.

3.4.2 The City provided timely notice that did not improperly limit the types of evidence property owners were authorized to present.

Although expressly authorized by RCW 35.44.090 (requiring 15 days' notice), this Court held that the 20 days' notice provided by the City of a *significantly increased* preliminary special assessment amount was not constitutionally sufficient to allow owners to obtain the kind of evidence necessary to challenge those assessment amounts. *Hasit*, 179 Wn. App. at 954-58. In this reassessment proceeding, both constitutional notice and statutory notice are not at issue.

For over three years, Appellants have now been on notice regarding the revised assessment process. As described above, moreover, the reassessment amount in this proceeding is *significantly reduced*, eliminating the extended notice requirements for alleged disproportionate assessment claims. *Hasit*, 179 Wn. App. at 956. Most importantly, the City provided specific, actual notice of reassessment in this proceeding at least three times, mailing the first courtesy notice on April 24, 2014, nearly five months in advance of the final hearing date and four months in advance of an initial August 13, 2014 hearing (which was later rescheduled after consulting with certain Appellants). AR at 29, 98-100. The City postponed the initial hearing by formal letter dated August 7, 2014. AR at 29. Shortly thereafter, the City mailed official notice on

August 14, 2014 of the final reassessment hearing, nearly one month in advance of the scheduled September 17, 2014 hearing date. AR at 29, 79-94. The City therefore provided sufficient notice "for anybody to be able to get an appraisal." *Hasit*, 179 Wn. App. at 955 (internal quotes omitted). The record does not contain contested evidence to the contrary. Indeed, all parties in this Appeal obtained appraisals or appraisal reviews. AR at 970-1047.

This Court also held that the City's original 2011 pre-hearing notice ambiguously suggested that only property owners (and not their witnesses) could testify at the assessment hearing and that testimony would be limited to proportionality and benefit amount issues. *Hasit*, 179 Wn. App. at 945. For this 2014 reassessment, the City's official notice did not contain anything that could be characterized as misleading. AR at 79-94. Indeed, Appellants do not contest notice in this Appeal.

3.4.3 The Council reviewed all testimony and evidence.

This Court held that the City's hearing examiner erred by stating "a party challenging a final assessment must present expert appraisal evidence ..." to challenge a finding of special benefit or to claim disproportionality. *Hasit*, 179 Wn. App. at 945. With this direction in mind, the City's pre-hearing notice emphasized that the City Council would sit as a board of equalization and would consider "**all** information

and evidence" in support of any landowner objection. *See* AR 79-94, 97 (emphasis added). Mayor Daryl Eidinger similarly opened the Council's final assessment roll hearing by stating its purpose as follows:

> The purpose of this hearing is to afford individual property owners an opportunity to present evidence and information to the Council, and to explain the reasons for any objections they may have to their own individual proposed assessments. The Board wants to hear whatever pertinent information or evidence you may wish to present concerning the amount of your final assessment. And no formal rules of evidence will control these proceedings.

AR at 616.

Following this statement, the Council heard and extensively considered all property owner testimony and evidence without objection. *See generally* AR at 617-773 (four hour hearing). The City therefore allowed property owners to present any information relevant to the proceeding. As this Court noted, a property owner "need not necessarily present her own independent appraisal." *Hasit*, 179 Wn. App. at 947. Accordingly, the City Council did not suggest—much less impose—any such evidentiary requirements during the 2014 reassessment proceedings.

3.4.4 The Council considered the evidence under *Hasit*.

In accordance with *Hasit*, the City Council also refrained from requiring Appellants to prove that LID #1's special benefit study was founded on a "fundamentally wrong basis" or was "arbitrary or

capricious." *Hasit*, 179 Wn. App. at 947. Instead, the Council considered the competing evidence—including all property owner testimony, appraisals, and appraisal reviews—to determine whether the assessment protests overcame the LID's recommended assessments. AR at 14-15. The City's review of the evidence follows this Court's order. *Hasit*, 179 Wn. App. at 949.

3.4.5 The Superior Court was fully briefed on the record.

The Superior Court, acting in an appellate capacity, similarly had the entire administrative record before it and was fully briefed by all parties on July 31, 2015. CP at 184:24-185:2 ("The Court reviewed the administrative record and record of proceedings on LID No. 1 as certified to the Court; considered the Appellants' Opening Briefs, the City's Response Brief and Appellants' Reply Briefs. The Court is familiar with the records and file herein. The Court heard argument of counsel.").

The Superior Court then held: "The City did not err in considering and weighing competing, qualified appraisal evidence…. The City did not act on a fundamentally wrong basis, or arbitrarily or capriciously…." CP at 185:6-7. Any suggestion that the Superior Court cavalierly dismissed the appeals without considering the administrative record or that the Superior Court failed to apply the applicable standards of review under

RCW 35.44.250 is without support in the record on appeal. *Contra* Stokes Br. at 21-23.

4. ARGUMENT

Under the "law of the case" doctrine, as more fully discussed in Section 4.3 below, this Court's holdings in *Hasit* are dispositive of this Appeal. *Hasit* affirmed the assessment methodology for LID #1. That holding is binding on the parties in this subsequent reassessment litigation. Because the Council based these reassessments on the upheld assessment methodology in *Hasit*, court review of its determination of special benefits remains limited to (and passes) the statutory "fundamentally wrong basis" and "arbitrary and capricious" reviewe standard. Applying this deferential standard, this Court should affirm the reassessments and dismiss these Appeals.

4.1 Standard of Review

The City Council's assessment decision is reviewed under the "fundamentally wrong basis" and "arbitrary and capricious" review standard. RCW 35.44.250; *Abbenhaus v. City of Yakima*, 89 Wn.2d 855, 858-60, 576 P.2d 888 (1978). The scope of review "is limited to the record of the proceedings before the municipality." *Abbenhaus*, 89 Wn.2d at 859. "Review under the statutory standards should not be an independent consideration of the merits of the issue but rather a

consideration and evaluation of the decision-making process." *Abbenhaus*, 89 Wn.2d at 859-60.

4.2 Appellants' Peripheral Arguments are Misplaced.

Instead of discussing the standard of review holdings in *Hasit* relevant to this appeal, Appellants seek to divert this Court from applying the statutorily mandated "fundamentally wrong basis" and "arbitrary and capricious" standard to the Council's assessment decision. The City nevertheless addresses these issues before turning to the case that is actually before the Court.

4.2.1 Appellants' "rebuttable presumption" issue does not apply to this reassessment.

Appellants' straw person argument that they have somehow defeated the City's "presumption" of special benefit does not apply to this reassessment. Fundamentally, the City based its finding of special benefit on the Macaulay appraisal and not on any legal presumption of benefit.

> The Board concludes that the reassessments **based on the Macaulay Study** were determined in accordance with the Court of Appeals' standards as set forth in Hasit. The Reassessments reflect properly the Special Benefits resulting from LID #1 improvements. Differing opinions were expressed regarding the Special Benefit to the Appellant Properties; however, the Board concludes that the evidence presented by the owners of the Appellant Properties did not overcome the City Staff/LID recommendations. Given that, the objections of the owners of the Appellant Properties are overruled.

AR at 14-15 (emphasis added). Further, as discussed below, the Macaulay appraisal's methodology and validity were affirmed by this Court in *Hasit*. These holdings are the binding law of this case. Presumptions and burden shifting are therefore inapplicable in this Appeal.

All parties presented evidence, and the Council considered within its judgment the weight of the evidence. Understanding that they provide the best forum to determine special benefit, the Legislature grants city councils considerable deference when determining benefit:

> The judgment of the court **shall** confirm, unless the court shall find from the evidence that such assessment is founded upon a fundamentally wrong basis and/or the decision of the council or other legislative body thereon was arbitrary or capricious.

RCW 35.44.250 (emphasis added). As the Docken Appellants correctly note, this Court must affirm the Council's decision even if it thinks the decision is erroneous: "Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous." Docken Br. at 22 (quoting *Hasit*, 179 Wn. App. at 935). The City Council met this standard.

Assessor Valuations Are Not Dispositive. Appellants' reliance on county assessor assessed valuation numbers, for example, went to the weight of the evidence before the council. Docken Br. at 4, 36 & 40;

Stokes Br. at 34. The presumption of correctness of a county assessor's valuation applies only to "review by any court, or appellate body, of a determination of the valuation of property **for purposes of taxation**...." RCW 84.40.0301 (emphasis added). Here, the LID special assessments are not taxes. *See, e.g., City of Seattle v. Rogers Clothing for Men, Inc.*, 114 Wn.2d 213, 232, 787 P.2d 39 (1990) ("Special assessments for local improvements are not deemed taxes within the uniformity provisions of the state constitution."); *McMillan v. City of Tacoma*, 26 Wash. 358, 361, 67 P. 68 (1901) ("The theory upon which general taxation proceeds is entirely distinct from that of local assessments."); Philip A. Trautman, *Assessments in Washington*, 50 Wash. L. Rev. 100, 102 (1965) ("The difference between general and special benefits is critical in distinguishing taxation from local assessment.").

More importantly, the Docken Appellants' assessed values from subsequent years are irrelevant to this appeal because this Court affirmed the Macaulay appraisal's 2011 valuation date in *Hasit*. *Hasit*, 179 Wn. App. at 941-43. Indeed, as Docken Appellants recognize: "The amount of the special benefits attaching to the property, by reason of the local improvement, is the difference between the fair market value of the property immediately *after* the special benefits have attached, and the fair market value of the property *before* the benefits have attached." Docken

Br. at 25 (quoting *In re Schmitz*, 44 Wn.2d 429, 434, 268 P.2d 436 (1954) (superseded on other grounds by statute) (emphasis in original)).[6]

Burden Shifting Is Not Dispositive. The Stokes Appellants, alternatively, seem to primarily rely on the unremarkable proposition that legal presumptions implicate a burden shifting analysis. Stokes Br. at 28 (quoting *Indian Trail Trunk Sewer v. City of Spokane*, 35 Wn. App. 840, 841-43, 670 P.2d 675 (1984)). Absent reliance on a legal presumption, however, the fact finder weighs the totality of the evidence. Here, the Council relied on the Macaulay appraisal and Appellants' submissions, not on a legal presumption of benefit. AR at 11-15.

And even if Appellants did rebut a legal presumption of special benefit (which is not at issue), the inquiry does not end. As one of the Docken Appellants' principle cases recognizes: "Even if the presumption of an assessment's validity is successfully rebutted, however, the objector must still show that the assessment was founded on a fundamentally wrong basis or was imposed arbitrarily or capriciously." *Kusky v. City of Goldendale*, 85 Wn. App. 493, 500, 933 P.2d 430 (1997) (citing *Abbenhaus*, 89 Wn.2d at 860-61); *see* Docken Br. at 54 (mistakenly citing, as in their brief below (CP 795:24-796:2), *Kusky* as a Supreme Court

[6] Further, because the Macaulay appraisals did not rely on county assessor data for property valuations, any inadvertent reference errors in parcel specific appraisals (which are denied) would not impact or serve as foundation for any of the properties' actual appraisals. *See, e.g.*, Docken Br. at 51.

decision); *see also* Stokes Br. at 31 (citing *Kusky* for general LID principles). As discussed below, Appellants fail to meet this burden on appeal.

Draft Findings And Conclusions Are Irrelevant. Finally, Appellants express concern about draft findings of fact and conclusions of law before the City Council. Docken Br. at 36; Stokes Br. at 17-21. But a draft is only a draft. Just like a court is not bound to an oral ruling or proposed order, the Council is not bound to drafts of proposed ordinances.

> It must be remembered that a trial judge's oral decision .... is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment.
>
> ... [A]ssignments of error directed to statements contained in a trial court's oral decision do not constitute proper assignments of error.... such statements, when at variance with the findings, cannot be used to impeach the findings or judgment.

Ferree v. Doric Co., 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963). Just like a draft order prepared by judicial staff or litigants does not indicate the judge's thinking (much less the standards of law applied), a draft ordinance does not suggest the Council's thinking or the standards of law applied. Appellants' claims to the contrary attempt to add gloss to the actual order in the uncontested administrative record. AR at 14-15.

Moreover, as the Council's official minutes reflect, the Council ordered staff to prepare the final ordinance confirming the reassessment roll *after* it adopted the recommendations by City staff. AR at 547. It is unclear how a subsequent draft might somehow guide the Council's decision-making process. Indeed, unsatisfied with the subsequent draft ordinance, the Council ordered revisions to reflect the Council's actual findings of fact and conclusions of law. AR at 606. Prior drafts accordingly did not indicate any basis for the Council's decision.

In any case, Appellants' "smoking gun" draft ordinance cites a standard Appellants themselves apply. *Compare* AR at 565-66 (Sept. 30, 2014 Meeting Notice, citing clear, cogent, and convincing standard), *and* AR at 593-94 (Oct. 2, 2014 Council Agenda, citing clear, cogent, and convincing standard), *with* Docken Br. at 13 & 26 (applying clear, cogent, and convincing standard), *and* Stokes Br. at 9-10 (suggesting clear, cogent, and convincing standard). Appellants' purported quote to a "fundamentally wrong basis" standard in a draft ordinance is incorrect and unsupported by the record. *Compare* AR at 593-94, *with* Docken Br. at 35-36 (misquoting AR at 593-94), *and* Stokes Br. at 18-21 (misquoting AR at 593-94). The final ordinance subject to this Appeal, which reflects the Council's actual findings of fact and conclusions of law, establishes

that the Council did not place any heightened standard of proof or any burden of production on Appellants at all. AR at 14-15.

4.2.2 The City Council's process conformed to the appearance of fairness doctrine.

Under Docken Appellants' appearance of fairness claim, they must show (1) "prejudgment or bias" by a decision maker or (2) an improper ex parte communication regarding the LID special assessments before the Council. *Org. to Pres. Agr. Lands v. Adams Cnty.* (*OPAL*), 128 Wn.2d 869, 885-90, 913 P.2d 793 (1996). They fail to show either. They also failed to preserve their appearance of fairness claim during the LID proceedings.

Waiver On Appeal. Appellants brought only one appearance of fairness claim during the entire LID proceedings, challenging the participation of one council member for being an attorney at the September 17, 2014, reassessment hearing. AR 616. That claim has no basis, was rejected at the reassessment hearing, was not raised on appeal to the Superior Court, and is not raised here. While Docken Appellants objected on other merits grounds at the October 2, 2014, confirmation meeting, appearance of fairness issues were not raised. AR 781.

To the extent Docken Appellants did not raise other appearance of fairness challenges to the City Council, they were waived on appeal to the

Superior Court and waived on appeal to this Court under RAP 2.5(a). *State v. Morgensen*, 148 Wn. App. 81, 91, 197 P.3d 715 (2008) ("Trial counsel cannot stay silent [regarding an appearance of fairness claim] to preserve an issue for possible future appeal.").[7]

Absence Of Disqualifying Bias. Even if not waived, Docken Appellants' appearance of fairness claim lacks merit. In order to claim disqualifying bias, Docken Appellants must show more than that the procedures in this reassessment proceeding appeared unfair. They must present "evidence of a judge's or decisionmaker's actual or potential bias." *State v. Post*, 118 Wn.2d 596, 619 n.8, 826 P.2d 172 (1992) (reformulating the threshold test for appearance of fairness claims). The Docken Appellants' reliance on their separate civil rights lawsuit against the former city manager to establish bias is therefore misplaced. The Washington Supreme Court has expressly rejected the theory that a staff member's potential bias stemming from a separate civil rights lawsuit initiated by an interested party is somehow "imputed" to the actual

[7] The common law appearance of fairness doctrine arose from the application of judicial standards of conduct to quasi-judicial proceedings. *Smith v. Skagit Cnty.*, 75 Wn.2d 715, 453 P.2d 832 (1969) *holding modified by State v. Post*, 118 Wn.2d 596, 826 P.2d 172 (1992). Judicial standards of review require the same rejection of this claim. *See* RAP 2.5(a). And in any event, this is not a constitutional (due process) claim for purposes of RAP 2.5(a)(3). *City of Bellevue v. King Cty. Boundary Review Bd.*, 90 Wn.2d 856, 863, 586 P.2d 470 (1978) ("Our appearance of fairness doctrine, though related to concerns dealing with due process considerations, is not constitutionally based."). Accordingly, Appellants' scattershot due process claims fail to cognizably allege a jurisdictional challenge to LID #1. *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 235, 119 P.3d 325 (2005).

decision making body. *Post*, 118 Wn.2d at 617-19. Any purported policy preference by the city manager in favor of the LID is similarly irrelevant and unsupported. Docken Appellants do not cite any evidence that the city manager held a prejudgment bias in favor of parcel specific assessments. At most, they allege "ideological or policy leanings" in favor of the LID. These allegations are insufficient to support a "personal bias" theory. *OPAL*, 128 Wn.2d at 890.

And even if policy preferences were relevant (they are not), again the city manager's alleged bias would not be automatically "imputed" to the City Council. *Post*, 118 Wn.2d at 617-19. The appearance of fairness doctrine ensures *decision makers* are free from bias. *Post*, 118 Wn.2d at 617-19; *see also Bunko v. City of Puyallup Civil Serv. Comm'n*, 95 Wn. App. 495, 504, 975 P.2d 1055 (1999) (dismissing appearance of fairness claim where challenging party had not "demonstrated that **any commissioner** had a personal stake in the outcome of the hearing.") (emphasis added). Here, the City Council, and *not the city manager*, was the decision making body in this reassessment proceeding.[8]

[8] Any post-hearing objection or presentation of evidence to disqualify any of the councilmembers would also have been time barred. RCW 42.36.080; *OPAL*, 128 Wn.2d at 888 ("Because OPAL did not object to Schlagel's participation at that time or before the commissioners made the final decision to issue the UUP, it cannot now seek to disqualify him on that basis."). To the extent Docken Appellants' claim seeks to defeat a quorum or necessary majority of the City Council for bias or failure to disclose bias, their claim is statutorily barred by RCW 42.36.090 and again time barred under

Absence Of Improper Ex Parte Communication. The Docken Appellants also fail to allege—much less demonstrate—an improper ex parte communication. In *Organization to Preserve Agricultural Lands v. Adams County* (*OPAL*), the Washington Supreme Court held that the existence of 63 long distance phone calls between a county commissioner and a solid waste management company was insufficient to demonstrate that any of those 63 communications involved the company's landfill use permit that was pending approval before the county commission. *OPAL*, 128 Wn.2d at 887. The challengers offered no evidence to suggest that the communications concerned the permit, as opposed to other legislative or administrative matters that were of concern to the solid waste company (which decisions are not subject to the appearance of fairness doctrine).

Here, Docken Appellants' claim is even more speculative, failing to cite any evidence in the administrative record establishing the city manager even attended an executive session (none exists). Docken Appellants similarly have not made any showing that the city manager was involved in any prohibited communications. *OPAL*, 128 Wn.2d at 887.

Moreover, the City Council was independently advised throughout the entire reassessment proceedings on LID #1, executive sessions, and

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RCW 42.36.080 for failing to challenge any Councilmember's participation at the time of the hearing.

quasi-judicial proceeding requirements by special counsel Jeff Capell, Deputy City Attorney for the City of Tacoma. *See, e.g.*, AR at 540, 547, 606-607 (meeting minutes); 611, 615, 774, 778-83 (meeting transcripts). Docken Appellants' appearance of fairness claim fails.

4.2.3 The LID statutes do not require city councils to recite all facts and arguments raised by the parties.

The Legislature recognizes that cities need not recite legal conclusions, negative facts, or even specific findings of fact already included in the administrative record when reviewing evidence presented in an LID proceeding. For example, a council does not need to recite the method of assessment that it will use. RCW 35.44.047 ("The failure of the council to specifically recite in its ordinance ordering the improvement and creating the local improvement district that it will not use the zone and termini method of assessment shall not invalidate the use of any other method or methods of assessment.").

Similarly, for over 100 years, the Washington Supreme Court has rejected the notion that the authority charged with determining special benefit must somehow detail all of its findings:

> **The commissioners are chargeable with the result of their work, and not with the manner by which they arrive at that result**. If the return itself does not show that the premises of the objector are assessed more than they are benefited, and more than their proportionate share of the cost of the improvement, the objector is not injured, and

> hence **it is of no moment to him what process the commissioners employed in order to arrive at the result** reached by them."

In re City of Seattle, 47 Wash. 42, 44, 91 P. 548, 549 (1907) (emphasis added). Just like many court orders, special assessment orders need not recite or explain every fact in the administrative record. *See, e.g.*, *Clausing v. DeHart*, 83 Wn.2d 70, 75, 515 P.2d 982 (1973) ("Negative findings of fact are not required."). Accordingly, the Appellants' claim that the Council and then the Superior Court somehow did not adequately explain their conclusions (which are both incorrect) has no bearing on the validity of the Council's action.

Tellingly, the Stokes Appellants only cite cases applying more rigorous review standards under statutory or local code mandates to enter specific findings. Stokes Br. at 26-27 (citing *Weyerhaeuser v. Pierce Cnty.*, 124 Wn.2d 26, 35, 873 P.2d 498 (1994) (reviewing a hearing examiner's decision under the "substantial evidence" standard where the Pierce County Code required the examiner "to make and enter findings and conclusions which supported his decision"), and *In re Marriage of Monkowski*, 17 Wn. App. 816, 818, 565 P.2d 1210 (1977) (reviewing a trial court's findings and conclusions under the "abuse of discretion" standard where state dissolution statutes required the court to consider six enumerated fact-sensitive inquiries)).

These cases do not apply to a city council's special assessment decision. The LID statutes do not require city councils to provide exhaustive findings and conclusions. This is because a city council's weighing of the evidence is not subject to judicial review. Instead, as discussed below, the Legislature limits court review of council decision making to the "fundamentally wrong basis" and "arbitrary and capricious" standard. Even if after reviewing the entire administrative record this Court finds the City Council's decision erroneous (which it is not), it must affirm because the Council duly considered the record. *See, e.g.*, Stokes Br. at 17 (recognizing approximately four hours of hearing testimony and two hours of deliberation); *Abbenhaus v. City of Yakima*, 89 Wn.2d at 858-59 ("Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.").

Importantly, the administrative record contains ample factual basis to support the reassessments, including the Macaulay parcel-specific appraisals and Appellants' submissions (together spanning 546 pages). AR 3095-3362 (Macaulay); AR 786-1057 (Appellants). And, the City Council did enter written findings of fact and conclusions of law explaining the basis for its decision—namely, the appraisals. AR 7-16. Other cases reversing administrative decisions where the record is devoid

of any basis of fact and the administrative body fails to enter any findings of fact or conclusions of law are therefore distinguishable. *Cf. Pentagram Corp. v. City of Seattle*, 28 Wn. App. 219, 229, 622 P.2d 892 (1981) (reversing denial of building permit absent written findings and conclusions).

4.2.4 Prior testimony is part of the administrative record.

Appellants argue that the City Council may not consider Appellants' own prior testimony because it was offered after receiving defective notice and is therefore invalid. This argument is akin to saying a city can preclude a protestor from offering evidence by violating that protestor's due process rights. *Hasit* held the opposite, prohibiting the City from *limiting* protest evidence. *Hasit*, 179 Wn. App. at 945-47. This argument is particularly odd because Appellants also claim in this Appeal (incorrectly) that the City failed to consider their evidence.

More fundamentally, Appellants invited the alleged error by requesting the City include the earlier 2011 *Hasit* record in this reassessment proceeding. *See* CP 179; AR at 1058-3094. They cannot now complain that the evidence they themselves submitted was improperly considered by the City. *In re Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003) (defendant invited error by offering as evidence portions of a statute that defendant later claimed were unconstitutional, precluding

due process argument on appeal); *JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn. App. 1, 10, 970 P.2d 343 (1999) ("It is a well-settled rule that a party cannot successfully complain of error for which he is himself responsible or of rulings which he has invited the trial court to make.") (internal quotation marks omitted).

Ultimately, based on the evidence introduced by Appellants (which they now challenge in this subsequent litigation), this Court upheld the City's assessment methodology in *Hasit*. That testimony is part of the uncontested administrative record and the law of *this* case. Moreover, Appellants were given the opportunity to refute their own prior evidence at the hearing, which they did. *See, e.g.*, AR at 660-62 & 713. Any question regarding that evidence now goes to weight, not admissibility. As discussed below, that determination lies with the Council. RCW 35.44.100; *Abbenhaus*, 89 Wn.2d at 858-59.

4.2.5 Appellants' "test of reasonableness" issue is misplaced and irrelevant to the appraisal's fundamentally sound assessment methodology.

The Macaulay appraisal report did *not* rely on the test of reasonableness as foundation for finding special benefit. Accordingly, Appellants' red herring argument that Macaulay's "test of reasonableness" is arbitrary and capricious is irrelevant. The Macaulay parcel-specific appraisals merely used the test to confirm values derived from the already

valid assessment methodology. That methodology, as discussed below, was affirmed by this Court in *Hasit*.

Moreover, as this Court held in *Hasit*, a "city need only show 'slight evidence,' **if any**" to show that its appraisal method accurately reflects special benefit. *Hasit*, 179 Wn. App. at 944 (emphasis added). Under that basis, this Court affirmed the City's appraisal methodology for this LID #1. Again, Appellants ignore this Court's holding in *Hasit* fundamental to this Appeal:

> We hold … the City [of Edgewood] did not err in assessing the entire cost of the improvements against the LID property owners; that the City's appraisal did not err by taking recent zoning amendments into account; and that **the City showed that the mass appraisal method more fairly reflected special benefits than would the zone and termini method**.

Hasit, 179 Wn. App. at 960 (emphasis added).

The City in this reassessment proceeding did go beyond that initial appraisal. It reconfirmed the assessment methodology affirmed by *Hasit* through an analysis of comparable properties (the test of reasonableness) and individual parcel-specific appraisals. *See generally* AR 3095-3362. The City cannot be faulted for these additional measures, which further support LID #1's reassessments on Appellants' parcels.

In any case, the test of reasonableness is itself an approved methodology for confirming assessed values by licensed appraisers in

Washington. *See* Uniform Standards of Professional Appraisal Practice (USPAP) Advisory Opinions, *Advisory Opinion 18* A-49 (2014-2015 ed.); Ch. 308-125 WAC (approving USPAP standards for real estate appraiser licensing purposes). The City should not now be penalized for providing more than is required by the LID statutes.

4.2.6 The LID (and other property owners within the LID) are not required to finance improvements to Appellants' properties.

Docken Appellants cite a split-panel decision from Division III of the Court of Appeals[9] for the proposition that "modifications to particular parcels necessary to enjoy improvements are to be deducted as a set off from the special assessment value." Docken Br. at 54, 56 (citing *Kusky*, 85 Wn. App. at 499). This statement mischaracterizes *Kusky*. There, the Washington Department of Ecology and the City of Goldendale required property owners to remove underground gasoline storage tanks and to remediate contaminated soil in order for the City to construct street improvements funded by the LID. *Kusky*, 85 Wn. App. at 496-97. Here, the City of Edgewood has not required the Docken Appellants to construct anything, much less require environmental remediation efforts necessary for LID improvements. Whether Appellants decide to construct

[9] Mistakenly cited as a Supreme Court Decision.

improvements to their own property is within their discretion. Similar claims by the Stokes Appellants also fail. *See* Stokes Br. at 39-43.

More fundamentally, the City of Goldendale in *Kusky* relied on the presumption of special benefit, failed to present competent evidence to support that presumption, and did not counter the property owner's showing of no special benefit. *Kusky*, 85 Wn. App. at 500. Here, the Edgewood City Council considered competing appraisal evidence, including Appellants' submissions and the Macaulay appraisal. Again, this Court in *Hasit* upheld the Macaulay appraisal's assessment methodology. Any contrary submissions go to the weight of the evidence. As discussed below, that determination lies with the Council. RCW 35.44.100; *Abbenhaus*, 89 Wn.2d at 858-59.

4.2.7 This Court held that the City did not simply distribute LID costs.

Appellants claim that the City improperly distributed LID costs without regard to special benefit. *See, e.g.*, Docken Br. at 55-57. This is incorrect. As this Court held, "the City [of Edgewood] did not err in assessing the entire cost of the improvements against the LID property owners…." *Hasit*, 179 Wn. App. at 960. As discussed below, this holding is correct, was not challenged, and is the binding law of this case. Appellants' claims to the contrary may not be relitigated.

4.2.8 The Macaulay appraisal did not "double count" assessments.

Like any lien upon property, *see* RCW 35.50.010, a special assessment is reflected in the property's sale price. If the buyer assumes the lien, the buyer pays the property's fair market value minus the lien's present value (effectively, the buyer amortizes that expense over the life of the assessment roll). If instead the seller pays the entire lien amount at closing, the buyer pays the property's fair market value without discount. In either case, the seller bears the lien's cost (with payment at closing or with a discounted sale price). And in either case, the fair market value of the property is the sale price without the lien.

For example, if a neighbor sells her property subject to a $200,000 mortgage, that sale does not automatically reduce her property's fair market value by $200,000 (much less the neighboring property's value by $200,000). Instead, the market adjusts the sale price for that mortgage to determine fair market value. Neighboring property values are then compared by fair market value (not the discounted price). The Docken Appellants' "double counting" argument, Docken Br at 26-27, defies this logic of real estate transactions. *See, e.g., Time Oil Co. v. City of Port Angeles*, 42 Wn. App. 473, 480, 712 P.2d 311 (1985) (rejecting as "speculation or conjecture" an expert's opinion that "to offset the LID

cost, Time Oil would have to sell the property at a higher price than competitors in other gas stations....").

In contrast, the Macaulay appraisals reflect the reality of real estate transactions by accounting for each comparable property's assessment lien discount at sale in order to calculate that property's fair market value. Each Macaulay appraisal showed in "adjustment grids" the before and after (with and without LID) values of comparable land sales for each parcel, including adjustments for sale conditions, market conditions, *and financing terms*, among others. *See, e.g.*, AR at 3120 & 3123 (Duncan); 3149 & 3153 (Stokes); 3179 & 3182 (Suelo Marina); 3206 & 3209 (Masters & Schmidt); 3237 & 3241 (Rempel); 3300 & 3303 (AKA The Brickhouse); 3337 & 3342 (Docken). This approach is consistent with the methodology validated in *Hasit*. *Hasit*, 179 Wn. App. at 943-44. Additionally, as held by this Court in *Hasit*, each property's fair market value can (and in this case did) increase as a result of domestic sewer service. *Hasit*, 179 Wn. App. at 941-44, 960.

4.2.9 Examples of existing "highest and best use" do not defeat special benefit when LID improvements allow that use to be expanded.

Docken Appellants claim that because existing uses are an "example" of highest and best use, their properties cannot be further improved and that the existing use cannot be expanded. *See generally*

Docken Br. at 41-70. Common sense rejects this argument. As the Docken Appellants note, the Macaulay appraisals found expansion and redevelopment potential even for properties that currently enjoy "examples" of highest and best use. *Id.* If anything, these considerations go to the weight of the evidence. As a matter of law, the Council makes these determinations. RCW 35.44.100; *Abbenhaus*, 89 Wn.2d at 858-59.

4.2.10 Parcel Nos. 133 and 140 were properly appraised as a unitary property.

Similarly, Docken Appellants quote a Westlaw case summary for the proposition that "possible future integrated use of separate parcels of land should not have been considered" for Parcel Nos. 133 and 140. Docken Br. at 69 (referring to *Doolittle v. City of Everett*, 114 Wn.2d 88, 786 P.2d 253 (1990)). The holding in *Doolittle v. City of Everett*, however, affirms the Macaulay appraisal's methodology. There, the property owner held four contiguous lots, three having a unitary commercial use (single commercial building) and the fourth having a separate commercial use. *Doolittle*, 114 Wn.2d at 91. The Court in *Doolittle* held that the fourth parcel must be valued separately, but that the three unitary parcels were properly appraised together. *Doolittle*, 114 Wn.2d at 103-104.

Here, Parcel Nos. 133 and 140 were purchased together in 2004, are surrounded by a common chain link fence, and are used together (office, parking, and storage). AR at 3325-26 & 3329. They therefore satisfy the three-element larger parcel test: unity of ownership, unity of use, and contiguity. *Doolittle*, 114 Wn.2d at 94-95. Closely paralleling the holding in *Doolittle*, the Macaulay appraisal valued Nos. 133 and 140 together, *but separately valued Parcel No. 131*. AR at 3333-45. Like the property owner in *Doolittle*, Docken Appellants must concede this fact. *Doolittle*, 114 Wn.2d at 103 ("The Owner properly concedes that these three lots should be combined for purposes of determining special benefits.").

4.3 The Law of the Case (*Hasit*) Controls.

The central issue in this case is the appropriate standard of review. This issue was decided in *Hasit* and is now the law of *this* case. "In its most common form, the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation." *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005).

On a subsequent appeal in the same litigation, the reviewing court may (or may not, within its discretion) review prior holdings in two limited circumstances: (1) where the prior holding is clearly erroneous and

would work a manifest injustice to one party; and (2) where there has been an intervening change in controlling precedent between trial and appeal. RAP 2.5(c)(2); *Robertson*, 156 Wn.2d at 42 (recognizing that RAP 2.5(c)(2) codifies the two common law exceptions to the law of the case doctrine).

This Appeal arises out of LID #1's subsequent reassessment proceedings following *Hasit*. RCW 35.44.280 (authorizing subsequent reassessment proceedings for the same LID in which assessments were invalidated or held void). Here, only those properties that successfully appealed are subject to LID #1's subsequent reassessment proceedings. *Hasit*, 179 Wn. App. at 960 ("due process claims were waived by all property owners other than the respondents.").

Applicable holdings in *Hasit* are the controlling law of this case, and neither exception to the law of the case doctrine applies. As Docken Appellants note, none of the parties sought review of *any* holding in *Hasit*. Docken Br. at 14 ("The Court of Appeals Ruling became final and binding upon the parties in 2014"). None of the parties in this case have contested any of the holdings in *Hasit*. This Court's holdings are therefore *not* clearly erroneous and apply as the law of this case.

LID law also has not changed since *Hasit*. Indeed, the Docken Appellants rely almost exclusively on *Hasit*'s general discussion of LID

law in this Appeal. *See* Docken Br. at 19-25 (block quoting eight paragraphs from *Hasit*). The Stokes Appellants also rely heavily on *Hasit*. *See* Stokes Br. at 24, 28 & 31 (citing *Hasit* at least eight times for separate LID principles). Except for the purpose of demonstrating that the City followed *Hasit* in this reassessment proceeding, this Court need not revisit its holdings.

4.3.1 This Court affirmed the City's special benefit methodology in *Hasit*.

After curing the procedural defects in LID #1's initial assessment process, as described above, the Court's review of the City Council's reassessment action in this proceeding is limited to the "fundamentally wrong basis" and "arbitrary and capricious" standard. RCW 35.44.250. In *Hasit*, this Court affirmed the City's special assessment methodology and the Macaulay appraisal. Because the City relies on the upheld assessment methodology and Macaulay appraisal in this reassessment proceeding, the law of *this* case holds that the City has met the "fundamentally wrong basis" and "arbitrary and capricious" standard. The City respectfully requests that this Court therefore affirm the City Council's reassessment determination.

4.3.2 The "fundamentally wrong basis" and "arbitrary and capricious" standard of review applies to this reassessment proceeding.

Even if the law of *Hasit* does not apply to each of Appellants' claims (it does), this reassessment proceeding still presents a straight-forward application of the review standard mandated by the Legislature:

> The judgment of the court **shall confirm**, unless the court shall find from the evidence that such assessment is founded upon a **fundamentally wrong basis** and/or the decision of the council or other legislative body thereon was **arbitrary or capricious**; in which event the judgment of the court shall correct, change, modify, or annul the assessment insofar as it affects the property of the appellant.

RCW 35.44.250 (emphasis added). Appellants' indiscriminate references to "de novo" review of the record before the council (Docken Br. at 21; Stokes Br. at 8) and to Appellant's self-imposed "clear, cogent, and convincing" burden of proof (Docken Br. at 26) are both incorrect. Restoring century-old precedent, the Legislature expressly abrogated de novo review of the administrative record before city councils nearly 60 years ago. Laws of 1957, ch. 143, § 7; *see Abbenhaus v. City of Yakima*, 89 Wn.2d at 858 (recognizing legislative abrogation of de novo review and *In re Schmitz*, 44 Wn.2d 429, 268 P.2d 436 (1954)).

Accordingly, this appeal is not a review of the *weight of the record* before the Council. It also is not a review of whether Appellants met a

certain *burden of proof* before the Council. Rather, this Appeal is a review of the City Council's assessment *decision*. As the Legislature has made clear, courts are limited to reviewing the Council's decision under the "fundamentally wrong basis" and "arbitrary and capricious" standard of review. RCW 35.44.250; *Abbenhaus*, 89 Wn.2d at 858.

4.3.3 The Council's decision passes "arbitrary and capricious" review.

"Arbitrary and capricious" refers to "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action." *Abbenhaus v. City of Yakima*, 89 Wn.2d 855, 858, 576 P.2d 888 (1978). Accordingly, as the Washington Supreme Court held, and as the Docken Appellants note: "Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious **even though a reviewing court may believe it to be erroneous**." *Abbenhaus*, 89 Wn.2d at 858-59 (emphasis added); Docken Br. at 22 (quoting *Hasit*, 179 Wn. App. at 935). This is because the Legislature recognizes balancing the credibility of opinion testimony in LID proceedings lies with the city council. RCW 35.44.100. The Supreme Court summarized the courts' limited role as follows:

> The first assignment of error in this case is based upon the facts, and depends upon on whether the assessments were too high or not. This is largely a matter of opinion. In this class of cases we said, in *In Re Seattle*, 50 Wash. 402, 97 P.

> 444: "Opinions will differ widely ... as to the benefits to accrue to the different properties within the district; but this court cannot substitute its judgment for the judgment of those whom the law has charged with the duty of establishing the district and apportioning the cost, whenever such difference of opinion may arise."

In re City of Seattle, 54 Wash. 297, 298, 103 P. 20 (1909) (alterations in original). This Court should reject Appellants' invitation to ignore over 100 years of precedent, which the Legislature reaffirmed in 1957. Laws of 1957, ch. 143, § 7; *see Abbenhaus*, 89 Wn.2d at 858; Philip A. Trautman, *Assessments in Washington*, 50 WASH. L. REV. 100, 128-30 (1965) (detailing history of review standards prior to *Abbenhaus*).

Here, the City Council gave due consideration to all facts and circumstances, including Appellants' evidence. As noted above, Mayor Daryl Eidinger opened the final assessment roll hearing by stating its purpose as follows:

> The purpose of this hearing is to afford individual property owners an opportunity to present evidence and information to the Council, and to explain the reasons for any objections they may have to their own individual proposed assessments. The Board wants to hear whatever pertinent information or evidence you may wish to present concerning the amount of your final assessment. And no formal rules of evidence will control these proceedings.

AR at 616. With respect to the eleven original parcels in this reassessment, the Council heard over four hours of testimony (*see generally* AR at 614-773) and deliberated on the evidence over a 15-day

period, from September 17 to October 2, 2014 (AR at 2 & 4). Although not required, the Council noted the testimony and evidence received from Appellants:

> Testimony was received from Attorney Carolyn Lake on behalf of appellant Owners Duncan, Suello Marina LLC, Masters and Schmidt, Skarich, AKA The Brickhouse LLC and Docken. In addition, Enid Duncan, Dexter Meacham (Suello Marina LLC), and Eric Docken all testified challenging the LID's proposed reassessments. The Docken Appellants based their challenges, at least in part, on the information contained in the Heischman Report, which is part of the record in this matter. Attorney Margaret Archer presented on behalf of the Stokes and Rempel properties, as did David Hunnicutt regarding separate valuations he conducted regarding these same properties. The Hunnicutt valuations are part of the record in this matter along with all other evidence submitted.

AR at 13-14. Appellants cannot dispute that the City Council considered the administrative record by just saying so.

At Appellants' invitation, this Court could spend a great deal of time reviewing the original 154-page Macaulay special benefit and proportionate assessment study (AR 361-515), supplemented here by the 267-page parcel-specific appraisals (AR 3095-3362), and comparing them with Appellants' 279-pages of submissions (AR 786-1057). (Again, a questionable invitation.[10]) And, this Court *might* find after making its own fact determinations that the competing evidence presented by the City

[10] In an LID appeal, "The reviewing court looks at the propriety of the process and does not undertake an independent evaluation of the merits." *Bellevue Associates v. City of Bellevue*, 108 Wn.2d 671, 674, 741 P.2d 993 (1987).

and the Appellants leaves "room for two opinions." For example, Appellants admit that the Court may properly find special benefit for the following LID parcels:

- No. 2 – Duncan. Docken Br. at 46 (acknowledging if "the Court is swayed" **$182,642 in special benefit**, based on the conceded special assessment amount of $129,493).

- No. 27 – Stokes. Stokes Br. at 46 (acknowledging **$167,196 in special benefit**).

- No. 31 – Suelo Marina. Docken Br. at 50-51 (acknowledging as a "less appropriate alternative" **$65,340 in special benefit**).

- No. 68 – Rempel. Stokes Br. at 33 (acknowledging **$538,681 in special benefit**).

- Nos. 71 & 79 – Masters & Schmidt. Docken Br. at 58 (acknowledging as a "less appropriate alternative" **$122,802 in special benefit**).

- No. 133 – Docken. Docken Br. at 65 (suggesting "best evidence" of **$74,438 in special benefit**).

- No. 140 – Docken. Docken Br. at 66 (suggesting "best evidence" of **$15,419 in special benefit**).[11]

Further, Appellants recite a number of alternative special benefit calculations for every parcel subject to this appeal, demonstrating that even Appellants recognize differing opinions as to special benefit for each parcel. *See generally* Docken Br. at 41-71; Stokes Br. at 32-47. Under the "arbitrary and capricious" standard, however, the Legislature directs the

[11] Although Docken Appellants deny any special benefit for the remaining two parcels, No. 131 (one of three Docken properties) and No. 128 (AKA The Brickhouse), this denial is similarly based on the weight of the evidence. Docken Br. at 58-69.

reviewing court to affirm the assessments even if that court believes a city council incorrectly weighed the evidence and believes the council's decision is therefore erroneous. Docken Br. at 22 (quoting *Hasit*, 179 Wn. App. at 935).

This Court, moreover, already affirmed the Macaulay appraisal's special benefit methodology, which is the law of this case. The fact that Macaulay updated the mass appraisal with additional market comparables and parcel specific information does not change the mass appraisal's underlying validity. And as discussed at length above, the individual attacks against the Macaulay appraisals in this Appeal lack basis in fact or law. Under the law of *Hasit* (this case) and over 100 years of precedent, the City respectfully requests this Court affirm these few remaining LID assessments.

4.3.4 The assessment methodology passes "fundamentally wrong basis" review.

"Fundamentally wrong basis" refers to "some error in the method of assessment or in the procedures used by the municipality, the nature of which is so fundamental as to necessitate a nullification of the entire LID, as opposed to a modification of the assessment as to particular property." *Abbenhaus*, 89 Wn.2d at 859 (internal quotation marks omitted). As the law of this case, *Hasit* forecloses Appellants from challenging the City

Council's reassessment in this proceeding as founded on a "fundamentally wrong basis." Specifically:

> We hold … the City [of Edgewood] did not err in assessing the entire cost of the improvements against the LID property owners; that the City's appraisal did not err by taking recent zoning amendments into account; and that the City showed that the mass appraisal method more fairly reflected special benefits than would the zone and termini method.

Hasit, 179 Wn. App. at 960 (affirming the City's assessment methodology and separate assessments on 150 individual LID properties).

Ultimately, Appellants assert only one "fundamentally wrong basis" claim: that the Council applied an incorrect standard when weighing the evidence presented at the LID hearing. *See* Docken Br. at 36-37. This claim is based on a *draft* Council order, not the order entered by the Council. The Council's actual order, which is offered as part of the uncontested administrative record on appeal, establishes that the Council did not apply the standard the Docken Appellants suggest. AR at 14-15. This claim therefore lacks merit.

Indeed, as Stokes Appellants indicated in briefing before the superior court, their similar standard of proof theory does not give rise to a "fundamentally wrong basis" claim. CP 47, n.2 ("Stoke and Rempel are not asserting in this appeal that the Re-Assessment is founded on a fundamentally wrong basis."); *see also* Stokes Br. at 6 (omitting the

fundamentally wrong basis standard in their presentation of the issue on appeal).

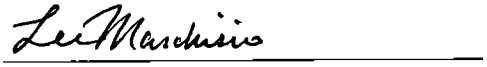
To the extent Appellants change course and claim the "fundamentally wrong basis" standard applies to their other claims, those separate attacks against the Macaulay appraisal still lack merit (as discussed at length in Section 4.2 above). In this regard, cases discussing an expert appraisal's legal sufficiency under the "fundamentally wrong basis" standard are distinguishable. *Cf. Bellevue Plaza, Inc. v. City of Bellevue*, 121 Wn.2d 397, 851 P.2d 662 (1993) (rejecting 1-page appraisals based on a speculative "superblock" valuation and an assessment methodology based on an unsupported car trip generation formula). Aside from including "oversizing" costs, this Court affirmed in *Hasit* the Macaulay mass appraisal methodology, which is additionally supplemented with a 267-page parcel-specific appraisal regarding Appellants' properties. AR 3095-3362. The Council did not proceed on a fundamentally wrong basis.

5. CONCLUSION

In *Hasit*, this Court held the City's assessment methodology was not founded on a fundamentally wrong basis. The City reassessed the properties in this reassessment proceeding in accordance with *Hasit* regarding oversizing costs, notice, a property owner's opportunity to present evidence, and applicable evidentiary standards. Accordingly, review of the City Council's decision in this reassessment proceeding is limited to the "fundamentally wrong basis" and "arbitrary and capricious" standard. Under this deferential review standard, the City respectfully requests this Court affirm the reassessments and dismiss this Appeal.

RESPECTFULLY SUBMITTED this 19th day of February, 2016.

J. Zachary Lell, WSBA No. 28744
OGDEN MURPHY WALLACE
City Attorney, City of Edgewood;
and



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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ENID AND EDWARD DUNCAN; ERIC DOCKEN, DOCKEN PROPERTIES, LP; JAMES AND PATRICIA SCHMIDT, DARLENE MASTERS; SUELO MARINA, LLC; AKA THE BRICKHOUSE, LLC; 1999 STOKES FAMILY LLC, et al., Appellants, v. CITY OF EDGEWOOD, Local Improvement District No. 1, Respondent.	No. 48028-0-II Pierce County Superior Court Case No. 14-2-13566-7 CERTIFICATE OF SERVICE

I, Susan G. Bannier, certify that I am a citizen of the United States of America and a resident of the State of Washington. I am over the age of eighteen and I am competent to be a witness herein.

On February 19, 2016, I caused a true and correct copy of the following documents:

1. Brief of Respondent City of Edgewood; and
2. this Certificate of Service

to be served via email and U.S. Mail, postage prepaid, upon designated counsel as follows:

Attorneys for Petitioners: Duncan; Docken; Schmidt; Suelo Marina; AKA The Brickhouse: Carolyn Lake Seth Goodstein Goodstein Law Group PLLC 501 South G Street Tacoma, WA 98405 Email: clake@goodsteinlaw.com sgoodstein@goodsteinlaw.com	☒ ☐ ☐ ☒ ☐	Via U.S. Mail Via Facsimile Via Messenger Via Email Via e-file / ECF
Attorneys for Petitioners: 1999 Stokes Family Trust LLC & Tina Rempel and the Ray and Eldean Rempel Irrevocable Trusts Parcel 68: Margaret Y. Archer Gordon Thomas Honeywell 1201 Pacific Avenue, Suite 2100 Tacoma, WA 98402 Email: marcher@gth-law.com	☒ ☐ ☐ ☒ ☐	Via U.S. Mail Via Facsimile Via Messenger Via Email Via e-file / ECF

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

Executed this 19th day of February, 2016 at Seattle, Washington.

Susan G. Bannier
Legal Assistant

FOSTER PEPPER LAW OFFICE

February 19, 2016 - 3:18 PM

Transmittal Letter

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Case Name: Duncan, et al. v. City of Edgewood

Court of Appeals Case Number: 48028-0

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Response__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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Court of Appeals Case Number: 48028-0

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