No. 93889-0

SUPREME COURT OF THE STATE OF WASHINGTON

(Court of Appeals No. 48028-0-II)

ENID and EDWARD DUNCAN; ERIC DOCKEN; DOCKEN PROPERTIES, LP; JAMES and PATRICIA SCHMIDT; DARLENE MASTERS; SUILO MARINA; AKA THE BRICKHOUSE , LLC; 1999 STOKES FAMILY LLC; TINA REMPEL; AND ELDEAN REMPEL as Trustee for the RECOVABLE TRUST AGREEMENT OF RAY AND ELDEAN B. REMPEL Dated December 12, 2006,

Appellants,

v.

CITY OF EDGEWOOD, Local Improvement District No. 1,

Respondent.

1999 STOKES FAMILY LLC, ELDEAN REMPEL, as Trustee for the REVOCABLE TRUST AGREEMENT OF RAY AND ELDEAN B. REMPEL dated December 12, 2006, and TINA REMPEL'S PETITION FOR SUPREME COURT REVIEW

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[4827-8225-9005]

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I. IDENTITY OF PETITIONER

Petitioners 1999 Stokes Family LLC ("Stokes") and Eldean Rempel, as Trustee for the Revocable Trust Agreement of Ray E. Rempel and Eldean B. Rempel dated December 26, 2006, and Tina Rempel (collectively "Rempel").

II. CITATION TO COURT OF APPEALS DECISION

Rempel and Stokes seek review of the Unpublished Opinion of the Court of Appeals, Division II filed on November 1, 2016 ("Opinion"). This decision dismissed Rempel and Stokes' appeals, as well as six other property owners' appeals, challenging the Edgewood City Council's October 15, 2015 decision (via adoption of Ordinance No. 14-0424) to affirm the Local Improvement District ("LID") No. 1 Sewer Assessment Roll. A copy of Division II's Opinion is in Appendix A at pages A-1 through A-42. A copy of the Ordinance, which appends the Council's Findings of Fact and Conclusions of Law, is attached as Appendix B at pages B-1 through B-26.[1]

III. ISSUE PRESENTED FOR REVIEW

Did the Council fail to fulfill its statutorily mandated role of a

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[1] A copy of Ordinance No. 14-0424 is in the Certified Administrative Record at bates stamp pages REF2014-00001 to REF2014-000026. Citations to the Administrative Record in this brief are denoted by AR followed by the last digits in the consecutively numbered bates stamps. Thus, citation to the Ordinance is AR 1-26.

Board of Equalization and therefore act in an arbitrary and capricious manner when it improperly applied presumptions and evidentiary burdens and confirmed the Assessment Roll without adjustment to the assessments against Stokes and Rempel despite unrebutted substantial evidence that that the assessments significantly exceeded the value of the special benefit conferred by the LID improvements and unanswered evidence that the assessments are grossly disproportionate to other assessments?

IV. STATEMENT OF THE CASE

This appeal involves Edgewood Sewer LID No. 1, which was formed in 2008 to construct certain sewer improvements intended to benefit 161 parcels of property within a 312-acre area. (AR 9, 268-310.) This is the second judicial appeal of the special assessments levied by the City of Edgewood to fund the LID sewer improvements. Though the LID was formed in response to a petition signed by several LID property owners, both Stokes and Rempel opposed and expressed concerns about the LID before it was formed. (AR 298.)

The parties to this consolidated appeal, who collectively own eleven of the 161 LID parcels, successfully challenged the first Assessment Roll approved by the Edgewood Council in 2011. This Court annulled the assessments levied against these eleven parcels in *Hasit, LLC v. City of Edgewood,* 179 Wn. App. 917, 320 P.3d 163 (2014). Following

the *Hasit* appeal, the City has collectively re-assessed the eleven parcels $2,385,785. (AR 2.) The re-assessment is the subject of this second consolidated judicial appeal.

Stokes and Rempel own two of the eleven parcels within the LID subject to this appeal, Parcel Nos. 27 and 68, respectively.[2] Of the $2,385,785 total re-assessment levied against the eleven LID parcels, Edgewood assessed the Stokes 7.67-acre parcel (Parcel No. 27) **$379,315**; it assessed the Rempel 7.22-acre parcel (Parcel No. 68) **$790,535**. (AR 12.) The assessments against just these two parcels comprise 49% of the re-assessment levied against all eleven parcels.

A. The First Assessment Roll – The Macaulay Mass Appraisal.

The City retained the private appraisal company Macaulay & Associates, Ltd. ("Macaulay") who prepared the May 10, 2011 Final Special Benefit / Proportionate Assessment Study, a "mass appraisal" for the LID parcels. (AR 362-449.) Macaulay was asked to determine the value of the special benefit – the valued added – to each LID parcel that resulted from the sewer improvements as a basis to allocate the sewer improvement costs. (AR 362-65, 372.) The total cost of the sewer improvements (being financed 100% through the LID) was estimated to be

[2] Stokes' property (LID Parcel 27) is located at 909 Meridian Avenue East. Rempel's property (LID Parcel 68) is located at 1914 Meridian Avenue.

$21,238,268, which was 74% the total special benefit value that Macaulay attributed to all the LID parcels. (AR 244-45, 361-65.)

Significant to this appeal, a substantial portion of the special benefit values Macaulay calculated were based on Macaulay's conclusion that the new sewer improvements will increase the development potential of the LID parcels, especially those parcels zoned for intense development (e.g. properties zoned Town Center (TC), Commercial (C), Multi-Family Residential (MR-2).) Macaulay concluded that "significantly more intensive development is possible with completion of the LID" and the he likelihood of development, or redevelopment also increased. (AR AR404. *See also* AR 362-64, 374-75, 406-08, 418, 425, 427-29.)

Thus, Macaulay added value to the parcels (calculated the special benefit) with the assumption that undeveloped properties would be developed with high intensity uses and underdeveloped properties would be re-developed to achieve high intensity uses. (AR 429.) Because development potential weighed heavily in his special benefit valuations, Macaulay recognized that known impediments to development that reduce development potential, such as the presence of wetlands, need to be considered as they will reduce the special benefit value. (AR 429-30, 74.)

On July 19, 2011, the City Council adopted the Assessment Roll as recommended by Macaulay, with some corrections and adjustments also

recommended by Macaulay. (*See* AR 2841-46.) The assessments were adopted over the objections of ten property owners.[3] (AR 9, 3065-91.)

B. Division II Annulled The Assessments As To Appellants.

Rempel, Stokes and seven other property owners, collectively owning twelve parcels within the LID, appealed the Council's action to the Pierce County Superior Court. The trial annulled the assessments as to the appealing parties and, on further appeal by the City, Division II also annulled the assessments. (AR 9, 28; *Hasit, supra,* 179 Wn. App. at 932.)

Division II annulled the first Assessment Roll on several grounds. The court held that Assessment Roll was made on a fundamentally wrong basis because it included costs for an oversized sewer system despite that the oversized system benefitted only future users not assessed under the LID. *Id.* at 938-41, 960.

The court also held that the objection process the City imposed on the property owners was so flawed that it violated the property owners' due process. *Id.* at 952-58. Division II also held that the Council's decision was arbitrary and capricious because it (1) based its confirmation in part on the objecting property owners' failure to present evidence that the City's flawed notice prohibited the property owners from presenting

[3] The written objections that Stokes submitted to the Hearing Examiner and the Council in 2011 are at AR 2684-2732, 2811-33, 3015-33. Rempel's 2011 written objections are at AR 1967-75, 2751-65, 2766-70, 3035-43.

(2) improperly required objecting parties to submit expert appraisal evidence to challenge the assessments, and (3) improperly imposed on property owners to prove that the assessments were founded on a fundamentally wrong basis or were arbitrarily and capriciously imposed. *Hasit,* a 179 Wn. App. at 944-50.

C. Edgewood's Reassessments.

After this Court annulled the assessments, the City began efforts to formulate reassessments for eleven of these LID parcels, owned by the eight parties that continued to participate in the appeal. The City determined that the cost attributable to the improperly assessed costs for over-sizing the sewer capacity was $805,687. (AR 29, 122, 124-25.) As a result, improvements costs were reduced from 74% of the total special benefit value as calculated by Macaulay to 70.9%. (AR 23.)

The City again retained appraisal firm Macaulay and Associates to supplement is analysis to "provide further and/or modified support and documentation for the mass appraisal." (AR 21, 29.) Macaulay performed site visits and gather additional information for each of the eleven parcels and issued Restricted Appraisals providing evaluations of the individual eleven LID parcels. (AR 21024, 29, 3095-3362.)

Macaulay's special benefit calculations continued to be founded upon his conclusion that the LID improvements significantly increased the

development potential for the parcels. Macaulay reported to the City:

> The difference in estimated retrospective market value before and after completion of the LID improvements is each property's special benefit. With the zoning changes ... in place, special benefit to the subject parcels is attributable to the significant increases in potential development density which occurred as a result of the project. In addition, the improvements will provide the impetus for more intense commercial and multi-family residential development, making the subject area more competitive with surrounding municipalities. (AR 23.)

Following Macaulay's supplemental analysis, the assessments were reduced by $408,557 from those originally levied against the properties in 2011; however, the substantial majority of the reductions were due to the removal of the eleven properties' proportionate share of the improperly allocated costs for over-sizing the sewer capacity. (AR 12, 21-26.)

D. Macaulay's Valuations And Stokes and Rempel's Objections.

On September 17, 2014, the City Council considered Macaulay's revised recommended valuations and heard property owner objections to the reassessments. (AR 2, 609-776.) Stokes and Rempel participated in the hearing by presenting testimony from the owners as well as expert testimony.[4] The evidence presented on their respective properties is below.

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[4] Macaulay's Restrictive Appraisals of the Stokes and Rempel properties are at AR 3134-63 and AR 3222-3355, respectively. Stokes' written submittal, including sworn declarations, documentary evidence and a professionally prepared expert appraisal are at AR 868-998. Rempel's written submittal, including documentary evidence, a professionally prepared expert appraisal and a professionally prepared expert critique of the Macaulay valuation, is at AR 853-60, 999-1030, 1031-51. The transcript of September 17, 2014 hearing is at AR 609-776. Testimony specific to the Stokes Property

1. Stokes' Property (LID Parcel 27).

Stokes' property is comprised of 333,977 square feet (7.67 acres). 150,000 square feet of the Stokes Property is occupied by wetlands and wetland buffers; thus, the total useable area is 183,977 square feet. The Property is split zoned; approximately 58% of the Property is zoned Commercial ("C") and 42% is zoned Mixed Residential Moderate Density ("MR2"). The total useable area in the C zoned property is 106,700 square feet (2.45 acres). The total useable area of MR2 zoned property is 77,277 square feet (1.77 acres). The C zoned property fronts Meridian Avenue frontage and the MR2 zoned property is situated in the back, east portion of the Property. (AR 973-74, 3145-46.)

In 2011, Macaulay opined that the value of the special benefit to the Stokes Property was $638,000 and the City assessed the property $472,120.[5] (AR 2842, 221, 667.) In 2014, the City appraiser valued the special benefit to the property slightly less, $535,000, and the City assessed the property $379,315. (AR 221, 3136.)

A portion of the reduced assessment reflects Stokes' pro rata share

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is at AR 622, 641-42, 666-701, 756-57, 765-68. Testimony specific to the Rempel Property is at AR 623, 642, 712-24, 757-58, 761-62.

[5] Macaulay initially valued the special benefit to Stokes' property at $719,000 and calculated an associated assessment of $529,151. Before the Council acted in 2011, Macaulay discovered an error, in that he assumed the property would be redeveloped, but still included the value of an existing home in the after LID value. After correcting that error, Macaulay revised his special benefit value to $638,00 and recommended an assessment of $472, 120, which is what the Council adopted in 2011. (AR 2842, 667-68.)

of the subtracted oversized capacity costs. The remainder results from a reduced special benefit value. Macaulay testified:

> ... after visually walking the site it was apparent that the wetlands encroached the property and restricted use of the property more than I anticipated in my previous analysis. So recognizing that, I lowered the special benefit to reflect the lowered utility of the site versus my previous analysis, and therefore reduced the benefit to 535,000 or 2.91 a square foot. (AR 641.)

Macaulay did not find that the wetlands occupied a greater area of Stokes' property or that there was a smaller developable area. However, "due to soil fill conditions and abutting wetland areas," the resulting diminished utility of the developable area was more than Macaulay previously contemplated. (AR 3150; *see also* AR 668.) Macaulay did not consult an engineer or planner, but reached this conclusion from his own observations and discussions with Stokes and City representatives. (AR 641, 3143, 3149.) Macaulay's revised recommendation did reinforce that, because his valuations assume redevelopment, consideration of impediments is critical to properly valuing the special benefit.

Stokes thus appropriately focused the evidence presented to the Council on the actual feasible development potential for his property. Stokes was well positioned to provide such evidence because, in 2012, Stokes retained a civil engineer to assist him with commercial development plans for his property. (AR 878.) The expert conclusions of

this civil engineer were presented to the Council through sworn written testimony. (AR 877-913.)

Included in the engineer's work was to design a stormwater system as necessary to support the planned development. His expert analysis revealed that development costs for this property are extraordinary and atypical. Adequate stormwater management will require **both** an underground detention vault, at a cost of approximately $260,000, and a detention pond that will occupy approximately 35,000 square feet that otherwise would be developable property. It is rare that developers are required to incur costs for both types of stormwater management. Moreover, due to problems created by recent road improvements, Stokes must acquire easements over three different privately owned properties for disbursal of retained stormwater. It is unknown if the requisite easements can be obtained and, if so, at what costs. Thus, there are extraordinary costs (both in construction costs and lost developable area) and increased risks associated with development of Stokes Property. (AR 877-906.)

Stokes also retained certified appraiser David Hunnicutt to prepare an independent appraisal to determine the LID special benefit to the Stokes Property. (AR 970-98.) Unlike Macaulay, Hunnicutt's appraisal took these extraordinary development costs into account in determining a more accurate value of the property based upon feasible development

potential. With consideration of the actual development costs and risks, Hunnicut, concluded that special benefit to the Stokes property is only $167,196. (AR 971, 995.) Based upon this special benefit valuation and applying 70.9%, the assessment should not exceed $118,542.

Finally, Stokes also presented testimony from planning consultant William Palmer that the stormwater management and critical areas development issues presented by Stokes' property are very similar to those presented for LID Parcel Nos. 20 and 21. But, Stokes' property assessment is grossly disproportionate to the assessment levied against similarly situated LID Parcel Nos. 20 and 21. Macaulay determined that the special benefit to LID Parcel 21 was $0 because the property is encumbered by critical areas and a stormwater pond similar to that required to develop Stokes' property, even though a developable area remained on that property. But Macaulay failed to consider and make appropriate adjustment for the even more extraordinary stormwater management measures required to develop Stokes' property. If treated as Parcel Nos. 20 and 21 and the same or similar adjustments are made, Stokes' property special benefit value must be reduced to $27,120 and the assessment should be reduced to $19,235. (AR 695-701, 873-75, 917-38, 949-69.)

Significantly, **the City offered no responsive testimony or rebuttal to any of the above expert evidence**, but instead, rested on

Macaulay's Restricted Appraisal. No one disputed the engineer's stormwater analysis. Macaulay was testified at the hearing. Yet he offered no response whatsoever to the stormwater cost issues in either his opening testimony (*see* AR 622) or the rebuttal testimony elicited from the City's attorney after all the objecting property owners completed their presentations (*see* 757-62.) He offered no testimony to dispute that the costs were extraordinary and required consideration or that he considered them in his valuation. The Assistant City Manager testified that at least one other Edgewood development had installed an underground vault. (AR 755-56.) But he also acknowledged that this development did not suffer lost developable area to a storm detention pond. (AR 756-57.) Neither Macaulay nor any City representative offered any testimony to respond to the disparate treatment of the Stokes and CAH properties.

2. Rempel's Property (LID Parcel 68).

Rempel's Property is a long narrow parcel comprised of 314,360 square feet (7.22 acres), with 193 feet fronting Meridian. The entire Rempel Property is zoned Town Center (TC). It is improved with a mini-storage that produces a positive annual cash flow. (AR 1002-03.)

In 2011, the City appraiser opined that the value of the special benefit to the Rempel Property was $1,115,000 and the City assessed the property $877,005 based upon a special benefit value of $1,190,000. (AR

225, 858.) In 2014, the City appraiser made no changes to the land value, but this time he minimally increased the contributing value of the mini-storage from $225,000 to $300,000, acknowledging that the mini-storage's positive cash flow adds more value to the property. (AR 623, 3337, 3347.) Macaulay gave the ministorage no value post sewer installation, because he assumed any purchaser would demolish the mini-storage and redevelop the Property. (*Id.*) This had a corresponding $75,000 reduction in the special benefit value. This, combined with Rempel's pro rata share of the subtracted oversized capacity costs, resulted a revised recommended assessment of $790,535. (AR 3342.)

Rempel also presented the Council with a professionally prepared appraisal by MAI appraiser David Hunnicutt. (AR 999-1027.) But Rempel did not simply provide a competing expert appraisal. Rempel also presented compelling evidence that the Macaulay valuation analysis was flawed. The most notable flaw in the Macaulay valuation is his valuation of the Rempel land Without LID.

MAI appraiser David Hunnicutt determined that Macaulay's before value was understated and the after value was overstated, resulting in a significantly inflated special benefit valuation.[6] Hunnicutt determined

[6] Notably, this Macaulay's Without LID valuation is substantially lower (25%) than the Pierce County Assessor's 2011 valuation of $1,462,000 (AR 1008) for the land only ($4.65/sf). Appraiser Hunnicutt researched arms-length sales in Edgewood for the

that the special benefit to the Rempel Property is only $538,681. Applying 70.9% to this special benefit value, the Rempel's assessment should not exceed $381,925. (AR 1000, 1026.)

Independently, Rempel demonstrated, through Macaulay's own appraisal, that their assessment is grossly disproportionate to the assessments levied against another similarly situated property. Macaulay's May 10, 2011 Report provided a range of Without LID values for all Town Center properties -- $4.00/sf to $8.00/sf. (AR 439.) Thus, Macaulay's valuation for the Rempel Property is outside his own range. Only one other Town Center property within the LID was given a value below $4.00/sf. That property is LID No.84, which the City held out to the Court as comparable to Rempel's property. (*See* AR 25, 865, 858-559.) However, LID No.84 was only valued at $6.30/sf With LID. Macaulay valued the Rempel land With LID at $8.00/sf. (*Id.*)

Finally, as additional evidence of disproportionate treatment, Rempel presented a separate evaluation of the Macaulay appraisal by MAI appraiser Donald Heishmann. Heishmann evaluated Rempel's property valuation by Macaulay as compared to other similarly situated LID properties and determined that the Rempel valuation and assessment is an

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relevant time period (including sales used in Macaulay's analysis). Based on the sales reviewed, he found that: (1) no properties sold for less than the assessed value; and (2) only one arms-length sale was at 100% of assessed value, the rested exceed assessed value. (AR 1008.)

"outlier" and that the Rempel Property is grossly disproportionate to the assessments levied against other similarly situated properties. (AR 1036.) Compared to the median increase in value to the LID properties of 40% that Macaulay attributed to the sewer improvements, Macaulay applied a 128% increase in value to the Rempel Property. (*Id.*) Heischman concluded that this increase that Macaulay applied to the Rempel Property "is not within reason." (*Id.*)

Rempel's evidence went unanswered by the City. Macaulay's rebuttal testimony (AR 757-62) did not even address, much less refute Rempel's evidence. Again, Rempel did not simply present the Council with a competing appraisal. They also presented evidence that Macaulay's analysis was internally consistent and expert evidence from two appraisers that the Macaulay' valuation and recommended assessment for Rempel's property is provably an outlier and grossly disproportionate to the other LID assessments.

E. The City Council Adopted Macaulay's Recommendations Without Adjustment Or Explanation.

After the presentation of evidence closed, the Council conducted deliberations in executive session. (AR 547.) After completing deliberations, the Council returned to public session and, without any

discussion, unanimously passed a motion to adopt the recommended re-assessments as determined by its private appraiser Macaulay. (*Id.*)

The Council adopted Ordinance 14-0424 to formalize its decision. (AR 1-26.) The Ordinance appends Findings of Fact and Conclusions of Law, but they provide no insight to the rationale for the Council's decision. After listing, without discussion, the evidence presented for consideration, the Council , acting as the Board of Equalization, stated:

> 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 the LID No. 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.

(Appendix B, AR 14-15, Conclusion No. 3.)

E. Division II Rejected Stokes and Rempel's Subsequent Appeal.

Rempel and Stokes appealed the Council's decision to the trial court and then to Division II of the Court of Appeals. (CP 635-742.) Division II dismissed their appeal. (Appendix A.)

The court acknowledged that Rempel and Stokes presented the Council with sufficient evidence to overcome any presumptions that initially favor Macaulay's recommended assessments and place the burden

of proof on the City. (Opinion at p. 19.) But ultimately, the court viewed the evidence presented as competing opinions weighed by the Council and concluded that Rempel and Stokes did not demonstrate that the Council's decision was arbitrary and capricious.

Though the court accepted Macaulay's views regarding development impediments and costs (*see e.g.* Opinion at p. 25), it inexplicably rejected Stokes and Rempel's expert evidence as speculative (*see, e.g.,* Opinion at p. 23.) Division II was unconcerned that the Council made no effort to explain its evaluation of the evidence or how it reconciled and resolved disputes. (Opinion at pp. 17-18.)

V. ARGUMENT IN SUPPORT OF REVIEW

A special assessment may not substantially exceed a property's benefit and a property should not bear proportionately more than its share of the total assessment relative to other LID parcels. *Hasit,* 179 Wn. App. at 933. *See also Cammack v. Port Angeles,* 15 Wn. App. 188, 196, 548 P.2d 571 (1976). Any assessment levied in violation of these limitations constitutes a deprivation of property without due process of law. *Id.*

> Because LID assessments involve a deprivation of property, affected owners have a right to a hearing as to whether the improvements resulted in special benefits to their properties and whether their assessments are proportionate... (Emphasis added.)

Hasit, 179 Wn. App. at 933.

As a result, any municipality that endeavors to levy special assessments is statutorily charged to review the assessments, through its council or other designated body, as a Board of Equalization, and adjust individual assessments as necessary to adhere to these basic and fundamental constitutional constraints. RCW 35.44.082(2). It is required to "consider all objections" timely submitted by the LID property owners at a formal hearing. RCW 35.44.070. Following Stokes and Rempel's first appeal, Division II instructed:

> Since a council or hearings officer considering an assessment roll sits as a board of equalization, these provisions disclose a legislative intent that it make a *de novo* determination while presuming the assessments to be correct, constrained perhaps by the clear, cogent and convincing evidence standard.

Hasit, 179 Wn. App. at 949. Yet, in this appeal, Division II required no evidence or documentation from the City to verify that it actually served its roll as a Board of Equalization and met its obligations. The evidence was to the contrary.

This petition presents an issue of substantial public interest and the Court should accept review. Guidance is needed from this Court regarding the roll and responsibility of a Board of Equalization when considering if assessments are appropriately within constitutional limits. Many are impacted by LID assessments, there are multiple parties in this appeal

alone and many others will be impacted. Moreover, the financial stakes are high. In this case, Rempel is faced with a $790,535 assessment on a 7.22-acre parcel, and Stokes is faced with a $379,315 assessment on property with enormous development challenges. But judicial guidance for what constitutes adequate review of citizen objections to these substantial assessments, beyond the standards of review, is very limited.

Here, Stokes and Rempel presented the Council with substantial evidence, including professionally prepared expert appraisals, that the assessments levied against their properties are both significantly in excess of the value of the special benefit to the properties and grossly disproportionate to assessments against other similarly situated properties within the LID. The evidence went unrebutted. Yet the Council summarily confirmed all of the re-assessments without a single adjustment. **It did so without explanation and without discussing, much less addressing Stokes and Rempel's specific and well-substantiated objections**.

Rempel and Stokes acknowledge that, on a judicial appeal, the Court is required to "confirm, unless the court shall find from the evidence that ... the decision of the council . . . was arbitrary and capricious." RCW 35.44.250; *see also Abbenhaus v. City of Yakima,* 89 Wn.2d 555, 558-58, 576 P.2d 888 (1979) 558-59. A decision is arbitrary and capricious if it is a willful and unreasoning action, taken without regard to

the facts and circumstances surrounding the action. *Hasit,* 179 Wn. App. at 945; *Abbenhaus,* 89 Wn. App. at 858-59. But the City's closed-door deliberations and lack of meaningful findings have made it impossible to assess whether it acted arbitrarily and capriciously. That the Council affirmed the Stokes and Rempel assessments in the face of **unrebutted evididence that the Macaulay analysis was flawed and resulted in disparate assessments that grossly the exceed the special benefit to their properties** is compelling evidence that its decision was arbitrary and capricious. *See Bellevue Plaza, Inc. v. City of Bellevue*, 121 Wn.2d at 418, 851 P.2d 662 (1993) (decision adopting assessments despite expert evidence by the objecting property owners that the City's expert appraisal was flawed arbitrary and capricious act). Moreover, in the absence of written findings and conclusions, the action of a city council exercising adjudicatory administrative discretion will be deemed arbitrary and capricious, as a court cannot presume reasons for the a council's decision that it failed to articulate. *Pentagram Corp. v. City of Seattle*, 28 Wn. App. 219, 229-30, 622 P.2d 892 (1981). This is especially true here, where the Council conducted all of its deliberations in executive session.

VI. CONCLUSION

Stokes and Rempel requests that this Court grant discretionary review of Division II's and City Council decisions.

Dated this 1st day of December, 2016.

Respectfully submitted,

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

November 1, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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; TINA REMPEL; ELDEAN REMPEL, as Trustee for REVOCABLE TRUST AGREEMENT OF RAY AND ELDEAN B. REMPEL Dated December 12, 2006, Appellants, v. CITY OF EDGEWOOD, Local Improvement District No. 1, Respondent.	No. 48028-0-II UNPUBLISHED OPINION

WORSWICK, J. — This is the second appeal of the City of Edgewood's local improvement district (LID) assessments for installation of a sewer system. In *Hasit, LLC v. City of Edgewood*, 179 Wn. App. 917, 320 P.3d 163 (2014), we annulled Edgewood's LID assessments against the appealing property owners. Following our decision in *Hasit*, the City reassessed the affected properties and the Edgewood City Council held a hearing to address the property owners' objections to their reassessments. The Council ultimately rejected the property owners' objections and adopted an ordinance confirming the reassessment roll. Several property owners[1]

[1] The appealing property owners include 1999 Stokes Family LLC ("Stokes"); Eldean Rempel, as Trustee for Revocable Trust Agreement of Ray E. Rempel and Eldean B. Rempel dated

appealed to the superior court, which affirmed the Council's reassessment decision. The property owners now appeal the superior court's order affirming the reassessment decision.

Property owners Stokes and Rempel assert that the reassessment roll must be annulled or modified[2] because the Council's decision to confirm the reassessment roll was arbitrary and capricious. Specifically, Stokes and Rempel contend that the Council's decision was arbitrary and capricious because the Council incorrectly (1) applied presumptions in favor of the City's proposed reassessments, (2) imposed a burden on the property owners to prove the reassessments were invalid, and (3) confirmed reassessments that were in substantial excess of the special

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December 12, 2006, a trust, and Tina Rempel ("Rempel"); Enid and Edward Duncan ("Duncan"); Darlene Masters and James and Patricia Schmidt ("Masters/Schmidt"); AKA the Brickhouse LLC ("Brickhouse"); Suelo Marina LLC; and Eric Docken and Docken Properties LP ("Docken").

[2] It is not clear whether there is statutory authority for this court to modify a LID assessment decision. RCW 35.44.250 provides:

> **Procedure on appeal—Hearing by superior court.** . . . 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.

By its terms, this statute applies to appeals heard by the superior court. In contrast, RCW 35.44.260 is silent about the remedies available on appeal from the superior court's judgment, stating only:

> **Procedure on appeal—Appellate review.**
> Appellate review of the judgment of the superior court may be obtained as in other cases if sought within fifteen days after the date of the entry of the judgment in the superior court.

Because we conclude that the appellants are not entitled to any relief from the judgment of the superior court, we do not reach this issue.

benefit to the properties and grossly disproportionate to similarly situated properties within the LID.

Property owners Duncan, Masters/Schmidt, Brickhouse, Suelo Marina, and Docken[3] also request that the reassessment roll be annulled or modified. They contend that (1) the Council's decision to confirm the reassessment roll was arbitrary and capricious or founded on a fundamentally wrong basis,[4] (2) the reassessments deprived them of due process because they did not receive any special benefits from the LID, (3) the City's failure to present any rebuttal evidence following their presentations at the reassessment hearing rendered the Council's decision to confirm the reassessment roll invalid, (4) the Council improperly considered property owners' statements from a previous 2011 hearing, and (5) the city manager's attendance in the LID executive session violated the appearance of fairness doctrine.

We affirm.

FACTS

I. First Assessment Roll and Appeal

In 2008, the Council created LID No. 1 to finance the construction of a sewer system, imposing the entire project cost on the owners of 161 parcels in the LID. The sewer system was

[3] Duncan, Masters/Schmidt, Brickhouse, Suelo Marina, and Docken are represented by the same counsel and raise several shared arguments in addition to their individual property-specific claims. Hereafter, this opinion will refer to these property owners collectively as the "Docken Petitioners."

[4] The Docken Petitioners raise various arguments, specific to the reassessments against their individual properties, in support of their contention that the Council's reassessment decision was arbitrary or capricious or founded on a fundamentally wrong basis. These various arguments are addressed in the body of this opinion.

completed in 2011 with an estimated cost of $21,238,268. To estimate the "special benefit"[5] attributable to each of the properties within the LID as a result of the sewer system, the City hired professional appraisal firm Macaulay and Associates Ltd. Administrative Record (AR) at 362. After Macaulay submitted its proposed assessments, the City notified affected property owners of their right to object to the assessments at a hearing before a hearing examiner. Following the hearing, the hearing examiner recommended rejecting all of the property owners' protests, apart from reducing assessments to three properties. The Council thereafter considered the hearing examiner's recommendations and heard objections from protesting parties. After hearing the protesting property owners' objections, the Council voted to approve an ordinance that, apart from reducing assessments on two properties, confirmed the assessment roll as recommended by the hearing examiner.

Nine affected property owners appealed the Council's assessment decision to the superior court.[6] *Hasit*, 179 Wn. App. at 932. The superior court concluded that the City's notice of the hearing examiner's proceedings was defective, and it remanded for a de novo hearing. *Hasit*, 179 Wn. App. at 932. The City appealed the superior court's decision to this court and the Docken Petitioners cross-appealed. *Hasit*, 179 Wn. App. at 932.

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[5] A "special benefit" is the "increase in fair market value attributable to the local improvements." *Doolittle v. City of Everett*, 114 Wn.2d 88, 103, 786 P.2d 253 (1990).

[6] One of the nine appealing property owners, Hasit LLC, agreed in a stipulated motion to a voluntary dismissal of its appeal. *See Hasit*, 179 Wn. App. at 932 n. 5. Additionally, property owners George and Arlyn Skarich do not participate in this current appeal from the 2014 reassessments.

On appeal, we annulled the LID assessments as to the appealing property owners. *Hasit*, 179 Wn. App. at 960. In annulling the LID assessments, we first held that the City calculated the assessments on a fundamentally wrong basis by including costs for an oversized sewer system because the oversized sewer system benefitted only future users not assessed under the LID. *Hasit*, 179 Wn. App. at 938-41, 960. We further held that the Council's confirmation of the proposed assessment roll was arbitrary and capricious because it (1) based its confirmation in part on the objecting property owners' failure to present evidence that the City's flawed notice prohibited the property owners from presenting, (2) improperly required objecting property owners to submit expert appraisal evidence to challenge the assessments, and (3) improperly imposed a burden on property owners to prove that the assessments were founded on a fundamentally wrong basis or were arbitrarily or capriciously imposed. *Hasit*, 179 Wn. App. at 944-50. We also held that the City violated the property owner's due process rights by failing to notify the property owners sufficiently in advance of the hearing to allow the property owners to obtain the evidence required to challenge the assessments.[7] *Hasit*, 179 Wn. App. at 952-58.

In annulling the assessments as to the appealing property owners, we rejected some of the property owners' claims. Relevant to this current appeal, we rejected the property owners' claims that the assessments rested on a fundamentally wrong basis due to the Macaulay

[7] Although we held that the City's flawed notice violated the appealing property owners' due process rights, we declined to address whether the flawed notice amounted to a jurisdictional defect rendering the proceedings invalid as to all the property owners assessed under the LID. *Hasit*, 179 Wn. App. at 952, 958-59. In declining to address the jurisdictional defect claim, we noted that nonappealing property owners had waived any due process challenge by failing to object to their notices. *Hasit*, 179 Wn. App. at 952, 958-59.

appraiser's decision to utilize a mass-appraisal method rather than a zone-and-termini method. *Hasit*, 179 Wn. App. at 943-44.

II. 2014 REASSESSMENT

After we issued our opinion in *Hasit*, the City reassessed the subject properties. The City commissioned a study to determine the costs of the sewer project attributable to oversizing the sewer capacity. The study determined that the oversizing costs totaled $805,687.

The City also recommissioned Macaulay to supplement its prior appraisals by conducting individual evaluations of the remaining subject properties. To assist in the reassessments of the subject properties, Macaulay's appraiser, Robert Macaulay, met with property owners and discussed the owners' concerns while inspecting their properties.[8] Macaulay made adjustments to some of his prior assessments based on his discussions with property owners and inspections of their properties. After accounting for the elimination of oversizing costs, Macaulay determined that the total estimated special benefit yielded a cost/benefit ratio[9] of 70.9 percent.

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[8] Regarding property owner Suelo Marina, Macaulay's supplemental appraisal report states:

> A letter was sent to the property owner on April 25, 2014 offering them the opportunity to accompany the appraiser on a property inspection. I did talk to the property owner on my April 15, 2014 inspection, prior to sending the letter. I was taking photographs of the property from the adjacent sidewalk and he came out and asked me what I was doing. I explained that additional appraisal work was being done on the LID. He indicated that they (the owners) were through with challenging their assessment due to the appellate court ruling.

AR at 3173-74. Regarding property owner Docken, Macaulay's supplemental report states that the appraiser discussed Docken's concerns by telephone.

[9] Macaulay determined the cost/benefit ratio by "[d]ividing the total revised project cost by the total estimated special benefit." AR at 3098. The appellant property owners do not challenge Macaulay's cost/benefit ratio calculation.

Macaulay applied this revised cost/benefit ratio to each of the individual property assessments and, thus, reduced its estimated special benefit as to each property by 29.1 percent to reach his recommended final reassessment.[10]

Applying a retrospective valuation date of May 10, 2011, Macaulay recommended the following final reassessments:

Owner	Value without LID	Value with LID	Special Benefit	Updated Cost/Benefit	2014 Final Reassessment
Stokes	$755,000	$1,290,000	$535,000	0.709	$379,315
Rempel	$1,400,000	$2,515,000	$1,115,000	0.709	$790,535
Duncan	$925,000	$1,225,000	$300,000	0.709	$212,700
Masters/Schmidt	$815,000	$1,420,000	$605,000	0.709	$428,945
Brickhouse	$505,000	$535,000	$30,000	0.709	$21,270
Suelo Marina	$680,000	$1,135,000	$455,000	0.709	$322,595
Docken	$1,800,000	2,085,000	$285,000	0.709	$202,065

AR at 3099.[11]

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[10] The appellant property owners do not challenge the Council's adoption of the estimated oversize costs.

[11] The property owners were originally assessed as follows:

Owner	2011 Final Assessment	2014 Final Reassessment
Stokes	$529,151	$379,315
Rempel	$877,005	$790,535
Duncan	$325,008	$212,700
Masters/Schmidt	$445,872	$428,945
Brickhouse	$34,638	$21,270
Suelo Marina	$333,852	$322,595
Docken	$257,206	$202,065

AR at 219-33.

The City notified property owners that it would conduct a hearing on the final reassessment roll on September 17, 2014, and that property owners objecting to the proposed reassessment must file written objections at or before the hearing.[12] Each of the affected property owners filed written objections.

III. OBJECTIONS

The property owners filed the following written objections to Macaulay's proposed reassessments.

A. *Stokes*

Stokes asserted that Macaulay's proposed reassessment (1) understated the property's before-LID value, (2) overstated the property's after-LID value by failing to consider extraordinary costs associated with developing the property, and (3) disproportionately estimated the property's special benefit as compared to a similarly situated property within the LID. In support of these assertions, Stokes presented an appraisal from Hunnicutt & Associates Inc. that concluded the assessment to the Stokes property should be $118,542. Stokes also presented a declaration from James Schweickert, a civil engineer with Larson & Associates Land Surveyors and Engineers Inc. Schweickert's declaration stated that he was retained by Stokes in 2012 to assist in commercial development plans for the property.

Larson & Associates completed a "Conceptual Site Plan" for the Stokes property that concluded storm water improvements would need to be made to develop the property. The Conceptual Site Plan estimated the costs of developing the necessary storm water improvements

[12] The appealing property owners do not challenge the City's notice procedure.

would total $340,000 and would cause the loss of 35,000 square feet of otherwise developable property. The Conceptual Site Plan cost estimates did not include costs for acquiring easements through neighboring properties, which easements would be required to implement the storm water improvements.

B. *Rempel*

Rempel asserted that Macaulay's proposed reassessment (1) understated the property's before-LID value, (2) failed to provide any explanation for the low valuation of the portion of the property not fronting Meridian Avenue, and (3) overstated the property's after-LID value. In support of these assertions, Rempel presented an appraisal from Hunnicutt that concluded the assessment to the Rempel property should be $381,925.

C. *Duncan*

Duncan asserted that Macaulay's proposed reassessment (1) determined that the existing use of the property both before and after the LID is the highest and best use of the property and, thus, the property receives no special benefit from the LID; (2) overstated the usable portion of the property when compared to the City's own critical areas map; and (3) failed to deduct from its assessment the area of the property needed to support development.

D. *Masters/Schmidt*

Masters/Schmidt asserted that Macaulay's proposed reassessment (1) fell outside Macaulay's own "[t]est of reasonableness" range of $1.00 to $2.75 per square foot, (2) failed to reduce the special benefit of the LID by the cost of installing sewer lines, and (3) impermissibly distributed full sewer costs to property owners within the LID without calculating the parcel-specific special benefits. AR at 801.

E. *Brickhouse*

Brickhouse asserted that Macaulay's proposed reassessment (1) determined that the existing use of the property both before and after the LID is the highest and best use of the property and, thus, the property receives no special benefit from the LID, and (2) failed to reduce the special benefit of the LID by the cost of installing sewer lines.

F. *Suelo Marina*

Suelo Marina asserted that Macaulay's proposed reassessment (1) fell outside Macaulay's own "test of reasonableness" range of $1.00 to $2.75 per square foot, (2) determined that the existing use of the property both before and after the LID is the highest and best use of the property and, thus, the property receives no special benefit from the LID, (3) presumed an artificially low before-LID value by placing no value on the existing buildings on the property, and (4) improperly double-counted the special benefit to the property.

G. *Docken*

Docken owns three parcels of land within the LID. As to parcel 131, Docken asserted that Macaulay's proposed reassessment (1) determined that the existing use of the property both before and after the LID is the highest and best use of the property and, thus, the property receives no special benefit from the LID; (2) failed to discount the assessment for unusable land; (3) improperly speculated that future market demands would create a need for more single family housing units; and (4) failed to present evidence of poor soil conditions on the property. As to parcels 133 and 140, Docken asserted that Macaulay's proposed reassessment (1) undervalued the properties' before-LID value, (2) improperly double-counted the special benefit to the

properties, and (3) improperly considered the potential integrated use of the properties when calculating the special benefit.

IV. HEARING ON PROPERTY OWNERS' OBJECTIONS

On September 17, 2014, the Council held a hearing to address the property owners' objections. At the hearing, Macaulay briefly testified about his proposed reassessments as to each of the individual properties.

Regarding the Stokes property, Macaulay testified that after "visually walking the site it was apparent that the wetlands encroached the property and restricted use of the property more than I anticipated in my previous analysis. So recognizing that, I lowered the special benefit to reflect the lowered utility of the site versus my previous analysis." AR at 641.

Regarding the Rempel property, Macaulay testified that his reassessment increased the before-LID value of the property based on an existing ministorage building on the property. Macaulay stated that the increase in pre-LID value resulted in a special benefit of $3.55 per square foot, a reduction from the $3.75 per square foot special benefit calculated in Macaulay's original assessment.

Regarding the Duncan property, Macaulay testified that his reassessment calculated the usable area of the property at 4.62 acres. Macaulay stated that he had reduced the usable area from the 6.75 acres calculated in his original assessment based on his on-site inspection of the property.

Regarding the Masters/Schmidt properties, Macaulay testified that Schmidt discussed concerns about potential wetlands on the property for which no critical areas study had been

made. Macaulay stated that the area of potential wetlands was too small to have any measurable impact on development and, thus, it did not affect his reassessment.

Regarding the Brickhouse property, Macaulay testified that after inspecting the property and discussing the property owner's concerns, he determined that the risk of septic system failure was substantially less than he had predicted in his original assessment. Macaulay stated that based on this decreased risk, his reassessment recommended a $30,000 special benefit as a result of the LID, a reduction from his original recommendation of a $47,000 special benefit.

Regarding the Suelo Marina properties, Macaulay testified that his reassessment differed slightly from the original assessment due to downsizing cost, but otherwise there were no notable changes.

Regarding the Docken properties, Macaulay testified that he could not inspect the properties but that he discussed the owner's concerns by telephone. Macaulay stated that, based on the discussion, the reassessment lowered the special benefit as to parcel 131 but not to parcels 133 and 140.

Macaulay concluded his testimony by stating that a number of properties within the LID had been sold with buyers assuming the LID assessments. According to Macaulay these sales, together with pending sales, demonstrate that "these assessments and benefit estimates are reasonable, and that they reflect the intensity of use change in the market resulting from the LID sewer project." AR at 646. Macaulay later expanded on this testimony during his rebuttal testimony, describing specific sales or pending sales of properties within the LID and the buyers' willingness to assume the prior LID assessment values on those properties.

After Macaulay testified, the Council admitted into the record the property owners' written objections and heard testimony from the property owners and their witnesses. Macaulay responded to questions posed to him during the property owners' testimony. The Council then heard rebuttal testimony from Macaulay and Eric Phillips, the assistant city manager for Edgewood.

After concluding the hearing, the Council went into executive session for approximately 30 minutes before closing the special council meeting. The Council stated that, due to the volume of the submitted materials, it would continue deliberations on September 24. After again deliberating the reassessment roll during an executive session on September 24, the Council passed a motion to adopt the recommended reassessment roll and directing City staff to prepare an ordinance recording the same to be presented at a subsequent council meeting.

At the subsequent October 2, 2014 special council meeting, the Council adopted findings of fact and conclusions of law. The Council also adopted Ordinance 14-0424, which confirmed the reassessment roll.

Some of the affected property owners appealed the Council's reassessment decision to the superior court. On August 28, 2015, the superior court entered an order dismissing the property owners' appeals and affirming the Council's reassessment decision. The property owners appeal from the superior court order.

ANALYSIS

I. STANDARD OF REVIEW

RCW 35.43.040 provides municipalities with authority to order the construction of local improvements, including sewer systems, and to "levy and collect special assessments on property

specially benefited thereby to pay the whole or any part of the expense thereof." A "special benefit" is "the increase in fair market value attributable to the local improvements." *Doolittle v. City of Everett*, 114 Wn.2d 88, 103, 786 P.2d 253 (1990). A property's special benefit "must be actual, physical and material and not merely speculative or conjectural." *Heavens v. King County Rural Library Dist.*, 66 Wn.2d 558, 563, 404 P.2d 453 (1965).

An assessment against a property may not substantially exceed the special benefit to the property attributable to the LID. *Hasit*, 179 Wn. App. at 933. And a property "should not bear 'proportionally more than its share' of the total assessment relative to other parcels in the LID." *Hasit*, 179 Wn. App. at 933 (quoting *Cammack v. Port Angeles*, 15 Wn. App. 188, 196, 548 P.2d 571 (1976)). But this proportionality requirement does not mandate that all properties "be assessed the same percentage of the special benefits received." *Hasit*, 179 Wn. App. at 933.

Parties may appeal a council's final assessment decision to the superior court. RCW 35.44.200. The superior court shall confirm the assessment decision, unless it finds "that such assessment is founded upon a fundamentally wrong basis and/or the decision of the council . . . was arbitrary or capricious." RCW 35.44.250. "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). And, "[w]here 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. App. at 858-59. An assessment is founded on a "fundamentally wrong basis" if there exists "'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. App. at 859 (quoting *Cammack*, 15 Wn. App. at 196). A superior court's judgment from an appeal of a final assessment decision may be appealed to this court. RCW 35.44.260.

When reviewing a superior court's determination under RCW 35.44.250, our review is not 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. "Review is limited to the record of proceedings before the City Council." *Bellevue Assoc. v. City of Bellevue*, 108 Wn.2d 671, 674, 741 P.2d 993 (1987). We presume that the Council's assessment decision was proper, and the party challenging the assessment bears the burden of overcoming this presumption. *Bellevue Assoc.*, 108 Wn.2d at 674. We also presume "'that an improvement is a benefit; that an assessment is no greater than the benefit; that an assessment is equal or ratable to an assessment upon other property similarly situated; and that the assessment is fair.'" *Abbenhaus*, 89 Wn.2d at 861 (quoting Philip A. Trautman, *Assessments in Washington*, 40 WASH. L. REV. 100, 118 (1965)).

II. LAW OF THE CASE DOCTRINE

As an initial matter, the City contends that several of the appellants' arguments on appeal are foreclosed by the law of the case doctrine. We agree in part and disagree in part.

As applicable here, "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). The City argues that because *Hasit* approved of Macaulay's use of a mass appraisal method over a zone and termini method, and because Macaulay again utilized this method in his

2014 reassessment analysis, the appealing property owners cannot argue on appeal that the Council's reassessment decision was arbitrary or capricious or founded on a fundamentally wrong basis. The City reads our holding in *Hasit* too broadly.

Although *Hasit* approved of Macaulay's use of a mass appraisal method, we annulled the LID assessment as to the appealing property owners because, among other reasons, (1) the City's assessment decision was arbitrary and capricious because the decision was based on the property owners' failure to present evidence that the City's flawed notice prevented the property owners from presenting, (2) the City improperly required the property owners to prove the assessments were based on a fundamentally wrong basis or were imposed arbitrarily or capriciously, and (3) the City failed to provide property owners with constitutionally adequate notice of the assessment hearing. 179 Wn. App. at 944-45, 948-49, 954-58. Our decision in *Hasit* does not prohibit the property owners from arguing in this appeal that the Council's assessment decision was arbitrary or capricious or founded on a fundamentally wrong basis based on the evidence they presented at the reassessment hearing.

Our decision in *Hasit* prevents property owners only from again arguing that Macaulay's use of the mass appraisal method, alone, shows the Council reassessment decision was arbitrary and capricious or founded on a fundamentally wrong basis. Contrary to the City's position, our decision did not immunize the Council's decision to reject the property owners' objections at a reassessment hearing from any scrutiny on appeal. If we were to accept the City's proposed application of the law of the case doctrine, the reassessment proceedings would be little more than an exercise in futility, and our decision to annul the prior assessments would provide no effective relief to the property owners. Accordingly, we reject the City's broad application of the

law of the case doctrine and hold that the doctrine prevents property owners only from again arguing that Macaulay's use of the mass appraisal method, alone, requires annulment of the Council's reassessment decision.

III. COUNCIL'S REASSESSMENT DECISION NOT ARBITRARY OR CAPRICIOUS OR FOUNDED ON FUNDAMENTALLY WRONG BASIS

All of the appealing property owners contend that the Council's decision confirming the reassessment roll was arbitrary and capricious. We disagree.

A. *Stokes and Rempel*

1. *Contentions with Findings of Fact*

Stokes and Rempel contend that (1) several of the Council's findings are not supported by substantial evidence in the record and (2) the findings are inadequate to show the bases of the Council's decision to confirm the reassessment roll.

Stokes and Rempel assign error to the Council's findings of fact 5-7, 11-14, and 16, arguing that the record fails to provide substantial evidence in support of the findings. But Stokes and Rempel fail to provide any argument with regard to these challenged findings, and it is unclear how these findings relate to their arguments on appeal. Accordingly, we do not address the challenged findings of fact. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (failure to present argument regarding a challenged finding of fact waives assignment of error as to that finding).

Next, Stokes and Rempel contend that the Council's findings are inadequate to show how the Council resolved factual disputes. It is unclear whether Stokes and Rempel are asserting that such alleged inadequacy of the findings are independent grounds for reversing the Council's reassessment decision. And Stokes and Rempel do not identify any requirement within the LID

statutes that a council submit findings of fact and conclusions of law that address every objection lodged by property owners. *See* Chapter 35.44 RCW.

To the extent that a council's findings of fact reveal an infirmity in the decision-making process, such as arbitrary or capricious action, a fundamentally wrong basis in support of assessments, or a due process violation stemming from inadequate notice, such findings may be relevant to our appellate review. However, absent such an infirmity, a council's factual findings, even if we believe them to be erroneous, cannot support a basis for this court to annul or modify the final assessment decision. *Abbenhaus*, 89 Wn.2d at 858-59. No such infirmity is present here. The Council's factual findings reveal only that it considered the Macaulay reassessment appraisals and other submitted evidence, including the property owners' written objections, hearing testimony, and expert appraisal evidence, and weighed the evidence in favor of Macaulay's proposed reassessments. Accordingly, the Council's written factual findings do not show any deficiency in the Council's decision-making process requiring annulment of the reassessments.

2. *Presumptions and Burdens*

Next, Stokes and Rempel contend that the Council's conclusion of law 3 shows that it engaged in arbitrary and capricious action by improperly applying presumptions in favor of Macaulay's proposed reassessments and imposing a burden on property owners to overcome that presumption. We disagree.

Conclusion of law 3 states:

> 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). Stokes and Rempel argue the Council's conclusion that the property owners' evidence "did not overcome the City Staff/LID recommendations" show that the Council applied improper presumptions and evidentiary burdens. Br. of Appellants (Stokes) at 27 (emphasis omitted). Our Supreme Court has stated the presumptions and burdens of proof applicable to assessment decisions as follows:

> (1) the burden is upon the one challenging the assessment to prove its incorrectness as it is presumed the City has acted properly and legally; (2) the assessment is presumed to be a benefit; (3) the assessment is presumed to be no greater than the benefit; (4) it is presumed that an assessment is equal or ratable to an assessment upon other property similarly situated and that the assessment is fair; and (5) evidence of appraisal values and benefits is necessary to rebut these presumptions. Appellate review of such cases does not permit an independent evaluation of the merits.

City of Seattle v. Rogers Clothing for Men, Inc., 114 Wn.2d 213, 229-30, 787 P.2d 39 (1990). If an objecting property owner produces competent evidence of contrary appraisal values and special benefits resulting from a LID, the presumptions in favor of the City's assessments disappear and the burden shifts to the City to prove its assessments are valid. *Rogers*, 114 at 231; *see also Bellevue Plaza, Inc. v. City of Bellevue*, 121 Wn.2d 397, 403, 851 P.2d 662 (1993).

Here, Stokes and Rempel produced expert appraisal evidence that was contrary to the City's proposed assessments. Accordingly, the City could not rely on the presumptions set forth in *Rogers* to support its proposed reassessments. Instead, the City was required to produce evidence to support its assessments. It did so in the form of Macaulay's reassessment studies, which the Council admitted into the administrative record. The Council's conclusion of law 3

does not state that property owners' objections were rejected because their evidence did not overcome presumptions in favor of the City. Rather, it stated that the property owners' evidence did not overcome the city staff/LID recommendations, which recommendations were based on the evidence presented in Macaulay's reassessment reports.

In other words, conclusion of law 3 shows only that the Council weighed the competing appraisal evidence and concluded that the Macaulay reassessment evidence was more persuasive. And Stokes and Rempel cannot demonstrate arbitrary or capricious action based merely on the Council's weighing of evidence. *See Abbenhaus*, 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.").

3. *Special Benefit*

Before addressing whether Stokes or Rempel can meet their burdens of showing the Council acted arbitrarily or capriciously in adopting Macaulay's special benefit analysis, our standard of review of this issue merits additional discussion. Prior to a 1957 amendment to RCW 35.44.250, appellate courts engaged in a detailed de novo review of the evidence supporting a special benefit determination and could overturn an assessment decision based on its de novo review of the merits. *Abbenhaus*, 89 Wn.2d at 857-58; *see also Cammack*, 15 Wn. App. at 193-94.

The 1957 amendment, however, "limit[ed] court involvement in assessment proceedings." *Abbenhaus*, 89 Wn.2d at 859. Under the "'fundamentally wrong basis'" and "'arbitrary or capricious'" standards of review implemented through the 1957 amendment, we no longer make an "independent decision regarding the most desirable method of assessment."

Abbenhaus, 89 Wn.2d at 859. Instead, we review the record before the Council to determine "whether it adequately supports the action of the municipality." *Abbenhaus*, 89 Wn.2d at 859. And the appealing property owners bear the burden on appeal of overcoming the presumption that the Council's assessment decision was legal and proper. *Abbenhaus*, 89 Wn.2d at 860-61. Neither Stokes nor Rempel meet this burden.

a. *Stokes*

i. *Before-LID Valuation*

Stokes first contends that the Council acted arbitrarily and capriciously in confirming the reassessment roll because Macaulay's appraisal understated the before-LID value of the Stokes property. Macaulay employed a sales comparison approach in determining the estimated before-LID value of the Stokes property. This approach evaluated the sales prices of similarly situated properties without sanitary sewer service and adjusted the comparable value to account for any differences between the Stokes property and the similarly situated properties. For example, Macaulay valued the Stokes property at the low end of the value range of similarly situated properties because a significant area of the Stokes property is composed of fill material, making it difficult to receive approval from the Pierce County Health Department to install septic systems to service the property. Based on the sales comparison approach, Macaulay estimated the before-LID value of the Stokes property at $755,000.

Stokes does not identify any specific error with regard to Macaulay's sales comparison approach. Instead, Stokes contends that its appraiser's estimated before-LID valuation of $1,052,904 was more consistent with applicable comparable sales. In other words, Stokes requests that we annul or modify the Council's reassessment decision because its appraiser

employed a more "desirable method of assessment." *Abbenhaus*, 89 Wn.2d at 859. But, under our applicable standard of review, this is an inadequate basis upon which to annul the Council's assessment decision. *Abbenhaus*, 89 Wn.2d at 859. Because the Macaulay appraisal study "adequately supports the action of the municipality," Stokes cannot show that the Council acted arbitrarily or capriciously in accepting Macaulay's proposed before-LID valuation of the Stokes property.[13] *Abbenhaus*, 89 Wn.2d at 859.

ii. *After-LID Valuation*

Next, Stokes contends that the Council acted arbitrarily and capriciously in confirming the reassessment roll because Macaulay's appraisal overstated the after-LID value of the Stokes property. Stokes argues that Macaulay's appraisal of its property's estimated after-LID value of $1,290,000 failed to account for extraordinary development costs required to realize the special benefit of the LID. In contrast with Macaulay's appraisal, the Stokes appraiser calculated the after-LID value of the Stokes property to be $1,220,100. Notably, the Stokes appraiser calculated the after-LID value of the Stokes property to be $1,966,800 but discounted the special benefit resulting from the LID by $340,000 to account for the costs of developing a storm water management retention system and again reduced the special benefit by 25 percent ($406,700) for the risks and costs of obtaining easements and for unspecified developmental difficulties.

At the outset we reject Stokes contention that Macaulay was required to discount its estimated special benefit by 25 percent to account for "heightened risks and unknown costs associated with development of the Stokes Property." Br. of Appellants (Stokes) at 42.

[13] Both Macaulay and the competing appraiser purported to comply with the Uniform Standards of Professional Appraisal Practice and with the Code of Professional Ethics of the Appraisal Institute.

Unspecified heightened risks and unknown costs are not appropriate factors to consider when determining the after-LID market value of a property because these factors are speculative at best. *See Bellevue Plaza*, 121 Wn.2d at 411 ("[W]hen an appraiser uses a factor 'beyond the knowledge of reasonable certainty', it becomes pure speculation.") (quoting *In re Seattle Local Improvement No. 6097*, 52 Wn.2d 330, 335-36, 324 P.2d 1078 (1958)).

We also reject the contention that Macaulay was required to discount the estimated special benefit to the Stokes property by $340,000 to account for the costs of developing a storm water management system. Stokes does not cite any authority for the proposition that municipalities must account for development costs when calculating the special benefit to a property as a result of a local improvement. Moreover, Macaulay's appraisal calculated the after-LID value of the Stokes property based on the increased development *potential* of the property as a result of the sewer system, again by employing a comparable sales approach. And Stokes did not present any evidence showing that the comparable properties under Macaulay's analysis did not face similar development costs. In short, the Macaulay study provided an adequate basis for the Council to determine the special benefit to the Stokes property as a result of the LID and, thus, Stokes fails to show that the Council's assessment decision was arbitrary or capricious on this basis.

iii. *Proportionality*

Finally, Stokes contends that the Council's reassessment decision was arbitrary and capricious because Macaulay failed to treat the Stokes property in the same manner as a similarly situated property in the LID. Stokes argues that Macaulay failed to assess its property in the same manner as LID property 21 by failing to reduce the usable area of the Stokes property by

the area of a potential future storm drainage pond that would need to be installed for development on the property, speculating that the "only viable explanation for $0 assessment against LID No. 21 is that Macaulay considered the significant storm pond as rendering the remainder of the site un-useable." Br. of Appellants (Stokes) at 44-45.

We begin with the presumption that "'an assessment is equal or ratable to an assessment upon other property similarly situated.'" *Abbenhaus*, 89 Wn.2d at 861 (quoting Philip A. Trautman, *Assessments in Washington*, 40 WASH. L. REV. at 118). Stokes fails to overcome this presumption.

Stokes merely speculates that Macaulay's assessment of LID property 21 had reduced the usable portion of the property to account for an *existing* storm water retention pond. And even assuming that this speculative evidence was sufficient to show that Macaulay had, in fact, reduced the usable portion of LID property 21 to account for the *existing* storm water retention pond on the property, it was not arbitrary or capricious for the Council to treat the Stokes property differently based on the lack of an *existing* storm water retention pond on the property. Stokes did not present any evidence that Macaulay had reduced the usable portion of any LID property based on the *potential* need to create a storm water retention pond to facilitate development. Accordingly, we reject this argument and affirm the superior court's order dismissing Stokes' appeal of the Council's reassessment decision.

b. *Rempel*

i. *Before-LID Valuation*

Rempel first contends that the Council acted arbitrarily and capriciously in confirming the reassessment roll because Macaulay's appraisal understated the before-LID value of the

Rempel property. Specifically, Rempel argues that Macaulay failed to cite comparable sales to justify his low valuation of the back 254,360 square feet of the property. We disagree. As with his reassessment of the Stokes property, Macaulay employed a sales comparison approach to estimate the entire before-LID value of the Rempel property. Macaulay's report states that he valued the Rempel property lower than comparable properties without sewer service because the long configuration of the property makes development of the western 6 acres difficult in light of standards for septic systems and other site development costs.[14]

Rempel's remaining challenges to Macaulay's before-LID valuation merely assert that its appraiser's assessment methodology was more desirable. But this argument is insufficient to show arbitrary and capricious action on the part of the Council. *Abbenhaus*, 89 Wn.2d at 859. Because the Macaulay appraisal study supports the Council's action, Rempel cannot show that the Council acted arbitrarily or capriciously in accepting Macaulay's proposed before-LID valuation of the Rempel property. *Abbenhaus*, 89 Wn.2d at 859.

ii. *After-LID Valuation*

Next, Rempel contends that the Council acted arbitrarily and capriciously in confirming the reassessment roll because Macaulay's appraisal overstated the after-LID value of the Rempel property. Again, Macaulay employed a sales comparison approach when determining the after-LID value of the Rempel property. Rempel identifies no error with the Macaulay's after-LID sales comparison approach, instead arguing that its appraiser's valuation method was more

[14] Rempel's argument on this issue appears to rely on a portion of the Macaulay analysis that determined the contributory value of improvement on the property, which was unrelated to Macaulay's analysis of the before-LID land value.

desirable.[15] Accordingly, Rempel cannot show that the Council acted arbitrarily and capriciously in accepting Macaulay's proposed after-LID valuation of the Rempel property.

iii. *Proportionality*

Finally, Rempel contends that the Council's reassessment decision was arbitrary and capricious because Macaulay failed to treat the Rempel property in the same manner as similarly situated properties in the LID. Rempel argues that its reassessment was grossly disproportionate to other LID properties because the median increase in value to LID properties was 40 percent whereas Macaulay's proposed reassessment increased the value of the Rempel property by 128 percent. But in light of unique characteristics of properties within a LID, it is not unreasonable that certain properties would benefit more from a local improvement than others. Absent some error in Macaulay's appraisal method, the mere difference in benefit to the Rempel property as compared to other properties in the LID, alone, does not show that that the reassessment was impermissibly disproportionate. Because Rempel fails to show such error in Macaulay's appraisal method, he cannot overcome the presumption that his reassessment was "'equal or ratable to an assessment upon other property similarly situated.'" *Abbenhaus*, 89 Wn.2d at 861 (quoting Philip A. Trautman, *Assessments in Washington*, 40 WASH. L. REV. at 118). He therefore fails to demonstrate that the Council's reassessment decision was arbitrary or

[15] Rempel also appears to argue that Macaulay improperly relied on a listing price for the sale of the Rempel property to justify his after-LID valuation. Even assuming that such reliance is improper, there is no evidence that Macaulay relied on the listing sale price in determining the after-LID value of the Rempel property. Macaulay's appraisal report merely contains a sales history section that notes the property is listed for sale at $1,750,000 plus the original LID assessment for a total asking price of $2,627,000.

capricious. Accordingly, we affirm the superior court's order dismissing Rempel's appeal of the Council's reassessment decision.

B. *Docken Petitioners (Duncan, Masters/Schmidt, Brickhouse, Suelo Marina, Docken)*

1. *Presumptions and Burdens*

Similarly to Stokes and Rempel, the Docken Petitioners assert that the Council's reassessment decision was founded on a fundamentally wrong basis because the Council applied improper presumptions and evidentiary burdens. In support of this assertion, the Docken Petitioners cite to a draft conclusion of law that was not approved by the Council. But our review concerns the Council's final assessment decision and not a draft conclusion of law that was ultimately rejected by the Council. And the draft conclusion of law is wholly irrelevant to our review of the Council's final assessment decision as we "'are not permitted to speculate on the motives prompting the city council in the enactment of the ordinance, so long as we find it reasonable *upon its face* and within the city's power.'" *Hasit*, 179 Wn. App. at 951 (emphasis added) (quoting *Cont'l Baking Co. v. City of Mount Vernon*, 182 Wash. 68, 73, 44 P.2d 821 (1935)). As we held above, the Council did not rely on presumptions in favor of the City's recommended reassessment but instead relied on the evidence presented to support the recommended reassessment.[16] Accordingly, the Docken Petitioners fail to show the Council acted arbitrarily or capriciously by applying improper presumptions or evidentiary burdens.

[16] Because we hold that the Council did not rely on presumptions in favor of the City's recommended reassessment, we need not address the Docken Petitioners' argument regarding the evidentiary standard for overcoming these presumptions.

2. *Special Benefit*

a. *Collective Arguments*

All of the Docken Petitioners collectively argue that the Council's reassessment decision was arbitrary or capricious because (1) Macaulay's proposed reassessments failed its own "'Test of Reasonableness,"' (2) Macaulay's proposed reassessments were based on inflated values to comparable pending sales properties, and (3) Macaulay's proposed reassessments lacked any basis in reality as evinced by subsequent values attributed to the properties by the county tax assessor. Br. of Appellants (Docken) at 37. On all points, we disagree.

i. *Test of Reasonableness*

Macaulay's reassessment analyses include a "Test of Reasonableness," whereby Macaulay compared his proposed special benefit values to the value increases of properties "in nearby market areas where large infrastructure projects have been completed in recent years, such as Kent." AR at 3124. Macaulay determined that the increase in value of properties in comparable markets that underwent infrastructure projects ranged from $1.00 per square foot of land to $2.75 per square foot of land. The Docken Petitioners argue that because some[17] of Macaulay's proposed special benefit values fall outside this range, Macaulay's special benefit analyses were flawed and, thus, the Council acted arbitrarily and capriciously in accepting Macaulay's proposed reassessments. We reject this argument.

[17] Of the Docken Petitioners, only the Suelo Marina and Masters/Schmidt properties had proposed special benefits values that fell outside the $1.00 to $2.75 per square foot range. Macaulay calculated the special benefit to the Suelo Marina property at $4.00 per square foot with a reassessment value of $2.85 per square foot. Macaulay calculated the special benefit to the Masters/Schmidt properties at $3.75 per square foot with a reassessment value of $2.45 per square foot.

Macaulay did not employ his "Test of Reasonableness" to calculate the special benefits to LID properties but, rather, merely used the test as a comparison tool. That Macaulay determined some of the Docken Petitioners' properties received a special benefit greater than the average range for properties in similar markets does not, itself, reveal any flaw in Macaulay's special benefits analysis. Accordingly, the Docken Petitioners fail to show arbitrary or capricious action on this basis.

ii. *Inflated Values*

Next, the Docken Petitioners argue that Macaulay's proposed reassessments were flawed because the reassessments were calculated by inflating the value of comparable properties that were pending sale. The Docken Petitioners' argument on this point is difficult to discern. But even accepting that Macaulay had inflated the value of these pending sale properties, there is no evidence that Macaulay used the value of pending sale properties in his sales comparison analysis. Although the reassessment studies for the Suelo Marina, Masters/Schmidt, and Docken properties include charts listing pending sale properties, these properties were not listed among the properties used in Macaulay's sales comparison adjustment grid for calculating the subject properties' after-LID values. Accordingly, the Docken Petitioners fail to show that the Council acted arbitrarily or capriciously in accepting Macaulay's proposed reassessments on this basis.

iii. *County Property Tax Assessments*

Next, the Docken Petitioners argue that the Council's reassessment decision was arbitrary and capricious because their properties have lost value after the May 10, 2011, retrospective reassessment date as shown by subsequent county tax assessments. This argument lacks merit.

The Docken Petitioners cite *Hasit* for the proposition that a municipal council sitting as a board of equalization in a LID assessment proceeding presumes a county tax assessors' valuation of property to be correct unless overcome by clear, cogent and convincing evidence. 179 Wn. App. at 949. In *Hasit*, we cited WAC 458-14-046(4) in support of our holding that the fundamentally wrong basis and arbitrary or capricious standards of review on appeal from a LID assessment decision does not apply at the municipal hearing level. 179 Wn. App. at 948-49. We do not interpret *Hasit*'s reliance on WAC 458-14-046(4) to support the proposition that county tax assessor's property values are presumptively correct measures of special benefits in LID proceedings.[18]

By its terms WAC 458-14-046(4) applies only to county boards of equalization reviewing property tax assessments. In contrast with property tax assessments, LID assessments determine only "the increase in fair market value attributable to the local improvements." *Doolittle*, 114 Wn.2d at 103; Ch. 84 RCW. To the extent that county property tax assessments bear any relation to "the increase in fair market value attributable to the local improvements," the property tax assessments merely go to the weight of evidence supporting the LID assessment valuation. *Doolittle*, 114 Wn.2d at 103. As such, the Docken Petitioners cannot demonstrate that the Council's action concerning the weight of this evidence was arbitrary or capricious. We now turn to the Docken Petitioners property-specific arguments.

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[18] The Docken Petitioners claim that "[t]here is no presumption of correctness applied to city staff [LID assessment] recommendations" and that the City bears the burden of proving by clear, cogent and convincing evidence that the county property tax assessments are incorrect is clearly contrary to our discussion of applicable presumptions in *Hasit*, decades of Supreme Court precedent cited in support of that discussion, and the legislative directive of the LID statutes. Br. of Appellants (Docken) at 36; 179 Wn. App. at 935-36; *see also* Chapter 35.44 RCW.

a. *Duncan*

The Duncan property owners contend that the Council's reassessment decision was arbitrary and capricious because Macaulay's proposed reassessment (1) recommended a $212,700 reassessment despite Macaulay's determination that the highest and best use of the property after the LID was the existing use of the property, (2) failed to deduct unusable portions of the property from its special benefits calculation, (3) failed to deduct the footprint of an existing building and parking lot from the portion of the land benefitted by the LID, and (4) failed to deduct portions of property that would require supporting infrastructure to facilitate future development. On all points, we disagree.

Regarding the Duncan property owners' contention that it received no special benefit based on Macaulay's determination that the property's existing use was the highest and best use after the LID, Macaulay's reassessment study concluded that the LID provided expansion/redevelopment potential to the property. This conclusion provided the Council with evidence that the Duncan property specially benefitted from the LID and, thus, the Duncan property owners cannot demonstrate that the Council acted arbitrarily or capriciously in so finding.[19] *Abbenhaus*, 89 Wn.2d at 859-61.

Regarding the contention that Macaulay failed to deduct unusable portions of the Duncan property from his special benefits analysis, the Macaulay study stated that Macaulay physically inspected the property and reviewed soils/topographical maps to determine that 4.62 acres of the property was unusable, an increase from the 2011 assessment's determination that only 2.36

[19] Because the Council had evidence that the Duncan property was specially benefitted by the LID, the Duncan property owners related due process claim fails.

acres of the land was unusable. The Duncan property owners assert that Macaulay's determination was flawed based on the City's critical area maps, which the Duncan property owners assert show 6.48 acres of unusable land. But it is impossible to determine from this map the precise area of the Duncan property that could be feasibly developed. Because the Macaulay study provided evidence supporting the Council's reassessment decision as to the usable area of the Duncan property, the Duncan property owners fail to demonstrate that the Council acted arbitrarily or capriciously on this basis.

Regarding the contention that Macaulay failed to deduct from his special benefit analysis portions of the property already supporting an existing building and parking lot, the Duncan property owners fail to provide adequate argument, or any supporting legal authority, to show how this area of the property was not specially benefited from the LID. To the extent that the Duncan property owners are asserting that these portions of the property did not specially benefit from the LID because the existing use of these portions were at their highest and best use after the LID, that argument ignores Macaulay's determination that the existing use could be expanded as a result of the LID. Accordingly, the Duncan property owners fail to demonstrate arbitrary or capricious action on this basis.

Finally, we reject the contention that Macaulay's special benefit analysis was flawed for failing to deduct from his special benefit analysis additional portions of land that would require supporting infrastructure to facilitate future development. The Duncan property owners merely argue that it is not possible to develop every square foot of land under the City's building codes. But, even accepting this argument, Macaulay's special benefit analysis utilized a sales comparison approach that examined the increase in value to similar properties, which also face

development constraints. Accordingly, the Duncan property owners fail to show any flaw in the Macaulay special benefit analysis rendering the Council's reassessment decision arbitrary or capricious.

b. *Masters/Schmidt*

The Masters/Schmidt property owners contend that the Council's reassessment decision was arbitrary and capricious because Macaulay's proposed reassessment (1) failed to deduct from its special benefit estimate the cost of installing sewers lines and obtaining necessary easements to connect to the City sewer system and (2) improperly distributed the costs of the sewer system without evaluating the special benefit to each LID property.

Regarding the contention that Macaulay's proposed reassessments were flawed for failing to deduct the costs of installing sewer lines and obtaining easements, the Masters/Schmidt property owners failed to present evidence sufficient to overcome the presumption that the Council's reassessment decision was correct. The Masters/Schmidt property owners merely cite to aerial maps showing the layout of their parcels, but do not identify any evidence establishing the required length of sewer line or the costs of installing such sewer line. Thus, even assuming without deciding that LID assessments must reduce special benefits for expenses necessary to enjoy the benefit of a local improvement, the Masters/Schmidt property owners failed to produce competent evidence of such expenses at the reassessment hearing to overcome presumption in favor of the City's assessment. *Rogers*, 114 at 230-31. Accordingly, they fail to demonstrate the Council's reassessment decision was arbitrary or capricious on this basis.

The Masters/Schmidt property owners' argument regarding the distribution of LID costs is largely conclusory and difficult to discern. To the extent that this argument relates to

Macaulay's use of the mass appraisal method generally, we approved this method in *Hasit*. 179 Wn. App. at 943-44. Accordingly, as addressed above, the law of case doctrine prevents appellants from challenging the mass appraisal method in this subsequent appeal. *Roberson*, 156 Wn.2d at 41. Moreover, Macaulay's reassessment studies clearly calculated the special benefit attributable to each of the appealing property owners and did not simply distribute the full cost of the sewer improvement to the property owners. Accordingly, the Masters/Schmidt property owners fail to show the Council's reassessment decision was arbitrary or capricious on this basis.

c. *Brickhouse*

Brickhouse contends that the Council's reassessment decision was arbitrary and capricious because Macaulay's proposed reassessment (1) recommended a $21,270 reassessment despite Macaulay's determination that the highest and best use of the property after the LID was the existing use of the property and (2) failed to deduct from its special benefit estimate the cost of installing sewers lines.

Regarding Brickhouse's contention that it received no special benefit based on Macaulay's determination that the property's existing use was the highest and best use after the LID, Macaulay's report did conclude that, as improved, the existing use of the property is at its highest and best use. But Macaulay's report also concluded that, with the addition of the LID, the property obtained future development potential for commercial and multifamily mixed use development. That Brickhouse may prefer to utilize the property with its existing use rather than for its development potential does not defeat the special benefit determination. *See Doolittle*, 114 Wn.2d at 93 ("Property cannot be relieved from the burden of a local improvement district assessment simply because the owner devotes it to a use which may not be specially benefitted

by the local improvement."). Accordingly, Macaulay's report provided the Council with evidence that the Brickhouse property received a special benefit from the installation of the LID. As such, Brickhouse cannot show that the Council reassessment decision was arbitrary or capricious.[20] *Abbenhaus*, 89 Wn.2d at 859-61.

Regarding the contention that Macaulay's proposed reassessments were flawed for failing to deduct the costs of installing sewer lines, Brickhouse failed to present evidence sufficient to overcome the presumption that the Council's reassessment decision was correct. Similar to the Masters/Schmidt property owners, Brickhouse declares the purported costs of installing sewer lines without any evidence in support. Although we have declined to address the evidentiary standard for overcoming presumptions in favor of the City at the municipal hearing level, Brickhouse's unsupported declaration clearly falls short. *See Hasit*, 179 Wn. App. at 949 n. 7. To hold otherwise would render the presumption a nullity. Thus, even assuming that LID assessments must reduce special benefits for expenses necessary to enjoy the benefit of a local improvement, Brickhouse failed to produce competent evidence of such expenses at the reassessment hearing to overcome the presumption in favor of the City's assessment. Accordingly, it fails to show the Council acted arbitrarily or capriciously on this basis.

d. *Suelo Marina*

Suelo Marina contends that the Council's reassessment decision was arbitrary and capricious because Macaulay's proposed reassessment (1) determined that the property's existing

[20] Because the Council had evidence that the Brickhouse property was specially benefitted from the LID, Brickhouse's related due process claim fails.

use was at its highest and best use before the LID and (2) failed to assign any value to the buildings on the property.

Suelo Marina's contention that it received no special benefit based on Macaulay's determination that the property's existing use was the highest and best use before the LID is meritless. For the reasons set out above, that the Suelo Marina property was at its highest and best use *before* the LID does not defeat the conclusion that the property received a special benefit as a result of the LID.[21]

With regard to the second claim, Suelo Marina argues only that Macaulay lacked a foundation for finding the existing buildings worthless because he did not personally inspect the property as part of his original 2011 assessment recommendations. We fail to see how this lack of foundation supports Suelo Marina's argument in this current appeal, as Macaulay inspected the property as part of his 2014 reassessment recommendations. Moreover, Suelo Marina fails to cite any evidence in the record showing the buildings' value. Accordingly, it did not overcome the presumption that the reassessment was correct on this point. As such, Suelo Marina does not show that the Council's reassessment decision was arbitrary and capricious on this ground.

e. *Docken*

The Docken property owners contend that the Council's reassessment decision was arbitrary and capricious as to parcel 131 because Macaulay's proposed reassessment (1) determined that the property's existing use was at its highest and best use before and after the LID, (2) failed to lay a foundation for his opinion as to the property's soil conditions, and (3)

[21] Because the Council had evidence that the Suelo Marina property was specially benefitted from the LID, the Suelo Marina property owners related due process claim fails.

failed to deduct the footprint of an existing buildings and parking lots from the portion of the land benefitted by the LID. Additionally, the Docken property owners contend that the Council's reassessment decision was arbitrary and capricious as to parcels 133 and 140 because Macaulay's proposed reassessment (1) understated the properties' before-LID values and (2) assumed combining the parcels when determining special benefits. On all points, we disagree.

i. *Parcel 131*

Regarding the Docken property owners' contention that it received no special benefit based on Macaulay's determination that the property's existing use was the highest and best use before the LID, the contention is meritless because the determination that a property was at its highest and best use *before* the LID does not defeat the conclusion that the property received a special benefit as a result of the LID.

Regarding the Docken property owners' contention that it received no special benefit based on Macaulay's determination that the property's existing use was the highest and best use after the LID, the Macaulay study determined that the LID provided parcel 131 with future commercial/multifamily mixed use development potential. Thus, Macaulay's report provided the Council with evidence that parcel 131 was specially benefitted from the LID. Accordingly, the Docken property owners cannot show that the Council reassessment decision was arbitrary or capricious on this basis.[22] *Abbenhaus*, 89 Wn.2d at 859-61.

Regarding the Docken property owners' contention with the basis for Macaulay's opinion regarding poor soil conditions, Macaulay noted in his original 2011 summary assessment report

[22] Because the Council had evidence that the Docken property was specially benefitted from the LID, the Docken property owners related due process claim fails.

that Pierce County Health Department officials' reports of numerous complaints regarding septic system failures in the LID area, coupled with poor soil conditions including wetlands, clay content, and a high water table, make it impossible to achieve maximum development density under the then current zoning regulations. Even assuming that this did not establish an adequate foundation for Macaulay's opinion regarding the soil conditions of parcel 131, the Docken property owners did not present any competent evidence to overcome the presumption that the City's recommended reassessment was incorrect on this ground. On this issue, Docken's written objection contains only a declaration from one of the Docken property owners stating, "I disagree with the City Consultant's tentative assertion that 'soil conditions and probable Pierce County Health Department requirements' prevent attaining the highest and best use of the land." AR at 818-19. A mere disagreement as to an appraiser's opinion does not constitute evidence sufficient to overcome the presumption in favor of a City's assessments. Accordingly, the Docken property owners cannot show that the Council reassessment decision was arbitrary or capricious on this ground.

As with the Duncan property owners, the Docken property owners fail to provide adequate argument or legal authority in support of their contention that existing buildings and parking lots on its property did not specially benefit from the LID. To the extent that the Docken property owners are asserting that these portions of the property did not specially benefit from the LID because the existing use of these portions of the property were at their highest and best use after the LID, that assertion ignores Macaulay's determination that the LID provided potential for upgrading/renovation to more intensive uses of the property improved with the

existing buildings. Accordingly, the Docken property owners do not show that the Council reassessment decision was arbitrary and capricious on this ground.

ii. *Parcels 133 and 140*

Regarding the Docken property owners' contention with Macaulay's before-LID valuation, the owners do not identify any specific error with Macaulay's sales comparison approach, instead relying on its own appraiser's opinion that Macaulay understated the before-LID value of the property when compared to Macaulay's valuation of a similar LID property. But, an appraiser's contrary assessment determination, alone, is an inadequate basis upon which to overturn the Council's assessment decision on appeal. *Abbenhaus*, 89 Wn.2d at 859.

Finally, the Docken property owners rely on our Supreme Court's decision in *Doolittle*, 114 Wn.2d 88, to support the argument that Macaulay improperly considered the potential future integrated use of parcels 133 and 140 when calculating the parcels' special benefit. This reliance is misplaced. The *Doolittle* Court did not create a bright-line rule that separate parcels could not be assessed as a single lot when determining special benefits. Instead, the *Doolittle* court held that separate parcels could be assessed as a single lot when determining special benefits if the following three conditions are met: (1) unity of ownership, (2) contiguity of the parcels, and (3) unity of use. 114 Wn.2d at 94-96.

There is no question that parcels 133 and 140 are contiguous and have unity of ownership. And the Docken property owners did not raise any issue regarding unity of use at the reassessment objection hearing or on appeal, instead relying on its incorrect interpretation of *Doolittle*. As such, we hold that the Docken property owners have failed to show that Macaulay improperly considered the potential future integrated use of parcels 133 and 140 when

calculating special benefits to the properties. Accordingly, they fail to show that the Council's reassessment decision was arbitrary and capricious on this ground.

IV. Failure To Present Rebuttal Evidence Argument Waived

The Docken Petitioners present the following assignment of error:

> Once property owners present evidenced [sic] on the issue of special benefits and the presumptions in favor of a municipality disappears, did the City meet its burden to introduce competent evidence of benefit when the City presented no rebuttal evidence after the property owners' presentation? NO.

Br. of Appellants (Docken) at 2. But, the Docken Petitioners fail to present any argument in support of this assignment of error regarding the timing of the City's presentation of evidence. Accordingly, that assignment of error is waived. RAP 10.3(a)(6); *Olympic Tug & Barge, Inc. v. Dep't of Revenue*, 188 Wn. App. 949, 959 n. 9, 355 P.3d 1199 (2015), *review denied*, 184 Wn.2d 1039 (2016).

V. Statements from 2011 Hearing

Next, the Docken Petitioners assert that the Council's decision to admit evidence of statements made by property owners during the original assessment hearing violated their constitutional right to due process because those statements were made without the benefit of constitutionally adequate time to gather evidence for the original hearing. This argument is difficult to discern and lacks any citations to legal authority in support. The Docken Petitioners appear to argue that the Council improperly relied on a statement from one of the Duncan

property owners during the original assessment hearing that she believed the proper special benefit value to her property should be $293,470.[23] This argument lacks merit.

Contrary to their assertion on appeal, the Docken Petitioners neither objected to the City attorney questioning the Duncan property owner about her prior statements at the original assessment hearing nor requested that the Council exclude the transcripts from the original hearing from the administrative record. Rather, *after* the Duncan property owner completed her testimony regarding her prior 2011 statements in response to the City's attorney's questioning, counsel for the Docken Petitioners stated that she wanted to "supplement . . . Ms. Duncan's testimony" and argued that it was unfair for the City's attorney to use her prior testimony because that testimony was made without the benefit of constitutionally adequate time to gather evidence of what the proper assessment value should be for her property. AR at 662. At best, counsel for the Docken Petitioners argued that the Counsel should give little weight to the Duncan property owner's prior testimony due to the City's constitutionally inadequate notice of the prior hearing. Because the Docken Petitioners did not request the Council to exclude such prior testimony from the record, they cannot show that the Council erred by failing to do so. Accordingly, we reject the Docken Petitioners' due process claim.

VI. Appearance of Fairness Doctrine

Finally, for the first time on appeal, the Docken Petitioners argue that City Manager Mark Bauer's attendance at the Council's executive session, in which the Council deliberated on the property owners' reassessment objections, violated the appearance of fairness doctrine. The

[23] Even if we were to agree with the Docken Petitioners that the Council improperly considered the Duncan property owner's statements, we fail to discern how such error would invalidate the reassessments as to the other property owners.

Docken Petitioners, however, fail to identify any evidence in the record that Bauer had attended the Council's executive session. The Docken Petitioners also fail to identify any evidence in the record that they had objected to Bauer's attendance at the Council's executive session or any reason why they should be relieved from the duty to object. Claims of bias or violations of the appearance of fairness doctrine cannot be raised for the first time on appeal. *Club Envy of Spokane, LLC v. Ridpath Tower Condominium Ass'n*, 184 Wn. App. 593, 605, 337 P.3d 1131 (2014). Accordingly, we do not further address this issue.

We affirm the superior court's order dismissing the property owners' appeal from the Council's reassessment decision.

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.

Worswick, J.

We concur:

Bjorgen, C.J.

Melnick, J.

APPENDIX B

ORDINANCE NO. 14-0424

AN ORDINANCE OF THE CITY OF EDGEWOOD, WASHINGTON, CONFIRMING THE ASSESSMENT ROLL, AS TO CERTAIN PROPERTIES, FOR LOCAL IMPROVEMENT DISTRICT NO. 1 TO FINANCE CERTAIN SEWER MAIN EXTENSIONS ALONG MERIDIAN AVENUE, AS PROVIDED BY ORDINANCE NO. 08-0306; AND, LEVYING AND ASSESSING THE COST AGAINST THE PROPERTIES AS SHOWN ON THE ASSESSMENT ROLL.

THE CITY COUNCIL OF THE CITY OF EDGEWOOD, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. Recitals and Findings.

1.1. The City of Edgewood ("City") was incorporated in 1996. Early in its brief history, the City began planning for better public health services and community development through a modern wastewater (sanitary sewage) system. There had been no public sewers in the City. The City, with Department of Ecology approval, adopted its Edgewood General Sewer Plan in 2004 (updated, 2007 and 2009). See, RCW 90.48.110. Phase I of that system has now been constructed. With the limited financial resources of a new and small City, the City relied on a local improvement district ("LID") to support system funding. The City created LID No. 1 by Ordinance No. 08-0306 (October 2008).

1.2 By Ordinance No. 11-0366 (July 2011), the City Council confirmed the assessment roll for the City's LID No. 1. The LID financed the construction of the sewer system. The contractor substantially completed the sewer system by March 2011, and the Council officially accepted the work by resolution on April 12, 2011. The LID costs were spread to the owners of 161 parcels in a 312 - acre area of the City. A portion of the planned system and system costs provided for the accommodation of flows from properties outside the LID that may connect to the system in the future ("oversizing costs").

1.3 Of the 161 parcels in the LID, owners of 11 parcels (nine owners) sought review of the final LID assessment. In March 2014, the Washington Court of Appeals ruled that the

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oversizing costs were impermissibly allocated to the LID. *Hasit, LLC v. City of Edgewood*, 197 Wash. App. 917 (2014). In *Hasit*, the Washington Court of Appeals rejected claims regarding the assessments against other parcels in the LID, but nullified the assessments against the 11 parcels.

1.4 The City commissioned a report to determine the components of LID costs attributable to oversizing and the associated oversizing costs. The City received and published that report: Meridian Avenue Sewer LID No. 1 Evaluation of Oversizing Costs (BHC and Tetra Tech, June 17, 2014). The City also commissioned a further valuation of the 11 parcels. The revised assessment roll levying the special assessments against the 11 parcels has been filed with the City Clerk as provided by law.

1.5 The initial hearing on those final assessments was postponed from August 13 to September 17. Notice of the time and place of hearing on the assessments and making objections and protests to the assessment roll was published at and for the time and in the manner provided by law fixing the time and place of hearing before the City Council thereon for 6:00 p.m., local time, on September 17, 2014, in the Council Chambers in the Edgewood City Hall, 2224 104th Avenue East, Edgewood, Washington; and further notice thereof was mailed by the City Clerk to each property owner shown on the roll.

1.6 At the time and place fixed and designated in the notice the City Council, sitting as a Board of Equalization, held the hearing and all written protests received were considered and all persons appearing at the hearing who wished to be heard were heard. The City Council considered the evidence received, the roll and the special benefits to be received by each lot, parcel and tract of land shown upon such roll, including the increase and enhancement of the fair market value of each such parcel of land by reason of the sewer system improvement.

1.7 The City Council incorporates the Findings of Fact, Conclusions and Order, attached to this ordinance as Appendix 1.

Section 2. Assessments Confirmed. The final assessment roll for the 11 parcels in the total amount of $2,385,785, as shown on Appendix 2, is hereby confirmed, which roll reflects reduction in assessments for those parcels whose assessments were nullified in *Hasit* due to oversizing and additional factors considered on reassessment.

Section 3. Special Benefits. Each of the lots, tracts, parcels of land and other property shown on the assessment roll is determined and declared to be specially benefited by this improvement in at least the amount charged against the same, and the assessment appearing against the same is in proportion to the several assessments appearing upon the roll. There is levied and assessed against each lot, tract or parcel of land and other property appearing upon the roll the amount finally charged against the same thereon.

Section 4. Assessment. The assessment roll as approved and confirmed shall be filed with the City Finance Director/City Clerk for collection and the City Finance Director/City Clerk is authorized and directed to publish notice as required by law stating that the roll is in her hands for collection and that payment of any assessment thereon or any portion of such assessment can be made at any time within 30 days from the date of first publication of such notice without penalty, interest or cost, and that thereafter the sum remaining unpaid may be paid in 20 equal annual installments of principal and interest. The notice shall indicate that the assessment for those property owners that prepay in whole will be reduced by the amount the City will not be required to fund for the Reserve Fund. The estimated interest rate is stated to be .25% per annum above the rates on the bonds that will be issued, with the exact interest rate to be fixed in the ordinance authorizing the issuance and sale of the local improvement bonds for Local Improvement District No. 1. The first installment of assessments on the assessment roll shall become due and payable during the 30-day period succeeding the date one year after the date of first publication by the City Finance Director/Clerk of notice that the assessment roll is in her hands for collection and annually thereafter each succeeding installment shall become due and payable in like manner.

Section 5. Assessment Collection. If the whole or any portion of the assessment remains unpaid after the first 30-day period, interest upon the whole unpaid sum shall be charged at the rate as determined above, and each year thereafter one of the installments of principal and interest shall be collected. Any installment not paid prior to expiration of the 30-day period during which such installment is due and payable shall thereupon become delinquent. Each delinquent installment shall be subject, at the time of delinquency, to a penalty of 12% per year levied on both principal and interest due upon that installment and all delinquent installments also shall be charged interest at the rate as determined above. The collection of such delinquent installments shall be enforced in the manner provided by law.

Section 6. Ordinance No. 11-0366 Confirmed. Nothing in this Ordinance modifies the assessments in LID No. 1, except as to the 11 parcels subject to *Hasit*. Except as provided herein, City Ordinance No. 11-0366 is ratified and confirmed.

Section 7. Effective Date. This ordinance shall take effect and be in force 5 days after publication, as provided by law.

PASSED by the City Council of the City of Edgewood, Washington, at a special open public meeting thereof, on the 2ND day of OCTOBER, 2014.

CITY OF EDGEWOOD, WASHINGTON

By: _____
Daryl Eidinger, Mayor

ATTEST:

Jane Montgomery
Jane Montgomery, Acting City Clerk

APPROVED AS TO FORM:

_____
Zach Lell, City Attorney

CERTIFICATION

I, the undersigned, Acting City Clerk of the City of Edgewood, Washington (the "City"), hereby certify as follows:

The attached copy of Ordinance No. 14-0424 (the "Ordinance") is a full, true and correct copy of an ordinance duly passed at a special meeting of the City Council of the City held at the regular meeting place thereof on the 2nd day of October, 2014, as that ordinance appears on the minute book of the City; and the Ordinance will be in full force and effect five days after publication in the City's official newspaper; and

A quorum of the members of the City Council was present throughout the meeting and a majority of those members present voted in the proper manner for the passage of the Ordinance.

IN WITNESS WHEREOF, I have hereunto set my hand this 2ND day of October, 2014.

CITY OF EDGEWOOD, WASHINGTON

Jane A. Montgomery

Jane Montgomery, Acting City Clerk

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REF2014-000005

Appendix 1
Appendix 2

BEFORE THE CITY COUNCIL OF THE
CITY OF EDGEWOOD ACTING AS BOARD OF EQUALIZATION

In the Matter of: LOCAL IMPROVEMENT DISTRICT NO. 1	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER (ASSESSMENT ROLL)

A **PUBLIC HEARING** in the above-captioned matter was held on September 17, 2014 (after being rescheduled from August 13, 2014), before the City Council of the City of Edgewood, Washington acting as a Board of Equalization (the "Board"). This matter has come back before the Board on remand from the Washington State Court of Appeals (the "CofA" decision is found at *Haslt, LLC v. City of Edgewood*, 179 Wn. App. 917, 320 P.3d 163 (2014). In its decision, the CofA "annul[ed] the special assessments imposed against the respondents' properties." As a result, those same respondents' properties are herein reassessed in accordance with the CofA's decision.

The City of Edgewood appeared at the public hearing through City Attorney Zach Lell. The Local Improvement District (the "LID") was principally represented by

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REF2014-000007

legal counsel Stephen P. DiJulio. Robert J. Macaulay, author of a Special Benefit Study of the LID improvements appeared and testified regarding the study he prepared (the "Macaulay Study"). Tony Fischer of BHC Consultants testified on behalf of the LID regarding oversizing design issues. Jim Santrock of Tetra Tech also testified on behalf of the LID regarding oversizing design issues.

The owners of parcels 27 (tax parcel no. 0420033077—Stokes) and 68 (tax parcel no. 0420091134—Rempel) were represented by Attorney Margaret Archer. In addition, on behalf of these two properties, David Hunnicutt of Hunnicutt and Associates, Inc. testified at the hearing regarding valuation studies he conducted separately from the Macaulay Study challenging its conclusions. Tina Rempel presented testimony regarding her property on her own behalf and land use planning consultant, William Palmer testified regarding the properties represented by Ms. Archer as well.

The owners of the remaining properties on remand from the CofA (as referenced further herein below) were represented by Attorney Carolyn Lake (collectively the "Docken Appellants") who submitted various materials including the "Declaration and Report of Property Owner Appraiser Don Heischman (the "Heischman Report")." Of the Docken Appellants, live testimony was presented by Enid Duncan, Dexter Meacham, and Eric Docken in addition to Ms. Lake's presentation.

The Board, having now considered the evidence presented, having reviewed the records and files in the case, and being otherwise fully advised, makes the following:

FINDINGS OF FACT

1. In October of 2008, the City adopted Ordinance No. 08-0306 creating LID No. 1 providing for the construction of a modern wastewater (sanitary sewage) system in accordance with the Edgewood General Sewer Plan as adopted in 2004 (updated, 2007 and 2009).

2. Phase I of the system was substantially completed in March 2011, and the Council officially accepted the work on April 12, 2011 by resolution.

3. Thereafter, the City Council adopted Ordinance No. 11-0366 in July of 2011, by which the City Council confirmed the assessment roll for LID No. 1 previously filed with the City Clerk in accordance with applicable laws. Pursuant to that Ordinance, costs of the LID were assessed to the owners of 161 parcels in a 312 acre area of the City. Of those owners, originally nine owners of eleven parcels challenged their assessments in a proceeding in Pierce County Superior Court, which led to (a) the City's appeal to the CofA and the *Haslt* decision referenced above, (b) nullification of the assessments for the appealing owners and (c) the present reassessment proceeding.

4. Of those nine owners, eight are still active in this reassessment proceeding as follows:

° Duncan, Edward & Enid-	Map No. 2 (Tax Parcel No. 042003202100),
° 1999 Stokes Family LLC- ° Suelo Marina LLC-	Map No. 27 (Tax Parcel No. 0420033077), Map No. 31 (Tax Parcel No. 0420033140),
° Rempel Ray E & Eldean TTEE & Rempel, Tina-	Map No. 68 (Tax Parcel No. 0420091134),
° Masters, Darlene & Schmidt, Patricia-	Map Nos. 71 & 79 (Tax Parcel Nos. 0420091012 & 0420091051),
° Skarich, George J & Arlyn J-	Map No. 115 (Tax Parcel No. 0420103139),
° AKA The Brickhouse LLC-	Map No. 128 (Tax Parcel No. 3625000373), and
° Docken Properties LP-	Map Nos. 131, 133 & 140 (Tax Parcel Nos. 0420094080, 0420094023, 0420094079).

The foregoing are referred to hereinafter collectively as the "Appellant Properties."

5. After the CofA nullification, the City commissioned the Macaulay Study referenced above, together with evaluations from BHC Consultants and Tetra Tech regarding oversizing for use in the reassessment process for the Appellant Properties. The Macaulay Study took into account additional factors in reevaluating the Appellant Properties such as actual usable area information, information specifically regarding

wetlands, other critical areas and stormwater challenges, and information regarding the conditions/status of existing improvements.

6. A proposed reassessment Roll for LID No. 1 was filed in the Office of the City Clerk, and the same shows the amount staff recommended be reassessed against the Appellant Properties in payment of the cost and expense of the improvements previously referred to herein, and said proposed roll has been open for inspection by all parties interested therein.

7. Sufficient legal notice, as required by RCW 35.44.080 and Edgewood Municipal Code ("EMC") 3.40.030, was published/ provided. All other procedures required by law with respect to adoption of the reassessment roll have been taken, including, but not limited to, direct notices to the owners of record of the Appellant Properties which were mailed on August 14, 2014. An Affidavit of publication for the proposed reassessment roll is attached hereto as Exhibit A.

8. A public hearing was held on September 17, 2014 (after being rescheduled from August 13, 2014), before the Board in Council Chambers at City Hall located at 2224 104th Ave. East, Edgewood, WA.

9. At the outset of the hearing, Enid Duncan requested that Council Member Crowley recuse himself apparently because he is an attorney. With no other reason offered and no actual conflict or appearance of fairness issue presented, the request was denied.

10. At the hearing, Stephen P. DiJulio, as legal counsel for LID No. 1 made opening remarks and then directed the presentation of testimony by Robert J. Macaulay regarding the findings of the Macaulay Study a copy of which is attached hereto as Exhibit B and incorporated herein as part of the Board's findings. Tony Fischer of BHC Consultants and Jim Santrock of Tetra Tech both testified on behalf of the LID regarding oversizing design issues among others. Opportunities to cross examine all LID witnesses was provided to the Appellant Owners' counsel.

11. Based on the Macaulay Study and other information presented by City staff and the LID, an overall reduction in the assessed amounts to the Appellant Owners' due to oversized capacity and other reconsidered factors referenced in the Macaulay Study, was recommended in the amount of $408,557, leading to an overall assessment to the Appellant Owners of $2,385,785 broken down as follows:

° Duncan, Edward & Enid-	Map No. 2	$212,700
° 1999 Stokes Family LLC-	Map No. 27	$379,315
° Suelo Marina LLC-	Map No. 31	$322,595
° Rempel Ray E & Eldean TTEE & Rempel, Tina,-	Map No. 68	$790,535
° Masters, Darlene & Schmidt, Patricia-	Map No. 71 Map No. 79	$428,945
° Skarich, George J & Arlyn J-	Map No. 115	$28,360
° AKA The Brickhouse LLC-	Map No. 128	$21,270

° Docken Properties LP- Map No. 131
Map No. 133
Map No. 140 $202,065.

12. A mass appraisal method was used in determining the special benefits conferred by the LID No. 1 improvements on the Appellant Owners' properties. The Board finds this method appropriate under the circumstances and the evidence supporting the employment of this method sufficient.

13. Based on the Macaulay Study and other submitted evidence, the Board has determined that the fair market value of the Appellant Properties benefited by LID No. 1 has been increased in an amount equal to or greater than the assessments.

14. All owners of the Appellant Properties have challenged the proposed reassessment valuations in the Macaulay Study as the same are proposed for assessment by the LID. 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.

15. The verbatim digital recording of the public hearing and the file in this matter are in the custody of the City Clerk; and both are available for review by any party in interest.

16. Any Conclusion of Law set forth hereinafter which may be deemed to be a Finding of Fact herein is hereby adopted as such.

From these Findings of Fact the Board makes the following:

CONCUSIONS OF LAW

1. City staff and the LID have complied with all applicable laws with respect to approval and confirmation of the (re)Assessment Roll for the Appellant Properties in LID No. 1.

2. Improvements constructed pursuant to a local improvement district are presumed to benefit properties within the LID on an equitable basis, and the assessments are presumed to have been made fairly and legally. *See Abbenhaus* v. *Yakima,* 89 Wn.2d 855, 860-61,576 P.2d 888 (1978); *see also Bellevue Plaza* v. *Bellevue,* 121 Wn.2d 397,402-403, 851 P.2d 662 (1993); *Hansen v. Local Imp. Dist., 54 Wn. App. 257-62, 773 P.2d 436 (1989).*

3. 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.

4. The revised Assessment Roll conforms to applicable legal requirements, and there is no compelling evidence that the methodology used to substantiate the assessments for the Appellant Properties was incorrect. Accordingly, the Board should adopt an ordinance assessing the Appellant Properties for benefits conferred under LID No. 1, previously created by the City Council, and the revised Assessment Roll for LID No. 1 should be confirmed and approved.

5. Any Finding of Fact hereinbefore stated which may be deemed to be a Conclusion of Law herein is hereby adopted as such.

From the foregoing Findings of Fact and Conclusions of Law the Board enters the following:

ORDER

It is hereby ordered that the Assessment Roll for LID No. 1, including the reassessed amounts for the Appellant Properties be confirmed and approved and an ordinance be adopted reflecting the same.

DONE THIS 2ND day of October, 2014.

By:_____
DARYL EIDINGER, Mayor on Behalf
of the City Council of Edgewood, WA
acting as Board of Equalization

EXHIBIT A TO FINDINGS, CONCLUSION AND ORDER
AFFIDAVIT OF PUBLICATION

B-17

REF2014-000017

THE NEWS TRIBUNE
[thenewstribune.com]

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AFFIDAVIT OF PUBLICATION

Account #	Ad Number	Identification	PO	Amount	Cols	Lines
255556	0001216577	CITY OF EDGEWOOD, WASHINGTON NC	MTG 9/17	$562.43	1	51

Attention: JANE MONTGOMERY

CITY OF EDGEWOOD
2224 104TH AVE E
PUYALLUP, WA 983721513

CITY OF EDGEWOOD, WASHINGTON
NOTICE OF HEARING ON FINAL ASSESSMENT ROLL
LOCAL IMPROVEMENT DISTRICT NO. 1

NOTICE IS GIVEN that the final assessment roll for Local Improvement District No. 1 ("District"), established for the purpose of constructing a sewer main extension along Meridian Avenue East as ordered by Ordinance No. 08-0305 of the City of Edgewood, Washington ("City"), has been prepared as required by law and is on file and open to inspection at the office of the City Clerk at the Edgewood City Hall, 2224 104th Avenue East, Edgewood, Washington.

NOTICE FURTHER IS GIVEN that the City Council of the City has fixed the time for the hearing upon the final assessment roll on certain properties for 6:00 p.m., local time, on September 17, 2014, in the Council Chambers in the Edgewood City Hall, 2224 104th Avenue East, Edgewood, Washington. This hearing is limited to properties within LID No. 1 the original assessments for which were annulled by the Washington Court of Appeals.

Any person desiring to object to any assessment appearing on the revised final assessment roll is notified to make all objections in writing and to file them with the City Clerk prior to or at the hearing on the final assessment roll. All objections should state clearly the grounds of the objections and should contain lot, block and addition, section, tax number, or other identifying description of the property.

At the time and place fixed, and at such other times to which the hearing may be adjourned, the City Council will sit as a board of equalization for the purpose of considering objections duly filed, together with all information and evidence in respect of those objections, and for the purpose of considering the assessment roll. At the hearing, or adjournment thereof, the City Council may correct, revise, raise, lower, change or modify the roll or any part thereof, or set aside the roll and order a new assessment. When property has been entered originally upon the roll, and the assessment thereon is not raised, no objection shall be considered by the City Council or by any court on appeal unless the objection is made in writing at or prior to the date fixed for commencement of the hearing upon the roll.

Jane Montgomery
Acting City Clerk
City of Edgewood, Washington

JANICE WASSENAAR, being duly sworn, deposes and says: That she is the Principal Clerk of The News Tribune, a daily newspaper printed and published in Tacoma, Pierce County, State of Washington, and having a general circulation therein, and which said newspaper has been continuously and uninterruptedly published in said County during a period of six months prior to the first publication of the notice, a copy of which is attached hereto: that said notice was published in The News Tribune, as amended, for:

2 Insertions

Beginning issue of: 08/15/2014

Ending issue of: 08/22/2014

(Principal Clerk)

Subscribed and sworn on this 22nd day of August in the year of 2014 before me, a Notary Public, personally appeared before me Janice Wassenaar known or identified to me to be the person whose name subscribed to the within instrument, and being by first duly sworn, declared that the statements therein are true, and acknowledged to me that she executed the same.

NICOLE WE... NOTARY PUBLIC STATE OF WASHINGTON 03-15-15

Notary Public in and for the state of Washington residing in Pierce County
1950 S State St, Tacoma, WA 98405

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REF2014-000018

EXHIBIT B TO FINDINGS, CONCLUSION AND ORDER
THE MACAULAY STUDY

B

Filed with the City Clerk:
June 23, 2014

ORIGINAL

Restricted Appraisal Reports

Eight Properties Located Within the Boundaries of the City of Edgewood's Meridian Avenue Sewer Project LID Number 1 (LID Map Nos. 2, 27, 31, 68, 71/79, 115, 128, 131/133/140)

Location:
Edgewood, WA 98371

Prepared for:
Mr. Zach Lell, City Attorney
City of Edgewood
2224 104th Avenue East
Edgewood, WA 98372-1513

Date of Valuation:
May 10, 2011

Date of Report:
June 20, 2014
Job No. 14-141

Prepared by:
Robert J. Macaulay, MAI
MACAULAY & ASSOCIATES, LTD.
Everett, Washington

Macaulay & Associates, Ltd. Real Estate Appraisers & Consultants
2927 Colby Avenue, Suite 100 • Everett, WA 98201
www.macaulayltd.com • 425-258-2611 • Fax 425-252-1210

Restricted Appraisal Reports
June 20, 2014

Mr. Zach Lell, City Attorney
City of Edgewood
Edgewood, WA 98372-1513

Re: Eight properties located within the boundaries of the City of Edgewood's Meridian Avenue Sewer Project LID Number 1 (LID Map Nos. 2, 27, 31, 68, 71/79, 115, 128, 131/133/140). Job No. 14-141.

Dear Mr. Lell:

As requested, a personal inspection has been made of the above-referenced parcels (eleven tax parcels under eight ownerships), together with a study of current market data, for the purpose of providing estimates of the fee simple interest in each property both before and after (or "without and with") completion of the City of Edgewood infrastructure project known as the Meridian Avenue Sewer Project LID Number 1. The scope of this assignment is to provide further and/or modified support and documentation for the mass appraisal assignment completed earlier in connection with the LID (and consistent with the ruling of the Washington State Court of Appeals). Your attention is invited to the following reports for brief narrative descriptions, analyses and conclusions of value for each of the eight ownerships. The individual restricted appraisal reports are included herein as eight separate sections.

The date of valuation for this analysis and report is May 10, 2011, a date corresponding to the availability of the LID improvements. As part of a 2011 update of the City's development code, important changes in land use regulations allowing more intensive development occurred. While the names of several zoning categories governing the subject vicinity were unchanged, revisions to both the development code and the city's comprehensive plan were approved by the Edgewood City Council as of April 26, 2011 and became effective on May 9, 2011. Those revisions supported by the LID had a significant effect on the subject area. Not only was more intensive development now allowed (with sewer service), a number of uses permitted prior to the revisions could not be achieved without sewers. Because of the timing of these changes in land use regulations as they pertain to the project, this appraisal estimates retrospective market value of the subject properties as of the same date (May 10, 2011) both without and with the LID project assumed completed.

These are restricted appraisal reports intended solely for use by the City; the rationale for how the appraiser arrived at the opinions and conclusions set forth in the reports may not be understood properly without additional information in the appraiser's workfile. The reports are, however, intended to comply with the reporting requirements set forth under Standards Rule 2-2(b) of the Uniform Standards of Professional Appraisal Practice (USPAP) and the Code of Professional Ethics of the Appraisal Institute.

As such, the sections present summary discussions of the data, reasoning, and analyses that were used in the appraisal process to develop the opinions of value. Supporting documentation is retained in the appraiser's file. The depth of discussion contained in these reports is specific to the needs of the client and for the intended use stated herein. The appraiser is not responsible for unauthorized use of these reports. Although the valuation date is May 10, 2011, the reports comply with the 2014-2015 edition of USPAP.

In compliance with Statement 3 (SMT-3), which can be found on page U-74 of the 2014-2015 edition of USPAP, the value opinions contained herein apply to the May 10, 2011 retrospective effective date of value. Any comparable market data or other information on transactions or events occurring since that date is intended to help the reader understand market conditions as of this retrospective effective date. The date of the reports, as shown on this letter, indicates the perspective from which the appraiser is examining the market, whereas the effective date of the appraisals---May 10, 2011---establishes the context for the value opinions.

A significant factor considered in the valuation analysis is that, as stated above, the intensity of use allowed under prior zoning regulations could not in most instances be achieved without the LID improvements. Furthermore, it is reasonably probable that the 2011 zoning changes would not have been initiated without the sewer project.

The difference in estimated retrospective market value before and after completion of the LID improvements is each property's special benefit. With the zoning changes discussed above in place, special benefit to the subject parcels is attributable to the significant increases in potential development density which occurred as a result of the project. In addition, the improvements will provide the impetus for more intense commercial and multi-family residential development, making the subject area more competitive with surrounding municipalities. Despite the lingering effects of the nationwide economic recession, the vicinity remains desirable in the marketplace due to excellent access to transportation networks and major employment centers.

As of the May 2011 valuation date, the recession, which began in late 2007, was still having a profound and long-lasting effect on both commercial and residential real estate markets. Although market conditions in 2011 were weakened due to the recession, these factors are reflected in both the "without" and "with" valuations. Recognizing this, land value with the project as of the valuation date is enhanced due to the elimination of costs and risk associated with on-site septic systems, potential development density is increased since septic drainfield areas no longer need to be set aside, and there is significant improvement in the neighborhood's reputation and market appeal. Typically, special benefit to property is reflected in the underlying land value. As a result of a project like this, the market will pay a higher price for land; in this instance, probable increases in land value are primarily due to the aforementioned factors and most emphasis is placed on land values in these reports.

The LID was initiated as a result of a citizen group of property owners with the presentation of a petition to the City of Edgewood. Numerous property owners contributed funds to initiate the formation process. Due to the poor soils in the Edgewood area and the currently widespread use of septic systems, development within the City has stagnated. The sanitary sewer LID increases potential economic activity within the City, spurring development along Meridian Avenue. The Washington State Department of Transportation (WSDOT) began construction of a $50 million road-widening project along Meridian Avenue in the subject area in September 2011. Phase one, a 1.2- mile long section extending south from Milton Way/8th St E to 24th St E, is scheduled for completion in the summer of 2014. Phase two, continuation of the improvements south from 24th St E to 36th Street E, is scheduled to commence in 2027. The project, fully funded and done at no cost to the affected property owners, is not part of the LID. The market was aware of these proposed road improvements, both before and after completion of the sewer LID project.

At the time of closing of the initial final assessment roll for the LID, the City's estimated total project cost (100% financed by the LID) included costs for oversizing of the sewer lines that were installed. The cost figure utilized in the May 10, 2011 report prepared by Macaulay and Associates, Ltd. entitled, "Final Special Benefit/Proportionate Assessment Study—Meridian Avenue Sewer Project LID Number 1, City of Edgewood, Pierce County, WA" was $21,238,268. That figure is reduced in this report following the discussion by the City after the Court of Appeals' ruling.

Referring to the June 17th, 2014 City of Edgewood Meridian Avenue Sewer LID No. 1 Evaluation of Oversizing Costs Report, prepared by BHC Consultants and Tetra Tech of Seattle, WA, the revised total LID cost is $20,432,581.

The total estimated special benefit to all affected parcels, including the eight subject properties discussed herein, was $28,818,000. Dividing the total revised project cost by the total estimated special benefit yielded a cost/benefit ratio of 70.90%. This new cost/benefit ratio is applied to each of the eight appellant properties' special benefit to arrive at a revised recommended assessment amount.

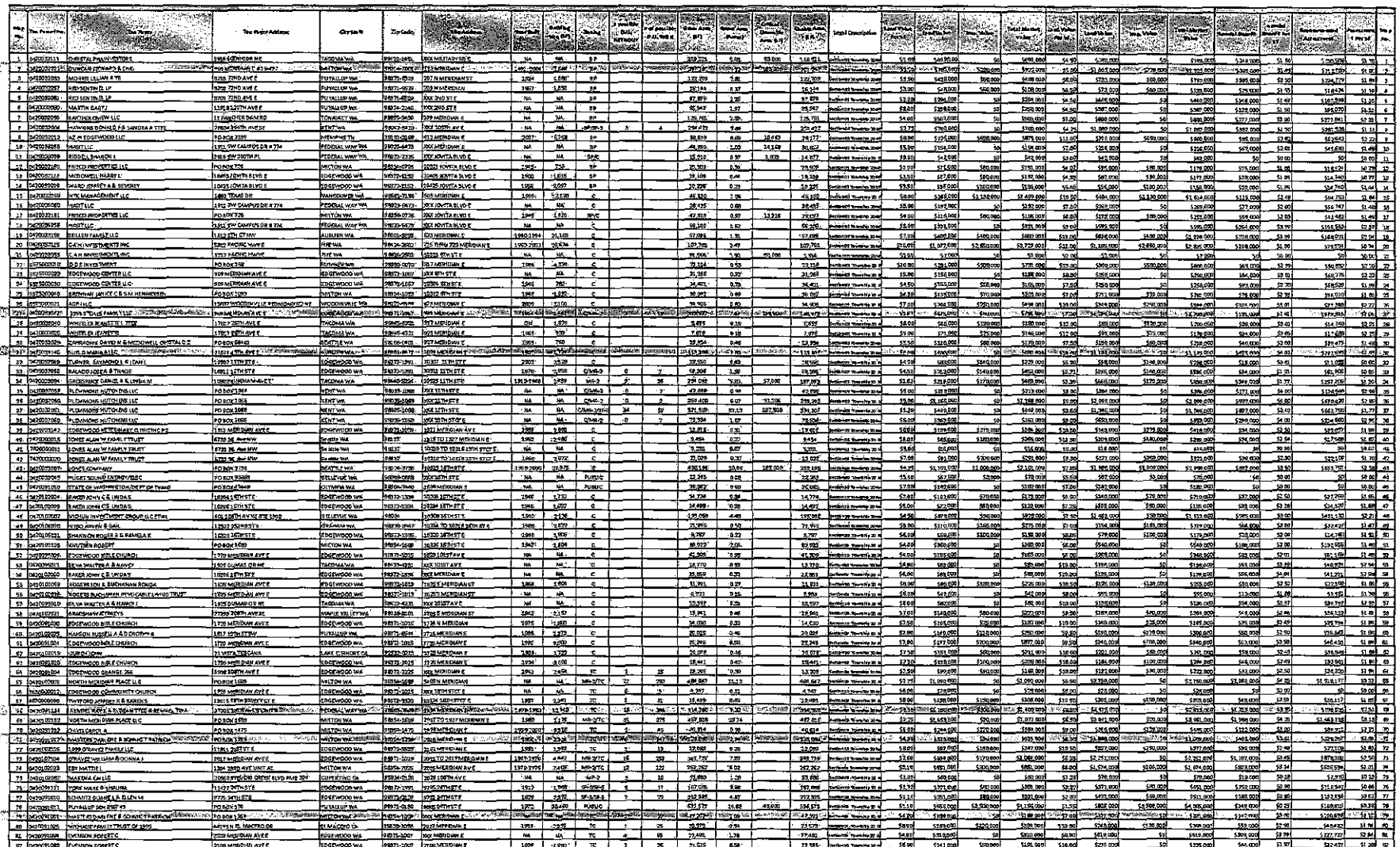
Based on the investigation and analyses described herein, I have formed the opinion that retrospective market value of the fee simple interest in each of the eight subject ownerships, both without and with the LID project (discussed herein and in the above-referenced document), as of May 10, 2011, is as shown in the summary chart below. Based on the revised cost/benefit ratio of 70.90%, recommended final assessment amounts are shown on the far right column.

Map No.	*Owner*	*Estimated Retrospective Market Value—without LID*	*Estimated Retrospective Market Value—with LID*	*Estimated Special Benefit*	*Recommended Final Assessment*
2	Edward and Enid Duncan	$925,000	$1,225,000	$300,000	$212,700
27	1999 Stokes Family LLC	$755,000	$1,290,000	$535,000	$379,315
31	Suelo Marina LLC	$680,000	$1,135,000	$455,000	$322,595
68	Ray and Eldean Rempel TTEE and Tina Rempel	$1,400,000	$2,515,000	$1,115,000	$790,535
71, 79	Darlene Masters & Patricia Schmidt	$815,000	$1,420,000	$605,000	$428,945
115	George J. and Arlyn J. Skarich	$500,000	$540,000	$40,000	$28,360
128	Aka The Brickhouse LLC	$505,000	$535,000	$30,000	$21,270
131, 133, 140	Docken Properties LP	$1,800,000	$2,085,000	$285,000	$202,065

Respectfully submitted,
MACAULAY & ASSOCIATES, LTD.

Robert J. Macaulay, MAI
WA State Certified - General Appraiser No. 1100517

Appendix 2
Final Assessment Role Per Ordinance 14-0424



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REF2014-000025

Appendix 2
Final Assessment Role Per Ordinance 14-0424

These parcels have been reassessed and the amounts shown are at Council Direction from Reassessment Hearing on September 17, 2014

B-25

REF2014-000026

No. _____

SUPREME COURT OF STATE OF WASHINGTON

(Court of Appeals No. 48028-0-II)

ENID and EDWARD DUNCAN; ERIC DOCKEN; DOCKEN PROPERTIES, LP; JAMES and PARTICIA SCHMIDT; DARLENE MASTERS; SUILO MARINA; AKA THE BRICKHOUSE, LLC; 1999 STOKES FAMILY LLC; TINA REMPEL; and ELDEAN REMPEL, as Trustee for REVOCABLE TRUST AGREEMENT OF RAY E. REMPEL and ELDEAN B. REMPEL DATED DECEMBER 12, 2006,

Appellants,

vs.

CITY OF EDGEWOOD, Local Improvement District No. 1,

Respondent.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 1st day of December, 2016, I did serve, by email, and regular U.S. Mail, postage prepaid, true and correct copies of the 1999 Stokes Family LLC, Eldean Rempel, as Trustee for the Revocable Trust Agreement of Ray and Eldean B. Rempel dated December 12, 2006, and Tina Rempel's Petition for Supreme Court Review addressed to the following:

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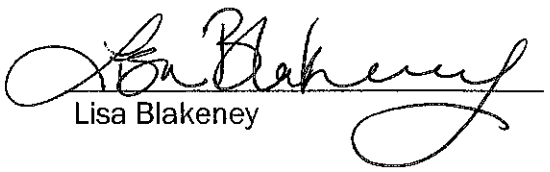

Lisa Blakeney