

No. 47766-1-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

NARROWS REAL ESTATE, INC., dba RAINIER VISTA MOBILE
HOME PARK,

Respondent,

v.

MHDRP, CONSUMER PROTECTION DIVISION, OFFICE OF THE
ATTORNEY GENERAL,

Appellant.

REPLY BRIEF OF RESPONDENT/CROSS-APP.

NARROWS REAL ESTATE¹

Walter H. Olsen, Jr., WSBA #24462
Deric N. Young, WSBA #17764
Olsen Law Firm PLLC
205 S. Meridian
Puyallup, WA 98371
(253) 200-2288

Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick/Tribe
2775 Harbor Ave. SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Respondent Narrows Real Estate

¹ Per Division II General Order 2010-1.

TALMADGE FITZPATRICK LAW

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walt@olsenlawfirm.com

deric@olsenlawfirm.com

jennifers3@atg.wa.gov

leticia@nwjustice.org

allysono@nwjustice.org

leslieo@nwjustice.org

amy.crewdson@columbialegal.org

ty.duhamel@columbialegal.org

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii-iv
A. INTRODUCTION	1
B. REPLY ON STATEMENT OF THE CASE	2
C. ARGUMENT IN REPLY	3
(1) <u>The Challenged Findings of Fact Are at Issue Because the RAP 2.5 Applies to This Court, Not the Superior Court, Which Reviewed OAH’s Decision Under the APA</u>	4
(2) <u>The Phrase “Actual Utility Costs” Means Utility Costs Actually Incurred; MHDRP’s Interpretation Rewrites It to Mean “Amount Charged by the Utility Provider” and Ignores Other “Actual” Costs</u>	7
(a) <u>An Interpretation of “Actual Utility Costs” that Does Not Include All Actual Utility Costs Is Not Reasonable</u>	7
(b) <u>If This Court Accepts the OAH Interpretation of “Actual Utility Costs” and Its Refusal to Accept Evidence of Estimated Usage, No Park Owner Can Comply with the Statute Unless Each Lot Is Individually Metered</u>	9
(c) <u>The MHDRP and the OAH Also “Estimated” Water Usage Despite a Total Lack of Evidence, and Did So Using a Less Accurate Formula than Rainier Vista</u>	10
(3) <u>OAH Considered Evidence of Other Actual Utility Costs Relevant Despite MHDRP’s Statutory Arguments; OAH Should Have Dismissed Based on the Flawed Investigation and MHDRP’s Failure to Meet Its Evidentiary Burden</u>	12

(4)	<u>MHDRP Jurisdiction Is Statutorily Limited to Dispute Resolution of Complaints Made by Individual Tenants; OAH Power Is Limited to Reviewing Evidence to Support a Notice of Violation</u>	14
(a)	<u>Standard of Review</u>	14
(b)	<u>The MHDRP Cannot Expand Its Expressly Limited Jurisdiction Based on the Legislative Purpose of the Statute or by Relying on the Statutory Authority of Other Agencies</u>	15
(c)	<u>As the Legislature Determined When It Rejected MHDRP’s Request for the Precise Powers It Now Seeks from This Court, the MHDRP Is Not the Proper Forum In Which to Fairly Litigate De Facto Class-Action Tenant Complaints</u>	20
(5)	<u>The OAH Decision Is Not Supported by Substantial Evidence, Is Arbitrary and Capricious, and Exceeds OAH Authority Because It “Reimburses” More Than Twice What Rainier Vista Allegedly Overcharged, and More Than 61 Times What Santiago Was Allegedly Overcharged</u>	21
(a)	<u>No Evidence Supports the Finding that Rainier Vista Incurred <i>No</i> Actual Utility Costs; the ALJ Reached This Conclusion by Arbitrarily and Capriciously Disregarding Rainier Vista’s Evidence</u>	21
(b)	<u>The OAH Was Not Empowered to Impose a Different Remedy</u>	23
(6)	<u>The Multiple Procedural Flaws in this Process Demonstrate Why the MHDRP Is Not the Proper Forum for a De Facto Class Action</u>	24
D.	CONCLUSION.....	27

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Burton v. Lehman</i> , 153 Wn.2d 416, 103 P.3d 1230 (2005).....	7
<i>Campbell v. State, Dep't of Soc. & Health Servs.</i> , 150 Wn.2d 881, 83 P.3d 999 (2004).....	16
<i>City of Redmond v. Moore</i> , 151 Wn.2d 664, 91 P.3d 875 (2004).....	25
<i>Conway v. Washington State Dep't of Soc. & Health Servs.</i> , 131 Wn. App. 406, 120 P.3d 130 (2005), <i>as amended on</i> <i>reconsideration in part</i> (Feb. 24, 2006).....	23, 24
<i>Darkenwald v. State Employment Sec. Dep't</i> , 183 Wn.2d 237, 350 P.3d 647 (2015).....	4
<i>Daughtry v. Jet Aeration Co.</i> , 91 Wn.2d 704, 592 P.2d 631 (1979)	6
<i>Fahn v. Cowlitz Cty.</i> , 93 Wn.2d 368, 610 P.2d 857 (1980), <i>amended sub nom. Fahn v. Civil Serv. Comm'n of</i> <i>Cowlitz Cty.</i> , 621 P.2d 1293 (1981).....	16
<i>Fuller v. Dep't of Employment Security</i> , 52 Wn. App. 603, 762 P.2d 367 (1988).....	5-6
<i>Green River Cmty. Coll. Dist. 10 v. Higher Educ. Pers. Bd.</i> , 107 Wn.2d 427, 730 P.2d 653 (1986).....	6
<i>Hitchcock v. Dep't of Ret. Sys.</i> , 39 Wn. App. 67, 692 P.2d 834 (1984), <i>review denied</i> , 103 Wn.2d 1025 (1985).....	6
<i>HomeStreet, Inc. v. State, Dep't of Revenue</i> , 166 Wn.2d 444, 210 P.3d 297 (2009).....	7
<i>In re Elec. Lightwave, Inc.</i> , 123 Wn.2d 530, 869 P.2d 1045, <i>as amended on denial of reconsideration</i> (Apr. 28, 1994).....	15, 16
<i>McGahuey v. Hwang</i> , 104 Wn. App. 176, 15 P.3d 672 (2001)	7
<i>Moolick v. Lawson</i> , 33 Wn. App. 665, 655 P.2d 1185 (1982).....	19
<i>Nationscapital Mortgage Corp. v. State Dep't of Fin. Institutions</i> , 133 Wn. App. 723, 137 P.3d 78 (2006).....	16, 17, 18
<i>Nevers v. Fireside, Inc.</i> , 133 Wn.2d 804, 947 P.2d 721 (1997).....	15
<i>Smith v. Employment Sec. Dep't</i> , 155 Wn. App. 24, 226 P.3d 263 (2010).....	5, 6
<i>State v. Adams</i> , 107 Wn.2d 611, 732 P.2d 149 (1987).....	24, 25

Federal Cases

Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976).....25

Statutes

RCW 18.44.42017
RCW 19.8617
RCW 19.14418
RCW 19.14617
RCW 19.146.22118
RCW 19.146.22718
RCW 19.146.23518
RCW 19.146.235(1).....18
RCW 31.04.14517
RCW 31.45.10017
RCW 34.05.5705
RCW 35.05.5465
RCW 59.20.070(6).....7, 8
RCW 59.20.130(6).....8
RCW 59.20.14027
RCW 59.3015, 21
RCW 59.30.01016, 27
RCW 59.30.010(3)(a)16
RCW 59.30.03016
RCW 59.30.0402, 16, 19, 27
RCW 59.30.040(1).....23
RCW 59.30.040(1)(b).....13
RCW 59.30.040(3).....13
RCW 59.30.040(5).....13
RCW 59.30.040(8).....3

Codes, Rules & Regulations

RAP 1.2(a)5
RAP 2.5.....4, 5
RAP 2.5(a)4
RAP 10.3.....4, 5, 6

A. INTRODUCTION

The Manufactured Housing Dispute Resolution Program (“MHDRP”) is empowered to do what its name suggests: resolve disputes. It is designed to be a simple and cheap forum for disputes between mobile/manufactured home tenants and the owners of the parks in which they live. Unless a tenant or park owner has made a complaint, the MHDRP is not authorized to be a law enforcement agency investigating and adjudicating matters to the detriment of non-parties.

The Legislature knows how to empower administrative agencies with the enabling statutes, resources, rules, limiting protocols, and due process protections that allow mass law enforcement actions on behalf of persons who have not sought assistance. When it believes such powers are in the public interest, the Legislature has done so in a number of contexts.

When an agency acts outside its statutory authority without the requisite tools and constraints on power, the results are problematic. The present case demonstrates the many substantive and procedural errors that can result from a lack of legislative guidance and constraints. A dispute resolution program should be confined to resolving disputes. If the Legislature wants to expand the powers of the MHDRP, it may. In fact, the MHDRP has asked for such expanded powers in the past, but the

Legislature has declined to grant them. The agency's request to rewrite RCW 59.30.040 in the guise of "interpretation" should be declined

B. REPLY ON STATEMENT OF THE CASE

The MHDRP concedes that its investigation did not include any inquiry into the infrastructure or administrative costs of delivering water from the property line to residents. Br. of App./Cross-Resp't at 6-9. The MHDRP only investigated Rainier Vista's billing methods and amounts and compared them to the City of Lacey water bill. *Id.* Although Rainier Vista owns and operates the water infrastructure and billing system inside the park, the MHDRP declined to seek facts about the costs of maintaining and administering that infrastructure because it did not consider those costs to be the "actual utility costs." AR 8; CP 121. Its investigation was limited to inquiring into Rainier Vista's method for dividing the City's water bill among the tenants. *Id.*

The MHDRP concedes that, even assuming *arguendo* Rainier Vista is not allowed to charge for anything but the actual water consumed, tenants were "overcharged" only \$35,240 for water. Br. of App./Cross-Resp't at 9. MHDRP also concedes that OAH's order requires Rainier Vista to "reimburse" tenants \$88,445. *Id.* at 10. The MHDRP justifies the OAH decision – which more than doubles the refund amount the MHDRP imposed in its notice of violation – by claiming that Rainier Vista

dramatically undercharged many tenants who were not part of the adjudicative process here. Thus, despite the fact that park-wide Rainier Vista's alleged "overcharge" was only \$35,240, it must "pay back" more than twice that amount to only some tenants.

The MHDRP correctly notes that either party to the dispute resolution process may request an administrative hearing to contest a Notice of Violation or Nonviolation. Br. of App./Cross-Resp't at 5. However, it is notable that if the MHDRP expands its jurisdiction and resolves an issue on behalf of non-complaining parties, those parties have no recourse should they disagree with the result. RCW 59.30.040(8).

This procedural impediment for non-parties is notable because the agency might actually act to a non-party's detriment. For example, here the MHDRP concluded Rainier Vista's method of prorating water charges by occupancy, rather than by lot, resulted in some tenants being charged less for water than others. Br. of App./Cross Resp't at 39. The MHDRP's action here, taken on behalf of those non-party tenants, will require Rainier Vista to charge all lots equally for water, regardless of the actual occupancy of those lots. CP 58-59. Thus, many tenants could see a substantial increase in their water bills.

C. ARGUMENT IN REPLY

(1) The Challenged Findings of Fact Are at Issue Because the RAP 2.5 Applies to This Court, Not the Superior Court, Which Reviewed OAH's Decision Under the APA

Rainier Vista assigned error to a number of OAH's factual findings in its opening brief. Br. of Resp't/Cross-App. at 2-3.

The MHDRP responds that all of OAH's findings of fact are "verities" for this Court's purposes because Rainier Vista ostensibly did not "challenge" any findings of fact at the *superior* court level. Br. of App./Cross-Resp't at 13. The MHDRP cites RAP 2.5(a) and *Darkenwald v. State Employment Sec. Dep't*, 183 Wn.2d 237, 350 P.3d 647 (2015). *Id.*

The MHDRP is simply wrong that Rainier Vista did not preserve challenges to the factual findings of OAH in its superior court appeal. CP 4-9. Rainier Vista stated in its petition for review to superior court that OAH's findings were not supported by substantial evidence. *Id.*

Darkenwald does not involve the procedural issue here. It merely recites the well-known principle that, in an appeal to this Court from a superior court trial, unchallenged findings of fact are verities on appeal. *Darkenwald*, 183 Wn.2d at 244. RAP 10.3 requires parties to assign error to factual and legal determinations made below.

Unlike in RAP 10.3, at issue in *Darkenwald*, there is no mechanism to "assign error" to individual findings of fact in an APA appeal to superior court. Judicial review under the APA is governed by

RCW 34.05.570, which does not have a requirement to assign error to findings of fact. Also, a petition for review of a final agency action by a superior court does not require assignments of error to findings of fact. RCW 35.05.546. There is no provision in the APA applying RAP 2.5 to require specific assignments of error to agency findings of fact at the superior court.

The MHDRP conflates “issues” raised below, for purposes of RAP 2.5, with assignments of error to findings of fact required in a traditional appeal under RAP 10.3. Br. of App./Cross-Resp’t at 13. Although in an APA appeal this Court’s review is generally limited to *issues* raised in the superior court petition, no statutory provision or court opinion requires a superior court APA petition to individually assign of error to *facts* found by the agency in order to challenge them at this Court.

Finally, RAP 2.5 is discretionary. Even when a party challenging an agency decision fails to assign error to findings of fact in briefing to *this* Court (which did not happen here) RAP 1.2(a) permits liberal interpretation of the RAPs and allows appellate review. *Smith v. Employment Sec. Dep’t*, 155 Wn. App. 24, 33, 226 P.3d 263 (2010). Technical violations of assignment of error provisions do not preclude review when the nature of the challenge is clear and the challenged findings are set forth in the party's brief. *Id.*, see also, *Fuller v. Dep’t of*

Employment Security, 52 Wn. App. 603, 605, 762 P.2d 367 (1988) (citing *Green River Cmty. Coll. Dist. 10 v. Higher Educ. Pers. Bd.*, 107 Wn.2d 427, 431, 730 P.2d 653 (1986)).

Regardless of what occurred at the superior court, this Court can exercise discretion to address challenges to OAH's findings of fact because (1) the nature of the challenge is clear, (2) Rainier Vista assigned error to the agency's findings of fact in its opening brief as required by RAP 10.3, and (3) Rainier Vista discussed its contentions with specific findings of fact in the argument portion of its brief. *Smith*, 155 Wn. App. at 33; *see also, Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 709–10, 592 P.2d 631 (1979) (Despite failure to strictly comply with RAP 10.3, appellate courts may consider merits of the challenge where the nature of the challenge is perfectly clear and the challenged finding is set forth in the appellate brief.); *Hitchcock v. Dep't of Ret. Sys.*, 39 Wn. App. 67, 72 n.3, 692 P.2d 834 (1984) (failure to designate a specific finding of fact as error in an appeal from agency determination did not bar appellate review under RAP 10.3 where nature of the challenge was clear and the challenge to the finding was extensively discussed in the brief), *review denied*, 103 Wn.2d 1025 (1985).

Rainier Vista properly challenged OAH's findings of fact in its petition for review. CP 4-9. The individual assignments of error made to

this Court in Rainier Vista’s opening brief are proper, and this Court can and should review the challenges to those findings of fact.

(2) The Phrase “Actual Utility Costs” Means Utility Costs Actually Incurred; MHDRP’s Interpretation Rewrites It to Mean “Amount Charged by the Utility Provider” and Ignores Other “Actual” Costs

The MHDRP argues that there is only one possible meaning of “actual utility costs” as used in RCW 59.20.070(6). Br. of App./Cross-Resp’t at 15-18. It avers that the only possible meaning is “the charge for a utility that appears on the utility provider’s bill,” and not any other costs incurred in actually furnishing that utility to the tenant. *Id.* The MHDRP relies on the statute’s “plain language” and *McGahuey v. Hwang*, 104 Wn. App. 176, 15 P.3d 672 (2001).

If a statute remains subject to multiple interpretations after analyzing the plain language, it is ambiguous. *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005). A statute is ambiguous if “susceptible to two or more reasonable interpretations.” *HomeStreet, Inc. v. State, Dep’t of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297, 301 (2009).

(a) An Interpretation of “Actual Utility Costs” that Does Not Include All Actual Utility Costs Is Not Reasonable

The MHDRP’s interpretation of RCW 59.20.070(6) is not reasonable. In using the phrase “actual utility costs,” the Legislature was

well aware that those costs include the private costs of maintaining and distributing water inside the park. RCW 59.20.130(6) places a duty on park owners to maintain such infrastructure.

If the Legislature meant to restrict parks to only passing through utility charges from the water company to the tenants, then its “plain language” would have said so. The Legislature could have said parks were prohibited from including in “utility fees” any charge “other than the cost of the utility charged by the provider,” or “the actual cost of the commodity provided,” or some other phrasing.

The MHDRP’s desire for transparency in utility billing, and to avoid “hiding” utility costs in rent increases, is actually thwarted by its position here. Rather than subjecting *all* utility costs to scrutiny under RCW 59.20.070(6), park owners would be required to recoup those costs in the form of higher rent, in order to avoid operating at a loss to maintain utility infrastructure. Rent, unlike utility fees, does not fluctuate up and down in most rental agreements. So even during years where park owners do not incur substantial utility infrastructure costs beyond minor administrative costs, rents will be higher in order to account for those costs when they do increase. If these costs are included in “actual utility costs,” then rents will be lower and utility fees will decrease during years when such costs are lower.

The Legislature’s decision to allow fees for “actual utility costs” provides the transparency that the MHDRP seeks, because MHDRP can discover the actual costs if it conducts a proper investigation. However, if MHDRP limits its investigation of actual utility costs to what the public utility charged the landlord, it lacks a factual basis to demonstrate that the water bill combined with the costs of delivering water to tenants is less than or equal to the total utility fees under a rental agreement.²

The meaning of “actual utility costs” is “plain.” However, it is not the strained meaning that the MHDRP advances. Part of Rainier Vista’s “actual utility costs” are the costs associated with delivering water from the property boundary to the tenants, including administrative costs.

(b) If This Court Accepts the OAH Interpretation of “Actual Utility Costs” and Its Refusal to Accept Evidence of Estimated Usage, No Park Owner Can Comply with the Statute Unless Each Lot Is Individually Metered

The MHDRP acknowledges that each tenant’s lot does not have an individual water meter. *Id.* at 6. However, MHDRP suggests that there is something nefarious or improper about estimating water usage based on lot occupancy. *Id.* at 16-19. MHDRP criticizes Rainier Vista for estimating lot-by-lot water usage based on current occupancy. *Br.* of

² Here, however, the MHDRP refused to investigate such facts, and OAH rejected all evidence of such costs because they were estimated. As explained in Rainier’s opening brief at 34-35 and *infra*, this was an arbitrary and capricious decision.

App./Cross Resp't at 16-19. It states that "an *estimate* certainly is not what the legislature intended when it used the specific term 'actual utility cost.'" *Id.* at 19 (emphasis in original). OAH agreed with this contention, rejected all Rainier Vista's method of imposing utility fees, and ruled that Rainier Vista could only charge tenants for utilities by dividing the City's water bill by the number of occupied lots. CP 58-59.

The MHDRP does not and cannot suggest that individual lot water meters are required by the MHLTA. Nothing in the statute so provides. Nonetheless, MHDRP suggests that the Legislature intended "actual utility costs" to mean only the actual amount of water used, and that it is improper to "estimate" usage. Br. of App./Cross-Resp't at 25-26.

What the MHDRP does not explain is how a park owner without individual lot meters could possibly calculate the actual water usage of each lot without estimating. With one lot meter, there is no record of exactly how much each individual lot uses. Thus, going forward, another tenant could now complain of that the MHDRP-imposed new method of prorating by lot, rather than estimating by occupancy as Rainier Vista did, results in that tenant being "overcharged" for individual water usage.

- (c) The MHDRP and the OAH Also "Estimated" Water Usage Despite a Lack of Evidence, and Did So Using a Less Accurate Formula than Rainier Vista

The MHDRP faults Rainier Vista's method of calculating water service charges by occupancy for being "speculative." Br. of App./Cross-Resp't at 26. It says that Rainier Vista "overcharged" every tenant for water by adjusting the fee based on how many *people* occupied the property, rather than by how many lots were occupied. *Id.*

Despite its determination that certain tenants were "overcharged" for water, the MHDRP provided *no* evidence of any tenant's water usage. The MHDRP's own determination of each tenant's utility costs was also merely an "estimate" of water usage: a pro rata division of water usage by lot. However, the MHDRP's investigation did not pursue whether each lot uses the same amount of water. Br. of App./Cross-Resp't at 6-8.

Ironically, the MHDRP and OAH have imposed their own "estimated" charge for water (which they fault Rainier Vista for doing) and it is even *less* accurate in terms of actual utility costs per lot. Regardless of whether a lot has one, four, or ten people drinking, showering, cooking, or otherwise, the MHDRP concluded that the MHLTA requires a flat charge for water by lot. CP 1734.

Contrary to the MHDRP's suggestion and OAH's findings, Rainier Vista's decision to estimate water usage by lot occupancy is not nefarious or contrary to the MHLTA. It is more accurate and fair than the method imposed by MHDRP and OAH. It is the only way for Rainier Vista to try

to fairly distribute the actual utility costs between the tenants. In fact, charging each lot or tenant the same amount for water each month, as the MHDRP advocates, will cause some tenants to be “overcharged” for the actual water they consume.

By imposing an arbitrary and capricious method based on a misinterpretation of the MHLTA, the MHDRP and OAH have virtually guaranteed more disputes between tenants and park owners over this issue.

(3) OAH Considered Evidence of Other Actual Utility Costs Relevant Despite MHDRP’s Statutory Arguments; OAH Should Have Dismissed Based on the Flawed Investigation and MHDRP’s Failure to Meet Its Evidentiary Burden

The MHDRP argues that the OAH properly disregarded all evidence Rainier Vista presented of its actual utility costs because they were estimated. Br. of App./Cross-Resp’t at 24. The MHDRP claims that Rainier Vista cannot blame its own “failure to produce evidence of its other, *actual utility costs*” on the MHDRP’s truncated investigation (emphasis added). *Id.*

By conceding that Rainier Vista has other “actual utility costs” but arguing they were not proven, the MHDRP engaged in the same strange logic as the OAH. The ALJ made a similar statement, noting in a preliminary ruling that “there is a question regarding the actual cost of the

utility with respect to getting the water from the property line...and to the tenants' lots," AR 1642, but concluding there was insufficient evidence.

The MHDRP and the ALJ's statements to this effect are perplexing because the conflict with the statutory interpretation of "actual utility costs" that the MHDRP has advanced. A request for evidence of "actual utility costs" beyond the City's water bill conflicts with the legal position that "actual utility costs" are only those charged by the City. If the Legislature "plainly" meant that only the water bill constituted actual utility costs, why hold a hearing to review evidence of other costs? Why would that evidence be relevant?

Under the statutory regime at issue here, if MHDRP believed that "actual utility costs" beyond the City's water bill were at issue, its duty was to investigate and make an accurate decision regarding the amount of those costs. RCW 59.30.040(3)-(5). Instead, the MHDRP simply reviewed water bills, compared them to tenant billings, and pronounced Rainier Vista in violation of the MHLTA.

Then, at OAH, the MHDRP's flawed investigation resulted in a failure of proof. The MHDRP had to prove by a preponderance of evidence that the notice of violation was correct. RCW 59.30.040(10)(b). The MHDRP did not investigate and discover facts to justify its notice of violation. If the OAH was convinced that there were actual utility costs

beyond the amount charged by the City of Lacey, and the MHDRP failed to investigate those costs and make a proper determination, then the OAH should have dismissed the notice of violation.

(4) MHDRP Jurisdiction Is Statutorily Limited to Dispute Resolution of Complaints Made by Individual Tenants; OAH Power Is Limited to Reviewing Evidence to Support a Notice of Violation

Rainier Vista argued in its opening brief that both the MHDRP and the OAH violated express statutory provisions and acted *ultra vires* in this matter.³ Br. of Resp't/Cross-App. at 13-24.

The MHDRP argues that it has statutory authority to impose “corrective action” on behalf of non-parties based on any individual tenant complaint. Br. of App./Cross-Resp't at 27-37. It claims that general statements about legislative purpose of protecting the public and fostering honest competition provide this authority. *Id.* at 27-32. It also argues that this Court’s opinion relating to the investigative powers of the Department of Financial Institutions (“DFI”) is applicable here. *Id.* at 32-35. It also argues that it has the powers of “administrative enforcement action” and it would be inequitable to find that its statutory powers are limited to dispute resolution based on tenant complaints. *Id.* at 35-37.

(a) Standard of Review

³ The MHDRP does not respond directly to the arguments that any *ultra vires* action occurred.

The MHDRP argues that this Court should defer to MHDRP's interpretation of the scope of its enforcement authority under RCW ch. 59.30. Br. of App./Cross-Resp't at 28.

The agency is incorrect. Courts do *not* defer to agencies the power to determine the scope of their own authority. *In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 540, 869 P.2d 1045, *as amended on denial of reconsideration* (Apr. 28, 1994). The standard of review for a question of statutory construction is *de novo*. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721, 723 (1997).

(b) The MHDRP Cannot Expand Its Expressly Limited Jurisdiction Based on the Legislative Purpose of the Statute or by Relying on the Statutory Authority of Other Agencies

Rainier Vista argued in its opening brief that the MHDRP acted ultra vires and outside the scope of its statutory authority when it chose to turn a single complainant's dispute resolution process into a park-wide action. Br. of Resp't/Cross-App. at 13-23.

The MHDRP responds that the "plain language" of RCW ch. 59.30 grants it broad administrative enforcement powers to impose penalties for alleged MHLTA violations, even on behalf of tenants who do not have a dispute with a park owner. Br. of App./Cross-Resp't at 27-29. The MHDRP cites several sections of RCW ch. 59.30 in support of this

proposition. *Id.* It also cites *Nationscapital Mortgage Corp. v. State Dep't of Fin. Institutions*, 133 Wn. App. 723, 741, 137 P.3d 78, 88 (2006), a case examining the scope of DFI's investigative powers.

An agency has only the authority granted by statute. *Electric Lightwave*, 123 Wn.2d at 536; *Fahn v. Cowlitz Cty.*, 93 Wn.2d 368, 374, 610 P.2d 857 (1980), *amended sub nom. Fahn v. Civil Serv. Comm'n of Cowlitz Cty.*, 621 P.2d 1293 (1981). An agency has no authority to expand its powers beyond what the legislature has permitted, or to enact legislation. *Campbell v. State, Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 895-96, 83 P.3d 999, 1008 (2004).

Every section of RCW ch. 59.30 that the MHDRP cites describes the scope of the "dispute resolution process," and discusses the agency's powers to resolve a particular complaint. RCW 59.30.010, .030, .040.

In fact, this Court need not infer legislative intent from the statute, it is plainly stated. The MHDRP conducts individual dispute resolution:

Therefore, it is the intent of the legislature to provide an equitable as well as a less costly and more efficient way *for manufactured/mobile home tenants and manufactured/mobile home community landlords to resolve disputes*, and to provide a mechanism for state authorities to quickly locate manufactured/mobile home community landlords.

RCW 59.30.010(3)(a). Efficient dispute resolution, rather than "administrative enforcement," is the purpose of the MHDRP. The very

name of the agency, “the Manufactured Housing *Dispute Resolution* Program,” indicates that the agency’s purpose is more limited than that of a regulatory enforcement agency like DFI, the Department of Ecology, and others.⁴

In contrast, the powers afforded to DFI as described in *Nationscapital*, upon which the MHDRP relies, are broad powers of law enforcement, rather than more narrow powers of dispute resolution. *Nationscapital*, 133 Wn. App. at 739-43. This Court noted that DFI’s enforcement powers were intended to promote public confidence in the industry, and that a violation of the chapter was a per se violation of the Consumer Protection Act, RCW ch. 19.86 (“CPA”). *Id.* at 740. It also observed that DFI had “the power and broad administrative discretion to administer and interpret” the Mortgage Broker Practices Act. *Id.* DFI’s investigative powers specifically stated that it could investigate the entire business, and that the purpose of the investigation was “detection of violations of this chapter.” *Id.* at 742.

In fact, RCW ch. 19.146 starkly contrasts the broad and detailed law enforcement powers and remedies afforded DFI with the limited

⁴ Many statutes provide administrative investigative powers that are not conditioned upon the receipt of a complaint. *See* RCW 31.04.145 (consumer protection), RCW 18.44.420 (monitoring escrow agents), RCW 31.45.100 (consumer loans).

dispute resolution powers at issue here. The Director of DFI has authority to:

- [T]ake “*any action*” to enforce the Mortgage Broker Practices Act. RCW 19.146.221 (emphasis added)
- Issue cease and desist orders “*whenever...the public is likely to be substantially injured by delay....*” RCW 19.146.227 (emphasis added)
- Investigate violations *or* complaints “*as often as necessary*” in order to carry out the purposes of this chapter. RCW 19.146.235(1) (emphasis added)
- Take such action as provided for in this chapter to enforce, investigate, or examine persons covered by chapter 19.144

Also, the investigative powers afforded DFI are detailed and afford the mortgage broker at issue the assurance that the investigation will follow mandatory “protocols” that ensure a fair and complete investigative process. RCW 19.146.235. The investigation in *Nationscapital* was thorough, and lasted 10 months. *Nationscapital*, 133 Wn. App. at 729.

Most importantly, this Court repeatedly and strongly emphasized that the purpose of DFI’s powers was to foster public confidence in the industry, and to protect consumers at large from widespread violations of mortgage regulations. *Nationscapital*, 133 Wn. App. at 739-43. This Court’s interpretation of the powers afforded DFI was made in light of that broad public purpose.

By contrast, the MHDRP is specifically intended to be an efficient dispute resolution program to benefit tenants and park owners, not to foster public confidence. The MHLTA does not “contain a specific declaration of a public interest.” *Moolick v. Lawson*, 33 Wn. App. 665, 667, 655 P.2d 1185 (1982). Unlike a violation of mortgage regulations, a violation of the MHLTA is not a per se violation of the CPA. *Id.* RCW 59.30.040 is narrowly tailored to that purpose, with neither the broad authorities nor procedural protections afforded respondents to DFI enforcement actions. The MHDRP enabling statute also has no protocols for investigation, and simply allows the agency to investigate complaints (or not) at its own discretion.

Comparing these provisions reveals that the Legislature knows how to create an agency that has broad enforcement authority to seek out and remedy alleged violations of law even in the absence of a particular dispute between parties. It also acknowledges that such broad powers must be tempered with rules and due process, not simply left to the “discretion” of the agency. Such authority could have been afforded the MHDRP, but was not. The Legislature can decide to amend the law to afford the MHDRP such powers, this Court does not have that authority.

Neither this Court nor the agency can alter the nature of the legislative authority granted to the MHDRP by statute. The MHDRP may

investigate and remedy disputes between tenants and park owners. It overstepped its jurisdiction here.

(c) As the Legislature Determined When It Rejected MHDRP's Request for the Precise Powers It Now Seeks from This Court, the MHDRP Is Not the Proper Forum In Which to Fairly Litigate De Facto Class-Action Tenant Complaints

Rainier Vista pointed out in its opening brief that the MHDRP failed to persuade the Legislature to afford it the precise powers it now claims to already possess. Br. of Resp't/Cross-App. at 17-18 n.5. Rainier Vista pointed out that this is strong evidence that even the MHDRP does not actually believe the statute as written provides broad powers to issue park-wide violation notices and penalties beyond the dispute resolution process it currently administers. *Id.* It is also evidence that the Legislature did not grant the MHDRP broad law enforcement authority.

The MHDRP now contends that Rainier Vista has “mischaracterized” its position, and that the legislative amendment it sought was to expand investigations beyond the “subject of a complaint,” rather than expand its powers beyond dispute resolution between individual tenants and park owners.

The MHDRP's position in the documents at issue is that it cannot investigate violations, even health and safety violations, “for which the unit has not received a formal complaint.” CP 837. The agency asked for

such powers, arguing that tenants often are not aware of their rights under the MHLTA. *Id.* The Legislature declined to grant them.

In other words, the agency's own position contradicts the MHDRP's claim that the legislative intent behind RCW ch. 59.30 would be thwarted if the agency were "turn a blind eye to violations of the law" by waiting for tenant complaints. Br. of App./Cross-Resp't at 28. If the Legislature did not think so, then this Court should not rewrite the statute to achieve what MHDRP could not do legislatively.

- (5) The OAH Decision Is Not Supported by Substantial Evidence, Is Arbitrary and Capricious, and Exceeds OAH Authority Because It "Reimburses" More Than Twice What Rainier Vista Allegedly Overcharged, and More Than 61 Times What Santiago Was Allegedly Overcharged

The MHDRP claims that the OAH decision to order refunds of more than twice the amount of the overcharge alleged in the Notice of Violation was not arbitrary or capricious, and was supported by substantial evidence. Br. of App./Cross-Resp't at 38-43. It also claims that OAH had the authority to dramatically increase the penalty imposed by the Notice, arguing that "there is no law prohibiting" an ALJ from imposing a different penalty than the MHDRP. *Id.* at 40.

- (a) No Evidence Supports the Finding that Rainier Vista Incurred No Actual Utility Costs; the ALJ Reached This Conclusion by Arbitrarily and Capriciously Disregarding Rainier Vista's Evidence

Having already erroneously shifted the burden of proof regarding the notice of violation from the MHDRP to Rainier Vista, OAH concluded that Rainier Vista failed to provide evidence of any actual utility costs beyond the amounts charged by the City of Lacey. CP 58-59. OAH reached this conclusion not because Rainier Vista provided no evidence, but because OAH disregarded the evidence. CP 54-55. The grounds for rejecting the evidence were that it was estimated, rather than exact. *Id.*

The decision is arbitrary and capricious because there is no rational basis to reject estimated evidence of utility costs. As OAH repeatedly stated, there is only one water meter for the entire park, so it is *not possible* to ascertain each lot's water usage precisely. Nor is it possible to calculate to the penny what portions of the park's expenses are attributable solely to the provision of water, as opposed to other activities. For example, Frank Evans of Rainier Vista testified that he had a vendor do miscellaneous work, some of which included installing water meter boxes and replacing valves. AR 1918. He charged for his labor, but if unless the labor was itemized by project, Evans would not know how much was attributable to water costs without estimating.

The OAH faulted Rainier Vista for "estimating" actual water costs, while at the same time imposing refund amounts that are not only estimates, but bear no relation to the one physical fact that determines

water usage: lot occupancy. The decision to reject evidence on the ground that it was estimated was arbitrary and capricious.

The decision also lacks substantial evidence because the burden was on the MHDRP to demonstrate that Rainier Vista incurred *no* actual utility costs beyond the City of Lacey water bill, and failed. CP 53-54. In order to prevail, the MHDRP had to prove a negative: that Rainier Vista incurred no actual water costs beyond the water bill. The OAH upheld and even enhanced the MHDRP's penalty despite the fact that Rainier Vista presented evidence of actual costs beyond the water bill. CP 58.

(b) The OAH Was Not Empowered to Impose a Different Remedy

The MHDRP is incorrect when it says there is “no law” prohibiting an ALJ from imposing a different remedy against Rainier Vista than the MHDRP imposed. In fact, the statutory authority of OAH is limited to “[d]ecid[ing] whether the evidence supports the attorney general finding by a preponderance of evidence....” RCW 59.30.040(1). In almost identical circumstances, this Court has held that an ALJ does not have authority to impose a different remedy. *Conway v. Washington State Dep't of Soc. & Health Servs.*, 131 Wn. App. 406, 419, 120 P.3d 130 (2005), *as amended on reconsideration in part* (Feb. 24, 2006). Rainier

Vista made this argument and analyzed *Conway* in its opening brief at 22-23, but the MHDRP offers no response.

Because the MHDRP did not investigate any actual water costs beyond the amounts charged by the City, the MHDRP had no evidence to support its notice of violation. Rainier Vista presented evidence, but the ALJ ignored it. The OAH acted arbitrarily and capriciously and ignored the burden of proof MHDRP had to meet in order to validate its Notice of Violation. The Notice should have been dismissed.

(6) The Multiple Procedural Flaws in this Process Demonstrate Why the MHDRP Is Not the Proper Forum for a De Facto Class Action

Rainier Vista argued in its opening brief that the MHDRP and OAH violated its right to due process by (1) failing to conduct a full and fair investigation, (2) exceeding its authority as a “dispute resolution” mechanism – founded on notions of efficiency and speed – rather than as a broad administrative law enforcement body, and then (3) rejecting evidence of actual water costs for arbitrary and capricious reasons. Br. of Resp’t/Cross-App. at 24-27. Rainier Vista cited *State v. Adams*, 107 Wn.2d 611, 615, 732 P.2d 149 (1987), in support, arguing that even when an OAH hearing is held, the process afforded is illusory if the agency and OAH exceed and misapprehend their own statutory authority and the burdens of the parties.

The MHDRP responds dismissively, stating that Rainier Vista “does not have a protected property interest in money it unlawfully overcharged its tenants,” and therefore it “does not have due process rights....” Br. of App./Cross-Resp’t at 44. It does not cite to *Adams* or any other case authority, and simply points to the OAH hearing statute as proof that due process was achieved.

The MHDRP’s response is perplexing and begs the question. The entire point of due process is to determine whether a citizen has or will be wrongfully deprived of property. To say that Rainier Vista has no due process right to money it “unlawfully overcharged” *presumes* that Rainier Vista acted unlawfully, which is what the investigation and hearing are supposed to determine. By the MHDRP’s logic, no citizen has a due process right once a government agency has summarily determined that the citizen has no right to the property at issue.

Due process is not always achieved simply by holding a hearing. The kind of hearing afforded, and the way it is conducted, matters in the analysis. *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S. Ct. 893 (1976); *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004). If there is a high risk of erroneous deprivation based on the procedure used, due process may be violated. *Mathews*, 424 U.S. at 335. Even if a hearing is afforded, it can violate procedural due process as applied. *Id.*

The OAH may review an MHDRP decision, but here the exercise of that power violated due process. The OAH granted MHDRP total discretion regarding whether and how to investigate, but then did not require MHDRP to produce evidence to support its determination. Instead, it put the burden on Rainier Vista to *disprove* the MHDRP's allegation. The OAH ignored evidence because it was "estimated," while at the same time imposing an "estimated" refund amount to tenants without having any evidence of their actual water usage. Also, MHDRP has no investigatory protocols or obligation to seek or accept any evidence that contradicts its initial suspicion, increasing the risk of erroneous deprivation. It has no obligation even to interview non-complaining tenants to determine whether they think they are being overcharged, or ask them for any evidence of the allegations made by another tenant.

The result here illustrates why the MHDRP is not an adequate forum in which to conduct broad administrative enforcement action or conduct a de facto class action. Not all tenants have the same interests or complaints as Santiago. Some might feel it is unfair for a single-occupancy lot using less water to pay the same as a multiple occupancy lot using more water. The MHDRP contends that these single-occupancy lots have been underpaying for water. If so, other tenants would be required to

pay more to subsidize MHDRP's "one size fits all" rule, and have not been afforded a right to be heard regarding MHDRP's parkwide action.

Also, the MHDRP ignores that park owners may also be complainants under the statute. RCW 59.30.040. Tenants, like park owners, have duties under the MHLTA. RCW 59.20.140. If a park owner requests dispute resolution with one tenant, should the MHDRP conduct a truncated investigation and apply the remedy against all park tenants? Should those tenants then be required to prove to the OAH that they did not violate their leases?

Because the statute is intended to be equitable and assist both tenants and park owners, RCW 59.30.010, then the MHDRP should be able to justify employing the same procedures and powers it claims to have with respect to park owners, when it is an individual tenant who is accused of violating the MHLTA.

D. CONCLUSION

There is no legal or factual support for the OAH decision here. This process was riddled with substantive and procedural flaws, and was without jurisdiction, justification, or reasonable basis. The MHDRP misinterpreted the law, ignored evidence, and acted capriciously, and OAH sanctioned those actions. The MHDRP has "resolved" a dispute on

behalf of persons who have not complained but who have now been aggrieved by the MHDRP's actions and have no recourse.

The OAH decision should be overturned, and the notice of violation dismissed.

DATED this 13th day of April, 2016.

Respectfully submitted,



Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick/Tribe
2775 Harbor Ave. SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Walter H. Olsen, Jr., WSBA #24462
Deric N. Young, WSBA #17764
Olsen Law Firm PLLC
205 S. Meridian
Puyallup, WA 98371
(253) 200-2288

Attorneys for Respondent/Cross-App.
Narrows Real Estate

DECLARATION OF SERVICE

On said day below, I e-served a true and accurate copy of the Reply Brief of Respondent/Cross-Appellant Narrows Real Estate in Court of Appeals Cause No. 47766-1-II to the following parties:

Jennifer S. Steele, WSBA #36751
Assistant Attorney General
Consumer Protection Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

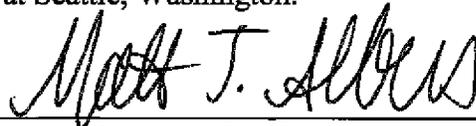
Walter H. Olsen Jr., WSBA #24662
Deric N. Young, WSBA #17764
Olsen Law Firm PLLC
205 S. Meridian
Puyallup, WA 98371-5915

Leticia Camacho, WSBA #31341
Allyson O'Malley-Jones, WSBA #31868
Leslie Owen, WSBA #27884
Northwest Justice Project
401 Second Avenue S., Suite 407
Seattle, WA 98104

Amy Crewdson, WSBA #9468
Ty Duhamel, WSBA #10848
Columbia Legal Services
711 Capitol Way S. #304
Olympia, WA 98501

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

DATED: April 13, 2016 at Seattle, Washington.



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe