

NO. 49073-1-II

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

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CAVE PROPERTIES, a Washington Partnership,  
and MARCIA WICKTOM,

Appellants,

v.

CITY OF BAINBRIDGE ISLAND, a Washington municipal corporation,  
and JOHN and ALICE TAWRESEY, husband and wife and the martial  
community comprised thereof,

Respondents.

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BRIEF OF RESPONDENT CITY OF BAINBRIDGE ISLAND

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## I. INTRODUCTION

A “land use decision” is a prerequisite to seeking relief under the Land Use Petition Act (“LUPA”). A quasi-judicial action is a prerequisite to seeking relief under a writ of review. Neither of those actions occurred here, resulting in the trial court’s proper dismissal for lack of subject matter jurisdiction of the LUPA and writ actions brought by Appellants Cave Properties and Marcia Wicktom (collectively, “Appellants”).

On appeal to this Court, Appellants restate their unsuccessful briefing before the trial court, again combining their arguments on these separate legal theories and failing to address the underlying flaws in their Land Use Petition and their requested writ. This Court should likewise reject Appellants’ arguments and affirm the trial court’s decision.

## II. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Whether the trial court properly dismissed the Appellant’s claims that the City erroneously imposed a reimbursement assessment where:

1. The approval of a latecomer agreement is not a “land use decision” as defined by LUPA, thereby depriving the Court of subject matter jurisdiction to hear the LUPA claim?
2. The approval of a latecomer agreement is not quasi-judicial in nature, thereby depriving the Court of subject matter jurisdiction

to hear the application for writ of review?

### III. RESTATEMENT OF THE CASE

In October of 2015, Respondents John and Alice Tawresey (collectively, the “Tawreseys”) and Respondent City of Bainbridge Island (“City”) entered into a developer extension agreement, pursuant to the provisions of the Bainbridge Island Municipal Code, to extend a water main along portions of Cave Avenue. CP 5. The Tawreseys subsequently also requested a latecomer reimbursement agreement, pursuant to the provisions of state law and the parallel provision of the municipal code, to recover a portion of their construction costs from owners of real property abutting the improvements who later connect to the water line. CP 24-25. The City’s public works director then determined the preliminary reimbursement charge and the geographic area subject to the charge. *Id.*; *see also* RCW 35.91.020; Bainbridge Island Municipal Code (“BIMC”) Section 13.32.130. Appellants’ property fell within the preliminary reimbursement charge and area. CP 24-49.

Following the preliminary determination, the City sent official notice to Appellants of the recommended reimbursement charge and area.

CP 25. Appellants then requested a hearing<sup>1</sup> before the City Council. Id.

On February 16, 2016, the City Council held a public hearing on the latecomer agreement. At Appellant Wicktom's request, the City kept the public hearing open until the March 8, 2016 regular City Council meeting. Id. On March 8, 2016, the City reopened the public hearing. Appellants, the Tawreseys, and their legal counsel spoke during this hearing. CP 30-39. At the close of the public hearing, the City Council approved the Latecomer Reimbursement Agreement which included the reimbursement assessment. CP 31-32; 40-49.

On March 25, 2016, Appellants filed a "Land Use Petition or Petition for Writ of Review." CP 3-7. On May 6, 2016, the City moved to dismiss Appellants' LUPA and writ actions for lack of subject matter jurisdiction. CP 13-21. The Tawreseys joined in the City's motion. CP 50. On June 3, 2016, the Honorable William Houser granted the City's Motion to Dismiss. This appeal followed.

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<sup>1</sup> Appellants repeatedly refer to their request for a hearing as an "appeal" of the proposed reimbursement assessment. *See* Appellants' Brief at 1-2; see also CP 5-6, 53. This characterization is incorrect. RCW 35.91.060 allows a property owner to request a hearing, not an appeal, after a preliminary determination is made. A *preliminary* determination by its very nature cannot be an action subject to an appeal, as there is no decision yet to be reviewed.

#### IV. ARGUMENT

##### A. Approval of a Latecomer Agreement Is Not a “Land Use Decision” Subject to Review Under LUPA.

LUPA is the exclusive means of judicial review of land use decisions. RCW 36.70C.030; Tugwell v. Kittitas County, 90 Wn. App. 1, 7, 951 P.2d 272 (1998). To that end, LUPA does not apply to decisions that are not “land use decisions.” Berst v. Snohomish County, 114 Wn. App. 245, 248, 57 P.3d 273 (2003). Whether a court has subject matter jurisdiction for a LUPA petition is a question of law that the Court reviews de novo. Durland v. San Juan County, 182 Wn.2d 55, 64, 340 P.3d 191 (2014).

As a preliminary matter, it is unclear what City action Appellants are actually challenging here. Appellants continuously reference and rely on the developer extension agreement,<sup>2</sup> and not the latecomer agreement at issue in the City’s underlying motion to dismiss, even declaring, “The Developer Extension Agreement . . . was a land use decision.” Appellants’ Brief at 8. As explained below and as the City previously explained in painstaking detail at the trial court, developer extension agreements and latecomer reimbursement agreements are two completely different types of

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<sup>2</sup> The City’s Municipal Code refers to these agreements to construct street or utility improvements as “utility extension agreements.” See BIMC 13.32.030.

agreements covering two separate issues.<sup>3</sup> To the extent Appellants now seek to challenge the approval of the utility extension agreement, such efforts are untimely.<sup>4</sup>

RCW 36.70C.020(2) defines “land use decisions” as a local jurisdiction’s final determination on:

- (a) An application for a project permit or other governmental approval required by law before real property may be improved, developed, modified, sold, transferred, or used . . . ;
- (b) An interpretative or declaratory decision regarding the application to a specific property of zoning or other ordinances or rules regulating the improvement, development, modification, maintenance, or use of real property; and
- (c) The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. . . .

Emphasis added.

A latecomer agreement is a contract for the pro rata reimbursement to a property owner from other property owners “who subsequently connect

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<sup>3</sup> Compare BIMC 13.32.040, which provides for agreements with the City “to construct utility or street improvements” and which make no provision for the assessment of any reimbursements, to BIMC 13.32.100, “Applications for latecomer reimbursement,” which provides for the reimbursement by property owners who later connect to the utility of street improvements but did not contribute to the original construction costs.

<sup>4</sup> See CP 25 (acknowledging at the City Council’s February 16, 2016 meeting that the City and the Tawreseys “entered into a city standard Developer Extension Agreement.”); see also CP 5 stating the City and the Tawreseys entered into the developer extension agreement on October 14, 2015.

to or use the water or sewer facilities, but who did not contribute to the original cost of the facilities.” RCW 35.91.020(2). By its very nature, an “agreement” is not “an interpretative or declaratory decision regarding the application to a specific property of zoning or other [land use] ordinances” under subsection (b) above, nor is it a determination on “the enforcement” of a land use ordinance under subsection (c), and Appellants do not attempt to argue otherwise.<sup>5</sup> Thus, for purposes of this appeal, whether a latecomer agreement constitutes a “land use decision” subject to review under LUPA turns only on the application of RCW 36.70C.020(2)(a), above.

As provided by the Municipal Water and Sewer Facilities Act, Chapter 35.91 RCW, latecomer agreements are *optional* vehicles for a property owner to recover a portion of the costs of utility improvements constructed at the owner’s expense. *See* RCW 35.91.020(1)(a) (“At the owner’s request . . . .”). Latecomer agreements are *not* required by law as a prerequisite to develop real property, and a “project permit or other governmental approval” can be issued, and most often *is* issued, without a latecomer agreement accompanying it along the way. *Id.*

Appellants seemingly rely on the BIMC 13.32.040,<sup>6</sup> the City code provision for developer extension agreements, to aid in their challenge of

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<sup>5</sup> In fact, Appellants seemingly only refer to RCW 36.70C.020(a) in their Brief, although not properly cited or quoted. *See* Appellants’ Brief at 6.

<sup>6</sup> Appellants incorrectly cite to BIMC 15.32.040 (*See* Appellants’ Brief at 5).

the latecomer reimbursement agreement. Appellants' Brief at 5-6. To support their argument, Appellants point to the Tawreseys' "request for construction of an extension to the City domestic water system *as part of its land use application*," and the fact that the "developer extension agreement application specifically indicates that the [Tawreseys] sought governmental approval to construct a water main extension necessary for Tawreseys' development." *Id.* at 6 (emphasis in original). Both of those statements may be literally true, but neither offer any assistance to Appellants' challenge to the reimbursement assessments at issue.

As previously explained, utility extension agreements, and applications for such, are separate and distinct from latecomer reimbursement agreements. *Compare* BIMC 13.32.040, "Applications for utility extension agreements," to BIMC 13.32.100, "Applications for latecomer reimbursement." Furthermore, unlike latecomer agreements which are not approved until *after* the improvements are completed, utility extension agreements are executed before construction commences. *Compare* BIMC 13.32.120, requiring submittal of latecomer reimbursement information "after determining the improvements are complete," to BIMC 13.32.050, requiring utility extension agreements be signed "before construction of the street or utility improvements is commenced."

The fact that the Tawreseys sought governmental approval to construct a water main extension is wholly immaterial to the instant matter challenging reimbursement assessments. Likewise, the timing of the Tawreseys *optional* request to enter into a utility extension agreement does nothing to aid Appellants' case. Appellants' reliance on arguments related to developer extension agreements are inapplicable.

Appellants' arguments regarding the application of LUPA to quasi-judicial matters also fail. Contrary to the Appellants' assertions, the City does not distinguish between legislative and quasi-judicial actions with regards to review under *LUPA*. Appellants' Brief at 5-6. As in the trial court, the City's arguments on quasi-judicial matters remain solely related to Appellants' application for a writ of review. *See* CP 57-58. Thus, Appellants' argument regarding the application of LUPA to quasi-judicial versus legislative actions is wholly misplaced.

Finally, despite Appellants' claim that "there are many LUPA decisions addressing similar disputes to the one in the case at bar" (Appellants' Brief at 7), neither of the *two* cases cited by Appellants apply. First, Stanzel v. Puyallup, 150 Wn. App. 835, 209 P.3d 534 (2009), *did not* hold that "any issues relating to [required infrastructure improvements] are reviewable under LUPA." Appellants' Brief at 7. Instead, Stanzel dealt with a decision to compel water service outside of a city's corporate limits.

Stanzel had nothing to do with latecomer agreements whatsoever and provides no authority for the broad statement that “any issues” regarding infrastructure improvements are governed by LUPA.

Second, Sims v. City of Burlington, No. 73608-6-I, 2016 WL 3675835, \*1 (Wash. Ct. App. July 5, 2016), a nonbinding, unpublished<sup>7</sup> decision from Division I, pertains to latecomer agreements subject to an entirely different statute, Chapter 35.72 RCW. Moreover, Sims dealt with the second prong of the “land use decision” definition, RCW 36.70C.020(2)(b), not RCW 36.70C.020(2)(a) at issue *in the instant matter*.<sup>8</sup> Appellants did not raise the applicability of RCW 36.70C.020(2)(b) in their Brief or in the trial court. This Court should refuse to review such arguments. RAP 2.5(a); *see also* Emmerson v. Weilep, 126 Wn. App. 930, 939-940, 110 P.3d 214 (2005); Dickson v. U.S. Fidelity & Guaranty Company, 77 Wn.2d 785, 787, 466 P.2d 515 (1970).<sup>9</sup>

Nothing in Chapter 35.91 RCW requires property owners subject to the latecomer agreement to connect to the utility nor does it require property

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<sup>7</sup> Under GR 14.1, “[u]npublished opinions of the Court of Appeals have no precedential value and are not binding on any court,” but “may be cited as nonbinding authorities[.]”

<sup>8</sup> In fact, Sims explicitly omitted reference to subsection (2)(a) in its decision. Id. at \*2.

<sup>9</sup> Even if this Court were to give some weight to Sims, the City also notes that the Sims court recognized that “a final land use decision for LUPA purposes is made when a property owner applies for a permit, and the City calculates and imposes the property owner’s actual assessments.” Id. at \*5. Appellants have not applied for a permit and the City has not calculated or imposed the Appellants’ actual assessments, and Appellants do not argue anything to the contrary.

owners to develop real property prior to connection. In other words, connection (and payment of the assessment) is not a prerequisite to developing real property. If Appellants do not want to pay the assessment, they can simply connect to the water system at a different location or not at all. See BIMC 13.32.240.<sup>10</sup> Thus, because there is absolutely *no requirement* that a developer seek and receive a latecomer agreement “before real property may be improved” and no requirement that a property owner, such as Appellants, even connect to or use the water system “before real property may be improved, developed, modified, sold, transferred, or used,” the City’s approval of the latecomer agreement at issue was not a land use decision subject to LUPA. Berst, 114 Wn. App. at 248; Tugwell, 90 Wn. App. at 7.

Appellants seemed to acknowledge the lack of subject matter jurisdiction under LUPA by filing this matter as a “Land Use Petition *Or* Petition for Writ of Review.” See CP 3. When a LUPA appeal is filed and there is no underlying “land use decision” as *expressly* defined by statute,

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<sup>10</sup> BIMC 13.32.240, “Multiple connection points,” provides:

If the real property abuts more than one street improvement for which there is a reimbursement charge, or more than one utility improvement for which there is a reimbursement charge, the public works director may either select the improvement to which connection shall be made, based on engineering, safety and topographical considerations, or allow the real property owner to select the improvement to which connection shall be made. The real property owner shall pay a reimbursement charge only for the improvement to which connection is made.

the remedy is dismissal. Pacific Rock Environmental Enhancement Group v. Clark County, 92 Wn. App. 777, 782-83, 964 P.2d 1211 (1998). A latecomer agreement is not a “land use decision” as defined by LUPA. A court accordingly lacks subject matter jurisdiction to hear the LUPA claims. The dismissal of Appellants’ LUPA claims should be affirmed.

B. Appellants’ Inadequately Briefed Writ Issues and Assigned Errors Should Be Deemed Abandoned.

It is unclear whether Appellants are appealing the dismissal of their application for writ of review. Their Brief contains inadequate assignments of error, and no issue statement pertaining to the writ. Instead, Appellants combine arguments on separate and distinct legal theories, focusing primarily on the LUPA action with only cursory references to the writ. Such failure should be deemed an abandonment of any issues pertaining to the writ.

“It is well settled that a party’s failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error.” Emmerson, 126 Wn. App. at 939-940 (citing to Escude ex rel. Escude v. King County Pub. Hosp. Dist. No. 2, 117 Wn. App. 183, 190, 69 P.3d 895 (2003)). A party must identify through a “separate concise statement . . . each error a party contends was made by the trial court,

together with the issues pertaining to the assignments of error.” RAP 10.3(a)(4). Failure to argue or discuss an assignment of error in the opening brief renders that assignment abandoned. Dickson, 77 Wn.2d at 787; *see also* CalPortland Co. v. LevelOne Concrete LLC, 180 Wn. App. 379, 392, 321 P.3d 1261 (2014) (citations omitted). Neither may any such arguments or discussion be presented for the first time in a reply brief. Id. at 787-788.

Appellants’ statement of “Issue Pertaining to Assignment of Error” is limited *only* to the LUPA issues and makes no mention of the writ of review. Even the assignment of error glosses over the writ, instead simply stating that the trial court “h[eld] that a challenge to the imposition of latecomer fees . . . was not a land use decision and not reviewable by the Superior Court.” The determination on whether the approval of a latecomer agreement was a “land use decision” is only relevant to the application of LUPA and has absolutely no bearing on the application for a writ of review.

Appellants’ Brief includes no legal argument supporting the writ issue, offering only a passing reference to the distinction between legislative versus quasi-judicial actions and a conclusory statement that the approval of a developer extension agreement – again, an agreement not at issue in the present case – “is a quasi-judicial decision adjudicating the rights of two competing parties by Writ of Review.” Appellants’ Brief at 6-7. However, Appellants provide no analysis (or even mention) of the criteria necessary

to seek a writ of review. Even Appellants' vague reference to quasi-judicial actions and the writ case law<sup>11</sup> previously cited by the City are cited by Appellants in support of their *LUPA* action. Thus, any assignments of error related to the writ have been abandoned and warrant no further review.<sup>12</sup>

C. The City Council's Approval of the Latecomer Agreement Is Not a Quasi-Judicial Action Subject to a Writ of Review.

If the Court nonetheless chooses to consider Appellants' writ issue, Appellants' arguments still fail. A statutory writ of certiorari, or writ of review, is "an extraordinary remedy reserved for extraordinary situations." King County v. Washington State Board of Tax Appeals, 28 Wn. App. 230, 237, 622 P.2d 898 (1981). The purpose of a writ of review is "to enable limited appellate review of a judicial or quasi-judicial action when the remedy of appeal is unavailable." Coballes v. Spokane County, 167 Wn. App. 857, 865, 274 P.3d 1102 (2012) (citation omitted).

When determining whether a local jurisdiction's actions are judicial, and thus subject to statutory writ of certiorari, courts may consider relevant factors such as:

- (1) whether the court could have been charged with the duty at issue in the first instance;
- (2) whether the courts have

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<sup>11</sup> See Kerr-Belmark Const. Co. v. City Council of City of Marysville, 36 Wn. App. 370, 372, 674 P.2d 684 (1984), discussed in Section IV.C, below.

<sup>12</sup> The City further notes that Appellants' conclusion explicitly mentions that "The trial court erred in dismissing Appellant's [sic] *LUPA* Petition," and makes no mention of the writ. Appellants' Brief at 8.

historically performed such duties; (3) whether the action of the municipal corporation involves application of existing law to past or present facts for the purpose of declaring or enforcing liability rather than a response to changing conditions through the enactment of a new general law of prospective application; and (4) whether the action more clearly resembles the ordinary business of courts, as opposed to those of legislators or administrators.

Raynes v. City of Leavenworth, 118 Wn.2d 237, 244-5, 821 P.2d 1204 (1992). Where a local jurisdiction's action is not judicial or quasi-judicial in nature, the action is not subject to judicial review through writ of review process. Id.

Here, Appellants appeared at a public hearing to voice their opposition to the latecomer agreement. The courts have found that public hearings in which there is "no legal right of representation with direct and cross examination, no resolution of disputed questions of fact, and no entry of findings of facts or reasons for the decision," but which instead merely provide the public with an opportunity to present its views, do not resemble judicial hearings, subjecting the action taken as a result of the public hearing to a writ of certiorari. Kerr-Belmark Const. Co., 36 Wn. App. at 372.

RCW 35.91.060(1)(c) provides that upon notice of a preliminary determination of a latecomer assessment reimbursement area boundaries and assessment, affected property owners "may request a public hearing by

submitting a written request to the municipality.” The municipality’s “*legislative* authority,” here, the City Council, then must hold a “public hearing.” *Id.* At the conclusion of the hearing, the City Council must approve, disapprove or modify the reimbursement charge and area. BIMC Section 13.32.180. The City Council acts in a largely ministerial manner. “The city council may disapprove reimbursement only if it concludes that the criteria of BIMC 13.32.080 or 13.32.090 have not been satisfied.” *Id.* No discretion is involved on the part of the City Council.

Appellants’ bare assertion that the approval of the latecomer agreement is “a quasi-judicial decision adjudicating the rights of two competing parties reviewable by Writ of Review,” misstates the law and the facts. Appellants’ Brief at 6-7. Further, it is unclear what, if any, argument Appellants attempt to make with their citation to Kerr-Belmark, the very authority cited by the City to the trial court in opposition to Appellants’ claims. To the extent Appellants seek a constitutional writ of certiorari, such as at issue in Kerr-Belmark, neither their underlying lawsuit nor their Brief here contain any such claim.<sup>13</sup>

Here, Appellants requested a public hearing as provided by statute, not an “appeal” as they contend in their Petition.<sup>14</sup> The City Council held

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<sup>13</sup> The Petition for Writ of Review expressly identified grounds for relief under Chapter 7.16 RCW, not a constitutional writ of review. CP 3-7.

<sup>14</sup> See fn. 1, *supra*.

two public hearings on the subject of the latecomer agreement. At the public hearing, there was no right to legal representation, no direct or cross examination, no resolution of disputed questions of fact, and no findings entered. The public hearings, instead, provided the public with an opportunity merely to present their opinions to the City Council. The City Council did not adjudicate a dispute. Once a property owner requests a latecomer agreement, the City Council has very limited discretion to disapprove the agreement, and may only do so if certain defined criteria have not been met. Such action by the City Council is almost entirely ministerial and administrative, and not the type of action which is traditionally undertaken by the courts. The trial court properly dismissed Appellants' application for a writ of review.

D. Appellants' Failure to Utilize the Proper Mechanism Did Not Deprive Them of Their Right to Seek Judicial Review.

Finally, Appellants allege that the dismissal of their LUPA and writ actions deprived them of their right to judicial review. The City does not argue that the Appellants have *no* recourse to seek judicial review. Rather, the City argues that neither LUPA nor a statutory writ of certiorari is the proper avenue.

While there is no published case law directly on point, challenges to latecomer agreements have been brought by way of application for writs of

mandamus, a remedy separate and distinct from LUPA and writs of certiorari. *See* Stone v. Southwest Suburban Sewer District, 116 Wn. App. 434, 65 P.3d 1230 (2003) (published in part). While the City does not opine on the appropriateness of other mechanisms for judicial review, the instant action is not an “extraordinary situation” in which the “extraordinary remedy” of a writ of certiorari is appropriate. King County v. Washington State Board of Tax Appeals, *supra*, 28 Wn. App. at 237. Appellants’ failure to utilize the proper mechanism for judicial review should not be used to prejudice the City.

## VI. CONCLUSION

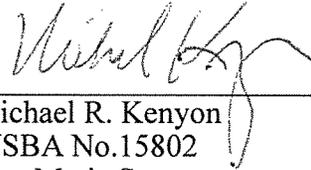
The approval of the *optional* latecomer reimbursement agreement, which provides for reimbursement by Appellants if and when Appellants connect to a water main improvement constructed by the Tawreseys pursuant to an *optional* developer extension agreement, does not give rise to a LUPA or writ of review action. Further, connection by Appellants is not required by law nor is connection contingent on Appellants developing their real property. Such action falls far from the “project permit or other governmental approval required by law” prior to developing real property and, likewise, the prerequisite land use decision necessary for this appeal. The trial court’s dismissal should be affirmed.

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RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of December, 2016.

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**DECLARATION OF SERVICE**

I, Antoinette Mattox, declare and state:

1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 5<sup>th</sup> day of December, 2016, I sent for service a true copy of the foregoing *Brief of Respondent of Bainbridge Island* on the following counsel of record using the method of service indicated below:

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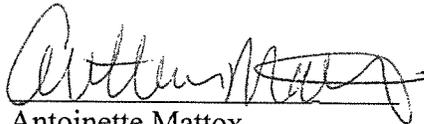
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 5<sup>th</sup> day of December, 2016, at Issaquah, Washington.

  
Antoinette Mattox

# KENYON DISEND

**December 05, 2016 - 10:30 AM**

## Transmittal Letter

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No Comments were entered.

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