

NO. 49507-4-II

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

**HAMILTON CORNER I, LLC,
Appellant**

v.

**CITY OF NPAVINE,
Respondent**

APPELLANT'S OPENING BRIEF (Corrected)

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(Assignment of Error 2.1)
- 3.2 Is the Napavine City Council’s decision confirming the Assessments for LID 2011-1 arbitrary and capricious because the Council knew that the water system improvements could not be utilized as set in the LID formation Ordinance 497 and would fail to benefit the assessed properties commensurate with their assessments? **Yes.**
(Assignment of Error 2.2)
- 3.3 Was Appellant required to first appeal the formation of LID 2011-1 under RCW 35.43.100 prior to being able to appeal the parcel-specific final assessment roll under RCW 35.44.190 and contest the City’s appraisals? **No.**
(Assignment of Error 2.3)

- 3.4 Because the land and site for Well 6 and the construction of Well 6, the water mains, transmission lines, reservoir, and the related design and engineering were paid for with LID 2011-1 funds, and because all of the LID 2011-1 improvements operate with the use of Well 6 and were designed and built to function with Well 6, is Well 6 an integral benefit to those on the Assessment roll for the LID 2011-1 improvements? **Yes.**
(Assignment of Errors 2.1, 2.2, 2.4)
- 3.5 Did the City of Napavine's appraisals of Appellant's Properties correctly support the requirement that the LID improvements benefit Appellant's properties commensurate with their assessment amounts? **No.**
(Assignment of Errors 2.1, 2.2, 2.5)
- 3.5.1 Were the appraisals properly founded upon accurate and complete information about the properties? **No.**
- 3.5.2 Did the Appraisers evaluate Appellant's properties on the basis of the properties' values immediately before and immediately after the LID improvements? **No.**
- 3.5.3 Did the Appraisers evaluate Appellant's properties based on existing uses and not speculative uses? **No.**
- 3.5.4 Were the appraisal evaluations based on the special benefits resulting from the LID improvements? **No.**
- 3.5.5 Did the Appraisers appraise Appellant's properties as individual parcels? **No.**
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3.6	Are the Napavine City Council’s Findings confirming the assessment of Appellant’s properties arbitrary and capricious because the appraisals supporting the assessment were founded upon a fundamentally wrong basis and the process did not afford Appellant due process? Yes. (Assignment of Errors 2.1, 2.2, 2.6)	
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 [a copy of this unpublished opinion is attached as Appendix I]

1. INTRODUCTION

This matter arises from Appellant Hamilton Corner I LLC's¹ appeal to the Lewis County Superior Court under RCW 35.44.190 of the final assessment roll of its properties that the City of Napavine affirmed through Ordinance 549 (AR² 0001-0014; CP 45-55) on December 8, 2015 to fund Local Improvement District "LID" 2011-1³. Under the LID (which was previously created in 2012), Napavine is to provide city water transmitted through a newly-constructed well and water delivery system, paid for through the LID assessments, to Appellant's and other properties in the vicinity of Exit 72, off Interstate-5 (AR 0114; CP 19).

The amounts of the individual pro rata assessments for LID 2011-1, however, were unknown until less than a month before the October 27, 2015 public hearing to object to the assessments (AR 0086-0091). The City also revealed, just a day or so prior to the October 2015 hearing, the existence of a special benefits appraisal report (AR 0015-0071) it had commissioned for Appellant's properties back in 2012 – an appraisal that the City instructed the

¹ Mike Hamilton, who is a member of the Appellant LLC, was the spokesperson to the City Council in the local proceedings. Our briefing refers to Appellant both as Mr. Hamilton, individually, as well as the LLC.

² The Administrative Record (AR) will be referenced by the last four digits of the bates-stamped pages. In some instances, portions of the AR were made exhibits to briefing and are thus duplicated in the Clerks Papers (CP). The Transcript (Tr.) is citing to the June 14, 2016 oral argument before the Superior Court.

³ LID 2011-1 was also variously referred to as 2011-11 in the proceedings below.

appraiser to perform without contacting or letting the Appellant property owners know about the appraisal (AR 0031, 0048; CP 58, 62).

Appellant timely protested the final assessment roll to the City Council (AR 0074-0076; CP 67-69; Tr. at 14-15, 55-56) on the basis that the assessments exceeded the value of the benefits, not only to his properties but to all of the LID properties. The water to be delivered through the new water system was discolored, and it was unknown when or even if it could be corrected, and in the meantime, the new City well would not be used for drinking water. The people paying the LID assessments would not be receiving the water system that they thought they would be getting when the LID was formed back in 2012.

The Napavine City Council, despite being fully aware that the new well and water system could not be utilized as had been planned in the LID through Ordinance 497 (AR 0092-0017; CP 72-99), and that the assessed citizens would be paying for benefits not received, nevertheless confirmed the assessment roll, without modification, via Ordinance 549 (AR 0001-0003; CP 45-55). The City of Napavine has imposed an LID assessment that was founded upon a fundamentally wrong basis and the Council's decision was arbitrary and capricious. Under RCW 35.44.250, the Superior Court was required to correct or annul the assessment insofar as it affects Appellant's properties, but instead upheld the assessments without modification through its Decision dated August 5, 2016, now on appeal to this Court.

2. ASSIGNMENTS OF ERROR

2.1. The Court erred by concluding the City's LID assessment was not founded upon a fundamentally wrong basis, and erred in stating that Appellant presented no competent evidence or legal theory.

2.2. The Court erred by concluding the City's decision confirming the LID assessment was not arbitrary and capricious, and erred in stating that Appellant presented no competent evidence or legal theory.

2.3. The Court erred in deciding that Appellant needed to have first appealed the City's earlier *establishment* of the LID in order to challenge the subsequent LID *assessment* amount imposed upon Appellant's properties, and that Appellant's arguments were moot.

2.4. The Court erred in its statement that Napavine's new Well 6, which was sited and constructed upon land that the City is funding through LID 2011-1 as part of its LID-funded water delivery system to the LID-benefit area, "is not part of the LID." The Court similarly erred in deciding that Napavine's discolored water from Well 6 that citizens on the assessment roll are being assessed to have transmitted, even though the well will not be used and the water will not be transmitted, is an issue "entirely irrelevant to this appeal."

2.5. The Court erred in upholding the City's flawed appraisals of Appellant's properties despite the City's lack of due process, and failure of the

appraisals to provide evidence that the LID improvements immediate benefit Appellant's properties commensurate with the amount of the assessment.

2.6. The Court erred in its statement that the "Council entered lengthy findings which dealt [with], among other issues, each of the Appellant's claims."

2.7. The Court erred in its misstatement of fact, and unsubstantiated theory: "... only Appellant has chosen to appeal the assessment... Surely if the method of assessment fundamentally unfair, Appellant would have found some allies among the LID." The Court further erred in its inference that Appellant's appeal was not credible, either because the Judge failed to identify the other appellants, or that the presence/absence of additional appellants could even be relevant to Appellant's appeal or form a basis for denial of the appeal.

3. ISSUES REALTED TO ASSIGNMENTS OF ERROR

3.1. Are the Napavine City Council's assessments for LID 2011-1 confirmed through Ordinance 549, founded upon a fundamentally wrong basis because the water system improvements cannot be utilized as set out in the LID formation Ordinance 497, and thus fail to provide benefit to the assessed properties commensurate with the amount of their assessments? **Yes.**

(Assignment of Error 2.1.)

3.2. Is the Napavine City Council's decision confirming the assessments for LID 2011-1 arbitrary and capricious because the Council knew that the water system improvements could not be utilized as set out in the LID

formation Ordinance 497 and would fail to benefit the assessed properties commensurate with the their assessments? **Yes.** (Assignment of Error 2.2.)

3.3. Was Appellant required to first appeal the *formation* of LID-2011-1 under RCW 35.43.100 prior to being able to appeal the parcel-specific final *assessment roll* under RCW 35.44.190 and contest the City's appraisals? **No.** (Assignment of Error 2.3.)

3.4. Because the land and site for Well 6 and the construction of Well 6, the water mains, transmission lines, reservoir, and the related design and engineering were paid for with LID 2011-1 funds, and because all of the LID 2011-1 improvements operate with the use of Well 6 and were designed and built to function with Well 6, is Well 6 an integral benefit to those on the assessment roll for the LID 2011-1 improvements? **Yes.** (Assignment of Errors 2.1, 2.2, 2.4)

3.5. Did the City of Napavine's appraisals of Appellant's properties correctly support the requirement that the LID improvements benefit Appellant's properties commensurate with their assessments? **No.** (Assignment of Errors 2.1, 2.2, and 2.5.)

3.5.1. Were the appraisals properly founded upon accurate and complete information about the properties? **No.**

3.5.2. Did the Appraisers evaluate Appellant's properties on the basis of the properties' values immediately before and immediately after the LID improvements? **No.**

3.5.3. Did the Appraisers evaluate Appellant's properties based on existing uses and not speculative uses? **No.**

3.5.4. Were the appraisal valuations based on the special benefits resulting from the LID improvements? **No.**

3.5.5. Did the Appraisers appraise Appellant's properties as individual parcels? **No.**

3.5.6. Are the City's appraisals of Appellant's properties founded upon a fundamentally wrong basis? **Yes.**

3.5.7. Is an opposing expert opinion required to refute an appraisal founded upon a fundamentally wrong basis? **No.**

3.6. Are the Napavine City Council's Findings confirming the assessment of Appellant's properties arbitrary and capricious because the appraisals supporting the assessment were founded upon a fundamentally wrong basis and the process did not afford Appellant due process? **Yes.**

(Assignment of Errors 2.1, 2.2, 2.6.)

3.7. Is the Court's reliance on unsubstantiated theory and incorrect facts, (e.g., stating in its Decision: "Notably, of all the entities within the LID, only Appellant has chosen to appeal the assessment. Surely if the method of assessment were fundamentally unfair, Appellant would have found some allies among the LID.") a proper basis for the Court's decision? **No.**

(Assignment of Error 2.7.)

4. STATEMENT OF THE CASE

4.1 LID Improvements Funded via Ord. 549 Assessment Roll

In March 2012, Napavine created LID 2011-1 to expand the City's water service to properties in the vicinity of Exit 72, off Interstate-5 (AR 0096; CP 76). The LID formation Ordinance 497 (AR 0001-0004; CP 45-55) lists the parcels to be included in the LID, identifies the water system components on a map (AR 0114; CP 94), and recites the total cost of the LID, but does not identify the parcel-specific assessments (except for a few properties that prepaid latecomer fees).

The centerpiece of the LID water service expansion is through a new City well, known as Well 6. The site for Well 6 was purchased with LID funds (AR 0249-0252; CP 157-160). Well 6 was constructed with LID funds (AR 0591-0593; CP 167-169). Well 6 is connected to and functions with the new water main transmission lines, water reservoir, etc., all of which were constructed using LID 2011-1 funds (AR 0564-0565; CP 165-166). The engineering design work and other services to integrate Well 6 with the water main transmission lines, water reservoir, and water service area was paid for with LID funds. (AR 76, 83; CP 69-70). Well 6 is an integral component of LID 2011-1 and Napavine's water service expansion.

Unfortunately, Well 6 yields yellowish-colored water. This problem was not disclosed at the time of the 2012 LID formation (although we now know that a water test in 2010 showed elevated color levels (AR 0230; CP

156)). By 2015, the discoloration had gotten much worse (we now know that the February 2015 water test identified color at more than double the maximum contaminant level (AR 0231; CP 155)). In June and August 2015, the City Engineer presented written reports to the City (AR 213-229; CP138-154), relaying that the previous plan to blend Well 6 with other City water won't work. Because of the large volume of water transmitted from Well 6, if it were to be blended it would discolor all of the City's water. The Engineer proposed some possible ideas that could be tested through a pilot program, but he didn't know if they would work. Also, assuming a permanent treatment solution eventually could be found, it would likely require continual additional funding to maintain the treatments, and the source of such funding is unknown.

4.2 Assessment Roll Notice, Hearing, and Protest

The City of Napavine nevertheless proceeded with the assessment roll for LID 2011-1, and on September 29, 2015 notified the LID participants of their parcel-specific assessments and provided notice that they could protest these assessments at the City Council's October 27, 2015 hearing (AR 0086-0091). Appellant timely submitted a letter of protest (AR 74-76; CP 67-69) and testified at the hearing. He objected to the assessments because the City failed to show that the LID improvements would provide a benefit, especially because of the poor quality water. He further complained that he'd just been given a copy of an Appraisal that had been prepared back in 2012 without his knowledge or participation, and disputed its assertion that his properties would

increase in value after connection to City water. He stated that his properties would be devalued if his restaurant tenants had to switch from his private water system that provided clean, clear water, to instead serve the City's urine-colored water.

4.3 Napavine Determines Well 6 will Stay Out of Service until Discoloration is Corrected

Responding to public comment at the end of the October 27, 2015 hearing, the City Engineer stated to the City Council: "As far as Mike Hamilton's comments, the City is not going to provide any water from Well No. 6 until it is – the color issue is resolved." (AR 0154). The City Engineer restated this in writing in a subsequent letter dated November 24, 2015⁴:

The City will not provide water that does not meet all public health requirements as well as the City's own stricter requirements. Water from Well 6 will not be placed into service until the discoloration issue is resolved. Costs associated with resolving this problem are not included in the LID costs.

(AR 0083-84; CP 70-71).

At the City Council's next meeting on November 10, 2015, the City Engineer discussed possible solutions for correcting Well 6 (AR 0180-0206; CP 111-137). The discussion revealed that the discoloration may be caused by several different reasons, and the final solution could require multiple levels of

⁴ The second page of the letter is mis-dated December 31, 2015, which clearly is incorrect, since the final LID assessment action was December 8, 2015 (the Record cut-off date), and Appellant's appeal to Superior Court was December 18, 2105.

on-going treatments, and all costs were unknown. At the end of the meeting, the Council voted to fund a six-month pilot study to test one of the possible solutions to correct discoloration (AR 0201-0205; CP 132-136).

4.4 City's Written Appraisal of Appellant's Properties

In 2012 Napavine commissioned a "secret" appraisal (AR 0015-0071; 0314-0317; CP 161-164) of Appellant's properties, in which the Appraiser was prevented from contacting Hamilton Corner I LLC, and instead had to consult the City with their questions, and limited their review to what could be ascertained from publicly-available data (AR 0031, 0048; CP 58, 62).⁵ Because the City prevented the Appraiser from consulting with the owner (AR 0033, CP 60), the Appraiser failed to place an accurate value on Appellant's private water system, which in fact has been maintained and upgraded throughout the years. The appraisal also failed to factor in the loss of personal property value for the private system and the significant costs for demolition, if, as the appraisal assumes, the private water system is replaced by the City's water system.

The appraisal further failed to calculate the added monthly costs for City water that will be imposed upon the owner and tenants, and how these increased costs, in addition to the connection fee and LID assessments, would

⁵ Note that City Engineer Hinton's presentation to the City Council on November 10, 2015 (AR 0180-0206), relayed a lot of inaccurate information about Appellant's water system. Thus the City Engineer and other City personnel likely provided the source of inaccurate information for the written appraisal.

affect tenant retention and vacancies, and the income-generating potential of the properties.

The appraisal also projected, without any factual foundation, that if Appellant were to develop more of the property without city water, then he would need an additional private water system, with new well, booster stations, and reservoir, and factored these invented costs into the appraisal (AR 0057-0058; CP 64-65). This resulted in a valuation that measured the difference between a) the inflated costs of an unnecessary expansion of the private water system and b) the costs of connecting to city water (based on outdated assessments and omitted monthly costs), artificially boosting the appraised value of Appellant's properties once on city water.

The appraisal deduced a final per-square-foot value at the highest and best use for both the developed and undeveloped portions as if the property were one unified parcel and one-hundred-percent-developable (AR 0058; CP 65). The appraisal made no market or environmental analysis to support its theory that once connected to city water, new development would immediately come to the site and occupy everything that is presently undeveloped at the full "highest and best use" valuation.

4.5 Appraiser Testimony to City Council on Behalf of Napavine

After the October 27, 2015 LID assessment hearing, the City commissioned another appraiser to present what amounted to an oral appraisal of appellant's properties, as "testimony" to the City Council in a continued

hearing on the LID assessment, although no advance notice was provided to Appellant of either the hearing continuation or that an appraiser would be presenting an oral appraisal of his properties to the City Council.

On November 24, 2015 the testifying Appraiser presented an impromptu oral opinion (AR 0169-0177) to the City Council based entirely upon his stated premise that due to a City Code requiring Hamilton Corner to forfeit its water rights to the City and decommission its wells and water system, this means Appellant is unable to support existing tenants, much less new development, unless on City water. The Appraiser stated that because of this Code requirement, once City water is available, Appellant's properties have to connect, and have only nominal value unless served by City water (AR 0174-0176; CP 108-110).⁶

The oral appraisal ignored Appellant's existing water system, essentially zeroing-out the value as if there were no water system at all on the property, substituted in the value of the city's water system in place of Appellant's private system, then asserted that Appellant's property gains great value after the LID improvements because it can now accommodate new development. Similar to the written appraisal, the oral opinion provided no substantiation as to what development would immediately come to the site that wasn't already there. The oral opinion was an artificially skewed valuation.

⁶ As argued to the Superior Court, there are exceptions in the City Code that may apply (Tr. at 18-19, 68), as well as a significant question as to the City's ability to enforce such requirements, which would amount to a taking without compensation.

4.6 City Council Affirmed Assessments Despite Inadequacies of Appraisals, Altered LID, and Lack of Due Process

Although the Council was completely aware of Appellant's protest of the LID assessment and the City's inaccurate and incomplete appraisals of Appellant's properties; and was fully apprised that Well 6 would not be put into service until the discoloration was corrected, and that there was presently no known solution for correcting the problem nor funding for the additional treatments for whatever permanent solution might be found, or how long it would ultimately take to correct the discoloration; nonetheless, on December 8, 2015, the City Council voted (AR 0208-0209) to approve the LID assessments, without modification, through Ordinance 549 (AR 0001-0014; CP 45-55).

4.7 Appeal to Superior Court

Appellant appealed to Superior Court⁷ and during oral argument explained the ways in which Napavine's Assessment Roll and Appraisal was founded upon a fundamentally wrong basis; why the City's appraisals of Appellant's properties were not competent evidence; and why the Council's confirmation of the assessments was arbitrary and capricious. The following chart summarizes Appellant's arguments to the Superior Court:

⁷ A non-jury proceeding under the authority of RCW 35.44.250.

FOUNDED UPON A FUNDAMENTALLY WRONG BASIS	ARBITRARY AND CAPRICIOUS
<p><u>Well #6 Benefits Removed, but Assessment is Unchanged</u></p> <p>The Assessment Roll for LID 2011-1, enacted via Ord. 549 includes Assessments for the costs of Well 6 and Assessments for All water system components that were designed to connect with and Use Well 6, as set forth in the formation Ord. 497 for LID 2011-1.</p> <p style="text-align: center;">↓</p> <p>Non-Use of Well 6 and its pro-rata share of the integrated water system components means the LID participants are paying for special benefits not received.</p> <p style="text-align: center;">↓</p> <p>Non-Use of Well 6 materially alters LID 2011-1, yet the City conducted no LID amendment process.</p> <p style="text-align: center;">↓</p> <p>An Assessment for Benefits that <u>None</u> of the LID Participants are Receiving Means the Assessment is so fundamentally wrong that it necessitates annulment of the entire assessment. [<i>Hasit</i> at 938-938, citing <i>In Re Shilshole</i>; <i>Abbenhaus</i>, at 859, citing <i>Cammack</i>.]</p> <p style="text-align: center;">↓</p> <p>A Fundamentally Wrong Assessment Shall be Modified or Annulled by the Court. [RCW 35.44.250.]</p>	<p><u>Affirmation of Assessment Roll was Arbitrary and Capricious</u></p> <p>City willfully and without regard to reason affirmed an Assessment Roll that not only would require LID participants to pay assessments for Well 6 benefits no one would receive, but also materially altered the formation LID without due process to anyone.</p> <p style="text-align: center;">↓</p> <p>Fully informed by the City Engineer that Well 6, along with its related components, could not be used until the water discoloration was corrected; and fully aware there was no solution in place, or funding for a permanent solution; the City Council could have waited, or proceeded with modified assessments, or amended the LID. Instead, in a “willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action” [<i>Abbenhaus</i> at 858-859] still voted to proceed with the LID assessment to pay for LID improvements that could not be used and would benefit no one.</p> <p style="text-align: center;">↓</p> <p>An Arbitrary or Capricious Decision Shall be Modified or Annulled by the Court. [RCW 35.44.250.]</p>

FOUNDED UPON A FUNDAMENTALLY WRONG BASIS	ARBITRARY AND CAPRICIOUS
<p><u>City's Appraisals are Founded on a Fundamentally Wrong Basis</u></p> <p>The Appraisals were prepared without property owner's participation. Expert opinions are based on inaccurate information, and are not credible.</p> <p>The 2012 valuation does not provide accurate appraisal immediately before and after special benefits have attached. [see <i>Appeal of Schmitz</i> at 434.]</p> <p>City's appraisers improperly derive their valuations entirely on speculative value of what development might come to the property. Speculative uses are not to factor into LID assessment valuation. [Kusky at 498-499, citing <i>Doolittle</i>.]</p> <p>The City's appraisals failed to demonstrate Appellant's property would increase in value because of the LID benefits. [See <i>Hasit</i> at 938-939, citing <i>In Re Shilshole</i>.]</p> <p>The City's appraisals improperly appraised Appellant's property as one unified parcel and valued the entire acreage at the highest per-square foot value. [Doolittle at 105-106]</p> <p>↓</p> <p>A Fundamentally Wrong Assessment Shall be Modified or Annulled by the Court. [RCW 35.44.250.]</p>	<p><u>City's Appraisals are Not Credible and are not Competent Evidence</u></p> <p>Napavine specifically prevented its Appraisers from contacting the property owner (Appellant), and instead they consulted City staff and limited their review to publicly-available data. The Appraisals were based on incomplete and inaccurate information.</p> <p>↓</p> <p>Appellant demonstrated the Appraisals were inaccurate and incomplete because the opinions were rendered without considering necessary facts that should have been obtained from the property owner, and further failed to account for LID benefits assessed but which would not be received. Because Appellant established that the Appraisals lacked credibility, this means the Burden of Proof for the Assessments shifts to the City. [Hasit at 935-936 citing <i>Bellevue Plaza</i>.]</p> <p>↓</p> <p>Because the City confirmed the Assessments regardless of the lack of credibility of the City's experts' opinions, and lack of competent evidence, the City's Decision was Arbitrary and Capricious. [Hasit at 936, citing <i>Bellevue Plaza</i>.]</p> <p>↓</p> <p>An Arbitrary or Capricious Decision Shall be Modified or Annulled by the Court. [RCW 35.44.250.]</p>

FOUNDED UPON A FUNDAMENTALLY WRONG BASIS	ARBITRARY AND CAPRICIOUS
<p data-bbox="402 401 711 432"><u>Materially-Altered LID</u></p> <p data-bbox="331 453 760 590">Inability to Use Well 6 results in an LID that is Materially Altered from the LID that was created under Ord. 497.</p> <p data-bbox="542 611 558 642">↓</p> <p data-bbox="331 653 769 1052">Approving the Assessment Roll for a materially-altered LID which has not undergone a formal LID amendment process is an error so fundamental that it necessitates a nullification of the entire assessment, and as such, the Assessment Roll was founded on a fundamentally wrong basis. [<i>Abbenhaus</i>, at 859, citing <i>Cammack</i>.]</p> <p data-bbox="324 1104 753 1251">A Fundamentally Wrong Assessment Shall be Modified or Annulled by the Court. [RCW 35.44.250.]</p>	<p data-bbox="862 401 1300 432"><u>Lack of Due Process to Appellant</u></p> <p data-bbox="834 453 1284 600">The City withheld information and provided unclear notice so that Appellant had inadequate time to respond.</p> <p data-bbox="834 621 1317 800">The parcel-specific assessments on Appellant's properties were unknown until less than 30 days prior to the 10/27/16 deadline to protest the assessments.</p> <p data-bbox="829 821 1292 1031">When Appellant submitted a public records request to see what benefit the assessments were to provide, he was given a one-page document that did not explain beneficial use of the LID funds.</p> <p data-bbox="824 1052 1300 1230">The City's Appraisal of Appellant's properties, although prepared in 2012, was not disclosed to Appellant until just before the 10/27/16 deadline to protest the assessments.</p> <p data-bbox="821 1251 1300 1430">The City Council received an additional oral appraisal on Appellant's properties as "testimony" at a continued hearing, for which no notice was provided to Appellant.</p> <p data-bbox="1049 1451 1065 1482">↓</p> <p data-bbox="818 1493 1300 1745">The <i>Hasit</i> Court found comparable acts to constitute a lack of due process, and the action of the Council upholding assessment despite lack of due process, to be arbitrary and capricious. The Court annulled the assessments. [<i>Hasit</i>, at 958-960.]</p>

5. SUMMARY OF ARGUMENT

5.1 Appellant's Appeal is Valid

The Superior Court incorrectly interpreted Appellant's case as an appeal of the creation of LID 2011-1 (through City Ordinance 497 in 2012), then concluded that the appeal was untimely and Appellant's arguments could not be considered. However, Appellant clearly stated in his Notice of Appeal he was appealing the assessment roll for LID 2011-1, which Napavine confirmed through Ordinance 549 in December 2015. There is no authority requiring an appellant to have first appealed the LID formation to later appeal the assessment roll.

The Superior Court also stated, incorrectly, that Appellant's was the only appeal, and commented others would have surely appealed if the City's method of assessment were fundamentally unfair. This is not a proper basis upon which to decide an appeal.

5.2 City Council's Confirmation of Assessment Roll was Founded Upon a Fundamentally Wrong Basis and is Arbitrary and Capricious

Under RCW 35.44.250, the Superior Court is required to modify or annul an Appellant's assessment if the assessment was founded upon a fundamentally wrong basis, and/or the decision confirming the assessment roll was arbitrary or capricious. As articulated in the prevailing case law authority on LID assessment appeals, the property owners in the LID area may not be assessed for benefits not received. The amount of the LID assessment must be

commensurate with the value of the benefits received through the LID. If the City's method of assessment or the procedures used involved an error that would necessitate nullification of the entire LID, then the City's action was founded upon a fundamentally wrong basis. Because Well 6 (the centerpiece of Napavine's water system expansion funded through LID-2011-1) does not provide drinking water, the LID participants are being forced to pay for benefits not received. The LID provides no one with benefits commensurate with the amounts of their assessments. Therefore, the assessment roll was founded upon a fundamentally wrong basis.

Further, if a city's action confirming the assessment roll was willfully and unreasonably made without regard to the facts and circumstances, then it was arbitrary and capricious. The Napavine City Council approved the LID assessment roll with the full knowledge that Well 6 could not provide drinking water, resulting in a materially-altered LID that does not provide the benefits for which the LID participants have been assessed. Napavine's action to confirm the assessments without regard to the facts and circumstances was arbitrary and capricious and should be reversed.

5.3 Napavine's Appraisals of Appellant's Properties were Founded Upon a Fundamentally Wrong Basis; thus the Council's Confirmation of Appellant's Assessments is Arbitrary and Capricious

Under RCW 35.44.250 and through case law interpretation, the amount of the assessment and method of assessment are presumed correct; however, if

the Appellant provides credible evidence for why the amount or method is incorrect, then the burden reverts to the city to prove the basis for its assessment. If the City confirmed an assessment based on an appraisal that was founded upon a fundamentally wrong basis, as was done in our case, or if the City failed to afford the Appellant proper due process, as was done here, then the City's action was arbitrary and capricious and should be reversed.

6. ARGUMENT

6.1 **There is No Statutory Requirement or Judicial Interpretation Requiring an LID Formation Appeal as a Prerequisite to an LID Assessment Appeal** (Issues 3.3, 3.4; Errors 2.3, 2.4)

In its Decision Affirming City Council, the Superior Court has made both an error of fact, in misinterpreting Appellant's appeal as concerning the "formation" of an LID, and an error of law in deciding that because Appellant did not appeal the LID formation, Appellant's arguments against the City's appraisal are rendered moot, whereby the Council's decision cannot be found arbitrary and capricious.

6.1.1 *Appellant's Appeal is Made Under the Authority of RCW 35.44.190*

The Superior Court's Decision affirming the Napavine City Council's confirmation of the assessment roll for LID 2011-1 is premised upon errors of fact and law. First, the Court has incorrectly characterized Hamilton's appeal as coming from an appeal of Respondent Napavine's *formation* of LID 2011-1 through Ordinance 497 in 2012 (Decision p.1, line 20) CP 237). The Court

then incorrectly concludes that because Appellant did not appeal the establishment of the LID itself and the period for doing so has long since passed, his arguments concerning the viability of his private water system are moot and Appellant therefore has no basis to contest the City's appraisal of his property as arbitrary and capricious. (Decision at p.2, lines 23-30; CP 238.)

Appellant acknowledges that challenges to the *creation* of the LID need to be made 30 days after the LID formation ordinance through the authority of RCW 35.43.100; however, Appellant clearly stated in his Notice of Appeal (CP 1-4) and briefing that he was appealing the LID *assessment* amounts enacted through Ordinance 549 in 2015, and cited to the authority of Chapter 35.44 RCW (CP 23, 31).

Viewing the relevant portions of the two referenced statutes together may be helpful:

No lawsuit whatsoever may be maintained challenging the jurisdiction or authority of the council to proceed with the *improvement and creating the local improvement district* or in any way challenging the validity thereof or any proceedings relating thereto unless that lawsuit is served and filed no later than thirty days after the date of passage of the ordinance ordering the improvement and creating the district ...

RCW 35.43.100 (emphasis added).

The scope of RCW 35.43.100's finality is limited to challenges relating to the *creation* of the LID and improvements to be built. In contrast, RCW 35.44.190 addresses the assessment amounts after the LID is created and built:

Whenever any *assessment roll* for local improvements has been confirmed by the council, the regularity, validity, and *correctness of the proceedings relating to the improvement and to the assessment therefor*, including the action of the council upon the assessment roll and the confirmation thereof shall be conclusive in all things upon all parties. They cannot in any manner be contested or questioned in any proceeding by any person unless he or she filed written objections to the *assessment roll* in the manner and within the time required by the *provisions of this chapter* and unless he or she prosecutes his or her appeal in the manner and within the time required by the *provisions of this chapter*.

RCW 35.44.190 (emphasis added).

The statutory requirements for appealing the assessment roll in Chapter 35.44 RCW do not refer back to the LID formation in Chapter 35.43 RCW and instead specifically reference the requirements of “this” Chapter 35.44. As set out in RCW 35.44.190, an appeal of the assessment roll is made in two parts: First by filing an objection to the local jurisdiction (made in the manner and within the time periods set out in Chapter 35.44 at RCW 35.44.070 -.110); then, it can next be appealed to Superior Court (per RCW 35.44.200 - .250) by a person who timely objected to the *assessment roll*. There is no statutory requirement to first appeal the creation of the LID under Chapter 35.43 RCW in order to later appeal the assessment under Chapter 35.44.RCW.

6.1.2 *Judicial Interpretation of Chapter 35.44 RCW Does Not Inject a Prerequisite LID Formation Appeal*

We also find no case law for the Court’s supposition that Appellant needed to have appealed the LID formation before appealing the LID assessment roll, and neither Napavine nor the Court cited any such authority.

In reviewing Washington precedential case law on LID assessments, there is no sign that any of the LID *assessment* appeals were preceded by LID *formation* appeals. (See generally: *Abbenhaus v. Yakima*, 89 Wn.2d 855, 576 P.2d 888 (1978); *Appeal of Schmitz*, 44 Wn.2d 429, 268 P.2d 436 (1954); *Bellevue Plaza v. City of Bellevue*, 121 Wn.2d 397, 851 P.2d 662 (1993); *Cammack v. Port Angeles*, 15 Wn. App. 188, 548 P.2d 571 (1976); *Doolittle v. Everett*, 114 Wn.2d 88, P.2d 253 (1990); *Hasit, LLC v. City of Edgewood*, 179 Wn. App. 917, 320 P.3d 163 (2014); and *Kusky v. City of Goldendale*, 85 Wn. App. 493, 933 P.2d 430 (1997).) By every indication, there is no requirement to first appeal the creation of an LID prior to appealing the LID assessment.

6.1.3 *Appellant Could Not Have Objected to City's Assessment Values, or Appraisal, at the time of LID Formation, because this Information was Undisclosed*

The Superior Court's reasoning that Appellant should have first appealed the formation LID prior to appealing the assessment amount is in further error because there was nothing for Appellant to appeal at the time LID 2011-1 was created. Appellant did not object to the overall LID as it was described by the City in Ordinance 497 on March 13, 2012 (AR 0092-0117; CP 72-97). (Note: In Ordinance 497 and in the Agreement Relating to Assessments for LID 2011-1 (AR 0100 et seq.), Hamilton's Walnut Shade LLC / (Owner) / "Hamilton" is a completely different entity than Appellant Hamilton Corner I LLC. This was also explained in briefing and argument to the Superior Court (CP 24; Tr. at 68). Appellant is not a party to the

Latecomer Agreements made between Napavine and Hamilton's Walnut Shade LLC concerning LID Assessments.)

At the time LID 2011-1 was created through Ordinance 497, Appellant could not have contested the amount he was to be assessed because the parcel-specific assessments were unknown at that time. A review of the Administrative Record confirms that parcel-specific assessments were not disclosed until the September 29, 2015 public notice for the October 27, 2015 hearing on the final assessment roll (AR 0086-0091). Although Napavine's Ordinance 549 recites to a preliminary assessment with the LID formation in 2012 (AR 0004-0005; CP 48-49), none of the documents for this LID formation Ordinance 497 (AR 0092-0117) include parcel-specific assessments (except a few properties that had prepaid contributions and latecomer agreements – see AR 0115).

Appellant similarly could not have contested the City's commissioned appraisal of his property in 2012, because, as discussed herein, the City kept the appraisal a secret from Appellant until shortly before the 2015 LID assessment roll hearing.⁸

⁸ Respondent stated in its brief to the Superior Court (CP 179-180) that Appellant has known of its parcel-specific assessments by citing to the preliminary assessments in the written appraisal (AR 0015, et seq.); however, Appellant explained numerous times that he did not receive this appraisal until shortly before the 10/27/15 assessment hearing (Tr. at 16-17).

6.1.4 Appellant Timely Protested and Appealed

On September 29, 2015, the Napavine City Clerk mailed and sent for publication the LID 2011-1 “Notice of Hearing on Final Assessment Roll” (AR 0086-0091). Appellant timely filed a written objection to the Council on October 27, 2015 prior to the public hearing, in accordance to the City’s notice (AR 0074-0076; CP 67-69) and in compliance with RCW 35.44.120. The City Council subsequently confirmed the assessment roll, without modification, through Ordinance 549 on December 8, 2015. Appellant then timely appealed to Superior Court on December 18, 2015 (CP 1-6). Respondent did not identify any jurisdictional problem with Appellant’s protest or appeal of the assessment roll. Appellant’s appeal was procedurally proper. This Court should decide the appeal on its merits.

6.2 Inability to Use Well 6 Materially Changes LID 2011-1; Assessment Roll for Altered LID is Founded Upon a Fundamentally Wrong Basis, and Decision to Confirm Assessments for Altered LID is Arbitrary and Capricious (Issues 3.1, 3.2, 3.5, 3.6; Errors 2.1, 2.2, 2.5, 2.6)

The Superior Court erred by not considering facts of record (e.g., Well 6 was entirely funded by the LID, and everything funded by the LID was designed, engineered, and constructed to function with Well 6), and erred in applying the law, because as long as Well 6 is unable to be utilized to provide drinking water, the LID participants are not receiving benefits commensurate with their assessments. The Council’s Findings in support of Ordinance 549 are in error.

6.2.1 Without Well 6, LID 2011-1 is Materially Altered

The Superior Court erred in concluding that the “LID only concerns the delivery system, not the product delivered. The colored water comes from a well that is not part of the LID ...” CP 238. The Record does not support this conclusion.

Well 6 was a material component of LID 2011-1. The LID formation Ordinance 497 describes the “Improvements” that are a part of the LID, in Exhibit A. (AR 0093, CP 73) Exhibit A states:

Description of Improvements ... water services for properties to be served by these water mains; equipping a recently drilled City well with a pump, power, controls, and piping to connect well to aforementioned water mains; and construction of a new water reservoir for pressure control for the zone to be served by aforementioned water mains, including piping from the new water reservoir to aforementioned water mains; and associated work and appurtenances related to the above-described improvements.

AR 0096; CP 76.

Ordinance 497 also incorporates a site map of the LID Improvements, which specifically includes the “New Well Facility \$260,000” (AR 0114, CP 94).

Additionally, the land upon which this Well 6 was sited is funded by the LID as proven from LID invoices and receipts (AR 0249-0252; CP 157-160). Other LID receipts show expenditures for the construction costs of the well, water transmission lines, water storage tank, water mains, related engineering and design costs, and other expenses being funded by LID 2011-1 in order to utilize Well 6 (AR 0076, 0083, 0249-252, 0564-0565, 0591-0593;

CP 69-70, 76, 157-169). Moreover, the appraisal on which the City relied to assess Appellant's properties specifically describes the LID improvements as including "a new well facility" (AR 0031; CP 58). Appellant enunciated these facts to the Superior Court (Tr. at 14-15, 38).

Well 6 is an integral component of the LID. Without Well 6, LID 2011-1 cannot fulfill the water system improvements that were approved through LID 2011-1. If the City had instead wanted to merely extend city water to the I-5 Exit 72 area using existing city wells, it would be an entirely different LID than the one which was approved in Ordinance 497.

Without Well 6, LID 2011-1 cannot provide benefits to the LID participants commensurate with their assessments. The assessments were predicated upon the delivery of potable water through Well 6, to enable increased uses and in turn increased value to the LID properties due to the new water service. The Superior Court reasoned that even if Well 6 is not used for potable water, it could be used for firefighting purposes (p. 2 Line 19 (CP 238)). However, LID 2011-1 promised potable water, not mere fire protection. Because Well 6 cannot provide potable water, the well and its water transmission lines, water mains, water storage tank, and related engineering design and other costs do not provide an increase in value to the LID properties. It does not provide a benefit commensurate with the assessments. The failure of Well 6 is a fundamental alteration of the LID.

6.2.2 Assessment Roll for Altered LID is Founded Upon a Fundamentally Wrong Basis

Under the 2012 formation ordinance, the benefits of LID 2011-1 included a new city well for drinking water, but the 2015 assessment roll was approved knowing that the LID would not include this integral benefit. This is contrary to the formation ordinance:

The Improvements shall be in accordance with the plans and specifications therefor prepared by the City Engineer, and may be modified by the City Council *as long as such modification does not affect the purpose of the Improvements.*

AR 0093; CP 73 (emphasis added).

The citizens paying the assessments are receiving substantially less benefit than what was identified in the LID formation ordinance, yet their assessments remain unchanged.

In *Hasit, LLC v. City of Edgewood*, this Court examined several cases and articulated the principle that an assessment is founded upon a fundamentally wrong basis if it requires a property owner to pay for something that does not benefit the property:

In keeping with the principle that special assessments serve as compensation for special benefits, *Heavens*, 66 Wn.2d at 564, our court has held that “only that portion of the cost of the local improvement which is of special benefit to the property can be levied against the property.” [Citations omitted.]

Hasit, LLC v. City of Edgewood, 179 Wn. App. 917, 938, 320 P.3d 163 (2014).

This principle transfers seamlessly into our instant case: The LID properties are being assessed for a new city well which cannot provide

drinking water. The LID assessment incorporated all of the costs associated with getting this well to transmit potable water: the land purchase, construction of the well, connecting transmission lines and reservoir, plus the related engineering and design costs. But because the water can't be used, the benefits from LID 2011-1 cannot be fully realized. The assessed properties are paying for something that does not benefit them; therefore, the assessments were founded upon a fundamentally wrong basis.

Another instructive case reference is in the Court of Appeals, Division I unpublished opinion, *Fury v. City of North Bend*, No. 69294-1-I, October 21, 2013⁹. The City of North Bend materially altered its Utility Local Improvement District (ULID) without passing a new ordinance to adopt the material change. The *Fury* Court found this to be contrary to statutory procedural requirements, including RCW 35.43.070, 35.43.100, and 35.44.020; sided with Appellants' reliance on *Buckley v. City of Tacoma*, 9 Wash. 253, 37 P. 441 (1894) in refuting the City's position that it could make material changes without regard to statutory procedures; and annulled the City's assessments imposed on Appellants.

The City's action to confirm the assessment roll for LID 2011-1, knowing the LID was materially altered due to the inability of Well 6 to provide drinking water, was fundamentally wrong. The Council's decision has

⁹ Under GR 14.1, the Court of Appeals may consider as nonbinding authority, unpublished opinions of the Court of Appeals filed on or after March 1, 2013. A copy is at Appendix I.

resulted in everyone in the assessment area paying for benefits not being received.

We think the fundamentally wrong basis (RCW 35.44.250) refers to some error in the method of assessment or in the procedures used by the municipality, the nature of which is so fundamental as to necessitate a nullification of the entire LID, as opposed to a modification of the assessment as to particular property.

Cammack v. Port Angeles, 15 Wn. App. 188, 196, 548 P.2d 571 (1976).

6.2.3 *Decision to Confirm Assessments for Altered LID is Arbitrary and Capricious*

Without the use of Well 6, LID 2011-1 is materially altered, yet the City of Napavine proceeded in affirming the assessment roll without modification. The City could have waited to affirm the assessments until after a permanent solution to fix Well 6 was funded and implemented. Or the City could have apportioned the remaining value of the LID, subtracting out the pro-rated construction and engineering costs attributable to Well 6, and then reassessed (and reappraised) the LID properties. Or the City could have initiated a revised LID to fund only the transmission of water from existing city wells to the new water service area. Instead, the City did the one thing it *could not do*, and that was to assess properties for benefits not received, and in amounts which exceed the value of the benefits. The Council confirmed the assessment roll, knowing that the LID participants would be paying special assessments for benefits not received. The City Council's decision meets the definition of arbitrary and capricious:

An arbitrary and capricious action refers to legislative decisions (such as the decision of the council here) made willfully and unreasonably, without regard or consideration of facts or circumstances. [Citations omitted.]

Kusky v. City of Goldendale, 85 Wn. App. 493, 500, 933 P.2d 430 (1997).

The failure of Well 6 to provide potable water fundamentally altered the LID. The assessments, based on benefits the properties will not receive, were founded upon a fundamentally wrong basis. The City Council's Findings for Ordinance 549 were in error, and confirmation of the fundamentally wrong assessments was arbitrary and capricious. This Court should reverse.

6.3 The City's Commissioned Appraisals of Appellant's Properties are Founded on a Fundamentally Wrong Basis (Issues 3.1, 3.5; Errors 2.1, 2.5)

The assessment must also be set aside because the appraisals on which the City based its decision were founded on a fundamentally wrong basis and were therefore incompetent evidence of value. Our Supreme Court set aside an assessment based on fundamentally wrong appraisals in *Doolittle v. Everett*, 114 Wn.2d 88, 786 P.2d 253 (1990):

We hold that the assessment is founded upon a fundamentally wrong basis, which is a statutory ground for annulling an assessment.

The City's expert testimony here was clearly grounded upon a fundamentally wrong basis. The testimony was entirely premised on an incorrect legal principle – that lots improved to separate uses could be assessed as a single unit. The City's expert testimony must be disregarded. There is no special deference to be accorded the Council's decision based on that unacceptable testimony....

Doolittle, Id., at 91, 106. The City's appraisals here were fundamentally wrong for a number of reasons, requiring the assessments to be set aside.

6.3.1 *City's Appraisals were Founded on Inaccurate and Incomplete Information about Appellant's Properties*

The obvious requirement of any appraisal is that it first be founded upon accurate and complete information. An appraisal conducted in secret without the knowledge or participation of the property owner (as was done here (AR 0031, 0048; CP 58, 62)), simply cannot, and in this instance specifically, did not result in a complete and accurate assessment. Because the City prevented the appraiser from contacting the property owner, and the written appraisal was formed merely from what could be seen from the street, from public data, and [mis]information provided by the City (AR 0033; CP 60), Napavine's commissioned appraisal is unreliable evidence to support its conclusion.

The additional oral appraisal given to the City Council in the form of *ad hoc* testimony was not accompanied by documentation, but rather on the appraiser's unsupported interpretation of a City Code requirement that would seemingly require Appellant to forfeit his water rights to the City and remove his private water system without due process or compensation for the taking.

Both the written appraisal (AR 0015-0071) and the oral testimony appraisal (AR 0169-0177) failed to assign any value to Appellant's existing water system and water rights; failed to analyze how the cost of city water will

affect income generated from tenancies; failed to provide any cost-benefit analysis to account for Appellant's lost value of the private water system versus the costs of city water; failed to include any substantiation for the new development that the appraisals stated would come once the property is on city water; and then improperly assessed the totality of the acreage at a presumed highest and best value. The City's appraisals did not provide competent evidence to support the assessments. The errors were briefed and fully argued before the Superior Court (CP 35, 199; Tr. 15-17, 73, 101-106, 108).

6.3.2 *The City's Appraisers Failed to Evaluate Appellant's Properties on the Basis of the Properties' Values Immediately Before and Immediately After the LID Improvements*

The amount of the special benefits attaching to the property, by reason of the local improvement, is the difference between the fair market value of the property immediately *after* the special benefits have attached, and the fair market value of the property *before* the benefits have attached (citation omitted).

Appeal of Schmitz, 44 Wn.2d 429, 434, 268 P.2d 436 (1954).

The City's commissioned written appraisal was made in April 2012; there was no written appraisal performed immediately before and after the LID improvements were completed in 2015 (the February 2015 re-submittal was still based on the April 2012 valuation AR 0017; CP 57). The testifying appraiser, Darin Shedd, did not support his statements about increased value with any documentation, and instead deferred to the written appraisal: "I reviewed this appraisal. It was done by my employee and colleague, Debra

Forman. The special benefits that are indicated, I certainly agree with.” (AR 0171; CP105.) Napavine failed to support its 2015 LID assessment roll with a timely relevant appraisal of Appellant’s properties.

Even aside from the obsolescence of the City’s commissioned appraisal, the analysis used to calculate the values immediately before and after the LID improvements on Appellant’s properties is incorrect. The testifying appraiser also had no contact with the property owner:

[I]n a typical appraisal you would like to be with the property owner, go out with the property owner and inspect it, but this was limited in the scope that we were requested not to meet with the property owner.... We weren’t allowed to be with the property owner, gather the property leases that he may have had on the property and look at some of that information.

AR 0273; CP 106.

The “before” value (e.g., existing value on the April 2012 review date) is derived from County assessor records due to the inability of the appraiser to inspect the property improvements, interview the owner, and lack of access to information on leases (AR 0050). The “after” value is assumed to be after the LID water system improvements are built and able to be utilized, but as we know, Well 6 cannot be used in the manner that had been planned in the LID.

This “after” value is based on further erroneous assumptions: “The only difference in the “after” condition compared to the “before” condition[] is the property is now served by the public water system. The owner no longer has the cost and expense of the private water system nor the cost to extend the

water system in order to develop the excess land” (AR 0057; CP 64.)

However, the appraisal failed to factor into the “after” value the costs of City water connection fees and monthly water charges for the existing development, and how all of these additional expenses for City water will affect tenant retention and income from leases.

The testifying appraiser based his opinion for the “immediately after” valuation increase on a City Code which he believes requires the private water system to be dismantled and water rights forfeited, thereby forcing Appellant to immediately connect his existing developed properties to City water. The appraiser not only failed to acknowledge Appellant’s inherent grandfathered rights which allow him to continue serving existing tenants through his private water system, but also failed to factor in the inability of Well 6 to provide drinking water, resulting in the City being unable to implement LID 2011-1 in the manner it had been approved. This opinion is based on a self-fulfilling prophecy: The LID allegedly benefits the property by providing water that the property would not need, but for the LID.

6.3.3 The City’s Appraisers Failed to Evaluate Appellant’s Properties based on Existing Uses, and Not Speculative Uses

The written appraisal’s “after” valuation goes on to further theorize what it would cost Appellant to extend his private water system to the undeveloped portions of his property, but assumes, without any foundation whatsoever, that Appellant would need an entirely new and additional private

water system with new well, booster stations, reservoir, etc., and then uses that conjecture to inflate the costs for new development on a private system versus connection to City system. (AR 0057; CP 64.)

Both appraisals are based on the speculation that once connected to the LID improvements, Appellant's undeveloped portions of his property would become immediately occupied with development (AR 0057-0058; CP 64-65), but provided no market data or any analysis at all to show any likelihood that Appellant's property would be developed in the near-term, much less immediately after the LID improvements.

A valuation based on a speculative use is an improper basis for an LID assessment appraisal:

The degree to which a property specially benefits from an LID is measured by the difference between the fair market value of the property immediately before and immediately after the improvement. *Doolittle*, 114 Wn.2d at 93 ... and *cannot include speculative value*.

Kusky v. City Goldendale, 85 Wn. App. 493, 498, 933 P.2d 430 (1997)

(emphasis added).

[A]n owner who is assessed for LID improvements based upon potential highest and best use is forced to pay an assessment on a valuation which may or may not become a reality.... When the governmental unit assesses its LID charges on a theoretical, compared to existing use, it is forcing the owner to pay on the basis of what an expert says the owner *should* do with his property.

Doolittle v. Everett, 114 Wn.2d, 88, 105, 786 P.2d 253 (1990) (emphasis in original).

6.3.4 *The City's Appraisal Evaluations were Not based on the Special Benefits Resulting from the LID Improvements*

The written appraisal is based on the incorrect presumption that the LID water improvements are superior to the Appellant's existing private water system, and incorporates this supposition despite the fact that the appraiser was not permitted by Napavine to contact the property owner to confirm necessary data. (AR 0031, 0048; CP 58, 62.) It is more accurate to say that the written appraisal evaluation is based on only an *assumption* that the LID benefits would result in increased value to Appellant's properties.

The entire premise of the testifying appraiser is not that the LID improvements themselves would increase the value of Appellant's properties, but rather the increased value could be realized only after the properties were first divested of their water rights and the private system removed, and then replaced by the City's water system (AR 43-45). Not only is this not an increase in value "immediately after" the improvements, but the ability for the property to increase in value hinges on the enforcement of a questionable city regulation instead of the actual LID benefits. Both the written and oral appraisals failed to demonstrate that Appellant's property would increase in value because of the LID benefits.

LID 2011-1 offers nothing to Hamilton Corner I LLC that it didn't already have prior to the LID improvements and Assessment Roll confirmation.

This principle is well illustrated by *In re Shilshole Ave.*, 85 Wash. 522, 525, 148 P. 781 (1915), which held invalid an assessment “... for a thing which did not benefit that property, was founded upon a fundamentally wrong basis and is wholly indefensible.” *Shilshole at Ave.*, 85 Wash. At 536. The court emphasized that “the basic principle and the very life of the doctrine of special assessments [is] that there can be no special assessment to pay for a thing which has conferred no special benefit upon the property assessed.” *Shilshole Ave.* 85 Wash. at 537.

Hasit, LLC v. City of Edgewood, 179 Wn. App. 917, 938-939, 320 P.3d 163 (2014) (parenthetical in original).

It has been law for 100 years that the special assessment must be directly tied to the special benefit. In *Horton Investment Co., v. Seattle*, 94 Wash. 556 (1917), Seattle imposed an assessment for fill to raise the street level, which might someday result in a benefit to Horton if the sewer were expanded; however, the present sewer system was good for another 15 years.

The Court ruled:

It seems to us that the filling of this street, which, as the evidence shows, was solely to benefit other property than that in the district, and to aid a thing not even contemplated as part of the improvement here involved, is too remote to serve as a taxable benefit to this property. A thing which is not a benefit cannot be made the basis of an assessment for benefits. This would seem to be axiomatic [citations omitted].

Horton Investment Co., Id., at 561-562.

6.3.5 The City’s Appraisers Did Not Appraise Appellant’s Properties as Individual Parcels

Appellant’s property is comprised of three tax parcels. The smallest parcel is undeveloped; the next-smallest parcel has a trailer-storage tenant; and

the largest parcel has several tenants (two fast food restaurants; one full-service restaurant; a service station; RV & Canopy sales and service) as well as a large undeveloped area being farmed as a hayfield. In the appraisers' evaluations, however, all of the property was evaluated as one unified parcel in reaching the per-square-foot "after" value, and then the totality of the acreage was improperly appraised at the highest and best use (AR0022-0029, AR0039, AR0058). This was exactly the fundamental error that rendered the appraisals incompetent in *Doolittle*. See *Doolittle*, 114 Wn.2d, at 106.

The testifying appraiser's opinion went even further because in his evaluation, he first stripped out the private water system and appurtenant water rights (AR 43-45), which would leave the existing tenants dependent on City water. This is an improper basis for a LID assessment appraisal:

The City's principal appraiser proceeded on the basis that all improvements would be removed, the parcels combined ... and existing rental incomes destroyed....As an appellate court, it is not our function to reexamine such evidence....However, all of the testimony of the City's experts on appraisal of the lots was based on use of the lots as an integrated whole. This court has previously held that where expert testimony regarding valuation of the special benefits was grounded on a fundamentally wrong basis, that testimony should be disregarded. [Citations omitted.] The City's expert testimony here was clearly grounded upon a fundamentally wrong basis....There is no special deference to be accorded the Council's decision based on that unacceptable testimony.

Doolittle v. Everett, 114 Wn.2d, 88, 105-106, 786 P.2d 253 (1990).

6.3.6 The City's Appraisals of Appellant's Properties are Founded Upon a Fundamentally Wrong Basis

Appellant refuted the City experts' appraisals of his property as being founded upon a fundamentally wrong basis because: (1) they were premised on incomplete and inaccurate information about the property; (2) were based upon an outdated valuation; (3) improperly included the values of speculative uses; (4) impermissibly included the value of Well 6 benefits not received; and (5) incorrectly evaluated Appellant's properties as one unified parcel at the highest rate. Ultimately, the appraisals fail to support the requirement that the LID improvement must increase the property value at least as much as the assessments. The City's appraisals are incompetent evidence of value, rendering the City's decision grounded on a fundamentally wrong basis.

Despite all of these deficiencies with the City's appraisals, the City Council confirmed the assessments on Appellant's properties, without modification. The Superior Court erred in upholding the City by saying that Appellant presented no competent evidence or legal theory that the City's decision was fundamentally wrong or arbitrary and capricious. No additional evidence from Appellant was required; the Superior Court should have disregarded the City's appraisals as incompetent based on their own deficiencies (CP 34-35):

It is solely within the providence of the trial court to determine matters of credibility. *Ladley v. St. Paul Fire & Marine Ins. Co.*, 73 Wn.2d 928, 442 P.2d 983 (1968). The irregularities ... were sufficient to justify the conclusion that the information

supplied to the expert witness was incomplete or unreliable. When that conclusion is reached, the trier of fact may disregard the opinion entirely. See *In re Estate of Hastings*, 4 Wn. App. 649, 484 P.2d 442 (1971), where we held that even where opinion evidence is persuasive, the trial court is not obliged to accept it.

Jarstad v. Tacoma Outdoor Rec., 10 Wn. App. 551, 556; 519 P.2d 278 (1974).

More importantly, the Superior Court should have relied on *Doolittle v. Everett*, 114 Wn.2d 88, P.2d 253 (1990), for the principle that an LID appraisal analysis founded on a fundamentally wrong basis is grounds to annul the assessment (Tr. at 101-102).

6.3.7 Opposing Expert Opinion is Not Required to Refute an Appraisal Founded on a Fundamentally Wrong Basis

While earlier case law deciding LID assessment appeal may have necessitated appellant to provide expert opinion in disproving the City's presumption of validity, that is no longer the law. This current legal interpretation was acknowledged by Napavine's attorney in a public hearing before the City Council: "We note that some of the more recent cases have recognized that a property owner doesn't necessarily need appraisal information in order to maintain a valid protest..." (AR 0169.)

This Court has further explained that once Appellant offers credible evidence contesting the City's presumption of validity, then the burden of proof for the assessment actually shifts to the City:

These presumptions, however, merely "establish which party has the burden of going forward with evidence," and when "the other party adduces credible evidence to the

contrary,” the burden shifts to the city, [citations omitted]. Thus, where a protesting owner alleges her assessment exceeds the special benefit and presents sufficient evidence to overcome the presumptions, but the city confirms the assessment roll regardless, a court will reduce or annul the assessment as arbitrary and capricious unless the city presented sufficient competent evidence to the contrary.

Hasit v. City of Edgewood, 179 Wn. App. 917, 935-956, 320 P.3d 163 (2014).

Moreover, this Court has further clarified that Appellant’s evidence need not even be an appraisal, and may be in the form of challenging the deficiencies of the City’s expert:

However, neither precedent nor the plain meaning of the passage from *Cammack* imply the requirements that (1) the challenging party present the evidence, (2) the expert evidence be “appraisal evidence,” or (3) that a party claiming disproportionate assessment “must” support the claim with such evidence. With respect to the requirement that the protesting owner must present the evidence, we have explicitly rejected an argument that because certain protestors “failed to offer expert testimony at the city council hearing[,] the presumptions [in favor of the assessment] were still operative as to their property.” *Indian Trail Trunk*, 35 Wn.App at 843.

Hasit, LLC v. City of Edgewood, 179 Wn. App. 917, 946, 320 P.3d 163 (2014).

The City’s appraisals were grounded on a fundamentally wrong basis. They were based on incorrect information and incorrect legal principles. Under *Doolittle*, the appraisals were incompetent evidence of value and must be disregarded. The City could not rely on the fundamentally wrong appraisals. As a result, the City’s confirmation of the assessments was grounded on a fundamentally wrong basis, was arbitrary and capricious, and must be reversed.

6.4 **Napavine's Decision to Confirm Assessments that were Founded Upon a Fundamentally Wrong Basis and Lacks Due Process is Arbitrary and Capricious**
(Issues 3.2, 3.6; Errors 2.2, 2.6)

The City's confirmation of the assessments was also arbitrary and capricious because the City violated due process by failing to provide Appellant meaningful notice or opportunity to be heard regarding the assessments and appraisals. The City deliberately prevented Appellant from responding to the appraisals at a public hearing prior to confirmation.

The appraisal of Appellant's properties was commissioned by the City of Napavine, and conducted in secret, at the City's request, to determine the 'before' and 'after' value as of April 24, 2012. (AR 0017, 0045; CP 57). As stated in the report: "At the request of the Client [Napavine], the property owner was not contacted ... there was no owner contact and the improvements were only inspected from the exterior of public areas." (AR 0031; CP 58). Throughout the report, the Appraiser identifies the various limitations due to the inability to contact the property owner to obtain non-public business information, and directly inspect the full property.

The Special Benefits appraisal report was re-transmitted to the City by letter dated February 22, 2015, yet still relied upon the April 24, 2012 valuation (AR 0016-0017, 0031-0032; CP 56-59). Although the City had known about this appraisal report since 2012 (as evidenced by the City's payment for it, charged to the LID (AR 314-317; CP 161-164)), the report was

not disclosed to Appellant until shortly before the October 27, 2015 public hearing on the assessment roll, in response to Appellant's public records request for the City to provide data to support its assessment amounts (see Hamilton's assessment roll protest letter AR 0074-0076; CP 67-69).

Napavine orchestrated the withholding of the appraisal and other important valuation information so that Appellant would have insufficient time in which to respond with his own opposing expert appraisal:

(1) Napavine commissioned a "secret" appraisal of appellant's properties in April 2012;

(2) A review of the record shows that Napavine's final assessment roll identifying the assessment roll amounts for Appellant's parcels was not published until 9/29/15 for a 10/27/15 hearing;

(3) A day or two prior the 10/27/15 hearing, the City finally disclosed its previously-commissioned appraisal of Appellant's properties, and provided a copy of that 2012 report in response to a public records request (but there was barely enough time to even review it, much less substantively respond);

(4) At the end of 10/27/15 hearing, Napavine's attorney recommend the council "hold the hearing over" for a month to allow time "to read these comments and protests and develop our staff report and recommendations for either modifying or accepting the assessment roll." The Mayor concluded by stating: "This public hearing is over." (AR 0156-0157.) Based on these statements, it did not appear the City would allow new testimony or exhibits,

from Hamilton Corner I LLC. The City also issued no new notice to extend the public hearing.

(5) At the beginning of the November 24, 2015 City Council meeting, the Mayor opens by re-characterizing it as a “continuation” of the prior hearing (AR 158). The City had brought in an appraiser to testify in support of the 2012 appraisal. No notice was provided to Mr. Hamilton that the City would have an appraiser make a presentation regarding the valuation of Appellant’s property. At the conclusion, the Mayor again closed the hearing. The City intentionally obstructed Appellant’s ability to provide his own expert analysis, and prevented Appellant from having his own counsel cross-examine the testifying appraiser.

In *Hasit, LLC v. City of Edgewood*, 179 Wn. App. 917, 945, 320 P.3d 163 (2014), this Court identified a comparable tactic used by Edgewood – preventing assessment roll protestors from responding with their own expert appraisals and then rejecting their challenges on a lack-of-evidence basis (similar to what the Superior Court has done in this appeal). This Court held Edgewood’s tactic to be a deprivation of due process, and arbitrary and capricious. This court ultimately annulled the City’s assessments as to the protestors’ properties:

Because the notice was misleading and because the interval between its mailing and the hearing did not allow the owners sufficient time to obtain the type of evidence necessary to successfully challenge an LID assessment, we

agree that the City denied the owners' due process right to a meaningful opportunity to be heard.

The constitutional problem is further exacerbated by the City's apparent failure to timely make available the information on which Macaulay relied in preparing parcel-specific value estimates. For example, respondent Docken stated that he did not receive parcel-specific information until the day of the hearing, and the information consisted of only one page, with no explanation of how the special benefits were calculated.¹⁰

Hasit v. City of Edgewood, 179 Wn. App 917, 952, 957, 320 P.3d 163 (2014).

The conclusion here should be the same. Napavine's failure to make the appraisals available in a timely manner and failure to provide a meaningful opportunity for Appellant to be heard in opposition violated due process and was therefore arbitrary and capricious. This Court should reverse the City's confirmation of the assessments.

6.5 Reliance on Unsubstantiated Theory and Incorrect Facts Concerning Other LID Assessment Appellants is Not a Proper Basis for the Court's Decision
(Issue 3.7; Error 2.7)

The Superior Court stated in its Decision: "Notably, of all the entities within the LID, only Appellant has chosen to appeal the assessment. Surely if

¹⁰ We call the Court's attention to the similarity of these facts to our instant case wherein the parcel-specific final assessments were disclosed less than 30 days prior to the protest hearing, and responses to Appellant's public record requests for LID assessment valuation information was not provided until a day or so before the protest hearing. Appellant's protest letter points out that all he received in response to his request to the City for documentation to support the assessment amounts was a "one-page 'Budget' ... [plus the appraisal prepared without his knowledge or participation] that does not explain what was constructed for \$1.5 million." AR 0074-0075; CP 67-68. Further, the City failed to provide notice that it would present an additional appraiser's testimony of Appellant's property at a continued hearing.

the method of assessment were fundamentally unfair, Appellant would have found some allies among the LID.” (CP 239.) While the Court may have found it “notable,” it is not true that Hamilton Corner was the only appellant of the LID assessment, and even if it were, being a sole Appellant is not a proper basis for the Court to then infer that Hamilton Corner’s appeal is without merit.

As evidenced in the record, in addition to Hamilton Corner I LLC, there were several protests of the LID Assessments to the Napavine City Council: Bethel Church (AR 0072); Glen Cook (AR 0073); and Brad Bond (AR 0077). Of these protestors, Hamilton Corner and Glen Cook subsequently appealed to the Lewis County Superior Court. Glen Cook’s appeal was later dismissed voluntarily through a stipulated order. (This Court may take judicial notice of the Glen Cook administrative appeal filed December 4, 2015, assigned Lewis County Superior Court No. 15-2-01193-21, and subsequent stipulated dismissal on January 5, 2016.)

Notwithstanding the Superior Court’s misstatements of fact, the presence or absence of other appellants has no legal bearing on the merits of this Appellant’s appeal made under Chapter 35.44 RCW, and no authority was cited. There are a multitude of reasons why others may not have appealed the unfair LID assessments. (For example, Napavine’s noticing is confusing and deficient, and the statutory protest and appeal timeframes are very short, in addition to other procedural hurdles.) The Court’s Decision should not have been influenced by its [incorrect] belief that there was no other appellant.

7. CONCLUSION

There are several significant reasons why the Napavine City Council should not have affirmed the assessment roll, not only for Appellant's properties, but for all of the LID-assessed properties. The Superior Court erred by failing to annul the City's assessments founded upon a fundamentally wrong basis, and which the City Council arbitrarily and capriciously confirmed.

7.1 **The Materially-Altered LID Fails to Provide the LID Participants the Benefits for which they are Assessed; the Assessment Roll is Founded Upon a Fundamentally Wrong Basis.**

The discolored water problem with Well 6 prevents it from being used to supply drinking water. The whole reason for LID 2011-1 was to enable Napavine to supply potable city water in the area of Exit 72 at Interstate-5 with water from the new City Well 6. The presumed increase in property valuations for all of the properties was entirely premised upon these properties receiving drinking water, which would come from Well 6. The LID was materially altered without any public amendment process, and people paying the assessments are not receiving the full benefits they are paying for. Napavine's confirmation of Assessment Roll for LID 2011-1 is founded on an error so fundamental that it necessitates a nullification of the entire assessment. It must be annulled as to Appellant's properties.

7.2 The City Council's Confirmation of the Assessment Roll, Knowing the Assessments are Funding Benefits Not Received, is Arbitrary and Capricious

Furthermore, the City Council was fully aware that the discoloration of Well 6 meant it could not be used for drinking water and the LID participants would not be receiving the full benefits of LID 2011-1. The Council was also fully aware that there was no present solution to correct the problem, or any funding for a permanent solution, or any timeframe for when the problem could be corrected or the solution funded. The Council could have postponed the assessments, reduced the assessments, or amended the LID, but instead it did what it could not legally do, and that was to assess the LID participants for benefits not received. The City Council's decision was made without regard to the facts and circumstances, and was therefore arbitrary and capricious.

7.3 The City's Appraisals of Appellant's Properties were Founded upon a Fundamentally Wrong Basis

Appellant is in a different position than most of the other LID participants because he already has long-established tenants using a pre-existing private water system. Thus, even if Napavine were able to provide clean, clear city water, it would not result in a benefit that exceeds Appellant's \$170,000 assessment.

The City's commissioned appraisals were incompetent evidence of value to support the assessment. Due to the City's no-contact directive, the appraisers were not permitted to review essential business records that

normally would be supplied by the property owner, and instead were limited to public data and erroneous information supplied by the City. The 2012 appraisal evaluation does not provide a valuation immediately before and after the LID improvements in 2015. The appraisals were entirely based on speculative use (and without any supporting research), instead of values resulting from the special benefits themselves. The appraisals improperly calculated a highest and best value applied to the total square footage of all of Appellant's properties, rather than taking into consideration the different parcels and different existing uses. The appraisals were also predicated upon the City supplying clean, clear drinking water to Appellant's property from the new City Well 6 and other LID-2011-1 improvements, which the City is, in fact, unable to provide. The appraisers' resulting opinions were based on incorrect information and incorrect legal principles and were therefore incompetent evidence. The City's confirmation of the assessments was founded upon a fundamentally wrong basis

7.4 City's Confirmation of Assessments on Appellant's Properties, Despite the Fundamental Errors and Lack of Due Process Afforded to Appellant, Renders the Council's Decision Arbitrary and Capricious

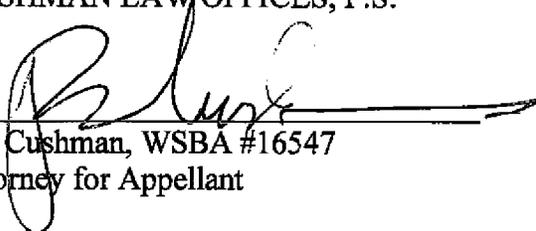
Appellant established that the City's appraisals of his property were not credible, and did so despite the City's maneuverings to deny Appellant due process. The City Council knew that the appraisers' opinions were based on incomplete and inaccurate information, and the appraisals were incorrectly

predicated on the Well 6 drinking water improvements to the LID 2011-1 benefit area, which could not be realized. The Napavine City Council's Decision affirming the assessments on Appellant's properties was made willfully and unreasonably, and therefore was arbitrary and capricious.

The Superior Court also knew that the City's appraisals were not competent and failed to comply with the standard analyses required in appraisals for LID improvements, and that Appellant had established evidence to refute these appraisals. The Superior Court's Decision to affirm the City Council was in error. The assessments should be annulled as to Appellant's properties.

SUBMITTED this 17th day of November, 2016.

CUSHMAN LAW OFFICES, P.S.



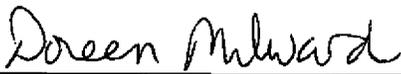
Jon Cushman, WSBA #16547
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the date signed below, I e-filed the foregoing document with this Court, and served it upon Respondent's attorneys via email and regular mail.

DECLARED UNDER PENALTY OF PERJURY ACCORDING TO
THE LAWS OF THE STATE OF WASHINGTON.

Dated this 17th day of November, 2016, in Olympia, Washington.



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Fury v. City of North Bend

Court of Appeals of Washington, Division One

October 21, 2013, Filed

No. 69294-1-I

Reporter

2013 Wash. App. LEXIS 2481

DENIS FURY ET AL., APPELLANTS, V. THE CITY OF NORTH BEND,
RESPONDENT.

NOTICE: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at *Fury v. City of North Bend*, 2013 Wash. App. LEXIS 2528 (Wash. Ct. App., Oct. 21, 2013)

Prior History: [*1] Appeal from Superior Court King County. Docket No(s): 12-2-11184-7 SEA. Judge signing: Carol Schapira. Date entered: August 28, 2012.

Disposition: Reversed.

Core Terms

property owner, gravity, sewer system, ordinance, assessments, vacuum, protest, special benefit, city council, parcels, City's, hearing examiner, rebuttal, fundamentally, estimated, superior court, materially, annul, notice, sewer, new ordinance, installed, improvement district, local improvement, material change, municipality, procedures, witnesses, provides, requires

Counsel: Stuart W. Carson and Todd W. Wyatt, Carson & Noel PLLC, Issaquah, WA, for Appellants.

Bruce Laurence Disend, Kenyon Disend Law Firm, Issaquah, WA, for Respondent.

Judges: AUTHOR: Verellen, J. WE CONCUR: Cox, J., Grosse, J.

Opinion by: Verellen

Opinion

¶1 Verellen, J. — The owners of five parcels within a utility local improvement district (ULID) appeal the trial court's grant of summary judgment to the City of North Bend (City). The owners contend that instead of remanding the matter for a limited hearing on the propriety of the assessments imposed on the owners, the superior court should have annulled their assessments all together, allowing the City to pursue a reassessment of those five parcels. RCW 35.44.250 states that a court shall annul an assessment if it is founded on a "fundamentally wrong basis." A "fundamentally wrong basis" involves errors in the procedures used by the municipality.

¶2 After receiving a petition for a sewer system improvement from property owners, the City passed an ordinance for construction of a vacuum system, specifying the cost would be approximately \$11.7 million. When the City then expanded the ULID to accommodate more parcels, the City determined the increased size of the ULID required construction of [*2] a gravity sewer system, which would cost approximately \$19 million. The City did not pass a new ordinance specifying the material change in design and cost of the improvement; rather, it proceeded with construction and approved construction contracts by resolution.

¶3 Under RCW 35.43.100, the passage of the ordinance creating an improvement district triggers a 30-day window in which the affected property owners may file suit to challenge the improvement district. Because the City did not pass a new ordinance after determining it would build a gravity system, the property owners did not have the opportunity to protest the substantially increased cost of the improvement under RCW 35.43.100. Rather, the appealing property owners had the opportunity to challenge the construction of the gravity system only after the assessments were imposed. We reverse the trial court and annul the assessments of the five parcels at issue, allowing the City to pursue a reassessment.

FACTS

Appendix I

a. *Establishment of ULID No. 6*

¶4 In November 2007, after receiving a petition for sewer service from some property owners, the City created ULID No. 6, which authorized the City to purchase and install a vacuum sewer system. The [*3] ULID was enacted through Ordinance 1293 and provided in part: “The City Council orders the following described improvements: Design and construction of a *vacuum sewer system* in the herein specified portions of the City of North Bend Final Comprehensive Sewer Plan.”¹

¶5 Ordinance 1293 estimated the cost of the sewer improvement to be approximately \$11.7 million, and, pursuant to *RCW 35.44.020*, set forth the various components of the total estimated cost:

The total estimated cost and expense of the improvements is declared to be \$11,685,032. The entire cost and expense of the improvements including all labor and materials required to make a complete improvement, all engineering, surveying, inspection, ascertaining ownership of the lots or parcels of land included in the assessment district, and all advertising, mailing and publication of notices, accounting, administrative printing, legal interest and other expenses incidental thereto, shall be borne by and assessed against the property specially benefited by such improvement included in the [ULID] embracing as nearly as practicable all property specially benefited by such improvement.^[2]

¶6 After [*4] the passage of Ordinance 1293, other property owners requested inclusion in the ULID.³ The City determined the authorized vacuum system would not provide sufficient capacity to the expanded ULID and installed a gravity sewer system instead. The cost of the gravity sewer system was approximately \$19 million.

b. *Notice and Opportunity to Protest Assessments*

¶7 After construction of the gravity sewer system was complete, the City sent notices of the proposed assessments, giving those property owners who wished to protest the assessments an opportunity for a hearing. Thirty-four property owners filed written protests of the assessments. The City appointed a hearing examiner to conduct a hearing and file his recommendations with the city council.

¶8 The hearing [*5] took place on November 10, 2011 and December 20, 2011. The hearing examiner stated at the beginning of the hearing that the property owners “will have a chance to ask questions of any city rebuttal witnesses or evidence.”⁴ The City presented testimony from Ron Garrow, the City’s public works director, from the city engineer, and from Deborah Foreman, the appraiser.

c. *Testimony on Change from Vacuum to Gravity Sewer System*

¶9 On the issue of the change from the vacuum system to the gravity system, Garrow testified that the city council approved the gravity system when it approved the construction contracts for the project.⁵ Garrow testified:

Q. Who made the decision to switch to a gravity system?

A. That was a technical decision through not only the consultants but also the City.

Q. Did the City Council ever pass a resolution approving of a gravity system?

A. They approved the construction of the gravity system through the acceptance of the bids for that project.

Q. Did they—but did they ever pass an ordinance or resolution expressly saying the project is dually [sic] changed due to a gravity system?

¹ Clerk’s Papers at 81 (emphasis added).

^[2] Clerk’s Paper at 81.

³ See Clerk’s Papers at 86 (Ordinance 1452). Ordinance 1452 references Ordinance 1312, but the parties did not include Ordinance 1312 in the record. However, we take judicial notice of the public record, which states there was a public hearing on May 20, 2008 and June 3, 2008 on the proposed expansion of the ULID, and it was determined to be in the best interests of the City and the property owners to include the previously omitted properties.

⁴ Transcript (Tr.) (Nov. 10, 2011) at 7.

⁵ Resolution 1390, [*6] passed on October 6, 2009, accepted the construction bid for piping construction, but did not specify the type of sewer that would be installed. By Resolution 1435, the city council awarded the pump station contract.

A. Not as a separate ordinance, no. ^[6]

¶10 Garrow further testified that the City consulted with its own staff, its consultants, and the city attorney and determined that

the value of the project was still less than the special benefits that were determined at the time [of the proposal for the vacuum sewer system] and therefore because we were still underneath the special benefit, the project was still viable and we didn't have to go out for district property owners' approval [for the gravity sewer system] to go any further. ^[7]

d. *Testimony on the City's Special Benefits Analysis*

¶11 To support the amount of the assessments, the City presented testimony showing the amount of the special benefit afforded to each property owner. Foreman conducted a preliminary special benefits study in 2007. Foreman assessed the average value per square foot of each property within the ULID, and then determined the special benefit the new sewer system would add to each property. For [*7] vacant land, Foreman determined that the addition of a City sewer system would add 25 percent in value.

¶12 In 2011, Foreman made her final special benefits study, concluding that the addition of a City sewer system to vacant land would add approximately 25 percent in value (the same calculation as in 2007). The final special benefits study concluded the "after" value of all of the property within the ULID was \$256,229,300 and the "before" value of the property within the ULID was \$230,415,600, rendering \$25,813,700 in ULID special benefits. With the total cost of the sewer project at \$19,270,000, the City was able to assess 100 percent of the ULID project costs to ULID property owners.

¶13 Many of the owners contested Foreman's appraisal of the property and corresponding special benefits. For instance,

appellant Fury presented evidence that he purchased his parcels for \$475,000 in 2010 with knowledge of the ULID; Foreman's appraisal of the "after" fair market value of those parcels was \$1,122,400. Others highlighted that Foreman's square foot values were the same in 2007 as they were in 2011, reflecting Foreman's failure to take into account the market downturn. ⁸

c. *Continuation of Hearing*

¶14 At the conclusion of the first hearing day, the hearing examiner continued the hearing to December 20 to allow the City to submit rebuttal testimony. On December 20, the City distributed materials to the owners rebutting the owners' protests to the assessments. The hearing examiner noted the objections of the property owners to the new material, but did not grant additional time for surrebuttal. The City also introduced some exhibits which were never provided to appellants before or during the first day of hearing.

¶15 After the City presented its rebuttal testimony, some of the property [*9] owners raised challenges to the fairness of the hearing. They argued the City did not provide the owners with the rebuttal information until the night of the December 20 hearing, and all voiced concern that the hearing examiner did not allow them to present additional witnesses after the City's rebuttal testimony. ⁹

¶16 The property owners presented expert evidence to rebut Foreman's appraisals, arguing there was a significant downturn between 2007 and 2011, resulting in up to 40

^[6] Tr. (Nov. 10, 2011) at 51-52.

^[7] Tr. (Dec. 20, 2011) at 338.

⁸ They specifically argued Foreman [*8] neglected to consider the post-2008 decrease in development, rendering Foreman's appraised values for "highest and best use" impossible to obtain. Protest Letter 32 at 5-15; *see also* Protest Letter 33 at 25-26 (explaining the dearth of lending for proposed commercial developments renders most projects de facto infeasible). Other owners presented the opinion of an accredited appraiser, who stated Foreman did not provide a basis for determining average values and did not utilize market data to determine special benefits. *See* Protest Letter 28 at 72-87; Protest Letter 30 at 10-14.

⁹ Specifically, the property owners objected because Foreman's complete files were not available to them until after the first hearing, and because the City did not disclose certain rebuttal evidence until the second day of hearing. *See* Exs. 26, 37 (requesting disclosure of rebuttal evidence five days before the continued hearing date and reserving the right to respond to rebuttal evidence); Ex. 30 (requesting all reports on which the City relied to support the assessments); Ex. 31 (requesting another opportunity to examine Foreman because the City did not disclose her files until after the first hearing day); Ex. 77 (handwritten letter from Dahlgren).

percent loss in total value. On cross-examination,¹⁰ Foreman [*10] testified she did not make any significant downward adjustment to pre-crash sale and valuation data. She did not offer a full explanation, but suggested that her report did not incorporate market decline from 2008 to 2011, in part because the market began to recover in 2011.

¶17 The hearing examiner issued findings and conclusions and recommended adopting the assessments proposed by the City, with the exception of protests 4, 26 and 33. The hearing examiner declined to rule on the procedural due process issues raised by the property owners.

f. Appeal to City Council and Superior Court

¶18 The owners of ten of the parcels, including the five parcels at issue in this appeal, appealed the hearing examiner's recommendation to the city council. The city council, via Ordinance 1452, accepted and adopted the hearing examiner's findings, conclusions and recommendations, confirming the assessment. The city council also concluded "the ULID [*11] property owners and or their legal counsel ... were afforded the opportunity to question City witnesses; all persons appearing at said hearing were heard."¹¹

¶19 Of the ten who appealed to the city council, five appealed the city council's decision to superior court. These property owners are Dennis and Gail Fury and Tanner Way LLC, Tom Weber, Ken and Nancy Parsons, Tom and Nancy Thornton, and the Dahlgren Family LLC. Upon review of the record and oral argument, the superior court concluded:

Appellants did not have a meaningful opportunity to review written materials presented during the City's rebuttal before the Hearing Examiner, and Appellants having requested the opportunity to examine employees of the City Planning Department who provided

information to the two City witnesses who testified at the hearing.^[12]

The superior court then issued an order remanding the case to the hearing examiner for a limited hearing to allow for "[r]eview of the written materials presented during the City's rebuttal" and "examination of City Planning Department employees who provided information to the City's witnesses."¹³

¶20 The owners of the five parcels appeal the superior court's order of remand,¹⁴ contending the court should have annulled the assessments because (1) RCW 35.44.250 does not authorize the superior court to remand, and the court determined procedural irregularities had deprived the owners of a fair process; (2) the City materially changed the sewer improvement from a vacuum system to a gravity system, substantially increasing the cost and thereby unlawfully increasing the assessments; and (3) the City's appraiser estimated the assessments upon a fundamentally wrong basis because she did not take into consideration decreased property values.¹⁵

DISCUSSION

a. Standards of Review

¶21 RCW 35.44.250 sets forth the procedure [*13] by which to appeal assessments to superior court. The statute provides relief to property owners if a ULID assessment is founded upon a "fundamentally wrong basis and/or the decision of the council ... was arbitrary or capricious":

[T]he superior court shall hear and determine the appeal without a jury 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

¹⁰ While the owners did have the chance to cross-examine both Foreman and Garrow, it became apparent that other City employees in the planning department had the personal knowledge underlying Foreman and Garrow's testimony. See Tr. (Dec. 20, 2011) at 221, 315, 358-59.

¹¹ Clerk's Papers at 87.

^[12] Clerk's Papers at 151-52.

¹³ Clerk's Papers at 152. Appellants [*12] did argue to the court that the remedies available to them were limited by RCW 35.44.250, and that crafting a "limited" remand was outside the scope of the statute. See Clerk's Papers at 148-50.

¹⁴ This court previously determined the order of remand was appealable as a matter of right.

¹⁵ In the alternative, appellant Dahlgren requests a modification of his assessment on the grounds that his assessment is greater than the special benefit the sewer system provides to his property.

which event the judgment of the court shall correct, change, modify, or annul the assessment insofar as it affects the property of the appellant.¹⁶

“Arbitrary and capricious” refers to “willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.”¹⁷ An action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe the action to be erroneous.¹⁸

¶22 In *Abbenhaus v. City of Yakima*, our Supreme Court adopted the lower court’s [*14] definition of “fundamentally wrong basis,” which was “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.”¹⁹ The *Abbenhaus* court then noted the lower court’s definition was inconsistent with the legislative mandate of RCW 35.44.250 that relief be awarded “insofar as it affects the property of the appellant.”²⁰ Accordingly, a “fundamentally wrong basis” involves error in the method of assessment or in the procedures used by the municipality, but relief is available only to those property owners who challenge their assessments.

¶23 Appellate review of the superior court’s determination under RCW 35.44.250 “should not be an independent consideration of the merits of the issue [*15] but rather a consideration and evaluation of the decision-making process.”²¹ On appeal, we consider the record before the hearing examiner.²² To the extent the appellants raise issues of statutory interpretation, we review de novo the meaning of a statute.²³

b. Fundamentally Wrong Basis

¶24 The appellants contend their assessments are founded on a fundamentally wrong basis and must be annulled because they did not receive adequate notice of the cost of the gravity sewer system. To support their argument, appellants rely predominately on RCW 35.43.070, which provides that an improvement may be ordered only by ordinance; on RCW 35.43.100, which provides a 30-day period, triggered by the ordinance forming the ULID, in which to protest the formation of a ULID; and on RCW 35.44.020, which requires the City to provide a cost estimate for the authorized improvement.

1. RCW 35.43.070 & RCW 35.43.100

¶25 RCW 35.43.070 mandates that whether by petition or resolution, all improvement districts must be created through ordinance: “A local improvement may be ordered only by an ordinance of the city [*16] or town council, pursuant to either a resolution or petition therefor. The ordinance must receive the affirmative vote of at least a majority of the members of the council.”

¶26 Appellants argue the change to the gravity system was unlawful because the city council did not approve the change from a vacuum system to a gravity system through enactment of a separate ordinance. Ordinance 1293, which authorized the City’s initial proposal for construction of the vacuum sewer system, specified the improvement as a “vacuum sewer system” and estimated a cost of \$11,685,032.

¶27 The City responds that nothing in the plain language of RCW 35.43.070 prevents a municipality from approving increased cost of an improvement. The City highlights that the same section of Ordinance 1293 that specified construction of the vacuum system also stated that “[a]ll of the foregoing ... may be modified by the City Council as long as such modification does not affect the purpose of the improvement.”²⁴ Further, the City highlights that the city

¹⁶ RCW 35.44.250.

¹⁷ *Abbenhaus v. City of Yakima*, 89 Wn.2d 855, 858, 576 P.2d 888 (1978).

¹⁸ *Id.* at 858-59.

¹⁹ 89 Wn.2d 855, 859, 576 P.2d 888 (1978) (quoting *Cammack v. Port Angeles*, 15 Wn. App. 188, 196, 548 P.2d 571 (1976)).

²⁰ *Id.* (“[W]e emphasize that the statute [RCW 35.44.250] provides that where such fundamental error exists the court is limited to nullification or modification only of those parcel assessments before it.”).

²¹ *Id.* at 859-60.

²² *Id.* at 860.

²³ *Pasco v. Pub. Emp’t Relations Comm’n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992).

²⁴ Clerk’s Papers at 81.

council approved the change from a vacuum system to a gravity system by resolutions that awarded the construction contracts for the gravity system. Appellants also point out [*17] that RCW 35.43.100 gives property owners 30 days to contest a ULID after passage of the ordinance. The statute reads:

The council may continue the hearing upon any petition or resolution provided for in this chapter and shall retain jurisdiction thereof until it is finally disposed of. The action and decision of the council as to all matters passed upon by it in relation to any petition or resolution shall be final and conclusive. No lawsuit whatsoever may be maintained challenging the jurisdiction or authority of the council to proceed with the improvement and creating the local improvement district or in any way challenging the validity thereof or any proceedings relating thereto unless that lawsuit is served and filed no later than thirty days after the date of passage of the ordinance ordering the improvement and creating the district or, when applicable, no later than thirty days after the expiration of the thirty-day protest period provided in RCW 35.43.180.^[25]

¶28 Appellants rely on *Buckley v. City of Tacoma* [*18]²⁶ to refute the City's position that it could make material changes to the cost of the improvement without regard to the statutory procedures. There, our Supreme Court invalidated assessments levied by Tacoma where the city had passed a resolution to improve a street by grading and installing sidewalks but provided no details. Once the city completed the work, it passed another resolution taxing property owners for the improvement. The court reasoned

that "the difference in cost [between the vague proposal and what was actually installed] may mean an easy payment by the owner in one case and substantial ruin in another."²⁷ The court further noted that to allow such a process would be "to cut off from property owners all knowledge of what they will be expected to answer for, and to deprive them of the opportunity to remonstrate in sufficient numbers if they see fit."^{28, 29}

¶29 Appellants did not have the opportunity to protest the change to a gravity sewer system and its resulting 63 percent cost increase because the City did not pass a new ordinance under RCW 35.43.070 specifying this material change. Appellants' only opportunity to challenge ULID No. 6 was within 30 days of the passage of Ordinance 1293. But Ordinance 1293 described a materially different, and much less expensive, sewer system. Appellants were accordingly without recourse to invoke RCW 35.43.100 to challenge the substantially increased cost of the vacuum system.

¶30 Consistent with RCW 35.43.070, RCW 35.43.100, and *Buckley*, once the City became aware of the substantially increased cost of the gravity sewer system, it should have passed a new ordinance giving the property owners a new opportunity to protest.

2. RCW 35.44.020

¶31 Appellants also rely on RCW 35.44.020, which requires certain cost items to be included in every local improvement for assessment against the property in the district, and

^[25] RCW 35.43.100, RCW 35.43.180 applies only to improvement districts initiated by resolution, rather than petition. ULID No. 6 was initiated by petition.

²⁶ 9 Wash. 253, 37 P. 441 (1894).

²⁷ Id. at 262.

²⁸ Id.

²⁹ Appellants rely on *George v. City of Anacortes*, 147 Wash. 242, 265 P. 477 (1928) for the proposition that a municipality cannot set forth the particulars of an improvement and then substantially change them. Appellants' reliance on *George* is misplaced. In that case, [*19] the city changed the location of the water system improvement. *George*, 147 Wash. at 244-45. The court rejected the city's change because the ordinance had detailed the specific street where the main was to be located, and the record presented "no change of situation requiring a departure from the plan, lack of feasibility, or any reason other than a desire to substitute a different plan than that submitted to the people." Id. at 246. Here, while the change to a gravity system materially increased the cost, that change in cost was forced by feasibility concerns—a vacuum sewer system would not meet the projected capacity of the expanded ULID. Further, the remedy awarded to the property owners in *George* was to order the city to install the main in the original location. This type of remedy is not available here because the dispute arose after the gravity system had already been constructed.

Appellants also rely on *Sage Transit v. Sound Transit*, 151 Wn.2d 60, 68, 85 P.3d 346 (2004) for the proposition that taxpayer funds cannot be used to construct a substantially different public project than the one approved by voters. That case involved a public project approved by voters in multiple [*20] counties, unlike the ULID at issue here, which taxes only the benefited property owners.

specifically requires “[t]he cost of all of the construction or improvement authorized for the district.”³⁰

¶32 At oral argument, the City contended that once a ULID is formed, the City has carte blanche to authorize cost increases for the improvement, as long as the total cost does not exceed the special benefit afforded to the property owners. We are not persuaded. RCW 35.44.020 requires the City to include a cost estimate. If the City has latitude to materially increase the initial cost estimate without proper notice to the property owners, RCW 35.44.020 serves no purpose.

c. Remedy of Property Owners

¶33 Finally, the City emphasizes it was necessary to change the type of sewer system because the City expanded the ULID to serve additional property owners. Once the ULID expanded, the City [*22] conducted a value engineering study on the proposed vacuum system. The study revealed that the vacuum system would not work “because the expected flows from the properties to be served was going to exceed the capacity of what a vacuum system could handle and therefore the design had to be changed to a gravity system.”³¹

¶34 We recognize that to accommodate all of the property in the expanded ULID, the City had to construct a system with

appropriate capacity. However, once the City became aware of the substantially increased cost of the gravity sewer system, it should have passed a new ordinance, thus triggering a new notice and protest period for all property owners within the expanded ULID. As the appellants vigorously protest, the only validly created ULID was for a \$11.7 million vacuum sewer system. No ULID was ever created for a \$19 million gravity sewer system.

¶35 Although the City passed resolutions adopting construction contracts for the gravity system, in proceedings open to the public, these procedures were in violation of the statutory requirements for creation of improvement districts. The City does not have authority to impose assessments for an improvement [*23] not created under the ULID statutes. The property owners should have had the chance to protest the substantial and material changes to the sewer system. Because we have determined the City’s material change to sewer improvement necessitated the passage of a new ordinance and a new 30-day protest period, we decline to address the remaining issues.³²

¶36 Consistent with Abbenhaus, we reverse the trial court and annul the assessments only of the appealing property owners, allowing the City to pursue a reassessment.³³

Grosse and Cox, JJ., concur.

³⁰ “There [*21] shall be included in the cost and expense of every local improvement for assessment against the property in the district created to pay the same, or any part thereof: (1) The cost of all of the construction or improvement authorized for the district including, but not limited to, that portion of the improvement within the street intersections; (2) The estimated cost and expense of all engineering and surveying necessary for the improvement done under the supervision of the city or town engineer.” RCW 35.44.020.

³¹ Tr. (Nov. 10, 2011) at 15.

³² With the annulment, the procedural issues raised in this appeal are moot.

³³ In both their opening brief and reply brief, appellants acknowledge that a city may proceed with a reassessment after an assessment is nullified. RCW 35.44.280. See Br. of App. at 41; Reply Br. at 19.

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Appellant's Opening Brief (Corrected)

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