

NO. 49507-4-II

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

**HAMILTON CORNER I, LLC,
Appellant**

v.

**CITY OF NAPAVINE,
Respondent**

APPELLANT'S REPLY BRIEF

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1. **Reply to Respondent’s “Motion” re Administrative Record (Resp. Br. at 13-15)**

Respondent appears to be making what amounts to a motion to this Court to deny the admittance of documents that have already been established to be part of the Administrative Record (e.g., AR 0180–0659 [Exhibits 26-31]). (Resp. Br. At 13-15.) Respondent’s objection is both improper and unsubstantiated.

In response to Respondent’s motion during the 6/14/16 Oral Argument, the Superior Court allowed all of Appellant’s supplemented documents, including the two transcripts of City Council proceedings:

THE COURT: All right. So I’ll deny the motion to closing supplementation of the record and allow the record to be supplemented as indicated.

...

MR. CUSHMAN: So, Your Honor, then I would move to publish those two original transcripts so those originals can be included in this record.

...

THE COURT: Your motion was to publish, and that will be granted.

6/14/16 Oral Argument Tr. at 13.

Respondent submitted a Notice of Filing a Record of Proceedings, with an Index and the Record on 2/29/16 (CP 9-13), but it did not contain all of the pertinent documents and proceedings that the City Council considered in making its decision. On 3/2/16, Appellant provided Notice (CP 16-17) that it would be supplementing the record with transcripts of two additional proceedings before the City Council: a presentation made to the Council by

the City Engineer on 11/10/15 regarding Well 6 (AR 0180-0206), and the 12/8/15 Council's final action approving Ord. 549 for LID 2011-1 (AR 0207-0212). Respondent neither objected to this Notice, nor to the actual record supplementation after it was submitted on 3/30/16 (CP 14-15).

On 4/11/16, Appellant submitted another notice with a second supplementation (CP 18-20), which included the documents that the City Engineer was discussing with the City Council at its 11/10/15 presentation (AR 0213-0231). The bulk of Appellant's supplementation consists of copies of all of the invoices/receipts that the City Council specifically approved for payment as LID 2011-1 expenditures between 2012 and 2015 (AR 0234-0659)¹. Respondent did not object to this record supplementation at the time either.

Clearly, all of these documents and transcripts pertain to information that was before the Council, who approved each invoice before authorizing payment and explicitly considered the Well 6 information presented during the Council's 11/10/15 meeting, all prior to making its decision to confirm the assessment roll made during its 12/8/15 meeting, as transcribed. The Superior Court did not exceed its jurisdiction (Resp. Br. at 15).

Respondent did not file a cross-appeal requesting the Court of Appeals to review the Superior Court's denial of Respondent's motion (made at Oral

¹ Prior to the 10/27/15 Protest hearing, Appellant made a public records request for the invoices/receipts because Napavine had not explained how its LID funds were expended, although the documents were not provided until after that hearing.

Argument) to strike Appellant's previously supplemented record documents. The Superior Court issued its decision 8/5/16. Appellant filed its appeal on 8/17/16 and provided copies via email to Respondent's attorneys on that date. There was adequate time, but Respondent chose not to cross appeal. It is improper for Respondent to now present an objection to this Court. In any event, Respondent has a baseless claim that Appellant's supplementations were not documents or actions considered by the City Council prior to its enactment.

2. **Reply to Respondent's Restatement of Appellant's Argument re Superior Court's Error that LID Assessment Appeal Required Prerequisite Appeal of LID Formation (Resp. Br. at 19-20) see Opening Brief Argument 6.1 (App. Br. at 19-24) (Appellant's Issue 3.2; Assignment of Error 2.2)**

As discussed in Appellants' Opening Brief, the Superior Court made an error of law when it determined that because Hamilton had not first appealed the LID formation, all of his issues regarding the supposed benefit to be received by the LID improvements were rendered moot:

[T]he LID was established by passage of Ordinance 497. Appellant did not file an appeal challenging either the ordinance or the inclusion of his properties within the LID within the 30 day time period set by RCW 35.43.100.

This issue is completely controlled by the Appellant's failure to appeal it during the statutory time frame. The time to appeal that decision was within 30 days of the passage of the ordinance establishing the LID. That period has long since passed. Consequently, all the arguments made by Appellant concerning the viability of his private water system or its superiority over the public system are moot.

Decision Affirming City Council, CP 236-237.

Respondent provided no response to Appellant's briefed arguments (App. Br. at 19-24) on this issue that an appeal of the LID assessment roll under RCW 35.44.190 did not require Appellant to have previously appealed the formation of the LID. This lack of response indicates Respondent's agreement, or at least concession, on this point.

Respondent has instead inaccurately restated the Superior Court's Order, and more improperly, mischaracterized Appellant's arguments (Resp. Br. at 19). Hamilton Corner's protest letter (AR 074-075) did not contest the extension of water to Exit 72 or the City's choice of bidders, but rather the City's concealment of an appraisal of his properties conducted in secret, non-transparency in disclosing what the LID funds have funded, especially when such inordinate costs have resulted in undrinkable water, and protested that the City has not shown how these expenditures will benefit the LID participants. (AR 074-075.)

The inability of Well 6 to produce drinking water means the LID does not provide Appellant or anyone else with the benefits they were led to believe they would receive when the formation LID Ordinance 497 was passed. The LID 2011-1 assessments for special benefits exceed the actual benefits received, particularly for Appellant because Appellant is already served with a private water system, which as it has turned out, is superior to the one resulting from LID 2011-1.

The LID formation ordinance documents did not include parcel-specific assessments (except for a few specific properties not at issue). In fact, the City purposely withheld from Appellant a written appraisal valuation prepared in 2012 of Appellant's properties. There was nothing to appeal or challenge at the time of the LID formation in 2012. (App. Br. at 22-23).

Hamilton Corner protested the fact that the City did not show beneficial use of the LID funds commensurate with the assessments, not only on Appellant's properties, but for everyone being assessed. Appellant's arguments are relevant, not moot, and the Superior Court was in error to dismiss them.

3. Reply to Respondent's Discussions of Well 6

(Resp. Br. at 4-7, 22-24, 26)

see Opening Brief Argument 6.2 (App. Br. at 24-30)

(Appellant's Issues 3.1, 3.2, 3.4, 3.6; Errors 2.1, 2.2, 2.4, 2.6)

3.1 LID 2011-1 Funded Well 6; Well 6 is Integral to LID 2011-1

It is a fact that the land on which Well 6 is cited was purchased with LID funds (AR 0249-0252; CP 157-160; Tr. 57, 82), and that Well 6 was constructed using LID funds (AR 0076, 0083, 0249-252, 0564-0565, 0591-0593; CP 69-70, 76, 157-169). It is a fact that all of the additional water delivery system components, plus the Water Reservoir, were all constructed to transmit, or retain, water from Well 6, and were all funded with LID funds (AR 0096, 0114). It is also a fact that the engineering and other costs related to the construction of Well 6 and the water delivery system components that use Well

6 were also paid for from the LID funds (AR 0083). These are capital improvements, not operation and maintenance (Resp. Br. at 4-5).

Both parties cite to the same Description of Improvements attached to the LID formation Ord. 497 at AR 0096 (Resp. Br. at 6-7), but Respondent tries to say that this description does not actually include the well, but only equipping it. However, the Record does not support Respondent's misstatement because the LID Improvements site map attached to Ord. 497 at AR 0114, which also shows the locations of other key improvements, such as the East and West Water Mains and Water Reservoir, specifically identifies "New Well Facility \$260,000."² (See discussion in App. Br. at 7-8, 25-26).

3.2 Well 6 Exceeds Maximum Contaminant Level (MCL)

Respondent continues to misstate facts by saying that the Well 6 water "meets all standards" and it is only Napavine's "choice" to use "stricter standards" that are preventing the Well 6 water from being used (Resp. Br. at 7). Although that was a face-saving statement by the City Engineer, his testimony and written report to the City identified that the discoloration problem as evidenced in the 2015 water test greatly exceeded the maximum limit. Under Department of Health standards, color is a contaminant, thus the water does not meet all standards (CP 27-30; AR 0213-0231).

² Note that Respondent's arithmetic (Resp. Br. at 26), where it deducts \$260,000 from the total LID amount is baseless. Respondent has failed to account for all of the other water system components and related engineering costs which would have had no need to be constructed or funded without Well 6 being the centerpiece of LID 2011-1.

Regardless of what Napavine is telling the public, the fact remains that Well 6 water exceeds the MCL and cannot be used as drinking water until when, or if, it can be corrected. The “choice” that the City is making is its continued insistence in using a well site (purchased with LID funds) that yields undrinkable water. It makes no difference that the City obtained a grant to reduce costs for a water system when the foundation well site is no good.

3.3 Non-Use of Well 6 is a Material Change to LID 2011-1

Respondent proposes that the City can temporarily serve water to the Exit 72/Rush Road area from what would have to come from other city wells (Resp. Br. at 7, 22). First of all, the legality of extending water and expanding water rights from those older wells into new places of use within a different geographic area has not been established, nor was it a topic of discussion at any time during the LID proceedings. The City Council made no Findings on those issues; neither did the Superior Court.

Secondly, if the City had merely intended to expand its water service area using existing City wells, then that would be an entirely different LID. The improvements specified in LID 2011-1 (and the basis for the grant funding) are for a new well along with a completely new water system to provide drinking water from that new well to a new service area:

Water from Well No. 6 is pumped from the Rush Road Reservoir into the City’s 422-foot pressure zone which serves the area around the Exit 72 interchange and customers located

along Rush Road, Bond Road, Kirkland Road, and Hamilton Road.

AR 0217 (6/4/15 Engineer report to Napavine).

The City has materially altered its LID without undergoing any LID amendment process. Absent from Respondent's briefing is any explanation for why the Council could not have either waited to approve the assessments after Well 6 was able to provide the benefits as anticipated under the LID, or why the Council could not have enacted an LID amendment in the interim, so the LID participants would be informed and have an opportunity to respond. Respondent did not identify what authority the City had to make material changes to the LID without undergoing the statutory procedures (App. Br. 28).

Respondent attempted to distinguish its actions from the fact pattern in *Fury v. City of North Bend*, Court of Appeals, Div. I, No. 69294-1-I, October 21, 2013, (Resp. Br. at 23, FN 9), but the principle of that case stands:

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.

Fury, Id., at p.7 [¶35] (copy at Appendix I to Appellant's Opening Brief).

The City also states that the undrinkable water can be used for firefighting water flow (Resp. Br. at 26), but again, the purpose of the LID was not to simply aid City fire suppression, but to provide municipal drinking water in order to increase the development value of the properties (AR 0007).

Moreover, the municipal firefighting water flow capability (e.g., hydrants versus tanker trucks) is of minimal need unless the LID properties are developed at densities which cannot occur until the properties also have municipal drinking water.

3.4 Well 6 is Not an Incomplete Improvement – It is Unusable

Respondent next characterizes the non-potable Well 6 as an “incomplete” improvement, in an unconvincing attempt to match Napavine’s situation with the one cited in *Little Deli Marts, Inc., v. City of Kent*, 108 Wn. App. 1, 8, 32 P.2d 286 (2001) (Resp. Br. at 26). But in our case, Napavine has officially completed LID 2011-1:

1.22 August 12, 2015. Work completed on Schedule B LID improvements and accepted by Council on August 25, 2015.

AR 0006 (Appendix 1 to Ordinance 549 - Findings and Conclusions).

The problem is that the completed improvements cannot be used in the manner approved by the LID. It is unknown if the discoloration of Well 6 can be successfully corrected, and if so when, or for how long, or how much it will ultimately cost before a final solution is found, what the costs will be for continual treatments and how these long-term treatment and maintenance costs will be funded (App. Br. 8-10, 48; AR 0186-0188, CP 29-31).

Respondent cites in a footnote (Resp. Br. at 26, FN 11) recent steps the City has taken to approve funding for the ozone treatment option (which has only just recently gone out for bid; no treatment is being conducted). There is

no certainty that this ozone/oxidizing treatment will solve the problem or what the continual costs to operate the treatment will be (AR 0186-0188, CP 29-31). Further, since Respondent is opening the door for this Court to consider additional facts discovered after the date of Appeal, then know that Napavine's recent Water System Plan update reveals (excerpt attached at Appendix 1), for the first time to the public, that Well 6 also has high sodium levels, high enough that a health advisory will need to be posted.

The point is, Well 6 is not an "incomplete" improvement; it is an improvement that is unable to be utilized as planned in the LID, and for an indeterminable amount of time, perhaps forever. Without Well 6, LID 2011-1 is materially altered, and altered without public input or opportunity to protest. Citizens are paying assessments for benefits not received.

**4. Reply to Respondent's Arguments re Fundamentally Wrong Basis of Assessment Methodology (Resp. Br. 16-28, 35-40)
see Opening Brief Argument 6.3 (App. Br. at 30-42)
(Issues 3.1, 3.5; Errors 2.1, 2.5)**

4.1 *Appellant May Challenge City's Assessment Without having an Independent Appraisal*

Appellant's Opening Brief succinctly sets out five different errors in the appraisals, and how these errors demonstrate a fundamentally wrong basis of assessment methodology. See Appellant's Argument 6.3 (App. Br. at 30-42) and summary flow chart (App. Br. at 14-16). Under *Hasit, LLC v. City of Edgewood*, 179 Wn. App. 917, 946, 320 P.3d 163 (2014) (citing to *Cammack v. Port Angeles*, 15 Wn. App. 188, 548 P.2d 571 (1976)), the appealing party's

evidence does not need to be an appraisal, and may be in the form of challenging the opposing expert's deficiencies (App. Br. at 40-41).

4.2 Respondent Has Misinterpreted RCW 35.44.110 Requirements

Respondent is attempting to squeeze the allowable the scope of Appellant's arguments by injecting a statutory interpretation that does not exist. Respondent erroneously states that RCW 35.44.110 requires: "any ground for objection that was not submitted at or before the City Council's hearings on final assessments 'shall be conclusively presumed to have been waived'." (Resp. Br. at 16.) This is a misinterpretation. The exact wording is:

All objections to the confirmation of the assessment roll shall state clearly the grounds of objections. Objections not made within the time and in the manner prescribed in this chapter shall be conclusively presumed to have been waived.

RCW 35.44.110.

The "Objections not made within the time and in the manner prescribed in this chapter" refers to the requirements at RCW 35.44.190, et seq.:

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.

There is nothing in Chapter 35.44 RCW that is so specific as to require a protestor to provide a City with every conceivable nuance or sub-argument. Appellant's protest letter (AR 74-75) identified its basis for objecting to the LID assessment: that the City had not shown beneficial use of the LID funds. An additional objection was made disagreeing with the City's appraisal which had been conducted as a "drive-by" and without any confirmation of facts from the property owner. Appellant also protested that the assessments exceeded the benefit to his properties specifically, since his private water system provided clean, clear water to his properties, but the city's new water system funded by the LID did not. Appellant's protest letter adequately stated his objections and preserved his appeal rights.

4.3 The LID Assessments Must Not Exceed the Special Benefit

The Respondent next misinterprets the "slight evidence" discussion in *Hasit, supra at 943*, citing *Hansen v. Local Imp. Dist. No. 335*, 54 Wn. App. 257, 773 P.2d 436 (1989), which does not imply that a City only need "slight evidence, if any" to establish that its appraisal method reflects a special benefit (Resp. Br. at 17-18). Rather, only slight evidence is needed for a City to establish its selection of an appraisal method ("a city or town may use any other method or combination of methods to compute assessments...." *Hasit, Id.*, at 943). Whatever appraisal method is chosen, it must reflect a corresponding value-to-benefit received; otherwise, the assessment was

founded upon a fundamentally wrong basis, and is contrary to law. City Ord. 549 confirming the LID 2011-1 assessment roll is specific on this point: “State statute requires the assessment per parcel must not exceed the special benefit of the improvement of that parcel....” (AR 0012).

4.4 City’s Appraisals Failed to Include the Value of Appellant’s Water System

Respondent appears to be responding to arguments that were not made by Appellant, and then using that as a springboard to argue additional points that were neither before the Superior Court nor part of the LID proceedings (Resp. Br. at 38-40). What Appellant did argue was that the appraisers’ errors and omissions negated the credibility of their opinions.

Both appraisers failed to assign any value to Appellant’s water rights water system. The testifying appraiser obtained an artificially-derived valuation by first stripping Appellant’s property of its wells and water rights (which would leave it undevelopable), after which the property could only “gain” value once on City water – resulting in a contrived appraisal to support the City’s Assessments (Petitioner’s Br. at 32-34; Tr. 17-19).

Mr. Shedd’s oral opinion was entirely based on the ability of the City to enforce a questionable City Code requirement that would seemingly require Appellant to forfeit his water rights to the City without compensation (App. Br. at 12, 31, 36-38). The City’s legal ability to enforce such a Code regulation was not an issue addressed by Appellant in this LID assessment appeal.

Rather, the issue was that the appraiser's professional opinion, as he stated multiple times in his testimony (AR 0171-0176), was that under this City Code, Appellant's property would have little value unless on City water. Appellant disagrees and argued his points as they pertain to the credibility of the appraisals that Napavine relied upon to approve the assessment roll.

These are not issues raised for the first time. Appellant attempted to ask Mr. Shedd questions at the hearing. Because Mike Hamilton had to speak from the audience, rather than through a microphone at Council table, most of what he said is transcribed as "MALE SPEAKER: [UNINTELLIGIBLE]."

There is, however, a section of dialogue that was partially transcribed:

MALE SPEAKER: [UNINTELLIGIBLE] asking, do you know what the benefit to that property is with the present water system as it exists in a completely satisfactory fashion versus the benefit [UNINTELLIGIBLE] to the property, as the problem was analyzed, [UNINTELLIGIBLE] city water? Do you have any numbers in your hand to represent that difference?

MR. SHEDD: The property, as I've reviewed it, and also looking at the city code, is this is essentially an undevelopable piece of property unless you bring city water to this property. The code doesn't allow new wells, it doesn't allow subdivision, and it doesn't allow new development. So absent bringing water into this – water to this property, either the developer or in this case with a LID, the property is stunted and economically – it's economically stunted. There's no doubt in my mind that the benefit is – it's at least the 320 if not more.

MALE SPEAKER: I would like to ask [UNINTELLIGIBLE] ... Our water system is every bit as good as the city's if not better. We have a high volume available. We have multiple wells available

[UNINTELLIGIBLE]. Ours has a fluoridation and mixing system. We have a better system

[INDECIPHERABLE]

Can you address that, Mr. Shedd?

MR. SHEDD: Yes, I can. I think you would have to look at the city code. The subdivision code[] does not allow subdivision, it doesn't allow new development, unless you connect to the city's public water system, and at that time you would be required to donate whatever water rights and wells are on your property....

MALE SPEAKER: Could you explain that to me?
[UNINTELLIGIBLE.]

MR. SHEDD: I'm not saying it doesn't exist. I'm saying you have a valuable piece of property, but you can't develop it unless you bring in the infrastructure, and there's cost to bringing in that infrastructure, and the benefit is it's no longer the cost of the property owner, absent, you know, outside the LID, but any developer of that property would've had to spend the money to bring that infrastructure in and to realize – to develop the property to its highest and best use.

11/24/15 City Council Hearing (AR 174-176).

As evidenced through Mr. Shedd's appraisal opinion quoted above, he is the person who brought forward the theory which formed the basis for his appraisal, citing to Napavine's development and utility code for a requirement to abandon wells and forfeit private water rights to the City. Appellant disagreed with Mr. Shedd's opinion at the hearing before the Council, and disagreed again in his subsequent appeal to Superior Court and briefing through his counsel. These are not "collateral challenges to City regulations for the first time on appeal here" (Resp. Br. at 39).

5. **Reply to Respondent’s Arguments re Napavine’s Arbitrary and Capricious Decision; Deprivation of Due Process (Resp. Br. 29-39) see Opening Brief Argument 6.4 (App. Br. at 41-45) (Issues 3.2, 3.6; Assignment of Errors 2.2, 2.6)**

5.1 The Record Shows No Proof of Service of the Preliminary Assessments, as required by RCW 35.44.180

Respondent oft repeats its erroneous statement that Hamilton had “ample opportunity” since early 2012 to seek a separate appraisal and present independent valuation testimony (Resp. Br. at 8-10, 35-37), which not true. The Administrative Record which the City compiled for this matter [a Record which the City insists is complete, as evidenced by Respondent’s “motion” to this Court to disregard all Record documents other than the ones submitted by Napavine] does not include any parcel-specific Assessment Roll other than the one dated 9/29/15.

Ordinance 497 and its exhibits (AR 92-117) do not include any parcel-specific assessments for anyone other a few specific property owners who have latecomer agreements, none of which are Appellants (AR 100-103, 115). Respondent gleaned the preliminary amounts from a column in the 9/29/15 final Roll, or from the 2012 Appraisal (which Appraisal was not disclosed to Appellant until a day or two before the 10/27/15 hearing). So while the City may have known about the preliminary assessments (just like it knew about, but withheld, the 2012 Appraisal), there is no evidence that these parcel-specific assessments were provided to Appellant in 2012 at the time of the LID formation or any time prior to when the Clerk sent it on 9/29/15 (AR 87-91).

5.2 *The “Secret” Appraisal was a Deprivation of Due Process*

Respondent attempts to evade the offensiveness of Napavine’s conduct in keeping its February 2012 appraisal secret from Appellant until just before the 10/27/15 protest hearing, by suggesting that because Appellant has not cited to case law which specifically prohibits such a trick, then this Court should reject Appellant’s claims for failure to cite legal authority (Resp. Br. at 24, 35-36). The closest case law authority we found to our instant case is *Hasit, supra*, (App. Br. at 44-45, and discussed further below at pp. 19-21).

To parse out Respondent’s argument: First, admittedly, we found no other case where a City conducted an Appraisal in secret, relied on it for the LID assessment, and only after forced by a public records request, revealed its existence a day before the protest hearing, leaving Appellant no time to prepare a responding alternative (and this was on top of the City’s < 30-day notice of the assessment roll – see discussion above).

Second, the effect of the City springing its secret appraisal on Appellant right before the protest hearing goes far beyond Respondent’s “didn’t talk to me” theory (Resp. Br. at 24). Yes, the appraiser in this case should have talked to the property owner to obtain correct information and more than just mere public data in order to prepare an accurate appraisal (this is common sense), but it is the timing of the City’s orchestrated surprise that has caused a deprivation of due process.

Third, City Engineer Hinton's comments at the 10/27/15 hearing to Mr. Hamilton, about talking to his own appraiser after the City had a chance to provide the additional information Hamilton requested, could not have been a suggestion for Mr. Hamilton to present his own appraisal (Resp. Br. at 34), because that would have been contrary to the public notice for the 10/27/15 hearing which required all written materials to be submitted that evening:

Notice is further given that the City Council has fixed the time for the public hearing on October 27, 2015....

Any person desiring to object to any assessment appearing on the final assessment roll is notified to make all objections in writing and to file them with the City Clerk prior to or at the hearing on the final assessment roll.

AR 0089

The specific discussion at the 10/27/15 hearing about holding the hearing over was so Mr. Hinton and Mr. Ashley would have time to develop the staff report (AR 155). There was nothing to indicate that Mr. Hamilton was granted an extension to submit anything. The Mayor closed by stating "This public hearing is over." (AR 157.)

Fourth, no further public notice was issued to continue the LID hearing. Thus, the City's statement at the beginning of the Council's meeting on 11/24/15 calling it a continuation of the LID hearing (AR 158) was yet another ambush, because the City brought an additional appraiser to speak specifically about Appellant's property, yet provided neither public notice nor any notice to Appellant.

5.3 Appellant's Due Process Claims are Similar to those in *Hasit*

Respondent attempts to distinguish our case with some of the facts in *Hasit, supra* (e.g., paying for sewer outside the city limits, Resp. Br. at 24-25). However, the factual similarities of our case to *Hasit* are with the due process violations (App. Br. at 44-45). As discussed, the City secretly commissioned an appraisal of Appellant's properties, wherein Appellant had no idea such an appraisal even existed until just before the protest hearing. Even if Appellant had known about the appraisal, the less than 30-day time period between the public notice of the final assessment roll and the hearing date was too short to obtain an expert appraisal of Appellant's commercial properties, and the City's continuation of the hearing was done without public notice or any notice to Appellant, effectively preventing him from bringing witnesses or counsel on his behalf. The *Hasit* facts are directly comparable:

In the present appeal the preliminary estimate of assessments, made at the formation of the LID, is not in the record....

[T]he short time period here between notice and the hearing effectively crippled many of the protests....

Under those circumstances, due process at least required the City to allow sufficient time for the owners to obtain an expert appraisal and analysis of the assessment roll.

The constitutional problem is further exacerbated by the City's apparent failure to timely make available the information on which Macauley [the appraiser] 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 page, with no explanation of how the special benefits were calculated.

Under the totality of the circumstances presented in this case, the owners did not have “notice reasonably calculated, under all the circumstances, to ... afford them an opportunity to present their objections.” *Mullane*, 339 U.S. at 314. They faced a deprivation of property at the hands of the government *Mullane*, 339 U.S. at 313, and were thus entitled to an opportunity to present their objections “at a meaningful time and in a meaningful manner.” *Armstrong*, 380 U.S. at 552. Instead, they received notice of large assessments against their property less than three weeks before the hearing. At least one assessment far exceeded the initial estimated and the time until the hearing did not reasonably suffice to obtain the type of evidence demanded at the hearing and necessary to mount a successful challenge in the courts. The notice, furthermore, misled them as to the type of evidence they could present. These procedures denied respondents the fair hearing to which due process entitles them.

Hasit, LLC v. City of Edgewood, 179 Wn. App. 917, 955-958, 320 P.3d 163 (2014).

The factual similarities between the instant appeal and the *Hasit Id.*, due process violations are remarkably similar:

- When Appellant asked the City for documentation to describe the LID improvements and expenditures, he received a one-page Budget that did not explain what had been constructed and did not provide information that shows beneficial use of the LID funds (AR 0074).
- There is nothing in the Record that shows the preliminary assessment roll was provided to Appellants. The citations to AR 0004, 0013, 0094 (Resp. Br. at 36) are mere references to undated preliminary assessment information, without the proof of service required by RCW 35.44.180. For example the 9/29/15 Final Assessment Roll (AR 13) chart contains a

column labeled Preliminary Assessment, but the data in that column is undated, and there is nothing to identify the chart was provided to anyone prior to 9/29/15. A preliminary assessment is also mentioned in chronology lists of actions taken (AR 0004, 0094), which similarly cite to undated preliminary assessments without proof of service.

- The City did not reveal the existence of its appraisal of Appellant's properties until a day or two prior to the 10/27/15 hearing. As stated in the written appraisal, the appraiser was told by their client (Napavine) to not contact the property owner (App. Br. at 31-33; AR 0031, 0048; CP 58, 62).
- With less than 30 days between notice of the final assessment amounts and the protest hearing (AR 0087-0091), and less than two days prior to the 10/27/15 hearing before receiving a very belated copy of the appraisal which had been used by the City to base its preliminary assessments, Appellant was afforded insufficient time to obtain an expert and submit a responding appraisal regarding his commercial properties.
- The Notice for the final assessment roll hearing instructed all objections to be made in writing prior to or at the hearing, scheduled for 10/27/15 (AR 0089). More specifically, the Mayor closed the hearing at the conclusion of the 10/27/15 hearing (AR 0157).
- There was no subsequent notification of any kind advising Appellant that the City would keep the record open for Appellant, nor was Appellant notified in any fashion that the City would commission an additional oral

appraisal in the form of testimony to the Council in an unadvertised “continuance”, or that Appellant would have had any opportunity to present witnesses or any non-written evidence. The continuation notice of hearing was non-existent; the original notice of hearing was misleading.

Respondent’s claims of “ample” opportunity for Appellant to present its own appraisal are specious. Napavine’s procedures denied Appellant due process in a manner similar to the situation in *Hasit, Id.*, and Appellant’s assessments should similarly be annulled.

5.4 The Record Shows No Deliberations by City Council

Respondent states that the Council “gave due consideration to all facts and circumstances” and “deliberated on the evidence for six weeks from October 27 to December 8, 2015” (Resp. Br. at 33). However, a review of the hearing transcripts show absolutely no discussion or deliberations from the Council regarding the assessments: At the 10/27/15 protest hearing, the transcript (AR 0132-0157) shows there were staff presentations, and testimony from several citizens protesting the assessment roll, but no deliberations by the Council. The 11/10/15 transcript (AR 0180-0206) is a presentation to the Council about Well 6, in which some Council members ask questions and discuss the problems with Well 6, but do not deliberate the citizen testimony or the assessment roll. The 11/24/15 “continued” LID Assessment hearing (AR 0158-0179) shows dialogue by the City’s attorney to the Council, along with Appraiser Shedd’s oral presentation, but there are no deliberations by the

Council. The 12/8/15 transcript (AR 0207-0212) shows that the Council approved the LID Assessments via Ord. 549 without any deliberations or discussion of any issue, and only after taking final action, was there was a short commentary from one councilmember about the costs of a water test of Well 6.

If the Council deliberated regarding the LID assessments, it was done outside of an open and public meeting, which is a violation of the Open Public Meetings Act, Chapter 42.30 RCW. The Record transcripts show no deliberations by the Council on the LID 2011-1 Assessment Roll matter.

Respondent identifies that this Court has direct review of the Council's decision (Resp. Br. at 18-19). Had the City Council actually had discussions in an open, public forum, then there would be a record which would enable review of the City Council's decision-making process. Although Respondent quotes from the Council's Findings (Resp. Br. at 21, 30, 33-34), there is no demonstrated connection in the Record between Council's [non-existent] deliberations and its Findings.

**6. Respondent Concedes there is No Basis to Deny Appellant's Appeal on the Presence or Absence of Other LID Appellants
See Opening Brief Argument 6.5 (App. Br. at 45-46
(Appellant's Issue 3.7; Assignment of Error 2.7)**

Respondent offered no reason to refute Appellant's arguments (App. Br. at 45-46) that the Superior Court lacked a basis for denying Appellant's appeal due to its (incorrect) belief that there were no other LID Appellants.

7. CONCLUSION

By all indications, the City's maneuverings were calculated to prevent Appellant from being able to timely present its own expert appraisal. Fortunately, this Court has recognized such strategies in other cases, and annulled the assessments when the Appellant was deprived of due process. We ask the Court to do the same in this case.

SUBMITTED this 11th day of January, 2017.

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 11th day of January, 2017, in Olympia, Washington.



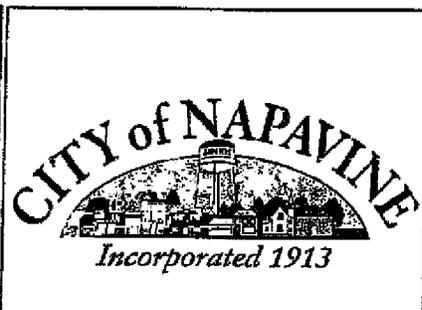
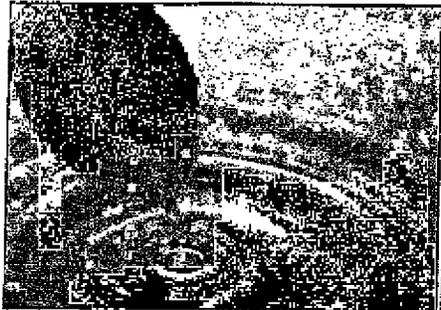
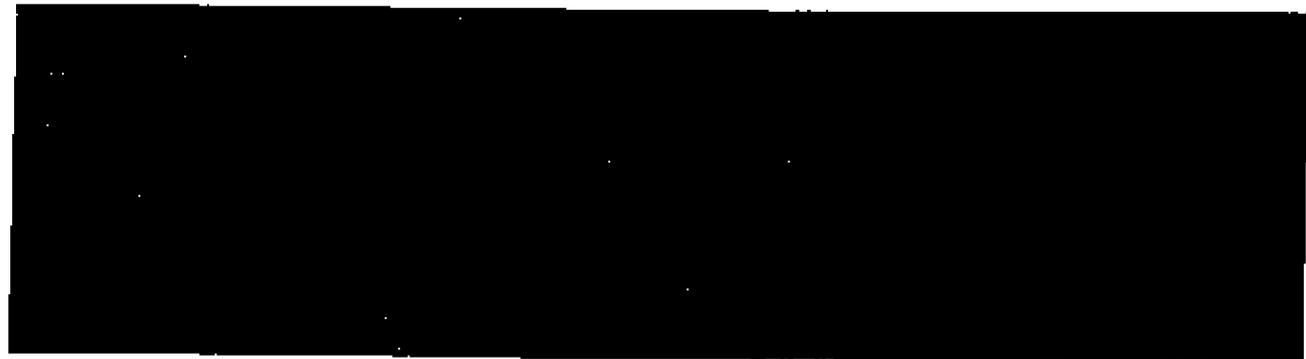
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APPENDIX 1



CITY OF NAPAVINE WATER SYSTEM PLAN

G&O No. 15215
DOH ID NO. 58200X
May 2016

excerpt



Gray & Osborne, Inc.

Appendix 1

capacity and currently produces 25 gpm. Well 3 is equipped with a 6-hp submersible pump and flow meter. This well is currently used as a supplemental source for the water supply system.

Well 4

Well 4 is an 8-inch, 84-foot-deep well drilled in 1994, located on Birch Avenue South of Lincoln Street. The well intake is by stainless steel well screen installed between 63 and 84 feet. The well log indicates a static water level of 11 feet, and a yield of 90 gpm based on a 48-hour pump test by Rogers Machinery. It is equipped with a 7.5-hp submersible pump capable of producing up to 110 gpm against system pressure, although it has been throttled back to about 90 gpm to prevent over-pumping the well. This well is currently one of the City's main sources for the water supply system.

Well 5

Well 5 is an 8-inch, 97-foot-deep well drilled in 2000, located on Birch Avenue South of Lincoln Street, approximately 300 feet west of Well 4. The well intake is by stainless steel well screen installed between 68 and 78 feet. The well log indicates a static water level of 3 feet, and an air test yield of 85 gpm with the stem set at 80 feet. It is equipped with a 10-hp submersible pump capable of 150 gpm against system pressure. The pump has been throttled back to about 60 gpm to prevent over pumping of the well. This well is currently one of the City's main sources for the water supply system.

Well 6

Well 6 is an 8-inch well drilled in 2010 to a depth of 393 feet, completed at a depth of 385 feet, and screened between 346 feet and 365 feet. Well 6 is located on the Newarkum River Terrace approximately 200 feet east of Rush Road and approximately 200 feet south of the Newarkum River. This well was drilled through almost 340 feet of non-productive clay, silt and fine sand before it struck a productive water layer. The water level then quickly rose up the well casing to within about 19 feet of ground surface. The well was pump tested in 2010 at rates of 76, 140, 200 and 270 gpm with resultant pumping levels of 47.6, 70.7, 93.9 and 122 feet below ground surface, respectively. Well No. 6 was equipped as part of the Rush Road LID project in 2014-2015. The well is currently equipped with a 7.5 hp submersible pump capable of producing 140 gpm, (the water right limit) and is designed to discharge to the Rush Road Reservoir. Water from Well 6 is not yet in service, but when it is, it will be pumped from the Rush Road Reservoir into the City's 422-foot pressure zone.

When Well 6 was drilled and tested in 2010 it was discovered that the water had sodium at a concentration of 90.6 mg/L, which is in excess of the health advisory level of 20 mg/L for individuals on low sodium diet. A subsequent sample in January 2015 found sodium at 77.4 mg/L. When the well driller penetrated the aquifer and the water level began to rise in the well, the well driller put salt in the wells to try to prevent the well

from free-flowing. The well has since been pumped significantly so that the sodium found in the sampling is most likely not from the well driller salting the well, but it is possible that the elevated level of sodium may be at least partly due to the salting of the well and may continue to decline as the well is used. It is also possible, even if the sodium is not from the salting of the well, but is from the aquifer itself, that the sodium level will continue to decline as water is pumped from the aquifer and the aquifer replenishes from a lower sodium recharge source. However, we cannot predict with any certainty how the sodium level in this well will behave in the future. The 20 mg/L level is strictly an advisory level and not a regulatory level, and there is no MCL for sodium, so Napavine can use the well with an elevated level of sodium, provided that an advisory is posted regarding the sodium level.

Another issue regarding Well 6 was discovered when the well was put on line and used to fill the Rush Road reservoir. The water has an excessive level of color. The initial testing in 2010 found color in the water at 8.2 color units, which is below the secondary MCL of 15 color units. However, testing in February 2015 found color at 35 color units. The water has a noticeable "tea color". At this time the City is working on a plan to blend this water with water from their other wells or add treatment to remove the color so that they can bring the color level below the secondary MCL and more fully utilize this water source. One concern is that the organic matter causing the color will react with chlorine to form disinfection byproducts. The City does not currently add chlorine to their water, but if they ever do chlorinate in the future, it is possible that the water from this well could have a problem with disinfection byproducts if the organic matter is not removed.

The City plans to implement a system to blend the water from this well with water from the City's other wells, or provide treatment to remove color, prior to putting this well and booster pump station into service. These issues will be discussed further in Chapter 3 of this WSP.

A summary of existing sources is provided in Table 1-1. A further analysis of Napavine's sources may be found in Chapter 3.

CUSHMAN LAW OFFICES PS

January 11, 2017 - 4:44 PM

Transmittal Letter

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Court of Appeals Case Number: 49507-4

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Appellant Hamilton Corner I LLC's Reply Brief

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