

No. 323692-III

IN THE COURT OF APPEALS FOR  
THE STATE OF WASHINGTON  
DIVISION III

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KENNEWICK POLICE DEPARTMENT,

Respondent,

v.

ALFREDO AHUMADA, ET AL,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
BENTON COUNTY, STATE OF WASHINGTON  
Joseph Schneider, Court Commissioner  
Superior Court No. 12-2-02618-9

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

The sole issue that is properly on review in this case is whether Benton County Superior Court Commissioner Joseph Schneider was correct in ruling that Appellants<sup>1</sup> failed to exhaust their administrative remedies as required under the Administrative Procedure Act (APA). This case originates from the Kennewick Police Department's (KPD) forfeiture of real and personal property pursuant to RCW 69.50.505. Appellants' interests in the property were forfeited by default and notice of that default was sent to their attorney. Appellants did not move to vacate the default within seven days as required by RCW 34.05.534 and RCW 34.05.440(3), but rather waited two weeks after the expiration of that period and initiated an appeal in Superior Court. The commissioner dismissed the appeal, holding that Appellants failed to exhaust their administrative remedies under the APA. Appellants now ask this Court to reverse that decision and either order the property returned to the Appellants or remand for a forfeiture hearing.

## II. STATEMENT OF THE CASE

At the outset of this section, it should be noted that KPD does not

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<sup>1</sup> Although this writer is aware of the Court's preference that parties be referred to by their names, Mr. Ahumada, Ms. Lopez, and Ms. Rivera will be collectively referred to as

believe that the majority of these facts are relevant to this appeal. As will be argued below, the only issue that should be reviewed by this Court is whether dismissal of the appeal by Commissioner Schneider for failure to exhaust administrative remedies was appropriate. Despite this fact, the City feels compelled to set forth a complete and accurate record of what occurred at the administrative level due to Appellants' attempts to argue issues not properly before this Court.

On June 20, 2012, KPD seized property consisting of three vehicles and a large sum of cash from the home of Appellant, Alfredo Ahumada, pursuant to RCW 69.50.505. Notice of Intent to forfeit this property was served personally upon each of the Appellants on June 28, 2012. The potential claimants to the property served with Notice of Intent to Forfeit included the three appellants, as well as, Joel Chavez, JP Morgan Bank, and Wells Fargo Bank. CP 10-22.

On July 25, 2012, KPD received a handwritten letter from Joel Chavez, which stated:

I would like to contest the forfeiture of 2004 Cadillac Escalade VIN 3GYEK62N246244899 taken June 20<sup>th</sup>, 2012.

The letter was signed by Mr. Chavez and contained a current mailing address.

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“Appellants” for simplicity’s sake. The Respondent will be referred to as “KPD.”

CP 28.

On July 19, 2012, KPD received a letter from Wells Fargo Bank stating that the bank was the lien holder on the seized 2005 Nissan Titan Crew Cab, VIN 1N6AA07A35N525044. The letter stated, "The loan contract was acquired in good faith, with no knowledge on the part of the lien holder that the property was used in violation of the law." The letter further stated, "Wells Fargo respectfully requests that [KPD] allow it to exercise its rights to obtain possession of the vehicle." CP 29.

On August 2, 2012, 10 days before the expiration of the 45-day term for claims, KPD received a letter from Robert J. Thompson. The letter stated:

RE: Alfredo Ahumada Ozuna

Dear Sir:

Please be advised that this office will represent all claimants on the potential forfeiture actions arising from Mr. Alfredo Ahumada Ozuna's arrest on or about June 20, 2012 in Kennewick, WA.

This Includes Joel Chavez (KPD No. 12-18645), Alfredo Ahumada Ozuna, Christina Lopez and Mr. Ahumada's mother, Diana Rivera, and any and all other potential claimants.

Please forward any and all correspondence or pleadings to this office.

Sincerely,

Robert J. Thompson  
Attorney at Law

CP 30. No additional correspondence was received from Mr. Thompson or any other potential claimant to the property.

In response to the letter from Mr. Thompson, indicating that he would represent “any and all potential claimants to the property” on the “potential forfeiture actions,” KPD scheduled a hearing for the claimant who submitted a written request, Mr. Chavez, and sent notice of the hearing to his attorney, Mr. Thompson. Separate arrangements were made with Wells Fargo Bank. Notice of the hearing was sent to Mr. Chavez and his attorney Mr. Thompson on August 17, 2012. The notice indicated the time, date, and location of the hearing and was sent via certified mail. CP 31-33. A representative of Mr. Thompson’s office signed the certified mailing with notice of the hearing. CP 32. Mr. Thompson was also promptly sent the City’s entire discovery packet associated with the case on August 21, 2012. CP 37.

On September 27, 2012, the contested hearing on Mr. Chavez’s case was held. The City was represented by Assistant City Attorney Kelly Walsh, who appeared with numerous witnesses for the City. The hearing examiner was present, as was Mr. Chavez and Attorney Kevin Holt. No other

claimants or attorneys appeared. CP 42. Mr. Holt represented that he was “standing in on behalf of Bob Thompson.” CP 36. Mr. Holt made clear that Mr. Thompson had approached him the previous day and indicated that he had a scheduling conflict between his “DSPD contract” and the contested hearing. CP 37-38. Mr. Holt requested a continuance. CP 38. The City objected, indicating that Mr. Thompson had spoken with the City on September 24, 2012 and made no mention of a scheduling conflict. *Id.* The hearing examiner allowed the continuance at the request of Mr. Holt. The hearing was continued to November 1, 2012. CP 51-58.

At the September 27, 2012 hearing, the City inquired on the record as to whom Mr. Thompson actually represented in the case and who was claiming a property interest, as it was unclear from the wording of his notice of appearance. CP 41-46. The City stated on the record that, in a conversation with Mr. Thompson four days prior to the hearing, Mr. Thompson indicated that he believed he had made a proper claim on behalf of multiple other claimants. CP 45. This was the first time Mr. Thompson contacted the City regarding the forfeiture matter. *Id.* The City expected to argue who had properly contested the forfeiture to the hearing examiner with Mr. Thompson at the September 27, 2012 hearing, but Mr. Thompson chose not to appear to argue his position. CP 36. Although Mr. Thompson sent Mr.

Holt to stand in for him, he did not provide him with instructions regarding his position on the proper claim issue. CP 42, 44. The Appellants also did not appear. The hearing examiner reviewed the letter from Mr. Chavez as well as the letter from Mr. Thompson - which was read into the record. CP 43-44.

The City requested a ruling from the hearing examiner that all other interests in the property seized from Mr. Ahumada on June 20, 2012, aside from the interests of Wells Fargo Bank and Mr. Chavez, would be forfeited to the City by default. CP 45-46. Mr. Holt had nothing to offer on Mr. Thompson's behalf and the hearing examiner ruled in favor of the City. CP 46. The hearing examiner noted that Mr. Thompson did not appear and no other claimants appeared at the hearing. The letter was to be taken just as the language states, an indication by Mr. Thompson of his representation of any person who contested the forfeiture. The only person who contested and/or appeared at the hearing was Mr. Chavez. CP 46. The hearing examiner made an oral ruling defaulting the Appellants' interests in the subject property at the hearing. On October 4, 2012, the hearing examiner issued an order of default finding that the document submitted to the City by Mr. Thompson was not an adequate claim to the property on behalf of any claimant. The Order found that Mr. Thompson, nor any other "potential claimants" aside

from Mr. Chavez, appeared at the September 27, 2012 hearing for which Mr. Thompson received adequate notice. CP 61-62. The Default Order of Forfeiture was served upon Mr. Thompson and Mr. Holt via electronic mail and by hand delivery via PRONTO Legal Messenger Service on October 9, 2012. CP 63-64. Mr. Thompson failed to move to vacate the default order with KPD under RCW 34.05.440(3) and, after the period to do so had passed, proceeded to file an appeal of the order in Benton County Superior Court. The appeal was filed on October 30, 2012. CP 71-73.

### **III. ARGUMENT**

#### **A. THE RECORD SUPPORTS THE COMMISSIONER'S FINDINGS OF FACT AND HIS CONCLUSIONS OF LAW WERE NOT LEGAL ERROR.**

A large portion of Appellant's briefing focuses on whether or not KPD complied with the forfeiture statutes and whether Appellants were afforded due process throughout the proceedings underlying this appeal. These arguments should not, however, be now considered by this Court on appeal. Although Commissioner Schneider did make comments during the August 15, 2013 hearing indicating his feelings about the underlying procedure and events in the case, his ruling was that he had no jurisdiction

over the appeal, as he dismissed it for Appellant's failure to exhaust administrative remedies. Rule of Appellate Procedure (RAP) 2.2 governs decisions of the Superior Court which may be appealed. The only subsection applicable to this case is (a)(3) which permits review of "any written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action." The dismissal of the appeal in this case is just such a written decision and is the only basis for appeal. Despite Appellant's portrayal of Commissioner Schneider's comments regarding due process as part of this decision, dismissal of the appeal precluded the Commissioner from making any rulings about the substance of the appeal. This fact is evident from a review of the findings of fact and conclusions of law that were adopted as the final ruling in this case. Appellant's attempts to argue issues not decided by the Superior Court due to a ruling that precluded consideration of those issues is an attempt to circumvent the Superior Court and its ruling. Even if this Court were to find that Superior Court's dismissal of the appeal was not warranted, the appropriate remedy would be remand for the Superior Court to evaluate Appellants' due process claims. For these reasons, this response will address only whether the findings of fact and conclusions of law are supported by the record and the law. If this Court decides to consider these arguments despite

the fact that they are not properly before this court, the City would be happy to provide additional briefing as to those issues.

**1. Substantial evidence in the record supports the Superior Court's findings of fact.**

Specifically, Appellants assign error to findings of fact 5, 6, and 8. Brief of Appellants at 6. In general a court reviews solely whether the trial court's findings of fact are supported by substantial evidence on appeal and, if so, will review whether the findings support the trial court's conclusions of law. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). The party challenging a finding of fact bears the burden of demonstrating that the finding is not supported by substantial evidence, which is defined as "evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." *Id.* Unchallenged factual findings are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

*(a) Finding of Fact 5*

Finding 5 states "The City scheduled an administrative hearing for September 27, 2012. Notice of the hearing was sent to Mr. Chavez and Mr. Thompson on August 17, 2012 via certified mail." This finding of fact is supported by the letter sent to Mr. Chavez and Mr. Thompson as well as the

receipt of certified mailing attached thereto. These documents can be found at CP 31-32. This evidence is sufficient to support finding 5.

*(b) Finding of Fact 6*

Finding 6 states “Notice of the September 27, 2012 hearing was not sent to the Appellants or to Mr. Thompson on their specific behalf.” This finding of fact is supported by the same evidence supporting finding of fact 5.

Although the letter was addressed to Mr. Chavez, the body of the letter made clear that the hearing that was to be held on September 27, 2012 would determine whether the property referenced in the letter would be forfeited to KPD. CP 31. The letter does not specifically reference Appellants nor was a copy sent to them individually. However, the letter was sent to and received by Appellants’ attorney, Mr. Thompson. CP 31-32. Finding 6 is supported by substantial evidence in the record.

*(c) Finding of Fact 8*

Finding 8 states “The hearing examiner ruled that Mr. Chavez was the only claimant who had properly contested the forfeiture. Because the appellants were not present, had not properly contested forfeiture within the time frame provided in RCW 69.50.505(4), and because Mr. Holt had nothing to offer on Mr. Thompson’s or the Appellant’s behalf, the

Appellant's interests in the subject property were defaulted." CP 173.

Appellants unsuccessfully attempt to construe this finding as a conclusion of law. It can only be assumed that they are referring to the first sentence of this finding, as the remainder of the finding is clearly factual. Appellant's interpretation of the first sentence of this finding as a conclusion of law, like a large part of the arguments in their brief, ignores the procedural posture of the Superior Court appeal. The Commissioner was not making a legal conclusion regarding who did or did not properly contest the underlying forfeiture action, but was merely stating as a factual finding the legal conclusion that was come to by the hearing examiner. The record of the September 27, 2012 hearing supports this finding. CP 46. The only legal conclusions made were related to the Commissioner's determination that dismissal of the appeal was warranted because Appellants failed to exhaust their administrative remedies.

**2. The Superior Court's findings of fact provide a sufficient factual basis for the conclusions of law and the conclusions do not reflect legal error.**

Appellants specifically assign error to Conclusions of Law 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, and 15. Brief of Appellants at 7. The standard of review for a trial court's findings of fact and conclusions of law is a two-step process. First, the appellate court must determine if the trial court's findings

of fact were supported by substantial evidence in the record, and if so, the appellate court must next decide whether those findings of fact support the trial court's conclusions of law. *Landmark Development, Inc. v. City of Roy*, 138 Wash. 2d 561, 980 P.2d 1234 (1999). A trial court's conclusions of law are reviewed de novo. *M H 2 Co. v. Hwang*, 104 Wash. App. 680, 16 P.3d 1272 (2001). De novo review means that the reviewing court “do[es] not defer to the lower court's ruling but freely consider[s] the matter anew, as if no decision had been rendered below.” *United States v. Silverman*, 861 F.2d 571, 576 (9th Cir.1988). As with the findings of fact, conclusions of law that are not challenged should be deemed conceded on appeal.

As many of the challenged conclusions of law relate to the same overall conclusions, they will be consolidated and analyzed under the headings below for clarity. The specific conclusions of law that are supported by the legal reasoning under the headings will be identified at the end of the analysis. Conclusion of law 3 states: “A person may file a petition for judicial review of an agency order under the Administrative Procedure Act only after exhausting all administrative remedies. RCW 34.05.534.” CP 173.

Conclusion of law 4 states: “Administrative remedies must be

exhausted when the relief sought could be obtained by resort to an exclusive or adequate administrative remedy. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wash.2d 861 (1997).” CP 173.

Conclusion of law 7 states: “RCW 34.05.440(3) provided an adequate administrative remedy for the relief sought by the Appellants in this judicial appeal.” CP 174.

Conclusion of law 8 states: “The remedy provided by RCW 34.05.440(3) is not a motion to reconsider governed by RCW 34.05.470(5). Therefore, no statute explicitly states that exhaustion of the remedy provided by RCW 34.05.440(3) is not required.” CP 174.

Conclusion of law 9 states: “The use of the word ‘may’ in RCW 34.05.440(3) does not negate the exhaustion requirement. *Northwest Ecosystem Alliance v. Washington forest Practices Board*, 149 Wash.2d 67 (2003).” CP 174.

Conclusion of law 10 states: “Under the forfeiture process described in RCW 69.50.505, the role of the judicial system is to review agency orders. Therefore, the Appellants are not excused from the exhaustion requirement merely because RCW 69.50.505(5) allows a person to remove the case from the agency to the court within a specified timeframe.” CP 174.

Conclusion of law 11 states: “The Appellants are not excused from the exhaustion requirement because the Appellants have not met their burden to show that the remedy provided by RCW 34.05.440(3) would have been patently inadequate or futile.” CP 174.

Conclusion of law 12 states: “The Appellants have not met their burden to show that irreparable harm that would have resulted from having to exhaust administrative remedies would have outweighed the public policy requiring exhaustion.” CP 174.

Conclusion of law 13 states: “The Appellants’ due process claims do not create an exception to the exhaustion requirement.” CP 174.

Conclusion of law 14 states: “The Appellants were required to exhaust the administrative remedy provided to them by RCW 34.05.440(3) before filing this appeal.” CP 174.

Conclusions of law 15 states: “Because the Appellants did not exhaust their administrative remedies as required, this court lacks jurisdiction over this appeal.” CP 174.

- a. **RCW 34.05.440(3) sets forth an administrative remedy that Appellants are required to exhaust in this case.**

In this case, exhaustion of administrative remedies was mandatory

and, as recognized by Commissioner Schneider, Appellant's failure to avail themselves of the administrative process was fatal to their appeal. Appellants make several arguments as to why RCW 34.05.534 either does not apply to them or does not mandate that they comply with the procedure set forth in RCW 34.05.440(3). None of these arguments are persuasive.

Exhaustion of administrative remedies is a well-founded and long established judicial doctrine barring suits in Superior Court until a litigant has exhausted their administrative appeals. *South Hollywood Hills Citizens Ass'n v. King County*, 101 Wash.2d 68, 73, 677 P.2d 114 (1984). This policy supports several important judicial goals such as protecting the agency's autonomy by allowing it to correct its own errors, ensuring parties use the administrative process, allowing the agency to develop a complete record, allowing the agency to apply its expertise, and providing a more efficient process to potential litigants and to the agency. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wash. 2d 861, 866, 947 P.2d 1208, 1211 (1997) (citing *McKart v. United States*, 395 U.S. 185, 193-94, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969)). The exhaustion of remedies is mandatory where: 1) a claim is cognizable in the first instance by the agency alone; 2) the agency has a mechanism for resolution of complaints; and 3) the relief sought can be

obtained by resort to an adequate administrative remedy. *South Hollywood Hills Citizens Ass'n v. King County*, 101 Wash.2d at 73. In other words, if the administrative procedure available can alleviate the harmful consequences of the governmental activity at issue, a litigant must first pursue that remedy. *Id.*; *Simpson Tacoma Kraft Co. v. Department of Ecology*, 119 Wash.2d 640, 646, 835 P.2d 1030 (1992); *see also, Dils v. Department of Labor and Industries of State of Wash.*, 51 Wash.App. 216, 752 P.2d 1357 (1988) (holding that appellant was required to exhaust remedies by objecting to administrative findings and requesting reconsideration by the Department).

In *Kreager v. Washington State University*, 76 Wash.App. 661, 886 P.2d 1136 (1984), Mr. Kreager was terminated from employment with Washington State University. He filed an appeal with the review board, which appointed a hearing examiner to conduct a fact-finding hearing. *Id.* at 663. The hearing examiner issued findings and conclusions affirming Mr. Kreager's dismissal. *Id.* at 664. Mr. Kreager appealed the decision directly to Superior Court. The university moved to dismiss the judicial appeal, arguing that Mr. Kreager failed to pursue the available administrative remedy of filing written exceptions to the hearing examiner's decision and seeking an additional hearing. *Id.* In addressing whether the exhaustion doctrine

applied, this Court reasoned that the board had cognizance of Mr. Kreager's claim and that procedures established by statute and administrative rule provided for appeal of the decision by raising exceptions. The board had the authority to affirm, reverse, or modify the decision. *Id.* at 664. The administrative decision was ultimately affirmed by the Court for failure to exhaust administrative remedies before resorting to the judicial system, holding that the trial court abused its discretion by granting review. "A claimant cannot pass up the review by the board and then bring an objection to that decision to superior court. The board has not had the opportunity to pass on the objections of the claimant . . . The superior court is entitled to have the benefit of the board's ruling on the claimant's objections." *Id.* at 665.

The forfeiture in this case is governed by RCW 69.50.505, which provides that hearings to contest forfeiture of property held by an agency are governed by the APA and RCW Chapter 34.05 et. seq. RCW 69.59.505(5). The APA provides that "[a] person may file a petition for judicial review under this chapter *only after exhausting all administrative remedies available within the agency whose action is being challenged*, or available within any other agency authorized to exercise administrative review." RCW 34.05.534

(emphasis added). As will be discussed later, this requirement is subject to limited exceptions. The APA provides a clear and simple administrative remedy to the entry of a default order: an aggrieved party may, within seven days of service of a default order, file a written motion to vacate the order. RCW 34.05.440(3). Appellants concede that this was not done and allege it was not required.

*Conflict Between RCW 34.05.534 and RCW 34.05.570*

Appellants' first argument as to why RCW 34.05.534 does not require them to exhaust their administrative remedies seems to be that RCW 34.05.534 and RCW 34.05.570 are in conflict and therefore the plain language of RCW 34.05.534 can be ignored. RCW 34.05.570 clearly governs judicial review of agency actions once that remedy is procedurally proper. Appellants' attempts to construe these statutes as conflicting is not persuasive—a plain reading of RCW 34.05.534 makes clear that it is a prerequisite to RCW 34.05.570 and no conflict exists.

*Constitutional Claim*

Appellants' second argument as to why they were not required to move to vacate the default order in this case revolves around the holding in *Yakima County Clean Air Authority v. Glascam Builders, Inc.*, 85 Wn.2d

255, 534 P.2d 33 (1975). Appellants cite *Glascam Builders* for the proposition that any time a party is challenging the constitutionality of an action, the exhaustion doctrine is inapplicable. Appellants misconstrue the holding of *Yakima Cnty. Clean Air Auth. v. Glascam Builders, Inc. (Glascam Builders)*, 85 Wash. 2d 255, 257, 534 P.2d 33, 34 (1975). *Glascam Builders* involved an action instituted by the county clean air authority to collect penalties imposed by a control officer. *Glascam Builders* alleged that the administrative penalty provision of the Clean Air Act and a similar county regulation were unconstitutional. In agreeing with their interpretation and holding that they were not required to exhaust their administrative remedies, the court surmised:

The rule is well established that one claiming a constitutional right as a defense can proceed directly to assert that right in a judicial proceeding. There are several sound reasons for this rule. An administrative tribunal is without authority to determine the constitutionality of a statute, and, therefore, there is no administrative remedy to exhaust. The administrative remedy is established by the same statute which is being challenged and recourse to an administrative remedy would put the respondent in the position of proceeding under the statute which it seeks to challenge.

*Glascam Builders*, 85 Wash. 2d at 257. It is evident from the holding in *Glascam Builders* that the exception to exhaustion for constitutional claims is only applicable in limited situations -- generally when a party is challenging

the constitutionality of a statute or ordinance -- not in cases such as this where the allegation is that an agency failed to comply with a constitutional statute or ordinance. This interpretation is also evident from the section of American Jurisprudence cited by Appellants on page 14 of their brief . On this page, Appellants argue that “[I]n regard to enforcement proceedings it has been held that **a defense of unconstitutionality of the statute providing the administrative procedure** is not precluded by failure to exhaust appeal procedures . . .” 2 Am.Jur.2d Administrative Law § 599 (1962) (emphasis added). Cases more akin to the case at hand have required exhaustion. For example, the court in *South Hollywood* held that the association’s challenges regarding King County’s compliance with constitutional notice requirements did not excuse them from exhaustion.

Exhaustion has been required even in cases where the constitutionality of a statute or ordinance is at issue. The rule is that where a party affirmatively seeks some form of relief from agency action by way of the court, the party must show that their administrative remedies have been exhausted to even demonstrate standing to raise a constitutional or other issue in the court system. In *Ackerley Communications, Inc. v. Seattle*, 92 Wash.2d 905, 602 P.2d 117 (1979) *cert. denied*, 449 U.S. 804, 101 S. Ct. 49 (1980),

plaintiff's filed for injunctive relief in Superior Court to challenge enforcement of a city ordinance. They did not exhaust the administrative remedies available to them prior to filing because of their argument that the ordinance was unconstitutional. *Id.* at 907-08. The Plaintiff in *Ackerley* took the exact position that Appellants take here, contending that the exhaustion doctrine does not apply when constitutional issues are raised. *Id.* at 908. The Washington State Supreme Court rejected this argument clarifying that although there are limited situations in which the argument could be successful, they did not apply. *Id.* The court further held that where a party affirmatively seeks some form of relief from agency action by way of the court, as *Ackerley Communications* did and as Appellants do here, the party must show that their administrative remedies have been exhausted to even demonstrate standing to raise a constitutional issue in the court system. *Id.* at 908-09. Here, Appellants do not challenge the constitutionality of the forfeiture statutes or any other statute or ordinance. Rather, their argument is that KPD did not comply with those statutes, so they affirmatively sought from Superior Court relief from the agency action of a default order. As such, Appellants are required to show that they exhausted their administrative remedies to even have standing. "The question is not whether the administrative procedure can respond to the charge of unconstitutionality, but

whether the [administrative] procedure [available] can alleviate any harmful consequence . . . to the complaining party.” *Id.* at 909 (quoting *Lange v. Woodway*, 79 Wash.2d 45, 48, 483 P.2d 116 (1971)). Appellants are not entitled to bypass administrative remedies merely because they argue that constitutional due process was violated in this case. Case law does not support such an argument and, in fact, explicitly rejects it. In the instant case, the policies underlying relief of the exhaustion requirement are not applicable. Had Appellants moved to vacate the order of default and provided some clarification and legal argument, it is quite possible that the hearing examiner would have given them what they now seek from this Court. Conclusions of law 13, 14, and 15 should, therefore, be affirmed.

*RCW 34.05.534 and use of the word “may”*

The next argument made by Appellants to excuse their failure to exhaust the remedy provided to them under the APA is that because RCW 34.05.534 uses the word “may” instead of “shall,” exhaustion of administrative remedies under the APA is permissive rather than mandatory. This very argument was explicitly rejected by the Washington State Supreme Court of Washington in *Northwest Ecosystem Alliance v. Washington Forest Practices Board*, 149 Wash.2d 67, 66 P.3d 614 (2003), which held that use of

the word “may” in RCW 34.05.330(1) did not excuse exhaustion of that particular remedy.. The court noted that “[t]he statute is permissive only in the sense that a person is not required to petition for rulemaking, but ‘may’ do so... There is no mandatory duty to pursue an administrative remedy - a party can simply give up.” *Id.* At 76-77. Although Appellants correctly point out that *Northwest Ecosystem Alliance* did not specifically address forfeitures, it did address a subsection of the APA laid out similarly to the statute at issue here, RCW 34.05.534, and imparted logical reasoning that is clearly applicable in this case. Initially it is important to specify that the fact that the statute does not require individuals to petition for judicial review has no impact on the second portion of RCW 34.05.534 stating that if a person chooses to petition for judicial review they may do so only after exhausting their administrative remedies. Had the legislature replaced the word “may” in this statute with the word “shall,” every party who would be required to petition for judicial review, and thereby would also be required to exhaust their administrative remedies, whether or not they had a desire or legal grounds to do so. This fact, combined with the context of the APA and the reality that the statute itself contains limited exceptions to this requirement, which would not be necessary if it were permissive, makes clear that the reasoning in *Northwest Ecosystem Alliance* is equally applicable here.

Conclusion of law 9 should be affirmed.

*Futility*

Appellants next argue that even if RCW 34.05.534 requires exhaustion of administrative remedies, they are excused from doing so under subsection (3)(b), as their motion to vacate would have been futile. Although the futility exception recognizes the principle that courts will not require vain and useless acts, a strong preference exists toward requiring parties to follow the statutorily prescribed administrative path before resorting to the courts. *Stafin v. Snohomish County*, 174 Wash.2d 24, 34, 271 P.3d 868 (2012). As such, there is a strong preference in favor of the exhaustion doctrine, *Estate of Friedman v. Pierce County*, 112 Wash.2d 68, 78, 768 P.2d 462 (1989). Futility will excuse exhaustion only in rare factual situations. *Dils v. Dep't of Labor & Indus.*, 51 Wash.App. 216, 219, 752 P.2d 1357 (1988); *see, e.g., Nolte v. City of Olympia*, 96 Wash.App. 944, 982 P.2d 659 (1999) (administrative review of a decision in which the city's decision was statutorily bound by a city ordinance was deemed futile); *see also Orion Corp. v. State*, 103 Wash.2d 441, 693 P.2d 1369 (1985) (developer's failure to exhaust remaining administrative remedy excused for futility because the record made clear that the State had issued and was bound by a policy to

prevent the type of development sought).

A party seeking to establish futility has a substantial burden to overcome in light of the policies favoring the doctrine of exhaustion of administrative remedies. *Estate of Friedman*, 112 Wash.2d at 77-78. A party's subjective belief that an internal administration procedure is futile is insufficient to establish futility. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wash.2d 127, 133, 769 P.2d 298 (1989). Nor can futility be shown by mere speculation that the decision maker is biased. *Buechler v. Wenatchee Valley Coll.*, 174 Wash. App. 141, 154, 298 P.3d 110, 117, *review denied*, 178 Wash. 2d 1005, 308 P.3d 642 (2013); *see also, Beard v. King County*, 76 Wash.App. 863, 889 P.2d 501 (1995). "It is inappropriate for the court to assume the outcome of the administrative process." *Bellevue 120<sup>th</sup> Associates v. City of Bellevue*, 65 Wash. App. 594, 829 P.2d 182 (1992). Even if a remedy is likely to result in something other than what the aggrieved party wants, it does not excuse them from pursuing the process. *Id.*

In *Buechler*, Ms. Buechler had the opportunity to appeal her dismissal from the Wenatchee Valley Community College School of Nursing to a review panel. Ms. Buechler did not exercise this remedy, but rather filed suit directly with Superior Court. Ms. Buechler argued that she should be excused from

exhaustion of the administrative appeal process because the individual who made the initial administrative decision was on the appeal panel. Ms. Buechler's position was that this person's presence on the review panel would have "poisoned" the appeal process, and therefore, appealing to the review panel was futile. *Buechler*, 174 Wash.App. at 154-55. The court disagreed, holding that Ms. Buechler had not demonstrated that the board routinely "rubber-stamped" the complained-of party's administrative decisions. The court also noted that Ms. Buechler failed to present "anything other than conjecture" that the board would do so in her case. *Id.* Ms. Buechler asked the court to speculate as to the outcome and the court refused to excuse her lack of exhaustion on the basis of futility. *Id.* As a result, the appellate court affirmed the dismissal of Ms. Buechler's state law claim.

The cases cited by Appellants in support of this argument are easily distinguishable from the facts in this case, as they involve clear and obvious reasons why the agencies would not or could not come to a different conclusion than they had originally. None of those facts are present here. For example, this is not a situation in which the City adopted an ordinance that would have prohibited KPD from acting in a different manner or even where a policy decision dictated a certain action. Here, as in *Buechler*,

Appellants provide mere conjecture regarding an unfavorable outcome. The administrative process could have clearly provided the relief sought and the remedy that was available to Appellants in the administrative process is the exact remedy that Appellants asked for in Superior Court.

The underlying record in this case reveals a significant amount of confusion with regard to whom Mr. Thompson represented and who was making a claim to property in this case. Had Appellants moved to vacate the default order and articulated their objections as required, some clarity would have been brought to the situation. It is possible that once KPD received some clarity from the Appellants, its position on the default may have changed. Regardless of KPD's position, the default order very easily could have been vacated by the hearing examiner resulting in a hearing being ordered over KPD's objection. This is especially true given that the hearing on Mr. Chavez's interest had not yet been held and would have involved the same evidence. RP 15. If Appellants had timely moved to vacate the order, the City may very well have agreed or been ordered by the hearing examiner to consolidate Appellants' claims into the impending hearing with Mr. Chavez. That opportunity was squandered due to Appellants' failure to move to vacate the default order. There has been absolutely no showing by

Appellants to overcome the high burden of establishing futility or that any other exception to the exhaustion requirement applies to them. Conclusions of law 11 and 12 should be affirmed.

#### *Concurrent Jurisdiction*

Appellant next argues that the requirement of exhaustion of remedies is relaxed because KPD and the Superior Court had concurrent jurisdiction in this matter. This argument misses the mark entirely. Appellants cite the doctrine of primary jurisdiction and *Chaney v. Fetterly*, 100 Wash. App. 140, 995 P.2d 1284 (2000), in support of this argument. However, the *Chaney* Court stated that the doctrine of primary jurisdiction applies when a court and an administrative tribunal have concurrent original jurisdiction, and the court is faced with deciding whether it should defer to the administrative tribunal on certain issues. *Id.* at 148. *Chaney* makes clear that this doctrine only affects the exhaustion doctrine when the determination of jurisdiction between court and agency is within the “sound discretion of the court ... predicated on judicial self-restraint.” *Id.* at 149. The Washington State Supreme Court has held that the doctrine of primary jurisdiction affects the exhaustion doctrine when the claim is originally cognizable in the courts and enforcement of the claim requires the resolution of issues which have been

placed within the special competency of an administrative body. *United States v. W. Pac. R. Co.*, 352 U.S. 59, 64, 77 S. Ct. 161, 165, 1 L. Ed. 2d 126 (1956). In such cases the judicial process is suspended pending referral of the issues to the administrative body for its views. *Id.* This is clearly not the situation in the case of property forfeitures. Under RCW 69.50.505(3), proceedings for forfeiture are deemed commenced by the seizure. Because these actions are always initiated by the agency and governed by the administrative process, the claim is not originally cognizable in the courts. The fact that RCW 69.50.505(5) provides an opportunity for a claimant to remove his or her claim to the court does not implicate the doctrine of primary jurisdiction according to *Chaney*. Further, in order to exercise the opportunity for removal a claimant must complete proper removal procedures within 45 days of serving a claim upon the agency. According to the ruling of this Court, the Appellants filed a claim with KPD on August 2, 2012. There is no dispute that they failed to properly remove the action to the court system within 45 days of that claim. A claimant cannot fail to meet that deadline and then later be permitted to abandon the administrative process for the courts through a premature appeal. Otherwise, the deadline for removal articulated in RCW 69.50.505(5) is pointless. Conclusion of law 10 should be affirmed.

*Fairness*

The crux of Appellant's argument is that it was not fair for Superior Court to hold them to the law. They ask this Court to overrule that decision and argue that even if they were required to exhaust their remedies, this Court should ignore the fact that they failed to do so and remand for a hearing instead of affirming the dismissal of their appeal. Courts have refused to excuse exhaustion based on a general equity argument. In *Graham Neighborhood Association v. F.G. Associates*, 162 Wash.App. 98, 252 P.3d 898 (2011), the court refused to grant equitable relief to a party who failed to properly exercise administrative remedies. F.G Associates submitted an application for plat approval in Pierce County in 1996. F.G. was notified that their application was incomplete, but subsequent amendments to the application rendered it complete later in the year. In 2005, pursuant to a new county ordinance, the county sent notice to F.G that if they did not act upon their completed application within one year from the date of the notice, the application would be cancelled. *Id.* at 104. F.G. did not make any response to the notice and the application was cancelled in 2006. Four years later, F.G filed amendments to the initial application. After the application had been cancelled in 2006, a county planner had been in conversation with F.G. and

reactivated the cancelled application in 2008. Parties opposed to the development, argued to the hearing examiner that the application was properly cancelled in 2006 and could not be reactivated. The hearing examiner focused on equitable principles, indicating that F.G easily could have misinterpreted the cancellation notice since they had been in conversation with county staff regarding the progress of the project after 2006. *Id.* at 106 (“Given the overall confusion and the County’s testimony, it would be unconscionable to cancel this project.”). The hearing examiner excused the exhaustion requirement on equity grounds. The Superior Court reversed the hearing examiner’s decision and the appellate court affirmed the superior court. *Id.* at 118. The court reasoned that according to the Pierce County Code, F.G was required to appeal the cancellation of its application to the hearing examiner within 14 days of the cancellation, which it did not do. The court criticized the hearing examiner’s equitable ruling indicating that he had attempted to “create an equitable exemption from the statutory 14-day appeal requirement.” *Id.* at 119. Appellants ask this Court to impose a similar equitable exemption here to the exhaustion doctrine, an argument which has been rejected by Washington courts. *See, Id.* at 119-20; *see also, Nickum v. City of Bainbridge Island*, 153 Wash. App. 366, 223 P.3d 1172 (2009).

None of the arguments made by Appellants to establish that they were not required to exhaust their administrative remedies in this case are persuasive. Much like in *Kreager*, Appellant's failure to move to vacate the default order led to the hearing examiner in this case having no opportunity to address their objections to it. Neither Mr. Thomson nor any of Appellants were ever before the hearing examiner on this issue, and the attorney sent to cover for Mr. Thompson had nothing to offer on it when the opportunity arose. Prior to judicial review of agency action, the appropriate issues must first be raised before the agency. RCW 34.05.534; *Citizens for Mount Vernon*, 133 Wash.2d at 869. The parties must be encouraged to fully participate in the administrative process. *Id.* Under *Kreager* and the APA, KPD was required to have had the opportunity to correct its error and, whatever the result, the Superior court was entitled to have the benefit of an administrative ruling on the claimant's objections. Due to Appellants' failure to comply with the law, neither remedy was afforded in this case. The requirement that administrative remedies be exhausted is especially applicable in cases such as this where the remedy sought by Appellants in Superior Court was the exact remedy that was available to them under RCW 34.05.440(3) through the administrative process. That remedy would have alleviated the harmful consequences of the governmental activity at issue. As

a result, Appellants were required to first pursue that remedy. Based on the procedural facts of this case, the statutory language, and the governing case law, exhaustion of the administrative remedy set forth in RCW 34.05.440(3) was required before Appellants were permitted to seek judicial review in this case. Conclusions of law 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, and 15 should be affirmed as they are supported by the findings of fact as well as the law.

#### IV. CONCLUSION

For the foregoing reasons, KPD respectfully requests that this Court AFFIRM the holding of the Benton County Superior Court and dismiss this appeal.

DATED December 9, 2014.

Respectfully submitted,



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1  
2 IN THE COURT OF APPEALS IN AND FOR THE STATE OF WASHINGTON  
3 DIVISION III

4 KENNEWICK POLICE DEPARTMENT, )

5 Respondent, )

6 vs. )

7 ALFREDO AHUMADA, ET AL, )

8 Appellant. )  
9 )  
10 )

No. 323692-III

AFFIDAVIT OF SERVICE

11 CERTIFICATE OF SERVICE

12 STATE OF WASHINGTON )

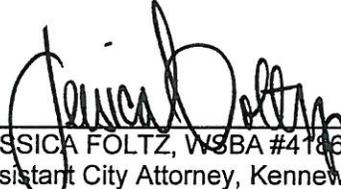
13 COUNTY OF BENTON )

) ss.  
)

14 **COMES NOW**, Jessica Foltz, who being first duly sworn upon oath, deposes and says:

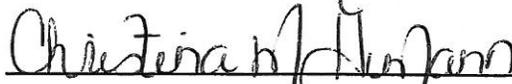
15 I am an Assistant City Attorney for the Kennewick City Attorney's Office and I served a copy of  
16 the BRIEF OF RESPONDENT via email upon the following, on the 9th day of December, 2014, and  
17 placed the same in PRONTO LEGAL MESSENGER SERVICE for hand delivery.

18 Robert Thompson  
19 504 West Margaret Street  
20 Pasco, WA 99301

21   
22 \_\_\_\_\_  
23 JESSICA FOLTZ, WSBA #41866  
24 Assistant City Attorney, Kennewick City Attorney's Office

25 SUBSCRIBED AND SWORN to before me this 9th day of December, 2014.



26   
27 \_\_\_\_\_  
28 Notary Public in and for the State of Washington,  
Residing at Richard. My Com. Expires: 12/9/16

AFFIDAVIT OF SERVICE  
Page 1 of 1

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