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Trial Court No. 17-2-00462-39

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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AHO CONSTRUCTION I, INC.,

Appellant,

v.

CITY OF MOXEE,

Respondent

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**APPELLANT AHO CONSTRUCTION I, INC.'S REPLY BRIEF**

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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
<b>TABLE OF AUTHORITIES .....</b>	<b>ii</b>
<b>I. INTRODUCTION.....</b>	<b>1</b>
<b>II. ARGUMENTS .....</b>	<b>2</b>
<b>A. There is a difference between the review of an agency recommendation and the administrative appeal of a land use decision. ....</b>	<b>3</b>
<b>B. The City can't change its rules through quasi-judicial fiat..</b>	<b>5</b>
<b>C. It would be unfair to deny Aho judicial review. ....</b>	<b>8</b>
<b>D. Constitutional avoidance is irrelevant. ....</b>	<b>9</b>
<b>E. Aho satisfied the exhaustion requirements. ....</b>	<b>10</b>
<b>III. CONCLUSION.....</b>	<b>11</b>

## TABLE OF AUTHORITIES

### Cases

<i>Applied Indus. Materials Corp. v. Melton</i> , 74 Wash. App. 73, 79, 872 P.2d 87 (1994) .....	6
<i>Citizens' Alliance for Prop. Rights v. Sims</i> , 145 Wn. App. 649, 187 P.3d 786 (2008).....	9
<i>Coughlin v. Seattle</i> , 18 Wash. App. 285, 567 P.2d 262 (1977) .....	6
<i>David Hill Dev., LLC v. City of Forest Grove</i> , 688 F. Supp. 2d 1193 (D. Or. 2010) .....	9
<i>Dolan v. City of Tigard</i> , 512 US 374 (1994) .....	9, 10
<i>Isle Verde International Holdings v. City of Camas</i> , 146 Wn. 2d 740 (2002) .....	10
<i>King County v Washington State Boundary Review Bd.</i> , 122 Wn.2d 648, 860 P.2d 1024 (1994) .....	7
<i>Towle v. Dep't of Fish &amp; Wildlife</i> , 94 Wash. App. 196, 971 P.2d 591 (1999) .....	6
<i>W. Linn Corp. Park L.L.C. v. City of W. Linn</i> , 534 F.3d 1091 (9th Cir. 2008) .....	9
<i>Wells v. Western Washington Growth Mgmt. Hearings Bd.</i> , 100 Wn. App 657, 997 P.2d 405 (2000) .....	7

### Other

RCW 36.70B.020 .....	2, 5, 10
RCW 82.02.020 .....	10

## I. INTRODUCTION

The exhaustion of remedies doctrine was never intended to be a trap for the unwary. It instead is designed to prevent a litigant from seeking a remedy in court not presented to the agency with original jurisdiction.

But, in a form of “gotcha” litigation, Respondent wants this court to adopt a new rule of administrative law that would require land use applicants to *resubmit* their legal arguments during a closed record *review* (vs. an *appeal*), even though the City Council received, and was required to *review*, the entire record created before the City Council’s appointed hearings examiner.

Respondent does this by conflating the rules related to administrative *appeals* of decisions made by subordinate agency decision makers with what occurred in this case; the *review* of recommendations and the record developed before the hearings examiner appointed by the City Council. Respondent also argues that, by not resubmitting its legal briefing during the closed record review, Aho “abandoned” its legal arguments.

There is no dispute that Aho fully raised and briefed these issues before the City’s hearings examiner,<sup>1</sup> and that the City Council knew of these arguments before it acted upon the hearings examiner’s

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<sup>1</sup> The record that was provided to City Council included Aho’s detailed briefing of the issues. See Appendix A to Moxee’s Memorandum in Support of Motion to Dismiss, SR 86-92 and SR 93-95.

*recommendation.*<sup>2</sup> Therefore, the City Council knew of Aho’s claims and had ample opportunity to avoid issuing an unlawful land use decision.

Finally, Respondent concedes that Aho’s attorney – who was led to believe he could not speak at the City Council’s closed record review – stated his objections to the hearings examiner’s decision because it “constituted an unconstitutional taking.”<sup>3</sup> Respondent also concedes that Aho’s attorney made clear that Aho “stood” on its prior briefing.<sup>4</sup> This means Aho never abandoned the issues.

## II. ARGUMENTS

Was Aho required to resubmit its legal briefs to the City Council, even though the City Council received and knew of those arguments, and Aho’s attorney made clear to the City Council that Aho was standing by its arguments?

The City’s arguments rely upon case law and a statute (RCW 36.70B.020(1)) that pertain only to administrative *appeals* and not the type of administrative *review* that occurred here. The City muddies the water by trying to conflate these two processes. The City also ignores its own ordinances, where it is clear that the City Council knows the difference

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<sup>2</sup> In addition to having the record from the hearings examiner proceeding, and hearing staff’s summary of the outstanding issues at the hearing, City Council also had Aho’s January 23, 2017 letter and City Council heard Madsen’s oral testimony.

<sup>3</sup> Hearing Transcript page 16, lines 12-16: Steve Madsen summarized the outstanding issues, stating “whether or not this constituted an unconstitutional taking, that is in conversion of private properties for public use without just compensation, and that remains our position here tonight [emphasis added].”

<sup>4</sup> Respondent admits in its brief that City staff told City Council at the hearing that Aho “stood on the information that they had originally submitted to us.” See Brief of Respondent City of Moxee, page 8.

between a “closed record *review*” of a hearings officer’s recommendation and a “closed record *appeal*.” But instead of simply applying its plain language, the City wants to rewrite its code through judicial fiat.

Regardless, the purpose of the exhaustion requirement was satisfied because the City Council (1) knew of Aho’s objections to the hearings examiner’s recommendation, and (2) had sufficient opportunity to issue a final land use decision free of legal defects.

**A. There is a difference between the review of an agency recommendation and the administrative appeal of a land use decision.**

A proper analysis requires the court to distinguish between administrative appeals of decisions and administrative review of recommendations.

The administrative process for agencies making final agency decisions (or taking final agency action) vary greatly amongst the various state and local agencies. These processes are governed by statute, administrative rules or local ordinances.

Many agencies provide for administrative appeals. A subordinate, often a staff person, hearings officer or commission, will issue a decision that is considered final unless appealed by an interested party. The appellants must then submit their appeal under the agency’s appeal rules. The appeal is then heard by the appellant agency and a final decision is

issued. Under that scenario, the litigant must identify the basis for their appeal.

Contrast the above to the process to what exists in the City of Moxee. For subdivisions, an applicant must have their applications reviewed by a City appointed hearings examiner. This hearings examiner must then hold an “open record” hearing to allow the parties to submit their factual and legal arguments and create their administrative record. The hearings examiner then issues a recommendation to the City Council and forwards the entire record to the City Council for review. In his or her recommendation, the hearings examiner outlines the facts, summarizes the parties’ legal positions and then makes recommendations on how the City Council should address those issues.

The City Council must then consider the administrative record and the hearings examiner recommendations in making the final decision. In other words, for subdivisions, the City has chosen not to provide for any administrative appeals – the City Council’s decision is the one and only land use decision, unless appealed to superior court.

Here, Respondent admits that the “issue is not whether Aho failed to exhaust an available administrative *appeal*.<sup>5</sup> Respondent instead argues that Aho needed to resubmit its legal briefs, even though the Respondent admits those legal briefs were submitted into the record at the open record hearing before the hearings examiner and that entire record was provide to

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<sup>5</sup> See Brief of Respondent City of Moxee, page 27 (emphasis in original).

City Council along with the hearings examiner recommendation. There was no administrative appeal here, only an automatic review by City Council of a hearing examiner recommendation.

This contrasts with RCW 36.70B.020(1), which, by its express terms, only applies to a closed record “appeal”. Thus, the City’s reliance on RCW 36.70B.020(1) is misplaced.

**B. The City can’t change its rules through quasi-judicial fiat.**

Perhaps the City could have adopted a rule to require what they seek to establish in this case – that land use applicants submit (or resubmit) legal briefs to the City Council during its administrative review. However, the City would have needed to do this through rule making authority (*i.e.* amending its code) rather than acting through its quasi-judicial authority on an ad hoc basis. The City can’t make up the rules as it goes. The City instead is bound by the administrative rules that it has adopted.

Nothing in Moxee’s code would have alerted land use applicants that they were required (or even allowed) to repeat their legal arguments to the City Council. To the contrary, the City code distinguishes between administrative appeals and City Council’s automatic review of a recommendation.

For administrative appeals, the code specifically required the appellant to provide a “statement of grounds for the appeal addressing

why the appellant believes the decision to be wrong.” MCC  
16.15.060(c)(i)(D).

Unlike administrative appeals, where the code specifically requires the applicant to explain “why the appellant believes decision is wrong,” the code imposes no such requirement on applicants where there is an automatic closed record review of a hearings examiner recommendation. The negative implication is that applicants do not have to explain why the applicant believes the recommendation was wrong in an automatic closed record review. As the court explained:

“In construing a statute, it is always safer not to add to . . . the language of the statute unless imperatively required to make it a rational statute.” *Applied Indus. Materials Corp. v. Melton*, 74 Wash. App. 73, 79, 872 P.2d 87 (1994). “Courts cannot read into a statute words which are not there.” *Coughlin v. Seattle*, 18 Wash. App. 285, 289, 567 P.2d 262 (1977). The negative implication from the statute's failure to give the reviewing officer express power to take additional evidence is that the reviewing officer cannot take additional evidence outside the record established by the presiding officer.”

*Towle v. Dep't of Fish & Wildlife*, 94 Wash. App. 196, 205-06, 971 P.2d 591, 595 (1999).

In *Towle*, there was a negative implication that there was no ability to allow additional evidence at the review stage after an open record hearing. By the same logic, the City's lack of any code provision requiring an applicant in a closed record review to explain “why the

recommendation is wrong” creates a negative implication that applicants do not have to do so.

The City clearly knows how to draft a code provision requiring applicants to explain “why the appellant believes decision is wrong,” and the City did so expressly for administrative appeals in MCC 16.15.060(c)(i)(D). The fact that the procedures for City Council review of a hearing examiner recommendation contain no such requirement implies that an applicant is not required to repeat issues and instead may merely stand on its prior briefing, as the applicant did here.

Respondents cite *Boundary Review Board*<sup>6</sup> and *Wells*<sup>7</sup>, but those cases have no applicability here. In those cases, the appellant either cited to the wrong statute or failed to even raise the particular legal argument. That’s quite different from what occurred here, since it is undisputed that Aho submitted detailed legal briefing on its issues to the hearing examiner, and the only question was whether Aho could stand on its prior briefing or whether Aho had to repeat what it had already said to the hearing examiner.

Since the Moxee code contains no provision requiring an applicant to explain why the hearings examiner recommendation was wrong, Aho did not have to repeat its issues to the City Council. It was enough for Aho to stand on its prior briefing. The City cannot seriously contend that

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<sup>6</sup> *King County v Washington State Boundary Review Bd.*, 122 Wn.2d 648, 860 P.2d 1024 (1994).

<sup>7</sup> *Wells v. Western Washington Growth Mgmt. Hearings Bd.*, 100 Wn. App 657, 997 P.2d 405 (2000).

it was unaware of Aho's issues or that it thought Aho had "abandoned" the issues.

If the City wishes to change its procedures, then it can do so. However, it can't change the rules on an ad hoc basis. It must instead go through the process to amend and publish its code to give notice to its citizens.

**C. It would be unfair to deny Aho judicial review.**

Respondent admits that, before the City Council conducted its closed record review, Aho's attorney, Steve Madsen sent the City Attorney a letter dated January 23, 2017. In that letter, Aho's counsel stated that due to ethical concerns, he was directing "all further communications in this matter" through the City Attorney.<sup>8</sup> The letter then lays out Aho's legal arguments. Indeed, the City admits this letter was submitted to and considered by the City Counsel.<sup>9</sup>

It's obvious from the letter that Mr. Madsen believed he was legally barred from addressing the City Council. It's equally clear that Mr. Madsen intended to give notice to the City Attorney of Aho's intent to appeal if the City followed the hearings examiner's recommendation. It is also clear that the City Attorney and City Council knew of Aho's legal position and intent to challenge the City's decision, if it adopted the recommendation.

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<sup>8</sup> See MMC 16.15.190(2)(c) prohibiting *ex parte* communications with the City Council.

<sup>9</sup> See Brief of Respondent City of Moxee, page 31.

It would be inequitable for the City to now claim that Mr. Madsen was in error in his belief about the process. It would also be unfair for the City to avoid judicial scrutiny on a technicality when it is undisputed that the City knew Aho's legal position and Aho's insistence that the City Council not follow the hearings officer's recommendation. To rule otherwise would be to bless the City's chicanery.

**D. Constitutional avoidance is irrelevant.**

Respondent attempts to sidestep the issues by raising an irrelevant argument about constitutional avoidance. This court is not being asked to make a constitutional ruling in this case, so the doctrine of constitutional avoidance does not apply. However, it should also be noted that Moxee's argument that plaintiff must exhaust administrative remedies to bring a takings claim for an exaction is legally incorrect.

The Ninth Circuit has distinguished between regulatory takings and exaction cases and held that exactions cases are more like physical invasion taking cases where procedural exhaustion/ripeness is not required. *W. Linn Corp. Park L.L.C.*, 534 F.3d at 1100. Further, in an exaction case, the burden is on the City of Moxee, not Aho to justify the exaction. *Dolan v. City of Tigard*, 512 US 374, 391 (1994); see also *David Hill Dev., LLC v. City of Forest Grove*, 688 F. Supp. 2d 1193, 1211 (D. Or. 2010); *Citizens' Alliance for Prop. Rights v. Sims*, 145 Wn. App. 649, 665, 187 P.3d 786 (2008), review denied, 165 Wn.2d 1030 (2009).

Therefore, Aho was not even required to exhaust administrative remedies to sue for compensation.

**E. Aho satisfied the exhaustion requirements.**

Regardless, the Court need not reach these constitutional issues to decide this case in Aho's favor, since the record demonstrates that Aho raised all of its issues in detailed briefing to the hearing examiner, that Aho's detailed legal briefing was provided to the City Council as part of the record of the hearing examiner open record hearing, and that Aho "stood" on its prior briefing at the City Council's closed record review.

There is no dispute that Aho fully briefed these issues at the open record hearing before the hearing examiner.<sup>10</sup> Aho's briefing to the hearing examiner included the statement that "Washington Law is very clear that mitigation requirements imposed on land development by municipal jurisdictions must be roughly proportional to the environmental impacts created by the development."<sup>11</sup> This statement was backed up in Aho's briefing by citation to the *Dolan* case that established the constitutional "proportionality" test for exactions and the *Isle Verde* case imposing a nearly identical test under RCW 82.02.020.<sup>12</sup>

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<sup>10</sup> See Appendix A to Moxee's Memorandum in Support of Motion to Dismiss, SR 86-92 and SR 93-95; see also Petitioner/Plaintiff's Opposition to Respondent City of Moxee's Memorandum in Support of Motion to Dismiss, Appendix A.

<sup>11</sup> See Appendix A to Moxee's Memorandum in Support of Motion to Dismiss, SR 93.

<sup>12</sup> See Appendix A to Moxee's Memorandum in Support of Motion to Dismiss, SR 93, citing to *Dolan v. City of Tigard*, 512 US 374 (1994) and *Isle Verde International Holdings v. City of Camas*, 146 Wn. 2d 740 (2002).

Thus, Aho squarely raised the issues of proportionality and RCW 82.02.020 in its briefing, which was provided to City Council as part of the record.<sup>13</sup>

### III. CONCLUSION

Because the City Council’s automatic and “closed record” review was not an appeal, the “exhaustion of remedies” doctrine does not even apply here. But even if it did, Aho properly and timely raised and preserved these issues; the City had adequate notice of Aho’s legal objections and an opportunity to address them before it took final action.

It would be manifestly unfair and inequitable for the City to avoid having its decision reviewed under the facts of this case, where the City made an ad hoc decision to impose a new exhaustion requirement that does not appear anywhere in its land use ordinances governing subdivision applications in order to avoid judicial review when it is obvious that the City Council knew of Aho’s detailed legal briefing of the issues and that Aho was standing on its prior briefing.

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<sup>13</sup> *Id.*

The court should therefore overturn the trial court's procedural dismissal of Aho's LUPA appeal and permit the appeal to proceed on the merits.

Dated: March 2, 2018

Respectfully Submitted,

LANDERHOLM, P.S.

/s/ Bradley W. Andersen

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies as follows:

1. My name is Jacqueline Renny. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party of this action.

2. On the 2nd day of March, 2018, a copy of the foregoing **APPELLANT AHO CONSTRUCTION I, INC.'S REPLY BRIEF** was delivered via first class United States Mail, postage prepaid, to the following person:

Kenneth W. Harper  
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*Attorney for Respondent*

**I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.**

DATED: March 2, 2018

At: Vancouver, Washington

*/s/ Jacqueline Renny*  
\_\_\_\_\_  
JACQUELINE RENNY

**LANDERHOLM, P.S.**

**March 02, 2018 - 11:52 AM**

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