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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

AHO CONSTRUCTION I, INC.,

Appellant,

v.

CITY OF MOXEE,

Respondent

APPELLANT AHO CONSTRUCTION I, INC.'S OPENING BRIEF

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I. INTRODUCTION

What does it take for an appellant to exhaust their administrative remedies under Washington's Land Use Petition Act (LUPA)?¹

The Appellant, Aho Construction I, Inc. ("Aho") claims the Respondent, City of Moxee ("Moxee") imposed unlawful, and even unconstitutional, conditions of approval ("Condition 5") on its subdivision.² But the trial court never considered Aho's substantive claims because it dismissed its land use appeal on procedural ground; it ruled that Aho had not adequately preserved these issues under LUPA.

The City concedes that, during the "open record" proceeding, Aho fully raised and briefed its objection to Condition 5 before the hearing examiner. It also concedes these arguments were part of the administrative record presented to the City Council. The City also concedes the hearing examiner detailed Aho's objections and arguments in his written *recommendations* to the City Council and that the council was aware of the issues before it approved the subdivision.

It is also undisputed that the City's staff verbally discussed Aho's objections to Condition 5 during the staff presentation during the

¹ RCW Chapter 36.70C.

² Specifically, the City required Aho to extend Chelan Avenue straight through the middle of its subdivision in direct contravention of the City's land use code and Comprehensive Plan. This condition also constitutes an unlawful exactions/takings under Wash. Rev. Code § 82.02.020 and Wash. Const. art. I, § 16.

Council's "closed record" review. The undisputed record also shows that Aho's in-house counsel submitted a letter to the City Attorney re-raising these issues before the Council conducted its "closed record review."³

The record also shows that Aho's in-house counsel – surprised by the Council's *sua sponte decision* to allow him to speak at its "closed record" review – stated that the key issue before the City Council was "whether or not this constituted an unconstitutional taking, that is in conversion of private properties for public use without just compensation."

The exhaustion of administrative remedies rule "is founded upon the belief that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional expertise of judges."⁴ At its heart, the rule only requires the appellant have given the agency sufficient notice of its concerns in time to allow the agency to address or cure the defect before it issued its final decision.

Did Aho adequately raise its concerns before the City issued its final decision?

The City contends, and the trial court agreed, that Aho needed to repeat the exact same legal arguments to the City Council during the "closed record" review that Aho submitted to the hearing examiner during

³ He wrote to the City Attorney to avoid violation of his ethical obligation against having direct contact with the Council and to avoid *ex-parte* communications.

⁴ *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997).

the “open record” review. This, even though the Council could not give final approval without first having reviewed and relied upon the administrative record developed during the only “open record” proceedings and considering the hearing examiner’s written recommendation which detailed Aho’s arguments.

Does the exhaustion rule require Aho to verbally repeat its legal arguments at the City Council’s “closed record” review, especially considering Aho’s reasonable belief that no further comments would be allowed? And should the City Council get the benefit of the doubt when it has established a misleading or confusing land-use process to possibly catch the unwary into waiving important due process rights?

The City’s land use code, at issue here, establishes a two-step process for the approval of subdivisions.⁵ The first step is for the hearings examiner to conduct an “open record” hearing in which all interested parties submit their positions, including comments, evidence, and arguments. The examiner must then make a *recommendation* to the City Council.

The examiner’s written recommendation and the administrative record (*i.e.* the application, staff report, evidence, comments and

⁵ MCC 16.15.230(2) and (3); MCC 16.60.190.

arguments), must then be submitted to the Council for final approval in a “closed record” review hearing.

By the City’s own code, the second step is automatic and does not require or even allow for an appeal to the City Council. This second step is also limited to a “closed record” review; the Council must base its ruling on the record established at the “open record” review. This “closed record” review means the City Council could not consider additional information.

Because the administrative record and written recommendation included Aho’s objections and arguments, and because, by rule, the Council’s “closed record” review meant no additional information could be presented, it would be unfair to conclude that Aho failed to preserve its administrative remedies. Regardless, Aho’s objections to Condition 5 were adequately raised before the City issued its final decision.

This court should therefore overturn the trial court’s procedural dismissal of Aho’s LUPA petition and permit Aho to pursue its appeal.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it dismissed Aho’s LUPA Petition for failure to exhaust its administrative remedies.
2. Even if Aho had to repeat its objections and arguments at the City Council “closed record” review, the trial court erred by finding that Aho’s written letter to the City Attorney and its verbal comments were not sufficient.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When the City Council is conducting an automatic “closed record” review of a hearing examiner recommendation made during an “open record” proceeding, are applicants required to reiterate issues fully briefed before the hearing examiner when the City code provides no apparent opportunity for the applicant to have further input to the review process due to the “closed record” nature of the City Council review?
2. When the City Council is conducting such a “closed record” review, are applicants required to verbally reiterate issues at the City Council hearing already discussed at length in the hearing examiner’s own recommendation that the City Council is supposed to be reviewing?
3. When the City Council is conducting such a “closed record” review, are applicants required to reiterate issues already fully briefed by the applicant’s prior memoranda included in the record provided to the City Council that the City Council was supposed to review?
4. When the City Council is conducting such a “closed record” review, are applicants required to verbally reiterate issues already discussed verbally by staff during the staff presentation at the City Council hearing?
5. When the City Council is conducting such a “closed record” review with no apparent opportunity for the applicant to provide further input, and the applicant has sent a letter to the City Attorney prior to the hearing outlining applicant’s issues and concerns and informing the City Attorney that the applicant is writing to him since the “closed record” review process does not allow further communication directly with the City Council, are applicants required to verbally reiterate the issues when the City Council surprises applicant and *sua sponte* decides to accept public testimony at what was advertised as a “closed record” hearing?

6. Was the applicant's verbal statement at the City Council hearing that the key issue before the City Council was "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" sufficient to preserve applicant's proportionality claim for judicial review?

IV. STATEMENT OF THE CASE

A. Statement of Procedures

This case involves a timely appeal of a Court Decision dismissing a timely LUPA appeal of a City of Moxee land use decision on a subdivision.⁶ The subdivision application was processed under the City of Moxee's municipal ordinances, which requires a two-stage review.

First, there is an "open record" public hearing before the City hearing examiner, which is the stage of review where parties are provided an opportunity to present their issues and the evidence supporting their issues. The "open record hearing" is followed by an automatic "closed record" review of the hearing examiner recommendation before City Council (*i.e.*, the second step).⁷

⁶ See Land Use Petition and Complaint, dated February 28, 2017, Court's Decision, dated August 4, 2017, Order Granting Defendant's Motion to Dismiss with Prejudice, dated August 30, 2017, and Notice of Appeal to Court of Appeals, dated September 15, 2017.

⁷ MMC 16.60.190 (City Council "shall" review recommendations on any preliminary plat in "a closed record hearing to consider the matter in accordance with the procedures and standards of Chapter 16.15 MMC for conducting a closed record hearing") and MCC

B. Statement of Facts

During the “open record” hearing, Aho objected and submitted detailed legal briefing to the hearing examiner about Condition 5. This briefing was provided to City Council as part of the record on review at the City Council meeting on February 9, 2017.⁸ The City hearing examiner’s recommendation that City Council was reviewing on February 9, 2017 contained detailed discussion of Aho’s technical legal briefing of Aho’s concerns with Condition 5.⁹

After the hearing examiner made his recommendation, but prior to the February 9, 2017 City Council meeting, Aho’s legal counsel, Steve Madsen submitted a letter to the City Attorney on January 23, 2017, because he felt it unethical to submit the letter directly to the City Council. This letter again raised Aho’s concerns with Condition 5.¹⁰ This letter was provided to City Council.¹¹

16.15.230(2)(“closed record decision shall be a closed record public meeting held by the city council prior to the issuance of a final decision, but follows a previous open record public hearing on the project permit application before the hearing examiner”).

⁸See Appendix A to Moxee’s Memorandum in Support of Motion to Dismiss, SR 86-92 and SR 93-95.

⁹ See Appendix D to Moxee’s Memorandum in Support of Motion to Dismiss (findings 19, 20, and 21 on page 5 of the hearings examiner recommendation, as well as findings 3 through 10 on pages 7-9, and findings 5 through 11 on pages 16-18).

¹⁰ See Appendix F to Moxee’s Memorandum in Support of Motion to Dismiss.

¹¹ Moxee Memorandum in Support of Motion to Dismiss, page 8, lines 6-9 (“At the hearing, Aho submitted no legal briefing or written materials of any kind, though a letter from Mr. Madsen to the City Attorney was included”).

At the February 9, 2017 City Council meeting, City staff reiterated Aho's concerns with Condition 5.¹² At the February 9, 2017 City Council meeting, Steve Madsen also reiterated Aho's concerns with Condition 5, stating that the key issue before the City Council was "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."¹³

V. ARGUMENTS

A. **De Novo is the standard of review in determining if Aho adequately exhausted its administrative remedies.**

The trial court dismissed Aho's LUPA petition for judicial review because it found Aho had failed to exhaust its administrative remedies. Because this involves a question of law, the standard of review is *de novo*.¹⁴

B. **Aho adequately gave notice of its objection to Condition 5 before the City took final action.**

Standing to bring a petition under LUPA requires a party to exhaust their administrative remedies. But "[t]he LUPA statute states

¹² Hearing Transcript page 8, lines 6-9, 12-13, and 14-17 and page 12, lines 8-11 and page 11, lines 8-10.

¹³ Hearing Transcript page 16, lines 12-16.

¹⁴ *Habitat Watch v. Skagit Cty.*, 155 Wn.2d 397, 405-06, 120 P.3d 56, 60 (2005) ("In reviewing an administrative decision, an appellate court stands in the same position as the superior court' *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Conclusions of law are reviewed de novo')."

nothing of the degree of participation or the specificity with which the issues must be raised.”¹⁵

The exhaustion rule is well established in Washington. In general, agency action cannot be challenged on review unless all rights of administrative appeal have been exhausted.¹⁶

The exhaustion rule “is founded upon the belief that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional expertise of judges.”¹⁷ The policy basis for the rule has been summarized as follows:

(1) insure against premature interruption of the administrative process; (2) allow the agency to develop the necessary factual background on which to base a decision; (3) allow exercise of agency expertise in its area; (4) provide for a more efficient process; and (5) protect the administrative agency's autonomy by allowing it to correct its own errors and insuring that individuals were not encouraged to ignore its procedures by resorting to the courts.

Id. (citing *McKart v. United States*, 395 U.S. 185, 193-94, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969)).

¹⁵ *Lauer v. Pierce County*, 173 Wn.2d 242, 255-56, 267 P.3d 988, 993-94 (2011) quoting *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868-71, 947 P.2d 1208 (1997) (holding that where the only administrative remedy available was participation in a public hearing, and where the petitioners participated, they satisfied the exhaustion requirement).

¹⁶ *Chelan Cty. v. Nykreim*, 146 Wn.2d 904, 937, 52 P.3d 1, 17 (2002).

¹⁷ *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 866, 947 P.2d 1208 (1997)(citing *S. Hollywood Hills Citizens Ass'n v. King County*, 101 Wn.2d 68, 73, 677 P.2d 114 (1984)).

The primary question in exhaustion cases is whether the relief an appellant seeks on judicial review was raised at some point during the administrative process in a manner that would have placed the lower agency on sufficient notice of the issue, and in time to allow the agency to act to correct the error.

Here, Aho participated and raised its issues with Condition 5 in the only hearing that was available as an “open record” hearing. And before it issued its final decision, the City was fully aware of and rejected Aho’s issues. Aho therefore exhausted its administrative remedies.

C. Aho did not have to repeat issues during an automatic “closed record” review of a hearing examiner recommendation.

The doctrine of exhaustion of administrative remedies is well established in Washington. In general, agency action cannot be challenged on review unless all rights of administrative appeal have been exhausted. *Ward v. Bd. of Cty. Comm'rs*, 86 Wash. App. 266, 271, 936 P.2d 42, 45 (1997), citing *Hollywood Hills Citizens v. King County*, 101 Wn.2d 68, 73, 677 P.2d 114 (1984).

However, this case does not involve a question of failure to exhaust an administrative *appeal*. Aho filed no administrative appeals, nor did Aho need to under the procedures at issue here. The City’s own application process requires an *automatic* review by the City Council of

the administrative record, and the hearing examiner's *recommendations*, generated by the "open record" review of the proposed subdivision. Thus, the process at issue here did not require (or even allow) any *appeals* to be filed.

Under MMC 16.60.190, the City Council "shall" review recommendations on any preliminary plat in "a closed record hearing to consider the matter in accordance with the procedures and standards of Chapter 16.15 MMC for conducting a closed record hearing." [Emphasis added]. Similarly, under MCC 16.15.230(2), a "closed record decision shall be a closed record public meeting held by the city council prior to the issuance of a final decision, but follows a previous open record public hearing on the project permit application before the hearing examiner."

Using the word "shall" in MCC 16.60.190 and MCC 16.15.230(2) means the City Council must review the administrative record created below together with the hearings officer recommendations. This means there was nothing here for the applicant to "appeal;" a final decision could only be made once the City Council had reviewed and approved the subdivision.

The City code's use of the words "closed record" in MCC 16.60.190 is significant and controlling. As discussed in *Ellensburg Cement Prods., Inc. v. Kittitas County*, a "closed record" appeal process is

“a hearing, conducted by a single hearing body or officer authorized by the local government to conduct such hearings, that creates the local government's record through testimony and submission of evidence and information, under procedures prescribed by the local government by ordinance or resolution.” Wash. Rev. Code § 36.70B.020(3). A “closed record appeal” is defined as “an administrative appeal on the record to a local government body or officer, including the legislative body, following an open record hearing on a project permit application when the appeal is on the record with no or limited new evidence or information allowed to be submitted and only appeal argument allowed.” Id. § 36.70B.020(1).

Ellensburg Cement Prods., Inc. v. Kittitas County, 179 Wash. 2d 737 (2014).

The process for a “closed record hearing” in Moxee is similar, but different in one important respect, since in Moxee, applicants need not appeal a hearings examiner recommendation because review by the City Council is *automatic* under per MMC 16.60.190, which required City Council to conduct a closed record review on all subdivision applications.

Once the hearings examiner conducts the “open record hearing,” – during which parties must raise all of their issues – the City Council must automatically review the hearings examiner’s recommendation and the record developed during the open record hearing. Because the Council’s

review is conducted through a “closed record hearing”, the parties must present all of their issues during the “open record” proceeding.

Since the issues were already aired in the initial “open record hearing”, and relied upon by the hearing examiner in issuing his recommendations, there was no need to repeat these before the City Council. Indeed, a reasonable developer (and their in-house counsel) could reasonable conclude that further evidence or arguments could not be presented to the Council at a “closed record” review.

MCC 16.15.230 confirms Aho’s belief: “Closed record appeal/decision hearing shall be on the record, and no new evidence may be presented.” Since Aho properly raised all issues during the prior “open record hearing”, and the City Council review of the subdivision at issue in this case was based on the record developed at the “open record hearing”, Aho reasonable believed that there was no need (or even the right) to exhaust administrative remedies by reiterating what was already presented at the “open record hearing” before the examiner.

This follows long-standing case law on the doctrine of exhaustion of administrative remedies, especially in the LUPA context. The Court of Appeals has explained the history, background, and purpose of the doctrine of exhaustion of administrative remedies:

Generally, actions by an agency cannot be challenged in court until administrative avenues of appeal are exhausted. *Beard v. King County*, 76 Wn. App. 863, 870, 889 P.2d 501 (1995). Exhaustion of administrative remedies is required when (1) a claim is cognizable in the first instance by an agency alone, (2) the agency's authority establishes clearly defined machinery for the submission, evaluation, and resolution of complaints by aggrieved parties, and (3) the relief sought can be obtained by resort to an exclusive or adequate administrative remedy. *Beard*, 76 Wn. App. at 870 (citing *State v. Tacoma-Pierce County Multiple Listing Serv.*, 95 Wn.2d 280, 284, 622 P.2d 1190 (1980) (quoting *Retail Store Employees Union Local 1001 v. Washington Surveying & Rating Bureau*, 87 Wn.2d 887, 558 P.2d 215 (1976))). The doctrine is founded on the principle that the judiciary should give proper deference to that body possessing expertise in areas outside the conventional experience of judges, so that the administrative process will not be interrupted prematurely, so that the agency can develop the necessary factual background on which to reach its decision, so that the agency will have the opportunity to exercise its expertise and to correct its own errors, and so as not to encourage individuals to ignore administrative procedures by resorting to the courts prematurely. *South Hollywood Hills Citizens Ass'n*, 101 Wn.2d at 73-74 (citing *Retail Store Employees*, 87 Wn.2d at 906 and *McKart v. United States*, 395 U.S. 185, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969)).

Phillips v. King Cty., 87 Wash. App. 468, 479-80, 943 P.2d 306, 313-14 (1997) aff'd, 136 Wn.2d 946, 968 P.2d 871 (1998).

Here, the second prong under *Phillips* – “(2) the agency’s authority establishes clearly defined machinery for the submission, evaluation, and resolution of complaints by aggrieved parties” – is most relevant because the City’s “clearly defined machinery” set up a two stage process for the review of subdivisions. Under the City’s system all interested parties, including Aho, had to submit their issues and evidence to the City hearings examiner during the “open record” hearing. At the conclusion of that hearing, the hearings examiner’s recommendation, together with the record generated at that hearing, would automatically be submitted to the City Council for final review and approval. Under the City’s own procedures, there was nothing further for the applicant to do but let the City Council conduct its final review.

And since the “necessary factual background on which to reach its decision” and legal arguments were developed at the “open record” hearing, the City Council necessarily had to consider those in reaching its land use decision. Thus, the City Council had “the opportunity to exercise its expertise and to correct its own errors” during the closed-record review. *Id.* A verbal repeat by Aho of what was clearly in the record or hearings

examiner's written recommendation was not required, was unnecessary and, in most jurisdictions, not even allowed.

Under this two-stage review process set forth in the City's own code, the applicant did not have to present issues to the City Council that had already been presented to the City's hearing examiner. Therefore, the trial court's decision should be overturned.

D. Aho did not have to repeat issues that had already been fully briefed and presented to the City Council through its review of the hearing examiner recommendation.

In his written recommendation, the Hearing Examiner analyzed the law and facts, including Aho's legal objection. So had the City Council simply read the hearing examiner's recommendations and the record created below – which is required by its own code – it would have been well informed of Aho's objection with Condition 5.

For instance, findings 19 and 20 on page 5 of the hearing examiner recommendation discussed in detail the September 14, 2016 technical memorandum filed by John Manix, PE on behalf of Aho. Finding 21 on page 5 of the hearing examiner recommendation discussed the September 15 legal memorandum filed by Steve Madsen on behalf of Aho.¹⁸ Additionally, the hearing examiners findings under "Issues on

¹⁸ See Appendix D to Moxee's Memorandum in Support of Motion to Dismiss.

Appeal” discussing the issues raised by Aho in findings 3 through 10 on pages 7-9, and findings 5 through 11 on pages 16-18.

Under its system, the City Council had to at least read the recommendation that they were reviewing. Aho was under no obligation to repeat, during a “closed record” hearing, what had already been fully briefed during the open record hearing because all of Aho’s issues were already discussed at length in the hearing examiner recommendation that the City Council had before it and was supposed to read as part of its review.

Simply asked, how could City Council conduct a legitimate review of a document (or record) they did not even read? And if they did read it, how could they not know of Aho’s issues with Condition 5, especially considering the hearing examiner’s extensive analysis of those issues in his recommendation? In either case, Aho has satisfied the minimum requirements for having exhausted the issue through its briefing submitted to the hearing examiner.

E. Aho was not required to verbally repeat issues that had already been fully briefed when those briefs were included in the record that was presented to the City Council.

As discussed above, Aho raised all issues during the open record hearing before the hearing examiner, which was in the stage of the review when issues had to be raised. In addition, Aho’s prior briefing to the

hearing examiner was provided to City Council as part of the record, before the City Council acted on February 9, 2017 to issue a final decision. What more was necessary?

For instance, the record before City Council on February 9, 2017 included a September 15, 2016 legal memorandum from Steven B. Madsen taking exception to the requested extension of Chelan Avenue through the subdivision and arguing that it was not “roughly proportional” to the impacts of the development under Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), as well as under Washington law, with citations to Burton v. Clark County, 91 Wash. App. 505, 520-23 (1998) and *Benchmark Land Company v. City of Battleground*, 94 Wn, App. 537 (1999) (applying the proportionality analysis of Wash. Rev. Code § 82.02.020).¹⁹ The record before City Council also included a September 14, 2016 technical memorandum from John Manix, PE of HDJ, explaining why the proposed extension of Chelan Avenue through the site was not required by Land Use Policy 5.3, Transportation Goal 1, Transportation Goal 2, Capital Facilities Goal 2, MMC 16.60.160, and MMC 16.60.560(3) and recommending against the extension of Chelan Avenue.²⁰

¹⁹ See Appendix A to Moxee’s Memorandum in Support of Motion to Dismiss, SR 93-95.

²⁰ See Appendix A to Moxee’s Memorandum in Support of Motion to Dismiss, SR 86-92.

Each of these memoranda were included as exhibits to the staff report submitted to City Council as part of the record for review on February 9, 2017.²¹

Since the record before the City Council included detailed briefing by Aho of these issues, there was no need for Aho to verbally repeat those issues on February 9, 2017.

F. Aho did not have to repeat issues that had already been discussed by staff during its verbal presentation to the City Council.

Besides the above analysis, the transcript of the February 9, 2017 City Council proceeding contains approximately 15 minutes of testimony by City staff member Bill Hordan.²² As evidenced by the transcript, Mr. Hordan referenced Aho's dispute with Condition 5 by stating:

“So the second comment period produced a letter from the proponent's engineer with reasons he didn't believe Chelan Avenue should be constructed to and through the plat.

And speaking of generalities, before they'll have an opportunity to talk, they mainly indicated that -- that the engineering -- that it did not affect the level of service of these three agencies in the area.

The second comment period also produced a letter from the proponent's attorney. And he's indicated that the proponents felt the

²¹ See Appendix A to Moxee's Memorandum in Support of Motion to Dismiss, SR 86-92 and SR 93-95.

²² See Hearing Transcript pages 3-13.

requested mitigation was a taking of the properties and not warranted.”²³

Mr. Hordan is referring to the September 14, 2016 technical memorandum from John Manix, PE of HDJ and the September 15, 2016 legal memorandum from Steven B. Madsen, which were provided to the City Council as exhibits to the staff report as part of the record the City Council was supposed to be reviewing, as discussed above.²⁴

Mr. Hordan also reiterated the main issues under review – whether “there’s a specific code there that in his opinion and his opinion of City staff that allows us to request that Chelan Avenue be extended to and through the plat and that’s Moxee Municipal Code 16.16.56(D)” and whether the “request to have Chelan Avenue extended to and through the plat was a taking of the properties as the proponents had originally argued.”²⁵

Given the closed record (*i.e.*, on the record) nature of the City Council review, there was no need for Mr. Madsen to reiterate, for a third time, legal arguments already included in the written record.

G. Aho did not have to repeat issues that had already been discussed in Aho’s pre-hearing briefing letter Aho sent to the City attorney prior to the City Council review.

²³ Hearing Transcript page 8, lines 6-9, 12-13, and 14-17.

²⁴ See Appendix A to Moxee’s Memorandum in Support of Motion to Dismiss, SR 86-92 and SR 93-95.

²⁵ Hearing Transcript page 12, lines 8-11 and page 11, lines 8-10.

On January 23, 2017, believing there were no further opportunities for Aho to speak directly with City Council, due to the “closed record” nature of that proceeding, and not wanting to run afoul of the Rules of Professional Conduct rule against contact with a represented party,²⁶ or the rule against ex parte contacts with a decision maker,²⁷ Mr. Madsen sent a letter to the Moxee City Attorney reiterating Aho’s dispute with Condition 5.²⁸

Mr. Madsen’s letter to the City Attorney starts by stating that he will direct all further correspondence to the City Attorney because the City of Moxee is now a “represented party” under the Rules of Professional Conduct. Never did the City Attorney tell Mr. Madsen that he should address his comments to the City Council directly. Mr. Madsen therefore reasonably believed that he could not speak directly to the City Council, due to the “closed record” nature of the City Council’s automatic review and the fact that the City Council was a represented party under the Rules of Professional Conduct. Under these circumstances, it would be inequitable, and unreasonable, to punish Aho for its attorney’s reliance upon the City Attorney’s failure to correct Mr. Madsen’s reasonable and ethical assumption that he could not speak directly to the City Council.

²⁶ See RPC 4.2.

²⁷ See RPC 3.5.

²⁸ See Appendix F to Moxee’s Memorandum in Support of Motion to Dismiss.

Regardless, Mr. Madsen's January 23, 2017 letter was provided to the City Council.²⁹ This letter specifically referenced "our constitutional arguments regarding proportionality of the exaction and whether such exaction would result in an unconstitutional takings." Mr. Madsen's letter also asserted that the Chelan Avenue extension "is grossly disproportional to any non-SEPA impacts of the development."

Therefore, and besides (1) Aho's briefing on Condition 5 being included in the written record that the City Council had to consider as part of its formal review, (2) the detailed discussion of those issues found in the hearing examiner's own recommendation, and (3) the verbal recitation of the issues that City staff provided to the Council at the February 9, 2017 hearing, the City Council was also provided Mr. Madsen's January 23, 2017 letter, which again raised the very issues that Aho seeks in its LUPA appeal.

This is more than sufficient to exhaust administrative remedies regarding Aho's constitutional challenges to Condition 5.

H. Regardless of the above, Aho's statement to City Council on February 9, 2017 that the key issue before the City Council was "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

²⁹ Moxee admitted that "At the hearing, Aho submitted no legal briefing or written materials of any kind, though a letter from Mr. Madsen to the City Attorney was included." Moxee Memorandum in Support of Motion to Dismiss, page 8, lines 6-9. Thus, Moxee admitted that the January 23, 2017 letter from Steve Madsen to the City Attorney was provided to City Council.

tonight” was sufficient to preserve Aho’s proportionality claim for judicial review.

Finally, when the City surprised Mr. Madsen at the February 9, 2017 City Council meeting by its *sua sponte* decision to take additional testimony at what was advertised as a “closed record” review, Mr. Madsen posed this question to City attorney Robert Noe: “My understanding is that this is a closed-record hearing, how is it that we’re having testimony here tonight?”³⁰

Mr. Noe responded to Mr. Madsen’s question that there “wasn’t any testimony” because “[e]verything that was talked about was previously talked about with the hearing examiner.”³¹

Since “[E]verything that was talked” about at the City Council hearing was being limited to what “was previously talked about with the hearing examiner,” why did Aho need to repeat what had already been said?

But despite being surprised that the City was taking testimony at what was supposed to be a “closed record” review, Mr. Madsen reiterated that the key issue before the City Council was “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

³⁰ Hearing Transcript page 14, lines 22-24.

³¹ Hearing Transcript page 15, lines 3-6.

position here tonight.”³² As analyzed above, this statement alone was sufficient under Washington exhaustion of administrative precedent to have properly exhausted administrative remedies. The exhaustion of administrative remedies requirements are not intended to be a “gotcha” tool for municipalities to escape judicial reviews of their decisions. Here, the City had plenty of notice of the claims and an opportunity to cure any legal problems.

But (and this is a big but), that statement made by Mr. Madsen at the February 9, 2017 City Council meeting cannot be taken in isolation. It must be reviewed in conjunction with the record that was on review by the City Council, which included Aho’s detailed briefing on the Condition 5 issues (discussed in Section V.E above), and the hearing examiner’s own recommendation being reviewed, which included detailed discussion of Aho’s issues with Condition 5 (discussed in Section V.D above), and the staff’s verbal testimony to City Council on February 9, 2017, which included detailed recitation of Aho’s issues with Condition 5 (discussed in Section V.F above), and Mr. Madsen’s January 23, 2017 letter, which included discussion of Aho’s issues with Condition 5 (discussed in Section V.G above).

³²Hearing Transcript page 16, lines 12-16.

The burden to raise issues in a land use matter is not particularly high. Participants in a land use matter must assert “more than simply a hint or a slight reference” to the issue, but they do “not have to raise technical, legal arguments with the specificity and to the satisfaction of a trained land use attorney during a public hearing.” *Citizens for Mount Vernon*, 133 Wash. 2d at 869-70, P.2d at 1213. That Aho was represented does not change the standard that applies here to participants in a land use process, where technical legal specificity is not required.

In the *Mount Vernon* case, the court found that participating in all aspects of the administrative process and raising their general challenge was sufficient to exhaust administrative remedies in a land use process. *Id.* Technical legal specificity is not required. Based on the above discussion, there is no question that City Council knew Aho’s issues with Condition 5.

Given the level of detail that went into the discussion of Aho’s issues in Aho’s briefing before the hearing examiner (See Appendix A to Moxee’s Memorandum in Support of Motion to Dismiss, SR 86-92 and SR 93-95) and the discussion of these issues in the hearing examiner’s own recommendation (See Appendix D to Moxee’s Memorandum in Support of Motion to Dismiss: Findings 19, 20 and 21 on page 5 of the hearing examiner recommendation, as well as findings 3 through 10 on

pages 7-9, and findings 5 through 11 on pages 16-18), there is no question here that the issues were raised with technical legal specificity.

Additionally, the issues were repeated by staff verbally at the City Council meeting, and by Mr. Madsen both verbally at the City Council meeting, and in his January 23, 2017 letter to the City Attorney, that was provided to City Council. This more than meets the standard of exhaustion of remedies set forth in the *Mount Vernon* case.

Even if Mr. Madsen's verbal testimony at the February 9, 2017 could be viewed in a vacuum, his statement – that the key issue before the City Council was “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” – is much more than a simple “hint” of Aho's concerns with Condition 5. Mr. Madsen straight up said the issue was whether it “constituted an unconstitutional taking.”

But Mr. Madsen's statement cannot be taken in a vacuum. It must be read in conjunction with the record before the City Council, which included Aho's prior detailed briefing of the issues, and the hearings examiner's own recommendation discussing that briefing, and Aho's January 23, 2017 letter to the City Attorney, and the detailed staff testimony about Aho's concerns with Condition 5 at the February 9, 2017

hearing. Since the issues were adequately raised, the trial court's Court Decision must be reversed.

VI. CONCLUSION

Because the Council's automatic and "closed record" review was not an appeal, the "exhaustion of remedies" doctrine does not even apply here. But even if the doctrine applies, 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 also be inequitable for the City to avoid having its decision reviewed under the facts of this case.

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 this 2nd day of January, 2018.

Respectfully Submitted,

LANDERHOLM, P.S.

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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 January, 2018, a copy of the foregoing **APPELLANT AHO CONSTRUCTION I, INC.'S OPENING BRIEF** was delivered via first class United States Mail, postage prepaid, to the following person:

Kenneth W. Harper
Menke Jackson Beyer, LLP
807 N 39th Avenue
Yakima, WA 98902-6389
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: January 2, 2018

At: Vancouver, Washington



JACQUELINE RENNY

LANDERHOLM, P.S.

January 05, 2018 - 11:39 AM

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