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NO. 355586

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

AHO CONSTRUCTION I, INC.,

Appellant,

vs.

CITY OF MOXEE,

Respondent.

BRIEF OF RESPONDENT CITY OF MOXEE

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The City of Moxee City Council possessed quasi-judicial decisionmaking authority over a large residential subdivision. During its SEPA analysis, the City found that extending Chelan Avenue through the subdivision was necessary to mitigate impacts caused by the development. The City also determined that the street extension was necessary to provide for sufficient ingress and egress of residential traffic and emergency vehicles based on the City's development regulations. Aho insisted that the dedication of Chelan Avenue was too expensive and unwarranted for various reasons.

Aho filed an appeal of the City's SEPA determination requiring Chelan Avenue. Aho's SEPA appeal and its subdivision application were first reviewed by the City's hearing examiner. The hearing examiner found that the City erred in requiring the Chelan Avenue extension as a SEPA matter, but that applicable development regulations required the street extension to address impacts that the development would generate. The hearing examiner recommended that the City Council approve the subdivision with the Chelan Avenue extension as a required condition.

When the matter came before the City Council, Aho's lawyer made obscure comments characterizing the hearing examiner's recommendation. No legal briefing was submitted to the City Council.

There was no coherent argument presented by Aho's lawyer on the issues that Aho later raised in its lawsuit against the City. The City Council adopted the hearing examiner's recommendation. Aho filed suit against the City raising an array of statutory and constitutional claims.

The City argued to the trial court that Aho's lawsuit should be dismissed because Aho did not raise the arguments before the City Council that formed the basis of its subsequent lawsuit. The trial court agreed that Aho's failure to make legal arguments to the City Council was a failure to adequately exhaust administrative remedies. The trial court's decision noted the unfairness to the City of Aho depriving the City Council of an opportunity to evaluate Aho's arguments after a full presentation of the issues.

Because Washington courts have developed a view of the exhaustion doctrine that requires meaningful presentation of arguments at the administrative level, which Aho failed to fulfill, the trial court's ruling should be affirmed.

II. COUNTER-STATEMENT OF THE ISSUES ON APPEAL

A. When a party to an administrative hearing fails to raise an issue sufficiently to allow the administrative body to understand the party's arguments and develop a response, is there a failure to exhaust administrative remedies?

B. In the absence of exhaustion of administrative remedies, does a litigant have standing to bring claims based on the Land Use Petition Act, Ch. 64.40 RCW, or inverse condemnation?

III. COUNTER-STATEMENT OF THE CASE

A. The proposed subdivision.

Aho filed an application with the City of Moxee for a 94-lot residential subdivision on May 13, 2016. CP 88-93. The proposed subdivision did not extend an existing road, Chelan Avenue, through the subdivision but instead depicted Chelan Avenue terminating near the westerly boundary of the plat map. CP 90. The proposed subdivision was characterized mainly by north/south-running streets. CP 90. Chelan Avenue was shown on the plat map to re-commence in an easterly direction following the break in its continuity in the middle of the subdivision. CP 90.

Because the development exceeded the density allowed by the R-1 single-family zone in which it was located, Aho submitted a rezone application. CP 91. The narrative filed by Aho in support of the rezone did not explain why the subdivision departed from the orderly road grid existing immediately to the west. CP 92-93. Aho's proposal was not exempt under the State Environmental Policy Act, Ch. 43.21C RCW, so Aho filed an environmental checklist. CP 94-103. The SEPA checklist did not explain the subdivision's departure from the City's street grid system. CP 102-103.

After Aho responded to several requests for additional information made by the City, Aho's applications were deemed complete for processing on July 28, 2016. CP 106. Public notice of the applications was provided on August 1, 2016. CP 106-120.

The Moxee police chief commented on the application to express "concerns regarding Chelan Avenue." CP 126-127. The police chief stated that it "appears from a logical stand-point that it should be extended through the plat from Faucher Road to the proposed stub-out on the east side of the plat." CP 126. The police chief pointed out that "the Moxee block system has been set-up in a grid pattern with continued local street segments connecting to one another. This preliminary plat does not continue that pattern." CP 126. He stated that the discontinuance of the street connection would affect police response time to this area and it "therefore does not promote the public health, safety and welfare of the citizens of Moxee." CP 126. He requested that "Chelan Avenue be continued through the plat to maintain the existing connectivity between neighborhoods on both sides of Faucher Road and permit the Moxee Police Department to maintain our ability to efficiently serve this entire area regardless of where our response originates." CP 126.

A representative of the East Valley Fire Department commented on the proposed application. CP 129. The acting operations chief stated

that "[n]ormally, we do not respond to requests unless they directly affect the district. In this proposal, we believe there will be a direct affect to the district." CP 129. The letter continued that it "is our opinion that Chelan Avenue should be extended through the development." CP 129. The letter stated:

> In the proposed plat, it would be necessary for our large vehicles to make additional turning movements or drive around entire blocks to access certain locations if Chelan Avenue is not extended easterly. This could delay our response times in an emergency situation. CP 129.

The City's consulting engineering firm commented on the application. CP 121-123. The engineering firm stated that the preliminary plat should be revised to extend Chelan Avenue through the length of the development to the east property line. CP 123. The engineering firm further stated: "[c]ontinuity within the roadway network is important as it provides consistent roadway connectivity, a reliable block system for various modes of transportation, and improved access for emergency vehicles." CP 123.

Based on these comments, the City issued a preliminary SEPA mitigated determination of non-significance dated August 31, 2016, which required that Chelan Avenue be extended easterly across the plat "to create a continuous street corridor through the plat." CP 138. Following another round of public comment, the City received remarks from Aho's engineer.

CP 152-158. Aho's engineer disputed the need to extend Chelan Avenue. CP 154. The engineer stated that "the extension is not recommended." CP 154.

The City also received a comment letter from Aho's lawyer dated September 15, 2016. CP 159-161. Aho's lawyer argued that there was no "public problem" that would justify extending Chelan Avenue across the plat. CP 160. Aho's lawyer claimed that there was no explanation supporting the extension of Chelan Avenue "despite an estimated additional cost of hundreds of thousands of dollars to Aho, increased street maintenance costs to the City, and the loss of property tax revenue for the eight houses sacrificed by the street dedication." CP 160.

The City retained the requirement that Chelan Avenue be extended across the plat as part of the mitigation measures in its final MDNS. CP 169.

B. The hearing examiner review and recommendation.

Aho appealed the final MDNS. CP 173. Aho supported its appeal with the same comment letters previously filed by Aho's engineer and its lawyer in response to the preliminary MDNS. CP 173-184. Consistent with Moxee Municipal Code ("MMC") 16.15.060, the SEPA appeal was consolidated along with review of Aho's proposed subdivision and rezone applications in a single open record hearing before the City's hearing

examiner. CP 188. The hearing was conducted by the hearing examiner on November 29, 2016. CP 200. The hearing examiner issued his written decision on the SEPA appeal and his recommendations to the City Council on the rezone and preliminary plat review on January 23, 2017. CP 200-221.

On Aho's SEPA appeal, the hearing examiner noted that the requirement to extend Chelan Avenue was not based on environmental impacts from the project but instead related to efficient transportation systems through the interior of the project. CP 207. For this reason, the hearing examiner decided that the Chelan Avenue extension could not be justified as an environmental impact mitigation measure under SEPA. CP 208.

The hearing examiner's review of Aho's subdivision under applicable development regulations led to a different result. The hearing examiner noted that the "thrust of the agency comments is that the proposed interior street layout does not make efficient use of the existing transportation network." CP 213. The examiner continued as follows: "This is part of the basis for agencies calling for the extension of Chelan Avenue through the plat. In other words, the preliminary plat as proposed would exacerbate the public problems the policies address." (citation omitted). CP 213. The hearing examiner recommended that Chelan

Avenue "must be extended easterly, from its intersection with South Zeus Street, and connect to the intersection of Leonard Street and Chelan Avenue, to create a continuous street corridor through the plat." CP 218.

C. The City Council review and decision.

The hearing examiner's recommendation was scheduled for consideration by the City Council, which convened a closed record public hearing on the matter on February 9, 2017. The hearing began with a presentation by the City's planning consultant, Bill Hordan. CP 269-271. Mr. Hordan noted that Aho's engineer and lawyer had submitted comments during the SEPA review process that were critical of the required extension of Chelan Avenue. CP 270. Mr. Hordan stated that he was "speaking of generalities" and that City staff "felt we'd adequately addressed that [issue] based on the comments from the three agencies, Moxee Police, East Valley Fire, our engineer, and the comments that we have received from their attorney and engineer. So we retained that and we did not change that part of the MDNS." CP 270.

Mr. Hordan also stated that Aho "didn't provide any additional information for the appeal, they just stood on the information that they had originally submitted to us." CP 270.

Aho's lawyer, Steve Madsen, spoke briefly at the City Council hearing. CP 272. Mr. Madsen objected to Mr. Hordan's characterization

of the hearing examiner's ruling. CP 272. Mr. Madsen disputed whether the hearing examiner ruled on any takings argument arising from the Chelan Avenue extension. CP 272. Mr. Madsen stated:

> In this case, the bill's over $500,000 and we have that uncontroverted here in the record and that's what the bill is going to be in a land use petition act claim. CP 272.

Mr. Madsen continued:

> So it's our position that, guess what, the City could require it under its own power of eminent domain, it's going to have to do that to take Chelan Avenue from this subdivision, that's really our only comment here. CP 272.

Mr. Madsen concluded his remarks with the following:

> We believe that the hearings examiner was not ambiguous in his findings, he simply didn't rule on the issue of 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. Thank you. CP 272.

The City Council unanimously voted to approve the hearing examiner's recommendation. CP 273.

D. Proceedings in the trial court.

On February 28, 2017, Aho filed a lawsuit against the City in which Aho combined a land use petition (Ch. 36.70C RCW) with a complaint for damages arising under Ch. 64.40 RCW and inverse condemnation. CP 9-15. Aho also made allegations based on Washington's Growth Management Act, Ch. 36.70A RCW. CP 11.

Because of the lack of subject matter jurisdiction in superior court for Aho's GMA-based claims, the City moved to dismiss those allegations. CP 50. The City argued that Aho failed to exhaust administrative remedies and lacked standing because Aho did not raise the grounds of its lawsuit in the proceedings before the City Council. CP 50.

The trial court issued an order staying the City's summary judgment motion pending a determination by the Growth Management Hearings Board on Aho's claims arising under the GMA. CP 325-326. The Growth Management Hearings Board dismissed Aho's petition in an order dated May 25, 2017. CP 329-334. This ruling laid the foundation for a return to the trial court on the City's motion to dismiss. CP 338-339.

The basis of the City's motion to dismiss was considered anew by the trial court in a hearing occurring on July 21, 2017. CP 338-339. The trial court issued a memorandum opinion dated August 4, 2017. CP 341-343. The trial court stated that "although a presentation to the city council is mandated by statute and ordinance, virtually no presentation was made by Aho Construction to the City of Moxee." CP 343. The court considered applicable legal standards and continued by stating that the "city council was given no opportunity to exercise its discretion following a full and fair presentation of the issues. Judicial review was not improved by the development of facts and argument at the council level." CP 343.

The trial court concluded with the following observation: "Had the matter been fully presented to the council, judicial review may never have been necessary. Furthermore, the failure of Aho Construction to present its position to the city council undermines the integrity of the process and gives the clear impression it is a step not worthy of effort." CP 343.

On August 30, 2017, an order of dismissal was entered on the basis of the court's memorandum opinion. CP 344-348. A timely notice of appeal followed. CP 351-352.

IV. ARGUMENT

A. Standard of review.

Review of rulings made under Ch. 36.70C RCW is de novo. *Durland v. San Juan County*, 182 Wn.2d 55, 64, 340 P.3d 191 (2014). Review of a trial court's ruling on a CR (12)(b)(6) motion to dismiss is also de novo. *Doe v. Benton County*, 200 Wn. App. 781, 787, 403 P.3d 861 (2017).

B. The trial court properly dismissed this case because Aho failed to exhaust available administrative remedies.

Washington's Land Use Petition Act is "the exclusive means of judicial review of land use decisions." RCW 36.70C.030(1); *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 407, 120 P.3d 56 (2005). LUPA applies to the land use decisions at issue here, which related to site-specific matters of rezone, subdivision, and environmental review.

RCW 36.70C.020(2)(a) (defining "land use decision" for LUPA purposes).

1. The exhaustion doctrine is integral to the process of judicial review of administrative agency decisions.

In order to exhaust administrative remedies a party must raise its legal issues during hearings before the agency tribunal. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 869, 947 P.2d 1208 (1997) (citing RCW 36.70C.060). In *Citizens for Mount Vernon*, the Supreme Court applied the principles of exhaustion arising from the Administrative Procedure Act, Ch. 34.05 RCW. *Citizens for Mount Vernon*, 133 Wn.2d at 866. "The court will not intervene and administrative remedies need to be exhausted when the 'relief sought . . . can be obtained by resort to an exclusive or adequate administrative remedy.'" *Id.* (citations omitted).

The rule requiring exhaustion "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." *Id.* (citations omitted). Additional policy reasons for this rule have been identified in decisions reaching back to *McKart v. United States*, 395 U.S. 185, 193-94 (1969). In summary, the purposes of the exhaustion doctrine are to: ensure against premature interruption of the administrative process; allow the agency to develop the necessary factual background on which

to base a decision; allow exercise of agency expertise in its area; provide for a more efficient process; and protect the administrative agency's autonomy by allowing it to correct its own errors and ensuring that individuals are not encouraged to ignore its procedures by resorting to the courts. *McKart*, 395 U.S. at 193-94.

Washington courts have enforced this rule consistently and have excused non-compliance infrequently. *See King County v. Washington State Boundary Review Bd.*, 122 Wn.2d 648, 668-69, 860 P.2d 1024 (1994) (issue not presented to administrative agency may not be raised on appeal); *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 338, 787 P.2d 907 (1990) (exhaustion of administrative remedies is generally required before resort to the courts); *Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 74, 768 P.2d 462 (1989) (same); *ABC Holdings, Inc. v. Kittitas County*, 187 Wn. App. 275, 283, 348 P.3d 1222 (2015) (issue that should have been raised at the administrative level was not properly before the appellate court); *Harrington v. Spokane County*, 128 Wn. App. 202, 209-210, 114 P.3d 1233 (2005) (a party must exhaust all available administrative remedies before the superior court can grant relief).

2. Aho did not meet the exhaustion doctrine's requirements because Aho did not present its legal arguments to the Moxee City Council.

There was no written brief filed by Aho with the City Council in support of Aho's challenges to the hearing examiner's recommendation. Aho's counsel made generalized statements characterizing the hearing examiner's recommendation but articulated no principled reasons why the hearing examiner erred. CP 272. The comments of Aho's lawyer lasted not more than two minutes and were devoid of any citation to legal authority. He asserted that the "bill" for the extension of Chelan Avenue would be "over $500,000" and threatened "that's what the bill is going to be in a land use petition act claim." CP 272. Mr. Madsen made passing reference to the phrases "eminent domain" and "taking" but provided no legal reasoning or analysis of their applicability to the circumstances of this case. On these topics he stated that "it's our position that, guess what, the City could require it under its own power of eminent domain, it's going to have to do that to take Chelan Avenue from this subdivision, that's really our only comment here." CP 272.

Nothing in Mr. Madsen's terse statements to the City Council developed any point or argument based on Washington subdivision law, inverse condemnation, or constitutional doctrines of exactions and takings law. Nothing in Mr. Madsen's remarks referenced Ch. 82.02 RCW or developed any argument as to how or why the required extension of Chelan Avenue through the subdivision might fail to

comply with RCW 82.02.020. *See* RCW 82.02.020 (prohibition on development conditions unless necessary to mitigate impact of project).

Taken in context, Mr. Madsen's remarks did not so much present legal issues for argument but, rather, stated his opposition to the characterization of the hearing examiner's recommendation offered by City staff. CP 272. Mr. Madsen stated that the hearing examiner recommendation acknowledged the examiner's lack of jurisdiction to rule on takings issues. CP 272. Continuing, Mr. Madsen stated that the examiner only found that the City's general plan supported the "requirement of the throughway of Chelan Avenue, that doesn't mean the City doesn't have to pay for it." CP 272. Reiterating this statement, but again failing to supply any meaningful legal analysis, Mr. Madsen summarized that Aho's "really . . . only comment here" was that the City would have to use its power of eminent domain "to take Chelan Avenue from this subdivision." CP 272.

The trial court found that Mr. Madsen's remarks constituted "virtually no presentation . . . by Aho Construction to the City of Moxee." CP 343. The trial court noted that the City Council "placed no limitations on Aho Construction as [to] length of presentation or content." CP 342. The trial court commented that the absence of any rational argument by Mr. Madsen deprived the City Council of an

opportunity to exercise its discretion, failed to support judicial review by the trial court, and gave "the clear impression" that presenting an adequate argument to the City Council was "a step not worthy of effort." CP 343.

The trial court should be affirmed because all of the policy reasons supporting the exhaustion doctrine are applicable in this case. Mr. Madsen's few remarks actually highlight that his presentation to the City Council focused on the examiner's jurisdiction and not on any merits-based legal argument supporting or opposing the extension of Chelan Avenue.

Without the presentation of an adequately developed legal argument below, the trial court was correct to find that the issues later raised in the lawsuit were not raised before the City Council with sufficient specificity and clarity. CP 343.

3. Washington courts have analyzed exhaustion by applying issue-specific scrutiny of the adequacy of arguments made during administrative proceedings.

Aho's lawyer used the terms "eminent domain" and "taking" but did so as part of his characterization of the hearing examiner's recommendation below and as part of Aho's threat to sue the City for a "bill" of "over $500,000." CP 272. These were not legal arguments. These statements consisted of no coherent set of reasons supporting a

point of view and failed to mention any facts or legal precedent. In Aho's opening brief, Aho argues that it nevertheless met the exhaustion requirement because "the City was fully aware of and rejected Aho's issues." Br. 10.

Aho betrays a lack of confidence in this theory by relying upon the presentation of issues raised *to the hearing examiner* as being sufficient to constitute exhaustion of its administrative remedies before the City Council. Br. 16-19. Aho implicitly admits the inadequacy of the statements its lawyer actually made before the City Council ("the applicant did not have to present issue to the City Council that had already been presented to the City's hearing examiner."). Br. 16.

This argument by Aho is necessary only because the comments of Aho's lawyer to the City Council were insufficient. Aho twice asks this Court not to take Mr. Madsen's statements "in a vacuum." Br. 26. But Washington precedent shows that the appellate courts will conduct a close and issue-specific review before finding that arguments were preserved through an adequate presentation below.

A good illustration of this principle can be found in *Wells v. Western Washington Growth Mgmt. Hearings Bd.*, 100 Wn. App. 657, 683-84, 997 P.2d 405 (2000). In *Wells*, the appellate court considered whether a litigant had adequately raised an argument during

administrative proceedings relating to the suspension of permits for single-family residences. *Wells*, 100 Wn. App. at 683. The plaintiff had included a paragraph in her opening brief to the administrative tribunal that referenced the statutory basis (RCW 36.70A.302(b)(i)) of her argument relating to single-family residence exemptions. *Id.* at 683-84. But the appellate court observed that *Wells* had technically mis-cited the relevant portion of the statute[1] and had included the paragraph raising this argument in the midst of a section of her brief that primarily addressed a different subject. For these reasons, the trial court ruled that the plaintiff had not adequately raised her issue below. *Id.* at 684.

The Court of Appeals affirmed. *Id.* It was insufficient that the reviewing court could readily determine that Wells' citation was incorrect and that the "statute she intended to refer to" indeed related to the exemption argument she claimed. *Id.* It was also insufficient that she had used bold print in making this argument. *Id.* The fatal problem was that Wells had provided merely a hint or a slight reference to the argument below. *Id.*

In *King County v. Washington State Boundary Review Bd.*, 122 Wn.2d at 668-69, the Supreme Court engaged in a close review of the

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[1] Although the plaintiff's brief at the administrative level cited RCW 36.70A.302[3](b)(i), the court noted that this was incorrect because the relevant section was RCW 36.70A.302(3)(b)(i). *Id.* at 683-84.

administrative record in evaluating whether issues raised below fulfilled the exhaustion doctrine's requirements. The issue before the Court was whether King County had made arguments at the administrative level regarding the effect of a particular local ordinance establishing interim urban growth areas. *Boundary Review Bd.*, 122 Wn.2d at 669. The Court noted that King County's representatives testified regarding the County's policies for municipal annexations but not the referenced ordinance specifically. *Id*. at 669-70. This was not sufficient to satisfy the Court that the exhaustion hurdle had been cleared. *Id*.

Much like Aho in the present case, King County attempted to fall back on the argument that the import of its annexation ordinance was well understood in the administrative proceedings. *Id*. at 670. King County argued that the ordinance was part of the record presented in materials to the administrative tribunal and was separately addressed in a memorandum presented on behalf of another party. *Id.* These additional factors were not sufficient to persuade the Court to compromise on its application of the exhaustion doctrine. For an issue to be properly raised before an administrative agency there must be "more than simply a hint or slight reference to the issue in the record." *Id*. The Court declined to consider the issue on appeal. *Id*. at 671.

Consideration of the issues raised in Aho's complaint helps reveal the inadequacy of Mr. Madsen's comments before the City Council. In the complaint, Aho listed specific allegations of error. CP 11-14.

At paragraph 7.1 of the complaint, Aho alleged that the City's actions were in violation of the GMA, citing to RCW 36.70A.070(3) and RCW 36.70A.070(6)(F).[2] CP 11. Nothing stated by Mr. Madsen to the City Council touched on any issue of GMA compliance and no GMA statutes were identified by him. CP 272.

Aho's complaint at paragraph 7.2 raised allegations that the City inconsistently and erroneously applied its comprehensive plan policy statements and its municipal code in requiring the extension of Chelan Avenue. CP 11-12. Aho listed several specific goals and policies from the City's comprehensive plan and cited several municipal code provisions. Mr. Madsen's remarks to the City Council raised no such issues. CP 272.

At paragraph 7.3 of the complaint, Aho alleged that the road extension was unlawful under RCW 82.02.020 and failed to meet the fact-specific "rough proportionality" and "essential nexus" tests established in a series of decisions beginning with *Nollan v. California Coastal Comm.*, 483 U.S. 825, 828 (1987). CP 12-14. By comparison,

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[2] Now, a moot subject. CP 329-334.

Mr. Madsen made no reference to RCW 82.02.020. CP 272. He made no reference to the concepts of "rough proportionality" or "essential nexus." He referenced no precedent of any court addressing the tests for exactions as a condition to issuance of a land use permit. He provided no factual explanation as to why the Chelan Avenue extension was not warranted. He responded to none of the factual material from the earlier proceedings explaining the basis and need for the street extension. CP 272.

Based on the issue-specific inquiry used to determine whether an argument raised at the administrative level is compliant with the exhaustion doctrine stated in *Wells* and *Boundary Review Bd.*, this Court should affirm the trial court.

4. The relaxed test for public testimony by lay citizens in non-adversarial public hearings is not applicable here.

Aho argues that its lawyer was "surprised" by the opportunity to argue Aho's case before the City Council. Br. 2. Aho also argues that its lawyer was the victim of a "misleading or confusing land-use process." Br. 3. According to Aho, its lawyer believed that “no further comments would be allowed.” Br. 3. The confusion of Aho’s lawyer apparently arose from the fact that the proceedings before the City Council were based on a closed record. Br. 4. But there is absolutely nothing in the Moxee Municipal Code or state law that disallows the presentation of

legal argument in a closed record decision process.[3] Pursuant to the Local Project Review Act, a "closed record appeal" specifically allows for appeal argument. RCW 36.70B.020(1). Aho exaggerates in arguing that a closed record proceeding prohibits the introduction of "additional information" as if this justified the failure to make legal arguments. Br. 4. The presentation of argument at a closed record proceeding based on the existing administrative record has never been prohibited in any Washington case. This is no basis to relax the exhaustion requirement.

Aho makes no effort to distinguish—and does not even cite—*Wells* or *King County*. Aho instead points to *Citizens for Mount Vernon* for the proposition that the burden to raise issues in a land use matter is "not particularly high." Br. 25. But Aho's claim, as shown above, is not consistent with relevant cases both preceding (*Boundary Review Bd.*) and following (*Wells*) *Citizens for Mount Vernon*. Aho's claim is also not borne out by *Citizens for Mount Vernon* itself.

In *Citizens for Mount Vernon*, the Supreme Court considered the exhaustion doctrine in the context of a LUPA petition that followed public hearings occurring before the Mount Vernon City Council. *Citizens for Mount Vernon*, 133 Wn.2d at 864-65. The public hearings

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[3] Aho's lawyer, if confused about closed record procedures, might have simply asked the City or its attorney if arguments would be allowed. He never did.

were attended by neighborhood residents and each speaker was limited to three minutes. *Id*. at 869. The Court noted that LUPA (at RCW 36.70C.060) "clearly" requires exhaustion of administrative remedies but that the statute does not state the degree of specificity with which issues must be raised. *Id*. at 868. The Court contrasted the abbreviated citizens' remarks offered to the Mount Vernon City Council with a "more formal and more adversarial" administrative process. *Id*. at 869. The Court also contrasted the general statements of lay citizens with the "technical, legal arguments" that might be expected of "a trained land use attorney during a public hearing." *Id*. at 870.

Given these factors, together with the Court's observation that the Mount Vernon City Council's zoning approval "was illegal" the Court created an exception to its precedent requiring issue-specific exhaustion. *Id*. A forceful dissent pointed out that the majority decision "subverts in practice" the traditional exhaustion rule and that inconsistent application of the rule "simply becomes an open invitation for discriminatory enforcement." *Id*. at 879 (Sanders, J. dissenting).

The dissent in *Citizens for Mount Vernon* may now be seen, 20 years later, to have slightly overstated matters. Precedent following *Citizens for Mount Vernon* has shown that the case was an outlier and has been limited to its facts. The main value of *Citizens for Mount*

Vernon has proved to be its reiteration of *Boundary Review Bd.*'s holding that exhaustion requires "more than simply a hint or a slight reference to the issue in the record." *Id.* at 869, citing *Boundary Review Bd.*, 122 Wn.2d at 670. The "more than simply a hint or a slight reference" standard has proved to be the rule and *Citizens for Mount Vernon* the exception. *See*, *e.g.*, *ABC Holdings, Inc. v. Kittitas County*, 187 Wn. App. 275, 282-83, 348 P.3d 1222 (2015) ("more than simply a hint or slight reference"); *B & R Sales, Inc. v. Washington State Dep't of Labor & Indus.*, 186 Wn. App. 367, 382, 344 P.3d 741 (2015) (same); *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 272, 255 P.3d 696 (2011) (same); *Boehm v. City of Vancouver*, 111 Wn. App. 711, 722, 47 P.3d 137 (2002) (same).

Aho's argument contradicts the weight of authority following *Citizens for Mount Vernon*. Aho also cannot show that the present circumstances are comparable factually to *Citizens for Mount Vernon*. Here, the administrative proceedings were formally adversarial based on an appeal of the hearing examiner's recommendation. All parties were represented by counsel. No time limit was placed on the oral remarks of Aho's lawyer. Aho's lawyer was freely entitled to submit written argument prior to or at the hearing. To avoid Justice Sanders' concern of arbitrary enforcement of the exhaustion doctrine, this Court should

distinguish the present case from *Citizens for Mount Vernon* and uphold the trial court's order of dismissal.

C. The failure to raise and argue legal issues to the Moxee City Council should not be excused simply because related issues were mentioned elsewhere in proceedings below.

Aho argues that it was not required to raise issues before the City Council that had been raised in earlier administrative proceedings. Br. 10-22. Aho claims that it was not required to "repeat" issues that had been presented to the hearing examiner, issues that had been discussed by City staff during the City Council hearing, or issues that were mentioned in a letter from Aho's lawyer to the City's lawyer. Br. 10-20.

These arguments frustrate the purpose of the exhaustion doctrine. The purpose of the doctrine is to actually apprise the administrative tribunal of the issues necessary to make a proper decision and develop an adequate record justifying its decision. This purpose is not met where the salience of issues raised early in administrative proceedings is not articulated before the final agency decisionmaker. Otherwise, the agency tribunal may assume that issues have been abandoned or that alternative issues have taken precedence. The administrative tribunal may assume that the earlier arguments have been proved wrong or unpersuasive. These concerns have real applicability here due to the

failure of Mr. Madsen to engage in any disagreement with the merits of the hearing examiner's detailed written recommendation.

Aho argues that its inadequate presentation of issues should be justified because the proceedings before the City Council did not arise from an appeal of the hearing examiner's SEPA decision. Br. 12-16. Aho goes so far as to claim that it was somehow limited to passively viewing the proceedings on the examiner's subdivision recommendation because "there was nothing further for the applicant to do but let the City Council conduct its final review." Br. 15. This line of argument is misplaced. First, as shown above, argument is allowed, not prohibited, in closed record proceedings. Second, if Aho did not agree with the Chelan Avenue extension, regardless of whether the matter was being heard by the City Council as an appeal or following the hearing examiner's recommendation, it needed to make its arguments. Third, as this case has plainly shown, no one else was going to make Aho's arguments on its behalf.

Aho's main theory here is an appeal to the "reasonableness" of its lawyer's belief that no further arguments could be presented to the City Council. Br. 13. But the fact that RCW 36.70B.020(1) specifically allows argument in closed record appeals is hardly authority for the claim that no appeal argument is allowed in other types of closed record

proceedings, such as the City Council's consideration of the hearing examiner's subdivision recommendation. Aho cites nothing for that contention.

The issue is not whether Aho failed to exhaust an available administrative *appeal*. The issue is whether Aho failed to exhaust available administrative *remedies*. Aho failed to assert its issues at the appropriate stage of administrative review. Aho's claims on this point are really no more than explanations for its mistaken waiver.

In *Citizens for Mount Vernon* Justice Sanders' dissent pointed out that fair play required that raising specific issues—not general issues—before the agency tribunal was required. *Citizens for Mount Vernon*, 133 Wn.2d at 882 (Sanders, J. dissenting) (citing *Boundary Review Bd.*, 122 Wn.2d at 669). Improper tactical behavior by litigants might otherwise be promoted. *Id.*

Practical considerations show that Aho's view of the rule cannot be correct. If Aho's rule governed, an administrative tribunal would be obligated to respond to every issue that had ever been raised at any stage of an administrative review process. This would be necessary to protect against the possibility of a litigant withdrawing arguments at a key time only to renew the same arguments later in judicial appeals. This thwarts the basic purposes of the exhaustion doctrine.

Courts have refused to accept similar arguments. The rule appears to be that extraneous sources may *not* be relied upon to excuse the actual failure to present an issue to the administrative tribunal. *See*, *e.g.*, *Boundary Review Bd.*, 122 Wn.2d at 670 (issue raised by mere presence of reference in the record and by third party in administrative proceedings was insufficient); *B & R Sales, Inc.*, 186 Wn. App. at 382 (reference to section of administrative board's decision insufficient to show that issue was actually raised); *Kitsap Alliance of Prop. Owners*, 160 Wn. App. at 272 (passing reference in prehearing brief without actual development of argument was insufficient).

1. The arguments that Aho made to the hearing examiner were not raised before the Moxee City Council.

The rationale behind these rulings justifies a similar result here. It is true that Aho's notice of SEPA appeal and briefing submitted to the hearing examiner developed legal arguments based on "rough proportionality" and "essential nexus." CP 182-184; 261-264. The hearing examiner gave these arguments due consideration in his recommendation on the subdivision application. CP 213-217. The hearing examiner explained how the City's review of the subdivision showed an individualized determination concerning proportionality

regarding the Chelan Avenue extension and stated that "[t]here is no such proportionality problem in this instance." CP 216-217.

In the absence of sufficient legal argument before the City Council, the Council could not have known how Aho believed that the hearing examiner erred. In fact, the record before the City Council strongly suggests that this is the exact dynamic that played out here.

The hearing examiner, in a carefully-expressed and detailed recommendation, explained how the extension of Chelan Avenue was not supported under SEPA because the City's MDNS did not show how the street was needed to mitigate "environmental impacts" as that term was used in its technical regulatory sense by WAC 197-11-660(1). CP 207. But the hearing examiner also stated that the street extension was a mitigation measure that responded to a "public problem" that was "of the development's making" and that there was no "proportionality problem in this instance." CP 217-217. It was thus an appropriate condition of preliminary plat approval if not necessarily an appropriate SEPA mitigation measure. CP 218.

Because Aho's legal arguments were not developed before the City Council, there was virtually no discussion of the content of the hearing examiner's recommendation. Aho's lawyer made no reference to any alleged problem with the hearing examiner's application of case law

dealing with “nexus” and “rough proportionality.” He did not argue how an “individualized determination” would show the extension of Chelan Avenue to be improper. CP 272.

2. Various other sources in the administrative record cannot substitute for the arguments that Aho failed to raise before the Moxee City Council.

Aho argues that it was under no obligation to “repeat" matters raised by City staff or in a letter from Aho's lawyer to the city attorney. Br. 19-20. In the first of these arguments, Aho points to generalized statements of the City's planning consultant, Mr. Hordan. Br. 19. But the record shows that Mr. Hordan’s role before the City Council was only to provide a summary of the matter before the Council. CP 269-272.

This is closely analogous to *Boundary Review Bd.*, in which King County claimed that an issue was adequately addressed because it had been raised by the City of Black Diamond during the course of administrative review. *Boundary Review Bd.*, 122 Wn.2d at 670. The Supreme Court disagreed and found Black Diamond’s participation insufficient to raise an issue later relied upon by King County. *Id.* Here, the City's consulting planner stated that he was "speaking of generalities." CP 270. There could have been no possible confusion that Mr. Hordan was not an advocate for Aho, nor did he attempt to develop

Aho's legal arguments on its behalf. CP 270. Against this backdrop, it was simply the responsibility of Aho's lawyer to develop the issues on which he sought reversal of the hearing examiner by the City Council. The City Council had every right to assume that Aho's lawyer had no meaningful way to rebut or dispute the hearing examiner's recommendation.

Second, as to the letter of Aho's counsel to the city attorney dated January 23, 2017, the most that can be said is that it offered Aho's characterization of the hearing examiner's recommendation and complained that the Chelan Avenue extension would cost Aho "over $500,000." CP 233-234. The letter predicted a lawsuit if the City continued to require the extension. CP 233.

The City does not dispute that this letter was before the City Council as part of the proceedings on Aho's appeal but, once again, the letter does not substitute for the development of issue-specific legal arguments. The letter includes no reference to any legal authority and contains no factual discussion disputing the grounds justifying the road extension. CP 233-234.

D. Aho's deficient presentation of issues to the Moxee City Council precludes Aho's damages claims.

Aho's complaint sought damages based on Ch. 64.40 RCW and included a claim for inverse condemnation. CP 14-15. Aho does not

assign error to the trial court's dismissal of its damages claims. Br. 4-6. Aho does not dedicate any portion of its opening brief to its damages claims and provides no argument or citation to authority on the matter. Even under a broad view of RAP 10.3(a), an appellate court will not consider an issue where there is no assignment of error nor argument in the brief. *State v. Olson*, 126 Wn.2d 315, 320-21, 893 P.2d 629 (1995).

Should this Court nevertheless wish to reach the issue, the damages claims of Aho were properly dismissed by the trial court because they are fatally flawed due to the same exhaustion problems addressed above. Comparison of Aho's damages complaint with the arguments it raised before the City Council shows the unfairness of excusing compliance with the exhaustion doctrine.

1. Aho's damages claim based on Ch. 64.40 RCW was properly dismissed.

A claim under Ch. 64.40 RCW requires the exhaustion of all available administrative remedies. RCW 64.40.030. This Court refused to consider a damages claim brought under Ch. 64.40 RCW in combination with a LUPA petition when the plaintiff failed to exhaust all administrative remedies. *Harrington*, 128 Wn. App. at 215. In the words of this Court, "superior court jurisdiction is conditioned on the exhaustion of administrative remedies." *Id.* Where the plaintiff could make no showing of futility or any other exception to the exhaustion

rule, no relief for allegedly arbitrary and capricious land use decisions could be afforded under Ch. 64.40 RCW. *Id.*

The trial court did not err in dismissing Aho's damages claim based on Ch. 64.40 RCW.

2. Aho's inverse condemnation claim was properly dismissed.

Aho alleged an inverse condemnation claim in its lawsuit. CP 14-15. Aho's failure to exhaust administrative remedies affects its inverse condemnation claim somewhat differently than its damages claim based on Ch. 64.40 RCW, but the end result is the same.

The statements of Aho's lawyer to the City Council failed to include any reference to RCW 82.02.020, which Aho made the lynchpin of its unconstitutional exactions argument in its lawsuit. CP 12-14. This statute embodies Washington's test for unlawful land use exactions. *See* RCW 82.02.020 (allowing municipalities to require only dedications that are reasonably necessary as a direct result of a proposed development or plat).

In the absence of any reference to RCW 82.02.020 in the administrative record, Aho cannot claim that there was even a "hint or a slight reference" to it below. The failure to raise RCW 82.02.020 below has a significant consequence for Aho's inverse condemnation claim.

The exhaustion requirement is "well established" and constitutes a "strong bias" mandating its observance in the regulatory takings context. *Estate of Friedman*, 112 Wn.2d at 78. The policies underpinning the exhaustion doctrine precluded review of a takings claim in *Estate of Friedman*. *Id*. at 81. In *Estate of Friedman*, the Court's discussion stemmed from a land use challenge in which the applicant had not made application for certain types of approvals from Pierce County for the land at issue. *Id*. at 72. Because the administrative review had been truncated, the Court "would not speculate" as to how the municipality would have handled the matter with a more complete record and found that the takings claim was premature. *Id*. at 80.

In the present case, the City does not contend that Aho failed to file necessary applications for its subdivision. But the principle of exhaustion should nevertheless apply to Aho's inverse condemnation claim. The City Council did not have an opportunity to consider the legal issues upon which Aho now bases its inverse condemnation theory. It would be unfair to presume the City Council's decision on arguments that were never presented to it.

a. A takings claim should not be allowed to proceed where it is coextensive with a statutory claim that fails the exhaustion test.

There should be no inverse condemnation claim where it is inherently based on the same arguments that could have been presented below but were never raised. Although no reported Washington case expressly holds that an exhaustion problem arising from failure to raise issues below—rather than failure to apply for necessary permits—bars an inverse condemnation claim, the policy of exhaustion warrants this result.

An instructive case is found at *Kitsap Alliance of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 255 P.3d 696 (2011). In *Kitsap Alliance*, a litigant failed to include mention of RCW 82.02.020 in the course of administrative agency litigation. *Kitsap Alliance*, 160 Wn. App. at 271. Because of this failure, the court held that it was precluded from addressing RCW 82.02.020 on appeal. *Id.* at 272. The court nevertheless allowed independent arguments regarding constitutional due process to proceed. *Id.* at 272-73. The court's review of due process principles was performed exclusive of any reference to RCW 82.02.020. *Id.*

Aho's constitutional claims here are not based on due process but instead stem from the law of land use exactions. CP 12-14. The concepts of exaction law are exactly the issues that Aho failed to develop below. Because the issues that Aho failed to present below are

coextensive with the inverse condemnation claim in Aho's lawsuit, the inverse condemnation claim should be barred by the exhaustion doctrine.

Aside from the exhaustion doctrine per se, this Court has adhered to the view that seeking resolution of issues at an administrative level is more than "simply a technical rule of appellate procedure; instead, it serves an important policy purpose in protecting the integrity of administrative decision-making." *ABC Holdings, Inc.*, 187 Wn. App. at 283 (citation and internal quotation omitted).

This Court may reach constitutional issues raised for the first time on appeal pursuant to RAP 2.5(a), but this rule touches a different matter and protects a different interest than the present controversy. Consideration of the rule highlights why Aho's exhaustion failure requires dismissal.

Under RAP 2.5(a), a constitutional issue may be raised for the first time on appeal if it is a "manifest error." Here, though, Aho cannot show that any error relating to inverse condemnation was manifest because Aho developed nothing before the Moxee City Council on the matter. Aho's failure to develop an issue below is not a justification for allowing Aho to make arguments for the first time in later proceedings. *See State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993) (rule inapplicable where necessary record was deficient of facts); *State v.*

Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (rule not intended for afford relief whenever litigant can identify an issue not raised below).

Further support can be found in *Bellevue 120th Assocs. v. City of Bellevue*, 65 Wn. App. 594, 601-02, 829 P.2d 182 (1992). Like in *Estate of Friedman*, the failure to exhaust problem in *Bellevue 120th Assocs*. was the failure to pursue an administrative permit appeal opportunity. *Bellevue 120th Assocs*., 65 Wn. App. at 596. A key observation of the court was that the "point of the administrative process is to determine the city's position and furnish a basis for judicial review." *Id*. at 602. The absence of a competent basis for the City of Bellevue's decision precluded the inverse condemnation claim. *Id*.

As shown above, Aho did not raise any argument based on Ch. 82.02 RCW below. Aho's arguments to the City Council provided no reasoned explanation for Aho's belief that it should be relieved of building an orderly road system in its new subdivision. The City Council heard no developed legal argument showing that its hearing examiner had erred. Holding the City Council responsible for effectuating a taking in this context rewards Aho's careless work at the critical stage in the administrative review process. It places culpability on a City Council comprised of lay persons who should have been right in assuming that Aho simply had no persuasive way to argue against the

hearing examiner's thorough recommendation since Aho articulated no such argument.

b. The rule of constitutional avoidance precludes consideration of Aho's inverse condemnation claim.

Courts should generally decide cases on nonconstitutional grounds where possible and refrain from deciding constitutional issues. *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 752, 49 P.3d 867 (2002). In *Isla Verde*, the Supreme Court found that the appellate court had erred in basing its decision on Fifth Amendment takings law. *Id.* at 752. Instead, the appellate court should have considered the challenged land use decision under RCW 82.02.020. *Id.*

The Supreme Court engaged in an extended discussion of whether a preliminary plat approval was conditioned on terms that violated RCW 82.02.020. *Id.* at 752-65. Because the Supreme Court had a basis to conclude that the City of Camas had violated Ch. 82.02 RCW, the Court never reached the takings claim. *Id.* at 770.

There is no way to harmonize Aho's failure to raise arguments based on Ch. 82.02 RCW with a result in which the City might have liability for inverse condemnation. Aho's arguments to the City Council said nothing about how the Chelan Avenue extension was not "reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply." RCW

82.02.020. To allow Aho's inverse condemnation claim would reverse the principle of constitutional avoidance. This result would paradoxically permit a litigant to press a constitutional claim where the ancillary statutory claim was not preserved.

Aho's problem is self inflicted. This Court should not struggle to make new law by allowing a takings argument to proceed in this context. If the exhaustion doctrine is to be given any effect at all, it should result in a ruling precluding Aho from making claims that expressly require exhaustion (like Ch. 64.40 RCW). It should also bar claims that are coextensive with claims that should have been raised below but were not.

V. CONCLUSION

For the forgoing reasons, the trial court's summary judgment dismissal should be affirmed.

RESPECTFULLY SUBMITTED this 2nd day of February, 2018.

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By: _____

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DECLARATION OF SERVICE

On the day set forth below, I emailed and deposited in the U.S. Mail a true and accurate copy of: Brief of Respondent City of Moxee in Court of Appeals, Division III, Cause No. 355586 to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED THIS 2ND day of February, 2018, at Yakima, Washington.

Julie Kihn

Julie Kihn

MENKE JACKSON BEYER, LLP

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