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No. 88165-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ELLENSBURG CEMENT PRODUCTS, INC.,

Petitioner,

v.

KITTITAS COUNTY,

Respondent,

v.

HOMER L. (LOUIE) GIBSON,

Respondent.

PETITIONER'S ANSWER TO PETITIONS FOR REVIEW

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December 28, 2012

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I. IDENTITY OF RESPONDENT

Ellensburg Cement Products, Inc., (“ECP”) hereby answers the petitions for review filed by Kittitas County and Homer L. Gibson.

II. INTRODUCTION

A. **The Court of Appeals correctly concluded that rock crushing was not permitted as “processing of products” in an agricultural zone.**

Under the Kittitas County zoning code, “rock crushing” is explicitly listed as a permitted or conditional use in various zones *other than* the County’s four agricultural zones. “Rock crushing” is *not* permitted in any agricultural zone. *Opinion*, ¶ 37. There is no evidence that the County has ever allowed rock crushing in agricultural zones. *See Opinion*, ¶ 33 (ignoring Gibson’s “unsupported historical assertions”).

Gibson owns 84 acres of rural property zoned “agriculture-20” (A-20). *Opinion*, ¶ 3; CP 192. “Gravel extraction” is a conditional use in an agricultural zone. *Opinion*, ¶ 37. Gibson’s predecessor obtained a conditional use permit (CUP) for gravel extraction on a portion of the property. *Opinion*, ¶ 4; CP 149. Even though he was previously cited for unauthorized rock crushing, Gibson applied for an amended CUP for rock crushing and other uses. *Opinion*, ¶ 4, 9; CP 121, 151-55, 265-274.

ECP objected to Gibson’s application, pointing out that rock crushing was not a permitted or conditional use in an agricultural zone.

Opinion, ¶ 13; CP 212. ECP also appealed the County’s issuance of a determination of non-significance (“DNS”) for Gibson’s CUP application. *Opinion*, ¶ 14; CP 218-233. In response to ECP’s appeal of the DNS, the County expressly admitted that rock crushing was *not* a permitted or conditional use in the agricultural zone. *Opinion*, ¶ 15; CP 206.

At some point after ECP objected, County staff concocted a new theory that rock crushing was permitted in the A-20 zone as “[p]rocessing of products produced on the premises,” a use classification that is only permitted in the County’s four agricultural zones. KCC 17.29.020(A)(13); CP 192-193; *see Opinion*, ¶ 35, 40. A divided Board of Adjustment (BOA) upheld the determination that rock crushing was permitted. *Opinion*, ¶ 27; CP 78, 103. The superior court affirmed. CP 533-535.

The Court of Appeals reversed, correctly concluding that rock crushing was *not* permitted as “processing of products” in an agricultural zone. *Opinion*, ¶ 2. The court never reached the issue on which Gibson seeks review—deference to a local agency’s interpretation—because the court concluded that the code was unambiguous. *Opinion*, ¶ 46.

B. The Court of Appeals correctly concluded that the County’s administrative appeal procedures violated RCW 36.70B.060(6).

Under the State Environmental Policy Act, Chap. 43.21C RCW (“SEPA”), the lead agency on a project application must make a threshold

determination of whether the project is likely to have a significant adverse environmental impact. RCW 43.21C.033; WAC 197-11-310, -330, -797. If an agency determines that no such impact is likely then the agency will issue a determination of non-significance. WAC 197-11-340, -734.

An agency is not required to provide any administrative appeal from a threshold determination. RCW 43.21C.075(3). However, if an agency provides an administrative appeal process, the agency may provide only one “open record hearing” on the SEPA appeal. RCW 36.70B.060(6). An “open record hearing” is a hearing before a single hearing body or officer “that creates the local government’s record through testimony and submission of evidence and information.” RCW 36.70B.020(3).

An agency is not required to provide further administrative appeals. RCW 36.70B.060(6). If an agency provides an appeal after the open record hearing, it must be a “closed record appeal.” *Id.* A “closed record appeal” is defined as an appeal on the record “following an open record hearing.” RCW 36.70B.020(1); WAC 197-11-721.

Until recently, Kittitas County had an ordinary administrative appeal process that complied with RCW 36.70B.060(6). The County provided an “open record hearing” followed by a “closed record appeal.” *Opinion*, ¶ 18; CP 108-09, 146; *see* KCC 15A.01.040; KCC 15A.02.030.

In 2010, the County amended its code to eliminate open record hearings. *Id.* The County's new procedure provides for only a "closed record appeal." KCC 15A.07.020; *see Opinion*, ¶¶ 18-19; CP 109, 148.

When ECP appealed the DNS, the County notified the parties that the BOA would hold only a closed record appeal hearing on the DNS. *Opinion*, ¶ 15; CP 196. ECP objected, explaining that a local agency cannot hold a closed record SEPA appeal without first providing an open record hearing. *Opinion*, ¶¶ 18, 59; CP 146-147. The County responded by noting that it had amended its code to omit any provisions for an open record SEPA appeal hearing. *Opinion*, ¶ 18; CP 148. The County Attorney instructed the BOA to provide only a closed record appeal hearing, without allowing any testimony, evidence, or additional argument. *Opinion*, ¶ 19; CP 108-109.

At the hearing, ECP was not allowed to present any evidence or argument in support its SEPA appeal. *Opinion*, ¶ 24. The members of the BOA did not ask any substantive questions or engage in any meaningful discussion before voting to deny the SEPA appeal. *Id.*; CP 31-34, 103.

The Court of Appeals reversed the County's DNS, correctly concluding that the County's failure to provide an open record hearing violated RCW 36.70B.060(6). *Opinion*, ¶¶ 2, 65, 70. The court did not

reach the substance of ECP's challenge to County's inadequate SEPA review.¹

III. RESPONSE TO STATEMENT OF THE CASE

Throughout this case Gibson has made unsubstantiated and false assertions that his property has a "long history" of rock crushing, and that rock crushing has been conducted on his property since 1982. *Pet. (Gibson)* at 1-2; CP 428-29. There is no evidence that Gibson has *legally* conducted rock crushing since 1982. In 2009, the County cited Gibson for unauthorized rock crushing. *Opinion*, ¶ 4; CP 121. Gibson's 2010 environmental checklist states that "at present rock crushing is *not* occurring on the site, but might possibly occur in the future." (Emphasis added). *Opinion*, ¶ 6; CP 269. The Court of Appeals ignored Gibson's "unsupported historical assertions." *Opinion*, ¶ 33.

Gibson asserts that "ECP requested and received confirmation that their pits would be treated in the same manner and that processing would be allowed with a conditional use permit." *Pet. (Gibson)* at 3. This is a misleading characterization of an exchange between ECP's representative

¹ ECP also argues that the DNS was clearly erroneous because the County failed to conduct any meaningful SEPA review before issuing the DNS. CP 212-16, 359-360; *App. Br.* at 6-7, 33-35; *Reply. Br.* at 30-34. Because the Court of Appeals concluded that the County's failure to provide an open record hearing was erroneous as a matter of law, *Opinion* at 26, ¶ 70, the appellate court did not reach this issue. If this Court grants review it may be necessary to address that issue. *See* RAP 13.7(b).

and one BOA member during the hearing. CP 46. ECP never asked for or received permission to conduct rock crushing in agricultural zones.

Gibson also asserts that “Kittitas County interpreted and applied the ordinance provisions in a uniform and consistent manner.” *Pet. (Gibson)* at 3. That is patently false. As explained above, there is no evidence that the County has ever allowed rock crushing in agricultural zones. County staff concocted the “processing of products” theory only after ECP pointed out that “rock crushing” was not a permitted or conditional use in an agricultural zone. CP 192-193; 212.

Gibson devotes two pages to a discussion of the County’s SEPA process and its decision to issue a DNS. *Pet. (Gibson)* at 4-5. Gibson’s allegations about the adequacy of the County’s SEPA review are not relevant to the issues on which Gibson seeks review. The Court of Appeals did not address the substance of ECP’s challenge to the DNS because the court concluded that the County’s failure to provide an open record hearing violated RCW 36.70B.060(6). *Opinion*, ¶¶ 2, 65, 70.¹

It is undisputed that the County followed its new SEPA appeal procedures. *See Pet. (County)* at 3; *Pet. (Gibson)* at 6-7, 10. Gibson’s

¹ ECP maintains that (in the alternative) the DNS must be reversed because no meaningful SEPA review actually occurred. *Opinion*, ¶¶ 2, 13, 48; *App. Br.* at 4-7, 33-35; *Reply Br.* at 30-34. ECP will address the adequacy of the County’s SEPA review if review is granted.

discussion of the County's compliance with its SEPA appeal procedures is irrelevant because, as the Court of Appeals correctly concluded, those procedures violated RCW 36.70B.060(6). *Opinion*, ¶¶ 2, 65, 70.

IV. ARGUMENT

A. The Court of Appeals did not reach the “deference” issue on which Gibson seeks review. The narrow question of whether rock crushing constitutes “processing of products produced on the premises” under KCC 17.29.020(13) does not warrant review by this Court.

In an attempt to obtain further review, Gibson misleadingly asserts that the Court of Appeals “refused” to afford deference to the County's interpretation of its zoning code as required by RCW 36.70C.130(1)(b) and various cases. *Pet. (Gibson)* at 13-16; *see* RAP 13.4(b)(1),(2), and (4). In fact, the lower court did not reach the deference issue. This Court has clearly stated that only an ambiguous ordinance requires statutory construction and deference to the interpretation of an ordinance by the local agency. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646, 151 P.3d 990 (2007). In this case, the lower held that the zoning ordinance was unambiguous. *Opinion*, ¶ 46. Consequently, the court never reached the deference issue on which Gibson seeks review. *Id.* Contrary to Gibson's argument, the court's decision does *not* conflict with this Court's decision in *Phoenix Dev., Inc. v. City of Woodinville*, 171 Wn.2d 820, 256 P.3d 1150 (2011), or any of the other cases cited by Gibson.

Gibson argues that the Court of Appeals erroneously concluded that the ordinance was unambiguous.¹ *Pet. (Gibson)* at 17. But the question of whether a particular provision of the County's zoning code is ambiguous does not warrant review under RAP 13.4(b). The Court of Appeals did not cite or contradict the cases cited by Gibson on the issue of whether an ordinance is "ambiguous." *See Pet. (Gibson)* at 17. Nor does the narrow question of whether the term "processing of products produced on the premises" includes rock crushing warrant review. The County has not sought review of the Court of Appeals' determination that the zoning code prohibits rock crushing in agricultural zones.

Even if the ordinance were ambiguous, as Gibson now argues, there is no basis for deference to the BOA's decision. The interpretation of an ordinance is a question of law. *Sleasman*, 159 Wn.2d at 642. Under the Land Use Petition Act, Chap. 36.70C RCW ("LUPA"), a court reviews an agency's conclusions of law *de novo*, "after allowing for such deference as is due the construction of a law by a local jurisdiction with

¹ Gibson's arguments about whether the zoning code is ambiguous are varied and inconsistent. At the BOA hearing, Gibson never argued that the zoning code was "unambiguous." On the contrary, Gibson's attorney asserted that the ordinance required "interpretation" by the Board, and he offered several arguments in favor of Gibson's interpretation. CP 41-42. Gibson's LUPA brief and his brief at the Court of Appeals confidently asserted that KCC 17.29.020(A)(13) was *unambiguous* (in Gibson's favor). CP 443-44; *Gibson Br.* at 25-27. Now that the Court of Appeals has rejected his untenable interpretation of the zoning code Gibson has shifted back to arguing that the ordinance is ambiguous. *Pet. (Gibson)* at 17.

expertise.” *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 175, 4 P.3d 123 (2000); RCW 36.70C.130(1)(b).

Deference to a local agency under RCW 36.70C.130(1)(b) is not automatic. Gibson ignores the plain language of the statute, which provides that a reviewing court will afford only “*such deference as is due* the construction of a law by a local jurisdiction with expertise.” RCW 36.70C.130(1)(b). In *Sleasman, supra*, this Court clearly stated that an agency must establish some basis for deference to its interpretation of a local ordinance. *Sleasman*, 159 Wn.2d at 646-47. Where, as here, an agency’s interpretation is not a consistent policy but merely the by-product of the current litigation, the agency is not entitled to deference. *Id.*¹

The record clearly shows that there is no basis for deference to the County’s interpretation of the ordinance. County staff had no experience in determining the meaning of “processing of products” in the zoning

¹ The other cases cited by Gibson do not hold otherwise. In *Phoenix Development, Inc. v. City of Woodinville*, 171 Wn.2d 820, 256 P.3d 1150 (2011), this Court deferred to the City Council’s interpretation of whether a project was consistent with the City’s comprehensive plan. In *Silverstreak v. Dep’t of Labor & Indus.*, 159 Wn.2d 868, 884, 154 P.3d 891 (2007), the majority faulted the Court of Appeals for failing to give proper weight to the Department’s interpretation of a regulation that determined whether truck drivers were entitled to be paid prevailing wages. But the *Silverstreak* majority did not address the basis for such deference (or lack thereof), and did not cite, much less overrule, the Court’s earlier unanimous decision in *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646-47, 151 P.3d 990 (2007). The cited portions in *Pinecrest Homeowners Ass’n v. Glen A. Cloninger & Assoc.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004), and *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App. 461, 475, 24 P.3d 1079 (2000), are boilerplate. *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 130, 186 P.3d 357 (2008), suggests that the court would defer to the City Council over the contrary opinions of staff and the hearing examiner.

code. Staff originally assumed that rock crushing was a *conditional* use in the A-20 zone. CP 259, 264. In response to ECP's appeal of the DNS, the County expressly recognized that rock crushing was *not* a permitted or conditional use in the agricultural zone. *Opinion*, ¶ 15; CP 206. Staff also failed to notice (until ECP objected) that temporary concrete and asphalt plants were not permitted or conditional uses. *Opinion*, ¶¶ 13-14; CP 212, 255. In response to ECP's objections, county staff concocted its new theory that rock crushing was permitted as "processing of products" under KCC 17.29.020(13). Nothing in the record explains how staff reached that conclusion. Similarly, the hearing transcript clearly shows that the BOA had no expertise in interpreting that section of the zoning code. CP 69-76. In sum, the County's "processing of products" theory is not entitled to deference under RCW 36.70C.130(1)(b) and *Sleasman, supra*.

Gibson also argues that the Court of Appeals "has effectively rewritten" the ordinance. *Pet. (Gibson)* at 18. On the contrary, the court interpreted the term "products produced on the premise" to be consistent with the language and structure of the zoning code, which shows that KCC 17.29.020(13) only refers to agricultural products. *Opinion*, ¶¶ 40-44.

Gibson erroneously asserts that the Court of Appeals "specifically rejected" the rule that ordinances should be construed in favor of the property owner. *Pet. (Gibson)* at 19. The court did not reach that issue

because the court found the ordinance to be unambiguous. *Opinion*, ¶ 46. Even if the Court of Appeals had reached that issue, the rule of narrow construction would not change the outcome. *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956), does not invite courts to rely on “strict construction” to the exclusion of all other considerations. *Morin* recited the rule of strict construction only after concluding that the zoning ordinance did not prohibit the use at issue. 49 Wn.2d at 279. Since *Morin*, Washington courts have rejected “strict construction” where the correct interpretation of an ordinance requires a different outcome.¹

Finally, Gibson argues that the Court of Appeals interpretation “is inconsistent with the practical and plausible application of the ordinance,” and that it is more “efficient, economic and practical to consolidate operations.” *Pet.* (Gibson) at 20. This policy argument does not warrant review. Further, if Gibson were correct, then “processing of products produced on the premises” would be permitted in all zones. But that use is only permitted in the four agricultural zones. *Opinion*, ¶¶ 35, 37. In rural

¹ See *Mall, Inc. v. City of Seattle*, 108 Wn.2d 369, 378, 739 P.2d 668 (1987) (rejecting argument that strict construction required interpreting “lot area” in favor of developer); *Friend v. Friend*, 92 Wn. App. 799, 804 n.3, 964 P.2d 1219 (1998) (rejecting argument that strict construction required approval of partition of real property); *Development Services of America, Inc. v. City of Seattle*, 138 Wn.2d 107, 116-17, 979 P.2d 387 (1999) (rejecting strict construction where Court agreed that helipad was not necessary to the appellant owner’s business); *Griffin v. Thurston County*, 165 Wn.2d 50, 66, 196 P.3d 141 (2008) (Sanders, J., in dissent, citing *Morin, supra*, for “strict construction”).

zones outside mining districts, “rock crushing” is only a conditional use regardless of the source of the rock. *Opinion*, ¶ 40.¹

The Court of Appeals correctly concluded that “processing of products produced on the premises” applies only to agricultural products, and that rock crushing in is not permitted in agricultural zones. *Opinion*, ¶¶ 42-47. In reaching that conclusion, the court did not modify existing Washington law or alter the LUPA standard of review in any way.

Significantly, the County has not sought review of the lower court’s determination that the zoning code prohibits rock crushing in agricultural zones. If the County wishes to permit rock crushing in agricultural zones the County may take legislative action to amend the zoning code.² The Court of Appeals’ decision does not warrant review.

¹ Gibson’s argument is also inconsistent with the purpose and structure of the zoning code. The purpose of the agricultural zones is to allow agricultural activities to exist with low density development, and “to preserve fertile farmland from encroachment by nonagricultural land uses.” *Opinion*, ¶ 41; KCC 17.29.010. Gravel *extraction* must, of necessity, occur where raw materials are located. Gravel extraction is only a conditional use in the County’s agricultural zones. In contrast, rock crushing can occur at other locations, away from the land from which the rock is extracted. The zoning code shows that rock crushing may be but is not necessarily, an appropriate or compatible use on the land where rock is extracted. Rock crushing is a permitted use in the County’s rural mining districts, and in the forest and range, liberty historic, and commercial forest zones. *Opinion*, ¶ 37. “Rock crushing” is expressly listed as either a permitted or a conditional use in zones other than agricultural zones. *Id.* “Rock crushing” is neither a permitted nor conditional use in the agricultural zones because it not an agricultural use. *Opinion*, ¶ 42.

² The County would need to tread carefully if it were to expand the non-agricultural uses allowed in the County’s agricultural zones. In *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 170-72, 256 P.3d 1193, 1205 (2011), this Court recently upheld a determination of the Growth Management Hearings Board that the County had violated the Growth Management Act, Chap. 36.70A RCW, by allowing impermissible uses of agricultural lands, including sand and gravel

B. The Court of Appeals correctly concluded that the County's administrative appeal procedures violated RCW 36.70B.060(6). The petitioners' arguments do not warrant further review.

It is undisputed that the KCC 15A.07.020 provides for a closed record SEPA appeal but no open record hearing, and that BOA followed this procedure. *Opinion*, ¶¶ 60-61. The issue is whether the County's appeal procedure complies with state law.

The County is not required to provide any administrative appeals from its SEPA decisions. However, as the Court of Appeals correctly concluded, if a local government provides an administrative appeal then there must be an open record hearing. *Opinion*, ¶ 65. This conclusion is required by the plain language of RCW 36.70B.060(6):

(6) Except for the appeal of a determination of significance as provided in RCW 43.21C.075, **if a local government elects to provide an appeal of its threshold determinations or project permit decisions, the local government shall provide for no more than one consolidated open record hearing on such appeal.** The local government need not provide for any further appeal and may provide an appeal for some but not all project permit decisions. **If an appeal is provided after the open record hearing, it shall be a closed record appeal** before a single decision-making body or officer... (Emphasis added)

The County and Gibson argue that this statute merely limits SEPA appeals to no more than one open record hearing, and that the County has elected

excavation as conditional uses. Allowing rock crushing as a permitted use is even less appropriate in agricultural zones, and is clearly inconsistent with this Court's decision.

to not provide such a hearing. *Pet. (County)* at 5; *Pet. (Gibson)* at 11-12. As the Court of Appeals correctly observed, the petitioners arguments ignore the plain language of RCW 36.70B.060(6). *Opinion*, ¶ 65. Indeed, the County purports to quote the statute on page 5 of its *Petition*, but the County omits the entire third sentence: “If an appeal is provided after the open record hearing, it shall be a closed record appeal before a single decision-making body or officer...” RCW 36.70B.060(6).¹

The first sentence of RCW 36.70B.060(6) provides that the first SEPA appeal, if any, must be an “open record hearing.” The second sentence states that no further appeal is required. The third sentence states that if a subsequent appeal is provided that appeal must be a “closed record appeal.” “This language does not provide that the local government can elect to have only a closed hearing.” *Opinion*, ¶ 65.

If the County and Gibson were correct, the first sentence of RCW 36.70B.060(6) would allow an agency to provide a closed record appeal followed by yet another closed record appeal. But that nonsensical interpretation is inconsistent with RCW 36.70B.120(2), which provides:

(2) Consolidated permit review may provide different procedures for different categories of project permits, but if a project action requires project permits from more than one category, **the local government shall**

¹ The County’s sloppy editing of RCW 36.70B.060(6) includes the sentence “*See also* WAC 197-11-680(2).” *Pet. (County)* at 5. That sentence is *not* part of the statute.

provide for consolidated permit review with a single open record hearing and no more than one closed record appeal as provided in RCW 36.70B.060...
(Emphasis added)

An agency cannot provide two closed record appeals. Therefore, RCW 36.70B.060(6) only allows a closed record appeal after an open record hearing. The correct interpretation of RCW 36.70B.060(6) is shown by the definition of “closed record appeal:”

(1) “Closed record appeal” means 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. (Emphasis added)

RCW 36.70B.020(1); *see also* WAC 197-11-721. RCW 36.70B.020(1) confirms that a closed record appeal must follow an open record hearing.

The County argues that the Court of Appeals “confused” the County’s appeal process with the “closed record appeal” defined in RCW 36.70B.020(1), and that the County has never offered a “closed record appeal.” *Pet. (County)* at 4. The County made this argument for the first time on appeal, accusing ECP of mischaracterizing the County’s process as a “closed record appeal.” *See County. Br.* at 13. The parties have referred to the County’s hearing process as a “closed record appeal,” because that process meets the definition of “closed record appeal” in

RCW 36.70B.020(1) and WAC 197-11-721, and is expressly titled “closed record appeals.” KCC 15A.07.020; CP 109.

Gibson argues that the definition of “closed record appeal” in RCW 36.70B.020(1) and WAC 197-11-721 applies to hearings on the underlying project permit but not to an appeal of a SEPA threshold determination. *Pet. (Gibson)* at 12-13; *see Gibson Br.* at 46-47. In fact, that term applies to appeals of both the underlying permit and SEPA threshold determination. *See* RCW 36.70B.050(2) (“Except for the appeal of a determination of significance as provided in RCW 43.21C.075, provide for no more than one open record hearing and one closed record appeal.”) Chapter 197-11 WAC only applies to SEPA, so it makes no sense to suggest that the definition in WAC 197-11-721 does not apply to SEPA appeals.¹

A meaningful “closed record appeal” cannot occur unless an “open record hearing” has been held. The County’s appeal procedure limits the “record” in a SEPA appeal to only the application and the comments

¹ Both petitioners mistakenly cite WAC 197-11-680(2). *Pet. (County)* at 5; *Pet. (Gibson)* at 9. That section deals with appeals from decisions to condition or deny a proposal under RCW 43.21C.060 (so-called “substantive SEPA”). Appeals of SEPA threshold determinations, like the DNS in this case, are authorized by RCW 43.21C.075(3). The petitioners not only cite the wrong SEPA rule, but that rule also confirms that the provisions of RCW 36.70B.060 are mandatory. WAC 197-11-680 (“Such appeals are subject to the restrictions in RCW 36.70B.050 and 36.70B.060 that local governments provide no more than one open record hearing and one closed record appeal for permit decisions.”)

received by the agency during the comment period (before a threshold determination is made). *Pet. (County)* at 3. But an applicant or project opponent cannot know before a threshold determination is actually made whether the agency has actually considered, addressed or mitigated the impacts of a project. Only after a threshold determination is made can an appellant determine what evidence and argument is needed to effectively challenge **that determination**. Where an agency does not provide any SEPA appeal process whatsoever—which is permitted by RCW 43.21C.075, a party may challenge the agency’s SEPA determination with new evidence and argument in superior court under LUPA. *See* RCW 36.70C.120(1) (judicial review limited to the record only where party has an opportunity to create a record on factual issues before quasi-judicial tribunal). By purporting to close the SEPA record at the end of the comment period and provide only a closed record appeal, the County seeks to prevent parties from effectively challenging its SEPA decisions. This approach is contrary to both SEPA and LUPA. As the Court of Appeals correctly observed,

Because ECP was not allowed to submit any evidence or argument after the SEPA threshold decision was made, there was nothing for BOA to review in deciding the appeal. The hearing record shows that BOA members were not happy with the constraints placed on their decision making and that BOA did not ask any substantive questions before voting to deny the SEPA appeal.

Opinion, ¶ 69.

Gibson erroneously asserts that County's SEPA appeal process is "identical to LUPA" because, according to Gibson, judicial review under LUPA is "based on the administrative record and 'dealt with completely in writing.'" *Pet. (Gibson)* at 10. Gibson misunderstands the LUPA statute. Under LUPA, the superior court's review is limited to the administrative record only where the record was created by quasi-judicial body or officer in a quasi-judicial hearing where the parties may create a record. RCW 36.70C.120(1). In other words, LUPA provides only a closed record appeal where an open record hearing has already occurred. The County's defective SEPA appeal process provides no open record hearing.¹

The County seeks review by arguing that the Court of Appeals' decision "conflicts with decisions of each division of the Court of Appeals, as well as with decisions of this Court." *Pet. (County)* at 9; see RAP 13.4(b)(1),(2). But the six cases cited by the County have *nothing* to do with SEPA or Chap. 36.70B RCW. See *Pet. (County)* at 6-8. Those cases merely admonish courts not to re-write the plain language of statutes. The Court of Appeals did not cite or contradict any of those

¹ Gibson takes a sentence allegedly from Richard L. Settle, *The Washington State Environmental Policy Act*, E-29 (Lexis 2006) out of context. *Pet. (Gibson)* at 12. The cited sentence does not support the argument that an agency may provide only a closed record appeal. Even if it did, Mr. Settle's characterization of RCW 36.70B.060 would be contrary to the plain language of the statute.

cases. Nor did the court rewrite or add to the language of RCW 36.70B.060(6). The court correctly interpreted the language of the statute.

Gibson asserts that the Court of Appeals' decision "presents substantial issues of statewide significance." *Pet. (Gibson)* at 8; *see* RAP 13.4(b)(4). Gibson relies on hyperbolic, wholly unsupported claims about the alleged significance of the "extraordinary conclusion" that an agency must comply with the plain language of RCW 36.70B.060(6). *Id.* Gibson boldly asserts, without any legal or factual basis whatsoever, that the Court of Appeals' decision "will render virtually every local administrative process invalid." *Id.* In sharp contrast, the County—whose defective appeal procedure has been invalidated—does not allege that the decision has any broader significance.

Gibson's claims are largely based on mischaracterizing the Court of Appeals opinion as *obligating* agencies to provide an open record hearing on SEPA decisions. *Pet. (Gibson)* at 1, 7, 8, 11. The court correctly noted that agencies are *not* obligated to provide an administrative appeal under SEPA. *Opinion*, ¶¶ 65-66; RCW 43.21C.075(3). But if they do, the plain language of RCW 36.70B.060(6) requires an agency to provide an "open record hearing," not merely a "closed record appeal."

Gibson also asserts that the Court of Appeals decision will require all local jurisdictions "to provide both an open record hearing and a closed

record hearing with respect to each and every administrative process.” *Pet. (Gibson)* at 13. This statement is patently false. The Court of Appeals merely concluded that an agency cannot provide only a “closed record appeal.” Gibson may not obtain this Court’s review by grossly mischaracterizing the decision of the Court of Appeals.

Finally, Gibson argues that “[t]he time, expense and delay associated with this requirement is antithetical to the intent and purpose of the Regulatory Reform legislation.” *Pet. (Gibson)* at 13. This claim is based on Gibson’s mischaracterization of the Court of Appeals decision. The purpose of the 1995 regulatory reform statutes (Chap. 36.70B RCW) was to reduce the regulatory burden and confusion created by disparate local permit processes. *See* RCW 36.70B.010. To that end, the legislature expressly defined and distinguished between “open record hearing” and “closed record appeal.” RCW 36.70B.020(1),(3). The plain language of RCW 36.70B.060(6) indicates that if a local government provides an administrative appeal of a SEPA threshold determination then there must be an “open record hearing” before any “closed record appeal.”

The Court of Appeals decision is entirely correct. The County’s recently amended SEPA appeal provisions result in a meaningless appeal process that does not comply with RCW 36.70B.060(6). The petitioners’ erroneous and misleading arguments do not warrant review by this Court.

DATED this 28th day of December, 2012.

Respectfully submitted,

GROFF MURPHY, PLLC

A handwritten signature in black ink, appearing to read "Michael J. Murphy", with a long horizontal flourish extending to the right.

Michael J. Murphy, WSBA #11132
William J. Crittenden, WSBA #22033

*Attorneys for Ellensburg Cement
Products, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served on December 28, 2012 a true and correct copy of the foregoing document to the parties listed below, via the method indicated:

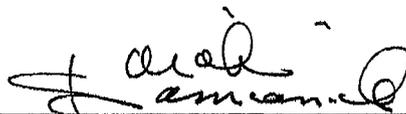
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