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DIVISION III
STATE OF WASHINGTON
By _____

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No. 303811

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

ELLENSBURG CEMENT PRODUCTS, INC.,

Appellant,

v.

KITTITAS COUNTY,

Respondent,

v.

HOMER L. (LOUIE) GIBSON,

Respondent.

BRIEF OF KITTITAS COUNTY

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February 15, 2012

**BRIEF OF KITTITAS
COUNTY**

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I. INTRODUCTION

Kittitas County (“County”), respondent before the Superior Court, submits this Opening Brief in this appeal of the Order On Land Use Petition issued on November 4, 2011 in Kittitas County Superior Court cause number 11-2-00215-5. Kittitas County’s position is that the Superior Court’s determination that the County’s decision to approve a Conditional Use Permit (CUP) for Mr. Gibson was correct; that the State Environmental Policy Act (SEPA) review associated with this CUP was proper and legally sufficient; that the County’s administrative appeal process used for the SEPA appeal comports with state law and was properly conducted; and that the declarations of Michael J. Murphy and J. Jeff Hutchinson were properly stricken and do not form a part of the record in this matter. Kittitas County hereby moves for the award of its attorney fees from ECP pursuant to RCW 4.84.370.

II. ASSIGNMENTS OF ERROR

17 In its Opening Brief, ECP lists six assignments of error at page
18 2. That Opening Brief, however, fails to brief the latter three issues at all.
19 The failure of an opening brief to address an issue constitutes
20 abandonment of that issue. *State v. Wood*, 89 Wn.2d 97, 99, 569 P.2d
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1 1148 (1977) see also *State v. Jones*, 172 Wn.2d 236, 241, 257 P.3d 616
2 (2011). The issues of the propriety of the superior court's striking the
3 declarations of Michael J. Murphy and J. Jeff Hutchinson as well as the
4 propriety of the superior court's refusal to strike portions of Mr. Gibson's
5 LUPA brief are abandoned. The County has nothing to respond to at this
6 juncture in the proceedings and it would be highly prejudicial to the
7 County should ECP be able to argue these issues in its response brief after
8 the County's opportunity to respond has already passed. ECP has chosen
9 to abandon these three issues and should not be allowed to begin arguing
10 them in its responsive pleadings.

11 III. STATEMENT OF THE CASE

12 Respondent Gibson filed application for expansion of a Conditional Use
13 Permit of an existing rock quarry to 85 acres and to allow rock crushing in
14 the Agriculture 20 zone, for which Kittitas County Community Development
15 Services (CDS) issued a Notice of Application on June 19, 2010. CP 93.
16 The application listed the size of the project as 84 acres and to include the
17 activities of crushing, screening, and washing. CP 266, item 6, 7. The
18 Applicant also submitted a SEPA checklist, where, at item 11, it lists the size
19 of the project as being 84 acres. CP 269. Notice of Application was
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1 published as required by law and distributed to adjoining property owners
2 and agencies with jurisdiction including Public Works, the Fire Marshal,
3 Department of Natural Resources, and Department of Ecology. *Id.* and CP
4 282. Kittitas County also distributed SEPA notice as required by law using
5 the alternative method provided for in WAC 197-11-355 in which the
6 County indicated its intention of issuing a Determination of Nonsignificance
7 (DNS). CP 261.

8 Written comments were received and included in the record for
9 consideration. CP 93. Neighbors commented their general support for the
10 project, and one even considered Mr. Gibson's operation "an asset to our
11 area." CP 186, 189, and 190. Public Works' comment required upgrading
12 access to the current road standards. CP 256. The Fire Marshal required
13 inspection of structures and access for fire suppression vehicles. CP 258.
14 The Department of Natural Resources' only comment was a concern about
15 5,000 board feet of lumber potentially being harvested near a Type F stream,
16 but otherwise made no comment. CP 259. The Department of Ecology's
17 only comment was that Mr. Gibson had submitted an application to them for
18 a Sand and Gravel Permit. CP 260. The Board of Adjustment (BOA)
19 imposed conditions based upon these comments as part of the Conditional
20

1 Use Permit. CP 95.

2 An administrative site analysis was completed by the staff planner in
3 compliance with Kittitas County Code Title 17A, Critical Areas. CP 94.

4 There were no critical areas on site. *Id.* After such critical areas review and
5 review of the comments received, CDS issued a Determination of

6 Nonsignificance (DNS) on October 21, 2010. CP 93; CP 244. Two appeals
7 were filed, one by Ellensburg Cement Products. *Id.* The notice of the SEPA

8 appeal was sent to the parties and described the proceeding as “There will be
9 no response or rebuttal briefing by any party on the SEPA appeal in

10 accordance with KCC 15A.07.010. Testimony will be taken at the open
11 record hearing for the Conditional Use Permit.” CP 196 and CP 197. Special

12 communication was made to both the BOA and the appellants to inform
13 them of the County’s administrative appeal process more fully described in

14 Ch. 15A.07 KCC. CP 108; CP 148. Despite the explicit instruction as to
15 the appeal proceeding, ECP chose to, for its brief, merely recycle its

16 comment letters that were already in the record. CP 208. At the hearing,
17 despite clear instruction and clear code provision as to how this proceeding

18 was to be conducted, ECP sought to introduce new material into the record
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1 and new briefing. CP 33.¹

2 The BOA held an appeal pursuant to Ch. 15A.07 KCC on May 11,
3 2011 at which time they considered the material in the record used to make
4 the decision being appealed and the briefs submitted by the parties. CP 94.
5 The BOA found that the responsible SEPA official followed all of the proper
6 procedures in the SEPA process and so upheld the DNS. *Id.*

7 The BOA then conducted its hearing on the merits of the CUP
8 expansion at which testimony was taken by those wishing to speak. *Id.* The
9 BOA found that the subject property's comprehensive plan designation was
10 rural, that it is zoned Ag-20, and that, pursuant to KCC 17.29.020(13)
11 processing of products produced on the premises is a permitted use in the
12 Ag-20 zone. *Id.* The BOA found that the proposed use is essential or
13 desirable to the public convenience and not detrimental or injurious to the
14 public health, peace, or safety or to the character of the surrounding
15 neighborhood. *Id.* The BOA found that the proposed use at the proposed
16 location will not be unreasonably detrimental to the economic welfare of the
17 county and that it will not create excessive public cost for facilities and
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19 _____
20 ¹ Both of which conceivably could have been done during the appropriate comment period
21 or as part of the brief on the appeal. Both of which are precisely the sort of ambush litigation
22 tactics-presenting a mass of information and argument at the last minute so the County and
23 other parties have no means of responding-that caused the Board of County Commissioners
24 to adopt the present system. CP 414.
25

1 services. *Id.* The BOA found that the proposal met the requirements of KCC
2 17.60A.010. *Id.* The BOA imposed conditions involving hours of
3 operation, requiring a DOE Sand & Gravel Permit, requiring storm water be
4 dealt with according to applicable standards, and the access be updated to
5 current road standards. CP 95. With those conditions and findings, the BOA
6 issued the expanded CUP for the larger project area with the understanding
7 that, pursuant to KCC 17.29.020(13), crushing rock is an outright permitted
8 use as it is “processing of products produced on the premises.” *Id.*, CP 92,
9 and CP 98.

10 The appeal was heard on July 13, 2011 before Judge Scott R. Sparks.
11 CP 533. The Superior Court struck the affidavits of Murphy and Hutchinson
12 and denied the motion to strike portions of the Gibson brief. CP 534. The
13 Superior Court further declared that the County’s administrative appeal
14 process comports with state law; that the SEPA appeal was properly
15 conducted and no clear error was shown as to the environmental review; and
16 that issuance of the CUP to Gibson was proper. *Id.*

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IV. ARGUMENT

A. Standard of Review

A governmental agency's SEPA threshold determination is reviewed under the "clearly erroneous" standard. A decision is clearly erroneous when the court is left with the definite and firm conviction that a mistake has been committed. A court does not substitute its judgment for that of the decision-making body, but it examines the record in light of public policy contained in the legislation authorizing the decision. An agency's decision to issue a mitigated DNS and not to require an EIS is accorded substantial weight. *Moss v. City of Bellingham*, 109 Wn.App. 6, 13, 31 P.3d 703 (2001).

Petitioners have brought this action pursuant to the Land Use Petition Act, Chapter 36.70C RCW ("LUPA"), which prescribes the applicable standards of review. The Court may reverse the County's decision only if Petitioners have established one of the following standards by a preponderance of the evidence in the Certified Record:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for

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such deference as is due the construction of law by a local jurisdiction with expertise;

(c)The land use decision is not supported by evidence that is substantial when viewed in the light of the whole record before the court;

(d)The land use decision is a clearly erroneous application of the law to the facts;

(e)The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).

It is well established that “substantial evidence” is “a sufficient quantity of evidence to persuade a fair-minded person of the truth of the correctness of the order.” *Schofield v. Spokane Cy.*, 95 Wn. App. 581, 586, 980 P.2d 277 (1999). Moreover, the Court may find that the County’s decision is “clearly erroneous” only if the Court is “left with a definite and firm conviction that a mistake has been committed.” *Id.* Washington courts have recognized that under LUPA “[o]ur review is deferential. We view the evidence and any reasonable inferences in the

1 light most favorable to the party that prevailed in the highest forum
2 exercising fact finding authority.” *Id.* at 586.

3 A court’s ruling upon a motion to strike is reviewed upon appeal
4 for an abuse of discretion. *Southwick v. Seattle Police Officer John Doe*
5 *No.1*, 145 Wn.App. 292, 297, 168 P.3d 1089 (2008); *Tortes v. King*
6 *County*, 119 Wn.App. 1, 12, 94 P.3d 2525 (2003). These standards
7 demonstrate that ECP has a high burden to meet in order to prove that the
8 County’s decision should be overturned. Petitioners fail to meet this high
9 burden.

10 **B. Kittitas County Followed the Proper SEPA Procedure, and**
11 **that Procedure is Fair.**

12 KCC 15.04.210 provides that SEPA threshold determinations are
13 appealed according to Title 15A KCC. KCC 15A.04.020(4) states that
14 SEPA appeals are treated as administrative appeals. KCC sections
15 15A.07.010 and .020 describe the procedure for administrative appeals,
16 including appeals of SEPA threshold determinations. In short, the record
17 for the appeal, consisting of the application materials and any comments
18 received during a comment period, is sent to the BOA and parties to the
19 appeal; each side submits one brief; and then the BOA deliberates upon
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1 the briefs and record to arrive at its decision. KCC 15A.07.010; 020. This
2 is the process the BOA employed in this matter and the BOA's conduct of
3 the proceeding was proper.

4 ECP does not contest that the BOA followed the process outlined
5 in our County Code, but rather takes issue with the ability of a County to
6 employ such a process at all. Essentially ECP seeks to argue that RCW
7 36.70B.060(6) and RCW 43.21C.075(3) require that, if a County offers an
8 appeal from a SEPA threshold determination at all, it must be an open
9 record appeal as defined by those statutes. ECP's brief at 36-40. Neither
10 of these statutes says anything of the kind and there is no authority for the
11 proposition that these appeals can only be conducted in the manner ECP
12 insists they be conducted.

13 RCW 36.70B.060(6) says:

14
15 Except for the appeal of a determination of significance as
16 provided in RCW 43.21C.075, if a local government elects
17 to provide an appeal of its threshold determinations or
18 project permit decisions, the local government shall provide
19 for no more than one consolidated open record hearing on
20 such appeal. The local government need not provide for
21 any further appeal and may provide an appeal for some but
22 not all project permit decisions. If an appeal is provided
23 after the open record hearing, it shall be a closed record
24 appeal before a single decision-making body or officer
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1 The statute limits the appeals to no more than one open record
2 proceeding, it does not say that, if an appeal is offered, it must be an open
3 record appeal. If the Legislature wanted to create such a requirement, it
4 could have, but did not. *City of Redmond v. CPSGMHB*, 136 Wn.2d 38,
5 58, 959 P.2d 1091 (1998). It is not the role of the court to rewrite
6 legislation. *State v. Groom*, 133 Wn.2d 679, 693, 947 P.2d 240 (1997).
7 Instead the Legislature merely placed a limit on the number of open record
8 appeals that could occur. Kittitas County has adopted a proceeding for
9 administrative appeals that comports with this statute as it is not offering
10 more than one open record appeal. It is providing for no open record
11 appeals. Kittitas County's procedure comports with the statute in that, the
12 statute does not require an open record appeal, but merely says that if one
13 is offered, no more than one can occur, and the County's procedure
14 comports with that because we do not offer an open record appeal in this
15 circumstance and so the prohibition on multiple open record hearings is
16 not violated. RCW 36.70B.060(6)'s language about closed record appeals
17 is not applicable because it only comes into play if a subsequent level of
18 appeal is offered, and Kittitas County has never offered such subsequent
19 appellate review. ECP's argument that the County cannot provide the
20

1 process that it does for administrative appeals fails because the statute
2 does not require that any offered appeal be an open record proceeding, but
3 merely limits that appeal process to no more than one open record
4 proceeding. The statute merely limits the number of open record
5 proceedings and does not place a prohibition on other processes that do
6 not incorporate open record hearings.

7 Similarly, RCW 43.21C.075(3) provides merely a limitation on the
8 number of appeal proceedings that can occur, and does not limit what
9 proceeding can occur to an open record appeal as ECP insists. RCW
10 43.21C.075(3) provides in pertinent part that “If an agency has a
11 procedure for appeals of agency environmental determinations made under
12 this chapter, such procedure shall allow no more than one agency appeal
13 proceeding on each procedural determination.” As explained above, this
14 statute merely places a limit on the number of appeals that can be offered
15 rather than affirmatively requiring that such appeal be an open record
16 appeal as argued by ECP. Kittitas County’s process comports with the
17 statute because it allows for only one appeal.
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19 Similarly, ECP cites to definitional language in RCW
20 36.70B.020(1) for the proposition that only processes as defined therein
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1 can exist (Appellant’s brief at 8 and 40). Some of the insurmountable
2 problems with that argument are that RCW 36.70B.020 states the
3 definitions are merely to “apply through this chapter” not in all the RCW
4 nor in all locally adopted codes. Nor is there authority for the proposition
5 that local governments cannot adopt or define processes different from
6 those found in Ch. 36.70B RCW or Ch 43.21C RCW. In fact WAC 197-
7 11-680(2) provides just that. It states in pertinent part “*Agencies may*
8 *establish procedures for such an appeal, or may eliminate such appeals*
9 *altogether, by rule, ordinance or resolution.*” Kittitas County, at Ch
10 15A.07 KCC did just that.² It adopted a process that is purely done in
11 writing and does not violate the prohibitions on multiple hearings nor
12 multiple open record hearings found in Ch 43.21C RCW and Ch 36.70B
13 RCW. There is specific authority for creating appeal procedures, which
14 the County has done, and those procedures do not run afoul of state law.

15
16 ECP consistently mischaracterizes the County’s administrative
17 appeal process as a closed record appeal. Petitioner’s brief at 36-40. The
18 County’s administrative appeal process is clearly described in Ch. 15A.07
19 KCC. It was expressly described to the Petitioners. CP 108, 148. And

20 ² While KCC 15A.02.030 adopts by reference Ch 36.70B RCW’s definition, the County
21 does not offer such process and the process it does offer is clearly described and indicated
22 in Ch 15A.07 KCC.

1 the BOA followed this process. CP 33, 94. If the County inadvertently
2 referred to the proceeding as a closed record hearing, that is harmless error
3 and not subject to relief under RCW 36.70C.130(1)(a). Whether the
4 County mistakenly referred to the proceeding as a closed record hearing,
5 an angel food cake, or as Elvis Presley, it makes no difference because the
6 process comports with the law, is described in our County code, was
7 specifically communicated to the Petitioners, and was correctly followed
8 by the BOA. An inadvertent incorrect reference to the name of the
9 proceeding does not serve as grounds for reversal because it creates no
10 harm. Nobody was deprived of any rights due to an inadvertent reference.

11 ECP asserts that the County's process is unfair. Appellant's brief
12 at 9. Though the appellants do not discuss how Kittitas County's
13 administrative appeal process might be unfair in their argument section,
14 because they asserted unfairness in the facts section, Kittitas County feels
15 the need to respond, even though there is no argument to respond to,
16 merely a bald factual assertion. Kittitas County's process comports with
17 the requirements of procedural and substantive due process. It is well
18 settled that procedural due process need not follow any preset form or
19 procedure. *Parker v. United Airlines, Inc.*, 32 Wn.App. 722, 727-28, 649
20

1 P.2d 181 (1982). It requires only that a party receive proper notice of the
2 proceeding and an opportunity to present his or her case before a
3 competent tribunal. *Id.* at 728. In this matter, ECP received notice of the
4 application. CP 282. ECP had opportunity to comment, and did so. CP
5 187, 238, 247, 283, 293. ECP has had the opportunity to present their case
6 before the BOA in the form of a brief and has done so. CP 207-230.
7 Kittitas County's process for administrative appeals satisfies procedural
8 due process.

9 Kittitas County's process for administrative appeals also satisfies
10 the requirements for substantive due process. In order to determine
11 whether a regulation violates substantive due process, courts apply a three-
12 pronged test. *Guimont v. Clarke*, 121 Wn.2d 586, 609, 854 P.2d 1 (1993).
13 It must be determined (1) whether the regulation is aimed at achieving a
14 legitimate public purpose; (2) whether it uses means that are reasonably
15 necessary to achieve that purpose; and (3) whether the regulation is unduly
16 oppressive on the landowner. *Id.* The County's process affords parties to
17 an appeal the opportunity to present their cases in a streamlined written-
18 only format that saves government and private legal costs and eliminates
19 ambush in appeals. This is a legitimate public purpose exercised in a
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1 reasonable manner that creates no oppression on anyone. Kittitas
2 County's process for administrative appeals comports with substantive due
3 process.

4 RCW 36.70C.120(2)(b) provides for courts in LUPA actions
5 considering material outside the certified record if it was "improperly
6 excluded from the record after being offered by a party to the quasi-
7 judicial proceeding." As has been described above, under Kittitas County
8 Code, the exclusion of new material, briefing, and testimony at the BOA
9 deliberation over an administrative appeal is proper. Therefore, the
10 rejection of the attachments to Mr. Murphy's declaration by the BOA was
11 proper, they are not part of the record in this matter. No abuse of
12 discretion has been shown and so the superior court's striking of this
13 material was proper.

14
15 **C. Kittitas County Conducted Adequate SEPA Review.**

16 Before a local government processes a permit application for a
17 private land use project, it must make a threshold determination of
18 whether the project is a major action significantly affecting the quality of
19 the environment. RCW 43.21C.030(2)(c). A threshold determination,
20 made by the responsible official of the lead agency reviewing the project,
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1 is required for any project constituting a SEPA action unless it is
2 categorically exempt. WAC 197-11-310(1) and (2). The lead agency
3 must make its threshold determination based upon information reasonably
4 sufficient to evaluate the environmental impact of a proposal. WAC 197-
5 11-335. The lead agency first reviews an environmental checklist
6 prepared by the applicant.³ WAC 197-11-315. If the checklist does not
7 contain sufficient information to make a threshold determination, the
8 applicant may be required to submit additional information. WAC 197-
9 11-335(1). The responsible official may also consider mitigation
10 measures which an agency of the applicant will implement as part of the
11 proposal. WAC 197-11-330(1)(c). The record of a negative threshold
12 determination by a governmental agency must demonstrate factors were
13 considered in a manner sufficient to amount to prima facie compliance
14 with the procedural requirements of SEPA. *Pease Hill Comm. Group v.*
15 *County of Spokane*, 62 Wn.App. 800, 810, 816 P.2d 37 (1991).

17 In *Pease Hill Comm. Group v. County of Spokane*, the Spokane
18 planning department, upon receiving comments from various agencies,
19 sought additional information, and then incorporated the comments

20 ³ Appellants argue at length in their brief about whether or not a SEPA checklist is
21 required. Appellant's brief 28-31. This makes no sense given that Gibson did in fact
22 submit one. CP 269.

1 received into a series of conditions of an MDNS. *Id.* at 810. The
2 adequacy of that SEPA review was affirmed. *Id.*

3 **D. Kittitas County conducted proper SEPA review.**

4 The staff planner conducted critical areas review. CP 94. The
5 County, pursuant to WAC 197-11-355 had indicated its intent to issue a
6 DNS in its notice sent to all agencies. CP 261. If a consulted agency does
7 not respond with written comments within the time periods for
8 commenting on environmental documents, the lead agency is authorized to
9 assume that the consulted agency has no information relating to the
10 potential impact of the proposal and the noncommenting agency is barred
11 from alleging any defects in the environmental determination process.
12 WAC 197-11-545. Consulted agencies have a responsibility to respond in
13 a timely and specific manner to request for comments. WAC 197-11-
14 502(2). The County received minimal comment from agencies with
15 jurisdiction over environmental issues-DNR and DOE. The DNR merely
16 expressed a concern about logging that is basically irrelevant to the land in
17 question, and the DOE merely pointed out, for the County's information,
18 that Mr. Gibson had applied for a Sand & Gravel permit. CP 259, 260.
19 Neither found any fault with the SEPA checklist, expressed the need for
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1 additional information, took issue with the proposed issuance of a DNS,
2 nor stated any conditions that should be imposed to mitigate
3 environmental impacts of the project, much less suggested a determination
4 of significance. *Id.* RCW 36.70C.130(1)(b) requires deference to such
5 comment by agencies with expertise. Therefore, Kittitas County issued a
6 determination of Nonsignificance and imposed the conditions of access
7 upgrades and obtaining a Sand and Gravel permit as conditions to the
8 CUP. Under the laws as outlined in Ch. 197-11 WAC and cases like
9 *Pease Hill*, cited above, Kittitas County conducted adequate SEPA review
10 as it constitutes prima facie compliance with the procedural requirements
11 of SEPA. It received the application and SEPA checklist, distributed the
12 same to agencies with expertise for comment, received comment
13 (essentially none), then issued a threshold determination considering the
14 application, checklist, and comment. There was no comment that would
15 have caused the County to issue anything but a DNS. An agency's
16 decision to issue a mitigated DNS and not to require an EIS is accorded
17 substantial weight. *Moss v. City of Bellingham*, 109 Wn.App. 6, 13, 31
18 P.3d 703 (2001). The BOA found the responsible official followed all of
19 the proper procedures in the SEPA process. CP 94. A Court must view
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1 the evidence and any reasonable inferences in the light most favorable to
2 the party that prevailed in the highest forum exercising fact finding
3 authority.” *Schofield v. Spokane Cy.*, 95 Wn.App. at 586. Kittitas
4 County’s issuance of an MDNS in this matter is entitle to substantial
5 weight, and must be affirmed. The fact that the responsible official
6 followed all proper procedures in the SEPA process, and all reasonable
7 inferences derived there from, must be viewed in the light most favorable
8 to Kittitas County.

9 **E. Kittitas County did not improperly incorporate an**
10 **existing environmental document.**

11 ECP argues at length (Petitioner’s brief pages 26-33) that the
12 County improperly incorporated an existing environmental document by
13 allowing Mr. Gibson to edit and reuse a SEPA checklist. This completely
14 misstates the law as to incorporation of existing environmental documents
15 which is actually not even applicable in this context. WAC 197-11-600
16 states that existing environmental documents may be used to satisfy an
17 “agency’s” responsibilities under SEPA. WAC 197-11-714 defines
18 agency to include a county. WAC 197-11-100 states that filling out a
19 SEPA check list is the responsibility of an “applicant.” *See also* WAC
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1 197-11-335 and KCC 15.04.115(2)(making filling out of a SEPA checklist
2 on a private project uniquely the responsibility of the applicant). Similarly,
3 WAC 197-11-960 describes filling out the checklist as the responsibility
4 of the applicant and states that the applicant dispatches that responsibility
5 when they have done so to the best of their knowledge. Under SEPA,
6 incorporation of existing environmental documents has nothing to do with
7 an applicant cribbing from a previously used SEPA checklist because it is
8 limited to dispatching the agency's responsibilities and filling out the
9 checklist is the applicant's responsibility. Incorporation of existing
10 environmental documents has to do with an agency making use of an
11 existing EIS or environmental study from a related or similar project. It
12 has nothing to do with an applicant dispatching their responsibilities to fill
13 out the SEPA checklist. There is no prohibition upon an applicant
14 cribbing from a previously submitted SEPA checklist. All the applicant
15 has to do is fill it out to the best of their knowledge. WAC 197-11-960.

17 The County did not improperly incorporate an environmental
18 document by accepting the SEPA checklist submitted by Mr. Gibson
19 because incorporation of existing environmental documents does not
20 involve checklists. Filling out the checklist is the applicant's

1 responsibility and incorporation of existing environmental documents only
2 involves dispatching agency responsibilities, and in private projects, filling
3 out a SEPA checklist is entirely the responsibility of the applicant. KCC
4 15.04.115(2).

5 **F. Kittitas County Properly Expanded The Gibson CUP.**

6 KCC 17.60.010 describes the criteria for granting a conditional use
7 permit as follows:

8
9 The Board of Adjustment, upon receiving a properly filed
10 application or petition, may permit and authorize a
11 conditional use when the following requirements have been
12 met:

- 13 1. The Board of Adjustment shall determine that the proposed
14 use is essential or desirable to the public convenience and
15 not detrimental or injurious to the public health, peace, or
16 safety or to the character of the surrounding neighborhood.
- 17 2. The Board of Adjustment shall determine that the proposed
18 use at the proposed location will not be unreasonably
19 detrimental to the economic welfare of the county and that
20 it will not create excessive public cost for facilities and
21 services by finding that (1) it will be adequately serviced by
22 existing facilities such as highways, roads, police and fire
23 protection, irrigation and drainage structures, refuse
24 disposal, water and sewers, and schools; or (2) that the
25 applicant shall provide such facilities or (3) demonstrate
that the proposed use will be of sufficient economic benefit
to offset additional public costs or economic detriment.

The BOA found that all of these criteria had been met. CP 94.

1 This is supported by substantial evidence in the record in the form of this
2 being an ongoing gravel mine, and there being support from numerous
3 neighbors. CP 186, 189, 190. A Court must view the evidence and any
4 reasonable inferences in the light most favorable to the party that prevailed
5 in the highest forum exercising fact finding authority.” *Schofield v.*
6 *Spokane Cy.*, 95 Wn.App. at 586. These findings are unchallenged by the
7 Appellants and coupled with the deference due because of the standard of
8 review demand affirmance of the County’s decision to expand the CUP.

9 Appellants argue at length about the BOA granting the CUP
10 because of KCC 17.29.020(13)’s provision for processing products
11 produced on site. Appellants brief pg 13-26. It is important to point out
12 that KCC 17.29.020(13) makes such processing an outright permitted use,
13 not a conditional use. That is what the BOA found at item 11 of its
14 findings of fact on this matter. CP 94. Hence, what we have is the BOA
15 approving the expansion of a CUP because the findings of public benefit
16 were made and the BOA also recognized that crushing, as a manifestation
17 of processing material found on the premises, is an outright permitted use
18 that can also occur regardless of the presence or absence of a CUP. RCW
19 36.70C.130(1)(b) requires deference to construction of law by a local
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1 jurisdiction with expertise. The BOA's construction of local law is
2 entitled to such deference. The BOA did not, as Appellants seems to
3 argue, approve the CUP because it believed that KCC 17.29.020(13) made
4 crushing, as processing material found on site, into a conditional use for
5 which one needed a CUP and for which they could grant approval.

6 Appellant's argument that processing is limited to agricultural
7 products must fail. Appellants put forth a strained argument that
8 "processing" under Kittitas County Code is limited to agricultural
9 products. Appellant's brief at pages 19-22. While one can find many
10 references to products that could be processed, listed in Kittitas County
11 code, that are agricultural products, there is no language or other support
12 in our code for the notion that "processing" is for some reason limited to
13 agricultural products. Just because most of the things that populate a list
14 of items subject to processing coming from a primarily agricultural county
15 are agricultural products (as opposed to forestry or mining), that does not
16 mean that the only things that can legally be processed in such a county
17 are agricultural products.⁴ There is no authority for Appellant's argument

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20 ⁴ There are several examples of "processing" in Kittitas County Code that do not involve
21 agricultural products. KCC 17.57.020(3), by allowing portable sawmills and chippers,
22 (yet permanent sawmills require a CUP) the code contemplates processing forest
23 products produced on site. Farmers needing to build internal roads in either Ag-20 or

1 about the limited definition of “processing.” The BOA obviously did not
2 agree with this limitation upon the word “processing” as found in Kittitas
3 County Code. RCW 36.70C.130(1)(b) requires deference to construction
4 of law by a local jurisdiction with expertise. The BOA’s construction of
5 local code regarding processing to not be limited to agricultural products
6 is subject to such deference.

7 Petitioner’s *expressio unius est exclusio alterius* argument
8 (Petitioner’s brief 13-26) misses the point. Just because Kittitas County
9 code provides for rock crushing (regardless of the origin of the material
10 being crushed) in certain zones does not lead to the conclusion that that is
11 a prohibition upon rock crushing limited to product produced on the
12 premises in other zones. Petitioners argue that, because the County calls
13 out rock crushing in certain zones and does not expressly mention it in
14 Ag-20, rock crushing must be prohibited in Ag-20. What Kittitas County
15 regulation does is provide for rock crushing, regardless of the origin of the
16 material being crushed, in certain zones, but in Ag-20, via the provision
17 for processing product produced on the premises, Kittitas County permits
18 crushing if the rock (product) was extracted on-site (on the premises).
19

20 Commercial Ag zoning (KCC 17.29.030(25); KCC 17.31.030(15)) can extract sand and
21 gravel non-commercially as outright permitted uses, and (KCC 17.29.020(13); KCC
22 17.31.020(9)) crush it as needed as processing product produced on premises.

1 Hence, crushing effectively is limited in Ag-20 (even though an outright
2 permitted use) because it can only be engaged in commercially by those
3 who have obtained a CUP for extraction of the rock. In Ag-20, one could
4 not crush rock extracted elsewhere. In Forest and Range, for example, one
5 could crush rock that came from anywhere. KCC 17.56.020(8).

6 ***G. Sleasman v. City of Lacey Supports the County's Action.***

7 ECP misuses *Sleasman v. City of Lacey* and advocates a result that
8 is contrary to the holding in that case. *Sleasman* stands for the proposition
9 that an unambiguous ordinance is accorded its plain meaning and courts
10 do not construe unambiguous ordinances. 159 Wn.2d 639, 643, 151 P.3d
11 990 (2007). If an ordinance is ambiguous, the court should give “great
12 weight to the contemporaneous construction of an ordinance by the
13 officials charged with its enforcement.” *Morin v. Johnson*, 49 Wn.2d 275,
14 279, 300 P.2d 569 (1956). If the court still needed to construe an
15 ordinance, then it had to be interpreted in favor of the property owner
16 because land-use ordinances must be strictly construed in favor of the
17 landowner. 159 Wn.2d at 643. The Court quoted *Morin v. Johnson* for
18 the proposition that:
19

20 It must also be remembered that zoning ordinances are in
21 derogation of the common-law right of an owner to use

1 private property so as to realize its highest utility. Such
2 ordinances must be strictly construed in favor of the
3 property owners and should not be extended by implication
to cases not clearly within their scope and purpose.” 159
Wn.2d at 643.

4 The Court continued by saying one means of construing an ordinance
5 involves consideration of past enforcement. *Id.* at 646.

6 Kittitas County’s provision for “processing products produced on
7 the premises” (KCC 17.29.020(13)) is unambiguous. An ordinance is
8 ambiguous only if it is susceptible of more than one reasonable
9 interpretation. *City of Spokane v. Carlson*, 96 Wn. App. 279, 285, 979
10 P.2d 880 (1990). KCC 17.29.020(13)’s provision for processing products
11 produced on the premises is not susceptible to both the interpretation that
12 it allows crushing rock mined on location and that it prohibits crushing
13 rock mined on location. The county ordinance is only susceptible to the
14 interpretation that crushing rock mined on location is permitted. That is
15 what the BOA found. CP 94. The BOA is the local jurisdiction with
16 expertise regarding uses outright and conditionally permitted in zones and
17 is entitled to deference. RCW 36.70C.130(1)(b); KCC 15A.010.040(5).
18 Since the ordinance is only susceptible of one interpretation, and that is
19 the interpretation given by the local body with expertise to whom
20

1 deference is owed under LUPA, the ordinance is not ambiguous. Because
2 the ordinance is unambiguous, it is accorded its plain meaning, which is
3 that given by the BOA - that crushing is processing rock mined on site.

4 Even if the Court believed the ordinance was ambiguous, “in any
5 doubtful case, the court should give great weight to the contemporaneous
6 construction of an ordinance by the officials charged with its
7 enforcement.” *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569
8 (1956). Again, the officials charged with enforcing these codes (KCC
9 15A.01.040(5)) are the BOA. They have held that crushing is processing
10 product produced on the premises (CP 94) and that determination is
11 entitled to “great weight.”

12 If the Court were to still believe it needs to construe the ordinance,
13 that construction must be in favor of the interest of the property owner and
14 his right to use his property to its highest utility because zoning
15 regulations are in derogation of common law. 159 Wn.2d at 643. The
16 property owner is Mr. Gibson, and he is asserting, by making this
17 application, that the highest utility for his land includes crushing. Hence,
18 under *Sleasman*, the Court would have to construe “processing products
19 produced on the premises” to include crushing, because to do otherwise
20

1 would be construing the ordinance against the property owner's common-
2 law right to put his property to its highest use. To construe the ordinance
3 to say it prohibits crushing is to construe the ordinance in a manner in
4 derogation of the common-law right to use ones property to its highest
5 utility. That is contrary to the law of this state. 159 Wn.2d at 643. But by
6 arguing that this Court should, through looking to Petitioner's
7 representation of enforcement history⁵ or their strained statutory
8 construction arguments, find that crushing is not "processing products
9 produced on the premises" that is exactly the result ECP advocates. By
10 skipping the step in *Sleasman* that ambiguous ordinances are construed in
11 favor of the landowner's interest, and going directly to Petitioner's
12 representations of enforcement history, ECP encourages this Court to
13

15 ⁵ Even if Petitioner's factual assertions about enforcement were correct, that does not rob
16 the County of the ability to properly enforce the regulations in the future. In *Dykstra v.*
17 *County of Skagit*, 97 Wn.App. 670, 985 P.2d 424 (1999) an applicant sought development
18 permits upon substandard-sized lots that had been created by testamentary division. *Id.* at
19 672. The county denied the permits because the lots did not meet minimum lot-size
20 requirements. *Id.* The applicant appealed the denial claiming this denial constituted a
21 violation of due process, fair warning, vested rights, and was arbitrary and capricious
22 because the county was refusing to continue a previous practice of exempting
23 testamentary lots from the requirements of county code. *Id.* at 673. The Court of
24 Appeals explained that actions by counties outside of authority from RCW or county
25 code are void as being ultra vires. *Id.* at 677. The Court of Appeals went on to explain
that "Governmental entities are not precluded from enforcing ordinances even though
they may have been improperly enforced in the past." *Id.* One does not obtain a vested
right to an unlawful past practice. *Id.* at 679.

1 arrive at a result that is directly contrary to the Supreme Court's holding in
2 *Sleasman*.

3 No matter how you slice it, crushing must be considered a
4 manifestation of "processing products produced on the premises." First, if
5 the ordinance is unambiguous (which it clearly is) then it is given its plain
6 meaning and deference granted to the jurisdiction with expertise, and, the
7 BOA's determination must be upheld. Second, even if the Court finds the
8 meaning of the ordinance doubtful, "great weight" is to be given to the
9 construction of the ordinance by the officials charged with its
10 enforcement, and the result would be affirming the determination of the
11 BOA. Third, even if the Court believed it still needed to construe the
12 ordinance because of ambiguity, that construction must be in favor of the
13 interests of the property owner-Mr. Gibson-and his common-law right to
14 use his property to its highest utility, again resulting in affirming the BOA
15 decision. There is no legitimate path that would lead to the result
16 advocated by ECP.
17

18 **H. Crushing is a form of processing as a matter of settled law.**

19 That crushing is a form of processing is settled law in this
20 Division, and specifically in Kittitas County. *Valentine v. BOA for Kittitas*
21

1 County, involved a gravel operation engaged in extraction and crushing in
2 a zone that did not allow crushing. 51 Wn.App. 366, 369, 573 P.2d 988
3 (1988). The operator argued that he had a DNR permit and that DNR
4 exclusively regulated surface mining and so the County could not stop him
5 from crushing. *Id.* at 368. The Court held that (1) the DNR did have
6 exclusive jurisdiction over activities then covered in the Surface Mining
7 Act (*Id.* at 370) and (2) that “*on-site processing such as rock crushing*
8 *operations*” were not under DNR jurisdiction, but rather regulated by
9 Kittitas County (*Id.* at 373). Hence, the basic notion that crushing is a
10 form of processing and is subject to local regulations has been established
11 by case law, specifically in Kittitas County. The BOA’s holding that
12 crushing is processing product produced on the premises is more than an
13 interpretation by the local authority with expertise, it is a restatement of
14 established law in this jurisdiction.
15

16 The fact that *Valentine* has been overruled by statute does not
17 affect this portion of the holding nor affect the analysis in this case. In the
18 early 90’s the Surface Mining Act was amended in a manner that did
19 essentially two things. First, RCW 78.44.050 provides for joint regulation
20 of mining with counties with the DNR retaining exclusive jurisdiction
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1 over only reclamation. Second, RCW 78.44.031(8) adds processing and
2 crushing to the list of things regulated under the Surface Mining Act.
3 Hence, the portions of *Valentine* holding that the DNR has exclusive
4 regulation of mining and that the surface mining act does not cover types
5 of processing such as crushing are no longer good law. This does not,
6 however, affect the holding in the case that crushing is a form of
7 processing, merely that that too is now jointly regulated by the DNR and
8 the counties under the Surface Mining Act. This also does not affect that
9 portion of the holding that, because crushing is a type of processing, it is
10 subject to Kittitas County's regulation. It merely means that crushing is
11 also potentially subject to DNR regulation. Established case law stands
12 for the proposition that rock crushing is a form of processing and regulated
13 by Kittitas County. That is what the County did here. The BOA found
14 that crushing is a type of processing product produced on the premises and
15 stated that it is allowed. That comports with the holding in *Valentine*.
16

17 **I. Petitioner's assertions about GMA cases and gas and oil**
18 **exploration are legally misguided.**

19 At page 25 of its brief, ECP argues that the uses involved in this
20 case violate the Growth Management Act (GMA) and so should be denied.
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1 In *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007) the
2 Supreme Court stated “A site-specific [land use action] occurs when there
3 are specific parties requesting a classification change for a specific tract.”
4 The Court continued “Unlike project permit applications, amendments to
5 the comprehensive plan and development regulations must conform to the
6 GMA...[T]he GMA does not explicitly apply to site-specific rezones and
7 the GMA has no provision that it is to be liberally construed...Because the
8 GMA does not provide for it, we hold that a site-specific rezone cannot be
9 challenged for compliance with the GMA.” 162 Wn.2d at 612, 614.
10 Hearings Boards alone have jurisdiction to determine GMA compliance
11 and this case has never been appealed to the Hearings Board (RCW
12 36.70A.280; .290(2)). Asserting that a site-specific land use action
13 violates the GMA, given that the GMA does not apply to site-specific land
14 use actions, is nonsense. This is particularly true in a LUPA action such
15 as this where the Superior Court has no jurisdiction to determine GMA
16 compliance.
17

18 Similarly misguided is Petitioner’s argument (page 20 of its brief
19 for example) that, if gas and oil exploration and construction as well as
20 processing products produced on the premises are permitted uses, then an
21

1 oil refinery would be an outright permitted use. KCC 17.29.020(16)
2 allows exploration and construction, not mining and extraction.

3 Exploration is something done with dynamite and sonar to detect oil and
4 gas deposits and does not involve any extraction of those deposits. It is
5 merely “exploring” to see if deposits are there, not extracting them if
6 found. To extract, one would need a rezone to Forest and Range for
7 extracting (KCC 17.56.020(7) and a rezone to General Industrial and a
8 CUP under KCC 15.52.030(i) for a refinery.

9 **J. The Superior Court properly struck the proffered**
10 **materials.**

11 Kittitas County code clearly describes its administrative appeal
12 process and LUPA clearly describes the circumstances in which a record
13 may be augmented. CH. 15A.07 KCC; RCW 36.70C.120(2). In complete
14 disregard of those rules, ECP has sought to submit extraneous material
15 into the record and has been properly thwarted by, first the BOA and then
16 the Superior Court. There has been no showing that the Superior Court’s
17 striking of these materials was an abuse of discretion. Indeed it was
18 proper. ECP has not even argued this, even though it listed this as an
19 issue. ECP has therefore abandoned this issue as well as failed to meet the
20

1 burden of showing that the Superior Court abused its discretion. The
2 Superior Court determination to strike various documents submitted by
3 ECP was proper and its determination not to strike certain portions of
4 Gibson's brief were also proper because the same lack of argument and
5 failure to show abuse of discretion exists there as well.

6 **K. The County Is Entitled to Attorneys' Fees as Prevailing**
7 **Parties Under RCW 4.84.370.**

8 The County is entitled to recover attorneys' fees and costs if it is
9 the substantially prevailing parties on appeal. RCW 4.84.370 provides, in
10 part, as follows:

11 (1) Notwithstanding any other provisions of this chapter,
12 reasonable attorneys' fees and costs *shall be awarded* to the
13 prevailing party or substantially prevailing party on appeal
14 before the court of appeals *** of a decision by a county,
15 *** to issue, *** a development permit involving a site-
16 specific rezone, zoning, plat, conditional use, variance,
17 shoreline permit, building permit, site plan, or similar land
18 use approval or decision. The court shall award and
19 determine the amount of reasonable attorneys' fees and
20 costs under this section if:

21 (a) The prevailing party on appeal was the prevailing or
22 substantially prevailing party before the county, city, or
23 town ...; and

24 (b) The prevailing party on appeal was the prevailing party
25 or substantially prevailing party in all prior judicial
proceedings.

1 The County prevailed before the Kittitas County Superior Court. The
2 issuance of the conditional use permit has been affirmed in each instance
3 and, if affirmed again on appeal, would entitle the County to fees under
4 the statutory structure. See *Feil v. Eastern Washington Growth*
5 *Management Hearings Board*, 153 Wn. App. 394, 417, 220 P.3d 1248
6 (2009); *Julian v. City of Vancouver*, 161 Wn. App. 614, 633, 255 P.3d 763
7 (2011) (Property owner was the substantially prevailing party because
8 they received approval of their short plat even though the hearing
9 examiner modified the approval by placing conditions on it); *Nickum v.*
10 *City of Bainbridge Island*, 153 Wn. App. 366, 383-84, 223 P.3d 1172
11 (2009) (awarding applicant fees against neighborhood group challenging
12 cell tower). Because this provision applies to all parties that succeed on
13 appeal, the County is entitled to attorney fees.

14 V. CONCLUSION

15
16 Kittitas County properly conducted its SEPA review and the
17 appeal there of. The County's administrative appeal process comports
18 with the law regarding SEPA appeals. The BOA properly expanded the
19 CUP for Mr. Gibson and properly determined that crushing is permitted as
20 a manifestation of processing product produced on the premises. All
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1 factual determinations are entitled to be made in favor of the County's
2 decision and great weight is accorded to its interpretation of its own
3 ordinances. Petitioners have failed to show an abuse of discretion, and so
4 the striking of materials from the record was proper. The Court must
5 affirm the determination of the BOA and the holding of the Superior
6 Court. Kittitas County, as a substantially prevailing party, is entitled to all
7 of its attorney's fees.

8 Respectfully submitted this 15th day of February,
9 2012.

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12 NEIL A. CAULKINS, WSBA #31759
13 Deputy Prosecuting Attorney
14 Attorney for Kittitas County
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