

No. 70527-0-I

THE COURT OF APPEALS OF THE STATE OF
WASHINGTON
DIVISION I

RAY E. GABELEIN AND LAURIE GABELEIN, HUSBAND and WIFE

Plaintiffs-Respondents,

v.

DIKING DISTRICT NO. 1 of ISLAND COUNTY of the State of
Washington

Defendant-Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ISLAND COUNTY
The Honorable Vickie I. Churchill

BRIEF OF RESPONDENTS RAY AND LAURIE GABELEIN

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3. Introduction

There are many ways that a diking district may raise the costs to maintain its facilities. But, “turnabout is fair play” is not one of them.

Believing that they were being assessed unfairly for some of the costs attributable to a controversial new pump, perceived to benefit only their inland low-lying agricultural neighbors, owners of valuable residential waterfront properties challenged those assessments, in court and at the ballot box. And they succeeded on both fronts, securing favorable judgments against the district and a majority on its governing board. The new majority thereafter imposed all of the costs to maintain the district’s drainage facilities – both the pump and, apparently, its older facilities – on the district’s lowest-lying, least valuable acres. The new majority also allocated most of the district’s operating costs to its drainage facilities. No effort was made to determine the monetary value of the benefits conferred, and the district’s annual drainage assessments were not limited even to the value of the benefitted acres. Annual assessments on many waterfront properties went down by over 50 percent, while annual assessments on low-lying properties shot up: in several cases, by well over 1,000 percent.

Ray Gabelein is the farmer who lost his bid for re-election. He owns low-lying acreage. According to the Assessor, his property has a fair market value of \$35,627, most of which is attributable to its highest,

driest acres. The new majority decided that the pump confers benefits on 25.44 of its lowest-lying, least valuable acres. According to the Assessor, 31 of its lowest-lying, least valuable acres are properly characterized as, “waste land”, with a fair market value of only \$10 per acre: before and after the new pump was put in service. Under the applicable financing statute, the new majority was authorized to use assessed value in establishing benefits, and its benefit assessment roll assigned, “drainage continuous base benefits” of \$201.37 to Ray Gabelein’s property. Nonetheless, his first annual district drainage assessment after the roll was adopted came in at \$15,548.

Summary judgment was granted on Ray Gabelein’s petition challenging the roll and resulting assessments. Because the new majority’s assessment methodology was not consistent with final judgments entered against the district in two of the prior court cases, he was also awarded reasonable attorney’s fees. The new majority appeals.

4. Issues Presented

A. Whether the district’s methodology was flawed: whether the district correctly construed and applied ch. 85.18 RCW in adopting its benefit assessment roll when the district concedes that its determination of “continuous base benefits” was actually an allocation of costs and defends its determination, on appeal, as based on a methodology, “inspired” by the

hypothetical assessment authorized in a different financing statute, producing results that deprive affected owners of the statutory protection limiting continuous base benefits to assessed value?

B. Whether the district's results were flawed: whether the district may impose an annual assessment to operate its drainage facilities of \$15,548 on property with an assessed value of \$35,627 based on drainage continuous base benefits of \$201.37, when the 25.44 acres of that property determined to benefit from those drainage facilities have a fair market value, according to the Assessor, of \$10 per acre?

C. Whether the trial court had the power to fix the flaw: whether the trial court erred in limiting the amount of a property's annual drainage assessments to its drainage continuous base benefits?

D. Whether it is clear, as a matter of law, that the district could properly ignore or defy final judgments in two prior cases to which the district was a party in adopting a new assessment methodology?

5. Statement of the Case

A. Washington's Laws on Diking Districts.

The new majority adopted its benefit assessment roll under chapter 85.18 RCW. Resolution 12-10-23.01 ("Resolution") at 1 (CP at 731). There are no reported cases construing chapter 85.18 RCW, but it is one of several venerable statutes that govern diking districts.

Diking District No. 1 of Island County was formed under Washington's 1895 laws on diking districts. Decl. of Gabelein, Ex. C ("1914 Order") at 4 (CP at 618). Under chapter 85.05 RCW, both the identity of the properties to be benefitted by dikes and the maximum amount of benefits, stated on a "per acre" basis, were proposed by a district but ultimately determined by a jury, RCW 85.05.090-120. By 1915, diking districts were empowered to provide for the construction of drainage systems for land within their borders, RCW 85.05.071, and, where the board determined that the benefits accruing therefrom were different than from its dikes, to determine the amount of such benefits, *see* RCW 85.05.075, subject to *de novo* judicial review to assure that assessments were in accordance with benefits. RCW 85.05.076.

Under Chapter 45 of Laws of 1951, codified at chapter 85.18 RCW, diking districts that had created improvements that reclaimed land or protected it from overflow of water, whether fresh or salt, were given a method to function continuously. RCW 85.18.005-010. Under RCW 85.18.030, districts conduct public hearings to determine the, "continuous base benefits" of the properties they serve:

After the roll is prepared the board shall give notice of a time and place at which the board will hold a public hearing to determine whether the facts and conditions heretofore recited in this chapter as a prerequisite to its application do or do not exist, and if so found to exist by

said board at said hearing, then the board shall by resolution so declare. The notice shall also state that at said hearing, or any continuance thereof, the board will sit to consider said roll and to determine the continuous base benefits which each of the properties thereon are receiving and will receive from the continued operation and functioning of such district, which shall in no instance exceed one hundred percent of the true and fair value of such property in money, will consider all objections made thereto or to any part thereof, and will correct, revise, lower, change, or modify such roll as shall appear just and equitable; that when correct benefits are fixed upon said roll by said board, it will adopt said roll by resolution as establishing, until modified as hereinafter provided, the continuous base benefit to said protected lands and buildings against which will be levied and collected dollar rates to provide funds for the continuous functioning of said district.

The term, "continuous base benefit" is not defined. But the purpose of chapter 85.18 RCW is to enable districts to function continuously where there is a direct relationship between a district's improvements and the value of the land and improvements that they have reclaimed or protected. RCW 85.18.005. After a roll is adopted, a district provides an annual estimate of its costs of operation to the county, RCW 85.18.160, and annual assessments based on the roll are levied by county taxing authorities, until it is modified or supplemented. RCW 85.18.080.

Although Chapter 85.18 RCW thus authorized diking districts to determine the existence and value of the benefits conferred by their improvements, their decisions remain subject to judicial oversight. An

owner who has submitted written objections to a proposed roll at a district's public hearing and who files a timely petition is entitled to a bench trial to ensure that the diking district has not abused its discretion and has correctly construed and applied the law. RCW 85.18.120-130.

In 1985, the legislature enacted another financing method for various special districts, including diking districts. Laws of 1985, Chapter 396, Sections 1-19, codified at chapter 85.38 RCW. The changes were optional for existing districts, *see* RCW 85.38.140, but their purpose was to establish better theories to measure special assessments. Decl. of Cliff, Ex. B ("Legislative History") at 2 (CP at 369). Under RCW 85.38.150, "assessment zones" are created that establish a different relative ratio of benefit or use from a district's operations and facilities. Assessments are a function of the dollar value of benefit or use per acre or per improvement and the "assessment zone" in which the property or improvement is located. RCW 85.38.150(2). A wide variety of criteria, including elevation above or below district improvements, may properly be considered in establishing the assessment zones. RCW 85.38.150(4). But the zones are determined by county legislative authority, starting from a preliminary system of assessment that is prepared by the county's engineer: not by the district. RCW 85.38.160(2)-(3).

B. Diking District No. 1 of Island County.

Diking District No. 1 of Island County encompasses a diverse mix of land types and uses: large acreage tracts in the lowest-lying, inland portion, many enrolled in the farm and agricultural or other “current use” programs under ch. 84.34 RCW; portions of the Useless Bay Golf and Country Club, consisting of both open fairways and some residential-sized lots; and many residential-sized lots on either side or in the vicinity of Sunlight Beach Road. Resolution, Ex. F (maps) (CP at 746-47) and Decl. of Gabelein, ¶ 8 (CP at 589-90) and Exs. I and J (over-size maps).¹ Sunlight Beach Road runs along one of the District’s dikes, near the shore of Useless Bay.² Decl. of Gabelein at ¶ 8-9 (CP at 589-90).

In 1914, the Island County Commissioners determined that 460 acres would be protected by the dikes then proposed for the District. 1914 Order at 2 (CP at 616). In 1931, the District imposed assessments to construct and maintain a drainage system, levied based on benefits received per acre. Decl. of Gabelein, Ex. D (“1986 Resolution”) at 2 (CP at 621). In 1944, the District ordered construction of a drainage

¹ A second copy of Ray Gabelein’s declaration was provided to the appellate court (CP at 862-928) because the first (CP at 584-652) apparently did not include copies of the over-size maps. Because that second version appears to be two pages short, however, it is still not clear whether the over-sized maps have been provided. If they have, they should appear at the end of the second version of the declaration, at Exhibits I and J.

² In the interests of brevity, the residential lots on either side or in the vicinity of Sunlight Beach Road are all hereinafter referred to as, “waterfront”.

outfall/tide gate to serve as part of the drainage system. Id. The residential lots on the waterfront side of Sunlight Beach Road³ were, at that time, almost entirely vacant, and were not assessed for drainage. Id.

In 1960, the District undertook the necessary process under chapter 85.18 RCW to change its method for determining benefits from its dikes to the true and fair value of benefitted property. Id. at 3. (CP at 622) In 1986, the District did the same for its drainage facilities.⁴ Id. at 1-10 (CP at 620-29). After the 1986 Resolution was adopted, the District thus determined benefits for both its dikes and drainage facilities based on the true and fair value of the properties benefitted.

By 1986, the District's drainage facilities included a long main drainage channel, one leg of which is connected to the gravity outfall/tide gate. Decl. of Gabelein at ¶ 9 (CP at 590). In the 1986 Resolution, the District expanded the properties determined to benefit from its drainage facilities to include the properties on the waterfront side of Sunlight Beach Road, which had become a beachfront community with very high property

³ The location of the lots cannot be made out on the reduced-size version of the maps of the District but can be made out in the over-size maps that should be attached to the second version of the Declaration of Ray Gabelein at CP 862-928.

⁴ The new majority repeatedly asserts that, in 1960, the District determined drainage assessments based on acreage under the authority of chapter 85.18 RCW. App. Brief at 13, fn. 4, 25, fn. 9, and 30-31. The 1960 resolution is not part of the record, and the District's assessment history as described in the 1986 Resolution does not support the new majority's characterization: "[o]n October 28, 1960, the Board of Diking Commissioners undertook the necessary procedures under Chapter 85.18 RCW to change the basis for benefits received from **diking** improvements..." 1986 Resolution at 3, ¶ VIII (emphasis added)(CP at 622).

values. 1986 Resolution at 2 (CP at 621). With the addition, the properties determined to benefit from the District's drainage facilities included all of the 460-acre benefitted area as established in 1914. *Id.* at 8 (CP at 627).

In determining the amount of continuous base benefits conferred by its drainage facilities in 1986, the District did not rely on appraisals or other evidence of individualized, "before and after" values. Rather, the District reasoned that the value conferred by its continued operation was equal to 100 percent of the true and fair value of each benefitted property: in part, because the properties would be worthless if subject to continual flooding from fresh water. *See* 1986 Resolution at 5-6 (CP at 624-25).

In 1995, the District modified its assessment methods for some properties without providing proper public notice. Decl. of Cliff, Ex. C ("2010 Letter Ruling") at 3-4 (CP at 374-75). But the error did not come to light until after the District entered into a contract with Island County and Useless Bay Country Club to implement a plan to improve drainage. Decl. of Gabelein, Ex. A ("2004 Pump Contract") (CP at 603-10).

The District sits at the low end of drainage basins comprising some 5,000 acres. Decl. of Cliff, Ex. G ("2011 Petition"), at Ex. 3, page 7 (CP at 481), and Sub-Ex. K (map) (CP at 527). Ever-increasing water runoff resulting from ever-increasing upland development has been identified as a challenge for the District since 1986. 1986 Resolution at 5 (CP at 624).

By 2004, the District's drainage system was at maximum capacity. 2004 Pump Contract at 1 (CP at 603).

One feature of the plan to address the drainage problems was a pump. 2004 Pump Contract at 2 (CP at 604).⁵ The District got a \$300,000 loan to cover its share of the costs. Decl. of Gabelein at ¶ 15 (CP at 597). The pump was authorized for operation at the end of 2008 and has been in service ever since. (CP at 597).

But the new pump was controversial, especially after the District adopted a five-year benefit assessment to pay for it. Decl. of Gabelein at ¶¶ 5, 15 (CP at 587, 597) and Ex. B at 2. (CP at 613). Many waterfront owners believed that their properties did not benefit. 2011 Petition, Ex. 3 at 7 (CP at 481) and Sub-Ex. P (CP at 539-45). Lawsuits were filed challenging the assessments in 2008, 2009, 2010, and 2011. Resolution, Ex. H at 1 (CP at 753); Decl. of Gabelein at ¶ 10 (CP at 591).

Ray Gabelein joined the board of the District in 2004. Decl. of Gabelein at ¶ 4 (CP at 586). John Shepard, a waterfront owner and vocal critic of the new pump, was appointed to the board in 2010. *Id.* at ¶ 6 (CP at 587-88). In February of 2012, Ray Gabelein was defeated in his bid for re-election by Thomas Kraft, another waterfront owner. *Id.* at ¶¶ 4, 6 (CP

⁵ On appeal, the District asserts that the pump was intended to maintain agricultural lands and open space, citing the 2004 Pump Contract. App. Brief at 8. But the 2004 Pump Contract was also intended to protect residential properties. (CP at 603).

at 586-88). The District thereafter engaged Rudy Englund, another waterfront owner, to represent the District. Id. at ¶ 6 (CP at 588).

In several of the lawsuits against the District, one petitioner was a non-profit corporation for which John Shepard's wife was an initial director. Decl. of Gabelein at ¶ 10 (CP at 591). In the 2011 case, Thomas Kraft, John Shepard, and Rudy Englund were all petitioners. 2011 Petition at 1 (CP at 443). The 2011 petition, filed by the same firm that brought cases in 2009 and 2010, Decl. of Gabelein at ¶ 10 (CP at 591), attached a report prepared by MAI appraiser Steve Price, who has, "significant experience with the 'b-4[sic]/after' value process required for 'benefit' assessments" (CP at 482), who criticized the District for failing to use market data establishing a, "clear and likely change in market value following the December 2008 installation of the new pump." (CP at 562).

In 2011, the court issued its ruling on cross-motions for summary judgment in the 2009 and 2010 cases. Decl. of Cliff, Ex. D ("2011 Letter Ruling") (CP at 377-83). While agreeing with the challengers that assessments had to be based on, "before and after" values (CP at 382), the court defended the District's overall assessment approach. 2011 Letter Ruling at 5-6. The court's reasoning was consistent with the 1986 Resolution: the District could properly set continuous base benefits as the fair market value of benefitted properties because flooded properties have

no fair market value. Id. But the court upheld the assessment challenges on due process grounds, based on the 1995 modifications that were made without proper public notice. 2011 Letter Ruling at 8 (CP 377-80).

In its final judgments in the 2009 and 2010 cases, prepared by the challengers' law firm, the court determined that their argument that the District's approach to benefit assessment constituted an unconstitutional *ad valorem* tax was moot. Decl. of Cliff, Ex. E ("Final Judgments") at 2 (CP at 386). The court ruled that the issue would not be ripe for adjudication until after the District followed the proper public process and entered, "Findings of Fact supported by competent evidence establishing the actual benefit provided to properties benefited by DD-1 improvements, which must be measured by the difference in value for each parcel of property before and after receiving the benefit, if any." Id.

The District appealed. (CP at 404-05) But, after Thomas Kraft was elected to the District's board, Decl. of Cliff, Ex. H at 2 (CP at 565), Thomas Kraft, John Shepard, and Rudy England were all dropped from the 2011 Petition, Id., Ex. H (CP at 564-70). The 2009 and 2010 cases were settled thereafter. Id. at Ex. I (CP at 572).

C. 2012 Benefit Assessment Roll.

When Thomas Kraft joined John Shepard on the board, the pump was already in service. Decl. of Gabelein, ¶¶ 6, 15 (CP at 588, 597). But

a substantial balance was still due on the loan that the District had taken out to pay for it. *Id.* at ¶ 18. (CP at 599). In July of 2012, a new assessment roll was filed. Resolution at 1 (CP at 731). But the roll contained more than the information required by RCW 85.18.020: i.e., properties benefitted, owners' names and addresses, and assessed values of properties and improvements. The roll also contained two columns headed, "below 5 f[et]": one expressed as a fraction, and the other as a number of acres. *See generally* Resolution at Ex. B (CP at 737-40).

The roll filed with the District on July 27, 2012, was apparently created by listing the properties at or below 11.98 feet in elevation that the new majority believed to be protected by the District's dikes.⁶ *See* Resolution, Ex. B (all roll properties have diking entries) and Ex. C (original criteria) (CP at 736-41). As for the "below 5 f[et]" columns, John Shepard explained their significance as based on his determination that only property at or below that elevation benefitted from the new pump. Decl. of Cliff at ¶ 4 (CP at 361) and Motion at 18-19 (CP at 814-15). According to Thomas Kraft's roll criteria, the District's other drainage improvements benefitted all properties protected by dikes by

⁶ The specific criterion was the 100-year water surface elevation for salt water inundation of 11.98 feet per NAVD88. Resolution, Ex. C (CP at 741). The term, "NAV88", or "North American Vertical Datum of 1988" is not defined in the Resolution, but it appears to be a technical term that refers to the standard used for surveying vertical elevation. Motion at 18 (CP at 814) [a second copy of the motion for summary judgment (CP 797-836) was provided because the first (CP 668-706) appears to be missing a page].

allowing movement of fresh water from one side to the other. Resolution, Ex. H at ¶ 23 (CP at 756); *see also* 1986 Resolution at 5 (CP at 624) (but for district’s drainage system, dikes would preclude dispersal of fresh water, causing flooding of waterfront properties). But, like John Shepard, Thomas Kraft also concluded that the new pump benefitted only those properties at or below 5 feet in elevation. Resolution, Ex. H at ¶ 24 (CP at 756). Yet the benefit assessment roll does not distinguish among the District’s drainage facilities.⁷ (CP at 766-69). And the roll is thus based on the proposition that only 127.77 acres⁸ of the 460-acre benefitted area established in 1914 benefit from district drainage facilities. (CP at 740).

The new majority’s roll also treats diking and drainage benefits differently. Diking benefits are based on value: “The ‘Total Value’, as listed by Island County’s Office of the Treasurer, which is determined by

⁷ At the same July 27, 2012 special meeting at which John Shepard explained the origin of the “below 5 feet in elevation” columns, he also implied that costs attributable to the District’s older drainage facilities should be included in the “diking base benefit” column. Decl. of Cliff at ¶ 4. (CP at 361-2). But, if that is, in fact, how the new majority has allocated the costs to operate the older drainage facilities, that is not apparent from the Resolution (CP at 731-69) or from its estimate of operating expense, Decl. of Cliff, Ex. A (“Annual Estimate of Operating Costs for 2013)(CP at 366), and such an allocation would not be consistent with RCW 85.05.077, requiring segregation of diking and drainage assessments. Although the Gabeleins identified the discrepancy in their motion for summary judgment, Motion at 19, fn. 3 (CP at 815), and 30, fn 4 (CP at 826), the new majority chose not to provide factual materials to address it and consequently may not now resolve the matter in argument on appeal.

⁸ Because the final version of the roll, Resolution, Ex. K (CP at 766-69) does not include a column for acres, this number is taken from the initial version of the roll, Resolution, Ex. B at 4 (CP at 740). The actual number of total acres based on which drainage continuous base benefits were determined is actually somewhat less, as a result of the new majority’s ruling on one objection. *See* footnote 12 *supra*.

the District to be the true and fair value as last assessed and equalized by the taxing agency of Island County,⁹ shall be used to apportion the continuous base benefit to such properties within the District afforded such protection.” Resolution, Ex. J (CP at 765).¹⁰ In contrast, drainage benefits are based on acreage: “The acreage of property at or below the five foot NAVD88 elevation as depicted on the TMI Land Surveying Map dated 5/03/2102, will be used to apportion the continuous base benefit to such properties within the District afforded such protection.” Id.

The criteria for the final roll provide that diking and/or drainage continuous base benefits not exceed the true and fair value of subject properties in money, in accordance with RCW 85.18.030. Id. As used in the criteria for the final roll, Id., the term, “continuous base benefit” thus refers both to the individual entries in the, “continuous base benefits” roll

⁹ This language, which tracks language in RCW 85.18.020, refers to a property’s fair market value as determined by the Assessor. See 2011 Letter Ruling at 6 (CP at 382).

¹⁰ The new majority initially attributed diking benefits to properties with 20% or more of their surface area at or below 11.98 feet, with assessments to be based on the true and fair value of each property, including all improvements, as a whole. Resolution, Ex. C (CP at 741). As ultimately adopted after objection and comment, however, the new majority substantially refined its criteria for properties benefitting from its dikes, such that the portion of assessed value used is in proportion to the land or improvements at or below 11.98 feet. Resolution Ex. J (CP at 765). The refined criteria assure that the assessed value of any given property that is attributable to the portion thereof that the new majority has determined do not benefit from them is not used to determine the amount of the assessments for the portion that does, so long as the Assessor’s determination of that property’s total fair market value is based on the proposition that the value of any particular portion thereof does not vary with its elevation. No such criteria refinement was made for drainage benefits.

columns¹¹ and to the annual operating costs to maintain the drainage facilities under RCW 85.18.160.

The benefit assessment roll as adopted in October of 2012 (CP at 735) has entries in its “drainage continuous base benefit” column that are expressed in monetary terms: each number has two decimal points and is preceded by a dollar sign. (CP at 766-69) For the Gabeleins’ property, that number is \$201.37. (CP at 766). But the “drainage continuous base benefits” entries actually reflect a benefitted property’s portion of the District’s total acres at or below 5 feet in elevation.¹² Notwithstanding the dollar sign that precedes the, “201.37” figure in the drainage continuous

¹¹ The initial criteria for the assessment roll described, apparently, the entries in the columns for both diking and drainage continuous base benefits as a, “dollar rate”. Resolution, Ex. C (CP at 741). For reasons that do not appear of record, the term was dropped from the final version of the criteria, Exhibit J. (CP at 765)

¹² The new majority’s methodology is not readily apparent from the final version of its benefit assessment roll, which does not include any, “below 5 feet” columns and which does not total the entries in the columns for drainage and diking continuous base benefits. (CP at 766-69). But the initial version reflects the new majority’s decision that 127.77 acres lie at or below 5 feet (CP at 740) and that 25.44 of those acres lie within the boundaries of the Gabeleins’ property, R32918-348-3990, at issue (CP at 737), and the entries in the columns for drainage and diking continuous base benefits each total almost exactly \$1,000. (CP at 740). It was therefore possible for the Gabeleins to determine from the \$199.12 entry in the “drainage continuous base benefits” column in the initial roll represented their portion of the total acres below 5 feet ($x = \$199.11$, where $25.44/127.77 = x/1,000$). Apparently because of a modest change when one benefitted property was omitted from the drainage column in the final roll, Resolution, Ex. H at 4(d) (CP at 763), the “drainage continuous base benefits” entry for the Gabeleins’ property was \$201.37. (CP at 766). Once the new majority estimated \$77,212 as the costs required to operate its drainage facilities in 2013, it was thus possible for the Gabeleins to determine that their first drainage assessment under the new roll would be \$15,548 ($x = \$15,548$, where $x/77,212 = \$201.37/1,000$). Compare Petition at 6 (CP at 775) with Reply Decl. of Cliff, Ex. C (“Island County Treasurer’s Version of Roll”) at 1 (CP at 293). The Reply Declaration of Cliff was inadvertently omitted from the list of documents identified in the order granting summary judgment as considered by the court, but the omission was corrected in the order denying the motion for reconsideration. (CP at 56).

base benefits column for the Gabeleins' property, its significance is that over 20% of the District's costs to operate its drainage facilities are to be assessed against the Gabeleins' property. App. Brief at 25 and footnote 9 (Gabeleins' property pays \$201.37 of every \$1,000 in costs).

The resolution adopting the roll incorporates, "Thomas Kraft's Criteria for Establishing Benefit Assessment Roll." Ex. H (CP at 753-57). That document lists materials and information considered by Mr. Kraft, including pleadings from the 2009 and 2010 cases in which final judgments were entered against the District. (CP at 753).

On the day that the final roll was adopted, the new majority also adopted the estimate of annual costs required under RCW 85.18.160. Annual Estimate of Operating Expense for 2013 (CP at 366). Notwithstanding the new majority's determination regarding benefits broadly attributable to District drainage facilities other than the pump, *see* footnote 7 and accompanying text *infra*, the estimate contains only two columns and allocates \$58,413 of operating costs to dikes and \$77,212 to drainage facilities. *Id.* The next annual assessments on many waterfront properties went down by over 50 percent,¹³ while district assessments on

¹³ The objections attached to the 2011 Petition identify the properties then owned by Messrs. Kraft, Shepard, and Englund by geographic identification numbers. 2011 Petition at Ex. 3 (CP at 475-78), while the Island County's Treasurer's Analysis, Reply Decl. of Cliff, Ex. B (CP at 288-91), identifies affected properties by key numbers. But the Island County's Version of Roll (CP at 293-97) includes both kinds of identifiers, and cross-

many other properties went up by more than 1,000 percent. Reply Decl. of Cliff, Ex. B (“Island County Treasurer’s Analysis”) (CP at 288-291).

D. The Gabeleins’ Property.

The Gabeleins are farmers. Decl. of Gabelein at ¶ 3 (CP at 585). Their property that is the subject of this case is Parcel R32918-348-3990. Id. at ¶ 14. (CP at 595). After a 2011 boundary line adjustment, Parcel R32918-348-3990 is more than 60 acres in size. Id., Ex. F at 3 (CP at 635).

The Gabeleins’ property is undeveloped bottom land, which is enrolled in Washington’s “current use” program for farm and agricultural lands, Id. at ¶ 17 (CP at 599), a program under which property taxes are determined by use rather than value. Decl. of Engle at ¶ 3 (CP at 654). But the Assessor determined that the fair market value of the total parcel for the 2012 assessment year is \$35,627. Id. at ¶ 4 (CP at 654-55).

The Assessor’s determination that Parcel R32918-348-3990 has a fair market value of \$35,627 is based on comparable sales and review of the three types of land that it contains. Id. at ¶¶ 4-7 and Exs. A and B (CP at 655-57, 661, 663). The most valuable acres are the driest acres: “summer pasture”, to which \$34,517 of its total fair market value of

referencing the three confirms that Messrs. Kraft, Shepard, and Englund are among those benefitting financially from the new majority’s approach.

\$35,627 is attributable. Id. Two acres of Parcel R32918-348-3990 consist of “swamp/marsh”, with a value of \$400 each. Id.

As for the remaining acres, the Assessor has determined that 31 acres of Parcel R32918-348-3990 consists of, “waste land”, which she describes as, “even wetter than wetlands”: property that is, “typically not usable for the majority of the year.” Id. “Waste land” is worth only \$10 per acre, Id. at ¶ 7 (CP at 657), and the 31 acres of “waste land” of Parcel R32918-348-3990 has a total fair market value of \$310. Id. That valuation is not an artifact of the current use program, Id. at ¶ 8 (CP at 657-58). Rather, the Assessor has determined that the market value of land that is, “wetter than wetland” is, in fact, only \$10 per acre. Id. (CP at 658). References to the \$10 per acre fair market value of 31 acres of the relevant parent parcel of R32918-348-3990 appear in the Assessor’s records as far back as 1997. Id. at ¶ 8 and Ex. C (CP at 658, 665).

E. Proceedings Below.

The Gabeleins attended hearings on the proposed roll, Decl. of Gabelein at ¶ 11 (CP at 591-92) and submitted several objections.¹⁴ (CP

¹⁴ The Gabeleins’ objections raised issues of fact and law, but their motion for summary judgment was directed to those that appeared to be dispositive. Motion at 5, fn. 1 (CP at 801). In addition to the “takings” objection addressed in text above, their legal objections included the proposition that the new majority could not use acreage to determine benefits under ch. 85.18 RCW (CP at 721), could not use acreage to determine drainage benefits and assessed value to determine diking benefits (CP at 722), could not use a methodology permissible only under ch. 85.38 RCW (CP at 722), and had not correctly

at 721-28). The new majority overruled all of them, Resolution, Ex. I (CP at 758-764),¹⁵ including their objection that the amount of their drainage assessment would exceed the fair market value of the only acres that the new majority had determined to benefit from District drainage facilities (CP at 722): even though their objection was supported by an Assessor's, "Land Snapshot" with the \$10 per acre "waste land" valuation (CP at 727),¹⁶ and the new majority ruled that it was not competent to independently determine fair market value and was relying on its statutory authorization to use assessed values. Resolution, Ex. I at 4(e) (CP at 763).

After the 2012 benefit assessment roll was adopted, the Gabeleins filed a timely petition for judicial review. (CP at 770). The writ of review was based on RCW 85.18.110 and required the District to file copies of

construed and applied the law (CP at 726), as well as that owners had no way of knowing the economic impact of the new roll because of the new majority's delay in adopting an estimate of operating expense (CP at 726). They also objected to the disparate results, because all properties benefitted by drainage facilities were not assessed (CP at 724).

¹⁵ Because there were many objections filed, the new majority ruled on all of them together. The new majority's rulings on the Gabeleins' objections appear to be identified with the term "Exhibit 11", corresponding to the number assigned to the Gabeleins' objections when filed. *See* Resolution, Ex. G at 3 (CP at 750).

¹⁶ The Land Snapshot was for the relevant parent parcel, R32918-381-4030, of the 2011 boundary line adjustment. *See* Decl. of Engle, Ex. C (CP at 665). Almost all of the 25.44 acres identified by the new majority as benefitted by District drainage facilities corresponds to this parent parcel, Decl. of Gabelein at ¶ 14 (CP at 596); to the extent that a small portion is not, the new majority has never asserted it to be material. Similarly, the discrepancy between the 60.53-acre size of the Gabeleins' property as determined in the 2011 boundary line adjustment, *Id.* at Ex. F at 3 (CP at 635), and its 66.84-acre size as determined by the Assessor, Decl. of Engle at Ex. A (CP at 661), appears to reflect a surveyor's approach to legal descriptions and is not material, especially in light of the similar discrepancy between the 25.44-acre size of the lowest-lying portion of the Gabeleins' property as determined by the new majority and the 31-acre size of its lowest-lying portion as determined by the Assessor.

the relevant portion of its roll, the objections that the Gabeleins had filed at the public hearing, and the resolution adopting the roll. (CP at 853-54).

The Gabeleins moved for summary judgment. (CP at 797-836). The new majority then moved to dismiss the petition on technical grounds (CP at 355-58), which was denied. (CP at 271-72). As for the Gabeleins' motion, the new majority filed an opposing declaration from Rudy Englund, who explained that he had been named in the 2011 Petition without his knowledge. (CP at 352-53). The new majority otherwise relied on the materials filed pursuant to RCW 85.18.110, asserting that ch. 85.18 RCW requires only that the District follow its procedural requirements and imposes no substantive limits on continuous base benefits other than that they not exceed, as to each property determined to be benefitted, 100 percent of the assessed value thereof, (CP at 345-46); that the District complied with that one substantive requirement because \$201.37 is less than \$35,627 (CP at 346)¹⁷; and that the Gabeleins' constitutional claims based on the District's \$15,548 annual assessment for drainage facilities on their property was not properly before the court. (CP at 347).

The Gabeleins' motion for summary judgment was granted, on three separate and independent grounds:

¹⁷ The new majority's actual reference therein to \$199.12 – the amount of benefits in the initial version of the roll – was in the nature of a typo. RP at 33 (04/18/13).

(1) in adopting the October 27, 2012 roll, the District did not correctly construe and apply ch. 85.18 RCW;

(2) the District's annual drainage assessment materially exceeds the amount of the drainage continuous base benefits that its facilities confer on the Gabeleins' property; and

(3) the District's annual drainage assessment materially exceeds the fair market value of the only acres of the Gabeleins' property that the District has determined to benefit from its drainage facilities.

Order Granting Motion at 3-4 (CP at 172-73).

The District having asserted, in response to the Gabeleins' motion, that the \$201.37 figure on the roll represented the continuous base benefits conferred on the Gabeleins' property by its drainage facilities (CP at 346, 347), the Gabeleins offered, in reply, to pay that amount of the \$15,548 annual drainage assessment. (CP at 319). The trial court's judgment reflected that offer (CP at 161), as well as a ruling that future annual drainage assessments against the Gabeleins' property that are based on the 2012 benefit assessment roll may not exceed \$201.37. (CP at 162).

After the trial court announced its decision, RP at 42 (04/18/13), the new majority conceded, for the first time, that the \$201.37 drainage continuous base benefits entry for the Gabeleins' property on the roll represented its percentage of the District's acres at or below 5 feet in

elevation rather than a determination of monetary value of benefits conferred. *See* Respondents' Orders (CP at 150).¹⁸ Despite the language in the final judgments entered in the 2009 and 2010 cases (CP at 386), the 2012 benefit assessment roll is not based on, "before and after" values. (CP at 731-69). Reasonable attorney's fees were therefore awarded under *Greenbank Beach & Boat Club v. Bunney*, 168 Wn. App. 517, 280 P. 3d 1133 (Div. I, 2012) (CP at 159-160); 2013 Letter Ruling at 3 (CP at 59).

The fee application was based on the amount that had been billed, based on a lower hourly rate than was justified by their attorney's professional qualifications but including variable expenses. Decl. of Cliff re: Fees at ¶¶ 2 and 5 (CP at 227, 229). The new majority objected to the fees as excessive, arguing that an award must be based on a lodestar analysis. (CP at 219-220). The award of fees was based on a lodestar analysis and did not include variable expenses. Finding and Conclusions at 1-4 (CP at 164-68). The award was higher than first requested because it was based on a reasonable hourly rate. *Id.* at 3 (CP at 166).

The new majority moved for reconsideration. (CP at 136-44). On the merits, the new majority asserted that the court lacked subject matter

¹⁸ The new majority cites this proposed order for the proposition that the Gabeleins conceded that drainage base benefits allocated to their property did not exceed its value. App. Brief at 16. The new majority is in error: this proposed form of order – which was not entered – was presented by the new majority (CP at 145): not the Gabeleins.

jurisdiction, because the Final Judgments in the prior cases were not identified in the Gabeleins' objections (CP at 136-39).¹⁹ The trial court's letter ruling discussed the specific objections filed during District hearings by the Gabeleins that raised each of the grounds on which the order granting motion for summary judgment was entered, 2013 Letter Ruling at 2 (CP at 58), expressly noting that it was the award of reasonable attorney's fees that was based on failure to comply with the Final Judgments in prior cases against the District. Id.

6. Argument

A. Standard and Scope of Review

Under Civil Rule 56, a motion for summary judgment should be granted if there is no genuine issue of material fact. An appellate court reviews an order granting summary judgment de novo. *Hill v. Department of Transportation*, 76 Wn. App. 631, 637, 887 P. 2d 476 (1995). Appellate review is limited to evidence and issues called to the attention of the trial court. RAP 9.12. Under RCW 85.18.130, the trial court determined whether the district had correctly construed and applied chapter 85.18 RCW and has acted within its discretion.

¹⁹ The new majority also sought reconsideration on the merits on grounds of "newly discovered evidence" and on the award of fees. (CP at 139-43). As regards the amount of fees, however, the new majority did not therein identify the argument now urged on appeal: that the trial court's use of the lodestar methodology, as demanded by the new majority, denied a full and fair opportunity to object when that methodology resulted in a higher award than had been originally requested. App. Brief at 40-41.

With the exception of Mr. Englund's declaration explaining his participation in the 2011 Petition, the only evidentiary materials before the court when summary judgment was granted were those submitted by the Gabeleins. On appeal, the new majority cites to those materials to describe the District's prior assessments, *see, e.g.*, App. Brief at 25, and litigation history, *Id.* at 9-10, and does not assign error to the trial court's consideration of materials outside its certified transcript. App. Brief at 4-5. Nonetheless, the new majority also asserts that appellate court review must be limited to the "record" that was before it when the roll was adopted, *Id.* at 18: meaning, apparently, that the new majority will decide on appeal which portions of the evidentiary materials filed by the Gabeleins it will now acknowledge to have been before it when the roll was adopted.

The new majority is in error. The only "record" that the new majority provided to the court was the certified transcript filed to fulfill its obligation under RCW 85.18.110.²⁰ When an assessing authority is required to provide a complete record of its assessment proceedings to a reviewing court, judicial review is properly limited to the record before that authority. *Abbenhaus v. City of Yakima*, 89 Wn. 2d 855, 859-60, 576

²⁰ In response to the Gabeleins' original request that the new majority provide copies of the materials identified in the Resolution as considered by Thomas Kraft in establishing roll criteria (CP at 284), the new majority originally agreed to comply (CP at 281), only to renege, several weeks later, on grounds that the task was, "overwhelming" and that judicial review of its action was limited to the contents of its certified transcript. (CP at 279). *See generally* Reply Decl. of Cliff, Ex. A (CP at 277-84) (correspondence).

P. 2d 888 (1978); *see also Responsible Urban Growth Group v. City of Kent*, 123 Wn. 2d 376, 384, 868 P. 2d 376 (1994) (judicial review based on record must be based on complete record). Thus, under RCW 35.44.230, the record provision for the assessments at issue in *Abbenhaus*, the legislative authority is required to provide the court with its complete record with reference to the assessments, upon payment for its costs.

In contrast, the new majority was required only to provide the specific materials identified in RCW 85.18.110. The court can determine from those basic materials – the Gabeleins’ objections, the roll, and the adopting resolution (CP at 714-69) – whether jurisdictional prerequisites regarding the filing of written objections with the District and a timely petition have been met. But RCW 85.18.120 provides for resolution of the merits of petition by bench trial. Furthermore, judicial review cannot properly be limited to the materials specified in RCW 85.18.110. Contrary to the new majority’s claim that its annual assessments were not properly before the court (CP at 347), RCW 85.18.090 specifies that a petition under 85.18.100 is the only method by which assessments based on the benefit assessment roll can be challenged. Yet nothing in the materials specified in RCW 85.18.110 – or in the materials identified in the Resolution as considered by Thomas Kraft in establishing roll criteria

(CP at 753-57) – provides information from which an owner can determine the amount of even the first annual assessment.

Although the new majority cites *Abbenhaus* for the proposition that review of assessments is limited to the assessing body's record, the new majority fails to note the difference between RCW 35.44.250, at issue in *Abbenhaus*, and RCW 85.18.130. RCW 35.44.250 was substantially amended in 1957, with the apparent specific purpose of limiting the scope of judicial review. See Philip A. Trautman, *Assessments in Washington*, 40 Wash. L. Rev 100, 129 (1965); see also *Abbenhaus*, 89 Wn. 2d at 857-58. In contrast, the last sentences of RCW 85.18.120 and .130 closely track the pre-amendment language of RCW 35.44.230.

Furthermore, even when the assessing authority provides a complete record, judicial review is not limited to that record when the challenger is raising constitutional questions, *Responsible Urban Growth Group*, 123 Wn. 2d at 384, as the Gabeleins did. Objections at ¶ 5 (CP at 722), ¶ 9 (CP at 724) and ¶ 12 (CP at 726). The trial court properly considered all evidentiary materials that were before it in granting the Gabeleins' motion for summary judgment, and so does the appellate court.

B. The New Majority's Methodology was Flawed.

Section Nine of Article Eleven of the Constitution of the State of Washington requires that property taxes be uniform upon the same class of

property within the boundaries of the authority levying the tax and that all real estate within the state constitutes a single class. *Bond v. Burrows*, 103 Wn. 2d 153, 157, 690 P. 2d 1168 (1984). By contrast, “special benefits” that accrue to properties as a result of local improvement are properly borne by the properties that benefit. Trautman, *Assessments in Washington*, 40 Wash. L. Rev. at 102. Such a property must have or will enjoy an increase in market value. *Weyerhaeuser Timber Co. v. Banker*, 186 Wash. 332, 342, 58 P. 2d 285 (1936).

Special assessments to pay for local public improvements benefitting specific land are of ancient lineage ... All such assessments have one common element: they are for the construction of local improvements that are appurtenant to specific land and bring a benefit substantially more intense than is yielded to the rest of the municipality. The benefit to the land must be actual, physical, and material and not merely speculative or conjectural.

Heavens v. King County Rural Library District, 66 Wn. 2d 558, 564, 404 P. 2d 453 (1965) (footnote and citations omitted).

Washington’s diking laws adopted in 1917 were sustained against constitutional challenge based on the proposition that the charge for improvements were to be in proportion to the benefits accruing thereto and that no property could be charged in excess of the benefits accruing thereto. *Foster v. Commissioners of Cowlitz County*, 100 Wash. 502, 512, 171 P. 539 (1918). After the laws were amended, they were sustained

again: constitutional rights were not violated, so long as (1) the law works uniformly against all parts of the district, and (2) their benefits continue respectively to exceed their individual assessments. *See Kadow v. Paul*, 274 U. S. 175, 181, 71 L. Ed 982 (1927).

It is against this backdrop that chapter 85.18 RCW was enacted. Its fundamental proposition is that, when a diking district has reclaimed or protected land and/or enabled the erection of improvements thereon, there is a direct relationship between the fair value of the land and improvements and the continued functioning of the district. Chapter 85.18 RCW authorizes a district to use the assessed value of such land and improvements as that fair value. *Compare East Hoquiam Co. v. City of Hoquiam*, 90 Wash. 210, 215, 155 P. 754 (1916) (no natural or logical relationship between benefits conferred on property from given improvement to assessed value of property for purposes of general taxation). Under RCW 85.18.030, the district determines the continuous base benefits that each property on its roll receives from its continued operation, so long as such benefits do not exceed 100% of the property's true and fair value in money.

But there is no authority for the proposition that a diking district may properly use chapter 85.18 RCW to simply allocate its costs to properties that it determines to be benefitted by some of its improvements.

The method of distributing costs associated with improvements that are of special benefit to a limited number of properties must ultimately be based on benefits to those properties: not just to spread costs. *Bellevue Plaza v. City of Bellevue*, 121 Wn. 2d 397, 415, 851 P. 2d 662 (1993). “The critical consideration always is whether the method of distributing cost properly represents benefits to the property assessed.” Trautman, *Assessments in Washington*, 40 Wash. L. Rev. at 122.

The new majority assert that its methodology to determine drainage continuous base benefits is, “similar to the method applied by the District in 1931, 1944, and 1960.” App. Brief at 25. But chapter 85.18 RCW was not even enacted until 1951, and the new majority elsewhere correctly asserts that the term, “continuous base benefit” is unique to that statute.²¹ App. Brief at 22. In any event, the 1895 legislation under which the District was established requires assessments on the basis of benefits per acre, RCW 85.05.090: not costs per acre. And, under Chapter 85.38 RCW, assessments on land are determined based on benefits per acre, RCW 85.38.150(2): not costs per acre. Under Chapter 85.18 RCW, benefits are determined using assessed value – not acreage – but a district

²¹ The new majority’s assertion that the drainage assessment rolls adopted in 1931 and 1944 were used as the basis for annual levies, “as contemplated by RCW 85.18.080”, App. Brief at 6, is a similar anachronism: RCW 85.18.080 did not exist until 1951. As for the new majority’s mis-reading of District assessments in 1960, *see* footnote 4 *infra*.

must still determine benefits: not just decide which properties are benefitted and allocate its costs among them. The financing provisions of chapter 85.38 RCW were adopted to establish better theories to measure special assessments, (CP at 369): not because districts already had the option to raise operating costs without determining the benefits conferred by their improvements.

The value of the special benefit caused by a local improvement is measured by the fair market value of the property immediately after the special benefits are added to the fair market value prior to the accrual of that benefit. *Doolittle v. City of Everett*, 114 Wn. 2d 88, 93, 786 P. 2d 253 (1980); *see also* Trautman, *Assessments in Washington*, 40 Wash. L. Rev. at 118. In the prior court cases, challengers successfully asserted that continuous base benefits were a kind of special benefit, the value of which was to be determined in accordance with this general principle. 2011 Letter Ruling at 6 (CP at 382). This is consistent with both the District's approach when the dikes were created, 1914 Order at 3 (CP at 617) (dikes will be of "special benefit" to protected properties), and its expansion of properties benefitted by drainage facilities, 1986 Resolution at 5-6 (CP at 624-25) (enumerating special benefits to waterfront properties). But the new majority asserts that "continuous base benefits" under ch. 85.18 RCW

are not, in fact, “special benefits”, App. Brief at 29, and that the new majority was therefore not required to apply a “before and after” analysis.

A precise mathematical approach to valuation would not be consistent with the circumstances for which chapter 85.18 RCW was adopted. Chapter 85.18 RCW provides diking districts that have already created improvements that reclaimed or protected land and enabled the erection of improvements thereon with a way to continuously function effectively: hence, presumably, the term, “continuous base benefits.” Furthermore, although the new majority makes no mention of it, chapter 85.18 RCW is not intended as a financing mechanism on a, “one time only” basis, as would be consistent with a value conferred before and after the construction of any given improvement to which such costs are attributable. Rather, chapter 85.18 RCW is specifically intended to allow districts to raise the costs they require to operate effectively every year, on a continuous basis. RCW 85.18.160.

But the new majority’s determination of drainage continuous base benefits did not compute benefits at all: the new majority simply decided which properties they believed were benefited and allocated costs to those properties. When the new majority defends its benefits assessment roll as a determination that the Gabeleins’ property is to bear 20.137% of the District’s annual costs to maintain its drainage facilities, App. Brief at 32,

the new majority is conceding that it made no determination of the dollar value of those benefits. Expressing a percentage of costs in dollar terms does not make the result a determination of benefits.

The new majority also asserts on appeal that it was not possible in 2012 to determine how much value to attribute to the District's many drainage improvements, which had been constructed at various times in its 100-year history. App. Brief at 30. Yet, despite their complaints on appeal about theoretical valuation challenges, both members of the new majority claimed, in establishing their roll, that there was an identifiable difference between the large number of properties that benefit from the District's drainage facilities that existed before the controversial pump was installed in 2008 and the much smaller number of properties that benefit from the pump and that assessments to support had to reflect that identifiable difference. See footnote 7 and accompanying text *infra*. In other words, both members of the new majority originally took the position that there **was**, in fact, a specific District improvement – the controversial pump – that conferred benefits on a limited number of properties and that the costs associated with it had to be borne only by those properties. But, to justify that approach, there must be an identifiable difference in the market value of such benefitted properties that is attributable to the pump. See, e.g., *Weyerhaeuser Timber*, 186

Wash. at 342. The problem for the new majority is not just that there is no evidence of such a difference in value for the portion of the Gabeleins' property that they assert to have benefitted from the new pump: the only evidence is that there was **no change** in the fair market value of that portion of the Gabeleins' property before and after the new pump was installed. Decl. of Engle at ¶¶ 7-8 and Ex. C (CP at 657-58, 665).

Theoretical complaints about the challenges in applying the valuation approach to drainage benefits that the new majority used, without difficulty, in determining the district's diking benefits also ignores the flexibility reflected in the trial court's opinion on which the Final Judgments in the 2009 and 2010 cases were based. The trial court therein not only upheld the District's decision to set continuous base benefits as 100 percent of the assessed values of benefitted properties – thus establishing not only that such an approach was consistent with a, “before and after” analysis but also that the assessed values were “competent evidence” on which such an analysis could be based – the trial court also noted that the District could properly determine benefits to be something less. 2011 Letter Ruling at 7 (CP at 383).²² But, to be consistent with the methodology of chapter 85.18 RCW, the determination must be based on

²² As originally enacted, the provision codified at RCW 85.18.030 limited continuous base benefits to 50 percent of true and fair value of subject properties. Laws of 1951, Ch. 45, § 4.

the value of the land and improvements determined to be benefitted. And, to be consistent with constitutional requirements, the determination must be a computation of benefits: not just an allocation of costs.

But the new majority did neither. On appeal, the new majority asserts that it was, “inspired by RCW 85.38.160(2) to articulate the benefits per \$1,000 of budgeted costs,” App. Brief at 25: without any citation to the record. But the record does reflect the new majority’s ruling on the Gabeleins’ objection to its use of methodology available only under chapter 85.38 RCW: it was overruled on grounds that its methodology was, “compliant with the provisions of RCW 85.18 and does not include the provisions of RCW 85.38.” Objection 4(f) (CP at 763).²³

The new majority’s ruling was certainly correct in one sense: the Gabeleins got none of the statutory protections that should have applied.

²³ The Gabeleins believed that the new majority’s methodology was appropriated from ch. 85.38 RCW, and objected on that basis. (CP at 722). But, because the new majority nowhere explained the purpose or function of the artificial \$1,000 totals that appears in the diking and drainage base benefit columns in the its initial version of the roll, the Gabeleins conceded below that it was possible that the methodology could have derived from a source other than RCW 85.38.160(2). Reply at 8-9 and footnote 4 (CP at 305-06). They specifically observed that, because funds raised under chapter 85.18 RCW are “dollar rate levy returns”, RCW 85.18.150, the proposition that such funds should be expressed in terms of, “parts per thousand” could have been based on WAC 458-19-005(n), under which levy rates for property taxes in the state of Washington are to be expressed as a dollar amount per thousand. *Id.* at 9, fn. 4 (CP at 306). But dollar levy rates under WAC 458-19-005(n) are expressly defined in terms of a levy amount, expressed in dollars and cents, that apply per thousand dollars of assessed value, and the District’s drainage base benefit is based on acreage: not value. Furthermore, the District is not empowered to raise its costs on an *ad valorem* basis. See *Foster v. Sunnyside Valley Irrigation District*, 102 Wn. 2d 395, 410, 687 P. 2d 841 (1984). In any event, the new majority having chosen not to provide a fact-based account of its methodology to the trial court below, the new majority cannot now use argument on appeal to do so.

If assessed value is to be used to establish assessments under chapter 85.38 RCW, it is the value based on use determined under chapter 84.34. RCW 85.38.165. Moreover, under chapter 85.38 RCW, the \$1,000 assessment is hypothetical: an assessment is designed to generate \$1,000 in revenue, and a copy is sent out to all properties subject to assessment, specifically described as for comparative purposes only. RCW 85.38.160(2). But there is nothing hypothetical about the new majority's roll, under which the Gabeleins' property is to pay more than 20% of all of the costs that the new majority allocates, each year, to the District's drainage facilities. And, under RCW 85.38.160(2), the preliminary system of assessment is prepared by the county engineer, for review and action by the county legislative authority, RCW 85.38.160(3): not by a district's board, the members of which may both have a financial and electoral incentive to impose substantial costs on those in the minority.²⁴

The new majority's methodology also eviscerates any protection from the statutory ceiling under RCW 85.18.030: that a property's continuous base benefits cannot exceed its assessed value. Under the new majority's approach, the combined amount of continuous base benefits

²⁴ District maps show some inland residential lots affected by the drainage assessments, the owners of which might reasonably be expected to protect their interests at the ballot box, even if the cost of a legal challenge proved too daunting. In fact, however, Island County's version of the new majority's roll shows that many of those lots are undeveloped, with only nominal assessed value, and are owned by the same entity, Reply Decl. of Cliff, Ex. C (CP at 296): which has only two votes. RCW 85.38.105(5).

could not exceed \$2,000: because the entries for drainage and for diking continuous base benefits each total \$1,000. (CP at 740). Only a handful of properties on the roll have an assessed value under \$2,000, Reply Decl. of Cliff, Ex. C (CP at 295-97): none have combined continuous base benefits, both drainage and diking, of more than \$300. Id. Yet at least one, parcel S8340-07-0000B-0, with an assessed value of \$1,620, was assessed over \$2,206.72 – just for its share of the District’s drainage assessments, and just for the calendar year 2013. (CP at 295).

C. A Flawed Methodology Produced a Flawed Result.

In overruling the Gabeleins’ objections, the new majority asserted below that both, “the continuous base benefits received, **and resulting assessments**, will not exceed the true and fair value of the property and buildings, as listed on the Island County tax roll.” Exhibit I at 2(d) (CP at 759) (emphasis added). Yet the new majority has already imposed an annual drainage assessment that exceeds the assessed value of one property. And the new majority’s position on appeal could not be clearer: “[t]he only limitation under Ch. 85.18 RCW on the amount of the annual levy is the amount of costs the district estimates that it will incur, which bears no relationship to the base benefit used to apportion those costs among benefitted properties.” App. Brief at 34. Thus, the new majority does not even attempt to explain how \$15,548 for one annual assessment

has properly been imposed on the Gabeleins' property for the costs to operate the District's drainage facilities based on its determination that 25.44 acres thereof benefit from those drainage facilities, when those acres were and are worth only \$10 per acre:²⁵ before and after the installation of the pump from which those acres are asserted to specially benefit.

This absurd result is the consequence of the new majority's misapplication of ch. 85.18 RCW. But statutes should be construed to avoid results that are absurd, as the new majority correctly asserts, App. Brief at 34: and to avoid results that are unconstitutional. *Ryan v. Dep't of Social and Health Services*, 171 Wn. App. 454, 467, 287 P. 3d 629 (2012).

Although the result of faulty methodology, there is no dispute that the new majority determined that the Gabeleins' "drainage continuous base benefits" was \$201.37. On appeal, the new majority wants to have it

²⁵ The new majority suggests, without citation to the record, that the fair market value of the Gabeleins' property is, "as is more likely, something substantially larger" than its \$35,627 assessed value. App. Brief at 33, fn. 12. For purposes of applying ch. 85.18 RCW, however, it is the determination of the Assessor that counts, and it is undisputed that the Assessor has determined that 31 of the lowest-lying and least valuable acres of the Gabeleins' property have a fair market value of \$10 per acre: before and after the pump was installed in 2008. Decl. of Engle at ¶¶ 7-8 and Ex. C (CP at 657-58, 665). The new majority's effort to secure reconsideration based on the sale of an different acreage parcel was not just factually unfounded – among other things, the property claimed to be "comparable" had been determined to be capable of supporting an on-site septic system, while the Gabeleins' property at issue in this case has been determined to not be capable of supporting an on-site septic system, Corrected Decl. of Gabelein at ¶¶ 3-4 and Exs. A and B (CP at 63-64, 68-69, and 71-73) – but legally unfounded: because Chapter 85.18 RCW is based on use of assessed value to determine fair value, and the new majority had already conceded that it was not competent to determine fair market value. Resolution, Ex. I at 4(e) (CP at 763).

both ways: to admit that this determination of “drainage continuous base benefits” was a determination that the Gabeleins’ property would be assessed, every year, 20.137 percent of the District’s operating costs, App. Brief at 25 and fn. 9, but defend its compliance with RCW 85.18.030 because \$201.37 is less than its \$35,627 assessed value. App. Brief at 32-33. In doing so, however, the new majority is using the assessed value attributable to the portion of the Gabeleins’ property that is above 5 feet in elevation, which – at least according to its initial version of its roll,²⁶ Resolution, Ex. B (CP at 737-40) – does not benefit from the District’s drainage facilities, to defend the extent to which the new majority has allocated the costs of those facilities to the Gabeleins’ property based on benefits to its acres that are below 5 feet in elevation.

In the case of the District’s dikes, continuous base benefits are determined in proportion to the amount of land or improvements that are below the 11.98-foot benchmark. Resolution, Ex. J (CP at 765). But the “continuous base benefits” for drainage improvements, which are expressly determined on the number of acres of property that are determined to be benefitted, are treated differently: those benefits are

²⁶ Again, both members of the new majority also defended their determination to assign drainage continuous base benefits to only the 127.77 acres within the District shown on the initial version of its roll, Resolution, Ex. B (CP at 740), based on the proposition that such acres were the only ones that benefitted from the controversial pump, as distinguished from benefits enjoyed more broadly from other District drainage facilities. See footnote 7 and accompanying text *infra*.

limited only by the fair market value of the property as a whole. And so the value of the portion of the Gabeleins' property that they can use as "summer pasture" is the basis on which the new majority defends its assessment on Parcel R32918-348-3990 based on benefits to their "waste land", worth only \$10 per acre.

Chapter 85.18 RCW allows the new majority to use assessed value as the "true and fair value" used to determine continuous base benefits. But the new majority cannot at the same time ignore the way that assessed value was computed so as to justify assessments based on the value of acres that do not benefit from its improvements. First, "assessments [must] be distributed with substantial equality over all property of like kind and similarly situated with reference to the subject-matter of the assessment." *In re Eighth Avenue NW*, 77 Wash. 570, 576, 138 P. 10 (1914). Second, special assessments for special benefits cannot substantially exceed the amount of the special benefits without falling afoul of constitutional protections against the taking of private property without compensation. *Hargreaves v. Mukilteo Water District*, 43 Wn. 2d 325, 331-32, 261 P. 2d 122 (1953); *see also Vine Street Commercial Partnership v. Marysville*, 98 Wn. App. 541, 549, 989 P. 2d 1238 (2000).

The new majority's determination of drainage continuous base benefits, and the resulting annual assessments on the Gabeleins' property,

do not fulfill either of these constitutional requirements. First, the new majority's drainage assessments do not work uniformly against all parts of the District. The new majority imposed the operating costs attributed to drainage facilities on the lowest, least valuable acres in the District, but overruled the Gabeleins' objection based on the \$10 fair market value of those acres as determined by the Assessor based on their property's assessed value as a whole. Resolution, Ex. I at 4(h) (CP at 764). But most of that assessed value is based on acres that the new majority has determined are not benefitted by the drainage facilities. If the portion of the Gabeleins' property that lies above 5 feet in elevation is considered in defending the District's drainage assessment, then the portions of all other properties within the District that lie above 5 feet in elevation must also be subject to drainage assessments: otherwise, the drainage benefit assessment does not apply uniformly to all parts of the District.²⁷

²⁷ It also does not appear that all properties that benefit from the District's drainage facilities are being assessed for the costs required to maintain them. Properties encompassing almost the entire 460-acre benefitted area established in 1914 have been assessed to maintain the drainage facilities at least since 1944. 1986 Resolution at 2 (CP at 621). The District's decision to expand the scope to include the few properties previously omitted – the valuable properties on the waterfront side of Sunlight Beach Road – in 1986 was supported by detailed findings of fact, *Id.* at 5-6 (CP at 624-25) and, in adopting its roll, both members of the new majority attributed benefit to properties that are protected by the dikes from the drainage facilities other than the pump. *See* footnote 7 and accompanying text *infra*. Yet, as demonstrated on the last page of the initial version of its roll, Resolution, Ex. B (CP at 740), the new majority appears to have radically reduced the geographic scope of properties benefitted by the drainage facilities, imposing all of the costs to operate all of them on the 127.77 lowest-lying acres in the District: because neither the final roll, Resolution, Ex. K (CP at 766-69) nor the Annual Estimate

Second, the Gabeleins' property has been assessed substantially more than the benefits conferred by the District's facilities: just for one annual operating expense assessment. Special assessments for special benefits cannot substantially exceed the amount of the special benefits. Hargreaves, 43 Wn. 2d at 331-32. Exact equality between benefit and assessment is not required, but a material excess of cost over special benefit is not permitted. Hargreaves, 43 Wn. 2d at 332. An annual assessment of \$15,548 attributable to benefits conferred on the 25.44 least valuable acres, worth \$10 per acre, of the property that is justified solely on its \$35,627 assessed value as a whole – without any showing of the value of the special benefit conferred – does not pass constitutional muster when most of that assessed value is attributable to its most valuable acres.

D. The Trial Court had the Power to Fix the Flaw.

The first issue raised in the Gabeleins' summary judgment motion was that the new majority had failed to compute drainage continuous base benefits and had instead allocated costs.²⁸ Motion at 26 (CP at 822). In

of Operating Costs for 2013 (CP at 366) distinguish among the drainage facilities. In this regard, the new majority's approach complies with RCW 85.05.077, which requires that, in all cases in which a district determines that assessments for drainage improvements differ from diking improvements, a district must segregate costs raised for drainage from costs raised, "for all other diking purposes." But it then does not comply with the fundamental principle that all benefitted properties must share in the cost to maintain the improvements from which they benefit.

²⁸ The new majority's assertion that the trial court lacked subject matter jurisdiction because the Gabeleins did not reference the Final Judgments in their objections, App.

opposition, the new majority asserted that the entry in the “drainage continuous base benefits” column for the Gabeleins’ property was, in fact, a determination of benefits. (CP at 346, 347). In reply, the Gabeleins then offered to pay \$201.37 of the \$15,548 first annual drainage assessment. (CP at 319). At oral argument, the new majority stuck to its guns: the \$201.37 figure was a determination of benefits expressed in monetary terms, which was all that was required. RP at 33 (04/18/13). Only after the trial court announced its ruling, RP at 42, did the new majority acknowledge what it now concedes: its determination of drainage continuous base benefits was simply an allocation of costs. (CP at 150).

Under RCW 85.18.130, the court has express power to modify a district’s decision. The new majority concedes that the court had the power to change its determination of continuous base benefits for the Gabeleins’ property. App. Brief at 35. Because the new majority’s methodology for determining all drainage continuous base benefits was flawed, however, the court could not fix the problem simply by correcting the value for the Gabeleins’ property. Presented with the new majority’s

Brief at 26-27, is based on the mistaken proposition that the court’s grant of summary judgment was based on their failure to comply with the Final Judgments. As the trial court explained in detail in denying the new majority’s motion for reconsideration based on this assertion, its grant of summary judgment was based on the three independent grounds set forth in its order, all of which had been identified by the Gabeleins in their objections; it was the trial court’s award of reasonable attorney’s fees that was based on the new majority’s failure to comply with requirements of the Final Judgments. 2013 Letter Ruling at 2 (CP at 26).

adamant assertion that its \$201.37 figure represented a determination of drainage continuous base benefits for the Gabeleins' property and the Gabeleins' offer based thereon to pay that portion of the District's annual drainage assessment, the trial court did not err in adopting the Gabeleins' offer. "[T]he exaction ... of the cost of a public improvement in substantial *excess* of the special benefits accruing ... is, *to the extent of such excess*, a taking ... of private property for public use without compensation." *Vine Street Commercial Partnership v. Marysville*, 98 Wn. App. at 549. (emphasis in original).

As for the new majority's complaint that the trial court's ruling is "apparently in perpetuity," App. Brief at 35, it demonstrably is not. Until a benefit assessment roll is modified, supplemented, or replaced, it serves as the basis for a levy against the District's annual estimate of costs. RCW 85.18.080. The trial court's judgment was expressly limited to the roll that was before it: the 2012 benefit assessment roll. (CP at 162) How many annual assessments are subject to the trial court's ruling is entirely up to the new majority.

E. The Award of Fees Should be Affirmed.

The trial court's award of reasonable attorney's fees was based on the new majority's prelitigation misconduct. The standard of review for an award of attorney's fees is abuse of discretion. Greenbank Beach and

Boat Club v. Bunney, 168 Wn. App. 517, 524, 280 P. 3d 1133 (Div. I, 2012). Prelitigation misconduct necessarily involves some disregard of judicial authority. Id., 168 Wn. App. at 526.

The challengers in the 2009 and 2010 cases against the District successfully asserted that continuous base benefits are a kind of special benefit, to be computed using a, “before and after” analysis. 2011 Letter Ruling at 6 (CP at 382). The section of the trial court’s judgments adopting the challengers’ argument ended up following the trial court’s holding that their argument that continuous base benefits as then computed by the District based on 100% of assessed value was moot:

The Petitioners ... declaratory judgment claim that DD-1’s benefit assessment at 100% of true and fair value constitutes an unconstitutional tax rather than a benefit assessment is rendered moot by part 3 of this judgment and will not be ripe for adjudication until such subsequent time as DD-1 provides notice, holds hearings, and enters Findings of Fact supported by competent evidence establishing the actual benefit provided to properties benefited by DD-1 improvements, which must be measured by the difference in value for each parcel of property before and after receiving the benefit, if any ..

Final Judgments at 2 (CP at 386).

In response to the Gabeleins’ request for an award of fees based on the new majority’s uncontested failure to comply with the requirement that benefits be determined by establishing, “before and after” values, the new majority chose to submit no declarations explaining, justifying, or

defending its actions. And so, on appeal, the new majority asserts, as a matter of law, that its failure to comply may not properly serve as the basis for an award of reasonable attorney's fees on grounds of prelitigation bad faith because (1) the trial court's requirement for a "before and after" valuation was wrong on the merits, and (2) the trial's court requirement for a "before and after" valuation was dicta. App. Brief at 37-38.

As regards the first rationale, there is a remedy for a litigant when the trial court errs: it is to appeal the trial court's decision. And that is, in fact, what the District did, but the case was settled after the new majority secured control of the board. (CP at 572). And, notwithstanding the new majority's complaints on appeal about the difficulties in determining "before and after" values for existing improvements, App. Brief at 30, both the majority's use of assessed value to determine diking continuous base benefits and the trial court's opinion in the 2009 and 2010 cases sustaining such an approach established that such obstacles were not, in fact, insurmountable. Indeed, the trial court expressly noted that chapter 85.18 RCW anticipates that the requisite "before and after" value may properly be based on something less than 100 percent of the assessed

value of subject properties, 2011 Letter Ruling at 7 (CP at 383):²⁹ had the new majority cared to try.

As regards the second rationale, “dicta” is a term that identifies a portion of reasoning in a court opinion that is not a part of its holding, which consequently is not binding authority on a lower court. *Protect the Peninsula’s Future v. Port Angeles*, 175 Wn. App. 201, 215, 304 P. 3d 914 (Div II, 2013). But the concept has no application to a party who participates in the case in which the court’s decision is issued and to whom the court’s language is directed. The precise question presented by the trial court’s award of reasonable attorney’s fees to the Gabeleins on grounds of prelitigation bad faith is whether it is clear, as a matter of law, that the new majority could properly ignore or defy the trial court’s decisions in the 2009 and 2010 cases, to which the District was a party.

The answer is, “no”. The language in the Final Judgments from the 2009 and 2010 cases with which the new majority did not comply was based on the trial court’s letter ruling on cross-motions for summary judgment, issued after years of litigation, multiple lawsuits to which the District was a party, and the expenditure of substantial judicial resources. Both members of the new majority were represented, as regards the 2011

²⁹ See footnote 22 *infra* (chapter 85.18 RCW as originally enacted limited continuous base benefits to 50 percent of assessed value).

Petition, by the same firm that represented the challengers in the 2009 and 2010 cases, Decl. of Gabelein at ¶ 10 (CP at 591) and Decl. of Cliff, Exs. E and G (CP at 385, 443), and that prepared the form of the Final Judgments. Decl. of Cliff, Ex. E (CP at 385-402). An expert opinion from an MAI appraiser regarding the need for data supporting a, “before and after” analysis was attached to the 2011 Petition. (CP at 562). The judgments were presented for entry in August of 2011 (CP at 385) – before Thomas Kraft defeated Ray Gabelein’s bid for re-election to the District’s board in 2012, Decl. of Gabelein at ¶ 4 (CP at 586) – when both members of the new majority was still on the “challengers” side of the caption. The purpose of the “before and after” language in the Final Judgments could not have been clearer: to require the District, with whom the challengers had been locked in litigation for years, to comply with their version of the, “before and after” valuation requirement.

For the new majority to then ignore or defy the requirement for some kind of, “before and after” valuation after they secured control of the District in 2012 is precisely the kind of extraordinary circumstance that will justify an award of reasonable fees. Such an award is based not the extent to which the new majority’s prelitigation conduct can fairly be characterized with pejorative adjectives or adverbs but is rather based on the fact that the conduct occurred after court decisions in previous

litigation and disregarded rights that had already been judicially determined, requiring those wronged to file yet another case – the case in which reasonable legal fees are awarded – to vindicate them.

As for the amount of the fee award, the new majority does not claim on appeal that the award is excessive. The new majority does complain that the award was based on a reasonable hourly rate rather than the hourly rate that the Gabeleins were charged. App. Brief at 40-1. The new majority does not deny that the award was correctly based on the lodestar analysis that they had demanded or that the hourly rate was, in fact, a reasonable one. As for their “due process” concerns, the new majority did not bring them before the trial court in their motion for reconsideration (CP at 140-43), and they do not support their complaints on appeal with citation to authority. The appellate court therefore properly declines to consider it. *Foster v. Gilliam*, 165 Wn. App. 33, 56, 268 P. 3d 945 (Div. I, 2011). If the award itself is affirmed, the amount of the award should be affirmed as well.

F. RAP 18.1 Request for Award on Appeal.

If the appellate court affirms the trial court’s order awarding fees to the Gabeleins, they ask for an award of their reasonable attorney’s fees on appeal. As a general proposition, a prevailing party who is entitled to an award of reasonable attorney’s fees from the trial court is also entitled

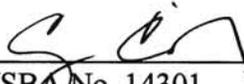
to an award of reasonable attorney's fees if they prevail on appeal. *Gray v. Bourgette Construction, LLC*, 160 Wn. App. 334, 345, 249 P. 3d 644 (2011). Under the new majority's approach, the Gabeleins are to pay all of their own legal fees on this appeal, along with 20.137% of fees incurred by the new majority.³⁰ If it is the Gabeleins who prevail instead, they ask an award of their reasonable attorney's fees on appeal.

7. Conclusion

The Gabeleins respectfully request that the trial court's order granting summary judgment and awarding reasonable attorney's fees be affirmed. The Gabeleins further respectfully request an award of reasonable attorney's fees on appeal.

DATED this 17th day of December, 2013.

CAROLYN CLIFF
Attorney for Ray and Laurie
Gabelein



WSBA No. 14301

³⁰ The Annual Estimate of Operating Expenses for 2013 allocates the lion's share of the new majority's legal fees to the District's drainage facilities. (CP at 366).