69294-1

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No. 69294-1

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

DENIS FURY, et al.,
Appellants,

v.

THE CITY OF NORTH BEND,
Respondent

APPELLANTS' BRIEF

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I. INTRODUCTION

In 2007, the City of North Bend (the "City") created a Utility Local Improvement District, commonly known as "ULID No. 6". ULID No. 6's enacting ordinance, passed by the City of North Bend City Council (the "Council"), authorized the City to purchase a vacuum sewer system at an approximate cost of $11 million. City employees, however—without Council or public approval—purchased a gravity sewer system at a cost of over $19 million.[1]

Improvements authorized by ULIDs are usually paid for by the property owners within a ULID. Appellants are a group of owners (the "Owners")[2] within ULID No. 6 challenging hundreds of thousands of dollars in assessments for the gravity sewer system purchased by the City's staff. After the City rejected the Owners' arguments during an administrative appeal, the King County Superior Court—sitting as a court of appeal—found that the administrative hearing process employed by the City to impose the assessments violated the Owners' due process rights, and remanded the case back to the City for a "limited" remand hearing. The Owners are appealing the Superior Court's order on a number of grounds.

First, the change by City staff from a vacuum system to a gravity system violates the ULID statutes and Washington precedents.

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[1] A vacuum sewer system relies upon air pressure and vacuum pumps to move flows through pipes. A gravity sewer system relies on gravity. Very basically speaking, gravity systems can be more expensive because the pipes need to be buried deeper.

[2] Specifically, the Owners/Appellants are: Denis and Gail Fury, Tanner Way, LLC, Thomas Weber, Thomas and Nancy Thornton, and Dahlgren Family LLC #7.

Second, the City relied upon one, and only one, appraiser to determine the "special benefit" received by each one of the hundreds of properties within ULID No. 6. The "special benefit" is the increase in value, if any, each property receives because of a new improvement. The City appraiser's conclusions were arbitrary, capricious, and fundamentally flawed, as she concluded that property values remained *exactly* the same between 2007 (at the height of the real estate market and when ULID No. 6 was enacted) and 2011 (at the low point of the market and when the assessments for ULID No. 6 were imposed). This opinion flew in the face of the other evidence presented, as well as common sense.

Third, the Superior Court's decision to only allow for a "limited" remand hearing is novel, contrary to common law, and not one of the remedies available to the Superior Court under the ULID statutes.

For these reasons and others discussed below, this Court should reverse the Superior Court order and instead order that the assessments are annulled. If this Court decides to limit its decision on the due process issues, this Court should order a full new administrative hearing under RCW 35.44.280.

II. ASSIGNMENTS OF ERROR

The Superior Court erred by entering the August 28, 2012 Order remanding this case to the City of North Bend, CP 151-52, because the Order: (1) failed to hold that the assessments issued by the City were arbitrary and capricious; (2) failed to hold that the assessments were fundamentally flawed; (3) in the alternative, failed to order a full, new

administrative hearing; and (4) in the alternative, failed to adjust the assessment for Appellant Dahlgren Family LLC #7 ("Dahlgren").

III. STATEMENT OF ISSUES

1. Washington law requires that cities "describe" the subject improvement when creating a ULID. Here, the ordinance enacting ULID No. 6 described and authorized a vacuum sewer system at a cost of approximately $11 million. The City's staff, however, decided to materially alter the design and purchased a gravity sewer system at a cost of $19 million. The City's own Public Works Director conceded that comparing the two systems was like comparing "apples and oranges." No ULID has even been created by the City for the construction of a gravity sewer system. May the City impose assessments for one improvement under a ULID created for a different improvement?

2. Under Washington law, an appraiser's opinions in the ULID context are "arbitrary and capricious" if the appraiser failed to consider material facts. Here, despite her own admission that the real estate market crashed between 2007 and 2011, the City's appraiser opined that land values (and corresponding special benefits) *did not change* between 2007 and 2011. Even the Hearing Examiner admitted that the appraiser could not fully explain this discrepancy. Under these facts, are her opinions arbitrary and capricious and/or founded upon a fundamentally wrong basis?

3. The Superior Court ruled that the Owners' due process rights were violated during the administrative hearing. But instead of

ordering a new hearing, the Superior Court ordered a "limited" remand hearing confined to only the evidence leading to the due process violations. There is no support in the common law or ULID statutes for such a result. Should this Court instead follow the ULID statutes and remand for a full new hearing?

4. A ULID assessment may not exceed special benefits. It is undisputed that the gravity sewer system does not fully benefit the Dahlgren property, which is long and narrow, with the sewer terminus at only one corner. Instead, it will cost Dahlgren over $465,000 to fully benefit the property. Under these circumstances, should Dahlgren's assessment be reduced?

IV. STATEMENT OF THE CASE

A. The History of ULID No. 6.

In order to create a ULID, a municipality must obtain the written authorization of over 50% of the citizens within a proposed ULID boundary. Here, that occurred, and in 2007 notice was sent to the citizens of North Bend that a public hearing would be held concerning the creation of a vacuum sewer system ULID. CP 55 (Hearing Exhibit 1 at page 21 of the PDF).[3] At the hearing, the Council decided to create

[3] Pursuant to a stipulation and order signed by the Superior Court, see CP 46-47, the administrative record—developed before a Hearing Examiner hired by the City—is voluminous and accordingly on a CD. That CD was admitted as an exhibit by the Superior Court and has been transferred to this Court. CP 55, 109-10. That CD is divided into three folders: (1) "Protest Letters" contains the original protest letters filed by property owners in response to the assessment roll. This brief will cite them as "Hearing Protest Letters"; (2) "Exhibits" contains the exhibits introduced at the hearing before the Hearing Examiner. This brief will cite them as "Hearing Exhibits"; and (3) "Appeals to HE Decision" contains the documents filed after the Hearing Examiner's

ULID No. 6 authorizing the vacuum system. The City effectuated its decision via ordinance, CP 80-84 ("Ordinance 1293", attached as Appendix A) and, as required by law—*see* RCW 35.43.080 & RCW 35.44.020—described in detail the improvement the City was authorizing:

> The City Council orders the following described improvements: Design and construction of a *vacuum* sewer system in the herein specified portion of the City [Comp Plan] . . . including but not limited to two (2) vacuum/pump stations, approximately 24,000 linear feet of 10-inch and 12-inch diameter force mains, approximately 40,600 linear feet of 4-inch, 6-inch, 8-inch, and 10-inch diameter collection pipes, one side sewer service and sump pit to each benefiting parcel, division valves, two (2) emergency generators, and appurtenances, all as approximately depicted in Exhibit A . . . .
>
> All of the foregoing shall be in accordance with the plans and specifications therefore prepared by the City Engineer, and may be modified *by the City Council* as long as such modification does not affect the purpose *of the improvement*.

CP 80-84 (emphasis added). The City estimated the total cost for the project as $11.6 Million. CP 81.

At some point after Ordinance 1293 was passed, City employees and consultants—but not the Council—decided to change the vacuum sewer system, approved by the Council and the landowners within ULID No. 6, to a gravity sewer system. Hearing Transcript, page 339, lines 2-9. The change was dramatic: it significantly altered the pipes and other items described in Ordinance 1293 and increased the cost of the project

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preliminary decision and on appeal to the Council. This brief will cite them as "Council Appeal Documents." Finally, there are five PDFs not placed in folders, including a full copy of Ordinance 1452 and two PDFs of the hearing transcript. The hearing transcript will be cited as "Hearing Transcript," whereas the Superior Court oral argument transcript will be cited as the Record of Proceedings, or "RP".

by over $7 million. *See, e.g.*, Hearing Transcript, page 307, lines 6-14; page 335, lines 22-24. As the City's Public Works Director Ron Garrow put it to both the press, *see* Hearing Exhibit 75, and during the administrative hearing, *see* Hearing Transcript, page 338, lines 1-4, comparing the vacuum system to the gravity system is like comparing "apples and oranges." The price for constructing the gravity system—approximately $19 million, CP 86-89 ("Ordinance 1452", attached as Appendix B)—was substantially higher than the original $11.6 million approved by the City and its citizens for constructing the vacuum system.

There was never any ordinance or resolution from the Council approving the City staff's decision to scrap the previously approved vacuum system. Hearing Transcript, page 51, line 16 through page 52, line 1. Instead, Mr. Garrow claimed that the Council approved the change when it approved the construction contract for the gravity system. Hearing Transcript, page 51, lines 21-22. However, the resolution (not an ordinance) referred to by Mr. Garrow approving the hiring of a contractor—CP 91—contains absolutely no mention of the change of the vacuum system to the gravity system. Indeed, until after the project was constructed, there is nothing in the record that shows any formal notice to the owners within ULID No. 6 that the project they had approved in 2007 had been dramatically altered at a substantial increase in price.

B. Ms. Foreman's Special Benefits Study.

The City divvied the costs of ULID No. 6 among the landowners within ULID No. 6 based upon the "special benefit" each landowner

would allegedly receive because of the new sewer. That is, the installation of a new sewer system theoretically increased the market value of each piece of property within ULID No. 6—the increased value for a property is that property's "special benefit." Under Washington law, this special benefit places a cap on the amount a landowner can be assessed for a ULID—assessments cannot exceed special benefits. The City engaged appraiser Debra Foreman, who was not certified by the Master Appraisal Institute ("MAI"), to conduct a special benefits study to determine the amount to assess each property owner within ULID No. 6.

To ensure that the total special benefits within ULID No. 6 would at least equal the cost of the new sewer system, in 2007 Ms. Foreman assessed the average values, per square foot, that the new sewer would add to vacant land within the ULID. The conclusions she reached in 2007 were as follows: [4]

Land Value (Zoning Designation) (L Value)

Zoning[5]	*Before $/sf*	*25%*	*After $/sf*

[4]The term "Before" in the chart refers to her conclusions of what the average value of the properties were without the sewer installed; "After" refers to the average values of properties on the same day if the sewer was instantaneously installed. In other words, "After" is *not* a prediction of what the properties would be worth four years later after the actual sewer system was finally built in 2011. Instead, the "After" value is Ms. Foreman's opinion of what the values of the properties within ULID No. 6 were in 2007 with the only difference between "Before" and "After" being the sewer—no other variables, such as time, are included in her analysis in this chart. Hearing Transcript, page 20, lines 8-16.

[5] The "Zoning" label refers to the different types of zoning that applied to the properties Ms. Foreman considered. For example, the first row of the chart, labeled "CR", refers to a cottage residential zoning designation. According to Ms. Foreman, properties with cottage residential zoning had an average value of $5.00 per square foot without a city sewer. If the sewer was added, the average value of properties with cottage residential zoning would be $6.25 per square foot.

CR	$5.00	$6.25
EP-1	$4.50	$5.63
EP-2	$4.00	$5.00
IC	$5.00	$6.25
LDR	$5.00	$6.25
NB	$5.00	$6.25
POSPF	$1.00	$1.25

CP 76. As the Court can see, Ms. Foreman determined in 2007, based upon the real estate market at that time, that the addition of a City sewer would add 25% in value to vacant land.

Four years later, after the sewer system was installed, Ms. Foreman was asked by the City to redo her analysis for the purpose of creating the final assessment roll. Her conclusions in 2011, based upon the 2011 market, were:

Land Value (Zoning Designation) (L Value)

Zoning	*Before $/sf*	*25%*	*After $/sf*
CR	$5.00		$6.25
EP-1	$4.50		$5.63
EP-2	$4.00		$5.00
IC	$5.00		$6.25
LDR	$5.00		$6.25
NB	$5.00		$6.25
POSPF	$1.00		$1.25

CP 78. That is not a typo: *Ms. Foreman's conclusions regarding the value of land in 2007 are identical—to the penny, for each and every zoning type—as her conclusions regarding the value of land in 2011.*

Ms. Foreman incorporated her analysis in her final report, which was finished in October 2011. Hearing Exhibit No. 2. In this report, Ms.

Foreman divided the properties in the ULID into two basic categories: vacant land and improved properties. *Id.* at 7. She then assumed that vacant land within ULID No. 6 was benefitted by the sewer project much more than improved land—the 25% value increase shown above. *Id.* Ms. Foreman's report, however, contains no objective basis (for example, charts showing market sales of comparable properties and how she analyzed such sales to reach the 25% number) to support the conclusion that the sewer project increased the market value of all vacant land in the ULID by a uniform 25%. *Id.*

C. The Owners Within ULID No. 6 Appeal the Assessments.

After receiving notice of their proposed assessments from the City in 2011, over 30 property owners within ULID No. 6 filed protest letters with the City, primarily contesting Ms. Foreman's appraised values and corresponding special benefits. *See* Hearing Protest Letters. For example, Appellant Denis Fury purchased ULID parcel nos.[6] 17 through 17.4 in 2010 for a total of $475,000 with full knowledge of the ULID. Hearing Protest Letter No. 28. Ms. Foreman, in contrast, opined that the actual fair market value of those lots in 2011 was $1,122,400. *Compare* Hearing Exhibit 2 (at page 40 of the PDF) *with* Hearing Protest Letter 28 at Ex. F of the protest letter (page 100 of the PDF). Other examples of appraisals by Ms. Foreman that significantly depart from actual sales, and other data, *and always on the high side*, abound. *See, e.g.*, Hearing

[6] Each parcel within ULID No. 6 was given a ULID parcel number, which is how the parcels are listed on the final assessment roll. *See* CP 93-107.

Transcript, page 131, lines 3-7 (property owner paid $700,000 for a piece of property; Ms. Foreman appraised the property as worth $2.9 million); Hearing Exhibit 28 (property owner purchased lot for $325,000 in 2010; Ms. Foreman appraised it as worth $827,100 in 2011); Hearing Exhibit 33 (the King County appraiser appraised a property as worth $364,000; Ms. Foreman appraised it as worth $1,221,000).

The owners (both Appellants and others) offered multiple objections to Ms. Foreman's conclusions and the assessments. *See, e.g.*, Hearing Protest Letter 28, at pages 72-87 of the PDF (the opinion of an MAI appraiser that Ms. Foreman did not follow relevant standards because she did not explain in her final report how she reached her average values and did not provide a proper basis supported by market data for determining special benefits); Hearing Protest Letter 30, at pages 10-14 (same); Hearing Protest Letter 32, at pages 5-15 of the PDF (stating that the market downturn has made development, as envisioned by Ms. Foreman to come up with her appraised values, almost impossible); Hearing Protest Letter 33, at pages 15-6 of the PDF (same and explaining that "virtually all commercial lending for proposed commercial developments has ceased for the time being. . . . To the extent that construction financing would then typically be considered as a primary feasibility requirement, most projects lacking a firm commitment for such financing may well be considered *de facto* infeasible."); Hearing Exhibit 15, 20, 21 (the opinion of a MAI appraiser that Ms. Foreman's

comparables were often inappropriate for use and that no comparables were presented in the appraisal to determine correct values).

The first stage of the public hearing concerning the City's proposed assessments for ULID No. 6 was held on November 10, 2011, and was presided over by a City-hired Hearing Examiner. At that hearing, the Hearing Examiner promised that "[p]roperty owners will have a chance to ask questions of any City rebuttal witnesses or evidence." Hearing Transcript, page 7, lines 6-9. The Hearing Examiner also explained that time "for final arguments" would also be allowed. Hearing Transcript, page 7, lines 11-13; *see also* page 71, lines 6-8; page 167, lines 2-3. The first hearing allowed the owners to present their cases.

The next part of the hearing was scheduled for December 20, 2011, and notice of the hearing was delivered to the owners. On December 14, 2011, various attorneys representing numerous property owners, including undersigned counsel, objected to the process described by the hearing notice because, among other issues: (1) Ms. Foreman's complete files were not made available until *after* the first hearing, which was after the chance to present evidence in support of owners' cases; and (2) it was unfair to allow the City to hide the materials it planned on using in the second hearing until the second hearing began, because this did not allow the owners time to review and analyze the City's evidence in advance. *See* Hearing Exhibits 26, 30, 31, 34, 37, 77. The Hearing Examiner refused to mandate that the City produce any records in advance of the second hearing. *See* Hearing Exhibits 35 and 36.

The hearing on December 20 confirmed the Owners' fears of being railroaded. Literally a few minutes before the hearing, the City passed out over 20 individual, multipage memos that Ms. Foreman had created "rebutting" each and every owner's arguments. *See* Hearing Exhibits 38 through 65. The hearing then immediately began, giving the owners no time to review the materials, confer with their experts and attorneys, and prepare appropriate cross examination questions. A number of property owners and their attorneys objected to the City's actions and the unfair process, but the Hearing Examiner did not allow any additional time. Hearing Transcript, page 290, lines 5-20; page 366, lines 6-15; page 387, line 21 through page 388, line 18; page 403, lines 3-11; *see also* CP 35-36, CP 56-57, CP 64-65, CP 68-71; and Hearing Exhibits 20, 21, 34, 35, 36, 37, 77-79, 85, 88.

Not only did the owners fail to receive the City's memoranda a reasonable time before the hearing, but also during the hearing the City introduced into evidence a number of exhibits—Hearing Exhibits 67-71—that were *never* provided to undersigned counsel either before or even during the hearings. Hearing Transcript, page 403 lines 3-11; Hearing Exhibit 87.

With respect to witnesses, the Hearing Examiner again confirmed at the second hearing that the owners would have an opportunity to question any witnesses presented by the City. Hearing Transcript, page 179, lines 6-8. It was revealed at the second hearing, however, that both Ms. Foreman and the City's only other witness—Public Works Director

Ron Garrow—did not have personal knowledge regarding many of the issues they were testifying to. Instead Ms. Foreman and Mr. Garrow were merely repeating information that they learned from other City employees in the City's Planning Department. Hearing Transcript, page 221, lines 4-6; page 223, line 25 through page 224, line 3; page 313, line 2 through page 315, line 2; page 358, line 10 through page 359, line 9.

But these witnesses from the City Planning Department—whose testimony, for example, established the entire basis for what a property's "usable area" was for purposes of Ms. Foreman's assessment—were not made available for questioning at the hearing. The Owners, accordingly, were not afforded a chance to review and meet the evidence presented by the City.

Despite this process, the Owners presented expert evidence of what we already know from common experience: despite Ms. Foreman's opinions that property values remained exactly the same between 2007 and 2011, there in fact was a significant real estate market downturn between 2007 to 2011, estimated by experts to be 30-40% of total value, with raw land even further devalued from previous highs in 2007. *See, e.g.*, Hearing Transcript, page 120, lines 12-15; Hearing Exhibit 29, page 4-22 of the PDF (explaining that the value of commercial land plummeted 35% in the market downturn). Indeed, Ms. Foreman candidly admitted that she did not make any adjustment for the market downturn when examining data from before the market crash and applying it to 2011. Hearing Transcript, page 431 line 21 through page 432, line 17.

She also admitted that nothing in her final report reflects or explains how the market downturn affected her analysis. Hearing Transcript, page 485, line 20 through page 486, line 2.

After the second hearing concluded, the Hearing Examiner issued his decision largely approving the City's proposed assessment roll. Hearing Exhibit 88. Without discussion or oral argument, the Council affirmed the roll. CP 86-89.

D. Dahlgren's Cost to Receive a Full Benefit from the Sewer.

Dahlgren has a property with some unique facts only relevant to its assessment. Dahlgren's property was assessed $573,021 based upon Ms. Foreman's finding that the property received a special benefit of $784,900 because of the sewer. Hearing Exhibits 20 & 21. Dahlgren's property is long and narrow with approximately 2,500 lineal feet of frontage on SE North Bend Way. *Id.* The original project design extended the sewer main across the entirety of Dahlgren's frontage and accordingly fully served the Dahlgren Property. Hearing Exhibit 85 at pages 50-52 of the PDF.

The City thereafter changed the project design to a gravity system to provide only one single sewer stub that extended 185 feet onto Dahlgren's property. This new design could proportionally serve only 25% of Dahlgren's property. Hearing Exhibits 20, 21, 34, 35, 36, 37, 60, 77-79, 85. An email from Mr. Garrow acknowledged that full service to the 75% remainder of the Dahlgren property could only be achieved by Dahlgren extending the system *at his own cost.* Hearing Exhibits 60 &

85. Implicit in this statement—Hearing Exhibit 60—is the admission that that Dahlgren's special benefit is limited to only that portion (25%) immediately adjacent to the single sewer stub installed on the westerly 185 feet of frontage. Hearing Exhibits 20, 21, 60 & 85 (with attached Declarations of David Hill, PLS, Craig Sears, Anthony Gibbons, MAI, and Bill Dunlap, PE.). Dahlgren's objection to the full ULID assessment was supported by expert testimony calculating an off-setting proportional credit of $465,000—which was Dahlgren's cost to extend the City's modified project to serve the 75% percent of his property not benefitted by the project. Hearing Exhibits 20, 21, 34, 35, 36, 77-79, and 85; Ordinance No. 1452, Exhibit A, at 8-9.

The Hearing Examiner and Council denied Dahlgren's objections and imposed an assessment of $573,021 based upon full special benefits of $784,900, indicating that "some larger parcels . . . would also need developer extensions of service anticipated development." Hearing Exhibit 88; Ordinance No. 1452, Exhibit A, at 8-9.

E. The Superior Court Orders a "Limited" Remand.

The Owners appealed the Council's confirmation of the assessment roll to the King County Superior Court—which sat as an appellate court per RCW 35.44.250. A hearing was held on August 10, 2012, before Judge Carol Schapira, and the she found that the City's actions during the administrative proceeding violated due process and the case should be remanded back to the City. RP 39-40. The Superior

Court left to the parties to craft an order summarizing the ruling for her signature. RP 48-49.

The parties were unable to reach agreement on the form of an order. The City proposed an order which remanded the case on a "limited" basis—that is, a remand just to address the memoranda that were passed out before the second night of the administrative hearing and the witnesses who were unavailable. The Owners, conversely, proposed an order annulling the assessments completely and remanding for a brand new hearing from start to finish. Specifically, the Owners argued that the Superior Court's options for the order were limited by RCW 35.44.250, and crafting a "limited" remand fell outside the bounds of that statute. CP 148-50. The Superior Court, however, crafted and signed an order for a "limited" hearing whereby only certain evidence and witnesses could be at issue. CP 151-52. This appeal followed. CP. 153-57.

V. ARGUMENT

A. Standard of Review.

Judicial review of ULID assessments is governed by RCW 35.44.250, which reads:

> At the time fixed for hearing in the notice thereof or at such further time as may be fixed by the court, the superior court shall hear and determine the appeal without a jury and the cause shall have preference over all other civil causes except proceedings relating to eminent domain in cities and towns and actions of forcible entry and detainer. The judgment of the court shall confirm, unless the court shall find from the evidence that such assessment is founded upon a fundamentally wrong basis and/or the decision of the council or other legislative body thereon was arbitrary or

> capricious; *in which event the judgment of the court shall correct, change, modify, or annul the assessment* insofar as it affects the property of the appellant.

Emphasis added. Although apparently never expressly stated in cases undersigned counsel could locate, this Court's review of a Superior Court's decision under RCW 35.44.250 appears to be de novo. *See, e.g.*, *Bellevue Plaza, Inc. v. City of Bellevue*, 121 Wn.2d 397, 851 P.2d 662 (1993).

B. Legal Principles Governing ULIDs.

The process for challenging a ULID assessment is straightforward. After a notice of assessments is given by a municipality, a hearing must be held concerning any objections to the assessment. RCW 35.44.100. Under the North Bend Municipal Code, North Bend chose to hold these hearings via a City-hired Hearing Examiner. North Bend Municipal Code § 2.20.140. The North Bend Code allows a party to appeal the Hearing Examiner's decision to the Council, who can adopt or reject the assessments. *Id.*

After the Council renders it decision, the Superior Court serves as a court of appeals. RCW 35.44.200. While sitting in this appellate capacity, the Legislature has limited the Superior Court's options to two. RCW 35.44.250. One, the Superior Court can "confirm" the assessment roll. *Id.* Or two, if the Superior Court finds that the assessments were "arbitrary and capricious," or founded upon a "fundamentally wrong basis," the Superior Court can "correct, change, modify, or annul the assessment." *Id.* The ULID statutes also grant to this Court further

appellate review over the Superior Court's appellate decision: "Appellate review of the judgment of the superior court may be obtained as in other cases if sought within fifteen days after the date of the entry of the judgment in the superior court." RCW 35.44.260.

To assess a property within a ULID based upon the "special benefit" received by the property, a city must "prove the difference between the fair market value of property immediately before and after the improvement." *Bellevue Plaza,* 121 Wn.2d at 404; *In re Local Imp. 6097,* 52 Wn.2d 330, 335-36, 324 P.2d 1078 (1958). A property owner may only be assessed in direct proportion to the amount of the special benefit that they receive. *Vine Street Commercial Partnership v. City of Marysville*, 98 Wn. App. 541, 548-49, 989 P.2d 1238 (1999).

A city's appraiser cannot employ speculation to determine the fair market value of property within a ULID. *Bellevue Plaza,* 121 Wn.2d at 404. Rather, the appraiser's determination "requires *proof* of the increase in the fair market value of a particular property caused by the improvements." *Id.* at 411 (emphasis added). A court may disregard an appraiser's opinion of a special benefit and nullify a final assessment roll if it finds the appraiser "proceeded on a fundamentally wrong basis in arriving at that opinion". *Id.; In re Local Imp. 6097,* 52 Wn.2d at 336.

When a court examines whether the opinion of a city's appraiser is arbitrary, capricious, or founded upon a fundamentally wrong basis, although the initial presumption of acceptability of the roll is in favor of a municipality, a court should analyze the factors considered by the

appraiser in reaching his or her opinions. *See, e.g., In re Local Imp. 6097,* 52 Wn.2d at 334-35. This is especially true when a city relies entirely on only one appraiser for its assessments, as is the case here. In such circumstances the underlying bases for the lone appraiser's assessments "must be examined in detail." *Bellevue Plaza,* 121 Wn.2d at 405.

An "arbitrary" action taken by an appraiser or city is one taken "without regard to or consideration of the facts surrounding the action." *Abbenhaus v. City of Yakima*, 89 Wn.2d 855, 858, 576 P.2d 888 (1978). A "fundamentally wrong basis," on the other hand, refers to "some error in the method of assessment, or in the procedures used by the municipality, the nature of which is so fundamental as to necessitate a nullification of the entire LID[.]" *Id.* at 859.

C. The Superior Court Should Have Annulled the Assessment Roll as Founded Upon a Fundamentally Wrong Basis Because of the Improper Change from a Vacuum System to a Gravity System.

1. The ULID statutes require that the public be informed of the details of the improvement in advance.

A city cannot grant itself broad and unlimited power via a ULID. Instead, the statutory scheme contains specific demands and processes that a city must employ. The policy behind these statutes is obvious: to ensure that the owners within a ULID are given notice of the estimated financial burden they face as well as the improvement they are paying for.

For example, RCW 35.43.080 requires an ordinance creating a ULID to "describe the improvement." Section .130 contains similar

requirements, including the obligation to make a preliminary estimate of costs. RCW 35.44.020 requires a city to include within its cost estimates a number of items, including engineering costs, property acquisition costs, etc. These statutes are there to ensure that the citizens within a proposed ULID know what they are purchasing.

The details must be incorporated into an ordinance enacted by a city, which is what formally creates the ULID. RCW 35.43.070 & .080. The passing of that ordinance also triggers important deadlines. Once that ordinance is passed, anyone wishing to challenge the ULID only has 30 days to do so. RCW 35.43.100.

2. ULID No. 6 empowered the City to construct an $11 million vacuum system, not a $19 million gravity system.

Here, when the City created ULID No. 6, it described the vacuum system in detail in Ordinance 1293. *See* Appendix A. The assessment being charged against the Owners is *not* for the improvement described in Ordinance 1293.

Instead, at some point after this Ordinance was passed, City employees and consultants decided to change from a vacuum system to a gravity system, which altered the pipes and other items described in the ordinance, in addition to increasing the price by over 63%. There was not any ordinance or resolution adopting this modification. Hearing Transcript, page 51, line 16 through page 52, line 1. Comparing the two systems is, according to the City, like comparing "apples and oranges." Hearing Transcript, page 338, lines 1-4.

Under these undisputed facts, the assessment roll should be annulled. The assessment roll violates the statutory scheme for ULIDs. When the City created ULID No. 6, the City did not label its improvement as merely a general "sewer system": the City instead specifically described the improvement as a vacuum system, and went so far as to describe the diameter of the pipes and the like. It is not difficult to surmise that this level of detail in Ordinance 1293 was politically necessary to gain approval—property owners and Council members are generally not interested in writing blank checks for City staff to later fill in. The Ordinance's description of a vacuum system was the "improvement" for the purposes of RCW 35.43.080. But this is *not* the improvement that is the basis for the assessments currently under consideration. No ULID has ever been created for the purposes of a $19 million gravity sewer system, and the City cannot impose assessments for an improvement that was not created under the ULID statutes.

The case of *George v. City of Anacortes*, 147 Wash. 242, 265 P. 477 (1928), is analogous. There, the City of Anacortes passed an ordinance that authorized the improvement of a water system and specifically called for, among other items, the installation of a certain water main, of a certain size, on a certain street. *Id.* at 242-43. After public approval of bonds for construction of the improvement, the city then decided to change the particular street where the particular main was to be installed. *Id.* at 243-44. Up on a suit brought to enjoin use of the bonds for payment of this different project, the city argued that "the

change in location of the main is but a minor incident in the progress of the work, and that therefore there has been no change in the plan provided by ordinance and approved by the people." *Id.* at 244. The court, however, rejected this argument, holding that because: (1) where the main was located accounted for over 10% of the total cost of the improvement project; and (2) the ordinance specifically detailed the particular street where the main would be located, the location of the main was not something the city staff could later ignore:

> The council evidently considered this matter [the particulars of where one water main would be] more than a mere detail, *for it set out just what this improvement was to be*. . . . Just how far into detail such a plan must go is, of course, governed by no hard and fast rules. But we think an item as large as this, being specifically set out, that it would violate the spirit of the statute to require its approval by the voters and then permit it to be changed at the caprice of the city's officers.

Id. at 244-45 (emphasis added). *See also Sane Transit v. Sound Transit*, 151 Wn.2d 60, 68, 85 P.3d 346 (2004) ("While minor details in a public project may be changed by the governing agency, taxpayer funds may not be used to construct a substantially different project than the one approved by the voters.").

Like in *George*, the City of North Bend set forth particulars of the vacuum system when enacting ULID No. 6. Like in *George*, the "change" at issue here—which added $8 million in costs—was not immaterial or minor. And like in *George*, the City's argument, as adopted by the Hearing Examiner, is that as long as the larger purpose is served (the installation of any sewer system), the particulars of the enacting

ordinance could be ignored. This Court should reject that line of argument and instead follow the reasoning and result in *George*.

The City also pointed out below that Ordinance 1293 specifically allows for modification. *See* Ordinance 1293 at Section 1. True, but only if the modification is made by the Council and does not affect the purpose "of the improvement." *Id.* The City defined what "the improvement" was: a vacuum sewer system. This is not what was constructed, and the change to a gravity system was not a small one effectuated by a mere change order or the like. The City was obviously free to create a new ULID for a gravity sewer system, but it cannot pigeonhole its new system in a ULID that was never adopted for a gravity system. *See Hayes v. City of Seattle*, 120 Wash. 372, 374-75, 207 P. 607 (1922) (holding that even though the enacting ordinance for an improvement authorized a city to make changes to the improvement as long as the purpose of the improvement was not affected, the city did not have the right to make anything other than "minor" changes and the "radical" change to one part of the improvement plan was impermissible).

Furthermore, it is undisputed that the Council never passed a new ordinance approving the change to a gravity system, and instead Mr. Garrow testified that City staff and engineers made a "group decision" to change the improvement. Hearing Transcript, page 51, line 16 through page 52, line 22. This, again, was an act that exceeded the power to modify under Ordinance 1293 as well as the ULID statutes.

3. If the City wanted to implement a sewer system in general, and leave to City staff the choice of what, exactly, to build, the City would have said so.

The City's primary response to the Owners' argument below was that the "improvement" authorized by ULID No. 6 is a sewer system in general, and the City was free to implement different types of sewer systems just as long as the alleged benefit to owners within ULID No. 6 exceeded the estimated cost. There are a number of problems with the City's position.

First, had the Council in 2007 merely wanted to create a ULID for the general purpose of a sewer system, and leave to City staff the discretion for what kind of sewer system to install, *the Council would have expressly and constitutionally delegated its authority to change the improvement to City staff. It did not.* The Council in 2007 instead described the vacuum system in detail, and estimated its cost, in the ordinance and left to itself the right to modify the improvement. To adopt the City's reasoning is to read that detailed language out of Ordinance 1293. Furthermore, to leave individual questions of legislative policy on the design of the project in the hands of administrative personnel, without express delegation, would be unconstitutional. *Mission Springs v. Spokane*, 134 Wn.2d 947, 961, 954 P.2d 250 (1998).

Second, the City's position runs afoul of the policies behind RCW 35.43.070, .080, .100, and RCW 35.44.020. If administrative staff were allowed to scrap specific plans in ordinances enacting ULIDs without standards controlling the delegation of such decisions, and instead chose

completely different plans—at substantially larger costs—there would be little point in these statutes. *Cf. Barry & Barry v. State DMV,* 81 Wn.2d 155, 158-59, 500 P.2d 540 (1972). Cities could always chose the easiest political route for ULID approval, but then enlarge and/or change the scope of the improvment later on without following the detailed process prescribed by the statutes. The public would have authorized one thing, yet received another. They authorized buying apples; they received oranges at almost twice the price. This is not good policy, is inconstant with the mandates of the statutes, and is a violation of the legislative delegation doctrine standards. *Id.*

Nor is the City's position consistent with Washington precedents that have considered similar questions. Beginning with *Buckley v. City of Tacoma*, 9 Wash. 253, 37 P. 441 (1894), case law is in accord with the Owners' position. In *Buckley*, the City of Tacoma's charter required that improvements be authorized by formal resolution. *Id.* at 257. Tacoma passed a resolution stating that it "intended" to improve a certain street by "grading and sidewalking", but the resolution did not describe the details. *Id.* at 258. No member of the public objected to the resolution, the work was completed, and the Tacoma City Council then passed an ordinance retroactivity confirming the work. *Id.* at 259-60.

The Supreme Court reversed the assessments levied by the Tacoma for the work. The *Buckley* court reasoned that a resolution failing to provide the actual details of the work violated the policies of the city charter—to ensure that the city council, not executive officers,

decided upon the improvement—and robbed the public of their limited window to challenge the resolution upon passage:

> One way of making an improvement may be substantially as good as another, and may serve the purpose just as well, although the difference in cost may mean an easy payment by the owner in one case and substantial ruin in another. It is not be supposed that the council would overlook such considerations, but that it would endeavor, while prosecuting a reasonable improvement, to lighten the burden of expense . . . To accomplish this it must know the circumstances surrounding the proposed work, and with this knowledge it can easily prescribe the general features of the improvement. *To do otherwise is to cut off from property owners all knowledge of what they will be expected to answer for, and to deprive them of the opportunity to remonstrate in sufficient numbers if they see fit.* But the worst of such a loose system is that it leaves to mere executive officers the exercise of a large discretion *which the charter does not confer upon them.*

Id. at 263 (emphasis added). Similarly, here, staff within the City exercised discretion to materially change the authorized improvement. But neither the ULID statutes, nor Ordinance 1293, bestow the staff with such discretion. Would the owners within ULID No. 6 have signed a petition, and failed to appeal the enacting ordinance of ULID No. 6 under RCW 35.43.100, had the improvement been a gravity sewer system at a cost of $19 million instead of a vacuum sewer system at the cost of $11 million? The change is surely material, but we do not know the precise answer because the owners *never had the chance* to "intelligently determine whether [to] remonstrate or not"—a failure that in *Buckley* led to the rejection of the assessments. *Id.* at 264.

Since *Buckely*, numerous courts have followed the same principle: improvements cannot be materially altered by municipal personnel in

ways inconsistent with, or beyond the bounds of, the plain language of ordinances ordering improvements. *See, e.g.*, *O'Byrne v. City of Spokane*, 67 Wn.2d 132, 135-36, 406 P.2d 595 (1965) (holding that a city exceeded its power when, after it ordered a street improvement via ordinance and public vote that referenced specific items, the city then changed one of the items concerning a route of part of a street, and relying on the principle that "[i]t is probably true that the city may make minor changes in the plans but may *not* radically alter them *so as to construct an entirely different system* from that voted upon by the people" (citation omitted and emphasis added)); *La Franchi v. City of Seattle*, 78 Wash. 158, 164, 138 P. 659 (1914) (rejecting an assessment roll passed by the City of Seattle when the City included items in the assessed expenses not included in the original petition calling for the improvement, and quoting a treatise for the proposition that "the ordinance being the sole authority for the construction of a public improvement to be paid for by special assessment, the municipal authorities *have no right to change the nature, locality, character or description* of the improvement as prescribed in the ordinance" (citation omitted and emphasis added)).

Another line of reasoning employed by the City is that because the Council approved the assessment roll *four years after* the creation of ULID No. 6 (and after the chance of protest against the creation of the ULID has lapsed) and *after* the construction of the gravity sewer system, the approval of the roll in 2011 was sufficient "Council approval" to modify Ordinance 1293. Again, that is not how the ULID statutes work.

Under the City's reasoning, *any* change to and improvement inconsistent with a ULID enacting ordinance would be proper as long as at some future point a city's legislative body ratified it. Cities, of course, would almost always do so—at the point the assessment roll comes before a city council, the project is complete, and if a city failed to ratify the assessments, a city's general fund could potentially be left liable for the work. If cities could orchestrate such schemes, whether intentional or not, the requirements of the statutes when implementing a ULID would be rendered meaningless, as ULID could always be changed and ratified even if the improvement "described" was never built. This is exactly the kind of reasoning rejected in *Buckley*. 9 Wash. at 267-68.

Third, if what the City did here was allowed, it would rob the public of their rights under RCW 35.43.100. Under that statute, a person only has 30 days to challenge a ULID after it is originally passed. The presumption behind that statute is, of course, that the ordinance actually describes the improvement that is going to be constructed. Members of the public, then, can make an informed decision regarding how to proceed. But if a municipality were allowed to change at its whim what the improvement was, after its passage, the right to intelligently decide whether to object to the ULID would be vacated.

In sum, the City's staff chose to scrap the previous plan for a vacuum sewer system and instead purchased a more expensive gravity system. But the property owners within ULID No. 6 had only petitioned for, and the Council only approved, the vacuum system. If an

improvement district is created for the express purpose of buying a Ford, a municipality cannot buy a Cadillac and later argue that the Cadillac falls under the same district. That is exactly what occurred here. If the City wished to effect its dramatic change from a vacuum plan to a new gravity plan, it had to create a new improvement district and describe the new improvement and its estimated costs (and also, of course, obtain approval from the property owners as required by the ULID statutes). It cannot impose costs that were incurred for improvements materially different than those described when the ULID was approved. It is a classic bait and switch, and it undercuts the entire LID and ULID statutory scheme. The assessments were founded upon a fundamentally wrong basis and should be annulled.

D. Ms. Foreman's Opinions Are Arbitrary, Capricious, and Founded Upon a Fundamentally Wrong Basis.

1. Ms Foreman's ignored all post-2007 data; her opinions accordingly, by definition, are "without regard to or in consideration of" the material facts.

As noted above, an "arbitrary" action taken by an appraiser or city for the purposes of RCW 35.44.250 is one taken "without regard to or consideration of the facts surrounding the action." *Abbenhaus*, 89 Wn.2d at 858.

The City's appraiser Ms. Foreman reached her conclusions concerning land values in 2007 and failed to modify them to reflect the market downturn in the subsequent years. *See* CP 76-78 (hereinafter "Hearing Exhibits 72 and 73", attached as Appendices C and D). Her

numbers never changed, despite the obvious downturn in the economy and real estate market, which she even described as "drastic." Hearing Transcript, page 60, line 19. Other appraisers at the hearing estimated this market downturn to have caused a 30-40% reduction of total value, with raw land even further devalued from previous highs in 2007. *See, e.g.*, Hearing Transcript, page 120, lines 12-15; Hearing Exhibit 29, page 4-22 of the PDF (explaining that the value of commercial land plummeted 35% in the market downturn).

Ms. Foreman admitted that she did not make any adjustment for the market downturn when examining data from before the market crash and applying it to 2011. Hearing Transcript, page 431 line 21 through page 432, line 17. She also admitted that nothing in her final report reflects or explains how the market downturn affected her analysis. Hearing Transcript, page 485, line 20 through page 486, line 2. These admissions alone justify reversal: prices in 2007 were significantly higher than they were in 2011. Her report does not allow the Court to examine "in detail" the bases for her startling opinions that, in fact, prices did not change, nor is there "proof" that her numbers can be justified in light of the undisputed facts concerning market conditions.

When confronted with Hearing Exhibits 72 and 73 at the administrative hearing, Ms. Foreman's tortured explanation was that she was merely being "conservative" in 2007. Simply put, her explanation—Hearing Transcript, page 320, line 4 through page 324, line 10; page 401, lines 1-18—is not logical or supportable. Nor is her testimony that she

actually did consider post-2007 sales data even though—again and again—the actual sales data introduced by the Owners and others belied her conclusions:

> Q. When you came – when you reached the conclusions in 2011 about dollars per square foot, did you perform a new analysis different from the one you performed in 2007?
>
> A. Right. Like updated information.
>
> Q. Okay. So, and again, I just want to understand. So your testimony is you went through a new analysis, you looked at updated information and yet to the penny you came up with the exact same before and after values [for 2007 and 2011], correct?
>
> A. That's correct.

Hearing Transcript, page 324, lines 2-10. Even the Hearing Examiner was forced to concede during the hearing that Ms. Foreman "cannot fully explain" why her 2007 values and 2011 values precisely match. Hearing Transcript, page 330, lines 1-4.

There are two conclusions that can be made of these facts. One could conclude that Ms. Foreman really did perform a new analysis of land values in 2011, consider comparable sales after 2007,[7] and, despite the *astronomical* odds against such a result and her own admission that the market crash was "drastic," miraculously found that the average before and after per-square-foot prices for vacant land in 2011 were the

[7] Again, there is no way of knowing whether she actually did perform such an analysis as she could offer no documents, in her final report or elsewhere, that showed *how* exactly she reached her conclusion that values in 2007 were the same as they were in 2011.

same—to the penny, for each type of zoning—as they were in 2007. *See* Hearing Exhibits 72 and 73.

Alternatively, one could conclude that Ms. Foreman reached her conclusions in 2007 *and never incorporated new sales data.* She simply chose to not analyze new data or the market downturn. The second conclusion is the only logical conclusion. And it was the conclusion reached by the other professional appraisers who reviewed Ms. Foreman's work. *See, e.g.*, Hearing Transcript, page 121, lines 10-20. Ms. Foreman's failure to consider the surrounding facts, such as new market data after 2007, renders her opinions arbitrary under the standard set forth in *Abbenhaus* since she did not fully consider the material circumstances regarding land values—chiefly, that the values had plummeted from 2007 to 2011.

The City will undoubtedly point out that Ms. Foreman testified that she did in fact consider post-2007 data. The Owners have never disputed that this is what she claimed at the hearing. The problem is that *what she said* does not match *what she wrote* in Hearing Exhibits 72 and 73. If she really did look at hundreds of post-2007 data points, as the City has argued, it is mathematically impossible that she would have reached the same results, *to the penny*, that she reached in 2007, especially considering the market downturn.

Armed with these facts, this Court should invalidate the entire assessment roll under *Abbenhaus* since Ms. Foreman's opinions are both arbitrary and capricious and fundamentally wrong.[8]

2. Ms. Foreman's could not provide the proof needed to support her blanket assertion that all vacant land within ULID No. 6 uniformly increased in value by 25% merely because of the addition of a sewer.

As noted above, a critical question under *Bellevue Plaza* is *how* Ms. Foreman reached her opinion that the mere addition of a sewer increased the value of unimproved land by a whopping 25%. This opinion is responsible for millions of dollars in owner assessments, and under *Bellevue Plaza* the Court must examine such questions "in detail." 121 Wn.2d at 405. But Ms. Foreman could not explain with any detail how she calculated that number. At the administrative hearing, Ms. Foreman was asked, repeatedly, by undersigned counsel and others, to provide a calculation, a chart, an analysis, a document, an explanation—*anything*—which would show how she came to the conclusion that unimproved land received a benefit from a sewer that added 25% in value.

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[8] The City will also attempt to cast this appeal as one where the Owners are simply offering a different opinion of special benefits, and accordingly it is not within the courts' province to substitute its judgment for what the City determined was the "actual" fair market value was (and accordingly what the special benefit was). That is not the Owners' argument. Although the Owners obviously believe that Ms. Foreman's opinions of value are incorrect, the thrust of the Owners' case is that Ms. Foreman *ignored facts*—chiefly, the market downturn and actual sales data—when she came to her erroneous conclusions. It is this failure and others that renders her opinions arbitrary and capricious under the standard set forth in *Abbenhaus*. 89 Wn.2d at 858 (explaining that arbitrary and capricious actions are ones "taken without regard to or consideration of the facts and circumstances surrounding the action").

All she could do was summarily state that she "considered" the relevant data and reached that number. Hearing Transcript, page 147, line 16 through page 148, line 14; page 315, line 20 through page 316, line 16; page 321 line 6 through page 322, line 7; page 486 lines 12-19.

Without any way to verify, test, calculate, or check what factors or bases Ms. Foreman employed when reaching her 25% number, it is impossible for this Court to analyze, "in detail," "the factors considered" by Ms. Foreman as required by Washington precedents. *Bellevue Plaza,* 121 Wn.2d at 405. Put differently, if one does not know how factors were employed to reach a conclusion, it is impossible to evaluate whether those factors were properly reviewed and considered. An assessment such as Ms. Foreman's, which has *no basis* that she could articulate, is by definition fundamentally wrong.

The Hearing Examiner glossed over this issue by summarily stating that Ms. Foreman's opinions are the result of her "judgment" and not a calculation, and accordingly it is not surprising that she does not have a spreadsheet or a document showing how she reached her conclusion of 25%. Hearing Exhibit 88 at 14. In other words, since her "judgment" was the result of her own, subjective, mental considerations, it was not troubling to the Hearing Examiner that she could not explain them with any detail to third parties, such as the Owners. Not only does this reasoning violate the clear command that her factors be considered, "in detail," by a reviewing tribunal, but the logical conclusion of the Hearing Examiner's position is that Ms. Foreman could come up with

any number and it would be supportable merely because she claimed she "considered" relevant data—even though she could not tie that data to any proof or analysis that could be reviewed with any depth by the Owners or this Court. The assessment roll, adopted by the City via the Hearing Examiner's reasoning, is founded upon a fundamentally wrong basis.

3. Ms. Foreman ignored what is financially feasible.

Ms. Foreman's opinions of value for vacant land must be tied to what is realistic: "when an appraiser uses a factor beyond the knowledge of reasonable certainty, it becomes pure speculation. . . . Fair market value cannot include a speculative value." *Bellevue Plaza*, 121 Wn.2d at 411 (citation omitted). Instead, only future uses which are reasonably foreseeable may be assumed by an appraiser to determine market value *if* that appraiser has a foundation for his or her opinion. *Id.* at 417.

Ms. Foreman's appraisal of the special benefits imparted by the sewer assumed properties are put to their "highest and best use." Hearing Exhibit 2 at 15. "Highest and best use," however, has a definition in the appraisal field that must be followed, which includes that the proposed highest and best use is "financially feasible." Hearing Exhibit 2 at 9.

For vacant land, Ms. Foreman generally appraised it as if it were likely to be developed into residential or retail lots. *See, e.g.*, Hearing Exhibit 2 at page 18, 32-33 of the PDF. She refused to concede that the declining real estate market had affected the feasibility of development. Hearing Transcript, page 334, lines 6-9. She did not, however, perform

any analysis of what was *actually* feasible considering the market conditions in 2011. Hearing Transcript, page 410, lines 7-15; page 436, line 19 through page 438, line 6.

The unsupported assumptions by Ms. Foreman concerning future development—that all vacant land within ULID No. 6 could be developed into commercial or residential lots—underlie the entire assessment roll. Other experts, however, testified *without rebuttal or comment from Ms. Foreman* that this kind of development was simply not feasible. Hearing Transcript, page 36 lines 9-11; page 37, lines 11-13; page 120, line 17. The testimony by other appraisal experts at the hearing instead established that there was a five-year supply of residential lots for sale in North Bend and sales were progressing at a very slow rate. Hearing Transcript, page 36 lines 9-11; page 37, lines 11-13. Financing for the development fantasized by Ms. Foreman is almost impossible to obtain. Hearing Transcript, page 120, line 17. This evidence was never challenged or rebutted by the City.

Under these facts, the assessments should be rejected. The only conclusion from the record is that Ms. Foreman simply did not take into account what was actually feasible when creating the assessment roll. Her values, which assume massive development is feasible, are arbitrary, capricious, and founded upon a fundamentally wrong basis. *Bellevue Plaza*, 121 Wn.2d at 418 (holding that when an appraiser relied on speculation concerning future use, the appraiser's opinion was fundamentally flawed).

4. The Owners did not need a separate appraisal for each of their parcels.

One contention repeatedly asserted by the City is that because the Owners did not pay for a separate appraisal for each one of their parcels, the Owners cannot meet their burdens under the case law that "expert" evidence be provided to rebut the initial judicial presumption in favor of approving an assessment roll. Put another way, the City claims that since Ms. Foreman is the only one who appraised each and every parcel—although she did so in a mass appraisal—the Owners cannot show her opinions and methods were arbitrary, capricious, or fundamentally flawed. This reasoning is flawed for a number of reasons.

First, the Owners and others did present expert evidence showing, in a variety of ways, that the assessments violated RCW 35.44.250.[9] Such evidence showed, without rebuttal from Ms. Foreman, that land values declined 30% to 40% between 2007 and 2011.[10] The City's contention that no appraisal or expert evidence was presented by the Owners is false: both professional appraisers, and the opinions of the

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[9] *See, e.g.*, Hearing Protest Letter 28, at pages 72-87 of the PDF (the opinion of an MAI appraiser that Ms. Foreman did not follow relevant standards because she did not explain in her final report how she reached her average values and did not provide a proper basis for determining special benefits); Hearing Protest Letter 30, at pages 10-14 (same); Protest Letter 32, at pages 5-15 of the PDF (stating that the market downturn has made development almost impossible); Hearing Protest Letter 33, at pages 15-6 of the PDF (same and explaining that "virtually all commercial lending for proposed commercial developments has ceased for the time being. . . . To the extent that construction financing would then typically be considered as a primary feasibility requirement, most projects lacking a firm commitment for such financing may well be considered *de facto* infeasible."); Hearing Exhibit 15 (the opinion of a MAI appraiser that Ms. Foreman's comparables were often inappropriate for use).

[10] Hearing Transcript, page 120, lines 12-15; Hearing Exhibit 29 at pages 4-22 of the PDF.

King County Assessor's Office, show that Ms. Foreman's opinions were dramatically askew from what the actual fair market value was for the properties within the ULID. The only burden on the Owners is to present "credible evidence to the contrary"[11] of the presumption in favor of the City that the assessment is correct; that burden was met here, and a separate appraisal is not the only means meeting that burden. *See, e.g., Douglass v. Spokane County,* 115 Wn. App. 900, 905-09, 64 P.3d 71 (2003) (affirming the trial court's invalidation of an assessment when the owner presented evidence, which did *not* include a separate appraisal, that the assessment was fundamentally flawed); *Bellevue Plaza*, 121 Wn.2d at 403-08 (invalidating an assessment because the evidence showed, like here, that the city's appraiser's general methods were arbitrary and flawed, not merely because a different appraiser had a different assessment or because a particular special benefit was incorrect).

Second, the City's position defies common sense. Hearing Exhibits 72 and 73 show that Ms. Foreman refused to let the real estate decline of the last few years affect her 2007 conclusions. After discovering the exhibits, neither the Owners nor any other owners needed any additional evidence (although additional evidence was provided): the only reasonable conclusion was that the assessment was arbitrary and flawed since she ignored the market downturn. Once this conclusion is reached, there is no need to analyze further. RCW 35.44.250. The City's

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[11] *Bellevue Plaza*, 121 Wn.2d at 403 (citation omitted); *see also* RCW 35.44.250 (which does not require an appraisal, merely "evidence that such assessment is founded upon fundamentally wrong basis and/or . . . was arbitrary or capricious").

position, taken to its logical conclusion, is that the City appraiser could come up with *any* appraisal based upon *any* basis, or no basis at all, and as long as the property owners did not present their own appraisers with their own calculations of special benefits, the City's position must be upheld. This is not the standard.

E. The Superior Court's "Limited" Remand Order is Improper.

The Superior Court found that due process had been violated during the administrative hearing. The Superior Court correctly determined that the Owners were not permitted to review supporting materials, adequately confer with their experts, or prepare cross examination of the City's witnesses. RP at 15-19, 33-37, 39-45. The City did not appeal the trial court determination under RAP 2.2 that the City violated procedural due process standards that denied the Owners a fair hearing under the Fifth Amendment of the United States Constitution and Article 1, Section 3 of the Washington State Constitution. The question before this Court, then, is whether the Superior Court's remedy—a *limited* remand hearing—is proper. For a number of reasons, the answer is "no".

First, sitting as an appellate court, the Superior Court held the City violated due process, meaning that the assessments against the Owners are founded upon a "fundamentally wrong basis" under RCW 35.44.250. *See Abbenhaus*, 89 Wn.2d at 859 (explaining that a "fundamentally wrong basis" refers to "some error in the method of assessment, *or in the procedures used by the municipality*, the nature of which is so

fundamental as to necessitate a nullification of the entire LID" (emphasis added)). Accordingly, the Superior Court had only four options under RCW 35.44.250: "correct, change, modify, or annul the assessment." The Superior Court's order does none of these things. RCW 35.44.250 on its face does not authorize a Superior Court to craft selective relief to cure assessments founded on a fundamentally wrong basis or the result of arbitrary and capricious action. A Superior Court may only "correct, change, modify, or annul the assessment." RCW 35.44.250. The Superior Court's only choice—where the court found widespread violations of due process that denied a fair hearing to all owners—was to annul the assessments altogether and direct a new hearing. *See, e.g., Abbenhaus,* 89 Wn.2d at 858-59 (explaining that a trial court "is limited" in the relief it can grant under RCW 35.44.250).

Second, there is no provision in the LID or ULID statutes—or anywhere else in law that undersigned counsel could find—for a partial or "limited" hearing once a due process violation occurs. By analogy, when the Court of Appeals reverses a Superior Court's judgment based on a due process violation that occurred on the second day of a two-day trial, the appellate court does not order a "new day two" of the trial, as the Superior Court's order essentially dictates in this matter. The court instead orders *an entire new trial*, as the due process violation taints the entire proceeding and decision below. So too does the due process violation here mandate a new hearing from start to finish per RCW 35.44.070 *et. seq*. That is what Washington courts instruct municipalities

to do in these circumstances. *See, e.g., Bellevue Plaza,* 121 Wn.2d at 419 (annulling assessments and remanding for a new hearing under the LID statutes); *Triangle Traders v. City of Bremerton*, 89 Wash. 214, 225, 154 P. 193 (1916) (holding that a procedural error nullified a LID assessment and remanding without prejudice to the city's right to impose a "*new* assessment," which by definition would require a new hearing (emphasis added)); *see also* RCW 35.44.280 (allowing for reassessments per the procedure outlined in statutes if an existing assessment is void).

Third, the Superior Court's order leads to a perverse result. The Superior Court found that due process was violated, but did not "correct, change, modify, or annul" the assessments. Accordingly, although the Owners' due process rights were violated, and the assessments at issue were imposed via constitutional violations, the status quo is that the assessments *are in effect* and *are being collected* despite the violation. The Superior Court's order allows the continued depravation of the Owners' funds based on a procedure the Superior Court found constitutionally insufficient.

F. Dahlgren's Assessment Should Be Modified.

In written submittals, and, in testimony before the Hearing Examiner, Dahlgren appealed the assessment of $573,021.00 against its property. Hearing Exhibits 20, 21, 34, 35, 36, 37, 77-79, 85. Dahlgren's experts calculated an off-setting proportional credit of $465,000.00 against the City's special benefit of $784,900 as Dahlgren's cost to extend the City's modified project to serve the 75% percent of his

property not benefitted by the project. Dahlgren's experts calculated a corrected proportional assessment of $319,900: $784,900 less the "cost to cure" of $465,000. *Id.*

The City did not dispute its inability to serve 75% of Dahlgren's property. It only disputed the cost to construct the extension of the City's system. Hearing Exhibit 60. Notwithstanding this City-staff memo admitting that Dahlgren would incur costs ranging from $225,000 to $304,000 to fully serve the remainder of its property that could not be served by the single sewer main stub, the Hearing Examiner erroneously rejected Dahlgren's appeal on the basis that the City had determined that "some larger parcels . . . would also need developer extensions to service anticipated development." Hearing Exhibit 88, at 8-9.

Vine Street Commercial Partnership v. Marysville, 98 Wn. App. 541, 548-49, 989 P.2d 1238 (1999), confirms the rule in Washington that assessments cannot exceed a figure equal to the increased true and fair value the improvement adds "in direct proportion to the amount of the special benefit" to the property:

> Our Supreme Court has said:
> "[T]he only legal basis for a special assessment against real estate is a finding that the improvement for which the assessment is levied will result in some special benefit to the property assessed, and the assessment cannot exceed in amount the special benefit to the property[.]" *Hargreaves v. Mukilteo Water Dist.*, 43 Wash.2d 326, 332, 261 P.2d 122 (1953) (quoting *In re Sixth Ave.*, 155 Wash. 459, 471, 284 P. 738 (1930)). This is because " 'the exaction from the owner of private property of the cost of a public improvement *in substantial excess of the special benefits*

> accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.'" *Id.* (quoting *Village of Norwood v. Baker*, 172 U.S. 269, 279, 19 S.Ct. 187, 43 L.Ed. 443 (1898)).

Emphasis added. It is undisputed that 75% of Dahlgren's property is not specially benefitted by the sewer project. Hearing Exhibits 20-21 & 60. Dahlgren will be forced to extend the sewer system at its own cost to serve development of the remainder of its property. Hearing Exhibits 20, 21, 34, 35, 36, 37, 77-79, 85; RP at 15-16.

Dahlgren's experts, a private planner and certified Master of Appraisal Institute appraiser, calculated the cost of extending the system at $465,000.00. That the City openly and unlawfully assessed other large parcel owners in violation of the proportional special benefit requirements of RCW 35.44.010 and RCW 35.44.120 by City Staff's opinion that "other larger parcels would also need developer extensions" does not forgive either these statutes or the requirements of *Vine Street Commercial Partnership*. To do otherwise would constitute an unconstitutional taking of property under the guise of taxation without just compensation. *Id.*

The City failed to meet its burden of proof sufficiently rebutting Dahlgren's experts' testimony and written submittals required under *Bellevue Plaza v. City of Bellevue*. The City was unable to show that its lone westerly 185 feet of the stubbed sewer main would serve the entirety

of the Dahlgren property to warrant a full assessment under RCW 35.44.010 and RCW 35.44.120.

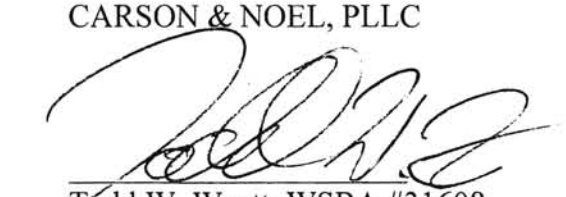
Dahlgren should not be forced to re-litigate this issue. It should not have to bear the costs of rehearing where the only basis for rejecting Dahlgren's proportional "cost to cure" credit was based upon other property owners who would also have to extend the City's sewer system. The Court should grant Dahlgren's appeal. It should direct the City to recalculate its assessment of Dahlgren's parcel to reflect a special benefit of $784,900 less the cost to cure amount of $465,000—or a final assessment of $319,000. Any assessment payments made to date by Dahlgren should also be credited against the correct assessment.

VI. CONCLUSION

For the foregoing reasons, this Court should reverse the order of the Superior Court and instead annul the assessments under RCW 35.44.250. In the alternative, the Court should modify the assessment against Dahlgren.

RESPECTFULLY SUMITTED this 14th day of January, 2013.

CARSON & NOEL, PLLC



Todd W. Wyatt, WSBA #31608
Stuart Carson, WSBA #26427
Attorneys for Appellants

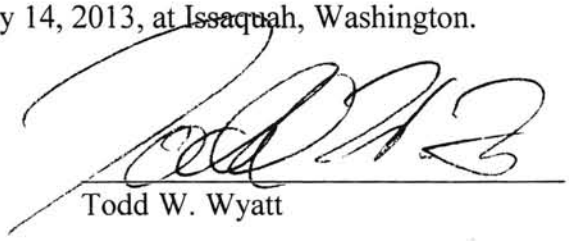
PROOF OF SERVICE

The undersigned hereby declare that on this 14th day of January, 2013, I caused the foregoing APPELLANTS' BRIEF to be served via the method listed below on the following party:

Via Hand Delivery to:

Bruce Laurence Disend
Kenyon Disend Law Firm
11 Front St S
Issaquah, WA 98027-3820
Attorney for Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this declaration was executed on January 14, 2013, at Issaquah, Washington.



Todd W. Wyatt

APPENDIX A

ORDINANCE 1293

AN ORDINANCE OF THE CITY OF NORTH BEND, WASHINGTON ORDERING CERTAIN IMPROVEMENTS; ESTABLISHING UTILITY LOCAL IMPROVEMENT DISTRICT NO. 6, AND ORDERING THE CARRYING OUT OF THE PROPOSED IMPROVEMENTS; PROVIDING THAT PAYMENT OF THE COSTS OF THE IMPROVEMENTS BE MADE BY SPECIAL ASSESSMENTS UPON THE PROPERTY IN THE DISTRICT, PAYABLE THROUGH ISSUANCE OF REVENUE BONDS; AND PROVIDING FOR THE ISSUANCE AND SALE OF SHORT-TERM OBLIGATIONS REDEEMABLE IN CASH AND REVENUE BONDS.

WHEREAS, a petition has been filed with the City Council, signed by the owners of the property aggregating a majority of the area within the proposed district, setting forth the nature and territorial extent of the proposed improvement, the mode of payment and that a sufficient portion of the area within the proposed district is owned by the petitioners as shown by the records in the office of the Auditor of King County, petitioning for the extension of sewer system and service together with related improvements more specifically described hereinafter; and

WHEREAS, the City Engineer has determined that the petition is sufficient and that the facts set forth therein are true; and

WHEREAS, the City Engineer caused an estimate to be made of the cost and expense of the proposed improvement and certified that estimate to the City Council, together with all papers and information in his possession touching the proposed improvement, and a statement of what portion of the cost and expense of the improvement should be borne by the property within the proposed District; and

WHEREAS, that estimate is accompanied by a diagram of the proposed Utility Local Improvement District ("District") and its boundaries showing thereon the lots, tracts, parcels of land, and other property which will be specially benefited by the proposed improvement and the estimated cost and expense thereof to be borne by each lot, tract and parcel of land or other property; and

WHEREAS, the City Council has conducted a public hearing on October 2, 2007 on the proposed District formation and has determined it to be in the best interests of the City and of the owners of the property within the District that said improvement petitioned for,

80

as hereinafter described, be carried out and that the District be created in connection therewith,

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF NORTH BEND, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1. The City Council orders the following described improvements: Design and construction of a vacuum sewer system in the herein specified portions of the City of North Bend Final Comprehensive Sewer Plan, July 2001 defined Tanner Area and Truck Town subbasins, including but not limited to two (2) vacuum/pump stations, approximately 24,000 linear feet of 10-inch and 12-inch diameter force mains, approximately 40,600 linear feet of 4-inch, 6-inch, 8-inch, and 10-inch diameter collection pipes, one side sewer service and sump pit to each benefiting parcel, division valves, two (2) emergency generators, and appurtenances, all as approximately depicted in Exhibit A, a copy of which is attached hereto and incorporated in full by this reference.

All of the foregoing shall be in accordance with the plans and specifications therefore prepared by the City Engineer, and may be modified by the City Council as long as such modification does not affect the purpose of the improvement.

Section 2. There is created and established an utility local improvement district, to be called Utility Local Improvement District No. 6 of the City of North Bend, Washington (the "District"), the boundaries and the territorial extent of which are more particularly depicted on Exhibit B, a copy of which is attached hereto and incorporated in full by this reference.

Section 3. The total estimated cost and expense of the improvements is declared to be $11,685,032. The entire cost and expense of the improvements including all labor and materials required to make a complete improvement, all engineering, surveying, inspection, ascertaining ownership of the lots or parcels of land included in the assessment district, and all advertising, mailing and publication of notices, accounting, administrative, printing, legal, interest and other expenses incidental thereto, shall be borne by and assessed against the property specially benefited by such improvement included in the District embracing as nearly as practicable all property specially benefited by such improvement.

Section 4. In accordance with the provisions of RCW 35.44.047, the City may use any method or combination of methods to compute assessments which may be deemed to fairly reflect the special benefits to the properties being assessed.

Section 5. Bond anticipation notes or other short term obligations may be issued in payment of the cost and expense of the improvement herein ordered to be assessed, such notes or other obligations to be paid out of the "North Bend 1979 Water and Sewer Revenue Bond Fund," heretofore created and referred to as the Revenue Bond Fund, and, until the bonds referred to in this section are issued and delivered to the purchaser thereof, to bear interest from the date thereof at a rate to be established hereafter by the

City Finance Director, as issuing officer, and to be redeemed in cash and/or by revenue bonds herein authorized to be issued. In the alternative, the City hereafter may provide by ordinance for the issuance of other short-term obligations pursuant to Chapter 216, Laws of 1982.

The City is authorized to issue revenue bonds for the District (the "Bonds"), which shall bear interest at the rates, and to be payable on or before such dates, to be hereafter fixed by ordinance. The Bonds shall be issued in exchange for and/or in redemption of any and all bond anticipation notes issued hereunder or other short-term obligations hereafter authorized and not redeemed in cash within twenty days after the expiration of the thirty-day period for the cash payment of assessments without interest on the assessment roll for the District. The Bonds shall be redeemed by the collection of special assessments to be levied and assessed against the property within the District, payable in annual installments, with interest at a rate to be hereafter fixed by the ordinance authorizing issuance and sale of the Bonds. The exact form, amount, date, interest rate and denominations of such Bonds shall be hereafter fixed by ordinance of the City Council. Such Bonds shall be sold in such manner as the City Council shall hereafter determine.

Section 6. In all cases where the work necessary to be done in connection with the making of said improvement is carried out pursuant to contract upon competitive bids, the call for bids shall include a statement that payment for such work will be made in cash warrants drawn upon the Project Fund, hereinafter created.

Section 7. There is created and established in the office of the City Finance Director for the District the Utility Local Improvement District Project Fund, District No. 6, into which fund shall be deposited the proceeds from the sale of bond anticipation notes or other short-term obligations drawn against the fund which may be issued and sold by the City and collections pertaining to assessments, and against which fund shall be issued cash warrants to the contractor or contractors in payment for the work to be done by them in connection with the improvement, and against which fund cash warrants shall be issued in payment for all other items of expense in connection with the improvement.

Section 8. Within fifteen (15) days of the passage of this ordinance there shall be filed with the City Finance Director the title of the improvement and District number, a copy of the diagram or print showing the boundaries of the District and the preliminary assessment roll or abstract of such roll showing thereon the lots, tracts and parcels of land that will be specially benefited thereby and the estimated coast and expense of such improvement to be borne by each lot, tract or parcel of land. The City Finance Director shall immediately post the proposed assessment roll upon her index of local improvement assessments against the properties affected by the local improvement.

Section 9. Economically Disadvantaged Property Owners, as defined herein, shall qualify for a deferral of yearly assessment payments as provided in this Section. An Economically Disadvantaged Property Owner eligible for the deferral is a property owner having a combined disposable income as defined in RCW 84.36.383, during the calendar year for which an assessment deferral is requested, either (1) not exceeding 50 percent of

the median income level for such calendar year for the Seattle, King County Primary Metropolitan Statistical Area (PMSA) for 1-person or 2-person households, whichever is applicable, as published by the Secretary of Housing and Urban Development, or (2) not exceeding the income qualification for low-income seniors set forth in RCW 84.36.381, whichever is greater, and who owns and is a full-time occupant of the single-family home on the property being assessed. Applications for deferment are valid only in the singular payment year during which they were made.

Deferred assessments remain as a lien on the property until paid, with compounded annual interest at a rate equal to the net interest rate of the Bonds plus half a percent, for every year left unpaid. The total accumulation of deferred assessments is limited to four annual installments, each of which may be deferred up to the date that is two years prior to the maturity date of the Bonds (the "Deferred Assessment Payment Date"). For properties with annual payments in excess of $6,000 for the first year of the ULID assessment period that support one owner occupied single family residence at the time of the ULID formation, all assessments may be deferred up to the Deferred Assessment Payment Date. Payment of deferred assessments plus interest must be made on the earliest to occur of the following: the Deferred Assessment Payment Date, the sale of the property, the development of the property to a higher use or intensity than the single family residence, or the death of the person or property owner to whom the deferral was granted.

Section 10. The payment of an assessment levied for the ULID on underdeveloped properties may be made by owners of other properties within the ULID, if they so elect, subject to the following:

a. The owner(s) of the underdeveloped property on whose behalf payments of assessments have been made, shall reimburse all such assessment payments to the party who made the payments when those properties are sold, developed or redeveloped, together with compound interest at a rate of five (5) percent (%) per year.

b. Reimbursement shall be made on a lump sum basis.

c. In the event the underdeveloped property has not been sold, developed or redeveloped before the end of the Deferred Assessment Payment Date, reimbursement shall be made no later than the time of dissolution of the ULID.

d. Underdeveloped property shall be those properties that are undeveloped or are not developed to their highest and best use.

e. Reimbursement amounts due from underdeveloped properties shall be liens upon the underdeveloped properties in the same manner and with like effect as assessments made under this ordinance.

Section 11. Should any section, paragraph, sentence, clause or phrase of this ordinance, or its application to any person or circumstance, be declared unconstitutional or otherwise invalid for any reason, or should any portion of this ordinance be pre-empted by state or federal law or regulation, such decision or pre-emption shall not affect the validity of the remaining portions of this ordinance or its application to other persons or circumstances.

Section 12: This ordinance shall be published in the official newspaper of the City, and shall take effect and be in full force five (5) days after the date of publication.

ADOPTED BY THE CITY COUNCIL OF THE CITY OF NORTH BEND, WASHINGTON, AT A REGULAR MEETING THEREOF, THIS 20TH DAY OF NOVEMBER, 2007.

CITY OF NORTH BEND:

Kenneth G Hearing, Mayor

APPROVED AS TO FORM:

Michael R. Kenyon, City Attorney

ATTEST/AUTHENTICATED:

Cheryl Proffitt, City Clerk

Published: November 28, 2007
Effective: December 3, 2007

APPENDIX B

ORDINANCE 1452

AN ORDINANCE OF THE CITY OF NORTH BEND, WASHINGTON, AMENDING, APPROVING AND ADOPTING THE FINDINGS, CONCLUSIONS AND RECOMMENDATIONS MADE BY THE APPOINTED HEARING EXAMINER REGARDING THE ASSESSMENT AND THE ASSESSMENT ROLL OF UTILITY LOCAL IMPROVEMENT DISTRICT NO. 6. CREATED FOR THE PURPOSE OF INSTALLING A SANITARY SEWER SYSTEM AS PROVIDED BY ORDINANCE NO. 1293 AND AMENDED BY ORDINANCE NO. 1312, CONFIRMING AND ASSESSING THE COST AND EXPENSE OF THE LOCAL IMPROVEMENT DISTRICT AGAINST THE SINGLE LOT, TRACT, PARCEL OF LAND AND OTHER PROPERTY AS SHOWN ON THE RESPECTIVE ASSESSMENT ROLL

WHEREAS, the final assessment roll proposing the special assessment to be levied against the property located in Utility Local Improvement District No. 6 (the "ULID" or "ULID No. 6") in the City of North Bend, Washington (the "City"), created by Ordinance No. 1293, and amended by Ordinance No. 1312, for the purpose of installing a sanitary sewer easterly from 424th Avenue SE, in the vicinity of SE North Bend Way, until its juncture with 468th Avenue SE, was filed with the City Clerk as provided by law; and

WHEREAS, on October 18, 2011, the City Council by Resolution No. 1546 directed that the hearing on the final assessment roll should be conducted before Mr. Wayne Tanaka, acting as Hearing Examiner, pursuant to RCW 35.44.070 and North Bend Municipal Code Chapter 2.20 and that notice should be given as required by law, by both mailing and publication, of the time and place fixed for the hearing in such resolution; and

WHEREAS, notices of the time and place of hearing and for making written objections and protests to proposed assessment on the final assessment roll or deletion of territory was published at the times and in the manner provided by law fixing the time and place of commencement of the hearing thereon for November 10, 2011, at 3:00 p.m., in the Council Chambers, located at 411 Main Avenue South, in North Bend. Washington, and further notice thereof was mailed or caused to be mailed by the City Clerk to the property owners shown on the roll and other interested parties; and

WHEREAS, at the time and place fixed and designated in the notice, the hearing was convened and commenced before the Hearing Examiner, and evidence and testimony were received for the purpose of considering the assessment roll and the special benefits to be received by the single lots, parcels and tracts of land shown upon such roll, including the increase and enhancement of the fair market value of such parcel of land in the ULID by reason of the Improvements: and

WHEREAS, on November 10, 2011, the ULID property owners and/or their legal counsel or representatives completed their presentation of testimony and evidence in regard to their respective objections and protests; and

WHEREAS, said hearing was continued to December 20, 2011 at 3:00 p.m. at which time the City presented rebuttal testimony in response to the objections and protests made; the ULID property owners and or their legal counsel or representatives were afforded the opportunity to question City witnesses; all persons appearing at said hearing were heard; and the hearing was concluded; and

WHEREAS, on January 6, 2012, the Hearing Examiner delivered to the City a detailed written report for the ULID consisting of Findings of Fact, Conclusions, and a Recommendation to the City Council, a true and complete copy of which is attached and made a part hereof marked Exhibit A, true and complete copies of which also are on file with the City Clerk; and

WHEREAS, the City Council (with two members recused) sitting in a quasi-judicial capacity, considered the recommendations of the Hearing Examiner, the entirety of the record before the Hearing Examiner, and the appeals (and other writings) to the Council from the recommendations of the Hearing Examiner; and

WHEREAS, the City Council has been presented with stipulations for settlement of certain of the assessments; and

WHEREAS, the City Council having deliberated on the record on the assessment roll;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF NORTH BEND, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1. **Approval of Hearing Examiner's Findings, Conclusions and Recommendations:** The City Council hereby accepts and adopts the Hearing Examiner's Findings, Conclusions and Recommendations as set forth in Exhibit A attached hereto and made a part hereof, except as set forth below.

1.1 Parcel 222 (Protest No. 33) – Mary L. Rogers Trust. This parcel of property was subject to disputed opinion testimony regarding the development opportunities following the availability of sewer (the property is under current, extensive use as a truck stop). The hearing examiner reduced the assessment by 15%. The parties (the ULID through the City Attorney, and the property owner and leasee through Schwabe, Williamson & Wyatt, PC), have stipulated to a total reduction in the assessment of 30%. The resulting assessment is $396,931 ($567,044 – 30%). This stipulation is accepted and the roll accordingly modified.

1.2 Parcel 61 (Protest No. 32) – McEwan LLC. The parties (the ULID through the City Attorney, and the property owner through Hillis Clark Martin and Peterson, P.S.), have offered a compromise with respect to the assessment on this parcel, reducing the assessment to the total amount of $497,436.64. This offer appears to be unsupported by the record of disputed issues before the Council and is therefore not accepted.

Section 2. **Confirmation of Assessment:** As recommended by the Hearing Examiner in Exhibit A. the parcels of land and other property shown upon the Final Assessment Roll Exhibit C to this ordinance, which is attached hereto and made a part hereof are hereby

determined, found and declared by the City Council, sitting and acting as a Board of Equalization, to be specially benefited by the improvements constructed pursuant to ULID No. 6 in at least the amount charged against the same. There is hereby levied, confirmed and assessed against the parcels of land and other property appearing upon the Final Assessment Roll the amount finally charged against the same being $19,020,359.

Section 3. **Filing of Roll for Collection and Related Matters:**

(a) The Final Assessment Roll as thus approved and confirmed shall be filed with the City finance Manager (as City Treasurer) for collection and the City Finance Manager is authorized to mail and publish notice as required by law stating that the roll is in his/her hands for collection and that payment of any assessment thereon or any portion of such assessment can be made at any time within 30 days from the date of first publication of such notice without penalty, interest or cost. Thereafter, the sum remaining unpaid on each assessment may be paid in 18 equal annual installments of principal, together with interest on the outstanding balance thereof. The estimated assessment interest rate is stated to be 4.5% per annum, with the exact interest rate to be fixed at a rate approximately one half of one percent higher than the interest rate on the bonds, all as set forth in the ordinance authorizing the issuance and sale of the local improvement bonds for the ULID No. 6. The first installment of assessments on the assessment roll shall become due and payable during the 30-day period succeeding the dale one year after the date of first publication by the City Finance Manager of notice that the assessment roll is in his her hands for collection and annually thereafter each succeeding installment shall become due and payable in like manner.

(b) If the whole or any portion of the assessment remains unpaid after the first 30-day period, interest upon the whole unpaid sum shall be charged at the rate as determined above, and each year thereafter one of the installments of principal and interest shall be collected. Any annual installment not paid prior to the expiration of the 30-day period during which such installment is due and payable shall thereupon become delinquent. Each delinquent installment shall be subject, at the time of delinquency, to a charge of 12% penalty levied on both principal and interest due upon that installment, and all delinquent installments plus penalty also shall be charged interest at the rate determined above. The collection of such delinquent installments shall be enforced in the manner provided by law.

Section 4. **Severability:** Should any section, paragraph, sentence, clause or phrase of this ordinance, or its application to any person or circumstance, be declared unconstitutional or otherwise invalid for any reason, or should any portion of this ordinance be pre-empted by state or federal law or regulation, such decision or preemption shall not affect the validity of the remaining portions of this ordinance or its application to other persons or circumstances.

Section 5. **Effective Date:** This ordinance shall be published in the official newspaper of the City, and shall take effect and be in full force five (5) days after the date of publication.

CITY OF NORTH BEND:

Kenneth G. Hearing, Mayor

Published: March 28, 2012

Effective: April 2, 2012

APPROVED AS TO FORM:

P. Stephen DiJulio
Foster Pepper, PLLC, Special Counsel

ATTEST/AUTHENTICATED:

Susie Oppedal, City Clerk

APPENDIX C

DATED MARCH 2008

Lookup Tables

DRAFT

Tanner / Truck Town - Sewer LID

Land Value (Zoning Designation) (1 VALUE)

Zoning	*Before $/sf*	*25%*	*After $/sf*
CR	$5.00		$6.25
EP-1	$4.50		$5.63
EP-2	$4.00		$5.00
IC	$5.00		$6.25
LDR	$5.00		$6.25
NB	$5.00		$6.25
POSPF	$1.00		$1.25

$24,924,900 Total Special Benefits, Combined
$14,011,800 Special Benefits, West
$10,913,100 Special Benefits, East

[redacted] LID Amount West/ East Combined
$5,920,000 LID Amount West
$5,760,000 LID Amount East

46.88% LID Ratio to Special Benefits, Combined
42.25% LID Ratio, West
52.78% LID Ration, East

	Bond Costs Costs from R. Garrow	LID Costs 26%	20%	Totals	%
West	$4,708,918	$1,215,560		$5,924,478	50.7%
East	$4,578,627	$1,181,927		$5,760,554	49.3%
				$11,685,032	

WEST	4,817,047	1,264,124	6,161,171	45.70
EAST	5,211,083	1,562,138	7,321,221	54.30
			13,482,392	100.00

APPENDIX D

EXHIBIT 73

Date 9 NOVEMBER 2011

Lookup Tables

Tanner / Truck Town - Sewer LID

Land Value (Zoning Designation) (LVALUE)

Zoning	*Before $/sf*	*25%*	*After $/sf*
CR	$5.00		$6.25
EP-1	$4.50		$5.63
EP-1/TL	$4.50		$5.63
EP-2	$4.00		$5.00
EP-2/TT	$4.00		$5.00
IC	$5.00		$6.25
IC/TT	$5.00		$6.25
LDR	$5.00		$6.25
NB	$5.00		$6.25
POSPF	$1.00		$1.25

Costs/ Other

$25,813,700 Total Special Benefits, Combine

[redacted] **LID Amount**

74.65% LID Ratio to Special Benefits, C