No. 48025-0-II

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

HAIST, LLC, et. al,

Appellants,

vs.

CITY OF EDGEWOOD,

Respondents.

REPLY BRIEF OF APPELLANTS ERIC DOCKEN, DOCKEN PROPERTIES, LP; ENID AND EDWARD DUNCAN; JAMES AND PATRICIA SCHMIDT; DARLENE MASTERS; AKA THE BRICKHOUSE, LLC; SUELO MARINA, LLC

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I. APPELLANT DOCKEN'S[1] REPLY ANALYSIS IN SUPPORT OF GRANTING LID APPEAL

This is an appeal of Local Improvement District ("LID") assessments. In summary, Edgewood may recoup costs of an LID project only to the extent the LID improvement actually confers special benefit on a parcel. The evidence shows the Docken et al. Appellants' properties collectively **lost** more than $570,000 in property value[2] after the sewer LID. Despite the demonstrated lack of special benefits, Edgewood nonetheless seeks to burden the Appellants' properties with $1,194.665 of purported "special benefit" assessments.

Edgewood's Response on appeal relies on primarily legal arguments which overstate the holding of *Hasit, LLC v. City of Edgewood*, 179 Wn. App. 917, 320 P.3d 163 (2014) as to City's claimed defense of its actions/non actions in this LID appeal on remand. Further, Edgewood fails to respond in any way to most of the parcel-specific issues. For this reason, Appellants rely on all

[1] LID Property owners Enid and Edward Duncan, The Suelo Marina, LLC, Schmidt/Masters, AKA the Brickhouse, LLC, and Eric Docken and Docken Properties LP, (Collectively: "Docken Appellants") through their undersigned attorneys Goodstein Law Group, PLLC.

[2] See Assessor Data at 821-826, 832-833, and 838-841.

issues raised in their Opening Brief; and reply to Edgewood selectively herein.

Significantly, nothing in Edgewood's Response overcomes the conclusion supported by Appellants' convincing, clear, and cogent evidence that the proposed assessments (1) are "unreasonable" and (2) burden the Appellants' properties well beyond any special benefit actually provided by the sewer, and (3) most properties received no special benefit at all. Thus the Court should reduce or eliminate the LID assessments as further described herein.

A. LID Law, When Correctly Applied to Edgewood's Process Requires That This Appeal Be Granted.

1. City Once Again Errs In Applying Burden of Proof at City Council & Appellate Level (Issue 3)[3]

Because LID assessments involve a deprivation of property, affected owners have the right to a hearing as to whether the improvement resulted in special benefits to their properties and whether their assessments are proportionate, which necessarily includes the right to adequate notice of the hearing. *Carlisle v. Columbia Irrigation Dist.*, 168 Wn.2d 555, 569 -70, 229 P.3d 761 (2010).

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[3] 3. When reviewing challenged assessments, is the standard to be applied one of clear cogent and convincing evidence? YES.

The council, serving as a board of equalization, may accept, revise, or reject the assessments in whole or in part. RCW 35.44.070, 080(1)(2).

When considering the assessment roll, the city council sits "as a board of equalization." RCW 35. 44.080(2). As such, the council or hearings officer will consider the objections made and will correct, revise, raise, lower, change, or modify the roll or any part thereof or set aside the roll." RCW 35. 44.080(3). A board of equalization presumes the value used by the county assessor to be correct, unless overcome by clear, cogent and convincing evidence. WAC 458 -14-046(4).

"Since a council or hearings officer considering an assessment roll sits as a board of equalization, these provisions disclose legislative intent that it make de novo determinations while presuming the assessments to be correct, constrained perhaps by the clear, cogent and convincing standard" *Hasit*.

In Round 1 of this LID appeal, this Court in *Hasit* found at the City Hearing Examiner level, Edgewood applied the wrong standard. [4] In this present Round 2, the City once again erred when

[4] The *Hasit* Appeal Court found, "that the heightened presumption of correctness carried by the fundamentally wrong basis and arbitrary and capricious standards contradicts this legislatively mandated role. Further, applying these elevated

applying the burden of proof at the City Council level, again giving the "unwarranted deference to a report prepared under contract by a private appraisal firm", which was found to be error in *Hasit.*

To grant this 2nd round appeal, the Appeal Court need look no further than the City's repeated conclusion throughout their Response Brief that the Property Owners did not "overcome" the LID's recommended assessment (*City Response* at p.11, and that the City's decision was based on the "weight of evidence" (*City Response* at p.13 ("All parties presented evidence, and the Council considered within its judgment the weight of the evidence," and p.41, footnote 11).

A ruling based on the "weight of evidence" does not reflect the legislature's intent, as determined by *Hasit* that the City Council make "de novo determinations".

2. City Failed to Meet Its Burden After Property Owners Presented Evidence Which Defeated "Presumptions" (Issue 4) [5]

Further, the City makes the novel claim that, at the hearing

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standards at the municipal hearing would afford unwarranted deference to a report prepared under contract by a private appraisal firm. For these reasons, the City erred in applying the fundamentally wrong basis and arbitrary and capricious standards in making its decision on the assessment roll."

[5] Issue 4. Once property owners present evidenced on the issue of special benefits and the presumptions in favor of a municipality disappears, did the City meet its burden to introduce competent evidence of benefit when the City presented no rebuttal evidence after property owners' presentation? NO.

before the city council (and presumably also here in on appeal), that "Presumptions and burden shifting are therefore inapplicable in this Appeal". *City Response* at p. 14. This City pronouncement ignores the role that presumptions play in LID case law.

An owner challenging the assessment bears the burden of production, and the court will presume that the action of the city council was legal and proper. *Doolittle v. City of Everett*, 114 Wash.2d 88, 103, 786 P.2d 253 (1990)at 93 (citing *Abbenhaus v. City of Yakima*, 89 Wn.2d 885, 860-861, 576 P.2d 888 (1978) at 860 -61).

Furthermore, a reviewing court must "` presume[] that an improvement is a benefit; that an assessment is no greater than the benefit; that an assessment is equal or ratable to an assessment upon other property similarly situated; and that the assessment is fair. "'*Abbenhaus,* 89 Wn.2d at 861 (quoting *Phillip Trautman, Assessments in Washington,* 40 WASH. L. RE, v. 100, 118 (1965)).

These presumptions, merely "` establish which party has the burden of going forward with evidence, "' and when "` the other party adduces credible evidence to the contrary, "'the burden shifts to the city. *Bellevue Plaza, Inc. v. City of Bellevue*, 121 Wn.2d 397, 403, 851 P.2d 662 (1993) (quoting *In re Indian Trail Trunk Sewer*

Sys., 35 Wn. App. 840, 843, 670 P.2d 675 (1983)**Error! Bookmark not defined.**). **If testimony on the issue of special benefits is produced by the property owner, the presumptions in favor of a municipality disappear**. Id, quoting *Mackowik v. Kansas City, St. J & C.B. R.R. Co.*, 94 S.W. 256, 262 (Mo. 1906).

Here, the Property Owners alleged the assessment on appeal exceeded the special benefit and presented the following evidence, sufficient to overcome the presumptions, yet the City offered NO rebuttal evidence:

- The City's Consultant's own work expressly establishes that many of the Docken Appellants' land uses already constitute the highest and best use, before the sewer installation. See, e.g., City Restricted Report 78. AR. 3177: "Highest and best use...The existing improvements are an example of the site's highest and best use." The City's own conclusion of highest and best use does not support that sewer being available to these properties would increase the value. Thus on the City's own conclusion, the corresponding Special Benefit assessment for these parcels would be minimal or zero. See: AR 3118, 3177, 3298. 3344-5, and 1031-1047 as to Parcels 2, 31, 128, 131, 133, and 140. See also Property Owner's Appraiser in agreement at AR 1024, AR 3177, AR 1040, AR 1041, and Owner's Declarations (unrebutted) at AR 816, 825,817.
- The City's Consultant assesses for development that cannot take place - i.e. assuming full build-out of median strips, setbacks, parking lots, etc. required to be set aside by Edgewood's Municipal Code. City Summary Presentation, AR 217-233.
- The City's Consultant uses of a "test of reasonableness" standard that does not actually exist, is wholly unsupported, cannot be used to supplant the statutory zone-and-termini appraisal method, and will not survive scrutiny. City Restricted Report 247. AR 3211.
- Further, in most cases, the City Consultant's value applied to the

Docken Appellants' Properties exceeds, sometimes vastly, the City Consultant's own "Test of Reasonableness" values. Id.

- The City's Consultant also charges for development within areas that Edgewood staff has previously designated for critical area protection and cannot be developed, due to City regulations. City Restricted Report 15-16. AR 3114-3115.
- The City's Consultant double-counts the alleged value of the assessment as to the Docken properties. The consultant cites to several pending sales of unrelated properties within the LID that have already been assessed. Then, the consultant adds the dollar amount of the LID assessment for the pending property to the pending sale price of the property. The Consultant uses that artificial summation as the value for the Appellants' clients' properties, and then adding again the alleged value of the improvements. This is tantamount to adding the next twenty years' property taxes to a property's value; untenable. City Restricted Report 243. AR 3341. And then, the Consultant charges the property owners even more than his artificially high values.
- The City Consultant calculates a maximum value of the assessment, and then overcharges the Docken Appellants outside the range of the range of possibilities set forth in the City's own materials. City Restricted Report 244-246. 3342-3344.
- City continues to use after the fact, post-sewer improvement zoning changes to use to artificially inflate the LID special benefit amount. City Restricted Report, cover letter 3. AR 3098.
- City Consultant fails to deduct from the assessment the cost needed to realize the special benefits. AR 3196-3791, AR 830. AR 834.

Thus, Appellant Property Owners' quality and type of evidence far exceeded that required by the Courts. For example, evidence ***other that appraisal opinions*** defeat the presumptions and shift the burden to the City to rebut: "With respect to the requirement that the protesting owner must present the evidence, we have explicitly rejected an argument that, because certain protestors " failed to offer expert testimony at the city council

hearing[,] the presumptions [in favor of the assessment] were still operative as to their property." *In re Indian Trail Trunk Sewer*, 35 Wn. App. 840, 843, 670 P.2d 675 (1983).

Instead, *Hasit* held that "On the contrary, in *Indian Trail* we held that "the burden of proving special benefit" shifted to the City because the protestors' parcels stood "in close proximity to the property on which expert testimony was given." 35 Wn. App. at 843 -44. Thus, protestors plainly may benefit from expert evidence which they themselves did not present. "

Further, the *Doolittle* Court sustained the appellant property owners' LID challenge because, even without the appraisal testimony, the protestor' s expert established that the assessment was " clearly grounded upon a fundamentally wrong basis" due to an error in the method employed by the City' s appraiser. *Doolittle*, 114 Wn.2d at 106. A property owner, then, need not necessarily present her own independent appraisal, or before and after values, to successfully challenge an LID assessment. Doolittle required only that some "[v] aluation testimony [be] presented to the Council." 114 Wn.2d at 106.

Here, all property owners presented both appraisal review information and testimony from property owners that in most cases

completely debunked that the LID parcels received any special benefit, in large part because the parcels already achieved their highest and best use without the sewer line. See, e.g., City Restricted Report 78. AR. 3177: "Highest and best use...The existing improvements are an example of the site's highest and best use." The City's own conclusion of highest and best use does not support that sewer being available to these properties would increase the value. Thus on the City's own conclusion, the corresponding Special Benefit assessment for these parcels would be minimal or zero. See: AR 3118, 3177, 3298. 3344-5, and 1031-1047 as to Parcels 2, 31, 128, 131, 133, and 140. See also Property Owner's Appraiser in agreement at AR 1024, AR 3177, AR 1040, AR 1041, and Owner's Declarations (unrebutted) at AR 816, 825,817.

Most other also submitted property owner information as to valuation, and many presented evidence that the city failed to deduct for unusable square footage on the parcels that should not be subject to the special benefits assessment, and or as to the cost of the improvements necessary to enjoy the sewer, all of which should have been deducted from the assessment. AR 842-852 as to Parcel 2, AR 834 as to Parcel 71 & 79, AR 830 as to Parcel 128.

The clear, cogent and convincing evidentiary standard to be applied to the Property Owners' evidence was affirmed in *Hasit* 179 Wash. App. at 949: "Since a council or hearings officer considering an assessment roll sits as a board of - equalization, these provisions disclose legislative intent that it make de novo determinations while presuming the assessments to be correct, constrained perhaps by the clear, cogent and convincing standard." "Any higher evidentiary standard would afford unwanted deference to a report prepared under contract by a private appraisal firm."

"Clear, cogent, and convincing evidence denotes a quantum of proof greater than a mere preponderance of the evidence; it does not require proof beyond a reasonable doubt." *Vermette v. Andersen*, 16 Wn.App. 466, 469 n. 2, 558 P.2d 258 (Div. 2, 1976), *citing Bland v. Mentor*, 63 Wn.2d 150, 385 P.2d 727 (1963).

Edgewood incorrectly dismisses Petitioner's self-imposed "clear, cogent, and convincing' burden of proof" which is error. No wonder the City Council erred if they were incorrectly advised on the evidence standard to be used when determining the assessment.

The Property Owners' level of evidence here is more than sufficient to overcome the presumptions, yet the City offered NO rebuttal evidence at the close of the Property Owners'

presentations. *TR of City Sept. 17 Council Meeting*. AR 609-777. Thus, when the "'the burden shifted to the city, it failed completely to meet that burden. The assessments thus are arbitrary and capricious and cannot be sustained. Where a protesting owner alleges her assessment exceeds the special benefit and presents sufficient evidence to overcome the presumptions, but the city confirms the assessment roll regardless, a court will reduce or annul the assessment as arbitrary and capricious unless the city presented sufficient competent evidence to the contrary. *Bellevue Plaza,* 121 Wn.2d at 403 -04.

Here the Appellants presented clear, cogent and convincing evidence from the Petitioner's Appraiser that disputed that the Appellants' properties received any special benefit. The presumption of benefit disappears at that point, and the burden then shifted back to Edgewood to establish special benefits. Edgewood has not met its burden to show any special benefits provided to each Parcel/Petitioner.

Instead, Edgewood Council reached its pre-ordained conclusion on the amount of the Appellants' LID assessments *by ignoring* Appellants' unrebutted, presentation of clear, cogent and convincing evidence of improper assessments.

3. City Is Wrong; *Hasit* "Law of the Case" Does Not Insulate the City's Errors in the Parcel Specific Assessments.

Edgewood apparently believes that the presumptions which apply to every other LID appellate review case do not apply here based on two closely related but flawed arguments: (1) that "the City based its finding of special benefit on the Macaulay appraisal and not on any legal presumption of benefit" and (2) that the *Hasit* "law of the case"' forecloses any disagreement with McCauley's determinations. *City Response* at 14, quoting the City Council: "The Board concludes that the reassessments **based on the Macaulay Study** were determined in accordance with the Court of Appeals' standards as set forth in *Hasit*".

First, the City is wrong that presumptions don't apply here. The City seems to be arguing that when a finding of special benefit is based on the "facts" contained in the McCauley Report, that "legal" presumptions do not apply. But, the issue of special benefits is ***always*** based on facts: Whether a property received a special benefit and the amount of the benefit ordinarily present questions of fact. *Bellevue Assoc.*, 108 Wn.2d at 676 -77 (citing *In re Jones*, 52 Wn.2d 143, 146, 324 P.2d 259 (1958)).

In all cases, the agency (here City) presents its facts as to

whether and the amount of special benefits accrue to each parcel and the property owners have opportunity to present their own evidence, which then shift the burden back to the City to justify the special benefit – ***without the benefit of any presumptions***. Here the City closed its case without any rebuttal at all to the Property Owner's assertion, thus failing to meet its burden as to special assessments.

Second, the City argues wrongly that the *Hasit* law of the case forecloses any future questioning of McCauley's actual assessments. Repeatedly, the City argues that *Hasit* approved of the McCauley "methodology", (*City Response* at pgs.9, 27, 28, 36, 42), and at one point, the City overstretches its claim to even state that "In *Hasit*, this Court affirmed the City's special assessment methodology and the Macaulay appraisal", at 36).

The City incorrectly translates acceptance of a methodology to mean we all must blindly accept the *application of* the methodology to each parcel specific assessment. *Hasit* says no such thing. At most Hasit allows the use of a mass appraisal methodology in lieu of the statutes zone and termini method.[6]

Carried to its conclusion, the City's assertion would mean, that

[6] "We hold: ....that the City showed that the mass appraisal method more fairly reflected special benefits than would the zone and termini method". *Hasit.*

on remand, property owners could not contest the application or results of any McCauley assessment as long as a mass appraisal approach was used. This is an absurd result, which this Court should avoid. Courts will not apply the law of the case doctrine is doing so results in manifest injustice. *State v. Harrison*, 148 Wn.2d 550, 562, 61 P.3d 1104, 1110 (2003); *citing* 5 AM. JUR. 2d Appellate Review § 605 (1995) at 563. *Accord Greene v. Rothschild*, 68 Wn.2d 1, 8, 414 P.2d 1013 (1966) ("And in fact it is the increasingly accepted view that the doctrine of 'law of the case' is a discretionary rule, which should not be applied where it would result in manifest injustice.")

Edgewood simply misconstrues the substance of *Hasit*, overstating it as somehow absolving it of all errors in this second round of LID assessments. *Hasit* does not go so far. *Hasit* considered the issue of whether Edgewood Consultant Macaulay and Associate's choice to depart from the statutory appraisal method (zone and termini) had been found more fair by Edgewood Council, as prerequisite to using that appraisal method. 179 Wn.App. 943-944, *analyzing* RCW 35.44.047[7]. All that this

[7] Other methods of computing assessments may be used. Notwithstanding the methods of assessment provided in RCW 35.44.030, RCW 35.44.040 and RCW 35.44.045, Edgewood or town may use any other method or

Appeals Court said regarding Edgewood Consultant's methodology is that the Council, as a matter of parliamentary procedure, met the prerequisite to depart from the zone and termini method. ("A City need only show "slight evidence," if any, to meet this requirement. *Hansen v. Local Improvement Dist. No. 335,* 54 Wash.App. 257, 261–62, 773 P.2d 436 (1989). The record contains sufficient evidence to do so." *Hasit,* 179 Wash. App. at 943-44. Emphasis original. This does not render assessments bullet proof to all the other flaws raised by Appellants.

Third, on remand, the City employed McCauley to re-assess each parcel. If, as the City claims, the Hasit ruling means that not only the methodology, but also resulting assessment cannot be challenged, why did the City re-assess each parcel? And what was the purpose of the remand?

Last, Edgewood admitted that its 2011 assessments were not "right". TR September 17, 2014 hearing 161:14-18 ("Edgewood went further than that, however and the LID did specific further analysis to be sure it got it right".) Edgewood's current actions are subject to

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combination of methods to compute assessments which may be deemed to more fairly reflect the special benefits to the properties being assessed. The failure of the council to specifically recite in its ordinance ordering the improvement and creating the local improvement district that it will not use the zone and termini method of assessment shall not invalidate the use of any other method or methods of assessment.

the same judicial review now, as in 2011. This case is not a run-on of the litigation that culminated in *Hasit*. *Hasit* did not hold, nor does Edgewood itself believe, that the 2011 assessments were right. *Hasit* merely stands for the proposition that, as a matter of parliamentary procedure, Edgewood Council made the prerequisite showing required to use a particular assessment method at issue in the 2011 case. How that assessment method was in fact applied to each parcel remains subject to scrutiny. Because Appellants clear, cogent, and convincing evidence that Edgewood did not overcome, the assessments are invalid.

4. The record supports that the City assessments were founded on a fundamentally wrong basis and or that the decision of the City Council was arbitrary and capricious. (Issue 2)[8]

Within a local improvement or related district, local governments may impose special assessments on property owners to pay for certain improvements that specially benefit those properties. *Covell v. City of Seattle,* 127 Wn.2d 874, 889, 905 P.2d 324 (1995)."

Special benefit" is " the increase in fair market value attributable to the local improvements." *Doolittle v. City of Everett*, 114 Wn.2d

[8] Issue 2. Does the record support that the City assessments were founded on a fundamentally wrong basis and or that the decision of the City Council was arbitrary and capricious? YES

88, 103, 786 P.2d 253 (1990).

To be subject to an LID assessment, a property must realize a benefit that is actual, physical and material[,] not merely-speculative or conjectural," and that is substantially more intense than [the benefit] to the rest of the municipality." *Heavens*, 66 Wn.2d at 563.

Consistently with this rule, a special assessment may not substantially exceed a property's special benefit. *In re Local Improvement No. 6097*, 52 Wn.2d 330, 333, 324 P.2d 1078 (1958).

Furthermore, a property should not bear " proportionately more than its share" of the total assessment relative to other parcels in the LID. *Cammack v. Port Angeles,* 15 Wn. App. 188, 196, 548 P.2d 571 (1976) (citing *Sterling Realty Co. v. Bellevue*, 68 Wn.2d 760, 415 P.2d 627 (1966)).

An assessment is founded on a fundamentally wrong basis where the method of assessment or the procedures used by the city involve "` some error .... the nature of which is so fundamental as to necessitate a nullification of the entire LID, as opposed to a modification of the assessment as to particular property. "' See *Abbenhaus v. City of Yakima,* 89 Wn.2d 855, 859, 576 P.2d 888 (1978). Even if a challenger establishes such a fundamental error,

however, " the court is limited to nullification or modification only of those parcel assessments before it." *Abbenhaus*, 89 Wn.2d at 859.

Here, the Property Owners established the following errors in the City assessments, which the City then failed to rebut.

a. The City assessments are flawed because the assessments were imposed on properties already at their highest and best use, and thus received no special benefit from the improvement.

Edgewood failed to take into account or refute Appellants' evidence that numerous parcels assessed are already at highest and best use. This means the corresponding special benefit (and assessment) would be zero. The Docken Appellants' expert appraiser confirms this:

> Based on Edgewood Report's conclusion **that the existing use of the property is the Highest and Best Use of the property both *without the LID* and *with the LID*,** although there may be "potential" for expansion, then the existing use represents the highest and best use. Based on the conclusions in Edgewood's Report, **the availability of sewer would not add significantly to the overall value of the property. In that case, the corresponding Special Benefit assessment would be minimal or zero.**

See *Heischman Report*. AR 1034-1035. Special benefit is defined: "Special benefit" is "the increase in fair market value attributable to the local improvements." *Doolittle v. City of Everett*, 114 Wn.2d 88, 103, 786 P.2d 253 (1990).

Even Edgewood's own consultant concedes no benefit – by expressly finding that several Petitioner Parcels are have already achieved their "with LID" highest and best use, without the sewer. *Restricted Report* AR 3167 (Suelo Marino Parcel 31 at highest and best use is commercial, matching present use); *Restricted Report* 18 AR 3118 (Duncan Parcel 2 at highest and best use); *Restricted Report* 199 AR (Highest and best use as improved with LID "existing use").

Appellants' Opening Brief presents numerous examples of the lack of special benefit due to highest and best use, that Edgewood in response completely fails to rebut:

- The **Duncan** property #2 is designated Business Park (BP). The BP zone incorporates an employment and commercial uses, such as light industrial, office and retail uses. Here, the Duncans operate an asphalt, bark and topsoil business. This use is consistent with light industrial BP use. Edgewood's 2014 Valuation confirms that the highest and best use is the "existing use with added expansion/redevelopment potential." Based on Edgewood's own conclusions as to highest and best use and as further reinforced by the property owners' appraiser, **Parcel 2** has no special benefit at all is derived from the sewer.
- The **Suelo Marina, LLC** property, **Parcel 31** has already attained its highest and best use without the sewer. The Suelo Marina property is zoned commercial. The commercial zoning allows for employment, services, and retail. *Edgewood Valuation Report* 68. Here, without connecting to the sewer, the property owner has repurposed an existing building for commercial, highest and best uses of a barber shop and

automobile shop on the property. The sewer did not provide any additional benefit to the property.

- The **AKA the Brickhouse, LLC, Parcel 128**, property has been fully developed to its highest and best use per Edgewood Consultant. This property contains a modern medical office and attendant parking lot. *See Edgewood Valuation Report* 189 (Image). Accordingly, the Parcel 128 Brickhouse, LLC has zero special benefit, and no assessment is supported. This property is already completely developed for its highest and best use: "Highest and Best Use (with the LID)...existing use." *Edgewood Valuation Report* 199.

Properties that have already attained highest and best use have not realized any actual, physical, and material special benefit from the LID sewer and thus should have no assessment.

Hasit is in accord:

> **An assessment against property which does not receive a special benefit from the improvement constitutes a "depriv[ation] of property without due process of law."** Heavens, 66 Wash.2d at 564, 404 P.2d 453. **To be subject to an LID assessment, a property must realize a benefit that is "actual, physical and material[,] ... not merely speculative or conjectural," and that is "substantially more intense than [the benefit] to the rest of the municipality."** Heavens, 66 Wash.2d at 563, 404 P.2d 453. Consistently with this rule, **a special assessment may not substantially exceed a property's special benefit**. *In re Local Improvement No. 6097*, 52 Wash.2d 330, 333, 324 P.2d 1078 (1958). Furthermore, a property should not bear "proportionately more than its share" of the total assessment relative to other parcels in the LID. *Cammack v. Port Angeles*, 15 Wash.App. 188, 196, 548 P.2d 571 (1976) (citing *Sterling Realty Co. v. Bellevue*, 68 Wash.2d 760, 415 P.2d 627 (1966)).

Hasit, accord 179 Wn.App. at 933. Therefore, Edgewood's assessments of parcels already at the highest and best use deprive the property owners of improperly shift LID costs without conferring any special benefit and must be invalidated.

After Appellants presented their evidence of highest and best use, the burden shifted to Edgewood to rebut. The presumption of valuation disappeared. Edgewood needed to affirmatively show the Council evidence that the Docken Appellants' properties were in fact somehow specially benefitted by the Improvement. Edgewood failed to make that required showing. Even Edgewood's own Consultant conceded that the pre-LID existing uses match the "after LID" highest and best use. Therefore, clear, cogent, convincing evidence supports only on conclusion: there is no special benefit to most of the Appellants' properties and their assessment should be zero.

b. The City assessments are flawed because the amount of assessments imposed exceeds the actual special benefits which each property received as a result of the public improvement.

Appellants presented evidence that **Docken Parcels 131, 133 and 140** already are enjoying full market rent. *Dec'l Docken* AR 816-825 & *Heischman Report* AR 1031-1047. As a result, there is no special benefit. Despite this clear, cogent and convincing

evidence, Edgewood imposed assessments for purported special benefit that simply are not there.

The Supreme Court recognizes that the value of commercial properties is driven by the rent, and not what the raw land might be sold for. "Nevertheless, we believe that, in valuing property subject to a long-term lease, **contract rent should be presumed the proper base figure for valuation** in the absence of clear, convincing evidence that market rent exceeds contract rent." *Folsom v. Spokane Cnty.*, 106 Wn. 2d 760, 769, 725 P.2d 987 (1986).

If the parcel already achieves market rent then no special benefits accrue and the assessment must be zero. The Docken Appellants' appraiser, Donald Heischman, MAI, principle of Strickland, Heischman and Hoss, Inc. agrees:

> Again, as market participants are primarily concerned with the return on their investment, or the net operating income they can receive from a property, assuming that the existing septic system was in good working condition, Edgewood's conclusion does not support sewer being available to the property would increase the value of Parcel 131 from the *without LID* scenario**. Based on Edgewood's conclusion, the corresponding Special Benefit assessment for Parcel 131 would be minimal or zero.**

See *Heischman Report*. AR 1041. The assessments for Parcels 131, 133, and 140 should be reduced to zero as a result.

d. The City assessments are flawed because assessments were not reduced to not apply to portions of site that cannot be developed under City's code.

Appellants Duncan Parcel 2 and **Schmidt/Masters Parcels 71 & 79** both presented evidence that Edgewood has indiscriminately applied special benefit to 100 percent of each affected parcel. But, not 100% of the parcels can be build out.

Most of the Duncan parcel contains a marsh or a steep hill that Edgewood designated for critical area protection. *Dec'l Duncan.* AR 842-852. A third of the Schmidt/Masters parcel contains a wetland. *Dec'l Masters.* AR 834. No special benefit accrues to these areas because they support no development that benefits from the sewer. The Assessments for these parcels must be reduced proportionate to these critical area square footages.

e. The City assessments are flawed when the cost of modification to particular parcels needed to enjoy the sewer improvement were not deducted as set off from the special assessment value.

An additional assessment reduction that the Appellants are entitled to are based upon the law that modifications to particular parcels which are necessary to enjoy the LID improvements are to be deducted as a set off from the special assessment value. *Kusky v. Edgewood of Goldendale,* 85 Wn.App. 493, 499, 933 P.2d 430 (Div. 3, 1997). Based upon Edgewood's own linear foot cost for sewer

line, Parcels 71 and 79 need at least a $77,650 investment to benefit from the proposed improvement, AR 3196-3791, and thus the special benefit for the Parcel 71 and 79 should (at the very least) be reduced by a corresponding amount. $124,381-77,650-= $46,731. The Schmidt/Masters Parcels 71 & 79 have been further burdened by Edgewood's choice to locate a sewer connection in front of existing improvements will mandate even more work.

AKA the Brickhouse, Parcel 128, Member Dr. Acosta also researched the hook-up cost for his property. *Dec'l* AR 830. The cost of $22,000 exceeds Edgewood's assigned "special benefit" of $21,270. *Id.* AKA the Brickhouse's "special benefit" is a net loss.[9] No assessment is proper.

The City poo-poos the requirement on the City to deduct from the special benefits assessment an amount equal to the costs of the modifications need to enjoy those benefits. The City claims: "Whether Appellants decide to construct improvements to their own property is within their discretion." *City Response* at 29-30. Yet, the Edgewood Municipal Code mandates that LID property owners hook up to the sewer. EMC 11.20.040(D)(2): "***Property within an LID.*** Buildings on property within a local improvement

[9] Further, AKA the Brickhouse's property has also lost $121,000 in value since the sewer was installed in 2011.

district are required to be connected to the city's sewer system and the property owner shall be required to pay all charges associated with such connection."

Edgewood, in the LID construction, misplaced its sewer connection locations resulting in extra costs to connect parcels to the sewer line. AR 834. Edgewood then failed to take into account the resulting staggering costs to each parcel involved in hooking up to that sewer. AR 834 and 830. The assessments must be reduced accordingly.

f. The City assessments fail for being arbitrary and capricious where assessments simply distributes improvement costs and does not take into account the actual special benefit conferred in each parcel.

The evidence establishes that Edgewood has simply distributed the LID costs to Appellants' appeal parcels without regard to any special benefit actually received. This tactic is "fundamentally wrong basis and is wholly indefensible". *Hasit LLC v. Edgewood of Edgewood (Local Improvement Dist. #1)*, 179 Wn.App. 917, 938, 320 P.3d 163 (Div. 2, 2014); *citing In re Shilshole Ave.*, 85 Wn. 522, 536, 148 P. 781 (1915).

Rather than calculating each parcel's actual special benefits, Edgewood simply divided the costs of the sewer project by the number of LID properties to arbitrarily apply a percent hypothetical

increase in value due to the sewer improvement. The Washington Supreme Court has established that a LID assessment will fail for being arbitrary and capricious if it simply distributes cost, and does not take into account the actual benefit conferred upon each property. *Bellevue Plaza*, 85 Wn.2d at 415, *Abbenhaus v. City of Yakima*, 89 Wn.2d 885, 860-861, 576 P.2d 888 (1978).

In its Response, Edgewood argues as Division II held, "Edgewood [of Edgewood] did not err in assessing the entire cost of the improvements against the LID property owners...." *Edgewood Br., citing Hasit*, 179 Wn. App. at 960. Here, Edgewood's error came when it distributed these costs in complete disregard to the actual special benefit.

g. The City Assessments are flawed when based on unsubstantiated "Test of Reasonableness" when the assessment applied exceeds the range of special benefit which the "Test" supposedly supports.

Edgewood Consultant's own work product demonstrates Appellants' assessments are "unreasonable". This line of analysis is simple. The Edgewood Consultant included a "Test of Reasonableness" by which Edgewood Consultant claims to support his Special Benefit values for most parcels. See Edgewood Report page 55:

Test of Reasonableness

> .... Commercial land in nearby market areas where large infrastructure projects have been completed in recent years, such as Kent, have reflected $1.00/SF to $2.75/SF or more in value increases for mitigation costs that allow development of affected sites to their highest and best use. These costs are commonly included in the market's purchase decision as they provide needed infrastructure (roads/utilities) for site development.

See AR 3183. Essentially the City Consultant intended that an increased sewer value in Kent ranged between $1-2.275 a square foot, therefore, so as long as the special benefit in Edgewood was within this range, it is afiora "reasonable". [Applying "test of reasonableness" to Suelo Marina, LLC, Parcel #31], AR 3124 [Duncan, Parcel #2], AR 3183 AR 3211 [Masters & Schmidt, Parcel # 71 & 79], AR 3305 [AKA the Brickhouse, 128], AR 3305 [Docken, Parcel #131, 133, & 140]. Yet, Edgewood fails its own "test of reasonableness" by assigning Parcel 31 Suelo Marina, increased value of $4.02 per square foot, well outside this "range of reasonableness". AR 3179-3182 [Suelo Marina Restricted Report]. Therefore, $4.02 per square foot in value increase for **Parcel 31** is neither supported by Edgewood nor an appropriate number to apply as the special benefit multiplier. Similarly, Edgewood valued Duncan, Masters & Schmidt, AKA the Brickhouse and Docken properties all outside the "test of reasonableness range" are foisted with "unreasonable" assessments.

Edgewood now argues "The Macaulay parcel-specific appraisals merely used the test to confirm values derived from the already valid assessment methodology." *City Response* at page 27. The problem is, the City's assessment fails to support its own test, fails to confirm the values, and fails to meet its own test. In fact, Edgewood proposes to charge more money to these Appellants than would be acceptable in the "superior" market of Kent, without any supporting evidence for this deviation.

Rather than rebut Appellants' clear, cogent, and convincing evidence that the assessment were invalid, Edgewood's own consultant further establishes that Edgewood's assessments are not reasonable.

h. The City assessments are flawed when based on presumed benefit to land that is not actual, physical or material, but instead is merely speculative and conjectural, in that they are based on possible, future integrated use of separate parcels of land and were not valued as existing, single tracts of land.

The **Docken LP properties Parcels 133 & 140** do not benefit from the new sewer, at all. If the purported LID assessments were applied, the net rent to the property owners is far lower than is realized now, due to the costs of Edgewood's proposed assessment. In addition, Edgewood erred by not valuing each parcel separately.

Docken's **Parcel No. 133** contains a house used as an office. AR 3333. Parcel 133 is zoned MUR, which provides for a mix of residential and office uses. *Id.* Viewed by itself, as it must be, Parcel 133 should not have any assessment, since it is already fully developed and being used consistent with its zoning.

Docken's **Parcel 140** is a 1/3 acre vacant lot zoned MUR. AR 3333. Parcel 140 is level land is used for storage, no service is needed or desired since the highest income and use for this lot has no use of sewer. *See Declaration of Docken.* AR 816-820. Thus, any cost from LID or monthly charges is a property **devaluation,** not an increase in value.

Despite the City's protests, these facts are precisely analogous to Edgewood's summary of *Doolittle v. City of Everett,* 114 Wn.2d 88, 786 P.2d 253 (1990), where the Supreme Court of Washington required separate valuation:

> There, the property owner held four contiguous lots, three having a unitary commercial use (single commercial building) and the fourth having a separate commercial use. *Doolittle,* 114 Wn.2d at 91. The Court in Doolittle held that the fourth parcel must therefore be valued separately, but that the three unitary parcels were properly appraised together. Doolittle, 114 Wn.2d at 103-104.

Edgewood Br. 18. Here, Docken has three continuous lots. Two of the lots have commercial buildings. The third lot has a separate commercial use of storage. The third lot must be valued separately.

Similarly, in *Bellevue Plaza,* 121 Wn.2d at 411 -12, the Washington Supreme Court invalidated an assessment based on various assumptions, **including that the improvement would lead to properties joining into " superblocks**," without regard to present use and that the improvement would allow owners to comply with a traffic ordinance which had not yet been implemented. The Court specified that special benefits are limited to "the increase in the fair market value of a particular property caused by the improvements," which "cannot include a speculative value." *Bellevue Plaza*, 121 Wn.2d at 411.

Instead, here, the Edgewood Consultant suggests: "Highest and best use of Map Nos. 133 and 140, "as vacant", is as a larger parcel entity for investment hold for future commercial or mixed use commercial/multifamily development. *Edgewood Restricted Report* 236. AR 3334. This method of "valuation" must be discarded and ignored, per the Supreme Court of Washington's decision in *Doolittle* and *Bellevue Plaza.*

Edgewood's Response Brief offers only pure conjecture and

speculation about the current uses of Docken's property: "Here, Parcel Nos. 133 and 140 were purchased together in 2004, are surrounded by a common chain link fence, and are used together (office, parking, and storage). AR at 3325-26, 3329. *City Response* at 33. The Court is encouraged to read the actual record and discard Edgewood's unsupported editorial. AR 3325 is an aerial, satellite, photograph that does not demonstrate land uses, nor any fence. AR 3326 is the same photograph. AR 3329 reportedly contains one photograph taken from the street that shows a fence surrounding some cars and also reportedly shows a photograph of parcel 130, which is unrelated to this illegal assessment technique Edgewood illegally, valued Parcels 133 and 140 as one. Edgewood completely lacks evidence that the use of theses parcels are unitary, that Parcel 133 is fenced together with Parcel 140, and that fenced-in storage of automobiles on Parcel 140 has anything to do with the commercial office on Parcel 133. Instead, the property owner Docken's Declaration must trump: "Parcel 140 contains a storage lot that is rented out." AR 816.

The Court should discard Edgewood's unsupported claims, and instead adopt Docken's Declaration confirming the separate uses of Docken's own property. Separate valuations therefore should have

been made.

5. The City deprived appellants of property without due process of law when City imposed assessments against properties which did not receive a special benefit from the improvements. (Issue 1) [10]

An assessment against property which does not receive a special benefit from the improvement constitutes a " depriv[ation] of property without due process of law." *Heavens*, 66 Wn.2d at 564.

"` Only that portion of the cost of the local improvement which is of special benefit to the property can be levied against the property.'" *Bellevue Assoc.,* 108 Wn.2d at 676 (*quoting In re Schmitz*, 44 Wn.2d 429, 433, 268 P.2d 436 (1954)). See also*: In re Shilshole Ave.*, 85 Wash. 522, 525, 148 P. 781 (1915).

The *Shilshole* Court emphasized that "the basic principle and the very life of the doctrine of special assessments [is] that there can be no special assessment to pay for a thing which has conferred no special benefit upon the property assessed." *Shilshole Ave.*, 85 Wash. at 537.

The Property Owners presented clear cogent evidence that most if not all parcels either received no special benefit or the special benefit assessment was grossly over-valued. See **Attachment 1,**

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[10] Issue 1. Did the City deprive appellants of property without due process of law when City imposed assessments against properties which did not receive a special benefit from the improvements? YES.

presented to the Superior Court which summarizes the Property Owner's evidence of City error. Thus the City's assessments constitute a deprivation of property without due process of law.

II. CONCLUSION

Edgewood Consultant's current "special benefits" are remain bit as unrealistic as what the Docken Appellants were assessed in 2011.

Edgewood Consultant now recommends the Appellants collectively *pay* $1,194,665 in assessments, despite having actually lost more than $500,000 in property value between 2011 and 2014. *Assessment Role.* AR 12-13. The Appellants unrebutted evidence in the record establish Edgewood has again overreached in assigning special benefits.

- Edgewood's Consultant's own work expressly establishes that many of the Docken Appellants' land uses already constitute the highest and best use, **before** the sewer installation. *See, e.g., Edgewood Restricted Report* 78. AR. 3177: "Highest and best use...The existing improvements are an example of the site's highest and best use." Edgewood's own conclusion of highest and best use does not support that sewer being available to these properties would increase the value.
- Thus on Edgewood's own conclusion, the corresponding Special Benefit assessment for these parcels would be minimal or zero.
- Edgewood's Consultant charges for development that cannot take place - i.e. assuming full build-out of median strips, setbacks, parking lots, etc. required to

be set aside by Edgewood's Municipal Code. *Edgewood Summary Presentation*, AR 217-233.

- Edgewood's Consultant makes use of a "test of reasonableness" standard that does not actually exist, is wholly unsupported, cannot be used to supplant the statutory zone-and-termini appraisal method, and will not survive scrutiny. *Edgewood Restricted Report* 247. AR 3211.
- Further, in most cases, Edgewood Consultant's value applied to the Docken Petitioner Properties exceeds, sometimes vastly, Edgewood Consultant's own "Test of Reasonableness" values. *Id.*
- Edgewood's Consultant also charges for development within areas that Edgewood staff has previously designated for critical area protection and cannot be developed, due to Edgewood regulations. *Edgewood Restricted Report* 15-16. AR 3114-3115.
- Edgewood's Consultant double-counts the alleged value of the assessment as to the Docken Appellants' properties. The consultant cites to several pending sales of unrelated properties within the LID that have already been assessed. Then, the consultant adds the dollar amount of the LID assessment for the pending property to the pending sale price of the property. The Consultant uses that artificial summation as the value for the Appellants' clients' properties, and then adding *again* the alleged value of the improvements. This is tantamount to adding the next twenty years' property taxes to a property's value; untenable. *Edgewood Restricted Report* 243. AR 3341. And then, the Consultant charges the property owners *even more* than the his artificially high values.
- Edgewood Consultant calculates a maximum value of the assessment, and then overcharges the Docken Appellants outside the range of the range of possibilities set forth in Edgewood's own materials. *Edgewood Restricted Report* 244-246. 3342-3344.
- Edgewood continues to use after the fact, post-sewer improvement zoning changes to use to artificially inflate the LID special benefit amount. *Edgewood Restricted Report*, cover letter 3. AR 3098.

The combined effect of these errors and miscalculations means that Edgewood's valuation study must be disregarded. Edgewood did not overcome, nor seriously attempt to overcome, the testimony of the property owner's expert who testified as to the lack of special benefits and errors and critical omissions of Edgewood Consultant. Edgewood instead disregarded the property owner's protests without rebuttal evidence or explanation. The proposed adoption of the assessment ordinance is without factual and legal basis, and therefore arbitrary and capricious. The assessments are assigned and distributed in a fundamentally wrong manner.

Statute empowers this Court to "correct, change, modify, or annul the assessment insofar as it affects the property of the appellant". RCW 35.44.250. For all of the above reasons, the Appellants request that in lieu of remand, this Court should adjust the assessments as requested in Appellants' Opening Brief.

Respectfully submitted this 1st day of April, 2016.

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Docken et al. v. City of Edgewood
Case No. 14-2-13566-7

	Duncan	Suelo	Schmidt	Brickhouse	Docken		
	#2	#31	#71 & 97	#128	#131	133	140
2011 Co. Tax Assessment	1,072,900.00	663,800.00	946,900.00	591,800.00	1,533,900.00		
2014 Co. Tax Assessment	842,500.00	627,000.00	877,500.00	470,700.00	1,420,300.00		
Loss Since Sewer	(230,400.00)	(36,000.00)	(69,400.00)	(121,100.00)	(113,600.00)		
City 2014 Assessment	**212,700.00**	**322,595.00**	**428,945.00**	**28,360.00**	**202,065.00**		
City Consultant's (CC) Test of Reasonableness: $1.00-2.75 sq. ft. in Kent	$1.49 AR 3123-4	**$4.02 Exceeds Test Range** AR 3182-3	**$3.75 Exceeds Test Range** AR 3211	$1.27 AR 3305	 AR 3345	**$2.98 Exceeds Test Range**	**$3.18 Exceeds Test Range**
Kent is "Superior Market" per CC @ AR 3182	**Not in Kent**	**Not in Kent**	**Not in Kent**	**Not in Kent**	**Not in Kent**		
Highest & Best Use (HBU)= No Special Request ***(Doolittle)***	**Yes, HBU** Contractor Yard in Business Park Zone, **CC concedes at AR 3118, P/O appraiser HR confirms at AR 1034**	**Yes, HBU** Barber & Auto Sale, Comm. Zone, **CC concedes at AR 3177**		**Yes, HBU** Medical Office Bldg., **CC concedes at 3298 "existing use" HR confirms @ AR 1040**	**Yes, HBU CC concedes at AR 3334-5, HR@ AR 1041, Owner Dec at AR 816 AR 825**	**Yes, HBU** Office MUR zone, Owner Dec at AR 819 **NO CITY REBUTTAL**	**Yes, HBU** Storage Lot, MUR, AR1031-1047 Owner Dec at AR 817 **NO CITY REBUTTAL**

ATTACHMENT 1

	Duncan	Suelo	Schmidt	Brickhouse	Docken		
	#2	#31	#71 & 97	#128	#131	133	140
Contract Rent= Market Value City Burden to Prove Otherwise ***(Folsom***				**CC concedes: Rent won't change either w or w/o sewer. AR 3311 HR confirms at 1040**	**CC concedes: Rent won't change either w or w/o sewer. AR 3353 Owner Dec at AR 817**		
Failed to Deduct for No Build Area	**Over 2/3 Site is Marshes, Steep Hill = Non Buildable** AR 842-852, City Deducted 1/3		**1/3 Site is Wetland= Non Buildable** AR 834				
Failed to Reduce by Cost to Install ***(Kusky)***			**$(-77,650)** Deduct based on cost to install AR 834	**$(-22,000)** Deduct based on cost to install Dec of Owner AR 830			
Must Be Valued Separately ***(Doolittle)***			**Improperly Valued Together**		**Improperly Valued Together** Owner Dec at AR 819		

	Duncan	Suelo	Schmidt	Brickhouse	Docken		
	#2	#31	#71 & 97	#128	#131	133	140
Exceeds Proportionality (*Cammack, Kusky & Sterling Reality*)		**HR compares City treatment of 31 to Parcel 72/3 &74- if value w/o sewer is correct. Then city value w/sewer is above market = SP too high** AR at 1035	**HR compares City treatment of 71/79 to Parcel 115- city's lower "before" value = SB too high.** AR at 1038			**HR shows Docken properties are valued too low w/o sewer as compared to #128, this makes difference in value (SP) w/sewer too high** AR at 1041 (applies to all Docken)	
Double Counting		AR 3179-3182			AR 3341	AR 3341	AR 3341
Actual Assessment Supported by Clear, Cogent, Convincing Evidence (*Hasit*)	**Zero since H/B/U**	**Zero since H/B/U**	2/3 acreage= $285,963 x .70= 200,174 -77,265 (cost improve.)= **$122,524**	**Zero since H/B/U**	**Zero since H/B/U**	**Zero since H/B/U**	**Zero since H/B/U**
Alternative assessment	Or 9.12 acres less 6.48 critical areas= 2.64 usable acres= 2.64 usable acres x $1.49 = **$125,793.00**	Or $1.00 (test of reasonableness) x 113,380 sq. ft.=$113,308 x .70= **$79,315**	Or 2/3 of 175,432 sf=116,954 x 2.50= $292,386 x .70= $204,670 less cost to install $77,650 = **$127,020**	Or 28,360 less cost to install (22,000)=**$6,360.00**			

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ENID DUNCAN, et al.,

Appellants,

v.

CITY OF EDGEWOOD, (Local Improvement District #1)

Respondent.

No. 48025-0-II

DECLARATION OF SERVICE

The undersigned declares that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. I caused this Declaration and Courtesy Copies of the following documents:

1. APPELLANTS ERIC DOCKEN ET AL'S. MOTION TO FILE OVERLENGTH REPLY BRIEF
2. REPLY BRIEF OF APPELLANTS ERIC DOCKEN, DOCKEN PROPERTIES, LP; ENID AND EDWARD DUNCAN; JAMES AND PATRICIA SCHMIDT; DARLENE MASTERS; AKA THE BRICKHOUSE, LLC; SUELO MARINA, LLC

to be served on April 1, 2016 on the following parties and in the manner indicated below:

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

Dated this 1st day of April 2016 at Tacoma, Washington.

Carolyn A. Lake