NO. 48028-0-II

DIVISION II COURT OF APPEALS
OF THE STATE OF WASHINGTON

93889-0

ENID DUNCAN, et al.,
Petitioners

v.

CITY OF EDGEWOOD, (Local Improvement District #1)
Respondents

PETITION FOR REVIEW BY THE SUPREME COURT

Carolyn A. Lake, WSBA #13980
Seth Goodstein WSBA#
Goodstein Law Group PLLC
501 South G Street
Tacoma, WA 98405
(253) 779-4000
Attorney for Petitioners Docken

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I. IDENTITY OF PETITIONERS

Petitioners Enid and Edward Duncan, Eric Docken, Docken Properties, LP, James and Patricia Schmidt, Darlene Masters, Suelo Marina, LLC, AKA The Brickhouse, LLC,(Petitioners Docken) hereby ask for the relief designated in Part II. Petitioners are represented by the Goodstein Law Group PLLC.

II. RELIEF REQUESTED

Petitioners ask the Supreme Court to accept review of the decision of the Court of Appeals, Division II in Case No. filed November 1, 2016. The decision meets the criteria for RAP 13.4(b). This Supreme Court should accept review, and reverse the Division II opinion.

III. COURT OF APPEALS DECISION

The decision of the Court of Appeals, Division II in Case No. filed November 1, 2016, is attached in the Appendix.

IV. ISSUES PRESENTED FOR REVIEW

A. City of Edgewood LID Reassessments presents a significant question under the Federal and Washington Constitution as Petitioners were deprived of due process because certain Petitioners did not receive any special benefits from the LID as their property was already at highest and best use before sewer and or constrained by undevelopable critical areas that would not benefit from the sewer, yet Petitioners collectively were assessed over 1.1 million dollars. RAP 13.4(b)(3).

B. The Division II decision Conflicts with US Supreme Court,

numerous decisions of this Washington Supreme Court and other divisions of the Court of Appeals. RAP 13.4(b)(1) and(2).

C. City of Edgewood decision to confirm the reassessment roll on arbitrary and capricious basis and founded on a fundamentally wrong basis is an issue of substantial public interest that should be determined by this Supreme Court. RAP 13.4(b)(4).

V. STATEMENT OF THE CASE

The Petitioners appeal purported sewer assessments for City of Edgewood Local Improvement Sewer District ("LID") No. 1. The LID, Edgewood's first since its incorporation a decade ago, is fatally flawed due to failure to provide process due, flawed and or untenable valuations that completely disregard clear cogent, convincing and unrebutted evidence presented by Property Owners, which resulted in assessments that outstrip benefits. Division II Court of Appeals annulled the first round of City 2011 assessments. *Hasit LLC v. City of Edgewood (Local Improvement Dist. #1)*, 179 Wash. App. 917, 932-33, 320 P.3d 163, 171 (2014). In the intervening five years, no property owner has come close to realizing the "after" sewer value of assessments forecasted in 2011 by the City's Consultant, or the sewer value of assessments forecasted again in 2015. In fact, each of the Docken Appellants' assessed land values has decreased by a collective total of $571,300

due to the blight of the City's bloated assessments. *See* AR 1052-53. 821-826, 832-833, 838-841. AR 12-13.

In the 2nd round of LID assessment, by Report dated June 20, 2014, the City's Macaulay Associates consultant provided revised assessments of the Docken Petitioners properties:

Name	Tax Parcel	2014 LID No.	2011 Assessment
Docken Properties LP	420094080	131	$ 159,188.00
Docken Properties LP	420094023	133	$ 68,539.00
Docken Properties LP	420094079	140	$ 28,476.00
Duncan	420032021	2	$ 441,000.00
Schmidt/Masters	420091012	79	$ 341,221.00
Schmidt/Masters	420091051	71	$ 104,651.00
AKA the Brickhouse	3625000373	128	$ 34,638.00

AR 3095-3103. ("City Report").

At hearing, the Docken Petitioners protested the assessments supported by a written protest AR 786-815, property-specific declarations of the property owners AR EX 17-20, Declaration and Appraisal Report of MAI-certified appraiser Donald Heischmann, AR 1031-1051, and testimony of Petitioners. AR 655-659, 708-711, 743-749. The Docken Petitioners established the City again overreached in assessing special benefits. 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 the City Consultant. Edgewood instead disregarded the property owners' protests

without explanation. The City passed Ordinance 14-0424, confirming the City Consultant's recommended assessments, without change. AR 1-4. Petitioners Docken appealed. This Court should accept review.

VI. SUMMARY & WHY REVIEW SHOULD BE ACCEPTED

RAP 13.4(b) sets forth the following grounds for review of appellate decisions:

> A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a decision by another division of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This case should be considered under all four prongs of this rule.

A. City of Edgewood LID reassessments Conflicts With Federal and Washington Constitution and deprived Petitioners of due process because Petitioners did not receive any special benefits from the LID, yet Petitioners collectively were assessed over 1.1 million dollars, despite having actually lost more than $500,000 in property value between 2011 (before sewer) and 2014 (after sewer)[1]. RAP 13.4(b)(3).

Article I, section 16 of the Washington Constitution provides

[1] AR 12-13

in relevant part that "No private property shall be taken or damaged for public or private use without just compensation having been first made."

The Fifth Amendment to the United States Constitution similarly provides that "[N]or shall private property be taken for public use, without just compensation." The Fourteenth Amendment to the U.S. Constitution guarantees, "No State shall... deprive any person of life, liberty, or property, without due process of law."[2] The due process clause of the fourteenth amendment of the federal constitution says, "No state shall ... deprive any person of life, liberty, or property, without due process of law."

Within a local improvement 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 Wash.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 Wash.2d 88, 103, 786 P.2d 253 (1990).

LID assessments involve a deprivation of property. *Carlisle v. Columbia Irrigation Dist.*, 168 Wash.2d 555, 569–70, 229 P.3d 761

[2] U.S. Const. amend. 14, § I.

(2010). 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 v. King Cnty.* Rural Library Dist., 66 Wash. 2d 558, 564, 404 P.2d 453, 456 (1965). 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).

1. Where Properties Already at Highest & Best Use Sewer Adds No Special Benefits.

The Court should accept review because Petitioners were "deprived of property without due process of law" because the assessments exceeded the special benefits. The evidence established that several properties are already at their highest and best use without the sewer improvements; the sewer thus adds no value.

- 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. The property owners' appraiser agrees. AR 1034-5.[3] Edgewood's 2014

[3] Based on the City 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 the City's Report, the availability of sewer would not add significantly to the overall value of the property. In that case, the

Valuation confirms that the highest and best use is the "existing use with added expansion/redevelopment potential." AR 3118. 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. AR 3167, 3177. The Suelo Marina property is zoned commercial. The commercial zoning allows for employment, services, and retail. AR 3118.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 as conceded by Edgewood Consultant. AR 3288, 3298. This property contains a modern medical office and attendant parking lot. There is no room to develop. AR 3297, 3297. *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* AR3298.
- **Docken's Parcel No. 131 and Docken's Parcel No. 133** are two office uses. AR 3333. Parcel 133 is zoned MUR, which provides for a mix of residential and office uses. Id. Parcels 133 & 131 should not have any assessment, since it is already fully developed and used consistent with its zoning. City agrees AR 1041, 3334, & see Owner Dec. at AR 816, 819, 825.
- **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. Decl of Docken. AR 816-820. Thus, any cost from LID or monthly charges is a property devaluation, not an increase in value.

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corresponding Special Benefit assessment would be minimal or zero. Heischman Report. AR 1034-1035.

- 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.

"[A]n owner who is assessed for LID improvements based upon potential highest and best use is forced to pay an assessment on a valuation which may or may not become a reality. *Doolittle v. Everett*, 114 Wn.2d 88, 105, 786 P.2d 253 (1990). "When the governmental unit assesses its LID charges on a theoretical, compared to existing use, it is forcing the owner to pay on the basis of what an expert says the owner *should* do with his property". *Id.* Emphasis original. In this case, the Petitioners' properties existing uses have already attained the highest and best use that the City's consultant says that the Petitioners' should do with their properties and have not realized any actual, physical, and material special benefit from the LID sewer and thus should have no assessment.

2. To the Extent that Properties are Constrained by Undevelopable Critical Areas, Sewer Adds No Special Benefits.

Petitioners **Duncan Parcel 2 and Schmidt/Masters**

Parcels 71 & 79 both presented evidence that not 100% of the parcels can be build out. The Duncan property contains a steep slope, and a standing-water wetland at the bottom of the slope. See City Critical Area Map, attached to Dec'l Duncan. AR 842-852. The City has chosen to enact large buffer zones to critical areas. Both the wetland and the slope are City designated critical areas and buffer area. Id. The City's critical areas map demonstrates that the City has designated over half of the Duncan's 9.12 acre parcel; 6.48 acres unusable land as a critical area or critical area buffer. This impaired land does not benefit from the addition of a sewer because it cannot be developed. *Dec'l Duncan*. AR 842-852, copy of City's critical area map attached. The City Consultant also agreed: "Approximately one half of the property is estimated as unusable from a market based perspective. Although more area could be developed from a zoning perspective, it does not appear to be economically viable" City Report at AR 3106; but then inexplicably assigned a whopping $212,700 "special benefit" assessment to the Duncan property. 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. The amount of the special assessment may not exceed the special benefit which is enjoyed by a specific parcel. "Under the local improvement district statutes, only that portion of the cost of the local improvement which is of special benefit to the property can be levied against the property. . . . Property not benefited by local improvement may not be assessed, and special assessments for special benefits cannot substantially exceed the amount of the special benefits...." *In re Schmitz*, 44 Wn.2d 429, 433-34, 268 P.2d 436 (1954).

B. Division II decision Conflicts with decisions of this Washington Supreme Court and other divisions of the Court of Appeals. RAP 13.4(b)(1) and(2).

1. Division II conflicts with *Bellevue Plaza v. City of Bellevue*, 121 Wn.2d 397, 851 P.2d 662 (1993) & *Heavens v. King Cnty.* Rural Library Dist., 66 Wash. 2d 558, 563, 404 P.2d 453, 456 (1965) by upholding assessments based on speculative benefits.

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 v. King Cnty.* Rural Library Dist., 66 Wash. 2d 558, 563, 404 P.2d 453, 456 (1965). In *Bellevue Plaza,* The city enacted an ordinance that ordered improvements to a street and created the LID. Following the confirmation of the final assessment roll, the owners

unsuccessfully challenged the roll in the superior court; the lower appellate court certified the case to the court, which reversed the judgment. This Supreme Court held that the city founded the LID assessments on a fundamentally wrong basis, which was ground for judicial denial of confirmation of the assessment roll pursuant to RCW 35.44.250. **Two-thirds of the assessments were based upon a speculative future highest and best use that was totally without evidentiary support**. This Supreme Court reversed the judgment and remanded to the city council for assessment proceedings that were consistent with the court's opinion and the applicable statutes. 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.

Here, the City's assessments are also based on speculative future highest and best uses that conflicted with the Petitioners' evidence and were totally without evidentiary support. The error is all the more egregious since the City admits various parcels are already at highest and best use AR 1034. 1040, 1041, but speculates without support that the properties can/will be redeveloped.

The **Duncan property #2** is designated Business Park (BP)

which allows employment and commercial uses, such as light industrial, office and retail uses. AR 3106. *Id.* Here, the Duncans operate an asphalt, bark and topsoil business occupying the usable portion of the land, which is the highest and best use, consistent with light industrial BP use. The balance of the property is severally constrained by critical areas. AR 642-52. The Property owners testified that at different times they engaged engineers to investigate potential development opportunities. AR 842-852. The resulting economic burden to meet the requirements imposed by the City's development regulations failed to give a positive return on the investment, especially given the constraints of the critical area City regulations. Id. However, despite this unrefuted evidence, the City based the assessment on "existing use with added expansion/redevelopment potential." AR 3118. There is no support in the record for this speculative or conjectural conclusion.

As for Docken properties, the 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, and as to **Parcel 131** to hold the property until sufficient market demand exists to build out more single family housing units "when market conditions indicate

sufficient demand." AR 3334. Therefore, the City Consultant impermissibly admits that present market conditions currently do **not** support the "potential, future" use upon which the assessment is based. In conflict with *Bellevue*, there is no support in the record for this speculative or conjectural conclusion. 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 Wash.2d at 403–04, 851 P.2d 662.

2. Decision Conflicts with Supreme Court Decision *Folsom v. Spokane Cnty.*, 106 Wn. 2d 760, 769, 725 P.2d 987 (1986) by upholding assessments that disregarded contract rent as the proper base for valuation.

In *Folsom*, this 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). Here, 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.[4] If the parcel already achieves market rent then no special benefits accrue and the assessment must be zero. The City presented no evidence to the contrary. Despite this omission, Edgewood imposed assessments for a purported special benefit that simply is not there.

For **Brickhouse Parcel 128,** the City Restricted Report *concedes* that this commercial property will not see any increase in the rent as a result of the LID sewer. City Restricted Report 212. AR 3311. (Potential gross income same with and without LID). "[I]n 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* 106 Wn. 2d at 769. The Owners' appraiser, Donald Heischman, MAI, principle of Strickland, Heischman and Hoss, Inc. agrees:

As market participants are primarily concerned with the return

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[4] The Docken Appellants' appraiser, Donald Heischman, MAI, principle of Strickland, Heischman and Hoss, Inc. at AR 1041, stated:

> 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.**

> 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, the City's conclusion of highest and best use does not support that sewer being available to the property would increase the value of the property from the without LID scenario. Based on the City's conclusion, the corresponding Special Benefit assessment for Parcel 128 would be minimal or zero.

Heischman Report. AR 1040. Therefore, because there are no special benefits as a result of adding sewer, the assessment should be zero.

3. Division II conflicts with Supreme Court Decision *Doolittle v. Everett*, 114 Wn.2d 88, 786 P.2d 253 (1990) by allowing assessments based on potential highest and best use of the lots as a single unit where the lots had actually been improved and used separately.

The issue in *Doolittle* was when assessing land for local improvements, were the special benefits to contiguous lots owned by the same owner to be determined based on potential highest and best use of the lots as a single unit where the lots had actually been improved and used separately? The court affirmed the judgment of the lower court, which found that the fourth of the owner's four contiguous lots had a separate commercial use and that no portion of that lot was used in conjunction with the other three lots. The lower court invalidated the assessment which treated all the lots as a single parcel. The court held that the assessment was founded upon a fundamentally wrong basis. Under Wash. Rev. Code § 35.44.250, this was a ground for annulling an assessment. The city's

expert appraisers failed to consider whether the four lots constituted a single "larger parcel" or separate parcels before applying their highest and best use evaluation. In short, the appraisal analysis was founded on a fundamentally wrong basis because there was never any determination of the appropriate parcel to which the "highest and best use" analysis should apply. This Supreme Court affirmed the lower court judgment which invalidated the an assessment for special benefits in a local improvement district which treated the owners four lots as a single parcel and assessed benefits on the basis of the potential highest and best use of the property as a combined parcel of all lots, with all improvements removed. "[P]ossible future integrated use of separate parcels of land should **not** have been considered in deciding whether separate parcels constituted a single tract and should be so treated in assessing for special benefits in local improvement district." *Doolittle v. City of Everett*, 114 Wash. 2d 88, 786 P.2d 253 (1990). Emphasis added. 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," including assumption that the improvement would lead to properties joining into "superblocks". *Bellevue Plaza*,

121 Wn.2d at 411.

Here Petitioner Docken has three lots **Parcels 131,133 and 140.** Two of the lots have commercial office buildings. ARR 816,819, 817. The third lot has a separate commercial use of storage. AR 825. Under *Bellevue,* the third lot must be valued separately. Yet, the Edgewood Consultant valued the lots assuming they would be combined with all improvements removed, exactly what was prohibited in Bellevue: "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.

4. Decision Conflicts with *In re Indian Trail Trunk Sewer Sys.*, 35 Wn. App. 840, 843, 670 P.2d 675 (1983), *review denied*, 100 Wn.2d 1037 (1984) (Division III) by failing to require City Council to apply the correct evidentiary standards in light of Petitioners' evidence that sewer provided no benefit.

In *Indian Trail,* the city adopted an ordinance creating a local improvement district. The landowners owned property within the district. They were assessed a reduced amount because construction of an additional trunk line would be necessary before their property could be drained by the trunk sewer. In affirming the decision, the Appeals Court found that the trial court correctly determined that the council's decision was arbitrary and capricious and should be

annulled. The city had the benefit of the *Abbenhaus*[5] presumptions, including the presumption that the city acted legally and properly. However the property owners' testimony was sufficient to rebut the city's presumption. The burden of proof then shifted to the city, and the city failed to carry its burden by introducing evidence that the landowners' property was specially benefited. The landowners' evidence was uncontroverted. The Appeals Court Division III affirmed the judgment of the trial court. If testimony on the issue of special benefits is produced by the property owner, the presumptions in favor of a municipality disappear. "Presumptions are the `bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts.' *In re Indian Trail Trunk Sewer Sys.*, 35 Wn. App. 840, 843, 670 P.2d 675 (1983), *review denied*, 100 Wn.2d 1037 (1984);quoting *Mackowik v. Kansas City, St. J & C.B. R.R. Co.*, 94 S.W. 256, 262 (Mo. 1906). Once a property owner produces competent testimony sufficient to rebut the presumptions in favor of the municipality, the burden shifts back to the municipality to introduce competent evidence of benefit. *Id.* If it fails to do so, its assessment will and should be nullified. *Bellevue Plaza, Inc. v. City of Bellevue*,121 Wn.2d 397, 418, 851 P.2d 662

[5] *Abbenhaus v. City of Yakima*, 89 Wn.2d 885, 860-861, 576 P.2d 888 (1978)

(1993).

Here, review should be granted because the City ignored the evidentiary standards to be applied at the city level, and ignored the burden placed on the city once the property owners presented their evidence. 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). [6]

"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 LLC v. City of Edgewood (Local Improvement Dist. #1)*, 179 Wash. App. 917, 932-33, 320 P.3d 163, 171 (2014). In Round 1 of this LID appeal, the Appeals Court in *Hasit* properly found that Edgewood applied the

[6] 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).

wrong standard. [7] In this present Round 2, the City once again erred when applying the burden of proof, 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 accept this Petition, this Court need look no further than the City's Conclusion #3 that the Property Owners **did not "overcome"** the Staff/ LID's recommended assessments. AR 14-15. Here, the Petitioners presented the following clear, cogent and convincing evidence[8], sufficient to overcome the presumptions. The City Consultant either agreed with the Petitioners and imposed assessments anyway, or the City offered NO rebuttal evidence. AR 609-777:

- The Petitioners' Appraiser Report expressly establishes that many of the Docken Appellants' land uses already constitute the highest and best use, before the sewer installation. AR 1024, AR 3177, AR 1040, AR 1041, and Owner's Declarations (unrebutted) at AR 816, 817, 819, 825,817. (As to parcels Duncan 2, Suelo 31, Brickhouse 128, Docken 131, 13, 140)

  The City's Consultant agreed. See, e.g., City Restricted Report

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[7] 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 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."

[8] "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).

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 68, 1031-1047,1034-35, 1040, 3106, 3185-3177, 3118, 3177, 3297-8, 3344-5, and 3353, as to Parcels 2, 31, 128, 131, 133, and 140.

- The Petitioners established that assessments wrongly imposed m areas undevelopable as they are constrained by critical areas and buffers. AR 842-52, 844, 834, 3115, as to Parcels 2, 71, 79. The City Consultant agrees that unmarketable areas should not be assessed, City Report at AR 3106; yet assessments were imposed.
- The Petitioners established that City Consultant based assessments on speculative, "potential" and future build out, unifies lots which presently don't exist, without any supporting evidence. AR 3118, 1034-5, 845-852, 3334. As to Parcels 2, 131, 133, 140.
- The Petitioners established that City assessments failed to deduct the cost incurred to access the sewer improvement. AR 3202, 3196-3197, 834, 829-833, 842-52, as to Parcels 2, 71, 79, 128.
- The Petitioners established Parcels were already at market rent, thus the sewers added no benefit and therefore assessments were improper. AR 3311, 1040, 3353, 1040, 817, as to Parcels 128 and 131, 133, 140.
- 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 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. And Duncan Declaration with City Critical Area Map attached. 842-846.

•City Consultant fails to deduct from the assessment the cost needed to realize the special benefits. AR 3196-3791, AR 830. AR 834.

Appellant Property Owners' quality and type of evidence far exceeded that required by the Courts. 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. Doolittle required only that some "[v] aluation testimony [be] presented to the Council." 114 Wn.2d at 106. Emphasis added. Once the Docken Property owners presented their evidence, the City Council failed to hold the Staff to its meet its burden. "[W]hen "` 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). Here the Court should accept review because the City failed to apply the *Indian Trail* burden and that burden was not met.

5. Decision Conflicts with *Kusky* v. *City of Goldendale*, 85 Wn. App. 493, 933 P.2d 430 (1997) (Division III) by failing to take into account the property owners' costs associated with the utility improvement when establishing assessments.

Kusky holds that an assessment formula that fails to consider costs does not fairly represent the benefit to any of the properties in the local improvement district. In *Kusky, w*hen a city started to widen a public street, its engineers discovered previously unknown underground gasoline storage tanks on a lot adjacent to the street. Ultimately, the landowners incurred hugely expensive environmental cleanup costs, and according to expert testimony, the market value of their land was greatly diminished. Yet the city imposed an assessment against the property for the alleged increased value of the property due to the street improvements. The landowners objected. The Appeals Court held that by any rational standard, the value of the property had greatly diminished, and that any formula for valuing the property had to relate to the benefits incurred by the property, not just the distribution of the city's costs. The Appeals court held that not only did the city not use the right formula in its appraisal of the property's value, but any assessment based on that formula had to be considered arbitrary and capricious, the standard required to justify reversal.

Here, the Court should grant the Petition for Review because the

City failed to deduct from the assessments the significant costs the property owners would incur in order to obtain the sewer improvements, after the owners presented that evidence. Based upon Edgewood's own linear foot cost for sewer line, **Schmidt Masters 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.[9] **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.[10] At different times the **Duncans, Parcel 2,** engaged engineers to investigate potential development opportunities. AR 842-852. The resulting economic burden to meet the requirements imposed by

[9] 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 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."

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

the City's development regulations failed to give a positive return on the investment, especially given that less than half the Duncan land is un available under current City critical area regulations.

The principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement . . . ." *Norwood v. Baker*, 172 U.S. 269, 278-279; 19 S.Ct. 187, 190; 43 L. Ed. 443, 447 (1898).

C. City of Edgewood decision to confirm the reassessment roll on arbitrary and capricious basis and founded on a fundamentally wrong basis is an issue of substantial public interest that should be determined by the Supreme Court.

It is a matter of substantial public interest anytime the government takes private property from one owner in order to meet the government's obligation to other property owners. That is what is happening here. The City of Edgewood imposed over one million dollars ($1,194,665) of the LID sewer construction costs onto seven property owners via inflated sewer assessments AR 12-13.

The adoption of the Growth Management Act lead to planning goals that include, encourage urban growth, reduce sprawl, and

protect private property rights. RCW 36.70A.020. Cities and counties look to LIDs as a means of financing needed urban improvements. LIDs and RIDs are special assessment districts in which improvements will specially benefit primarily the property owners in the district. ..Most municipal governments in Washington can use LIDs... [11]LIDs can play a very positive and powerful role in developing and enhancing your city's infrastructure.[12] LIDs, however, do have a reputation as difficult to administer, time consuming, and a public relations disaster waiting to happen.[13] A state municipal agency treatise on LIDs offers the following advice, which bears noting:

- Avoid LIDs with single or few property owners;
- Avoid LIDs with largely undeveloped properties;
- Only create LIDs in which properties have a high assessed or market valuation to assessment ratio;
- Create stiff penalties for assessment delinquencies;
- Have a reputation for aggressively collecting and foreclosing;[14]

As this case bears out, correct methods of calculating assessment is a matter of substantial public interest. Landowners, cities, and counties all over Washington need this Court's guidance on the

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[11] *Local and Road Improvement Districts Manual for Washington State Sixth Edition. At pages 1-2.* Municipal Research and Services Center 2601 4th Avenue, Suite 800 Seattle, WA 98121-1280 www.mrsc.org mrsc@mrsc.org 206.625.1300 *http://mrsc.org/getmedia/4233f39b-f38b-4766-8c22-a0f0d9340d91/lid-rid09.pdf.aspx*

[12] Id at 3.

[13] Id at 2

[14] Id at 47.

lawful boundaries for imposing LID assessments.

VII. CONCLUSION

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 v. King Cnty.* Rural Library Dist., 66 Wash. 2d 558, 564, 404 P.2d 453, 456 (1965). 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). Washington law 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, this Court should accept review to adjust the assessments to meet Washington law.

Respectfully submitted this 1st day of December, 2016.

GOODSTEIN LAW GROUP, PLLC

Carolyn Lake, WSBA #13980
Seth Goodstein, WSBA #45091
Attorneys for Appellants Eric Docken, Docken Properties, LP, Enid and Edward Duncan, James and Patricia Schmidt, Darlene Masters, AKA the Brickhouse, LLC, Suelo Marina, LLC.

APPENDIX A

OPINION OF THE COURT OF APPEALS.

Filed
Washington State
Court of Appeals
Division Two

November 1, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ENID and EDWARD DUNCAN; ERIC DOCKEN, DOCKEN PROPERTIES, LP; JAMES and PATRICIA SCHMIDT; DARLENE MASTERS; SUELO MARINA, LLC; AKA THE BRICKHOUSE, LLC; 1999 STOKES FAMILY LLC; TINA REMPEL; ELDEAN REMPEL, as Trustee for REVOCABLE TRUST AGREEMENT OF RAY AND ELDEAN B. REMPEL Dated December 12, 2006, Appellants, v. CITY OF EDGEWOOD, Local Improvement District No. 1, Respondent.	No. 48028-0-II UNPUBLISHED OPINION

WORSWICK, J. — This is the second appeal of the City of Edgewood's local improvement district (LID) assessments for installation of a sewer system. In *Hasit, LLC v. City of Edgewood*, 179 Wn. App. 917, 320 P.3d 163 (2014), we annulled Edgewood's LID assessments against the appealing property owners. Following our decision in *Hasit*, the City reassessed the affected properties and the Edgewood City Council held a hearing to address the property owners' objections to their reassessments. The Council ultimately rejected the property owners' objections and adopted an ordinance confirming the reassessment roll. Several property owners[1]

[1] The appealing property owners include 1999 Stokes Family LLC ("Stokes"); Eldean Rempel, as Trustee for Revocable Trust Agreement of Ray E. Rempel and Eldean B. Rempel dated

appealed to the superior court, which affirmed the Council's reassessment decision. The property owners now appeal the superior court's order affirming the reassessment decision.

Property owners Stokes and Rempel assert that the reassessment roll must be annulled or modified[2] because the Council's decision to confirm the reassessment roll was arbitrary and capricious. Specifically, Stokes and Rempel contend that the Council's decision was arbitrary and capricious because the Council incorrectly (1) applied presumptions in favor of the City's proposed reassessments, (2) imposed a burden on the property owners to prove the reassessments were invalid, and (3) confirmed reassessments that were in substantial excess of the special

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December 12, 2006, a trust, and Tina Rempel ("Rempel"); Enid and Edward Duncan ("Duncan"); Darlene Masters and James and Patricia Schmidt ("Masters/Schmidt"); AKA the Brickhouse LLC ("Brickhouse"); Suelo Marina LLC; and Eric Docken and Docken Properties LP ("Docken").

[2] It is not clear whether there is statutory authority for this court to modify a LID assessment decision. RCW 35.44.250 provides:

> **Procedure on appeal—Hearing by superior court.** . . . 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.

By its terms, this statute applies to appeals heard by the superior court. In contrast, RCW 35.44.260 is silent about the remedies available on appeal from the superior court's judgment, stating only:

> **Procedure on appeal—Appellate review.**
> 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.

Because we conclude that the appellants are not entitled to any relief from the judgment of the superior court, we do not reach this issue.

benefit to the properties and grossly disproportionate to similarly situated properties within the LID.

Property owners Duncan, Masters/Schmidt, Brickhouse, Suelo Marina, and Docken[3] also request that the reassessment roll be annulled or modified. They contend that (1) the Council's decision to confirm the reassessment roll was arbitrary and capricious or founded on a fundamentally wrong basis,[4] (2) the reassessments deprived them of due process because they did not receive any special benefits from the LID, (3) the City's failure to present any rebuttal evidence following their presentations at the reassessment hearing rendered the Council's decision to confirm the reassessment roll invalid, (4) the Council improperly considered property owners' statements from a previous 2011 hearing, and (5) the city manager's attendance in the LID executive session violated the appearance of fairness doctrine.

We affirm.

FACTS

I. First Assessment Roll and Appeal

In 2008, the Council created LID No. 1 to finance the construction of a sewer system, imposing the entire project cost on the owners of 161 parcels in the LID. The sewer system was

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[3] Duncan, Masters/Schmidt, Brickhouse, Suelo Marina, and Docken are represented by the same counsel and raise several shared arguments in addition to their individual property-specific claims. Hereafter, this opinion will refer to these property owners collectively as the "Docken Petitioners."

[4] The Docken Petitioners raise various arguments, specific to the reassessments against their individual properties, in support of their contention that the Council's reassessment decision was arbitrary or capricious or founded on a fundamentally wrong basis. These various arguments are addressed in the body of this opinion.

completed in 2011 with an estimated cost of $21,238,268. To estimate the "special benefit"[5] attributable to each of the properties within the LID as a result of the sewer system, the City hired professional appraisal firm Macaulay and Associates Ltd. Administrative Record (AR) at 362. After Macaulay submitted its proposed assessments, the City notified affected property owners of their right to object to the assessments at a hearing before a hearing examiner. Following the hearing, the hearing examiner recommended rejecting all of the property owners' protests, apart from reducing assessments to three properties. The Council thereafter considered the hearing examiner's recommendations and heard objections from protesting parties. After hearing the protesting property owners' objections, the Council voted to approve an ordinance that, apart from reducing assessments on two properties, confirmed the assessment roll as recommended by the hearing examiner.

Nine affected property owners appealed the Council's assessment decision to the superior court.[6] *Hasit*, 179 Wn. App. at 932. The superior court concluded that the City's notice of the hearing examiner's proceedings was defective, and it remanded for a de novo hearing. *Hasit*, 179 Wn. App. at 932. The City appealed the superior court's decision to this court and the Docken Petitioners cross-appealed. *Hasit*, 179 Wn. App. at 932.

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[5] A "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).

[6] One of the nine appealing property owners, Hasit LLC, agreed in a stipulated motion to a voluntary dismissal of its appeal. *See Hasit*, 179 Wn. App. at 932 n. 5. Additionally, property owners George and Arlyn Skarich do not participate in this current appeal from the 2014 reassessments.

On appeal, we annulled the LID assessments as to the appealing property owners. *Hasit*, 179 Wn. App. at 960. In annulling the LID assessments, we first held that the City calculated the assessments on a fundamentally wrong basis by including costs for an oversized sewer system because the oversized sewer system benefitted only future users not assessed under the LID. *Hasit*, 179 Wn. App. at 938-41, 960. We further held that the Council's confirmation of the proposed assessment roll was arbitrary and capricious because it (1) based its confirmation in part on the objecting property owners' failure to present evidence that the City's flawed notice prohibited the property owners from presenting, (2) improperly required objecting property owners to submit expert appraisal evidence to challenge the assessments, and (3) improperly imposed a burden on property owners to prove that the assessments were founded on a fundamentally wrong basis or were arbitrarily or capriciously imposed. *Hasit*, 179 Wn. App. at 944-50. We also held that the City violated the property owner's due process rights by failing to notify the property owners sufficiently in advance of the hearing to allow the property owners to obtain the evidence required to challenge the assessments.[7] *Hasit*, 179 Wn. App. at 952-58.

In annulling the assessments as to the appealing property owners, we rejected some of the property owners' claims. Relevant to this current appeal, we rejected the property owners' claims that the assessments rested on a fundamentally wrong basis due to the Macaulay

[7] Although we held that the City's flawed notice violated the appealing property owners' due process rights, we declined to address whether the flawed notice amounted to a jurisdictional defect rendering the proceedings invalid as to all the property owners assessed under the LID. *Hasit*, 179 Wn. App. at 952, 958-59. In declining to address the jurisdictional defect claim, we noted that nonappealing property owners had waived any due process challenge by failing to object to their notices. *Hasit*, 179 Wn. App. at 952, 958-59.

appraiser's decision to utilize a mass-appraisal method rather than a zone-and-termini method. *Hasit*, 179 Wn. App. at 943-44.

II. 2014 REASSESSMENT

After we issued our opinion in *Hasit*, the City reassessed the subject properties. The City commissioned a study to determine the costs of the sewer project attributable to oversizing the sewer capacity. The study determined that the oversizing costs totaled $805,687.

The City also recommissioned Macaulay to supplement its prior appraisals by conducting individual evaluations of the remaining subject properties. To assist in the reassessments of the subject properties, Macaulay's appraiser, Robert Macaulay, met with property owners and discussed the owners' concerns while inspecting their properties.[8] Macaulay made adjustments to some of his prior assessments based on his discussions with property owners and inspections of their properties. After accounting for the elimination of oversizing costs, Macaulay determined that the total estimated special benefit yielded a cost/benefit ratio[9] of 70.9 percent.

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[8] Regarding property owner Suelo Marina, Macaulay's supplemental appraisal report states:

> A letter was sent to the property owner on April 25, 2014 offering them the opportunity to accompany the appraiser on a property inspection. I did talk to the property owner on my April 15, 2014 inspection, prior to sending the letter. I was taking photographs of the property from the adjacent sidewalk and he came out and asked me what I was doing. I explained that additional appraisal work was being done on the LID. He indicated that they (the owners) were through with challenging their assessment due to the appellate court ruling.

AR at 3173-74. Regarding property owner Docken, Macaulay's supplemental report states that the appraiser discussed Docken's concerns by telephone.

[9] Macaulay determined the cost/benefit ratio by "[d]ividing the total revised project cost by the total estimated special benefit." AR at 3098. The appellant property owners do not challenge Macaulay's cost/benefit ratio calculation.

Macaulay applied this revised cost/benefit ratio to each of the individual property assessments and, thus, reduced its estimated special benefit as to each property by 29.1 percent to reach his recommended final reassessment.[10]

Applying a retrospective valuation date of May 10, 2011, Macaulay recommended the following final reassessments:

Owner	Value without LID	Value with LID	Special Benefit	Updated Cost/Benefit	2014 Final Reassessment
Stokes	$755,000	$1,290,000	$535,000	0.709	$379,315
Rempel	$1,400,000	$2,515,000	$1,115,000	0.709	$790,535
Duncan	$925,000	$1,225,000	$300,000	0.709	$212,700
Masters/Schmidt	$815,000	$1,420,000	$605,000	0.709	$428,945
Brickhouse	$505,000	$535,000	$30,000	0.709	$21,270
Suelo Marina	$680,000	$1,135,000	$455,000	0.709	$322,595
Docken	$1,800,000	2,085,000	$285,000	0.709	$202,065

AR at 3099.[11]

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[10] The appellant property owners do not challenge the Council's adoption of the estimated oversize costs.

[11] The property owners were originally assessed as follows:

Owner	2011 Final Assessment	2014 Final Reassessment
Stokes	$529,151	$379,315
Rempel	$877,005	$790,535
Duncan	$325,008	$212,700
Masters/Schmidt	$445,872	$428,945
Brickhouse	$34,638	$21,270
Suelo Marina	$333,852	$322,595
Docken	$257,206	$202,065

AR at 219-33.

The City notified property owners that it would conduct a hearing on the final reassessment roll on September 17, 2014, and that property owners objecting to the proposed reassessment must file written objections at or before the hearing.[12] Each of the affected property owners filed written objections.

III. OBJECTIONS

The property owners filed the following written objections to Macaulay's proposed reassessments.

A. *Stokes*

Stokes asserted that Macaulay's proposed reassessment (1) understated the property's before-LID value, (2) overstated the property's after-LID value by failing to consider extraordinary costs associated with developing the property, and (3) disproportionately estimated the property's special benefit as compared to a similarly situated property within the LID. In support of these assertions, Stokes presented an appraisal from Hunnicutt & Associates Inc. that concluded the assessment to the Stokes property should be $118,542. Stokes also presented a declaration from James Schweickert, a civil engineer with Larson & Associates Land Surveyors and Engineers Inc. Schweickert's declaration stated that he was retained by Stokes in 2012 to assist in commercial development plans for the property.

Larson & Associates completed a "Conceptual Site Plan" for the Stokes property that concluded storm water improvements would need to be made to develop the property. The Conceptual Site Plan estimated the costs of developing the necessary storm water improvements

[12] The appealing property owners do not challenge the City's notice procedure.

would total $340,000 and would cause the loss of 35,000 square feet of otherwise developable property. The Conceptual Site Plan cost estimates did not include costs for acquiring easements through neighboring properties, which easements would be required to implement the storm water improvements.

B. *Rempel*

Rempel asserted that Macaulay's proposed reassessment (1) understated the property's before-LID value, (2) failed to provide any explanation for the low valuation of the portion of the property not fronting Meridian Avenue, and (3) overstated the property's after-LID value. In support of these assertions, Rempel presented an appraisal from Hunnicutt that concluded the assessment to the Rempel property should be $381,925.

C. *Duncan*

Duncan asserted that Macaulay's proposed reassessment (1) determined that the existing use of the property both before and after the LID is the highest and best use of the property and, thus, the property receives no special benefit from the LID; (2) overstated the usable portion of the property when compared to the City's own critical areas map; and (3) failed to deduct from its assessment the area of the property needed to support development.

D. *Masters/Schmidt*

Masters/Schmidt asserted that Macaulay's proposed reassessment (1) fell outside Macaulay's own "[t]est of reasonableness" range of $1.00 to $2.75 per square foot, (2) failed to reduce the special benefit of the LID by the cost of installing sewer lines, and (3) impermissibly distributed full sewer costs to property owners within the LID without calculating the parcel-specific special benefits. AR at 801.

E. *Brickhouse*

Brickhouse asserted that Macaulay's proposed reassessment (1) determined that the existing use of the property both before and after the LID is the highest and best use of the property and, thus, the property receives no special benefit from the LID, and (2) failed to reduce the special benefit of the LID by the cost of installing sewer lines.

F. *Suelo Marina*

Suelo Marina asserted that Macaulay's proposed reassessment (1) fell outside Macaulay's own "test of reasonableness" range of $1.00 to $2.75 per square foot, (2) determined that the existing use of the property both before and after the LID is the highest and best use of the property and, thus, the property receives no special benefit from the LID, (3) presumed an artificially low before-LID value by placing no value on the existing buildings on the property, and (4) improperly double-counted the special benefit to the property.

G. *Docken*

Docken owns three parcels of land within the LID. As to parcel 131, Docken asserted that Macaulay's proposed reassessment (1) determined that the existing use of the property both before and after the LID is the highest and best use of the property and, thus, the property receives no special benefit from the LID; (2) failed to discount the assessment for unusable land; (3) improperly speculated that future market demands would create a need for more single family housing units; and (4) failed to present evidence of poor soil conditions on the property. As to parcels 133 and 140, Docken asserted that Macaulay's proposed reassessment (1) undervalued the properties' before-LID value, (2) improperly double-counted the special benefit to the

properties, and (3) improperly considered the potential integrated use of the properties when calculating the special benefit.

IV. HEARING ON PROPERTY OWNERS' OBJECTIONS

On September 17, 2014, the Council held a hearing to address the property owners' objections. At the hearing, Macaulay briefly testified about his proposed reassessments as to each of the individual properties.

Regarding the Stokes property, Macaulay testified that after "visually walking the site it was apparent that the wetlands encroached the property and restricted use of the property more than I anticipated in my previous analysis. So recognizing that, I lowered the special benefit to reflect the lowered utility of the site versus my previous analysis." AR at 641.

Regarding the Rempel property, Macaulay testified that his reassessment increased the before-LID value of the property based on an existing ministorage building on the property. Macaulay stated that the increase in pre-LID value resulted in a special benefit of $3.55 per square foot, a reduction from the $3.75 per square foot special benefit calculated in Macaulay's original assessment.

Regarding the Duncan property, Macaulay testified that his reassessment calculated the usable area of the property at 4.62 acres. Macaulay stated that he had reduced the usable area from the 6.75 acres calculated in his original assessment based on his on-site inspection of the property.

Regarding the Masters/Schmidt properties, Macaulay testified that Schmidt discussed concerns about potential wetlands on the property for which no critical areas study had been

made. Macaulay stated that the area of potential wetlands was too small to have any measurable impact on development and, thus, it did not affect his reassessment.

Regarding the Brickhouse property, Macaulay testified that after inspecting the property and discussing the property owner's concerns, he determined that the risk of septic system failure was substantially less than he had predicted in his original assessment. Macaulay stated that based on this decreased risk, his reassessment recommended a $30,000 special benefit as a result of the LID, a reduction from his original recommendation of a $47,000 special benefit.

Regarding the Suelo Marina properties, Macaulay testified that his reassessment differed slightly from the original assessment due to downsizing cost, but otherwise there were no notable changes.

Regarding the Docken properties, Macaulay testified that he could not inspect the properties but that he discussed the owner's concerns by telephone. Macaulay stated that, based on the discussion, the reassessment lowered the special benefit as to parcel 131 but not to parcels 133 and 140.

Macaulay concluded his testimony by stating that a number of properties within the LID had been sold with buyers assuming the LID assessments. According to Macaulay these sales, together with pending sales, demonstrate that "these assessments and benefit estimates are reasonable, and that they reflect the intensity of use change in the market resulting from the LID sewer project." AR at 646. Macaulay later expanded on this testimony during his rebuttal testimony, describing specific sales or pending sales of properties within the LID and the buyers' willingness to assume the prior LID assessment values on those properties.

After Macaulay testified, the Council admitted into the record the property owners' written objections and heard testimony from the property owners and their witnesses. Macaulay responded to questions posed to him during the property owners' testimony. The Council then heard rebuttal testimony from Macaulay and Eric Phillips, the assistant city manager for Edgewood.

After concluding the hearing, the Council went into executive session for approximately 30 minutes before closing the special council meeting. The Council stated that, due to the volume of the submitted materials, it would continue deliberations on September 24. After again deliberating the reassessment roll during an executive session on September 24, the Council passed a motion to adopt the recommended reassessment roll and directing City staff to prepare an ordinance recording the same to be presented at a subsequent council meeting.

At the subsequent October 2, 2014 special council meeting, the Council adopted findings of fact and conclusions of law. The Council also adopted Ordinance 14-0424, which confirmed the reassessment roll.

Some of the affected property owners appealed the Council's reassessment decision to the superior court. On August 28, 2015, the superior court entered an order dismissing the property owners' appeals and affirming the Council's reassessment decision. The property owners appeal from the superior court order.

ANALYSIS

I. STANDARD OF REVIEW

RCW 35.43.040 provides municipalities with authority to order the construction of local improvements, including sewer systems, and to "levy and collect special assessments on property

specially benefited thereby to pay the whole or any part of the expense thereof." A "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). A property's special benefit "must be actual, physical and material and not merely speculative or conjectural." *Heavens v. King County Rural Library Dist.*, 66 Wn.2d 558, 563, 404 P.2d 453 (1965).

An assessment against a property may not substantially exceed the special benefit to the property attributable to the LID. *Hasit*, 179 Wn. App. at 933. And a property "should not bear 'proportionally more than its share' of the total assessment relative to other parcels in the LID." *Hasit*, 179 Wn. App. at 933 (quoting *Cammack v. Port Angeles*, 15 Wn. App. 188, 196, 548 P.2d 571 (1976)). But this proportionality requirement does not mandate that all properties "be assessed the same percentage of the special benefits received." *Hasit*, 179 Wn. App. at 933.

Parties may appeal a council's final assessment decision to the superior court. RCW 35.44.200. The superior court shall confirm the assessment decision, unless it finds "that such assessment is founded upon a fundamentally wrong basis and/or the decision of the council . . . was arbitrary or capricious." RCW 35.44.250. "Arbitrary and capricious" refers to "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action." *Abbenhaus v. City of Yakima*, 89 Wn.2d 855, 858, 576 P.2d 888 (1978). And, "[w]here there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous." *Abbenhaus*, 89 Wn. App. at 858-59. An assessment is founded on a "fundamentally wrong basis" if there exists "'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, as opposed to a modification of the assessment as to particular property.'" *Abbenhaus*, 89 Wn. App. at 859 (quoting *Cammack*, 15 Wn. App. at 196). A superior court's judgment from an appeal of a final assessment decision may be appealed to this court. RCW 35.44.260.

When reviewing a superior court's determination under RCW 35.44.250, our review is not an "independent consideration of the merits of the issue but rather a consideration and evaluation of the decision-making process." *Abbenhaus*, 89 Wn.2d at 859-60. "Review is limited to the record of proceedings before the City Council." *Bellevue Assoc. v. City of Bellevue*, 108 Wn.2d 671, 674, 741 P.2d 993 (1987). We presume that the Council's assessment decision was proper, and the party challenging the assessment bears the burden of overcoming this presumption. *Bellevue Assoc.*, 108 Wn.2d at 674. We also 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 Philip A. Trautman, *Assessments in Washington*, 40 WASH. L. REV. 100, 118 (1965)).

II. LAW OF THE CASE DOCTRINE

As an initial matter, the City contends that several of the appellants' arguments on appeal are foreclosed by the law of the case doctrine. We agree in part and disagree in part.

As applicable here, "the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation." *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). The City argues that because *Hasit* approved of Macaulay's use of a mass appraisal method over a zone and termini method, and because Macaulay again utilized this method in his

2014 reassessment analysis, the appealing property owners cannot argue on appeal that the Council's reassessment decision was arbitrary or capricious or founded on a fundamentally wrong basis. The City reads our holding in *Hasit* too broadly.

Although *Hasit* approved of Macaulay's use of a mass appraisal method, we annulled the LID assessment as to the appealing property owners because, among other reasons, (1) the City's assessment decision was arbitrary and capricious because the decision was based on the property owners' failure to present evidence that the City's flawed notice prevented the property owners from presenting, (2) the City improperly required the property owners to prove the assessments were based on a fundamentally wrong basis or were imposed arbitrarily or capriciously, and (3) the City failed to provide property owners with constitutionally adequate notice of the assessment hearing. 179 Wn. App. at 944-45, 948-49, 954-58. Our decision in *Hasit* does not prohibit the property owners from arguing in this appeal that the Council's assessment decision was arbitrary or capricious or founded on a fundamentally wrong basis based on the evidence they presented at the reassessment hearing.

Our decision in *Hasit* prevents property owners only from again arguing that Macaulay's use of the mass appraisal method, alone, shows the Council reassessment decision was arbitrary and capricious or founded on a fundamentally wrong basis. Contrary to the City's position, our decision did not immunize the Council's decision to reject the property owners' objections at a reassessment hearing from any scrutiny on appeal. If we were to accept the City's proposed application of the law of the case doctrine, the reassessment proceedings would be little more than an exercise in futility, and our decision to annul the prior assessments would provide no effective relief to the property owners. Accordingly, we reject the City's broad application of the

law of the case doctrine and hold that the doctrine prevents property owners only from again arguing that Macaulay's use of the mass appraisal method, alone, requires annulment of the Council's reassessment decision.

III. COUNCIL'S REASSESSMENT DECISION NOT ARBITRARY OR CAPRICIOUS OR FOUNDED ON FUNDAMENTALLY WRONG BASIS

All of the appealing property owners contend that the Council's decision confirming the reassessment roll was arbitrary and capricious. We disagree.

A. *Stokes and Rempel*

1. *Contentions with Findings of Fact*

Stokes and Rempel contend that (1) several of the Council's findings are not supported by substantial evidence in the record and (2) the findings are inadequate to show the bases of the Council's decision to confirm the reassessment roll.

Stokes and Rempel assign error to the Council's findings of fact 5-7, 11-14, and 16, arguing that the record fails to provide substantial evidence in support of the findings. But Stokes and Rempel fail to provide any argument with regard to these challenged findings, and it is unclear how these findings relate to their arguments on appeal. Accordingly, we do not address the challenged findings of fact. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (failure to present argument regarding a challenged finding of fact waives assignment of error as to that finding).

Next, Stokes and Rempel contend that the Council's findings are inadequate to show how the Council resolved factual disputes. It is unclear whether Stokes and Rempel are asserting that such alleged inadequacy of the findings are independent grounds for reversing the Council's reassessment decision. And Stokes and Rempel do not identify any requirement within the LID

statutes that a council submit findings of fact and conclusions of law that address every objection lodged by property owners. *See* Chapter 35.44 RCW.

To the extent that a council's findings of fact reveal an infirmity in the decision-making process, such as arbitrary or capricious action, a fundamentally wrong basis in support of assessments, or a due process violation stemming from inadequate notice, such findings may be relevant to our appellate review. However, absent such an infirmity, a council's factual findings, even if we believe them to be erroneous, cannot support a basis for this court to annul or modify the final assessment decision. *Abbenhaus*, 89 Wn.2d at 858-59. No such infirmity is present here. The Council's factual findings reveal only that it considered the Macaulay reassessment appraisals and other submitted evidence, including the property owners' written objections, hearing testimony, and expert appraisal evidence, and weighed the evidence in favor of Macaulay's proposed reassessments. Accordingly, the Council's written factual findings do not show any deficiency in the Council's decision-making process requiring annulment of the reassessments.

2. *Presumptions and Burdens*

Next, Stokes and Rempel contend that the Council's conclusion of law 3 shows that it engaged in arbitrary and capricious action by improperly applying presumptions in favor of Macaulay's proposed reassessments and imposing a burden on property owners to overcome that presumption. We disagree.

Conclusion of law 3 states:

> 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. The Reassessments reflect properly the Special Benefits resulting from LID #1 improvements. Differing opinions were expressed regarding the Special Benefit to

> the Appellant Properties; however, the Board concludes that *the evidence presented by the owners of the Appellant Properties did not overcome the City Staff/LID recommendations*. Given that, the objections of the owners of the Appellant Properties are overruled.

AR at 14-15 (emphasis added). Stokes and Rempel argue the Council's conclusion that the property owners' evidence "did not overcome the City Staff/LID recommendations" show that the Council applied improper presumptions and evidentiary burdens. Br. of Appellants (Stokes) at 27 (emphasis omitted). Our Supreme Court has stated the presumptions and burdens of proof applicable to assessment decisions as follows:

> (1) the burden is upon the one challenging the assessment to prove its incorrectness as it is presumed the City has acted properly and legally; (2) the assessment is presumed to be a benefit; (3) the assessment is presumed to be no greater than the benefit; (4) it is presumed that an assessment is equal or ratable to an assessment upon other property similarly situated and that the assessment is fair; and (5) evidence of appraisal values and benefits is necessary to rebut these presumptions. Appellate review of such cases does not permit an independent evaluation of the merits.

City of Seattle v. Rogers Clothing for Men, Inc., 114 Wn.2d 213, 229-30, 787 P.2d 39 (1990). If an objecting property owner produces competent evidence of contrary appraisal values and special benefits resulting from a LID, the presumptions in favor of the City's assessments disappear and the burden shifts to the City to prove its assessments are valid. *Rogers*, 114 at 231; *see also Bellevue Plaza, Inc. v. City of Bellevue*, 121 Wn.2d 397, 403, 851 P.2d 662 (1993).

Here, Stokes and Rempel produced expert appraisal evidence that was contrary to the City's proposed assessments. Accordingly, the City could not rely on the presumptions set forth in *Rogers* to support its proposed reassessments. Instead, the City was required to produce evidence to support its assessments. It did so in the form of Macaulay's reassessment studies, which the Council admitted into the administrative record. The Council's conclusion of law 3

does not state that property owners' objections were rejected because their evidence did not overcome presumptions in favor of the City. Rather, it stated that the property owners' evidence did not overcome the city staff/LID recommendations, which recommendations were based on the evidence presented in Macaulay's reassessment reports.

In other words, conclusion of law 3 shows only that the Council weighed the competing appraisal evidence and concluded that the Macaulay reassessment evidence was more persuasive. And Stokes and Rempel cannot demonstrate arbitrary or capricious action based merely on the Council's weighing of evidence. *See Abbenhaus*, 89 Wn.2d at 858-59 ("Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.").

3. *Special Benefit*

Before addressing whether Stokes or Rempel can meet their burdens of showing the Council acted arbitrarily or capriciously in adopting Macaulay's special benefit analysis, our standard of review of this issue merits additional discussion. Prior to a 1957 amendment to RCW 35.44.250, appellate courts engaged in a detailed de novo review of the evidence supporting a special benefit determination and could overturn an assessment decision based on its de novo review of the merits. *Abbenhaus*, 89 Wn.2d at 857-58; *see also Cammack*, 15 Wn. App. at 193-94.

The 1957 amendment, however, "limit[ed] court involvement in assessment proceedings." *Abbenhaus*, 89 Wn.2d at 859. Under the "'fundamentally wrong basis'" and "'arbitrary or capricious'" standards of review implemented through the 1957 amendment, we no longer make an "independent decision regarding the most desirable method of assessment."

Abbenhaus, 89 Wn.2d at 859. Instead, we review the record before the Council to determine "whether it adequately supports the action of the municipality." *Abbenhaus*, 89 Wn.2d at 859. And the appealing property owners bear the burden on appeal of overcoming the presumption that the Council's assessment decision was legal and proper. *Abbenhaus*, 89 Wn.2d at 860-61. Neither Stokes nor Rempel meet this burden.

a. *Stokes*

i. *Before-LID Valuation*

Stokes first contends that the Council acted arbitrarily and capriciously in confirming the reassessment roll because Macaulay's appraisal understated the before-LID value of the Stokes property. Macaulay employed a sales comparison approach in determining the estimated before-LID value of the Stokes property. This approach evaluated the sales prices of similarly situated properties without sanitary sewer service and adjusted the comparable value to account for any differences between the Stokes property and the similarly situated properties. For example, Macaulay valued the Stokes property at the low end of the value range of similarly situated properties because a significant area of the Stokes property is composed of fill material, making it difficult to receive approval from the Pierce County Health Department to install septic systems to service the property. Based on the sales comparison approach, Macaulay estimated the before-LID value of the Stokes property at $755,000.

Stokes does not identify any specific error with regard to Macaulay's sales comparison approach. Instead, Stokes contends that its appraiser's estimated before-LID valuation of $1,052,904 was more consistent with applicable comparable sales. In other words, Stokes requests that we annul or modify the Council's reassessment decision because its appraiser

employed a more "desirable method of assessment." *Abbenhaus*, 89 Wn.2d at 859. But, under our applicable standard of review, this is an inadequate basis upon which to annul the Council's assessment decision. *Abbenhaus*, 89 Wn.2d at 859. Because the Macaulay appraisal study "adequately supports the action of the municipality," Stokes cannot show that the Council acted arbitrarily or capriciously in accepting Macaulay's proposed before-LID valuation of the Stokes property.[13] *Abbenhaus*, 89 Wn.2d at 859.

ii. *After-LID Valuation*

Next, Stokes contends that the Council acted arbitrarily and capriciously in confirming the reassessment roll because Macaulay's appraisal overstated the after-LID value of the Stokes property. Stokes argues that Macaulay's appraisal of its property's estimated after-LID value of $1,290,000 failed to account for extraordinary development costs required to realize the special benefit of the LID. In contrast with Macaulay's appraisal, the Stokes appraiser calculated the after-LID value of the Stokes property to be $1,220,100. Notably, the Stokes appraiser calculated the after-LID value of the Stokes property to be $1,966,800 but discounted the special benefit resulting from the LID by $340,000 to account for the costs of developing a storm water management retention system and again reduced the special benefit by 25 percent ($406,700) for the risks and costs of obtaining easements and for unspecified developmental difficulties.

At the outset we reject Stokes contention that Macaulay was required to discount its estimated special benefit by 25 percent to account for "heightened risks and unknown costs associated with development of the Stokes Property." Br. of Appellants (Stokes) at 42.

[13] Both Macaulay and the competing appraiser purported to comply with the Uniform Standards of Professional Appraisal Practice and with the Code of Professional Ethics of the Appraisal Institute.

Unspecified heightened risks and unknown costs are not appropriate factors to consider when determining the after-LID market value of a property because these factors are speculative at best. *See Bellevue Plaza*, 121 Wn.2d at 411 ("[W]hen an appraiser uses a factor 'beyond the knowledge of reasonable certainty', it becomes pure speculation.") (quoting *In re Seattle Local Improvement No. 6097*, 52 Wn.2d 330, 335-36, 324 P.2d 1078 (1958)).

We also reject the contention that Macaulay was required to discount the estimated special benefit to the Stokes property by $340,000 to account for the costs of developing a storm water management system. Stokes does not cite any authority for the proposition that municipalities must account for development costs when calculating the special benefit to a property as a result of a local improvement. Moreover, Macaulay's appraisal calculated the after-LID value of the Stokes property based on the increased development *potential* of the property as a result of the sewer system, again by employing a comparable sales approach. And Stokes did not present any evidence showing that the comparable properties under Macaulay's analysis did not face similar development costs. In short, the Macaulay study provided an adequate basis for the Council to determine the special benefit to the Stokes property as a result of the LID and, thus, Stokes fails to show that the Council's assessment decision was arbitrary or capricious on this basis.

iii. *Proportionality*

Finally, Stokes contends that the Council's reassessment decision was arbitrary and capricious because Macaulay failed to treat the Stokes property in the same manner as a similarly situated property in the LID. Stokes argues that Macaulay failed to assess its property in the same manner as LID property 21 by failing to reduce the usable area of the Stokes property by

the area of a potential future storm drainage pond that would need to be installed for development on the property, speculating that the "only viable explanation for $0 assessment against LID No. 21 is that Macaulay considered the significant storm pond as rendering the remainder of the site un-useable." Br. of Appellants (Stokes) at 44-45.

We begin with the presumption that "'an assessment is equal or ratable to an assessment upon other property similarly situated.'" *Abbenhaus*, 89 Wn.2d at 861 (quoting Philip A. Trautman, *Assessments in Washington*, 40 WASH. L. REV. at 118). Stokes fails to overcome this presumption.

Stokes merely speculates that Macaulay's assessment of LID property 21 had reduced the usable portion of the property to account for an *existing* storm water retention pond. And even assuming that this speculative evidence was sufficient to show that Macaulay had, in fact, reduced the usable portion of LID property 21 to account for the *existing* storm water retention pond on the property, it was not arbitrary or capricious for the Council to treat the Stokes property differently based on the lack of an *existing* storm water retention pond on the property. Stokes did not present any evidence that Macaulay had reduced the usable portion of any LID property based on the *potential* need to create a storm water retention pond to facilitate development. Accordingly, we reject this argument and affirm the superior court's order dismissing Stokes' appeal of the Council's reassessment decision.

b. *Rempel*

i. *Before-LID Valuation*

Rempel first contends that the Council acted arbitrarily and capriciously in confirming the reassessment roll because Macaulay's appraisal understated the before-LID value of the

Rempel property. Specifically, Rempel argues that Macaulay failed to cite comparable sales to justify his low valuation of the back 254,360 square feet of the property. We disagree. As with his reassessment of the Stokes property, Macaulay employed a sales comparison approach to estimate the entire before-LID value of the Rempel property. Macaulay's report states that he valued the Rempel property lower than comparable properties without sewer service because the long configuration of the property makes development of the western 6 acres difficult in light of standards for septic systems and other site development costs.[14]

Rempel's remaining challenges to Macaulay's before-LID valuation merely assert that its appraiser's assessment methodology was more desirable. But this argument is insufficient to show arbitrary and capricious action on the part of the Council. *Abbenhaus*, 89 Wn.2d at 859. Because the Macaulay appraisal study supports the Council's action, Rempel cannot show that the Council acted arbitrarily or capriciously in accepting Macaulay's proposed before-LID valuation of the Rempel property. *Abbenhaus*, 89 Wn.2d at 859.

ii. *After-LID Valuation*

Next, Rempel contends that the Council acted arbitrarily and capriciously in confirming the reassessment roll because Macaulay's appraisal overstated the after-LID value of the Rempel property. Again, Macaulay employed a sales comparison approach when determining the after-LID value of the Rempel property. Rempel identifies no error with the Macaulay's after-LID sales comparison approach, instead arguing that its appraiser's valuation method was more

[14] Rempel's argument on this issue appears to rely on a portion of the Macaulay analysis that determined the contributory value of improvement on the property, which was unrelated to Macaulay's analysis of the before-LID land value.

desirable.[15] Accordingly, Rempel cannot show that the Council acted arbitrarily and capriciously in accepting Macaulay's proposed after-LID valuation of the Rempel property.

iii. *Proportionality*

Finally, Rempel contends that the Council's reassessment decision was arbitrary and capricious because Macaulay failed to treat the Rempel property in the same manner as similarly situated properties in the LID. Rempel argues that its reassessment was grossly disproportionate to other LID properties because the median increase in value to LID properties was 40 percent whereas Macaulay's proposed reassessment increased the value of the Rempel property by 128 percent. But in light of unique characteristics of properties within a LID, it is not unreasonable that certain properties would benefit more from a local improvement than others. Absent some error in Macaulay's appraisal method, the mere difference in benefit to the Rempel property as compared to other properties in the LID, alone, does not show that that the reassessment was impermissibly disproportionate. Because Rempel fails to show such error in Macaulay's appraisal method, he cannot overcome the presumption that his reassessment was "'equal or ratable to an assessment upon other property similarly situated.'" *Abbenhaus*, 89 Wn.2d at 861 (quoting Philip A. Trautman, *Assessments in Washington*, 40 WASH. L. REV. at 118). He therefore fails to demonstrate that the Council's reassessment decision was arbitrary or

[15] Rempel also appears to argue that Macaulay improperly relied on a listing price for the sale of the Rempel property to justify his after-LID valuation. Even assuming that such reliance is improper, there is no evidence that Macaulay relied on the listing sale price in determining the after-LID value of the Rempel property. Macaulay's appraisal report merely contains a sales history section that notes the property is listed for sale at $1,750,000 plus the original LID assessment for a total asking price of $2,627,000.

capricious. Accordingly, we affirm the superior court's order dismissing Rempel's appeal of the Council's reassessment decision.

B. *Docken Petitioners (Duncan, Masters/Schmidt, Brickhouse, Suelo Marina, Docken)*

1. *Presumptions and Burdens*

Similarly to Stokes and Rempel, the Docken Petitioners assert that the Council's reassessment decision was founded on a fundamentally wrong basis because the Council applied improper presumptions and evidentiary burdens. In support of this assertion, the Docken Petitioners cite to a draft conclusion of law that was not approved by the Council. But our review concerns the Council's final assessment decision and not a draft conclusion of law that was ultimately rejected by the Council. And the draft conclusion of law is wholly irrelevant to our review of the Council's final assessment decision as we "'are not permitted to speculate on the motives prompting the city council in the enactment of the ordinance, so long as we find it reasonable *upon its face* and within the city's power.'" *Hasit*, 179 Wn. App. at 951 (emphasis added) (quoting *Cont'l Baking Co. v. City of Mount Vernon*, 182 Wash. 68, 73, 44 P.2d 821 (1935)). As we held above, the Council did not rely on presumptions in favor of the City's recommended reassessment but instead relied on the evidence presented to support the recommended reassessment.[16] Accordingly, the Docken Petitioners fail to show the Council acted arbitrarily or capriciously by applying improper presumptions or evidentiary burdens.

[16] Because we hold that the Council did not rely on presumptions in favor of the City's recommended reassessment, we need not address the Docken Petitioners' argument regarding the evidentiary standard for overcoming these presumptions.

2. *Special Benefit*

a. *Collective Arguments*

All of the Docken Petitioners collectively argue that the Council's reassessment decision was arbitrary or capricious because (1) Macaulay's proposed reassessments failed its own "'Test of Reasonableness,'" (2) Macaulay's proposed reassessments were based on inflated values to comparable pending sales properties, and (3) Macaulay's proposed reassessments lacked any basis in reality as evinced by subsequent values attributed to the properties by the county tax assessor. Br. of Appellants (Docken) at 37. On all points, we disagree.

i. *Test of Reasonableness*

Macaulay's reassessment analyses include a "Test of Reasonableness," whereby Macaulay compared his proposed special benefit values to the value increases of properties "in nearby market areas where large infrastructure projects have been completed in recent years, such as Kent." AR at 3124. Macaulay determined that the increase in value of properties in comparable markets that underwent infrastructure projects ranged from $1.00 per square foot of land to $2.75 per square foot of land. The Docken Petitioners argue that because some[17] of Macaulay's proposed special benefit values fall outside this range, Macaulay's special benefit analyses were flawed and, thus, the Council acted arbitrarily and capriciously in accepting Macaulay's proposed reassessments. We reject this argument.

[17] Of the Docken Petitioners, only the Suelo Marina and Masters/Schmidt properties had proposed special benefits values that fell outside the $1.00 to $2.75 per square foot range. Macaulay calculated the special benefit to the Suelo Marina property at $4.00 per square foot with a reassessment value of $2.85 per square foot. Macaulay calculated the special benefit to the Masters/Schmidt properties at $3.75 per square foot with a reassessment value of $2.45 per square foot.

Macaulay did not employ his "Test of Reasonableness" to calculate the special benefits to LID properties but, rather, merely used the test as a comparison tool. That Macaulay determined some of the Docken Petitioners' properties received a special benefit greater than the average range for properties in similar markets does not, itself, reveal any flaw in Macaulay's special benefits analysis. Accordingly, the Docken Petitioners fail to show arbitrary or capricious action on this basis.

ii. *Inflated Values*

Next, the Docken Petitioners argue that Macaulay's proposed reassessments were flawed because the reassessments were calculated by inflating the value of comparable properties that were pending sale. The Docken Petitioners' argument on this point is difficult to discern. But even accepting that Macaulay had inflated the value of these pending sale properties, there is no evidence that Macaulay used the value of pending sale properties in his sales comparison analysis. Although the reassessment studies for the Suelo Marina, Masters/Schmidt, and Docken properties include charts listing pending sale properties, these properties were not listed among the properties used in Macaulay's sales comparison adjustment grid for calculating the subject properties' after-LID values. Accordingly, the Docken Petitioners fail to show that the Council acted arbitrarily or capriciously in accepting Macaulay's proposed reassessments on this basis.

iii. *County Property Tax Assessments*

Next, the Docken Petitioners argue that the Council's reassessment decision was arbitrary and capricious because their properties have lost value after the May 10, 2011, retrospective reassessment date as shown by subsequent county tax assessments. This argument lacks merit.

The Docken Petitioners cite *Hasit* for the proposition that a municipal council sitting as a board of equalization in a LID assessment proceeding presumes a county tax assessors' valuation of property to be correct unless overcome by clear, cogent and convincing evidence. 179 Wn. App. at 949. In *Hasit*, we cited WAC 458-14-046(4) in support of our holding that the fundamentally wrong basis and arbitrary or capricious standards of review on appeal from a LID assessment decision does not apply at the municipal hearing level. 179 Wn. App. at 948-49. We do not interpret *Hasit*'s reliance on WAC 458-14-046(4) to support the proposition that county tax assessor's property values are presumptively correct measures of special benefits in LID proceedings.[18]

By its terms WAC 458-14-046(4) applies only to county boards of equalization reviewing property tax assessments. In contrast with property tax assessments, LID assessments determine only "the increase in fair market value attributable to the local improvements." *Doolittle*, 114 Wn.2d at 103; Ch. 84 RCW. To the extent that county property tax assessments bear any relation to "the increase in fair market value attributable to the local improvements," the property tax assessments merely go to the weight of evidence supporting the LID assessment valuation. *Doolittle*, 114 Wn.2d at 103. As such, the Docken Petitioners cannot demonstrate that the Council's action concerning the weight of this evidence was arbitrary or capricious. We now turn to the Docken Petitioners property-specific arguments.

[18] The Docken Petitioners claim that "[t]here is no presumption of correctness applied to city staff [LID assessment] recommendations" and that the City bears the burden of proving by clear, cogent and convincing evidence that the county property tax assessments are incorrect is clearly contrary to our discussion of applicable presumptions in *Hasit*, decades of Supreme Court precedent cited in support of that discussion, and the legislative directive of the LID statutes. Br. of Appellants (Docken) at 36; 179 Wn. App. at 935-36; *see also* Chapter 35.44 RCW.

a. *Duncan*

The Duncan property owners contend that the Council's reassessment decision was arbitrary and capricious because Macaulay's proposed reassessment (1) recommended a $212,700 reassessment despite Macaulay's determination that the highest and best use of the property after the LID was the existing use of the property, (2) failed to deduct unusable portions of the property from its special benefits calculation, (3) failed to deduct the footprint of an existing building and parking lot from the portion of the land benefitted by the LID, and (4) failed to deduct portions of property that would require supporting infrastructure to facilitate future development. On all points, we disagree.

Regarding the Duncan property owners' contention that it received no special benefit based on Macaulay's determination that the property's existing use was the highest and best use after the LID, Macaulay's reassessment study concluded that the LID provided expansion/redevelopment potential to the property. This conclusion provided the Council with evidence that the Duncan property specially benefitted from the LID and, thus, the Duncan property owners cannot demonstrate that the Council acted arbitrarily or capriciously in so finding.[19] *Abbenhaus*, 89 Wn.2d at 859-61.

Regarding the contention that Macaulay failed to deduct unusable portions of the Duncan property from his special benefits analysis, the Macaulay study stated that Macaulay physically inspected the property and reviewed soils/topographical maps to determine that 4.62 acres of the property was unusable, an increase from the 2011 assessment's determination that only 2.36

[19] Because the Council had evidence that the Duncan property was specially benefitted by the LID, the Duncan property owners related due process claim fails.

acres of the land was unusable. The Duncan property owners assert that Macaulay's determination was flawed based on the City's critical area maps, which the Duncan property owners assert show 6.48 acres of unusable land. But it is impossible to determine from this map the precise area of the Duncan property that could be feasibly developed. Because the Macaulay study provided evidence supporting the Council's reassessment decision as to the usable area of the Duncan property, the Duncan property owners fail to demonstrate that the Council acted arbitrarily or capriciously on this basis.

Regarding the contention that Macaulay failed to deduct from his special benefit analysis portions of the property already supporting an existing building and parking lot, the Duncan property owners fail to provide adequate argument, or any supporting legal authority, to show how this area of the property was not specially benefited from the LID. To the extent that the Duncan property owners are asserting that these portions of the property did not specially benefit from the LID because the existing use of these portions were at their highest and best use after the LID, that argument ignores Macaulay's determination that the existing use could be expanded as a result of the LID. Accordingly, the Duncan property owners fail to demonstrate arbitrary or capricious action on this basis.

Finally, we reject the contention that Macaulay's special benefit analysis was flawed for failing to deduct from his special benefit analysis additional portions of land that would require supporting infrastructure to facilitate future development. The Duncan property owners merely argue that it is not possible to develop every square foot of land under the City's building codes. But, even accepting this argument, Macaulay's special benefit analysis utilized a sales comparison approach that examined the increase in value to similar properties, which also face

development constraints. Accordingly, the Duncan property owners fail to show any flaw in the Macaulay special benefit analysis rendering the Council's reassessment decision arbitrary or capricious.

b. *Masters/Schmidt*

The Masters/Schmidt property owners contend that the Council's reassessment decision was arbitrary and capricious because Macaulay's proposed reassessment (1) failed to deduct from its special benefit estimate the cost of installing sewers lines and obtaining necessary easements to connect to the City sewer system and (2) improperly distributed the costs of the sewer system without evaluating the special benefit to each LID property.

Regarding the contention that Macaulay's proposed reassessments were flawed for failing to deduct the costs of installing sewer lines and obtaining easements, the Masters/Schmidt property owners failed to present evidence sufficient to overcome the presumption that the Council's reassessment decision was correct. The Masters/Schmidt property owners merely cite to aerial maps showing the layout of their parcels, but do not identify any evidence establishing the required length of sewer line or the costs of installing such sewer line. Thus, even assuming without deciding that LID assessments must reduce special benefits for expenses necessary to enjoy the benefit of a local improvement, the Masters/Schmidt property owners failed to produce competent evidence of such expenses at the reassessment hearing to overcome presumption in favor of the City's assessment. *Rogers*, 114 at 230-31. Accordingly, they fail to demonstrate the Council's reassessment decision was arbitrary or capricious on this basis.

The Masters/Schmidt property owners' argument regarding the distribution of LID costs is largely conclusory and difficult to discern. To the extent that this argument relates to

Macaulay's use of the mass appraisal method generally, we approved this method in *Hasit*. 179 Wn. App. at 943-44. Accordingly, as addressed above, the law of case doctrine prevents appellants from challenging the mass appraisal method in this subsequent appeal. *Roberson*, 156 Wn.2d at 41. Moreover, Macaulay's reassessment studies clearly calculated the special benefit attributable to each of the appealing property owners and did not simply distribute the full cost of the sewer improvement to the property owners. Accordingly, the Masters/Schmidt property owners fail to show the Council's reassessment decision was arbitrary or capricious on this basis.

c. *Brickhouse*

Brickhouse contends that the Council's reassessment decision was arbitrary and capricious because Macaulay's proposed reassessment (1) recommended a $21,270 reassessment despite Macaulay's determination that the highest and best use of the property after the LID was the existing use of the property and (2) failed to deduct from its special benefit estimate the cost of installing sewers lines.

Regarding Brickhouse's contention that it received no special benefit based on Macaulay's determination that the property's existing use was the highest and best use after the LID, Macaulay's report did conclude that, as improved, the existing use of the property is at its highest and best use. But Macaulay's report also concluded that, with the addition of the LID, the property obtained future development potential for commercial and multifamily mixed use development. That Brickhouse may prefer to utilize the property with its existing use rather than for its development potential does not defeat the special benefit determination. *See Doolittle*, 114 Wn.2d at 93 ("Property cannot be relieved from the burden of a local improvement district assessment simply because the owner devotes it to a use which may not be specially benefitted

by the local improvement."). Accordingly, Macaulay's report provided the Council with evidence that the Brickhouse property received a special benefit from the installation of the LID. As such, Brickhouse cannot show that the Council reassessment decision was arbitrary or capricious.[20] *Abbenhaus*, 89 Wn.2d at 859-61.

Regarding the contention that Macaulay's proposed reassessments were flawed for failing to deduct the costs of installing sewer lines, Brickhouse failed to present evidence sufficient to overcome the presumption that the Council's reassessment decision was correct. Similar to the Masters/Schmidt property owners, Brickhouse declares the purported costs of installing sewer lines without any evidence in support. Although we have declined to address the evidentiary standard for overcoming presumptions in favor of the City at the municipal hearing level, Brickhouse's unsupported declaration clearly falls short. *See Hasit*, 179 Wn. App. at 949 n. 7. To hold otherwise would render the presumption a nullity. Thus, even assuming that LID assessments must reduce special benefits for expenses necessary to enjoy the benefit of a local improvement, Brickhouse failed to produce competent evidence of such expenses at the reassessment hearing to overcome the presumption in favor of the City's assessment. Accordingly, it fails to show the Council acted arbitrarily or capriciously on this basis.

d. *Suelo Marina*

Suelo Marina contends that the Council's reassessment decision was arbitrary and capricious because Macaulay's proposed reassessment (1) determined that the property's existing

[20] Because the Council had evidence that the Brickhouse property was specially benefitted from the LID, Brickhouse's related due process claim fails.

use was at its highest and best use before the LID and (2) failed to assign any value to the buildings on the property.

Suelo Marina's contention that it received no special benefit based on Macaulay's determination that the property's existing use was the highest and best use before the LID is meritless. For the reasons set out above, that the Suelo Marina property was at its highest and best use *before* the LID does not defeat the conclusion that the property received a special benefit as a result of the LID.[21]

With regard to the second claim, Suelo Marina argues only that Macaulay lacked a foundation for finding the existing buildings worthless because he did not personally inspect the property as part of his original 2011 assessment recommendations. We fail to see how this lack of foundation supports Suelo Marina's argument in this current appeal, as Macaulay inspected the property as part of his 2014 reassessment recommendations. Moreover, Suelo Marina fails to cite any evidence in the record showing the buildings' value. Accordingly, it did not overcome the presumption that the reassessment was correct on this point. As such, Suelo Marina does not show that the Council's reassessment decision was arbitrary and capricious on this ground.

e. *Docken*

The Docken property owners contend that the Council's reassessment decision was arbitrary and capricious as to parcel 131 because Macaulay's proposed reassessment (1) determined that the property's existing use was at its highest and best use before and after the LID, (2) failed to lay a foundation for his opinion as to the property's soil conditions, and (3)

[21] Because the Council had evidence that the Suelo Marina property was specially benefitted from the LID, the Suelo Marina property owners related due process claim fails.

failed to deduct the footprint of an existing buildings and parking lots from the portion of the land benefitted by the LID. Additionally, the Docken property owners contend that the Council's reassessment decision was arbitrary and capricious as to parcels 133 and 140 because Macaulay's proposed reassessment (1) understated the properties' before-LID values and (2) assumed combining the parcels when determining special benefits. On all points, we disagree.

i. *Parcel 131*

Regarding the Docken property owners' contention that it received no special benefit based on Macaulay's determination that the property's existing use was the highest and best use before the LID, the contention is meritless because the determination that a property was at its highest and best use *before* the LID does not defeat the conclusion that the property received a special benefit as a result of the LID.

Regarding the Docken property owners' contention that it received no special benefit based on Macaulay's determination that the property's existing use was the highest and best use after the LID, the Macaulay study determined that the LID provided parcel 131 with future commercial/multifamily mixed use development potential. Thus, Macaulay's report provided the Council with evidence that parcel 131 was specially benefitted from the LID. Accordingly, the Docken property owners cannot show that the Council reassessment decision was arbitrary or capricious on this basis.[22] *Abbenhaus*, 89 Wn.2d at 859-61.

Regarding the Docken property owners' contention with the basis for Macaulay's opinion regarding poor soil conditions, Macaulay noted in his original 2011 summary assessment report

[22] Because the Council had evidence that the Docken property was specially benefitted from the LID, the Docken property owners related due process claim fails.

that Pierce County Health Department officials' reports of numerous complaints regarding septic system failures in the LID area, coupled with poor soil conditions including wetlands, clay content, and a high water table, make it impossible to achieve maximum development density under the then current zoning regulations. Even assuming that this did not establish an adequate foundation for Macaulay's opinion regarding the soil conditions of parcel 131, the Docken property owners did not present any competent evidence to overcome the presumption that the City's recommended reassessment was incorrect on this ground. On this issue, Docken's written objection contains only a declaration from one of the Docken property owners stating, "I disagree with the City Consultant's tentative assertion that 'soil conditions and probable Pierce County Health Department requirements' prevent attaining the highest and best use of the land." AR at 818-19. A mere disagreement as to an appraiser's opinion does not constitute evidence sufficient to overcome the presumption in favor of a City's assessments. Accordingly, the Docken property owners cannot show that the Council reassessment decision was arbitrary or capricious on this ground.

As with the Duncan property owners, the Docken property owners fail to provide adequate argument or legal authority in support of their contention that existing buildings and parking lots on its property did not specially benefit from the LID. To the extent that the Docken property owners are asserting that these portions of the property did not specially benefit from the LID because the existing use of these portions of the property were at their highest and best use after the LID, that assertion ignores Macaulay's determination that the LID provided potential for upgrading/renovation to more intensive uses of the property improved with the

existing buildings. Accordingly, the Docken property owners do not show that the Council reassessment decision was arbitrary and capricious on this ground.

ii. *Parcels 133 and 140*

Regarding the Docken property owners' contention with Macaulay's before-LID valuation, the owners do not identify any specific error with Macaulay's sales comparison approach, instead relying on its own appraiser's opinion that Macaulay understated the before-LID value of the property when compared to Macaulay's valuation of a similar LID property. But, an appraiser's contrary assessment determination, alone, is an inadequate basis upon which to overturn the Council's assessment decision on appeal. *Abbenhaus*, 89 Wn.2d at 859.

Finally, the Docken property owners rely on our Supreme Court's decision in *Doolittle*, 114 Wn.2d 88, to support the argument that Macaulay improperly considered the potential future integrated use of parcels 133 and 140 when calculating the parcels' special benefit. This reliance is misplaced. The *Doolittle* Court did not create a bright-line rule that separate parcels could not be assessed as a single lot when determining special benefits. Instead, the *Doolittle* court held that separate parcels could be assessed as a single lot when determining special benefits if the following three conditions are met: (1) unity of ownership, (2) contiguity of the parcels, and (3) unity of use. 114 Wn.2d at 94-96.

There is no question that parcels 133 and 140 are contiguous and have unity of ownership. And the Docken property owners did not raise any issue regarding unity of use at the reassessment objection hearing or on appeal, instead relying on its incorrect interpretation of *Doolittle*. As such, we hold that the Docken property owners have failed to show that Macaulay improperly considered the potential future integrated use of parcels 133 and 140 when

calculating special benefits to the properties. Accordingly, they fail to show that the Council's reassessment decision was arbitrary and capricious on this ground.

IV. Failure To Present Rebuttal Evidence Argument Waived

The Docken Petitioners present the following assignment of error:

> Once property owners present evidenced [sic] 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 the property owners' presentation? NO.

Br. of Appellants (Docken) at 2. But, the Docken Petitioners fail to present any argument in support of this assignment of error regarding the timing of the City's presentation of evidence. Accordingly, that assignment of error is waived. RAP 10.3(a)(6); *Olympic Tug & Barge, Inc. v. Dep't of Revenue*, 188 Wn. App. 949, 959 n. 9, 355 P.3d 1199 (2015), *review denied*, 184 Wn.2d 1039 (2016).

V. Statements from 2011 Hearing

Next, the Docken Petitioners assert that the Council's decision to admit evidence of statements made by property owners during the original assessment hearing violated their constitutional right to due process because those statements were made without the benefit of constitutionally adequate time to gather evidence for the original hearing. This argument is difficult to discern and lacks any citations to legal authority in support. The Docken Petitioners appear to argue that the Council improperly relied on a statement from one of the Duncan

property owners during the original assessment hearing that she believed the proper special benefit value to her property should be $293,470.[23] This argument lacks merit.

Contrary to their assertion on appeal, the Docken Petitioners neither objected to the City attorney questioning the Duncan property owner about her prior statements at the original assessment hearing nor requested that the Council exclude the transcripts from the original hearing from the administrative record. Rather, *after* the Duncan property owner completed her testimony regarding her prior 2011 statements in response to the City's attorney's questioning, counsel for the Docken Petitioners stated that she wanted to "supplement . . . Ms. Duncan's testimony" and argued that it was unfair for the City's attorney to use her prior testimony because that testimony was made without the benefit of constitutionally adequate time to gather evidence of what the proper assessment value should be for her property. AR at 662. At best, counsel for the Docken Petitioners argued that the Counsel should give little weight to the Duncan property owner's prior testimony due to the City's constitutionally inadequate notice of the prior hearing. Because the Docken Petitioners did not request the Council to exclude such prior testimony from the record, they cannot show that the Council erred by failing to do so. Accordingly, we reject the Docken Petitioners' due process claim.

VI. APPEARANCE OF FAIRNESS DOCTRINE

Finally, for the first time on appeal, the Docken Petitioners argue that City Manager Mark Bauer's attendance at the Council's executive session, in which the Council deliberated on the property owners' reassessment objections, violated the appearance of fairness doctrine. The

[23] Even if we were to agree with the Docken Petitioners that the Council improperly considered the Duncan property owner's statements, we fail to discern how such error would invalidate the reassessments as to the other property owners.

Docken Petitioners, however, fail to identify any evidence in the record that Bauer had attended the Council's executive session. The Docken Petitioners also fail to identify any evidence in the record that they had objected to Bauer's attendance at the Council's executive session or any reason why they should be relieved from the duty to object. Claims of bias or violations of the appearance of fairness doctrine cannot be raised for the first time on appeal. *Club Envy of Spokane, LLC v. Ridpath Tower Condominium Ass'n*, 184 Wn. App. 593, 605, 337 P.3d 1131 (2014). Accordingly, we do not further address this issue.

We affirm the superior court's order dismissing the property owners' appeal from the Council's reassessment decision.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Bjorgen, C.J.

Melnick, J.

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. PETITIONERS ENID DUNCAN ET AL'S. MOTION TO FILE OVERLENGTH PETITION FOR REVIEW
2. PETITION FOR REVIEW BY THE SUPREME COURT

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

P. Stephen (Steve) DiJulio
Lee R. Marchisio
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299
Email:dijup@foster.com
marcl@foster.com

[X] by United States First Class Mail
[ ] by Legal Messenger
[X] by Electronic Mail

Joseph Zachary Lell, Edgewood Attorney
Jeff Capell Special LID Counsel for Edgewood c/o Zach Lell
Ogden Murphy Wallace
901 Fifth Avenue, Suite 3500
Seattle, WA 98164

ORIGINAL

Email:zlell@omwlaw.com

[X] by United States First Class Mail
[ ] by Legal Messenger
[X] by Electronic Mail

Margaret Archer
Gordon, Thomas, Honeywell LLP
1201 Pacific Ave, #2100
Tacoma, Washington 98402
Email: marcher@gth-law.com

[X] by United States First Class Mail
[ ] by Legal Messenger
[ ] by Electronic Mail

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 December 2016 at Tacoma, Washington.

Carolyn A. Lake