

74435-6

74435-6

NO. 74435-6-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

TOM BUTLER and LINDA LEWIS,
Husband and wife

Appellants,

v.

SKAGIT COUNTY, a Washington County,
and HAZEL FORD

Respondents,

RECEIVED
COURT OF APPEALS
DIVISION ONE
MAY 27 2016

APPELLANTS' REPLY BRIEF

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ORIGINAL

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I. INTRODUCTION

Tom Butler and Linda Lewis reply to the Joint Response by Skagit County and Hazel Ford. Respondents' arguments to the Butlers' appeal should be rejected because they lack support in the decision record, county code, and statutory and case law.

II. ARGUMENT

A. The Building Setback Variances Should Be Reversed.

In their Opening Brief at Argument A, the Butlers show that the setback variances were unlawfully granted because neither Ford's application nor the Hearing Examiner's findings meet the requirements of county code. To be upheld, the variances approved for Ford must be supported by findings that the application requirements and the variance approval criteria have been met, including findings that the variance: 1) is the "minimum ... that will make possible the reasonable use of land"; 2) "will not confer ... any special privilege;" 3) if denied, "the applicant would be denied all reasonable use of his or her property;" and 4) "how the requested variance meets any other specific criteria," including those for critical areas.¹ Ford's application fails to make those

¹ SCC 14.10.030(2) and .040(1), included within Appendix 1 to Appellants' Opening Brief.

showings and the County's approvals fail to find that such showings have been made or that those variance criteria have been satisfied.

Ford's variance application asserts that the "[t]opographical features on [Lot 12] make it very difficult to build a residential structure due to the steep slope" and that the setback reductions are sought "to provide a solid and secure foundation platform..."² But Ford's application makes no showing that: the requested setback reductions are necessary to make possible any reasonable use of the land; rejection of the setback reductions would deny her all reasonable use; the variances would not grant to her privileges not available to those similarly situated; and that they would comply with other provisions of county code.

Likewise, none of the county approvals of her variance requests are supported by findings that those variance criteria have been satisfied. Such findings are absent from the initial PDS approval,³ the first, second, and third Hearing Examiner decisions⁴

² AR 00313 (Administrative Setback Reduction, Narrative Statement).

³ AR 00333 (Administrative Variance Decision, 8/21/2013).

⁴ AR 0004 (Notice of Decision, 12/19/13), AR 00025 (Hearing Examiner Decision of 7/10/14) and AR 00093 (Hearing Examiner Decision, 2/4/15).

and the two County Commissioner decisions.⁵ The required findings by the “approving authority” were never made.

The failure of any of the county’s approving authorities to enter findings on the variance criteria cited above renders those decisions contrary to law and invalid.⁶ Respondents concede the lack of required findings,⁷ but defend the error on asserted grounds that: the Butlers’ failed to assign error to the Examiner’s findings,⁸ the variance procedures should be liberally construed;⁹ the lack of required findings amounts to harmless error¹⁰ reviewable under the different, procedural error standard rather than the error of law standard invoked;¹¹ the setback variances should be affirmed under different standards than those applied;¹² the “denial of all

⁵ AR 00018 (Resolution R20140288) and AR 00098 (Resolution R20150144).

⁶ *St. Clair v. Skagit County*, 43 Wn.App. 122, 128-29, 715 P.2d 165 (1986). See also, *Cooper-George Co. v. City of Spokane*, 3 Wn.App. 416, 418, 475 P.2d 568, (1970) (board of adjustment’s disregard of the adopted variance approval criteria and reliance on its own, separate criteria found to be arbitrary and capricious).

⁷Response at 12 (claiming the Butlers needed to show harm resulting from lack of needed findings) and at 28 (conceding Examiner’s failure to explicitly find lack of special privilege).

⁸ Response at 13.

⁹ Response at 26.

¹⁰ Response at 11-12 and 19-20 (claims of harmless error).

¹¹ Response at 8 and 12 (arguing the issues to be reviewable under the procedural error and/or substantial evidence standards, rather than the error of law standard that is the basis for the appeal).

¹² Response at 16, 27 and 32, fn 15 (arguing applicability of administrative variance criteria).

reasonable use” standard is inapplicable;¹³ the record contains evidence that would have allowed the Hearing Examiner to enter the required findings anyway;¹⁴ the Butlers produced no site plans or surveys to prove the reasonable use of land without a variance;¹⁵ and other, more subjective criteria would be satisfied.¹⁶ None of these arguments is well-founded.

1. The Butlers properly assigned error.

This is an appeal of the superior court’s denial of a Land Use Petition, not the appeal of an original civil action. The Butlers’ Land Use Petition properly alleges error, in conformance with the requirements of the Land Use Petition Act.¹⁷ And their Opening Brief at 1 assigns error to the approval of the setback variances and the reasonable use exception challenged in this appeal. For several reasons, the Butlers’ perfection of this appeal does not require the specific assignment of error to the Hearing Examiner’s findings: the “final determination”¹⁸ appealed, the County Commissioners’ denial of the Butlers’ administrative appeal, did not

¹³ Response at 34.

¹⁴ Response at 20, fn 9.

¹⁵ Response at 38.

¹⁶ Response at 39.

¹⁷ CP 143 and 150-153 (allegations of error).

¹⁸ RCW 36.70C.020(2) (definition of “land use decision”).

contain findings of fact;¹⁹ the grounds for the Butlers appeal are clear from the briefing below and on appeal;²⁰ the principal basis for appeal of the variances is the *failure* of the Examiner and the County Commissioner to render findings required by law; and the reasonable use exception is challenged not for lack of substantial evidence, but for violation of express provisions of county code.

2. Variance procedures create exceptions and are strictly construed.

The Response at 26 asserts that “SCC 14.10.030(2)(b) allows the county to make a *liberal* interpretation of the requirements for a variance...” (Emphasis supplied). But that section allows relief when a “*literal* interpretation” of the code deprives a landowner of rights held by others in the same district. (Emphasis supplied.) The County misreads its own code. Because they create exceptions to zoning restrictions otherwise applicable, variance procedures are strictly, not liberally applied.²¹

¹⁹ AR 00098.

²⁰ *Goehle v. Fred Hutchinson Cancer Research Center*, 100 Wn.App. 609, 613-14, 1 P.3d 579 (2000)(“The appellate court will review the merits of the appeal where the nature of the challenge is perfectly clear and the challenged ruling is set forth in the appellate brief.”)

²¹ *Douglass v. City of Spokane*, 25 Wn.App. 823, 829, 609 P.2d 979 (1980)(applicant bears the burden in demonstrating compliance with variance criteria); cf, *Buechel v. State Dept. of Ecology*, 125 Wn.2d 196, 205, 884 P.2d 910 (1994)(variance from shoreline requirements is “strictly limited to granting relief from specific or unique circumstances...”).

3. The lack of required findings does not amount to harmless error.

The lack of required findings does not amount to harmless error, as Respondents claim at 19-20. Otherwise, the need for support of administrative decisions through adequate findings of fact and conclusions of law would not be a longstanding requirement of administrative law and of quasi-judicial zoning decisions,²² such as the one at hand. Accordingly, the Butlers seek review under the applicable error of law standard under RCW 36.70C.130(1)(b) and (d), not for failure to follow a prescribed process under subsection .130(1)(a), as claimed by Respondents.

4. The setback variances may not be affirmed under standards different from those applied.

Respondents' arguments that the setback variances be affirmed under different standards²³ should be rejected.

Respondents are barred from now defending the setback

²² *Parkridge v. City of Seattle*, 89 Wn.2d 454, 573 P.2d 359, (1978) (“Henceforth, we also require, founded upon and supported by the record, that findings of fact be made and conclusions or reasons based thereon be given for the action taken by the deciding entity...”); *Cooper-George Co. v. City of Spokane*, 3 Wn.App. at 418 (“... disregard for the requisites established by ordinance for the granting of a variance justifies the trial court's conclusion that the board acted in an arbitrary and capricious fashion.”); *St. Clair v. Skagit County*, 43 Wn.App. 122, 128-29, 715 P.2d 165 (1986) (“Granting a variance without entering the required findings of fact is also contrary to law.”).

²³ Response at 16, 27 and 32, fn 15 (arguing applicability of administrative variance criteria).

reductions as “administrative variances” procedures under 14.16.810 because they did not preserve that issue for review.

In their 2014 remand decision, the County Commissioners found that the variance procedures of Chapter 14.10 applied to administrative variances under 14.16.810(4).²⁴ In the subsequent remand proceedings before the Examiner, PDS conceded that the relationship between Chapter 14.10 and section 14.16.810(4) had been resolved by the County Commissioners.²⁵ In her memorandum to the Examiner, Ford chose not to dispute the applicability of the SCC 14.10.030 criteria, but to “supplement the record at the next hearing so that such findings may be made by the Hearing Examiner.”²⁶ Having accepted the County Commissioners’ determination of the applicability of Chapter 14.10 to the remand proceedings before the Examiner and having assigned no error to it in the second appeal to the County

²⁴ Resolution 20140288, Fourth Recital (9/16/14). The County Prosecuting Attorney’s Office approved this Resolution as to form. Nothing in the record indicates that the Prosecuting Attorney’s Office objected to the County Commissioners’ construction and application of Chapter 14.10. Yet, the County’s position on this issue in this appeal contradicts the ruling of its own County Commissioners.

²⁵ AR 0038 (PDS memorandum of 11/7/14). The memorandum’s last sentence asserts, without support, that “[t]he Department does not interpret this criterion [.030(2)(f)] as applying in this instance[.]” which was pursued no further.

²⁶ AR 00046 (Applicant’s Submittal and Memorandum, 11/12/14).

Commissioners, in superior court action, or in this appeal, Respondents are barred from raising that issue again.²⁷

5. The county may not disregard showings required of the applicant.

The court should also reject Respondents' argument that the variance criterion at SCC 14.10.030(2)(f) does not apply (*i.e.*, the need for the applicant to show that denial would result in the loss of all reasonable use of property).²⁸ Satisfaction of that showing is a requirement for variance approval. Under SCC 14.10.040(1)(a) the "Approving Authority shall make findings whether:"

- (a) The reasons set forth in the application justify the granting of the variance ...

Under SCC 14.10.030(2) the variance application shall include a narrative statement that:

- (f) If applicable, an explanation from the applicant as to why, if a variance is denied, the applicant would be denied all reasonable use of his or her property.

In remanding the variance determination back to the Examiner, the County Commissioners specifically referenced the above requirement:

²⁷ *Griffin v. Social & Health Servs.*, 91 Wn.2d 616, 631, 590 P.2d 816 (1979)(Failure to raise issues during the course of an administrative hearing precludes the consideration of such issues on review.).

²⁸ Response at 34.

Whereas, SCC 14.10.030(2)(f) specifies that variance applications must include “[i]f applicable, an explanation from the applicant as to why, if a variance is denied, the applicant would be denied all reasonable use of his or her property.”²⁹

Accordingly, the County Commissioners remanded the decision back to the Examiner to determine whether approval of the variance had complied with SCC Chapter 14.10, which necessarily included the above-cited subsection .030(2)(f). The applicability of SCC 14.10.030(2)(f) therefore was determined by the County Commissioners in the administrative proceedings and not challenged in those appeals. The Ford’s variance application,³⁰ the PDS approval³¹ and the Examiner’s decision³² each fail to show or to find that denial of the variance would result in the denial of all reasonable use of her property. The Examiner’s conclusion “the topography of Lot 12 and Lot 13 directs any reasonable

²⁹ Resolution 20140288, Sixth Recital.

³⁰ AR 00313, the application’s narrative statement asserts that the “[t]opographical features on [Lot 12] make it very difficult to build a residential structure due to the steep slope” and that the setback reductions are sought “to provide a solid and secure foundation platform...”

³¹ AR 00336. Contrary to the claim in Response at 38 that the “county found that ... there does not appear to be an alternative location that would allow construction of the proposed residence[,]” the passage cited at AR 00336 is not a county finding or determination, but a reiteration of what the application asserts.

³² AR 00095 (Hearing Examiner Decision of February 4, 2015, Finding 18).

development of those properties as requested by Ford,³³ is not the same as finding that denial of the variance would deny all reasonable use. Nor does it satisfy the related approval criterion that “[t]he variance is the minimum variance that will make possible the reasonable use of land, building or structure.”³⁴

6. It is not up to the court to search the record for evidence to support findings the Examiner never made.

The court should reject the Respondents’ plea that the Examiner’s failure to make the required findings be excused on asserted grounds that the record contains evidence that would have allowed the Hearing Examiner to render the required findings anyway.³⁵ Respondents’ record citation is to a letter by Ford’s architect that about half (197 of 389 lots) of Ford’s “neighbors could capitalize on the view potential in developing a lot in the vicinity of the proposed project.”³⁶ Conversely, about half (192/389) could not so capitalize; so denial of the requested variance for Lot 12 would put Ford in the company of 192 of her neighbors. Even if accepted

³³ *Id.*

³⁴ SCC 14.10.040(1)(b).

³⁵ See Response at 28, that “the record established that denial of the variance would ‘deprive Ms. Ford of her ability to develop the proposed residential property on Lot 12... Record at 432.” Also see Response at 27 and 28, that although findings of “special conditions and circumstances” and of lack of “any special privilege” were not expressly made, they are “implicit” in other findings.

at face value, the architect's letter would not support findings that the variance would be the minimum necessary, that denial of the variance would deny all reasonable use, and that it would not amount to a grant of special privilege. Respondents offer no authority that the satisfaction of required findings may be implicitly found. Indeed, the law is to the contrary.³⁷ It is not up to the court to search the record for evidence that might have supported entry of the required findings, but rather it is the obligation of the administrative agency to satisfy the court that the required findings have been rendered.³⁸

7. The Butlers were not obliged to design Ford's project for her.

The Respondents improperly fault the Butlers for not producing site plans or surveys to prove that a reasonable use of her property could be made without approval of the variances.³⁹ The variances have been sought by Ford, not the Butlers. As the

³⁶ AR 00432.

³⁷ *Andrew v. King Cy.*, 21 Wn.App. 566, 576, 586 P.2d 509 (1978)(Remand is the proper disposition to cure failure to render required findings.)

³⁸ *Andrew v. King Cy.*, 21 Wn.App. at 576 ("...the purpose of such findings is not only to inform the parties of the basis of the decision, but is also to assist the courts in reviewing the administrative action.")

³⁹ Response at 38.

variance applicant, Ford bears the burden of satisfying the variance criteria.⁴⁰ The Butlers are not required to design her project for her.

8. Both Lots 12 and 13 have views.

On a related topic, Respondents at 29 incorrectly assert that no view exists from Lot 13 and that the record lacks any support that it does. In the proceedings before the Examiner, the Butlers presented photographs showing views of the San Juan Islands to the west from potential home-sites on each of Lots 12 and 13, without the need for setback variances.⁴¹ The production of a photo by Ford's architect showing a lack of view from a particular perspective on Lot 13 does not disprove the existence of views from other perspectives. In any event, the desire to gain a better view would not fulfill the requirement that denial of the variance would preclude any reasonable use of the property.

9. The variance approval fails to show compliance with other relevant criteria.

The Butlers pointed out in their Opening Brief at 15 and 21-22 that the Examiner's approval of setback variances fails to

⁴⁰ *Douglass v. City of Spokane*, 25 Wn.App. at 829 ("Here, plaintiffs sought the variance and, therefore, they are the ones who bear the burden of proof."); cf, *Buechel v. State Dept. of Ecology*, 125 Wn.2d at 205 (applicants for variances from shoreline requirements bear the burden of proof in any review of the granting or denial of the application).

⁴¹ Those photographs are produced at Appendix 2 of Appellants' Opening Brief, at CP 98 and 113 and at AR 00302 and 00437, respectively.

address “compliance with any relevant variance criteria found in other sections of the Skagit County Code.”⁴² Ford proposes to place a residence at the top of a 94% slope with no buffer or setback.⁴³ In defense of the Examiner’s finding that this is the only reasonable location,⁴⁴ Respondents at 31-32 incorrectly argue that the site is not geologically hazardous on grounds that Ford’s engineers say it’s not. The opinion of Ford’s engineers does not remove Lot 12 from being geologically hazardous.

Lot 12 is geologically hazardous because its slopes exceed 40% over a vertical rise of 10 or more feet.⁴⁵ A geologically hazardous areas site assessment was prepared because Ford proposed development within 200 feet of a geologically hazardous area.⁴⁶ Preparation of the report does not remove the geologically hazardous area from classification as an environmentally critical area; rather, it provides the basis for a mitigation plan,⁴⁷ under which buffers may not be reduced below 10 feet.⁴⁸ The critical

⁴² SCC 14.10.040(1)(a); see also SCC 14.10.030(2)(e), requiring the variance application to provide “[a]n explanation of how the requested variance meets any other specific criteria required for the type of variance requested...”

⁴³ AR 00280-81.

⁴⁴ AR 00095.

⁴⁵ SCC 14.24.410(2)(c), set forth within Appendix 3 to Opening Brief.

⁴⁶ SCC 14.24.420(1).

⁴⁷ SCC 14.24.430 (preamble).

⁴⁸ SCC 14.24.430(2)(a)(ii).

areas code at SCC 14.24.140 contains separate procedures for variances from critical areas requirements. Ford's setback application did not include a critical areas variance request and the Examiner's findings did not include "findings relating to compliance with ... [the] variance criteria" as required by environmentally critical areas sections of Skagit County Code.⁴⁹ Contrary to Respondents' assertion at 32, these required findings were not omitted on grounds that the steep slopes were no longer considered to be environmentally critical areas, but rather because PDS and the Examiner deferred the need for critical areas review to the building permit application stage.⁵⁰ However such deferral fails to comply with the variance application and review requirements under SCC 14.10.030(2)(e) and .040(1)(a).

10. The Examiner failed to find lack of special privilege.

In defense of the Examiner's failure to render the required finding that the variance would not "confer on the applicant any special privilege that is denied by SCC Titles 14 and 15 to other

⁴⁹ SCC 14.10.040(1)(a).

⁵⁰ AR 00338 (PDS setback variance approval representing that "Critical Area Staff will review the referenced Plan [by Edison Engineering] prior to issuance of a Building Permit.") and AR 00027 (Examiner Finding 14 that "[the engineer's] recommendations will await a building permit request.")

lands, structures, or buildings in the same district,⁵¹ Respondents at 25 chide the Butlers for focusing on properties in the same subdivision rather than those in the county's entire Rural Intermediate zoning district. Naturally, the Butlers focused on the treatment of other properties in the Holiday Hideaway plat because those were the properties cited by Ford's architect⁵² and referenced by the Examiner.⁵³ Apart from claiming that only about half of those lots capture views, the architect offered no examples of home sites with steep slope setbacks less than the minimums required by SCC Title 14.⁵⁴ The approval of a setback variance that would reduce Ford's steep slope setback to zero and create an exception to the minimum steep slope setback and critical areas variance criteria in Title 14 would grant a special privilege to Ford.

11. Failure to satisfy the four specific criteria at issue cannot be excused by the alleged satisfaction of other, more general criteria.

Respondents at 39 attempt to excuse the county's failure to find compliance with the variance criteria at .030(2)(d)&(f) and .040(1)(a)&(b) on asserted grounds that the variance would satisfy other general, subjective criteria such as promoting the general

⁵¹ SCC 14.10.030(2)(d).

⁵² AR 00432.

⁵³ AR 0095(Hearing Examiner Decision, 2/4/15, Finding 19)

purposes of the zoning code and not being detrimental to the public welfare. In the same vein, Respondents at 23 claim that the variance would conform to the statutory board of adjustment standards under RCW 36.70.810 and that it would not conflict with plat restrictions. These arguments are beside the point: compliance with selected general criteria does not excuse lack of compliance with other, more specific criteria;⁵⁵ the county's more specific variance criteria would govern over general standards applicable to county boards of adjustment;⁵⁶ and the Holiday Hideaway plat restrictions may continue to apply, but they do not supplant the applicability of variance standards under the zoning code.⁵⁷

For the reasons above and those within the Butlers' Opening Brief, the setback variances should be vacated.

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⁵⁴ SCC 14.24.430(1)(g)(50' buffer from slopes with vertical rise greater than 50') and .430(2)(b)(ii)(possible reduction to no less than 10 feet).

⁵⁵ See *Cooper-George Co. v. City of Spokane*, 3 Wn.App. at 418 (variance failing to meet required criteria found arbitrary and capricious).

⁵⁶ *Weden v. San Juan County*, 135 Wn.2d 678, 693, 958 P.2d 273, (1998)(Article 11 §11 allows local governments to enact more stringent regulations not in conflict with statutory standards).

⁵⁷ RCW 19.27.095(1)(Proposed structures would be considered under the land use control ordinances in effect at the time of the filing of a complete building permit application).

B. The Reasonable Use Exception Was Not Properly Granted.

The reasonable use exception to allow the proposed construction on Lots 12 and 13 was not lawfully granted because the proposed development does not “otherwise satisfy all other requirements of the Skagit County Code”, and “variances from [those] requirements ... shall not be considered.”⁵⁸

Respondents offer two defenses of the reasonable use exception, each of which rests upon reading each of the above-cited requirements in isolation. Respondents’ arguments should therefore be rejected because they fail to give effect to all provisions within section .850(4)(f).⁵⁹

Respondents at 43-44 recognize that section .850(4)(f)(i) prohibits “variances from this Section,” but they claim the variances were not granted under “this Section [.850(4)(f)(i)]”, but under separate sections, .810(4) and Chapter 14.10. Respondents’ argument fails because it ignores that “this Section [.850(4)(f)(i)]” contains three subsections, one of which, .850(4)(f)(i)(B), requires

⁵⁸ SCC 14.16.850(4)(f)(i) and .850(4)(f)(i)(B); see Opening Brief at 25-28.

⁵⁹ See *Whatcom County v. City of Bellingham*, 128 Wn.537, 546, 909 P.2d 1303 (1996)(statutes to be construed with “no portion rendered meaningless or superfluous.”); see also, *Overlake Hosp. Ass’n v. Dep’t of Health*, 170 Wn.2d 43, 52, 239 P.3d 1095 (2010)(no section of regulations may be read in isolation.)

that “[t]he proposed use can otherwise satisfy all other requirements of the Skagit County Code.” Respondents ignore this requirement because the proposed use cannot satisfy all other requirements of the county, namely, minimum setback requirements. Respondents’ first defense of the reasonable use exception should be rejected because it ignores the requirement that an approved reasonable use must meet all other requirements of the zoning code, which Ford’s proposal does not do.

Respondents’ second defense of the reasonable use exception should be rejected as well because it ignores the first requirement that variances from “this Section [.850(4)(f)(i)]” not be allowed. In arguing the satisfaction of the three subparts to .850(4)(f)(i), Respondents at 46 claim the second subpart, .850(4)(f)(i)(B)(satisfaction of all other code requirements), is met through the approval of a variance. But that argument of course ignores that .850(4)(f)(i)(B) falls under a section plainly providing that “[v]ariations from the requirements of this Section shall not be considered.”

Respondents’ argument that the .850(4)(f)(i) prohibition of variances from further zoning code requirements may be side-stepped through the administrative variances under SCC

14.16.810(4) or the general variance procedures under Chapter 14.10 conflicts with two well-established canons of statutory construction: that specific measures (the prohibition of variances for reasonable use exceptions) prevail over the general variance procedures⁶⁰ and that all provisions be given effect.⁶¹

The reasonable use exception was approved in violation of the express provisions of county code and should be vacated.

C. Respondents' Request for Costs and Attorney Fees Should Be Denied.

Should the court affirm the superior court and the county's decisions, Respondents' application would be ripe at that time. The Butlers reserve their right to submit additional briefing and argument should an application for attorney fees be presented.

III. CONCLUSION

For the above reasons, the Butlers' appeal of the variance

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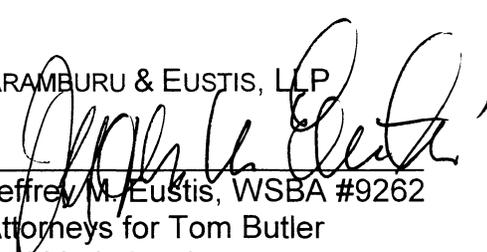
⁶⁰ *In re Estate of Kerr*, 134 Wn.2d, 328, 343, 949 P.2d 810 (1998).

⁶¹ *Whatcom County v. City of Bellingham*, *supra*.

approvals and the reasonable use exception should be granted and those approvals should be vacated.

Respectfully submitted this th 26 day of May 2016.

ARAMBURU & EUSTIS, LLP



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DECLARATION OF SERVICE

I am over eighteen years of age and competent to be a witness herein. On the date below, I served copies of the above document as follows:

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- hand delivery / messenger

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- first class postage prepaid
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- hand delivery / messenger

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 26th day of May, 2016.

Carol Cohoe
Carol Cohoe

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