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OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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ENID DUNCAN, ET AL.,

APPELLANTS,

v.

CITY OF EDGEWOOD,

RESPONDENTS.

APPELLANTS STOKES AND REMPEL'S OPENING BRIEF

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Family LLC and Eldean Rempel, as Trustee
for Revocable Trust Agreement of Ray E.
Rempel and Eldean B. Rempel Dated
December 12, 2006, a Trust, and Tina
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I. INTRODUCTION

This appeal involves Edgewood Sewer Local Improvement District (“LID”) No. 1, which was formed to construct certain sewer improvements intended to benefit 161 parcels of property within a 312-acre area. This is the second judicial appeal of the special assessments levied by the City of Edgewood to fund the LID sewer improvements. The parties to this consolidated appeal, who collectively own eleven of the 161 LID parcels, successfully challenged the first Assessment Roll approved by the Edgewood Council in 2011. This Court annulled the assessments levied against these eleven parcels in *Hasit, LLC v. City of Edgewood*, 179 Wn. App. 917, 320 P.3d 163 (2014).¹ Following the *Hasit* appeal, the City has collectively re-assessed the eleven parcels \$2,385,785. The re-assessment is the subject of this second consolidated judicial appeal.

This opening brief is presented by appellants 1999 Stokes Family LLC (“Stokes”) and Eldean Rempel, as Trustee for Revocable Trust Agreement of Ray E. Rempel and Eldean B. Rempel Dated December 12, 2006, a Trust, and Tina Rempel (“Rempel”). Stokes and Rempel own two of the eleven parcels within the LID subject to this appeal, Parcel Nos. 27

¹ A copy of the *Hasit* decision is in the Certified Administrative Record at bates stamp pages REF2014-000042 to REF2014-000078. Citations to the Administrative Record in this brief are denoted by AR followed by the last digits in the consecutively numbered bates stamps. Thus, citation to the *Hasit* decision as found in the Administrative Record is denoted as AR 42-78.

and 68, respectively. Of the \$2,385,785 total re-assessment levied against the eleven LID parcels, Edgewood assessed the Stokes 7.67-acre parcel (Parcel No. 27) \$379,315; it assessed the Rempel 7.22-acre parcel (Parcel No. 68) \$790,535. The assessments against just these two parcels comprise 49% of the re-assessment levied against all eleven parcels.

While a municipality may finance LID improvements by imposing special assessments against properties, the law imposes limitations on this power to levy assessments. First, “[i]t is the basic principal and very life of the doctrine of special assessments” that a municipality cannot assess a property unless it is “specially benefitted” by the new LID improvements. *In re Shilshole Avenue*, 85 Wash. 522, 537, 148 Pac. 781 (1915). Consistent with this basic principal, an assessment cannot substantially exceed the value of the special benefit attributable to the local improvements. Second, a municipality cannot assess any particular parcel more than its proportionate share of the total assessment relative to the other parcels in the LID.

Any assessment levied in violation of either of these two limitations constitutes a deprivation of property without due process of law. As a result, any municipality that endeavors to levy special assessments is statutorily charged to review the assessments, through its council or other designated body, as a Board of Equalization, and adjust

individual assessments as necessary to adhere to these basic and fundamental constitutional constraints.

Stokes and Rempel presented the Edgewood City Council with substantial evidence, including professionally prepared expert appraisals, that the assessments levied against their properties are both significantly in excess of the value of the special benefit to the properties and grossly disproportionate to assessments against other similarly situated properties within the LID. Despite this substantial evidence, and despite the recent guidance from this Court, the Council once again failed to fulfill its statutorily imposed duty to act as a Board of Equalization. The Council summarily confirmed all of the re-assessments without a single adjustment. It did so without explanation and without discussing, much less addressing Stokes and Rempel's specific and well-substantiated objections.

Pursuant to RCW 35.44.250, Stokes and Rempel request this Court to conclude that that, in light of the record and applicable law, the Council's action confirming the assessments was arbitrary and capricious. Also pursuant to RCW 35.44.250, Stokes and Rempel request this Court to correct and change their assessments so that they no longer exceed the value of the substantial benefit to their respective properties and are proportionate to similarly situated assessed properties. **Rempel requests**

the Court to reduce their assessment from \$790,535 to \$381,925, which is consistent with the actual special benefit value and proportionate to the other assessments. **Stokes requests this Court to reduce its assessment from \$379,315 to \$19,235**, which would make the assessment consistent with the City's treatment of another very similarly situated property, **but in any event no more than \$118,542**, as supported by the value of the special benefit determined by Stokes' professional appraiser.

II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

Rempel and Stokes assign error to the August 28, 2015 Judgment and Order of Dismissal through which the Honorable Katherine Stolz affirmed the October 15, 2015 Edgewood City Council's decision (as evidenced by its adoption of the appended Ordinance No. 14-0424) to affirm the Assessment Roll that is the subject of this appeal.

Rempel and Stokes also assign error to City Council decision. Though it does not appear that RAP 10.3 (h) requires separate assignments of error to the ordinance appealed pursuant to chapter 35.44 RCW, Rempel and Stokes assign error to the Council's decision to confirm the subject assessments as arbitrary and capricious as follows:

A. The Council improperly applied presumptions in favor of the reassessments recommended by its private appraiser. Stokes and Rempel presented credible evidence contrary to any favorable presumption

sufficient to shift the burden of proof to the City. But the Council failed to recognize the mandatory burden shifting and failed to place the burden of proof upon the City to establish that the assessments do not substantially exceed the special benefits and are ratable with assessments levied against similarly situated properties. The Council also improperly required the objecting property owners to establish that the reassessments are founded upon a fundamentally wrong basis.

B. The Council improperly applied the clear, cogent and convincing standard of proof to the objecting property owners to overcome presumptions favorable to the valuations and assessment roll recommended by the City's private appraiser.

C. The Council failed to act as a Board of Equalization. It failed to consider, address and apply evidence presented by Stokes and Rempel that establish that the Macaulay valuations were internally inconsistent and based upon incomplete, inaccurate and erroneous information, and the assessments are disproportionate to other similarly situated properties. The City did not meet its burden of proof to establish that the assessments recommended by the City's private appraiser do not exceed the special benefit and are ratable to other assessments. The Council failed to adjust the assessments as necessary to make the assessments ratable and no more than the special benefit to the properties.

D. The Council's Findings of Fact are insufficient to support the Council's Conclusions of Law.

In relation to the above, Stokes and Rempel assign error to the Council's Findings of Fact 5, 6, 7, 11, 12, 13, 14 and 16 as not supported by the substantial evidence in the record. They assign error to Conclusions of Law 1 through 5 and the Order as contrary to applicable law and unsupported by the Findings of Fact.

The assignments of error present the following issue:

Did the Council fail to fulfill its statutorily mandated role of a Board of Equalization and therefore act in an arbitrary and capricious manner when it improperly applied presumptions and evidentiary burdens and confirmed the Assessment Roll without adjustment to the assessments against Stokes and Rempel despite substantial evidence that that the assessments significantly exceeded the value of the special benefit conferred by the LID improvements and unanswered evidence that the assessments are grossly disproportionate to other assessments?

III. STATEMENT OF THE CASE

Edgewood's LID No. 1 was formed on October 14, 2008 by Ordinance No. 08-0306. (AR 17, 268-310.) The LID was formed for the purpose of constructing certain sewer improvements and distributing the cost of constructing the improvements to benefitted properties. (AR 9,

268-310.) The total land area within the LID is approximately 312 acres and is comprised of 161 parcels.²

A. Edgewood's First Assessment Roll And Its Failure To Fulfill Its Statutory Duty To Act As A Board Of Equalization.

The City retained the private appraisal company Macaulay & Associates, Ltd. ("Macaulay") to prepare the Final Special Benefit / Proportionate Assessment Study, a "mass appraisal" for the LID. The purpose of study was to determine the value of the special benefit to each LID parcel from the sewer improvements as a basis to allocate the sewer improvement costs. The total estimated cost associated with the sewer improvements, which the City sought to finance 100 percent through the LID, was \$21,238,268. (AR 244-45, 361-65.)

On July 19, 2011, the Edgewood City Council adopted the Assessment Roll for City of Edgewood LID No. 1 through Ordinance No. 11-0366. The Assessment Roll allocated the sewer improvement costs to the owners of the 161 parcels located within the previously formed LID. The Assessment Roll was adopted over the objections of ten property owners that timely submitted objections both to the Edgewood Hearing Examiner, who initially heard objections to the assessments, and then to

² Notably, though the LID was formed in response to a petition signed by several LID property owners, both Stokes and Rempel opposed and expressed concerns about the LID before it was formed. (AR 298.)

the Edgewood City Council.³ (AR 9, 3065-91.)

Nine property owners (including Stokes and Rempel), who collectively own twelve parcels within the LID, appealed the Council approved Assessment Roll to the Pierce County Superior Court. Judge John Hickman annulled the assessments levied against the appellants and remanded the matter for a new hearing consistent with certain direction from the court. (AR 9, 28; *Hasit, supra*, 179 Wn. App at 932.)

The City appealed. Following a *de novo* review of the Council's decision, this Court annulled the assessments levied against appellants on several grounds including that:

- The City denied the LID property owners, in violation of their due process rights, a meaningful opportunity to be heard because the hearing notice was both misleading and untimely; it did not allow the property owners sufficient time to obtain the type of evidence necessary to successfully lodge a challenge. *Hasit*, 179 Wn. App. at 952-53.
- Assessment Roll was made on a fundamentally wrong basis because the City improperly allocated to the property owners costs incurred for additional sewer capacity to serve future users outside the LID. Such capital costs for additional capacity did not specially benefit the LID properties, the. *Id.* at 940-41.
- The Council's confirmation and adoption of the Assessment Roll was arbitrary and capricious. The Council failed to appropriately consider the evidence presented by the objecting property owners and, as a result, the Council failed to fulfill its

³ The written objections that Stokes submitted to the Hearing Examiner and the Council in 2011 are at AR 2684-2732, 2811-33, 3015-33. Rempel's 2011 written objections are at AR 1967-75, 2751-65, 2766-70, 3035-43.

statutorily mandated roll as a Board of Equalization. *Id.* at 951. More specifically, the Council

- Improperly applied presumptions favorable to the Assessment Roll recommended by the City's retained private appraiser, failing to shift the burden of proof to the City (to demonstrate that the assessments do not exceed the special benefit to the properties and are ratable to other similarly situated properties) after the objecting property owners overcame the presumption by presenting credible evidence to the contrary. *Id.* at 949-50;
- Improperly required the objecting property owners to demonstrate that the assessments recommended by the City's hired appraiser were based upon a fundamentally wrong basis or that the assessments were arbitrary and capricious. *Id.* at 948-49;
- Improperly required the property owners to present expert appraisal testimony regarding the value of the properties before and after the sewer improvements were accepted. *Id.* at 945-47; and
- Failed to consider credible evidence presented that the assessments levied against the objecting property owners were disproportionate to similarly situated properties within the LID. *Id.* at 945.

Significant to this case, the *Hasit* Court explained the roll the Council must play when considering objections to LID assessments, and the proper manner in which evidence by objecting property owners must be considered, and also cautioned against affording undue deference to a report prepared by a private appraiser under contract:

Since a council or hearings officer considering an assessment roll sits as a board of equalization, these provisions disclose a legislative intent that it make a de novo determination while presuming the assessments to

be correct, constrained perhaps by the clear, cogent and convincing evidence standard. 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.

Hasit, 179 Wn. App. at 949. This Court refrained from deciding “whether the clear, cogent and convincing standard for boards of equalization applies to municipal decisions on assessment rolls” for determining if objecting property owners successfully overcome any presumption afforded the recommended assessments. *Id.* at 949, n. 7. The Court also noted that the presumptions used “may be a question of little consequence” in light of the “burden-shifting commanded by *Bellevue Plaza*, 121 Wn.2d [397] 404, 851 P.2d 662 and *Indian Trail*, 35 Wn. App [840] at 843, 670 P.2d 675.” *Id.* at 950.

B. Edgewood’s Reassessment Against The Prevailing Property Owners And The Objections Presented By Stokes And Rempel.

After this Court annulled the assessments, the City began efforts to formulate reassessments for eleven of these LID parcels, owned by the eight parties that continued to participate in the appeal.⁴ The City

⁴ Hasit, LLC ceased participation after the Superior Court appeal was concluded.

determined that the cost attributable to the improperly assessed costs for over-sizing the sewer capacity was \$805,687. (AR 29, 122, 124-25.) The City again retained appraisal firm Macaulay and Associates to supplement the prior mass appraisal with additional Restricted Appraisals providing evaluations of the individual eleven LID parcels. (AR 29, 3095-3362.)

On June 22, 2014, the City notified the eight property owners of the reassessments that would be levied against their respective properties. (AR 29.) The assessments were reduced by \$408,557 from those originally levied against the properties in 2011; however, the substantial majority of the reductions were due to the removal of the eleven properties' proportionate share of the improperly allocated costs for over-sizing the sewer capacity. (AR 12, 21-26.) Though Stokes and Rempel (and some of the other prevailing property owners) had previously asserted that they were disproportionately assessed as compared to the actual special benefit received and as compared to assessments against other similarly situated property owners,⁵ the updated or new Macaulay analysis did not discuss, much less address these issues.⁶

The proposed reassessments presented for Council review were

⁵ See Stokes challenges at AR 2684-2732, 2811-33, 3015-33 and Rempel challenges at AR 1967-75, 2751-65, 2766-70, 3035-43.

⁶ See Macaulay's Restricted Appraisal on Stokes Property at AR 3134-63 and Macaulay's Restricted Appraisal on Rempel Property at AR 3221-3355.

exclusively founded upon the City's private appraiser's analysis. The City's staff did no independent analysis or review, but instead simply recommended confirmation of the Assessment Roll prepared by Macaulay "[b]ased upon the content" of his appraisal. (AR 30.)

On September 17, 2014, the City Council heard objections to the reassessments. (AR 2, 609-776.) All eight property owners, including Stokes and Rempel, participated in the hearing by presenting testimony from the owners as well as expert testimony. Stokes' written submittal, including sworn declarations, documentary evidence and a professionally prepared expert appraisal are at AR 868-998. Rempel's written submittal, including documentary evidence, a professionally prepared expert appraisal and a professionally prepared expert critique of the Macaulay valuation, is at AR 853-60, 999-1030, 1031-51. The transcript of September 17, 2014 hearing is at AR 609-776. Testimony specific to the Stokes Property is at AR 622, 641-42, 666-701, 756-57, 765-68. Testimony specific to the Rempel Property is at AR 623, 642, 712-24, 757-58, 761-62.

1. The Rempel Property (Parcel No. 68) And Rempel's Objections To The Reassessment.

Rempel owns the real property located at 1914 Meridian Avenue East, Edgewood, Washington and identified as Pierce County Tax Parcel

No. 0420091134 and LID Parcel 68 (“Rempel Property”). The Rempel Property is a long narrow parcel comprised of 314,360 square feet (7.22 acres). Only 193 feet of the property has frontage along Meridian. The entire Rempel Property is zoned Town Center (TC). It is improved with a mini-storage that produces a positive annual cash flow. (AR 1002-03.)

In 2011, the City appraiser opined that the value of the special benefit to the Rempel Property was \$1,115,000 and the City assessed the property \$877,005. (AR 225, 858.) In 2014, the City appraiser made no changes to the special benefit value. The City assessed the property \$790,535, reducing the assessment only to adjust for the improperly assessed costs associated with over-sizing the sewer system. (AR 3342.)

Rempel presented the Council with a professionally prepared appraisal that evidenced that the assessment is substantially greater than the value of the special benefit to the property. Independently, Rempel demonstrated, through Macaulay’s own appraisal and the analysis of another professional appraiser, that their assessment is grossly disproportionate to the assessments levied against another similarly situated property. The evidence Rempel presented, which is found in the record at AR 853-60, 999-1030, 1031-51 and 713-24, is discussed in more detail in the Argument section below, but generally included:

- An appraisal by MAI appraiser David Hunnicutt that the special benefit to the Rempel Property is only \$538,681. Based upon this special benefit valuation, the assessment should not exceed \$381,925. (AR 1000, 1026.)
- Macaulay applied a “before LID” value to the Rempel Property that is grossly disproportionate to other similarly situated LID properties. Macaulay’s “before LID” value for the Rempel Property 25% below the its assessed value and well below the range that Macaulay applied to other TC zoned properties (Macaulay applied \$3.50/sf to the Rempel Property, but determined that the range for TC properties in the LID should be \$4 to \$8/sf.) While Macaulay applied a lower “before LID” value on the Rempel Property than he applied on other TC-zoned property, he did not apply a lower “after LID” value, thus inflating the special benefit value. (AR 439, 1008, 3341.)
- MAI appraiser Donald Heishmann separately evaluated the Rempel Property valuation by Macaulay as compared to other similarly situated LID properties and determined that the Rempel valuation and assessment is an “outlier” and that the Rempel Property is grossly disproportionate to the assessments levied against other similarly situated properties. (AR 1036.)
- Eldean Rempel testified that Macaulay’s assumption that the property had been sold and was subject to a binding purchase and sale agreement was a false and incorrect assumption. (AR 720.)

2. The Stokes Property (Parcel No. 27) And Stokes’ Objections To The Reassessment.

Petitioner Stokes is the owner of real property located at 909 Meridian Avenue East, Edgewood, Washington and is identified as Pierce County Tax Parcel No. 0420033077 and LID Parcel 27 (“Stokes Property”). The Stokes Property is comprised of 333,977 square feet (7.67 acres). 150,000 square feet of the Stokes Property is occupied by wetlands

and wetland buffers; thus, the total useable area is 183,977 square feet. The Property is split zoned; approximately 58% of the Property is zoned Commercial (“C”) and 42% is zoned Mixed Residential Moderate Density (“MR2”). The total useable area in the C zoned property is 106,700 square feet (2.45 acres). The total useable area of MR2 zoned property is 77,277 square feet (1.77 acres). The Stokes Property is a long narrow piece of property with Meridian Avenue frontage along only half of the west boundary of the Property. Only the C zoned property has Meridian Avenue frontage. The MR2 zoned property is situated in the back, east portion of the Property. (AR 973-74, 3145-46.)

In 2011, the City appraiser opined that the value of the special benefit to the Stokes Property was \$638,000 and the City assessed the property \$472,120. (AR 2842, 221, 667.) In 2014, the City appraiser valued the special benefit to the property slightly less, \$535,000, and the City assessed the property \$379,315. (AR 221, 3136.)

Stokes presented evidence that the assessment is substantially greater than the value of the special benefit to the property and that the assessment is grossly disproportionate to the assessment levied against another similarly situated property. The evidence Stokes presented, which is found in the record at AR 868-969, 970-98, and 666-701, is discussed in more detail in the Argument section below, but generally included:

- An appraisal by MAI appraiser David Hunnicutt that the special benefit to the Stokes property is only \$167,196. Based upon this special benefit valuation, the assessment should not exceed \$118,542. (AR 971, 995.)
- Engineer James Schweickert testified that development of the Stokes Property will require extraordinary and costly measures to manage stormwater, including a \$260,000 underground detention vault and a 35,000 square foot detention pond. Moreover, to proceed with additional development Stokes must acquire easements over three different privately owned properties for disbursal of retained stormwater. It is unknown if the requisite easements can be obtained and, if so, at what costs. The additional cost of installing a conveyance system over the privately owned properties is also unknown at this time. Thus, there is significant and extraordinary risk and costs associated with development of the Stokes Property. (AR 877-906.)
- Planning consultant William Palmer presented evidence that the stormwater management and critical areas development issues presented by the Stokes Property are very similar to those presented for LID Parcel Nos. 20 and 21. But, the Stokes Property assessment is grossly disproportionate to the assessment levied against similarly situated LID Parcel Nos. 20 and 21. City appraiser Macaulay determined that the special benefit to LID Parcel 21 was \$0 because the property is encumbered by critical areas and a stormwater pond similar to that required to develop the Stokes Property. Macaulay and the City failed to consider and make appropriate adjustment for the even more extraordinary stormwater management measures required to develop the Stokes Property. If treated as Parcel Nos. 20 and 21 and the same or similar adjustments are made, the Stokes Property special benefit value must be reduced to \$27,120 and the assessment should be reduced to \$19,235. (AR 917-38, 949-69.)
- Macaulay applied a “before LID” value to the Stokes Property that is grossly disproportionate to other similarly situated LID properties. (AR 977-78, 993.)

C. The City Council Rejected The Stokes And Rempel Objections Without Explanation.

The September 17 hearing lasted four hours. (AR 614, 773, 540, 545.) The Council purported to sit as a quasi-judicial body charged with the responsibilities of a Board of Equalization. (AR 540, 615-16.) After the presentation of evidence closed, the Council went into executive session for 30 minutes. The Mayor then announced that the Council would reconvene on September 24, 2014 to continue its deliberations in executive session. The Council did, in fact, reconvene on September 24 and continued its deliberations in executive session for another 1.5 hours. (AR 547.) Thereafter, the Council returned to public session and, without any discussion, unanimously passed a motion to adopt the recommended re-assessments as determined by its private appraiser Macaulay. (*Id.*) Without any explanation, this Board of Equalization wholly rejected each and every objection and did not make one single adjustment to the Macaulay re-assessments. The Council then directed the City staff to prepare an ordinance to formally document its decision. (*Id.*)

A special Council meeting was held on October 2, 2014 for the Council to consider and vote on findings of fact and conclusions of law regarding the approved re-assessments and to consider and vote on an ordinance confirming the re-assessments. (AR 606-07.) On the eve of the

meeting, Edgewood made available to the public the findings of fact and conclusions of law that the Council would consider on October 2.⁷ (*See* AR 578, 586-95.) These findings and conclusions provided little to explain the Council's decision. There was absolutely no discussion of the specific evidence presented by Stokes and Rempel demonstrating that their assessments exceed the special benefit value. There was also no discussion of the specific evidence that the assessments levied against their properties are grossly disproportionate to the other assessments. Instead the findings and conclusions disseminated to the public generally concluded:

None of the testimony taken from the owners of the Appellant Properties refuted that the reassessments based on the Macaulay Study were determined on a "fundamentally wrong basis" or otherwise failed to reflect properly the special benefits resulting from the LID No. 1 improvements. Differing opinions were expressed regarding the special benefit to the Appellant properties; however, the Board concludes that the presumption afforded the City staff / LID recommendation was not overcome by the evidence presented by the owners of the Appellant Properties. Given that, the objections of the owners of the Appellant Properties are overruled. (Emphasis added.)

(AR 593-94, Conclusion of Law No. 3.)

The objecting LID owners were not privy to the Council's closed discussions in executive session; and, again, the Council offered no oral

⁷ Identical findings and conclusions were provided with the agenda at the October 2, 2014 meeting. (*See* AR 550, 558-67.)

explanation for its decision in the public sessions. However, the above conclusion indicates that the Council still did not grasp the appropriate standards to be applied to the objections and evidence proffered by the LID owners. The above conclusion, prepared after the Council completed its deliberations, indicate that the Council not only continued to improperly place the burden of proof on the objecting LID property owners, but also, contrary to *Hasit, supra*, still expected the property owners to meet a heightened burden and demonstrate that Macaulay's appraisal was founded on a fundamentally wrong basis to overcome the presumption that the assessment roll was correctly determined.

When the Council convened on October 2, 2014 to consider the findings of fact and conclusions of law disseminated to the public, it immediately went in to executive session with its attorney to "conclude the deliberations relevant to the Findings and Conclusion." (AR 778.) Of course, the Council had already completed its deliberations with regard to the evidence presented by the eight appealing property owners in the four-hour hearing on September 17; the Council publicly announced its total rejection of all eight objections upon completion of its September 24, 2014 executive session. (AR 547.)

In any event, following a 20 minute executive session, the Council returned to the public meeting. With regard to the findings and

conclusions, the Council did not disburse at the meeting the actual findings and conclusions ultimately adopted, but instead generally announced through its attorney:

After additional deliberations the Council is making revisions to the 4th paragraph of the of the [sic] introduction section and also the Findings of Fact fourteen, in order to reference the Study Report of Don Heishmann, and also revisions to Conclusion of Law No. 3 in order to reference the Court of Appeals standard of review set forth in Hasit. (Emphasis added.)

(AR 780.) Though the Council did not announce it to the public attending the October 2 meeting, it appears that the Council recognized that it applied the wrong standard to reach the conclusion it announced on September 24. The Conclusion of Law No. 3 appears to be an after-the-fact attempt to remedy the error. Presented in red-line form,⁸ Conclusion of Law No. 3 was revised as follows:

~~None of the testimony taken from the owners of the Appellant Properties refuted~~ The Board concludes that the reassessments based on the Macaulay Study were determined on a “fundamentally wrong basis” or otherwise failed to in accordance with the Court of Appeals’ standards as set forth in Hasit. The Reassessments reflect properly the special benefits resulting from the LID No. 1 improvements. Differing opinions were expressed regarding the special benefit to the Appellant Properties; however, the Board concludes

⁸ Revisions in red-line or any other form were not provided to the public, nor were the specific actual revisions announced at the public meeting. (See AR 778-80.) The red-line form was prepared by petitioners to better illustrate the revision that was apparently made in the 20-minute executive session on October 2.

~~that the presumption afforded the City staff / LID recommendation~~ was 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 14-15, Conclusion No. 3; AR 593-94, Conclusion No. 3 .)

Again, this revision changing the recitation of the standard of review, was drafted one week after the Council completed its two-hour deliberations on the merits of the eight LID owner objections and after the Council publicly announced that it wholly rejected all eight objections on September 24 and would make no adjustments to the re-assessments as determined by Macaulay. (*See* AR 547.)

At the October 2 meeting, the Council formally adopted the revised findings of fact and conclusions of law⁹ and adopted Ordinance 14-0424 confirming the re-assessments. (AR 1-26, 780-81.)

D. The Trial Court Also Rejected The Stokes And Rempel Objections Without Explanation

Stokes and Rempel timely appealed the Council's decision to the Pierce County Superior Court (CP 1-31) and their appeal was consolidated with those filed by the other objecting LID owners (CP 32-35.)

Judge Katherine Stolz heard and then rejected the appeals. She offered little explanation for her decision, but announced

⁹ A copy of the adopted findings of fact and conclusions of law are at Appendix A.

There is a lot of information that was presented by argument in this case a lot of information that was presented to the Hearing Examiner [sic] below;¹⁰ and I realize that no matter what I do, this case is probably going to be heading back up on the appellate route.

I am going to affirm the Hearing Examiner's [sic] decision.

(RP (8/21/15) at 5.)

Though there no comment was on the challenges specific to the other ten property assessments, Judge Stolz did comment on Stokes' challenge that Macaulay failed to consider limitations on development potential when he calculated the special benefit value for the Stokes Property and thereby grossly overstated the special benefit value.

In regards to the property that has the – if developed, they would have to build the retaining pond and what have you. I mean, the appellate courts basically said that the City cannot charge for prospective, speculative future use. I don't find, at this time, that the owners – because this hasn't been done, there's no immediate plans to have it done, it is speculative. I think the appellate court's reasoning there is, you know, if it good for one side, it's good for the other; so at least as to that, I will go ahead and affirm the Hearing Examiner's [sic] decision in full.

(*Id.*)

Of course, the *Hasit* Court held that the City could not charge LID property owners for capital costs incurred to create capacity to serve

¹⁰ Objections to the re-assessment were not presented to a Hearing Examiner. Rather the City Council exclusively heard the re-assessment objections and served as the Board of Equalization.

properties outside the LID. 179 Wn. App. at 938-41. Moreover, Judge Stolz failed to reconcile this ruling with the fact that Macaulay's special benefit valuations and corresponding assessment recommendations were based upon the assumptions that (1) most of the assessed properties would be developed or redeveloped and (2) that their development potential was increased by the LID improvements, making actual development potential highly relevant. (*See* AR 1151-53, 1209-12, 1220-23; *see also* AR 3136, 3146-47, 3223, 334-35.)

Judge Stolz's ruling was formally entered through a Judgment and Order of Dismissal prepared and presented by the City's counsel. (CP 183-86.) Stokes and Rempel thereafter timely appealed to this Court. 187-93.)

IV. ARGUMENT

A. Standards Of Review.

This Court stands in the same position as the trial court and limits its review to the record that was before the City Council. *Abbenhaus v. City of Yakima*, 89 Wn.2d 855, 559, 576 P.2d 888 (1979); *Indian Trail Trunk Sewer v. City of Spokane*, 35 Wn. App. 840, 841, 670 P.2d 675 (1984). On a judicial appeal the Court is required to "confirm, unless the court shall find from the evidence that ... the decision of the council . . . was arbitrary and capricious." RCW 35.44.250; *see also Abbenhaus*, 89 Wn.2d at 558-59. A decision is arbitrary and capricious if it is a willful

and unreasoning action, taken without regard to the facts and circumstances surrounding the action. *Hasit*, 179 Wn. App. at 945; *Abbenhaus*, 89 Wn. App. at 858-59.

If the Court finds the Council's decision arbitrary and capricious, "the judgment of the court shall correct, change, modify, or annul the assessment insofar as it affects the property of the appellant." RCW 35.44.250.

B. The City Council Once Again Failed To Fulfill Its Role As A Board Of Equalization And Improperly Applied Presumptions And The Burden Of Proof.

The Council was required to "consider all objections" timely submitted by the LID property owners at a formal hearing. RCW 35.44.070. The Council was also statutorily directed to "sit as a board of equalization." RCW 35.44.080(2). The role of a Board of Equalization is to "examine and compare the returns of the assessment of the property of the county and proceed to equalize the same, so that each tract or lot of real property and each article or class of property shall be entered on the assessment list at its true and fair value." RCW 84.48.010. At the hearing, the Council, sitting in its capacity as Board of Equalization, should thus "consider the objections made" and correct and revise the roll as necessary to ensure that it complies with the requirement set forth at RCW 35.44.070, which is to proportionately assess costs to each property in

accordance with the special benefits actually conferred to that property.
RCW 35.44.080(3).

Significantly, the governing statute does not direct cities to give deference to an appraiser's recommendation that has yet to be legislatively confirmed. To the contrary, the statute expressly provides that the assessment submitted to the council "shall be in the nature of a preliminary determination" and "shall not be binding and conclusive in any way on the board, officer or authority in the preparation of the assessment roll for the improvement or upon the council in any hearing affecting the assessment roll." RCW 35.44.060.

In this case, all eight of the LID property owners presented over a four-hour hearing objections that were supported by substantial data and documentary evidence (including in Stokes and Rempel's case, professionally prepared appraisals) and sworn testimony. The entirety of the Council's analysis of the objections and supporting evidence is set forth in Conclusion of Law No. 3:

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 Benefits 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.
(Emphasis added.)

(AR 14-15, Conclusion of Law No. 3.) Though the Council identified the persons who presented objections and testimony (*see* AR 7-8), the Council's findings and conclusions fail to provide any analysis of the evidence presented by the objecting property owners, much less its resolution of vastly differing professional appraisals and clearly disputed factual conclusions. Only the above general conclusion is provided.

Of course, the purpose of the findings of fact is to ensure that the decision-maker, in this case the Council, sitting as a quasi-judicial body, has dealt fully and properly with all of the issues in the case before the Council decides the matter, and so that the reviewing court and parties involved may be fully informed as to the bases of its decision. *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 35, 873 P.2d 498 (1994). *See also* Washington Administrative Law Practice Manual § 9.06[B][3][a] at 9-39 (“formal findings of fact serve an important function for meaningful judicial review[and t]he absence of clearly stated findings of fact ... give [s] the reviewing court the responsibility to determine what facts actually were found by the agency”). Findings of fact must glean pertinent facts from the record, thereby resolving conflicting evidence, and they must apprise the reviewing court of the legal theories applied. *In re*

Marriage of Monkowski, 17 Wn.App. 816, 818, 565 P.2d 1210 (1977). A statement of the positions of the parties or a summary of the evidence presented followed by findings which consist of “general conclusions drawn from an ‘indefinite, uncertain, undeterminative narration of general conditions and events’ are not adequate.” *Weyerhaeuser*, 124 Wn.2d at 36 (citations omitted).¹¹

The adopted findings and conclusions in this case do nothing to inform the Court and the parties of the Council’s resolution of clearly disputed issues regarding the value of special benefits and the proportionality of the assessments. They do, however, at least inform the Court that the Council improperly levied the burden of proof upon the objecting LID owners. Again, the Council stated:

Differing opinions were expressed regarding the Special Benefits 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. (Emphasis added.)

(AR 15, Conclusion of Law No. 3.)

A reviewing City may initially presume that the properties within the LID are specially benefited and that the recommended assessments are

¹¹ Findings of fact by a quasi-judicial body are subject to the same requirements as findings of fact by a trial court. *Weyerhaeuser*, 124 Wn.2d at 35.

fair. *Indian Trail Trunk Sewer v. City of Spokane*, 35 Wn. App. 840, 841-42, 670 P.2d 675 (1984). A city may not, however, simply rest on that initial presumption. The presumption does no more than place the initial burden going forward with evidence upon the party challenging the assessment. *Id.* at 842. It means only that an assessment will be presumed valid in the absence of a timely filed objection supported by evidence. Upon the presentation of credible evidence contrary to these presumptions, the burden of proof shifts to the City. *Hasit*, 179 Wn. App. at 935-36. “The ultimate burden of showing that the LID is specially benefited remains with the City.” *Indian Trail*, 35 Wn. App at 843. *See also*, *Bellevue Plaza, Inc. v. City of Bellevue*, 121 Wn.2d 397, 404, 851 P.2d 662 (1993).

In *Hasit, supra*, this Court confirmed that, upon the presentation of credible evidence contrary to these presumptions, the burden of proof shifts to the City. *Hasit*, 179 Wn. App. at 935-36. Confirming that the threshold showing necessary to overcome this initial presumption is not an onerous burden, the *Hasit* court noted that “with the burden-shifting commanded by *Bellevue Plaza*, 121 Wn. 2d at 404, 851 P.2d 662 and *Indian Trail*, 35 Wn. App. at 843, 670 P.2d 675, the extent to which ... [these] presumptions are used by municipal decision makers may be a question of little consequence.” *Id.* at 950. The *Hasit* court also confirmed

that improper application of the initial presumption is an arbitrary and capricious act that is grounds for annulment. The court concluded:

Thus, 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 competent evidence to the contrary.

Id. at 936.

Here, the evidence presented by Rempel and Stokes, discussed in detail below, established that the assessments levied against the Rempel and Stokes properties are substantially in excess of the special benefit to the property and, independently, grossly disproportionate to the assessments levied against other similarly situated properties. The evidence presented was certainly well in excess of that required to overcome favorable presumptions initially afforded Macaulay's recommended assessments and to shift the burden of proof to the City to establish that the assessments do not exceed the special benefit and are ratable to the assessments levied against other properties within the LID. Yet the limited deliberative detail provided in the findings and conclusions reveals that the Council failed to place the burden of proof onto the City.

[T]he 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. (Emphasis added.)

The Council improperly placed the burden of proof on the objecting LID property owners. Its confirmation of the re-assessments based upon this improper application of the initial presumption and burden of proof was an arbitrary and capricious act. Pursuant to RCW 35.44.250, this Court is authorized to and should reduce the Stokes and Rempel assessments, consistent with the substantial evidence in the record, so that they no longer exceed the value of the special benefits to their properties and are proportionate to the assessments against other LID properties.

C. The Reassessment Against The Rempel Property Substantially Exceeds The Special Benefits Value And Is Grossly Disproportionate To The Assessments Levied Against Similarly Situated LID Properties. This Court Should Reduce The Rempel Assessment From \$790,535 To \$381,925.

Special assessments cannot simply spread the costs of the improvements. Assessments must comply with two overriding principles: First, the property upon which assessments are imposed must be peculiarly benefited so that the owner does not, in fact, pay substantially more than he receives by reason of the improvement. Second, the property must not be assessed proportionately more than its share in relation to other parcels throughout the district. *Sterling Realty Co., v. City of Bellevue*, 68 Wn.2d 760, 415 P.2d 627 (1966).

The value of the special benefit from an LID is measured by the

difference between the fair market value immediately before and immediately after the improvements – it is the increase in fair market value attributable to the local improvements. *Hasit, LLC, supra*, 179 Wn. App. at 933; *Kusky v. City of Goldendale*, 85 Wn. App 493, 498, 933 P.2d 430 (1997); *Doolittle v. City of Everett*, 114 Wn.2d 88, 93, 786 P.2d 253 (1990). A special assessment may not substantially exceed the property's special benefit. *Hasit*, 179 Wn. App. at 933. Likewise, no property should bear an assessment that is proportionately more than its share of the total assessment relative to other parcels in the LID. *Id.* An assessment against property which does not receive a special benefit from the improvements constitutes a deprivation of property without due process of law. *Id.*

Because LID assessments involve a deprivation of property, affected owners have a right to a hearing as to whether the improvement resulted in special benefits to their properties and whether their assessments are proportionate.

Hasit, 179 Wn. App. at 933, citing *Carlisle v. Columbia Irrigation Dist.*, 168 Wn.2d 555, 569-70, 229 P.3d 761.

The assessment levied against the Rempel Property violates both fundamental tenants. The assessment significantly exceeds the value of the special benefits and it is grossly disproportion to the assessments levied against similar LID properties.

1. The independent appraisal prepared and presented by Hunnicutt & Associates, Inc. proves that the Rempel assessment substantially exceeds the special benefit conferred to Parcel No. 68.

As noted earlier, the City has assessed the Rempel's 7.22 acre parcel with a staggering \$790,535, which, remarkably, is one-third of the total \$ 2,385,785 reassessment collectively levied against all eleven LID properties. This assessment is based upon Macaulay's determination that the before LID value of the Rempel Property was \$1,400,000 (including \$300,000 for existing improvements) and the after LID value of the property is \$2,515,000, making the estimated special benefit value \$1,115,000. The \$790,535 assessment is 70.9% of the special benefit value (the same percentage applied to all of the eleven LID parcels).¹² (AR 3223, 3346.)

Rempel retained certified appraiser David Hunnicutt, Hunnicutt & Associates, Inc., to prepare an independent appraisal to determine the LID special benefit to the Rempel Property. Hunnicutt's appraisal of the Rempel Property is at AR 999-1030).

Hunnicutt's appraisal revealed that Macaulay's before value was understated and the after value was overstated, resulting in a significantly

¹² This is the ratio (70.9%) of the actual allocable costs for the installation of the sewer improvements, adjusted to remove costs associated with oversizing for future capacity) to the special benefit to all LID properties (as determined by Macaulay). (AR 23.) The ratio is uniformly being applied to all of the special benefit values for the private property owners who participated and prevailed in the *Hasit* appeal. (AR 23-24.)

inflated special benefit valuation. Hunnicutt determined that the Without LID value of the Rempel Property is \$1,708,389 and the With LID value is \$2,247,070, making the value of the **special benefit** to the Rempel Property **\$538,681**. (AR 1000, 1026.) Applying 70.9% to this special benefit value, the assessment to the Rempel Property should be **\$381,925**.

2. City appraiser Macaulay overstated both the without LID/before value for the Rempel Property as well as the with LID/after value.

Rempel did not simply provide a competing expert appraisal. Rempel also presented compelling evidence that the Macaulay valuation analysis was flawed. The most notable flaw in the Macaulay valuation is his valuation of the Rempel land Without LID.

Macaulay valued the property Without LID at \$1,400,000 (including the existing mini-storage). His Without LID land value is \$1,100,000, only \$3.50/sf. The \$3.50 is a weighted average. (AR 3337-38.) Macaulay valued the 60,000 square feet fronting Meridian at \$5.00/sf, leaving the back 254,360 square feet valued at only \$3.15/sf. (AR 3337, 3348.) Note, that while Macaulay provided comparable sales to support his \$5.00/sf valuation of the frontage, he provided no comps, or even an explanation for his very low valuation of the back property at \$3.15/sf. (See AR 3339-3340.)

Hunnicutt valued the Rempel land Without Sewer at \$1,608,109,

valuing 66,620 square feet of Meridian Frontage at \$6.00/sf and the remaining back 248,740 square feet at \$4.50/sf, which is more consistent with applicable comparable sales. (AR 1014, 1022, 1025.) As significant, Hunnicutt's Without LID valuation is also consistent with both the Pierce County Assessor's valuation in 2011 and Macaulay's own range of appropriate values for properties zoned Town Center (TC). (See 1008.)

Notably, this Macaulay's Without LID valuation is substantially lower (25%) than the Pierce County Assessor's 2011 valuation of \$1,462,000 (AR 1008) for the land only (\$4.65/sf). Appraiser Hunnicutt researched arms-length sales in Edgewood for the relevant time period (including sales used in Macaulay's analysis) and, based on the sales reviewed, found that: (1) no properties sold for less than the assessed value; and (2) only one arms-length sale was at 100% of assessed value, the rest exceeded assessed value. (AR 1008.)

Additionally, and even more significant, Macaulay's May 10, 2011 Report provided a range of Without LID values for all Town Center properties -- \$4.00/sf to \$8.00/sf. (AR 439.) Thus, Macaulay's valuation for the Rempel Property is outside his own range.

Finally, only one other Town Center property within the LID was given a value below \$4.00/sf. That property is LID No.84, which the City held out to the Court as comparable to the Rempel Property. (See AR 25,

865, 858-559.) However, LID No.84 was only valued at \$6.30/sf With LID. Macaulay valued the Rempel land With LID at \$8.00/sf. (*Id.*)

The Macaulay Without LID Value is disproportionate to other Town Center properties, disproportionate to Macaulay's own range of values and without explanation 25 percent below appraised value. Hunnicutt's valuation, on the other hand, is within Macaulay's own ranges, consistent with the assessed value and consistent with the comparable sales.

Macaulay has also overvalued the Rempel Property with LID. Though valuing the property very low in the before analysis, he applied one of the higher With LID valuations -- \$8/sf to the entire property. (AR 3341.) Again, LID Parcel 84, which was given nearly the same before value, was only valued at \$6.30/sf in the after. (AR 25, 858-59.) Macaulay attempted to justify the substantial after value by noting that Rempel listed the price for sale at \$1,750,000, asking any potential purchaser to take responsibility for the sewer assessment. (*See* AR 3334.) But, Rempel has never received any offer at the listing price and they have not been successful in entering a purchase contract for the property at any price. (AR 720, 1002, 762.) Regardless, the listing price is a mere offer to sell the property. It has long been established in Washington that offers may not be used as evidence to establish value. *North Coast R. Co. v.*

Newmann, 66 Wash. 374, 119 Pac. 823 (1911); *Chicago M. & St. P. Ry. Co. v. Alexander*, 47 Wash. 131, 91 Pac. 626 (1907).

That Macaulay's treatment of the Rempel Property was grossly disproportionate to that of other LID properties was independently confirmed by yet another certified MAI appraiser Donald Heischman of the appraisal firm Strickland, Heischman and Hoss, Inc. Heischman prepared a comprehensive review of the Macaulay valuation analysis. He concluded that the Rempel assessment was a "clear outlier," more so than any of the eleven properties. (AR 1036.) Compared to the median increase in value to the LID properties of 40% that Macaulay attributed to the sewer improvements, Macaulay applied a 128% increase in value to the Rempel Property. (*Id.*) Heischman concluded that this increase that Macaulay applied to the Rempel Property "is not within reason." (*Id.*)

Hunnicutt more appropriately applied a value of \$11.50/sf to the Meridian frontage, but then, applied \$6.00/sf to the back property that will more likely have residential, less valuable development. This Hunnicutt valuation is more consistent with the comparable sales and more appropriately addresses the different values of the two sections of property.

Rempel did not simply present the Council with a competing appraisal. They also expert evidence that the Macaulay appraisal was

internally inconsistent and resulted in an assessment that is provably an outlier and grossly disproportionate to the other LID assessments. This evidence went unanswered by the City.

Pursuant to RCW 35.44.250, this Court is authorized to and should reduce the Rempel assessment from \$790,535 to \$381,925. Such adjustment would be consistent with the substantial evidence in the record, appropriately align the assessment with the true value of the special benefit from the sewer improvement and make the assessment proportionate to the assessments against other LID properties.

D. The Reassessment Against The Stokes Property Substantially Exceeds The Special Benefits Value And Is Grossly Disproportionate To The Assessments Levied Against Similarly Situated LID Properties. This Court Should Reduce The Stokes Assessment From \$379,315 To \$19,235, Or At Most, To \$118,542.

As noted earlier, the City has assessed the Stokes Parcel No. 27 \$379,315. This assessment is based upon Macaulay's determination that the before LID value of the Stokes Property was \$755,000 (including \$80,000 for the existing SF home) and the after LID value of the property is \$1,290,000. Macaulay's after LID valuation assumed commercial and multi-family residential development of the Stokes' Property with the benefit of sewers. Based on these before and after LID valuations, Macaulay calculated the special benefit value to be \$535,000. Macaulay

then applied the same 70.9% applied to all of the eleven LID parcels to calculate the \$379,316. (AR 3136, 3154.)

Stokes retained Professional Engineer James Schweickert, Larson & Associates, in 2012 to assist Stokes in the planned commercial development of the site. Included in the work by Schweickert, was design of a storm water system as necessary to support the planned development. Schweickert's evaluation is significant to any valuation of the property. His professional analysis revealed that development of the Stokes Property will necessarily require development costs that are extraordinary and atypical for commercial development of this type. More specifically, the costs (both in money as well as lost developable area) are exceptional. Schweickert's detailed evaluation is set forth in the sworn declaration AR 877-913 and is discussed more fully below.

Stokes also retained certified appraiser David Hunnicutt to prepare an independent appraisal to determine the LID special benefit to the Stokes Property. Hunnicutt's appraisal of the Stokes property is at AR 970-98 and is also discussed below.

1. City appraiser Macaulay overstated the without LID/before value for the Stokes Property.

Macaulay valued the property Without LID at \$755,000 (including the existing single family home). (AR 3154, 3149.) Notably, this Without

LID valuation is substantially lower (17%) than the Pierce County Assessor's 2011 valuation of \$885,000. (AR 977-78.) As noted earlier appraiser Hunnicutt researched arms-length sales in Edgewood for the relevant time period (including sales used in Macaulay's analysis) and, based on the sales reviewed, found that: (1) no properties sold for less than the assessed value; and (2) only one arms-length sale was at 100% of assessed value, the rest exceeded assessed value. (AR 978.) As discussed later in this objection, Hunnicutt valued the Stokes Property Without Sewer at \$1,052,904 (AR 993), which is more consistent with applicable comparable sales and a reasonableness check as compared to assessed values for Edgewood properties.

2. City appraiser Macaulay overstated the with LID /after value for the Stokes Property.

a. Macaulay failed to consider the extraordinary costs development costs associated with development of the Stokes Property.

As explained in detail in the sworn Declaration of James Schweickert, P.E., extraordinary challenges are presented with regard to managing storm water run-off for the Stokes Property. First, it is necessary to install an underground vault on the northwestern portion of the site at an estimated cost of \$260,000. This vault would manage storm water for development of the northwestern commercial portion of the site – the frontage along Meridian, which is the most valuable portion of the site.

This is an extraordinary cost not typically incurred in commercial development of the nature proposed for the Stokes Property. However, if the vault is not installed, the valuable frontage would be lost to a necessary storm pond. (AR 878-85. *Also Compare* Site Plan A to Site Plan B at AR 914-15.) Installation of the underground vault, though costly, at least allows development on the frontage and parking can be constructed over the vault. (*Id.*)

Because of the topography of the site, however, additional storm water detention is required. In addition to the underground vault, development of the Stokes Property also requires an additional 35,000 square foot storm pond at an estimated cost of \$80,000. Beyond the added cost, the necessary additional storm water detention results in a loss of 35,000 square feet of otherwise developable (not encumbered by wetlands or buffers) commercially zoned property. Stokes considered installing a second underground vault in order to eliminate the loss of 35,000 square feet. The cost of a second vault of necessary size, however, is estimated to be \$420,000. (*See* AR 877-85, 886-909.) The cost of the second vault cannot be justified for the development available for this site and the loss of 35,000 square feet could not feasibly be avoided.

Remarkably, the onsite storm water management is not the only extraordinary challenge presented for development of the Stokes Property.

As the engineers were addressing the storm water issues for the proposed commercial development, another unique problem was presented. There is not currently a readily available and adequate catch basin to which the storm water detained on the site may be disbursed. (AR 879-84.)

When Meridian was widened, the associated storm water system was not designed to receive storm water from adjacent property owners, but instead is a self-contained system. Typically street improvements are designed to accommodate offsite storm water, so the situation presented here is not typical. Further, the improvements actually blocked access to storm basins. When the problem was brought to the Washington State Department of Transportation's (WSDOT) attention, WSDOT made an alteration to at least allow access to a basin. Unfortunately, the basin that WSDOT made available is too shallow to accommodate the storm water runoff from the Stokes Property. (*Id.*)

After evaluating various options, Stokes' engineers determined that the best available option is to direct the property to another basin further south. However, to do so, Stokes will need to acquire easements from three separate private property owners. Whether the easements can be obtained and, if so, at what costs, is unknown. If easements can be obtained, there will be an additional cost of installing a conveyance system over the private properties to connect to the necessary basin. (*Id.*)

Hunnicutt has determined that value added by increased development potential from the newly installed sewer must be discounted between 20 and 30 percent to address the greater risk factor and unknowns costs associated with development of the Stokes Property. (*See* AR 994.) Hunnicutt has applied a discount of 25%.

While the Macaulay special benefit valuation is largely founded on significantly increased development potential of the Stokes Property, it fails to consider, much less address, the unique and significant development costs that are associated with this property. Notably, Hunnicutt contacted the engineer for the purchaser of Macaulay comparable LID Parcel 38 (located at 2520 Meridian – developed into an 80 unit Alzheimer’s Treatment Center). The engineer advised Hunnicutt that the developer, to meet City of Edgewood storm requirements, but address the unavailability of offsite storm water facilities, was also required to incur approximately \$300,000 to control storm water for the development. The costs were not anticipated by the developer at the time of purchase. Presumably, Macaulay also did follow-up on this comparable and learned, or could have learned, the same information. (AR 981-82.)

Macaulay’s valuation does not take the extraordinary development costs into consideration, nor does it consider the heightened risks and unknown costs associated with development of the Stokes Property. At a

minimum, Macaulay's With LID valuation must be reduced by the 25% risk factor. This adjustment would reduce Macaulay's after valuation to from \$1,290,000 to \$967,500, the special benefit valuation from \$535,000 to \$212,500 and the assessment from \$379,315 to **\$150,663**.

b. Macaulay failed to treat the Stokes Property in the same manner as another similarly situated LID property – specifically LID Parcel No. 21.

LID property numbers 20 and 21 are owned by CAH Investments, Inc., an entity owned by Edgewood's former Mayor. The properties are located at 715-729 Meridian (tax parcel no. 0420032115) and 10313 8th Street (tax parcel no. 0420032053). Both properties are zoned Commercial. LID No. 20 is improved with a Walgreens, and the adjacent LID No. 21 contains a large storm water pond (similar to the pond that will be required on the southwestern portion of the Stokes Property) that serves the Walgreen Property. Though the adjacent LID No. 21 is encumbered by the storm pond, as well as some critical areas, it nonetheless still contains approximately 60,000 square feet available for development. (See 930-32.) An environmental check list submitted with Pierce County Planning and Land Services for the combined lots (LID Parcel Nos. 20 and 21) confirms that the owners believe that further development of the property remains possible. (See AR 938.)

However, the Macaulay appraisal concluded that there is no usable area on the site and **\$0** was assessed to LID No. 21. (*See* AR 917-21.) This is inconsistent with a prior evaluation prepared by the certified appraisal company Allen Brackett Shedd (“Shedd”). Though a draft evaluation by Shedd stated that 100% of LID No.21 (formerly LID No. 45) was useable (*see* AR 922), Shedd revised the evaluation to state that only 50% of LID No. 21 (formerly 45) was useable (*see* AR 923-29). This determination of 50% useable area is more consistent with the owner’s Environmental Checklist and the Palmer evaluation. The preliminary Shedd evaluation thus anticipate an assessment against LID No. 21 in the amount of \$43,931. (*See Id.*).

A public records request was made to obtain an explanation of Macaulay’s evaluation, but no documentation was provided that would explain the analysis or the significant deviation from the prior Allen Brackett Shedd evaluation. (*See* AR 949-69.) In Macaulay’s May 10, 2011 Report, Macaulay specifically noted the Stokes Property (LID No. 27) and LID No.37 as two commercially zoned properties that were significantly encumbered by critical areas (wetlands); but LID No. 21 was not so identified. (*See* AR 921.) 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.¹³

In order to ensure that property owners are not treated disproportionately, a similar adjustment must be made to the Macaulay after valuation. The anticipated increased commercial development will require a 35,000 square foot storm pond on otherwise developable commercial property. The useable square footage applied by Macaulay in the With LID valuation must be reduced by 35,000 square feet that is known will be dedicated exclusively to storm water retention. If this adjustment is made (following the reduction for the 25% risk factor), the With LID value is reduced to \$782,129. This, in turn, reduces the special benefit valuation to \$27,129 and the assessment is correspondingly reduced to \$19,235.

Appropriate and necessary adjustments to the Macaulay valuation for the development risk factors and loss of land to storm retention reduce the special benefit valuation to **\$27,120** and the assessment to **\$19,235**. This adjustment does not take into account Macaulay's significant understatement of the Without LID valuation for the Stokes Property. Quite frankly, if the adjustment were made, as it should be, the end result would be a \$0 assessment against the Stokes Property, as the City did for

¹³ Though this would be an inaccurate conclusion, as there is still land on LID No. 21 that may be developed.

LID No. 21 Property owned by CAH Investments, Inc.

3. Hunnicutt's appraisal independently confirms that the revised assessment grossly exceeds the special benefit to Parcel No. 27.

Certified appraiser David Hunnicutt determined that the **special benefit** to the Stokes property is **\$167,196**. (AR 971, 995.) Applying 70.9%¹⁴ to this special benefit value, the assessment to the Stokes Property should be **\$118,542**.

There are two primary differences between the Hunnicutt valuation and the Macaulay valuation. First, Hunnicutt has determined a higher value for the property Without LID. Macaulay valued the property Without LID at \$755,000 (including the existing single family home). Hunnicutt valued the Stokes Property Without Sewer at \$1,052,904, which is more consistent with applicable comparable sales and a reasonableness check as compared to assessed values for Edgewood properties. Second, Hunnicutt's special benefits valuation takes into account the extraordinary development costs and extraordinary risks associated with development of the Stokes Property.

¹⁴ This is the ratio (70.9%) of the actual allocable costs for the installation of the sewer improvements, adjusted to remove costs associated with oversizing for future capacity) to the special benefit to all LID properties (as determined by Macaulay). The ratio is uniformly being applied to all of the special benefit values for the private property owners who participated and prevailed in the first appeal to this Court.

Accordingly, if adjustments to the Macaulay valuation are not made as noted above, the Stokes Property assessment should, at the very least, be reduced to an assessment consistent with the Hunnicutt special benefit valuation. The Hunnicutt special benefit valuation more appropriately addresses the unique characteristics of the Stokes Property.

Like Rempel, Stokes did not simply present the Council with a competing appraisal. He also presented expert evidence that his property has significant development limitations and uncertainties that the Macaulay appraisal failed to address. Stokes also presented evidence of disparate treatment, demonstrating that at least one other LID parcel with similar development limitations was levied a substantially reduced assessment. The Stokes assessment substantially exceeded the special benefit value and resulted in an assessment that is disproportionate to the other LID assessments.

Pursuant to RCW 35.44.250, this Court is authorized to and should reduce the Stokes assessment from \$379,315 to \$19,235, making the assessment consistent with the City's treatment of the former Mayor's property. Alternatively, the assessment should be reduced to **no more than \$118,542**, so that it no longer exceeds the value of the special benefit appropriately determined by Hunnicutt.

V. CONCLUSION

RCW 35.44.250 directs the Court, upon finding that the City's action was arbitrary and capricious, to "correct, change, modify, or annul the assessment insofar as it affects the property of the appellant." *See also, Hasit*, 179 Wn. App at 936 ("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 competent evidence to the contrary.")

In the first appeal, because of the lack of due process, the LID objections were not fully developed. Likewise, the costs associated with the excess sewer capacity were unknown. As a result, this Court took the action appropriate under the circumstances and annulled the assessments of the objecting parties.

The circumstances under this second appeal are different. With the additional time yielded through the appeal, Stokes and Rempel were able to develop and present evidence, including expert appraisal evidence and expert evidence regarding the development limitations of the subject properties. With respect to the excess capacity costs, those costs have been determined by the City and removed from the assessments levied against the objecting LID property owners.

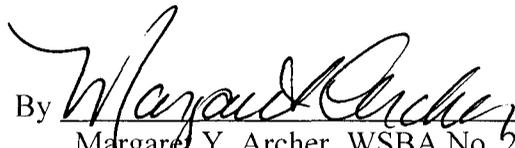
But the City of Edgewood has demonstrated continued willfulness by refusing to earnestly accept and carry out its responsibilities as a Board of Equalization. Given this historical conduct and because the record is more fully developed, Rempel and Stokes believe that it is appropriate and warranted for this Court to take direct action to reduce their respective assessments and bring this saga to an end.

Accordingly, pursuant to RCW 35.44.250, Stokes and Rempel request this Court to conclude that, in light of the record and applicable law, the Council's action confirming the assessments was arbitrary and capricious. Also pursuant to RCW 35.44.250, Stokes and Rempel request this Court to correct their assessments so that they no longer exceed the value of the substantial benefit to their respective properties and are proportionate to similarly situated assessed properties. **Rempel requests the Court to reduce their assessment from \$790,535 to \$381,925**, which is consistent with the actual special benefit value and proportionate to the other assessments. **Stokes requests this Court to reduce its assessment from \$379,315 to \$19,235**, which would make the assessment consistent with the City's treatment of another very similarly situated property, **but in any event no more than \$118,542**, as supported by the value of the special benefit determined by Stokes' professional appraiser.

Dated this 19th day of January, 2016.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By 
Margaret Y. Archer, WSBA No. 21224
Attorneys for Stokes and Rempel

APPENDIX A

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BEFORE THE CITY COUNCIL OF THE
CITY OF EDGEWOOD ACTING AS BOARD OF EQUALIZATION

In the Matter of:

LOCAL IMPROVEMENT
DISTRICT NO. 1

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER (ASSESSMENT ROLL)

A PUBLIC HEARING in the above-captioned matter was held on September 17, 2014 (after being rescheduled from August 13, 2014), before the City Council of the City of Edgewood, Washington acting as a Board of Equalization (the "Board").

This matter has come back before the Board on remand from the Washington State Court of Appeals (the "CofA" decision is found at *Hasit, LLC v. City of Edgewood*, 179 Wn. App. 917, 320 P.3d 163 (2014). In its decision, the CofA "annul[ed] the special assessments imposed against the respondents' properties." As a result, those same respondents' properties are herein reassessed in accordance with the CofA's decision.

The City of Edgewood appeared at the public hearing through City Attorney Zach Lell. The Local Improvement District (the "LID") was principally represented by

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER LID NO. 1 (ASSESSMENT ROLL)

1 legal counsel Stephen P. DiJulio. Robert J. Macaulay, author of a Special Benefit
2 Study of the LID improvements appeared and testified regarding the study he
3 prepared (the "Macaulay Study"). Tony Fischer of BHC Consultants testified on behalf
4 of the LID regarding oversizing design issues. Jim Santrock of Tetra Tech also
5 testified on behalf of the LID regarding oversizing design issues.

6 The owners of parcels 27 (tax parcel no. 0420033077—Stokes) and 68 (tax
7 parcel no. 0420091134—Rempel) were represented by Attorney Margaret Archer. In
8 addition, on behalf of these two properties, David Hunnicutt of Hunnicutt and
9 Associates, Inc. testified at the hearing regarding valuation studies he conducted
10 separately from the Macaulay Study challenging its conclusions. Tina Rempel
11 presented testimony regarding her property on her own behalf and land use planning
12 consultant, William Palmer testified regarding the properties represented by Ms.
13 Archer as well.

14 The owners of the remaining properties on remand from the CofA (as
15 referenced further herein below) were represented by Attorney Carolyn Lake
16 (collectively the "Docken Appellants") who submitted various materials including the
17 "Declaration and Report of Property Owner Appraiser Don Heischman (the
18 "Heischman Report")." Of the Docken Appellants, live testimony was presented by
19 Enid Duncan, Dexter Meacham, and Eric Docken in addition to Ms. Lake's
20 presentation.
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The Board, having now considered the evidence presented, having reviewed the records and files in the case, and being otherwise fully advised, makes the following:

FINDINGS OF FACT

1. In October of 2008, the City adopted Ordinance No. 08-0306 creating LID No. 1 providing for the construction of a modern wastewater (sanitary sewage) system in accordance with the Edgewood General Sewer Plan as adopted in 2004 (updated, 2007 and 2009).

2. Phase I of the system was substantially completed in March 2011, and the Council officially accepted the work on April 12, 2011 by resolution.

3. Thereafter, the City Council adopted Ordinance No. 11-0366 in July of 2011, by which the City Council confirmed the assessment roll for LID No. 1 previously filed with the City Clerk in accordance with applicable laws. Pursuant to that Ordinance, costs of the LID were assessed to the owners of 161 parcels in a 312 acre area of the City. Of those owners, originally nine owners of eleven parcels challenged their assessments in a proceeding in Pierce County Superior Court, which led to (a) the City's appeal to the CofA and the *Hasit* decision referenced above, (b) nullification of the assessments for the appealing owners and (c) the present reassessment proceeding.

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4. Of those nine owners, eight are still active in this reassessment proceeding as follows:

- ° Duncan, Edward & Enid- Map No. 2 (Tax Parcel No. 042003202100),
- ° 1999 Stokes Family LLC- Map No. 27 (Tax Parcel No. 0420033077),
- ° Suelo Marina LLC- Map No. 31 (Tax Parcel No. 0420033140),
- ° Rempel Ray E & Eldean TTEE & Rempel, Tina- Map No. 68 (Tax Parcel No. 0420091134),
- ° Masters, Darlene & Schmidt, Patricia- Map Nos. 71 & 79 (Tax Parcel Nos. 0420091012 & 0420091051),
- ° Skarich, George J & Arlyn J- Map No. 115 (Tax Parcel No. 0420103139),
- ° AKA The Brickhouse LLC- Map No. 128 (Tax Parcel No. 3625000373), and
- ° Docken Properties LP- Map Nos. 131, 133 & 140 (Tax Parcel Nos. 0420094080, 0420094023, 0420094079).

The foregoing are referred to hereinafter collectively as the "Appellant Properties."

5. After the CofA nullification, the City commissioned the Macaulay Study referenced above, together with evaluations from BHC Consultants and Tetra Tech regarding oversizing for use in the reassessment process for the Appellant Properties. The Macaulay Study took into account additional factors in reevaluating the Appellant Properties such as actual usable area information, information specifically regarding

1 wetlands, other critical areas and stormwater challenges, and information regarding
2 the conditions/status of existing improvements.

3 6. A proposed reassessment Roll for LID No. 1 was filed in the Office of the
4 City Clerk, and the same shows the amount staff recommended be reassessed
5 against the Appellant Properties in payment of the cost and expense of the
6 improvements previously referred to herein, and said proposed roll has been open for
7 inspection by all parties interested therein.

8 7. Sufficient legal notice, as required by RCW 35.44.080 and Edgewood
9 Municipal Code ("EMC") 3.40.030, was published/ provided. All other procedures
10 required by law with respect to adoption of the reassessment roll have been taken,
11 including, but not limited to, direct notices to the owners of record of the Appellant
12 Properties which were mailed on August 14, 2014. An Affidavit of publication for the
13 proposed reassessment roll is attached hereto as Exhibit A.

14 - 8. A public hearing was held on September 17, 2014 (after being rescheduled
15 from August 13, 2014), before the Board in Council Chambers at City Hall located at
16 2224 104th Ave. East, Edgewood, WA.
17

18 9. At the outset of the hearing, Enid Duncan requested that Council Member
19 Crowley recuse himself apparently because he is an attorney. With no other reason
20 offered and no actual conflict or appearance of fairness issue presented, the request
21 was denied.
22

23 FINDINGS OF FACT, CONCLUSIONS OF LAW,
24 AND ORDER LID NO. 1 (ASSESSMENT ROLL)

Page 5 of 5

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REF2014-000011

1 10. At the hearing, Stephen P. DiJulio, as legal counsel for LID No. 1 made
2 opening remarks and then directed the presentation of testimony by Robert J.
3 Macaulay regarding the findings of the Macaulay Study a copy of which is attached
4 hereto as Exhibit B and incorporated herein as part of the Board's findings. Tony
5 Fischer of BHC Consultants and Jim Santrock of Tetra Tech both testified on behalf of
6 the LID regarding oversizing design issues among others. Opportunities to cross
7 examine all LID witnesses was provided to the Appellant Owners' counsel.

8 11. Based on the Macaulay Study and other information presented by City staff
9 and the LID, an overall reduction in the assessed amounts to the Appellant Owners'
10 due to oversized capacity and other reconsidered factors referenced in the Macaulay
11 Study, was recommended in the amount of \$408,557, leading to an overall
12 assessment to the Appellant Owners of \$2,385,785 broken down as follows:

13	° Duncan, Edward & Enid-	Map No. 2	\$212,700
14	° 1999 Stokes Family LLC-	Map No. 27	\$379,315
15	° Suelo Marina LLC-	Map No. 31	\$322,595
16	° Rempel Ray E & Eldean TTEE 17 & Rempel, Tina,-	Map No. 68	\$790,535
18	° Masters, Darlene & 19 Schmidt, Patricia-	Map No. 71 Map No. 79	\$428,945
20	° Skarich, George J & Arlyn J-	Map No. 115	\$28,360
21	° AKA The Brickhouse LLC-	Map No. 128	\$21,270
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1 conducted regarding these same properties. The Hunnicutt valuations are part of the
2 record in this matter along with all other evidence submitted.

3 15. The verbatim digital recording of the public hearing and the file in this
4 matter are in the custody of the City Clerk; and both are available for review by any
5 party in interest.

6 16. Any Conclusion of Law set forth hereinafter which may be deemed to be a
7 Finding of Fact herein is hereby adopted as such.

8 From these Findings of Fact the Board makes the following:

9 CONCLUSIONS OF LAW

10 1. City staff and the LID have complied with all applicable laws with respect to
11 approval and confirmation of the (re)Assessment Roll for the Appellant Properties in
12 LID No. 1.

13 2. Improvements constructed pursuant to a local improvement district are
14 presumed to benefit properties within the LID on an equitable basis, and the
15 assessments are presumed to have been made fairly and legally. *See Abbenhaus v.*
16 *Yakima*, 89 Wn.2d 855, 860-61,576 P.2d 888 (1978); *see also Bellevue Plaza v.*
17 *Bellevue*, 121 Wn.2d 397,402-403, 851 P.2d 662 (1993); *Hansen v. Local Imp. Dist.*,
18 *54 Wn. App. 257-62, 773 P.2d 436 (1989).*

19 3. The Board concludes that the reassessments based on the Macaulay Study
20 were determined in accordance with the Court of Appeals' standards as set forth in
21

1 Hasit. The Reassessments reflect properly the Special Benefits resulting from LID #1
2 improvements. Differing opinions were expressed regarding the Special Benefit to the
3 Appellant Properties; however, the Board concludes that the evidence presented by
4 the owners of the Appellant Properties did not overcome the City Staff/LID
5 recommendations. Given that, the objections of the owners of the Appellant Properties
6 are overruled.

7 4. The revised Assessment Roll conforms to applicable legal requirements,
8 and there is no compelling evidence that the methodology used to substantiate the
9 assessments for the Appellant Properties was incorrect. Accordingly, the Board
10 should adopt an ordinance assessing the Appellant Properties for benefits conferred
11 under LID No. 1, previously created by the City Council, and the revised Assessment
12 Roll for LID No. 1 should be confirmed and approved.

13
14 5. Any Finding of Fact hereinbefore stated which may be deemed to be a
15 Conclusion of Law herein is hereby adopted as such.

16 From the foregoing Findings of Fact and Conclusions of Law the Board enters
17 the following:

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FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER LID NO. 1 (ASSESSMENT ROLL)

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ORDER

It is hereby ordered that the Assessment Roll for LID No. 1, including the reassessed amounts for the Appellant Properties be confirmed and approved and an ordinance be adopted reflecting the same.

DONE THIS 2nd day of October, 2014.

By: 
DARYL EIDINGER, Mayor on Behalf
of the City Council of Edgewood, WA
acting as Board of Equalization

FILED
COURT OF APPEALS
DIVISION II

2016 JAN 20 AM 11:20

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON
OF STATE OF WASHINGTON

DEPUTY

NO. 48028-0

CERTIFICATE OF SERVICE

1999 STOKES FAMILY LLC and
ELDEAN REMPEL, as Trustee for
REVOCABLE TRUST AGREEMENT
OF RAY E. REMPEL and ELDEAN B.
REMPEL DATED DECEMBER 12,
2006, a Trust, and TINA REMPEL,

Appellants,

vs.

CITY OF EDGEWOOD,

Respondent.

THIS IS TO CERTIFY that on this 19th day of January, 2016, I did serve, by regular U.S. Mail, postage prepaid, true and correct copies of the APPELLANTS STOKES AND REMPEL'S OPENING BRIEF addressed to the following:

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ORIGINAL


Margaret Archer