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DIVISION III
STATE OF WASHINGTON
By _____

No. 303811

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

ELLENSBURG CEMENT PRODUCTS, INC.
Appellant,

v.

KITTITAS COUNTY,
Respondent,

v.

HOMER L. (LOUIE) GIBSON,
Respondent.

**PETITION FOR SUPREME COURT REVIEW
BY HOMER L. (LOUIE) GIBSON**

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A. IDENTITY OF PETITIONER

Petitioner is Homer L. (Louie) Gibson. Petitioner joins in the Petition for Review filed by Kittitas County and supplements such Petition as more particularly set forth herein.

B. COURT OF APPEALS' DECISION

Petitioner requests review of the Decision of the Court of Appeals, Division III, in *Ellensburg Cement Products, Inc. v. Kittitas County, et al* (No. 30381-1-III), filed October 30, 2012.

C. ISSUES PRESENTED FOR REVIEW

A. Whether Court of Appeals erred in failing to provide deference to local jurisdiction's interpretation of ordinance as required by RCW 36.70C.120(1)(b)?

B: Whether local jurisdiction is obligated as a matter of law to provide one open record hearing on an administrative appeal of SEPA threshold determination?

D. STATEMENT OF THE CASE

Homer L. (Louie) Gibson ("Gibson" or "Respondent") owns and operates an existing sand and gravel excavation and processing business. A portion of the operations is located on 84 acres of real property situated on five contiguous parcels in rural Kittitas County. (CP 469-477). The property and immediate geographic area have a long history of mining and

rock crushing operations. (CP 38, 116 and 267-276). Gibson operated under a Conditional Use Permit issued by Kittitas County on December 18, 1997. (CP 149). Gibson sought to expand the operation on to adjacent parcels and relocate crushing and processing activities. (CP 265-274 and 276-279). Mining on the property had actually been conducted on the property without complaint since 1982. (CP 267).

Gibson submitted a Zoning Conditional Use Permit Application (“CUP Application”) for the expansion of existing mining and rock crushing operations to Kittitas County Community Development Services (“CDS”) on June 11, 2010. (CP 265-274 and 276-279).¹ The application proposed to amend the existing conditional use permit – Miller Conditional Use Permit (CU-97-17) – to allow for the expansion of the existing rock quarry on to adjoining parcels. (CP 266). Gibson submitted an Environmental Checklist for the project proposal, together with information previously provided to DNR (CP 268-274 and 275-279).

The property is designated “Rural” under the Kittitas County Comprehensive Plan and zoned A-20-Agricultural Zone. (CP 192).

¹ Mining projects require three (3) specific land use approvals: (1) surface mining permit issued by Washington State Department of Natural Resources (“DNR”); (2) a land use conditional use permit issued by Kittitas County, Washington; and (3) a sand and gravel general permit issued by Department of Ecology. Gibson previously submitted and obtained a Surface Mining Permit from DNR. (CP 166). All of the environmental and permit determinations made by DNR were included in the Administrative Record. (CP 157-172).

Kittitas County Code recognizes “sand and gravel excavation” as a permitted use within the zoning district through a conditional use permit. KCC 17.29.030. There is no dispute that mining and excavation operations are authorized within the zoning district. KCC 17.29.020(A)(13) also allows “processing of products produced on the premises.” The question in this case is whether the ordinance allows processing of sand and gravel produced on the premises. Court of Appeals interpreted the ordinance language to limit processing to “agricultural products”. This interpretation was contrary to that of the local jurisdiction – i.e. Kittitas County Community Development Services (CDS) and Board of Adjustment.

Kittitas County CDS is vested with responsibility for administering and enforcing the local zoning ordinance. The planner in this case – Dan Valoff – was an experienced and capable land use planner. CDS Staff Report specifically determined that “... [p]rocessing of products produced on the premises is a permitted use in the Ag-20 zone.” (CP 35-36 and 192). Board of Adjustment confirmed this interpretation. (CP 103). ECP requested and received confirmation that their pits would be treated in the same manner and that processing would be allowed with a conditional use permit. (CP 46). Kittitas County interpreted and applied the ordinance provisions in a uniform and consistent manner. Division III either ignored

or found the local jurisdiction's interpretation of its ordinance to be irrelevant.

Kittitas County followed all ordinance procedures in processing the application. The application was deemed to be complete on June 29, 2010. (CP 264). All notices identified the proposal as an application "for the amendment to the Miller Conditional Use Permit (CU-97-17) for the expansion of the existing rock quarry on 85 acres and to allow for rock crushing in the Agriculture 20 zone." (CP 196, 245-246, 315-316, 319-320, and 323-324). Notice of Application was published, posted and mailed to adjacent property owners, county departments and government agencies. (CP 192; 261-263; 282; and 325-326). Comments were received from affected agencies including Kittitas County Department of Public Works; Kittitas County Fire Marshall; Department of Natural Resources; and Department of Ecology (CP 256-260). Not a single commenting agency objected to the permit application or the proposed issuance of a Determination of Nonsignificance (DNS). All neighbors expressed support for the project. (CP 186 and 189-190). The sole objecting party was Ellensburg Cement Products, a competitor to Gibson.

Kittitas County CDS assumed lead agency responsibility and conducted environmental review for the permit application in accordance with State Environmental Policy Act (SEPA). Kittitas County determined

that the proposal did not have a probable significant adverse impact on the environment and issued a DNS (DNS) on October 21, 2010. (CP 244). Washington Department of Natural Resources (“DNR”) had previously reviewed the surface mining component of the project and reached the same conclusion when it issued a DNS on November 17, 2008. (CP 275-279).² This is because the proposal “. . . does not have a probable significant adverse impact on the environment.” (CP 164).

ECP appealed the threshold environmental determination (DNS) on November 2, 2010. (CP 293-298). Under Kittitas County ordinance, appeals are limited to “. . . review of the county’s *procedural compliance* with Chapter 197-11 WAC.” KCC 15.04.210. ECP set forth a list of objections to be reviewed under Kittitas County’s appeal process.³

² Kittitas County CDS received copies of DNR documents at least by July 13, 2010. (CP 275-279). Kittitas County had previously reviewed and commented on the DNR permit application and confirmed that proposed post-reclamation uses were permitted under the zoning code. (CP 156). All DNR environmental information was reviewed prior to issuance of the environmental threshold determination.

³ The identified appeal issues were a literal reprinting of ECP’s prior SEPA comments contained in correspondence dated August 12, 2011. (CP 309-313). SEPA Responsible Official had fully considered the comments before issuance of the threshold decision on October 21, 2010. (CP 244). At the time of issuance of the DNS, there was absolute clarity on the size of the project (84 acres on five specifically identified parcels); the presence of a DNR surface mining permit and associated environmental determination; identification of all adjacent properties; full comment from agencies with jurisdiction; and unambiguous removal of concrete and asphalt batch plant operations from the project proposal. ECP’s arguments and points were fully considered **before** the issuance of the threshold determination.

An administrative appeal of DNS is considered by Kittitas County Board of Adjustment. KCC 15.04.210. Appeal procedures are set forth in KCC 15A.07.010 and .020.⁴ The appellate review process is based upon the record before the administrative department. KCC 15A.07.010(2) (“the appeal . . . shall not contain or attempt to introduce new evidence, testimony or declaration.”). Each party to the administrative appeal is entitled to submit a written argument and brief to the Board of Adjustment. KCC 15A.07.010(3) sets forth the procedure as follows:

... The appellant’s brief shall be due 30 days prior to the hearing date. Briefing from the County and any other Respondents shall be due 10 working days prior to the hearing date. *There shall be no response or rebuttal briefing by any party.* The officer from whom the appeal is being taken shall forthwith transmit to the reviewing body and the parties all of the records pertaining to the decision being appealed. *Briefing shall be limited to legal argument based upon the documents comprising the record that formed the basis for the administrative decision on appeal that have been transmitted to the parties by said officer.*

Prosecuting Attorney advised the Board of the procedures and noted that “. . . the matter is to be dealt with completely in writing.” (CP 108).⁵ The

⁴ Kittitas County revised its administrative and environmental review procedures by Ordinance No. 2010-08, adopted October 5, 2010. The appeal procedures were developed in accordance with statutory directives. RCW 36.70B.060. There was no appeal or challenge to the ordinance procedures at time of adoption. Prosecuting Attorney described the appeal process to the Board of Adjustment before the hearing. (CP 108-109).

⁵ Kittitas County advised all parties of the briefing schedule. (CP 227). ECP filed its brief on March 9, 2011 (CP 207-226). ECP was afforded a full opportunity to present its

Board had authority to affirm, reverse, modify or remand the administrative decision. KCC 14A.07.040.and .050.

The ordinance further provided procedures for review of the appeal. KCC 15A.07.020 provides:

1. Administrative appeals shall serve to provide argument and guidance for the body's decision. *No new evidence or testimony shall be given or received.* The briefing shall not contain new evidence, testimony, or declarations, *but shall consist only of legal arguments based upon the documents comprising the record as transmitted to the parties by the relevant officer.* The parties to the appeal shall submit timely written statements or arguments to the decision-making body.

2. The hearing body shall deliberate on the matter in public in the manner of a closed record hearing and reach its decision on the appealed matter.

Board of Adjustment complied with the established ordinance procedure. After reviewing the record and briefing, the Board of Adjustment unanimously denied the appeal (CP 35 and 103). ECP sought to collaterally attack the ordinance procedure and contend that Kittitas County was obligated to provide at least one "open record hearing."

**E. REVIEW SHOULD BE ACCEPTED TO ADDRESS ISSUES
OF STATEWIDE SIGNIFICANCE AND CONFLICTS
BETWEEN COURTS**

argument in writing. Kittitas County filed its reply brief on March 30, 2011 (CP 200-206). And Gibson filed on April 1, 2011 (CP 191)).

This case presents substantial issues of statewide significance. Court of Appeals held in a published opinion that (1) local governments are *obligated* to provide at least one “open record hearing” on administrative appeals pursuant to RCW 36.70B.060(6); and (2) appellate courts are not required to apply statutory deference to a local jurisdiction’s interpretation of its zoning ordinance. Both determinations represent substantial departures from statutory directives and established case authorities. The mandate for provision of an “open record hearing” will render virtually every local administrative process invalid. The ramifications of the decision are extraordinary.

1. RCW 36.70B.060(6) Does Not Mandate or Obligate Local Jurisdictions to Provide an “Open Record Hearing” in Administrative Land Use Appeals.

Court of Appeals reached the extraordinary conclusion “... that the County’s failure to provide one open record hearing on the SEPA appeal was erroneous as a matter of law.” *Ellensburg Cement Products, Inc. v. Kittitas County*, at 2. The court further concluded that “... [t]he County’s failure to provide an open record hearing on ECP’s SEPA appeal was erroneous as a matter of law.” *Id.* at 25. These conclusions are in direct conflict with the clear statutory language of RCW 36.70B.060(6). The imposition of this mandate will have far reaching consequences. Each local jurisdiction and project applicant will be faced with the expense and

delay of additional hearings; local jurisdictions will lose authority to define and structure efficient appeal processes; and local administrative appeal procedures will be placed in jeopardy.

As a beginning proposition, local jurisdictions are authorized to develop administrative review processes applicable to environmental review. Local jurisdictions are not required to provide for administrative appeals of SEPA determinations. WAC 197-11-680(2) and (3) set forth rules for SEPA administrative appeals:

Agencies may establish procedures for such an appeal *or may eliminate such appeals altogether, by rule, ordinance or resolution*. Such appeals are subject to the restrictions in RCW 36.70B.050 and 36.70B.060 that local governments provide no more than one open record hearing and one closed record appeal for permit decisions.

WAC 197-11-680(2) (Emphasis added). Kittitas County was authorized to establish its own procedures for administrative appeals provided there is compliance with *limitations* on the number of hearings. Kittitas County complied with this directive and established an appeal procedure. The regulation does not require an open record hearing. Rather, it requires "... that local governments provide *no more than one* open record hearing ..."

Kittitas County adopted procedures for administrative review of environmental threshold determinations. KCC 15.04.210. ("A final

threshold determination ... may be appealed pursuant to Title 15A of this Code.”) The appeal process was based on the administrative record with all parties afforded a full opportunity to present written appellate argument. KCC 15A.07.010 (CP 109). This process is identical to a LUPA the appeal which is based on the administrative record and “dealt with completely in writing.” RCW 36.70C.110 and .120.⁶

Kittitas County followed the adopted procedure, which is the process followed for review of all *administrative decisions*.⁷ ECP was allowed to submit written argument and did not make any claim that it was denied due process rights. ECP did not assert a due process challenge to the ordinance procedure.

⁶ Judicial review of a land use decision under LUPA is based on the administrative record established before the local jurisdiction. RCW 36.70C.120(1). See also *Pinecrest Homeowners Ass'n. v. Glen A. Cloninger & Associates*, 151 Wn.2d 279, 288, 87 P.3d 1176 (2004) (Supreme Court “... stands in the shoes of the Superior Court and limits its review to the record before the [local jurisdiction]”.); and *Isla Verde Int'l. Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002). LUPA appeals do not allow for the presentation of new evidence or afford an appellant an opportunity for an “open record” evidentiary hearing. RCW 36.70C.120. Kittitas County could have chosen to simply eliminate administrative review of environmental threshold determinations. In such event, there would be no open record evidentiary hearing with respect to the environmental determination. The review would be based upon the administrative record before the SEPA Responsible Official. KCC 15A.07.010(3) established an identical procedure for administrative review of threshold determinations.

⁷ It should be noted that the administrative appeal procedure relates to all “administrative land use decision.” KCC 15A.070.010. Many land use decisions (including threshold determinations) are made solely by staff and do not require a public hearing process. Administrative decisions includes site plan reviews, zoning variances, short plats, segregations/lot line adjustments and similar land use applications. Any appeal of an administrative land use decision follows the same administrative review procedures. KCC 15A.070.020. The review is on the record and argument is written.

Court of Appeals erroneously concluded that Kittitas County was *obligated* to provide an open record hearing on ECP's SEPA appeal. The operative language of RCW 36.70B.060(6) is as follows:

Except for the appeal of a determination of significance as provided in RCW 43.21C.075, *if a local government elects to provide an appeal of its threshold determinations, or project permit decisions, the local government shall provide no more than one consolidated open record hearing on such appeal. The local government need not provide for any further appeal and may provide an appeal for some but not all project permit decisions. If an appeal is provided after an open record hearing, it shall be a closed record appeal before a single decision-making body or officer;*"

(Emphasis added). Court of Appeals read the statutory language and concluded:

This interpretation ignores the fact that the first sentence of RCW 36.70B.060(6) states that if a local government elects to provide an appeal, "the local government shall provide no more than one consolidated open record hearing on such appeal." While perhaps cryptic, this sentence is based on the assumption that there will be at least one open hearing. The phrase "the local government *shall provide for no more than one* consolidated open record hearing" indicates that the local government shall provide one open hearing. This language does not provide that the local government can elect to have only a closed hearing.

Ellensburg Cement Products v. Kittitas County, at 23-24. The Court's interpretation is contrary to the statutory structure which recognizes that a local jurisdiction may provide for appeal of threshold determinations provided that there shall be "... *no more than one* consolidated open

record hearing on such appeal.” This admonition is reiterated in RCW 36.70B.050(2) which states:

Except for the appeal of a determination of significance as provided in RCW 43.21C.075, *provide for no more than one open record hearing and one closed record appeal.*

The statutory directives are a limitation on the number and type of hearings, not a mandate for an open record hearing. In fact, under RCW 36.70B.060, “appeals of a SEPA threshold determination ... may be allowed *only in a single* open-record *or* closed-record appeal hearing.” Richard L. Settle, *The Washington State Environmental Policy Act*, E-29 (Lexus 2006). An open record hearing is not required under the clear language of the statute.

Second, no statutory authority exists requiring an open record hearing. Court of Appeals’ reference to the definition of “closed record appeal” does not require an open record hearing for an administrative SEPA appeal. The definitional reference simply applies to administrative reviews following an open record hearing on a *project permit application*. RCW 36.70B.020(1). A “project permit application” means “... any land use or environmental permit or license required from a local government for project action, including but not limited to, building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline and substantial development permits, site plan review,

permits or approvals required by Critical Area Ordinances, site-specific rezones," RCW 36.70B.020(4). The open record component relates to the hearing on the underlying land use application. It does not apply to administrative review processes related to a threshold determination. In the context of SEPA appeals, RCW 36.70B.060(6) recognizes that "... *if* an appeal is provided *after an open record hearing* it shall be a closed record appeal" Kittitas County did not provide for an appeal *following* the open record hearing on the *project permit*. The SEPA appeal was considered on the record with written argument prior to the open record hearing.

This issue is a matter of first impression. Court of Appeals' decision will have far reaching implications with respect to administrative review processes for both environmental and project review appeals. Based on the published opinion, all local jurisdictions will be obligated to provide both an open record and closed record hearing with respect to each and every administrative review process. The time, expense and delay associated with this requirement is antithetical to the intent and purpose of the Regulatory Reform legislation.

2. **Court of Appeals Failure to Provide Deference to Local Interpretation of Zoning Ordinance is Contrary to Statutory Directives of RCW 36.70C.120(2) and Represents a Significant Departure from Established Case Authorities.**

Land Use Petition Act (LUPA) provides exclusive means for review of land use decisions in the State of Washington. RCW 36.70C.030(1). *Phoenix Development, Inc. v. City of Woodinville*, 171 Wn.2d 820, 828, 256 P.3d 1150 (2011); and *Woods v. Kittitas County*, 162 Wn.2d 597, 610, 174 P.3d 25 (2007). ECP challenged Kittitas County's interpretation of its local zoning ordinance. Court of Appeals refused to afford deference to the local jurisdiction's interpretation of its own ordinance and held:

Because the phrase "processing of products produced on the premises" is not ambiguous, *we need not consider the issue of deference to the County or the impact of construing the ordinance in the light most favorable to the property owner.*

Ellensburg Cement Products, Inc. v. Kittitas County at 17. (Italics added). Court of Appeals disregarded the applicable appellate standard and its determination represents a significant departure from a plethora of decisions issued by the Supreme Court and the Courts of Appeal.

Court of Appeals' decision is in direct conflict with clear statutory language governing the applicable standard of review of land use decisions. Interpretation of local ordinances is under the "error of law" standard as set forth in RCW 36.70C.130(1)(b) which provides:

The land use decision is an erroneous interpretation of the law, *after allowing such deference as is due the construction of the law by a local jurisdiction with expertise; ...*

The court is not authorized to substitute its judgment for the local jurisdiction's interpretation of local ordinances. See e.g. *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 127-128, 186 P.3d 357 (2008) (“in any doubtful case, the court should give great weight to the contemporaneous construction of an ordinance by the officials charged with its enforcement.”); *Pinecrest Homeowners Association v. Colninger & Assoc.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004) (Supreme Court's review of city ordinance must accord deference to City Council's expertise); *Citizens to Preserve Pioneer Park, LLC v. City of Mercer Island*, 106 Wn. App. 461, 475, 24 P.3d 1079 (2001) (Courts generally accord deference to an agency's interpretation of an ambiguous statute). RCW 36.70C.130(1)(b) does not allow an appellate court to discard or disregard the mandate for deference to the local decision-maker.

Court of Appeals' decision is in direct conflict with Supreme Court's decision in *Phoenix Development, Inc. v. City of Woodinville*, 171 Wn.2d 820, 256 P.3d 1150 (2011).

The court in *Phoenix Development* reaffirmed the well-established principle that a “reviewing court gives considerable deference to the construction of the *challenged ordinance* by those officials charged with

its enforcement.” 171 Wn.2d at 830.⁸ The Court drew an analogy to Growth Management Act (GMA) and elaborated upon the standard of review:

Although this is not a Growth Management Act (GMA) Ch. 36.70A RCW case, to the extent that the GMA is implicated, we note that GMA does not prescribe a single approach to growth management. *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 125, 118 P.3d 322 (2005). Instead, the legislature specified that “the ultimate burden and responsibility for planning, harmonizing the planning goals of [the GMA], and implanting a county’s or city’s future rests with that community.” *Id.* ... Thus, the GMA acts exclusively through local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs. *Id.* at 125-26, 118 P.3d 322. These principles of deference apply to a local governments’ site-specific land use decisions where the GMA considerations play a role in its ultimate decision.

(Emphasis added). *Id.* at 830. As recognized in *Phoenix Development*, the legislature has clearly directed that local land use decisions and planning should be made at the local level. Appellate courts should not substitute judgment for matters that are local in nature. In this case, the Court of Appeals took the extraordinary step of holding that it is not required to follow the standard of review and apply deference. A court should reject deference only if there is “a compelling indication” that the interpretation

⁸ Courts distinguish applying deference standard based on whether the local jurisdiction is construing a local ordinance or a state statute. *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 38, 252 P.3d 382 (2011) (“We hold, therefore, that hearing examiner’s legal conclusions are not entitled to any deference under RCW 36.70C.130(1)(b) because they involve interpretations of state law, rather than Tacoma city ordinances.”) Construction of a local ordinance is at issue in this case.

“conflicts with the legislative intent or is in excess of the agency’s authority.” *Silverstreak, Inc. v. Wash. State Dept. of Labor & Indust.*, 159 Wn.2d 868, 884, 154 P.3d 891 (2007).

Second, Court of Appeals premised its decision on the conclusion that the ordinance language was “unambiguous”. This conclusion is contrary to case authority. An ordinance or statute is ambiguous when it “... it is susceptible to more than one meaning.” *Shoreline Community College Dist. No. 7 v. Employment Security Dept.*, 120 Wn.2d 394, 405, 842 P.2d 938 (1993); and *Timberline Air Service, Inc. v. Bell Helicopter Textron, Inc.*, 125 Wn.2d 305, 312, 884 P.2d 920 (1994) (“... where a statute is susceptible to more than one meaning it is ambiguous”) There can be no serious question that the language of KCC 17.29.020(A)(13) is susceptible to more than one meaning.

It has been further recognized that a statute or ordinance is ambiguous where “... it is susceptible to more than one reasonable interpretation.” Kittitas County CDS construed its own ordinance and concluded that processing of sand and gravel produced on site was a permitted use under KCC 17.29.020(13). (CP 35-36 and 192). Board of Adjustment came to the same conclusion – “... [p]rocessing of product produced on premises is a permitted use in the Ag-20 Zone.” (CP 103). It should also be noted that the ordinance at issue expressly grants deference

to the decision-maker to determine permitted uses. KCC 17.29.020 (“Any use not listed which is nearly identical to a listed use, *as judged by the administrative official*, may be permitted.”) Kittitas County’s interpretation of the ordinance and language was certainly “reasonable” and entitled to deference. In fact, “... an agency’s interpretation should be upheld as long as it reflects *plausible* construction” of a statute, ordinance or regulation.

Third, Court of Appeals has effectively rewritten the ordinance language to permit only the “... processing of *agricultural* products produced on the premises.” The word “agricultural” does not appear in the ordinance. Court of Appeals has impermissibly added language in direct conflict with established case authority. *Eugster v. City of Spokane*, 118 Wn. App. 383, 410, 76 P.3d 741 (2003) (“We will not add language to an unambiguous ordinance even if we believe the municipality ‘intended something else but did not adequately express it.’”); *Caritas Services, Inc. v. Department of Social and Health Services*, 123 Wn.2d 391, 409, 869 P.2d 28 (1994) (“A court may not add words to a statute even if it believes the Legislature intended something else but failed to express it adequately.”) The ordinance does not limit the word “product” to agricultural products, and any other reading requires an impermissible rewriting of the ordinance.

Fourth, Court of Appeals also specifically rejected the well-established requirement that the ordinance must be construed "... in a light most favorable to the property owner." *Ellensburg Cement Products v. Kittitas County*, at 17 ("Because the phrase 'processing of products produced on the premises' is not ambiguous, we need not consider ... the impact of construing the ordinance in the light most favorable to the property owner.") Board of Adjustment and Planning Staff's interpretations are supported by the well-recognized principle that ambiguous ordinances *must* be "... strictly construed in favor of the landowner." *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007). The court in *Sleasman* cited the following language from *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956):

It must be remembered that zoning ordinances are in derogation of the common-law right of an owner to use private property so as to realize its highest utility. *Such ordinances must be strictly construed in favor of property owners* and should not be extended by implication to cases not clearly within their scope and purpose.

(Emphasis added). Court of Appeals limited the scope of the ordinance in a manner that was contrary to the property owner. A use limitation that is not clearly articulated in the ordinance should not be read into the ordinance.

Finally, Court of Appeals' interpretation is inconsistent with practical and plausible application of the ordinance provision. The court in *Milestone Homes* noted:

The court should be guided by the reasonable expectation and purpose, as expressed in the ordinance or fairly to be inferred therefrom, of the ordinary person who sits in the municipal legislative body and enacts law for the welfare of the general public.

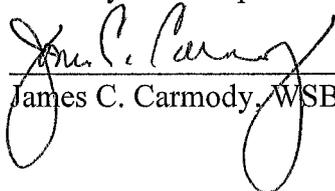
145 Wn. App. at 118, 126-27. The clear and unambiguous intent of KCC 17.29.020(A)(13) is to consolidate extraction and processing of products at a single location. It is more efficient, economical, and practical to consolidate operations. The fact that the ordinance permits rock *excavation* to take place within the zone clearly shows that rock was intended to be included as a "product" that may be processed on site in that same zone.

F. CONCLUSION

Respondent Gibson requests that this Court grant the Petition for Review to address the two significant issues raised in the Court of Appeals' decision in *Ellensburg Cement Products, Inc. v. Kittitas County*.

DATED this 29th day of November, 2012.

VELIKANJE HALVERSON P.C.
Attorneys for Respondent Gibson



James C. Carmody, WSBA #5205

CERTIFICATE OF SERVICE

I, Tori Durand, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am the legal assistant to James C. Carmody, attorney for Respondent , HOMER L. (LOUIE) GIBSON, and am competent to be a witness herein.

On the 29th day of November, 2012, I caused to be served via the method indicated below, a copy of the following documents:

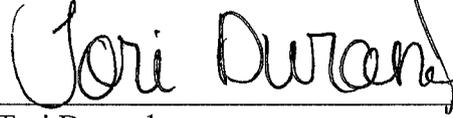
- ▶ Petition for Supreme Court Review by Homer L. (Louie) Gibson.

And a copy this Certificate of Service to:

Michael J. Murphy William J. Crittenden Groff Murphy, PLLC 300 East Pine Seattle, WA 98122 Attorneys for Ellensburg Cement Products	<input checked="" type="checkbox"/> Via UPS Overnight Mail <input checked="" type="checkbox"/> Via Email: mmurphy@groffmurphy.com
Neil Caulkins Deputy Prosecuting Attorney Kittitas County, Washington Room 213, Kittitas County Courthouse 205 W. Fifth Avenue Ellensburg, WA 98926	<input checked="" type="checkbox"/> United States 1 st Class Mail <input checked="" type="checkbox"/> Via Email: neil.caulkins@co.kittitas.wa.us

DATED this 29th day of November, 2012.

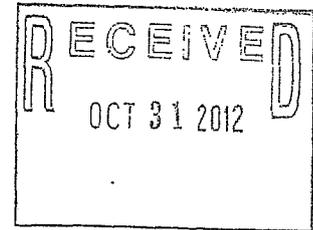
VELIKANJE HALVERSON P.C.

A handwritten signature in cursive script that reads "Tori Durand". The signature is written in black ink and is positioned above a horizontal line. To the right of the signature, there is a large, hand-drawn oval shape.

Tori Durand

Legal Assistant to James C. Carmody

g:\cc\gibson & son road building inc\kittitas co - cond use permit\ellensburg cement v. kittitas co - gibson\
supreme court\petition for review.doc td



FILED
OCTOBER 30, 2012
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

ELLENSBURG CEMENT PRODUCTS,)
INC.,)

Appellant,)

v.)

KITTITAS COUNTY,)

Respondent,)

and)

HOMER L. (LOUIE) GIBSON,)

Respondent,)

JAMES and DEANNA HAMILTON, and)
LARRY and SHERRIE MILLER,)

Defendants.)

No. 30381-1-III

PUBLISHED OPINION

KULIK, J. —Homer L. “Louie” Gibson owns real property in Kittitas County that is designated “rural” under the Kittitas County Comprehensive Plan and zoned “agriculture-20” (A-20). Through a series of administrative proceedings, and an appeal to superior court, Mr. Gibson obtained a determination of nonsignificance (DNS) and a

conditional use permit (CUP) allowing him to crush rock on his property. On appeal here, Ellensburg Cement Products, Inc. (ECP) asserts the CUP must be reversed because rock crushing is not a permitted or a conditional use in the A-20 zone. ECP also contends the DNS must be reversed because (1) the County violated State Environmental Policy Act (SEPA), chapter 43.21C RCW, regulations regarding the use of existing environmental documents, and (2) the record shows no meaningful SEPA review.

We conclude that the unambiguous language of the Kittitas County Code (KCC)¹ does not permit rock crushing in A-20 zones, and that the County's failure to provide one open record hearing on the SEPA appeal was erroneous as a matter of law. Therefore, we reverse the issuance of the CUP and the SEPA determination of nonsignificance.

FACTS

Mr. Gibson owns 84 acres of real property situated on five contiguous parcels in rural Kittitas County. The property is designated "rural" under the Kittitas County Comprehensive Plan and zoned "agriculture-20" (A-20). Clerk's Papers (CP) at 102, 192.

Miller Conditional Use Permit. In December 1997, Mr. Gibson's predecessor, John Miller, obtained a CUP for gravel extraction on one of the five parcels now owned

¹ KCC 17.29.020(A)(13).

by Mr. Gibson. This parcel is 13.4 acres in size. At some point, Mr. Gibson began expanding the gravel extraction area into the other parcels. In August 2008, the Department of Natural Resources (DNR) issued a stop work order. In April 2009, the court issued a notice of violation for unauthorized excavation *and/or* rock crushing on the five Gibson parcels. The County apparently did not follow up on this violation.

Gibson DNR Permit. In October 2008, Mr. Gibson applied for a DNR surface mining permit. The SEPA checklist submitted by Mr. Gibson indicated that he sought to mine an area of approximately 60 acres. At that point, Mr. Gibson had a CUP for only 13.4 acres. DNR issued Mr. Gibson a surface mining permit for a 60 acre site.

The project entailed:

Mining, crushing and removal of approximately 3,000,000 cubic yards of basalt/basalt shale from an area of approximately 60 acres. At present rock crushing is not occurring on the site, but might possibly occur in the future. Upon completion of mining the site will be used as a shop and equipment storage area, and house sites, therefore replacement of topsoil on either the pit floor or slopes is not anticipated or desirable.

CP at 158.

DNR reviewed the application and issued a SEPA threshold determination on November 10, 2008, concluding:

The lead agency for this proposal has determined that it does not have a probable significant adverse impact on the environment. An environmental impact statement (EIS) is not required under RCW 43.21C.030(2)(c). This

decision was made after review of a completed environmental checklist and other information on file with the lead agency. This information is available to the public on request.

CP at 164.

No appeal was filed. DNR issued a surface mining reclamation permit (DNR permit) on December 3, 2008. The DNR permit stated that (1) the total disturbed area would be 60 acres, (2) the maximum depth below pre-mining topographical grade would be 130 feet, and (3) the maximum depth of excavated mine floor would be 1,890 feet relative to sea level.

CUP Application. In June 2010, Mr. Gibson submitted the CUP application at issue here. He requested a CUP for the placement of rock crushing, screening, washing operations, and temporary concrete and asphalt plants in the A-20 zone.

Mr. Gibson argues that the application for the CUP proposed to amend the existing Miller CUP. This amendment was to allow for the expansion of the existing CUP onto the adjoining parcels. In contrast, ECP argues that Mr. Gibson's CUP application did not seek to expand the existing CUP. According to ECP, the CUP application misleadingly implied that the existing CUP already applied to all five parcels. Moreover, in ECP's view, Mr. Gibson's CUP application sought to amend the existing CUP to allow new

uses, including rock crushing, screening and washing as well as temporary plants for asphalt and concrete recycling.

ECP points out what purports to be a copy of the 2008 SEPA checklist that Mr. Gibson submitted to DNR. According to ECP, pages 1, and 3 through 6 of the checklist were the same as the 2008 checklist. However, other pages had been altered in the following ways: (a) on page 2, paragraph 11 of the original 2008 checklist referred to mining on a 60 acre site but paragraph 11 of page 2 of the altered checklist referred to mining on an 84 acre site, and (b) the bottom of page 7 had been altered to remove the original 2008 date.

In June 2010, Kittitas County issued a determination that Mr. Gibson's application was complete. One month later, the County published a notice of application for the CUP. The notice indicated that the County expected to issue a DNS for the CUP application.

In August, ECP filed its objection to the CUP application. ECP pointed out that rock crushing and asphalt plants were not permitted or conditional uses in the A-20 zone. ECP also explained that: (a) Mr. Gibson's gravel extraction had been illegally expanded, (b) the application did not ask to expand the existing CUP to the other parcels, (c) the 2008 SEPA checklist did not address the impacts of the current application, and (d) no

studies of the impacts of the CUP on dust, water, noise, vibration, safety, storm water, and toxics prevention had been performed. ECP asserted that the County, as SEPA lead agency, could not simply reuse the 2008 checklist from DNR. In short, ECP took the position that no meaningful SEPA review had occurred and that the County had abdicated its responsibilities under SEPA.

In September, Mr. Gibson amended his application to delete washing operations, and the temporary concrete and asphalt plants. One month later, the County issued a DNS to expand the existing gravel pit and to allow rock crushing. There is no evidence that any additional studies were performed before the DNS was issued. Later, the ECP appealed the DNS to the Board of County Commissioners (Board) and the CUP to the Board of Adjustment (BOA).

Notice of SEPA Appeal. In March 2011, the County issued a notice that the BOA would hold a closed record hearing on the SEPA appeal and the CUP. The County filed its SEPA appeal brief that expressly recognized that rock crushing was *not* considered a conditional or permitted use in the A-20 zone. Specifically, the brief read:

Indeed, there appears a problem with this application comporting with the underlying zoning in that it is asking for permission to engage in rock crushing, which is not a listed conditional use in this zone. But only the BOA has jurisdiction to answer that question when it reviews the merits of the application.

CP at 206.

The County provided for a single integrated comment period under the optional DNS process established by WAC 197-11-355. The process required the lead agency to advise recipients of the likely determination of the proposal. The County's notice contained the following disclosure:

The County expects to issue a Determination of Non-Significance (DNS) for this proposal, and will use the optional DNS process, meaning this may be the only opportunity for the public to comment on the environmental impacts of the proposal. Mitigation measures may be required under applicable codes, such as Title 17 Zoning, Title 17A Critical Areas, and the Fire Code, and the project review process may incorporate or require mitigation measures regardless of whether an EIS is prepared. A copy of the threshold determination may be obtained from the County.

CP at 261 (emphasis added).

Notice was circulated to agencies and neighbors. Affected agencies, including the Kittitas County Department of Public Works, Kittitas County Fire Marshall, DNR, and Department of Ecology, submitted comments. No commenting agencies objected to the proposal or opposed issuance of a DNS. Neighbors initially asked questions but, ultimately, the neighbors expressed support for the project.

Closed Record SEPA Appeal Hearing. In April, ECP wrote the County's attorney to object to the BOA's stated intent to hold only a closed record hearing. ECP acknowledged that the County had recently amended its code to eliminate the established

procedures for an open record hearing. ECP argued that the closed record SEPA appeal was unlawful under RCW 36.70B.020 and the relevant County codes. ECP also asked the County to explain the discrepancies and apparent alterations in the 2008 SEPA checklist. The County's attorney responded by directing ECP to chapter 15A.07 of the KCC.

The County also issued a memorandum to the BOA regarding the County's new SEPA procedures. The County's attorney explained that KCC 15A.07.010 and .020 required a closed record process with only written briefs from the parties. Specifically, the County's attorney stated that:

The process was designed by the Board of County Commissioners to provide for no oral argument, no presentation of witnesses, testimony, or cross-examination, and no presentation of evidence additional to the existing record. The matter is to be dealt with completely in writing. The record is essentially closed, the argument has been made in the form of the briefs before you, and your task is to make your decision based upon that record and briefing. If you have procedural questions, you may ask staff, but may not ask staff substantive questions about the matter. Nor may the BOA address or be addressed by the applicant or appellant during this deliberation.

CP at 108.

At the closed record SEPA hearing, the County received no evidence to establish that noise was a significant environmental impact. And no evidence was provided showing that the proposal presented adverse impacts as to roads or transportation, air quality, or surface or groundwater. The critical area site analysis was completed by

County staff pursuant to Title 17A KCC. There were no critical areas on site. No adverse impacts on farmland or agricultural operations were identified or documented.

The County determined that the proposal would not have a probable significant adverse impact on the environment and issued a DNS on October 21, 2010. A notice of SEPA action and the public hearing on the CUP application was properly published.

Board of Adjustment SEPA Review. ECP appealed the threshold DNS that was entered in November 2008. Under KCC 15.04.210, appeals are limited to “review of the county’s procedural compliance with Chapter 197-11 WAC.” ECP set forth a list of objections to be reviewed.

Under the KCCs, an administrative appeal of a DNS is considered by BOA. KCC 15.04.210. This appellate review process is based on the record before the administrative department. KCC 15A.07.010(2) provides that the appeal “shall not contain or attempt to introduce new evidence, testimony, or declaration.” Each party is limited to a written argument and brief to BOA. KCC 15A.07.010(2), (3). The matter is to be resolved completely by writing. KCC 15A.07.010(2).

On May 11, BOA held a closed record hearing on the SEPA appeal. ECP’s counsel objected, arguing that an open hearing was required. ECP’s counsel attempted to submit a binder of exhibits as well as a supplemental memorandum relating to the SEPA

issues. BOA would not allow ECP's counsel to address BOA, and the BOA chair directed BOA members not to consider any new information.

BOA unanimously denied the appeal of the DNS designation.

Board of Adjustment CUP Review. Following the determination regarding the SEPA review, the BOA then proceeded with an open record hearing on the CUP.

Interested parties provided testimony, evidence, and argument at the hearing. ECP was the only objecting party. ECP took the position that rock crushing was not a permitted or conditional use in the A-20 zone.

Following the public testimony, BOA closed the public hearing and deliberated on the CUP application. BOA approved the CUP and adopted findings of fact and conclusions of law. By a vote of two in favor, one opposed and one abstention, the BOA concluded that rock crushing was permitted in the A-20 zone as "[p]rocessing of products produced on the premises" under KCC 17.29.020(A)(13).

Superior Court. ECP sought review in superior court under the Land Use Petition Act (LUPA), chapter 36.70C RCW. After briefing by the parties and a hearing on the merits, the superior court upheld BOA's decision. The court also granted Mr. Gibson's motion to strike two declarations filed by ECP. The first declaration authenticated two documents ECP submitted to BOA during the closed record hearing on the SEPA appeal.

The second declaration authenticated two documents rebutting assertions in Mr. Gibson's LUPA brief indicating that the property had a long history of rock crushing. ECP appeals.

ANALYSIS

LUPA provides the exclusive means for review of land use decisions in the state of Washington. RCW 36.70C.030(1). When reviewing a superior court's decision under LUPA, the court stands in the shoes of the superior court and reviews the ruling below on the administrative record. *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751; 49 P.3d 867 (2002).

ECP challenges (1) Kittitas County's interpretation of its local ordinance, (2) the adopted administrative appeal procedures, and (3) the SEPA environmental review and threshold determination. This appeal is governed by the following standards:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

.....
(d) The land use decision is a clearly erroneous application of the law to the facts.

RCW 36.70C.130(1).

The petitioner bears the burden to prove a violation of one of the applicable standards. *Pinecrest Homeowners Ass'n v. Cloninger & Assocs.*, 151 Wn.2d 279, 288, 87 P.3d 1176 (2004). Judicial review of a land use decision under LUPA is based on the administrative record before BOA. *See* RCW 36.70C.120(1).

Here, the record was certified and provided to the superior court. Supplementing the record is limited. RCW 36.70C.120(2) provides:

For decisions described in subsection (1) of this section, the record may be supplemented by additional evidence only if the additional evidence relates to:

- (a) Grounds for disqualification of a member of the body or of the officer that made the land use decision, when such grounds were unknown by the petitioner at the time the record was created;
- (b) Matters that were improperly excluded from the record after being offered by a party to the quasi-judicial proceeding, or
- (c) Matters that were outside the jurisdiction of the body or officer that made the land use decision.

ECP submitted declarations to the superior court. The trial court rejected these declarations relating to the history of rock crushing on the Gibson's property. We need not address this issue because of our decision here. We also ignore the unsupported historical assertions Mr. Gibson makes in his brief.

Mr. Gibson points out that ECP has failed to challenge any findings of fact. Unchallenged findings of fact are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). However, the issues here are

questions of law, which we review de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

A. Is rock crushing a permitted use in the A-20 zone?

The BOA issued Mr. Gibson a CUP to perform rock crushing in the A-20 zone. The A-20 zone is one of four agricultural land use classifications² in Kittitas County. The BOA concluded that rock crushing was permitted under KCC 17.29.020(A)(13) as a “[p]rocessing of products produced on the premises.” In contrast, gravel extraction, a conditional use, requires a CUP.

We interpret local ordinances in the same way we interpret statutes. *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005). Courts look for the meaning of a statute in its wording, the context in which the statute is found, and the entire statutory scheme. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). The plain meaning of an unambiguous ordinance controls. *State v. Villarreal*, 97 Wn. App. 636, 641-42, 984 P.2d 1064 (1999).

KCC 17.29.020(A)(13) permits “[p]rocessing of products produced on the premises” in agricultural zones. For all four agricultural zones, “gravel extraction” is

² KCC 17.28.020(14) (A-3); KCC 17.28A.020(15) (A-5); KCC 17.29.020(A)(13) (A-20); and KCC 17.31.020(9) (CA).

designated as a conditional use while “rock crushing” is not listed. Rock crushing and other activities associated with mining are permitted uses in rural mining districts and in the forest and range, liberty historic, and commercial forest zones. “Rock crushing” is expressly listed as either a permitted or a conditional use in zones other than agricultural zones.

ECP argues that in light of the *unambiguous* exclusion of “rock crushing” from the permitted and conditional uses in the agricultural zones, BOA’s interpretation is clearly erroneous. Mr. Gibson and the County argue that the BOA’s decision was correct given the wording “processing of products produced on the premises.” They also maintain that the wording is *unambiguous* and that the County’s interpretation of the language is entitled to deference under RCW 36.70C.130(1)(b).

The definitions of the words “process,” “produced,” and “product,” are helpful. To “process” an item is “to prepare for market, manufacture, or other commercial use by subjecting to some processing.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1808 (1993). An item is “produce[d]” when it is caused “to have existence or to happen: bring about: originate . . . to give being, form, or shape to: make often from raw materials.” WEBSTER’S 1810. Arguably, both of these definitions could be applied to include rock crushing. ~~But the definition of “product” is dispositive. “Product” has one~~

~~agricultural~~ definition. Specifically, a “product” is “something produced naturally or as the result of a natural process (as by generation or growth) <major ~s from forest lands . . . are mahogany or chicle—*American Annual*>.” ~~WEBSTER’S 1-810~~.

This definition of “product” encompasses agricultural items, but not rock crushing. When we examine a term in a statute, we look for its meaning in the wording of the statute, the context in which the statute is found, and the entire statutory scheme. The “processing of products produced on the premises” describes the activities permitted only in agricultural zones. Significantly, in *rural* zones outside of mining districts, rock crushing is listed only as a conditional use.

Other provisions also support the exclusion of rock crushing in agricultural zones. The purpose of agricultural zones is to allow agricultural activities to exist with low density development and “to preserve fertile farmland from encroachment by nonagricultural land uses.” KCC 17.29.010. The definition of “agricultural activity” includes “processing” as an activity:

“Agricultural activity” includes, but is not limited to, the growing or raising, harvesting, storage, disposal, transporting, conditioning, *processing*, sale, and research and development of, but not limited to, the following: horticultural crops, poultry, livestock, grain, mint, hay, forages and feed crops, apiaries, beekeeping, equine activities, leather, fur, wool, dairy products and seed crops.

KCC 17.74.020(3) (emphasis added).

“Under *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other.” *State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003) (quoting *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002)). Here, the agricultural use classification encompasses products produced by agricultural means. Because rock crushing is not an agricultural means, and only gravel excavation is listed as a conditional use, the logical conclusion is that rock crushing is not allowed in an A-20 zone because it is not listed as a permitted or conditional use.

As we noted above, courts look for the meaning of a statute in its wording, the context in which it is found, and the entire statutory scheme. *State v. Stratton*, 130 Wn. App. 760, 764, 124 P.3d 660 (2005). Here, the “processing of products produced on the premises” language is used to describe an agricultural zone that expressly states that gravel extraction is a conditional use and that does not refer to “rock crushing.” Indeed, the language regarding gravel extraction would not be necessary if “processing of products” was read to be all inclusive.

To accept the argument that “processing of products produced on the premises” is broad enough to encompass rock crushing requires this court to ignore the definition of

“product” applicable to agricultural zones, the context in which the word is used, and the entire statutory scheme.

Relying on *Valentine v. Board of Adjustment for Kittitas County*, 51 Wn. App. 366, 753 P.2d 988 (1988), the County asserts that crushing is a part of “processing” as a matter of law. *Valentine* indirectly confirms that “gravel extraction” and “rock crushing” are not the same. *Id.* at 373-74. Significantly, *Valentine* did not consider the phrase “processing of products produced on the premises” or the context of the word “produced,” or the fact that rock crushing was a conditional use in rural zones.

~~Because the phrase “processing of products produced on the premises” is not ambiguous, we need not consider the issue of deference to the County or the impact of construing the ordinance in the light most favorable to the property owner.~~

In summary, the phrase “processing of products produced on the premises” is unambiguous and should be applied by its plain meaning. Rock crushing is not a permitted or a conditional use in an A-20 zone.

B. Should the County’s issuance of the DNS be reversed?

ECP contends that the County’s issuance of a DNS was clearly erroneous for two reasons: (1) the County violated SEPA regulations regarding the use of existing

environmental documents, and (2) the record shows no meaningful SEPA review of the project.

A SEPA threshold determination is reviewed under the “clearly erroneous” standard. *Chuckanut Conservancy v. Dep’t of Natural Resources*, 156 Wn. App. 274, 286, 232 P.3d 1154 (2010). A court will overturn a DNS only when “the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Norway Hill Pres. & Prot. Ass’n v. King County*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976) (quoting *Ancheta v. Daly*, 77 Wn.2d 255, 259, 461 P.2d 531 (1969)). The agency’s threshold decision shall be given substantial weight. RCW 43.21C.090.

1. *Use of Existing Environmental Documents.* The SEPA checklist submitted by Mr. Gibson as part of the CUP application was merely a copy of the 2008 DNR environmental checklist that had been altered to revise the description of Mr. Gibson’s proposal. The altered checklist increased the size of the proposal to 84 acres and added rock crushing, screening, and washing, as well as temporary plants for concrete, asphalt, and concrete recycling.

ECP told the County that SEPA has specific rules governing the use of existing environmental documents and that the County could not simply reuse the 2008 checklist. In response, the County argued that the SEPA environmental checklist was optional and

that the County had properly reused the 2008 checklist. Ultimately, the BOA upheld the DNS.

ECP maintains that the County erroneously argued that a SEPA checklist is optional. But there was no failure to submit an environmental checklist. Mr. Gibson provided two checklists for the project, one for the surface mining before DNR and one for the CUP. The checklists were for the same projects. Both checklists are in the administrative record and, presumably, both were reviewed prior to the issuance of the threshold decision. Significantly, ECP pointed out the differences.

SEPA encourages the combining of environmental documents in order to reduce duplication and paperwork. WAC 197-11-640 provides:

The SEPA process shall be combined with the existing planning, review, and project approval processes being used by each agency with jurisdiction. When environmental documents are required, they shall accompany a proposal through the existing agency review processes. Any environmental document in compliance with SEPA may be combined with any other agency documents to reduce duplication and paperwork and improve decision making.

The regulations recognize that agencies “may use an environmental checklist whenever it would assist in their planning and decision making.” WAC 197-11-315(3).

The lead agency makes its threshold decision based upon information reasonably sufficient to evaluate the environmental impact of the proposal. WAC 197-11-355.

Here, both checklists were identical in the identification of 5 parcels of property totaling 84 acres, and the sequential mining plans. However, DNR focused on the excavation of 60 acres while the CUP covered the entire 84. Also, Mr. Gibson had removed washing operations and temporary concrete and asphalt plants from the DNR application. A reduction in scale of the application does not require reprocessing of the environmental review. *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609, 613, 744 P.2d 1101 (1987) (reduction in scope of subdivision did not require a new threshold determination).

ECP next argues that the County failed to comply with SEPA regulations regarding the use of existing environmental documents. Under those rules, an agency must use one, or more, of four methods: (1) adoption, (2) incorporation by reference, (3) preparation of an addendum, or (4) preparation of a supplemental environmental impact statement (SEIS). WAC 197-11-600(4). ECP argues that the County failed to comply with any of these methods:

WAC 197-11-600 provides:

(4) Existing documents may be used for a proposal by employing one or more of the following methods:

(a) "Adoption," where an agency may use all or part of an existing environmental document to meet its responsibilities under SEPA. *Agencies acting on the same proposal for which an environmental document was prepared are not required to adopt the document;* or

(b) "Incorporation by reference," where an agency preparing an environmental document includes all or part of an existing document by reference.

(c) An addendum, that adds analyses or information about a proposal but does not substantially change the analysis of significant impacts and alternatives in the existing environmental document.

(d) Preparation of a SEIS if there are: (i) Substantial changes so that the proposal is likely to have significant adverse environmental impacts; or (ii) New information indicating a proposal's probable significant adverse environmental impacts.

(Emphasis added.)

An agency is not required to adopt existing environmental documents and may, instead, choose to simply incorporate the document by reference. *Moss v. City of Bellingham*, 109 Wn. App. 6, 28, 31 P.3d 703 (2001). Moreover, a harmless procedural error may not serve as a basis for the reversal of a land use decision.

RCW 36.70C.130(1)(a). Further, the failure to formally incorporate a prior environmental document is harmless error. *Concerned Taxpayers Opposed to Modified Mid-South Sequim Bypass v. Dep't of Transp.*, 90 Wn. App. 225, 233, 951 P.2d 812 (1998).

2. Meaningful SEPA Review. The administrative review of a DNS is considered by the BOA. See KCC 15.04.210. When ECP appealed the DNS, the County notified the parties that the BOA would hold a closed record hearing on the DNS. ECP objected then,

as now, arguing that a local agency cannot hold a closed record hearing without first providing an open record hearing.

Mr. Gibson and the County maintain that a open record hearing was not required because the proceeding complied with the County's procedures for administrative review of environmental threshold determinations. *See* KCC 15.04.210. Under the KCCs, the appeal is based on the administrative record with all parties afforded an opportunity to present a written appellate argument. KCC 15A.07.010. BOA considers the appeal under KCC 15A.07.020(1), which provides:

Administrative appeals shall serve to provide argument and guidance for the body's decision. *No new evidence or testimony shall be given or received.* The briefing shall not contain new evidence, testimony, or declarations, but shall consist only of legal arguments based upon the documents comprising the record as transmitted to the parties by the relevant officer. The parties shall submit timely written statements or arguments to the decision-making body.

(Emphasis added.)

ECP acknowledges that the County and BOA complied with chapter 15A KCC. However, ECP contends that, under state law, the County and BOA could not hold a closed record hearing until an open record hearing had taken place. ECP relies on RCW 36.70B.060(6) that reads, in part:

Except for the appeal of a determination of significance as provided in RCW 43.21C.075, *if a local government elects to provide an appeal of its*

threshold determinations or project permit decisions, the local government shall provide for no more than one consolidated open record hearing on such appeal. The local government need not provide for any further appeal and may provide an appeal for some but not all project permit decisions.

(Emphasis added.)

ECP reads this provision as follow: (1) the first sentence of this provision provides that the first SEPA appeal must be an open hearing, (2) the second sentence states that no further appeal is required, and (3) the third sentence states that if a subsequent appeal is required, that appeal must be a closed record appeal.

ECP also points to the definition of "closed record appeal," which states:

"Closed record appeal" means an administrative appeal on the record to a local government body or officer, including the legislative body, *following an open record hearing on a project permit application* when the appeal is on the record with no or limited new evidence or information allowed to be submitted and only appeal argument allowed.

RCW 36.70B.020(1) (emphasis added); *see also* WAC 197-11-721.

Mr. Gibson and the County read these provisions differently. The County contends that RCW 36.70B.060(6) merely limits the number of open record hearings that can take place. In the County's view, RCW 36.70B.060(6) does not place a prohibition on other processes that do not incorporate open record hearings.

This interpretation ignores the fact that the first sentence of RCW 36.70B.060(6) states that if a local government elects to provide an appeal, "the local government shall

provide for no more than one consolidated open record hearing on such appeal.” While perhaps cryptic, this sentence is based on the assumption that there will be at least one open hearing. The phrase “the local government *shall provide for no more than one* consolidated open record hearing” indicates that the local government shall provide one open hearing. This language does not provide that the local government can elect to have only a closed hearing.

The County also argues that its process was sufficient because the County did not have to permit a SEPA appeal in the first place. The County relies on WAC 197-11-680(2) that provides, in part:

Agencies may establish procedures for such an appeal, or may eliminate such appeals altogether, by rule, ordinance or resolution. Such appeals are subject to the restrictions in RCW 36.70B.050 and 30.76B.060 that local governments provide no more than one open record hearing and one closed record appeal for permit decisions.

Because the County established procedures for an appeal, RCW 36.70B.060 and WAC 197-11-680(2) apply to these procedures. The fact that the County could have elected not to establish appeal procedures does not mean that the County can elect whether or not to comply with the statutory requirements. Moreover, RCW 36.70B.060 states that local agencies planning under the Growth Management Act, chapter 36.70A RCW, had to establish compliant permit processes by March 31, 1996.

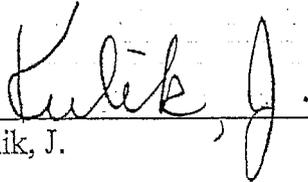
“[T]he record of a negative threshold determination by a governmental agency must “demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA.”” *Pease Hill Cmty. Group v. Spokane County*, 62 Wn. App. 800, 810, 816 P.2d 37 (1991) (quoting *Sisley v. San Juan County*, 89 Wn.2d 78, 85, 569 P.2d 712 (1977)). “The determination must be based upon information reasonably sufficient to determine the environmental impact of a proposal. *Id.*”

ECP describes the practical side to this controversy. ECP asserts that a meaningful closed record appeal cannot take place unless an open record hearing has been held. Because ECP was not allowed to submit any evidence or argument after the SEPA threshold decision was made, there was nothing for BOA to review in deciding the appeal. The hearing record shows that BOA members were not happy with the constraints placed on their decision making and that BOA did not ask any substantive questions before voting to deny the SEPA appeal.

The County’s failure to provide an open record hearing on ECP’s SEPA appeal was erroneous as a matter of law. Because of the court’s resolution of this matter, the court need not address the issue as to the admissibility of the two declarations.

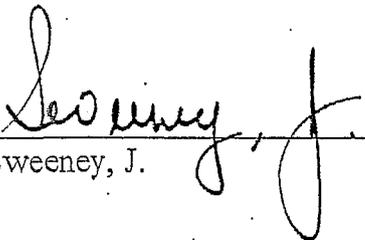
Attorney Fees. Mr. Gibson and the County seek attorney fees pursuant to RCW 4.84.370. This provision provides that “reasonable attorneys’ fees and costs shall be awarded to the prevailing party or substantially prevailing party” for the appeal of certain decisions made by the county. RCW 4.84.370(1). Because they are not the prevailing parties, they are not entitled to an award of fees.

Conclusion. We reverse the issuance of the DNS and CUP, and we deny attorney fees to the County and Mr. Gibson.

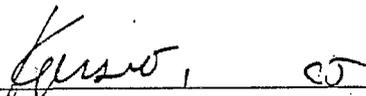


Kulik, J.

WE CONCUR:



Sweeney, J.



Korsmo, C.J.