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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Ellensburg Cement Products, Inc., (ECP) submits the following reply to the briefs filed by the County and respondent Gibson. Gibson makes the self-serving assertion that ECP's appeal seeks to "prevent competition." *Gibson Br.* at 2. Unlike Gibson, ECP has a long history of working with the County to conduct its business in compliance with environmental laws and County zoning regulations. ECP obtains proper permits, requests rezones when necessary, and does not attempt to circumvent the law by crushing rock without permits or in zones where that use is prohibited. Consistent with the County's historic practice, ECP has not sought to engage in land uses that are not appropriate in agricultural zones. ECP has every right to expect similar compliance from its competitors so that competition occurs on a level playing field.

II. ASSIGNMENTS OF ERROR

Both the County and Gibson assert that ECP has waived its assignments of error with respect to the two declarations that were stricken by the trial court. *County Br.* at 1-2, 34-35; *Gibson Br.* at 47-49. The first declaration ("Murphy declaration") merely authenticated two documents that were improperly rejected by the Board during the closed record hearing. CP 367-408. The second declaration ("Hutchinson declaration") rebutted Gibson's unsubstantiated and false assertions, made for the first

time in Gibson's LUPA brief (CP 428-29), that the Property has a "long history" of rock crushing, and that rock crushing has been conducted on the Property since 1982. CP 502-516. With respect to the Murphy declaration, the respondents' assertions are false. With respect to the Hutchinson declaration, the respondents' objections are moot.

A. ECP's opening brief explicitly argued, at pages 12-13, that the trial court erroneously struck the Murphy declaration. ECP has *not* waived this assignment of error.

The suggestion that ECP failed to address the trial court's decision to strike the Murphy declaration is simply false. ECP clearly explained, with supporting legal authority, that the trial court's decision was erroneous because (i) the Board did not provide an open-record hearing at which ECP was permitted to create a factual record, and (ii) the Board's exclusion of the underlying documents was based on the County's unlawful decision to provide only a closed record appeal on ECP's appeal of the determination of nonsignificance (DNS). *App. Br.* at 12-13. It is unclear why both the County and Gibson failed to read ECP's brief before making the false assertion that ECP had waived its assignment of error with respect to the Murphy declaration.

As explained in Section IV, the trial court's decision to strike the Murphy declaration is *not* reviewed under the "abuse of discretion" standard, as the County erroneously argues. The issue of whether the

documents attached to the Murphy declaration were erroneously excluded by the Board presents a question of law. *See* section V(C).

ECP was *not* required to seek leave of court before submitting the Murphy declaration to the trial court, as Gibson erroneously argues. *Gibson Br.* at 22. LUPA requires permission to conduct discovery, not to supplement the record with documents that were erroneously excluded from the record. RCW 36.70C.120(5). *See* section IV

B. The trial court's decision to strike the Hutchinson declaration is moot because Gibson concedes, *sub silentio*, that he has never legally engaged in rock crushing on the agriculturally-zoned Property.

In the trial court, Gibson made unsubstantiated and false assertions that the Property has a “long history” of rock crushing, and that rock crushing has been conducted on the Property since 1982. CP 428-29. ECP responded to these statements with a motion to strike and alternative motion to supplement the record with the Hutchinson declaration. CP 483-84. The trial court struck the Hutchinson declaration and ignored ECP's motion. CP 534. On appeal to this Court, ECP assigned error to the trial court's decision to strike the Hutchinson declaration out of an abundance of caution. Nonetheless, because it was unclear whether the trial court considered Gibson's unsubstantiated and false assertions, ECP addressed the issue in a footnote. *App. Br.* at 13 n.1. Both Gibson and the

County object to the lack of argument on this assignment of error, despite the fact that it was expressly addressed.

But the whole issue is moot because Gibson concedes, *sub silentio*, that he has never legally engaged in rock crushing in agricultural zones. If there were any evidence to suggest that Gibson had *legally* conducted rock crushing since 1982, Gibson would have cited it. Instead, Gibson makes only vague, unsupported assertions that the “property and immediate geographic area” have a long history of mining and rock crushing. *Gibson Br.* at 4. The record shows that Gibson illegally expanded his gravel extraction and was ordered to stop in 2008. CP 151-55. Gibson’s own 2010 SEPA checklist plainly states that “at present rock crushing is *not* occurring on the site, but might possibly occur in the future.” (Emphasis added). CP 269. There is no evidence to suggest that Gibson has *legally* engaged in rock crushing on the Property. Therefore it is not necessary to address the trial court’s decision to strike the Hutchinson declaration.

C. The Board’s “findings” are actually conclusions of law.

Gibson erroneously asserts that that ECP has not challenged the Board’s findings numbered 8, 9, 11, 13, 14, and 15. *Gibson Br.* at 19. In fact, ECP has clearly stated that findings 7 and 11 are erroneous conclusions of law, and that to the extent findings 13-15 suggest that rock crushing is appropriate in the A-20 zone those findings are based on the

Board's erroneous determination that rock crushing is a permitted use. *App. Br.* at 13 n.2, 26, n.1, 27 n.1. *See State v. Weber*, 159 Wn. App. 779, 786, 247 P.3d 782 (2011) (appellate courts treat mislabeled findings or conclusions in accord with what they actually are). ECP has not challenged any of the Boards' genuine findings of fact.

III. RESPONSE TO STATEMENT OF THE CASE

Gibson's application and arguments have been a moving target. What began as an application for additional uses pursuant to an amended CUP—uses that were clearly **prohibited**, such as temporary concrete and asphalt plants—eventually morphed into (i) a CUP to expand an existing gravel pit and (ii) an erroneous determination that rock crushing is permitted in agricultural zones as “processing of products produced on the premises.” CP 102-104, 265-274. Along the way, Gibson altered and recycled an old DNR environmental checklist, and the County completely failed to conduct the environmental review required by SEPA.

A. History of Gibson Quarry and Existing CUP

As set forth in Section II(B) (above), the record does not support Gibson's assertion that rock crushing has been conducted on the Property since 1982, or that such activities were lawful.¹

¹ In a footnote, Gibson asserts that “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.” The record does not support this assertion.

B. Gibson CUP Application and SEPA Process

The record clearly shows that both the County and Gibson originally assumed that rock crushing was a **conditional** use, not a permitted use. Although Gibson attempts to disguise this fact by now focusing on the expansion of the quarry, *Gibson Br.* at 5, 7-8, it is undisputed that Gibson originally applied for a CUP to allow rock crushing and other uses, *not* to expand the quarry. Both Gibson's CUP application and the County's notice of application stated that the CUP application was for rock crushing, screening, washing, and temporary concrete and asphalt plants. CP 261, 266. Neither document indicated that Gibson sought to expand the existing quarry. *Id.*

In August 2010, ECP objected to the application, noting that rock crushing was neither a conditional nor permitted use in the A-20 zone, and that the CUP application did not seek to expand the existing CUP for a 13.4 acre quarry. CP 212. The County's own SEPA brief acknowledged that the CUP application was defective because rock crushing was not listed as a conditional use in the agricultural zone. CP 206. After the County and Gibson realized that rock crushing was not a conditional use,

CP 156, cited by Gibson, is merely a DNR form on which the County erroneously indicated that Gibson already had a CUP for a 60 acre site. In fact, Gibson only had a CUP for one 13.4 acre parcel. CP 138, 149. Gibson's statement regarding "post-reclamation uses" misleadingly suggests that the County had approved rock crushing. In

County staff appears to have concocted the theory that rock crushing was a permitted use in the A-20 zone under “[p]rocessing of products produced on the premises.” CP 192-193. Gibson agreed. CP 191.

C. SEPA Appeal Process

It is undisputed that ECP appealed the DNS to the Board. *County Br.* at 4; *Gibson Br.* at 12.² The County asserts that ECP violated “explicit instructions” for briefing the SEPA appeal by merely recycling ECP’s earlier letters. *County Br.* at 4. First, the County’s “explicit instructions” for the SEPA appeal—which were drafted by the County’s attorney and which ECP maintains are unlawful—did not address the format or content of the briefs to be filed. CP 108, 148. Gibson’s “brief” consisted of a one-page letter. Second, there was no reason for ECP to re-write its SEPA appeal letters to which neither the County nor Gibson ever responded. Third, the County does not allege any prejudice.

D. Board of Adjustment SEPA Hearing and Decision

It is undisputed that ECP attempted to submit a binder of exhibits as well as a supplemental memorandum on the SEPA issues, and that

fact, the County only indicated that a maintenance shop, equipment and housing were permitted under the applicable zoning. CP 156.

² It undisputed that Hamilton and Miller subsequently withdrew their SEPA appeal, and that those parties were dismissed from the LUPA action by stipulation. CP 190, 226, 428; CP 15. In a footnote, Gibson erroneously asserts that Hamilton and Miller never opposed the Gibson project. *Gibson Br.* 13 n.12.

these submissions were rejected by the Board. CP 367-408; *App. Br.* at 9; *County Br.* at 4-5; *Gibson Br.* at 14-16. Gibson’s extensive commentary on the County’s SEPA appeal procedures is irrelevant because, as explained in section V(C), those procedures violated state law.

E. Board of Adjustment CUP Hearing and Decision.

It is undisputed that the Board concluded that rock crushing was a permitted use—not a conditional use—in the A-20 zone. CP 103; *County Br.* at 6; *Gibson Br.* at 10.³ It is also undisputed that the Board granted the CUP for expanded gravel extraction. *County Br.* at 6; *Gibson Br.* at 9-10.⁴

IV. STANDARD OF REVIEW

The County erroneously argues that the trial court’s decision to strike the Murphy declaration (CP 367-408), which authenticated documents that were improperly rejected by the Board during the closed record hearing, is reviewed under the “abuse of discretion” standard.

³ Gibson asserts, for the first time on appeal, that “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).” This is a misleading characterization of an exchange between ECP’s representative and one Board member during the hearing. CP 46. ECP never asked for or received any official permission to conduct rock crushing in agricultural zones. Gibson would only engage in such activities if, after this appeal has concluded, the County’s position is upheld.

⁴ It is also undisputed that the Board found that the expanded gravel extraction met the CUP requirements in KCC 17.60A.010. CP 102-104; *County Br.* at 6, 23; *Gibson Br.* at 18-19. ECP has not challenged the Board’s findings on that issue except to the extent that the Board’s CUP findings erroneously suggest that rock crushing is a permitted use in the A-20 zone. *App. Br.* at 26 n.1; see section II(C) (above). Consequently, the County’s assertion that these findings are supported by substantial evidence is irrelevant. See *County Br.* at 23.

County Br. at 9, 16, 34-35, 37. Under RCW 36.70C.120(2)(b), the record may be supplemented with materials that were improperly excluded from the record after being offered by a party to the quasi-judicial proceeding.” The dispositive *legal* question is whether the Board was required to hold an open record hearing. *County Br.* at 16.

If an open record hearing was required, as ECP argues, then the exhibits to the Murphy declaration were properly included in the record, and the trial court’s decision to strike those exhibits was erroneous as a matter of law. *See In re Rhome*, 172 Wn.2d 654, 668, 260 P.3d 874 (2011) (a trial court necessarily abuses its discretion where its ruling is based on an erroneous view of the law).⁵ Contrary to the County’s argument, the trial court’s decision to exclude the Murphy declaration was erroneous as a matter of law. *See* section V(C).

Gibson erroneously argues that ECP was required to seek “leave of court” before submitting materials under RCW 36.70C.120(2)(b). *Gibson Br.* at 22. Gibson ignored the plain language of RCW 36.70C.120(5), which requires a party to obtain permission to conduct **discovery**. That

⁵ The cases cited by the County are not LUPA cases, and those cases do not support the County’s erroneous argument regarding the standard of review. *See Southwick v. Seattle Police Officer*, 145 Wn. App. 292, 297, 186 P.3d 1089 (2008) (trial court’s decision to exclude undisclosed expert witness in tort case is reviewed for abuse of discretion); *Tortes v. King County*, 119 Wn. App. 1, 12, 84 P.3d 252 (2003) (trial court’s decision to strike opinions of expert witness is reviewed for abuse of discretion).

statute does *not* require leave of court to supplement the record under RCW 36.70C.120(2). The statute merely requires a party to disclose supplemental materials. ECP complied with this requirement by filing the Murphy declaration well before the hearing.

The County's discussion of the "substantial evidence" test is irrelevant. *See County Br.* at 8; 22. ECP has not challenged any of the Board's findings of fact. ECP has explained that the Board's "findings" number 7 (proper SEPA procedures followed) and number 11 (rock crushing permitted), CP 103, are actually conclusions of law. *App. Br.* at 13 n.2, 27 n.1. *See Weber*, 159 Wn. App. at 768. Gibson and the County have not argued otherwise.⁶

V. ARGUMENT

A. Rock crushing is *not* a permitted use in the A-20 zone.

The issue before this Court is whether rock crushing is a **permitted** use in the A-20 zone.⁷ ECP's opening brief explained how the language and structure of the zoning code shows that "processing of products produced

⁶ Gibson's facts section erroneously asserts that various "findings" are unchallenged by ECP. *See* section III.

⁷ Repeating an irrelevant section of its trial court brief, the County conflates the issue of rock crushing with the Board's issuance of the CUP for expanded gravel extraction, mischaracterizing ECP's argument on rock crushing as a challenge to the issuance of the CUP. *App. Br.* at 22-24; CP 423-24. Contrary to the County's unilateral failure to understand the issue, ECP has never argued that rock crushing was a **conditional** use in the A-20 zone. Nor did the Board conclude that rock crushing was a **conditional** use. CP 103.

on the premises” (KCC 17.29.020(13)) does *not* include rock crushing. *App. Br.* at 13-20. The zoning code clearly indicates that “gravel extraction” and “rock crushing” are not the same use. In all four of the agricultural zones “gravel extraction” is expressly designated as a conditional use while “rock crushing” is not listed. Therefore, omission of “rock crushing” from the agricultural zones clearly shows that “rock crushing” is not a permitted use in those zones. “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).

Both the County and Gibson largely ignore ECP’s arguments and the relevant language and structure of the zoning code. The County asserts that ECP’s argument “misses the point.” *County Br.* at 25. But the County employs the exact same canon of statutory construction to rebut ECP’s observation that “processing of products” could be interpreted to include petroleum refining. The County notes that oil and gas “exploration” is a permitted use in agricultural zones, *see* KCC 17.29.020(A)(16), while “extract[ion]” and “refin[ing]” are permitted or conditional uses in the Commercial Forest and General Industrial zones

respectively. KCC 17.57.020(6); KCC 17.52.030(1)(i).⁸ *County Br.* at 34. Because exploration, extraction, and refining are not the same use classification, the County argues that extraction and/or processing of oil located on agricultural land would require a rezone. *Id.* By the same logic, “gravel extraction” and “rock crushing” are *not* the same use. In order to lawfully engage in “rock crushing,” Gibson must have the Property rezoned to one of the rural zones in which “rock crushing” is either permitted or conditional use.

1. The agricultural use “processing of products” does *not* unambiguously include “rock crushing.”

The County and Gibson confidently assert that KCC 17.29.020(13) is “unambiguous,” and that this provision clearly permits rock crushing as “[p]rocessing of products produced on the premises.” *County Br.* at 27-28; *Gibson Br.* at 25-27. This argument is not consistent with the respondents’ own prior positions. Gibson first argued that the code was “unambiguous” in his LUPA brief. CP 443-44. The County makes this argument for the first time on appeal to this Court.

Both the County and Gibson originally assumed that rock crushing was a **conditional** use. CP 261, 264, 266. Only after ECP pointed out that rock crushing was neither a conditional nor permitted use, CP 212, did

⁸ The County erroneously asserts that “extract[ion]” of oil and gas is permitted in the Forest & Range zone. *County Br.* at 34 (citing KCC 17.56.020(7) (mining)).

the County and Gibson take the position that rock crushing was a **permitted** use. CP 191, 192. At the Board hearing, Gibson never argued that the zoning code was “unambiguous.” On the contrary, Gibson’s attorney asserted that the ordinance required “interpretation” by the Board, and he offered several arguments in favor of Gibson’s interpretation. CP 41-42. The Board never suggested that the code was “unambiguous.” The Board members struggled with the County’s interpretation, and noted that the code was not sufficiently clear. CP 69-77.

The respondents’ new “unambiguous” theory is meritless, and the cases cited by the respondents are inapplicable.⁹ “Processing of products” does *not* unambiguously mean “rock crushing.”

2. Neither the Board nor County staff are entitled to any deference in interpreting the zoning code.

Both the County and Gibson argue that the Board’s interpretation of KCC 17.29.020(A)(13) is entitled to deference under RCW 36.70C.130(1)(b). *County Br.* at 22, 24-30; *Gibson Br.* at 22-25, 29-32. But such deference is *not* automatic. The County and Gibson ignore the plain language of the statute, which provides that a reviewing court will

⁹ See *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 61 P.3d 1141 (2003); *McTavish v. Bellevue*, 89 Wn. App. 561, 949 P.2d 837 (1998); *Nisqually Delta Ass’n v. City of DuPont*, 103 Wn.2d 720, 696 P.2d 1222 (1985); *Pope & Talbot, Inc. v. State Dept. of Revenue*, 90 Wn.2d 191, 580 P.2d 262 (1978); *City of Spokane v. Carlson*, 96 Wn. App. 279, 979 P.2d 880 (1990).

afford only “*such deference as is due* the construction of a law by a local jurisdiction with expertise.” RCW 36.70C.130(1)(b). An agency must establish some basis for granting deference to its interpretation of a local ordinance. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646-47, 151 P.3d 990 (2007). Where, as here, an agency’s interpretation is not a consistent agency policy but merely the by-product of the current litigation, the agency is *not* entitled to deference. *Id.*

Both respondents completely ignore the record, which shows that there is no basis for deference to the Board’s decision. As ECP’s opening brief explained, (i) there is no showing that County staff or the Board has any expertise in determining the meaning of “products” in the zoning code, (ii) staff mistakenly assumed that rock crushing was a conditional use in the A-20 zone, (iii) the Board had no expertise in interpreting the relevant section of the zoning code, and (iv) the County’s interpretation of “processing of products” was developed for the first time in this case, after ECP pointed out that rock crushing was not a conditional use. *App Br.* at 21, 23. In fact, the County previously issued a notice of violation to Gibson for rock crushing without a CUP. CP 121. Apart from Gibson’s bland assertion that the County’s planner is “experienced and capable,” *Gibson Br.* at 31, neither the County nor Gibson has even attempted to explain why the Board’s decision is entitled to deference.

The record clearly shows that the Board's decision is not entitled to any deference under *Sleasman, supra*. Nonetheless, Gibson erroneously asserts that the discussion of deference in *Sleasman* is dicta, and that the Court of Appeals (Division II) found the analysis in *Sleasman* to be "questionable" in *Milestone Homes, Inc. v. Bonney Lake*, 145 Wn. App. 118, 127, 186 P.3d 357 (2008). *Gibson Br.* at 31-32.¹⁰

First, the analysis of deference in *Sleasman* is *not* dicta. Dicta is language that has no bearing on the court's decision. *Marriage of Rideout*, 150 Wn.2d 337, 354, 77 P.3d 1174 (2003). "It does not make a reason given for a conclusion in a case obiter dictum, because it is only one of two reasons for the same conclusion." *Richmond Screw Anchor Co. v. U.S.*, 275 U.S. 331, 340, 48 S. Ct. 194, 71 L. Ed. 836 (1928). *Sleasman* expressly states that the Supreme Court granted review to address, *inter alia*, the issue of deference to a local agency. 159 Wn.2d at 642. Although *Sleasman* first held that the ordinance at issue was unambiguous, the Supreme Court devoted an entire separate section of the *Sleasman* opinion to the court's alternative holding that "[T]he city's interpretation is not entitled to deference." 159 Wn.2d at 646-47. Following its decision in *Cowiche Canyon Conservancy v. Bosley*, 118

¹⁰ The County ignores the discussion of deference in *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646-47, 151 P.3d 990 (2007), erroneously asserting that *Sleasman* only addresses the interpretation of unambiguous ordinances. *County Br.* at 26.

Wn.2d 801, 815, 828 P.2d 549 (1992), the *Sleasman* court clearly held that the city's interpretation of its zoning code was not entitled to deference because it was not a matter of agency policy, but a "by-product of the current litigation." 159 Wn.2d at 646. The respondents might wish that the unanimous Supreme Court had not reached the issue of deference to local agencies in *Sleasman*. But it did, and *Sleasman* is binding precedent.

Second, the Court of Appeals in *Milestone Homes* questioned the discussion of strict construction in *Sleasman*, *not* the discussion of deference. *Milestone Homes*, 145 Wn. App. at 127 (citing *Sleasman*, 159 Wn.2d at 643 n.4). *Milestone Homes* did not follow *Sleasman* in rejecting deference because the court found the Bonney Lake ordinance to be unambiguous. 145 Wn. App. at 130. Unfortunately for Gibson, *Sleasman* precludes granting any deference to the Board's erroneous, ad hoc determination that rock crushing constitutes "processing of products."

In a footnote, Gibson asserts that *Sleasman* improperly applied the analysis in *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992). *Gibson Br.* at 32. Even if Gibson's criticism of *Sleasman* carried any weight, Gibson's observation that *Cowiche Canyon* involved a state statute is irrelevant. *Sleasman* notes that local ordinances are interpreted the same as state statutes. 159 Wn.2d at 643. *Cowiche Canyon* rejected an argument by the Department of Ecology that removal

of railroad trestles constituted a “substantial development” for purposes of the Shoreline Management Act. The Court noted that the agency’s interpretation of the SMA was not a policy or uniform interpretation, but an “isolated action” by the agency. 118 Wn.2d at 815. *Sleasman* applied the rationale of *Cowiche Canyon* to the analogous context of a local agency’s interpretation of a zoning regulation.

Morin v. Johnson, 49 Wn.2d 275, 300 P.2d 569 (1956), cited by both the County and Gibson, is both easily distinguishable and consistent with *Sleasman*. *Morin* rejected the argument, in a private nuisance action, that the defendant’s tire recapping plant was prohibited by the local zoning code. The court noted that the officials charged with enforcement of the zoning code had “uniformly construed” the code to allow such plants for many years, and that numerous building permits for such plants had been issued. 49 Wn.2d at 279. In contrast, there is no evidence that Kittitas County has ever allowed rock crushing in agricultural zones.

As Gibson’s brief demonstrates, numerous cases may be cited for the generic proposition that an agency’s interpretation of local ordinances is entitled to deference. The County and Gibson erroneously assume that such deference is automatically granted. But the Supreme Court’s unanimous opinion in *Sleasman* establishes that there must be some cognizable basis for deference to a local agency, such as an adopted

agency policy or past uniform enforcement. 159 Wn.2d at 646.¹¹ There is no such basis for deference to the County or the Board in this case.

3. The Board's interpretation of KCC 17.29.020(13) is erroneous as a matter of law.

Gibson also asserts that the Board's interpretation of the zoning code was "consistent with the established activities on this property." *Gibson Br.* at 34. Nothing in the record supports Gibson's assertion that rock crushing has historically occurred or been allowed by the County. Nor did the Board make any finding that such rock crushing had occurred or that such activities were legal. Gibson cites two letters from 2011

¹¹ The other cases cited by Gibson do not hold otherwise. In *Phoenix Development, Inc. v. City of Woodinville*, 171 Wn.2d 820, 256 P.3d 1150 (2011), the court deferred to the City Council's interpretation of whether a project was consistent with the City's comprehensive plan. In *Silverstreak v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 884, 154 P.3d 891 (2007), the majority faulted the Court of Appeals for failing to give proper weight to the Department's interpretation of a regulation that determined whether truck drivers were entitled to be paid prevailing wages. But the *Silverstreak* majority did not address the basis for such deference (or lack thereof), and did not cite, much less overrule, its earlier unanimous decision in *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646-47, 151 P.3d 990 (2007). The cited portions in *Pinecrest Homeowners Ass'n. v. Glen A. Cloninger & Assoc.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004), *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App. 461, 475, 24 P.3d 1079 (2000), and *Lanzce G. Douglass, Inc. v. City of Spokane*, 154 Wn. App. 408, 415, 225 P.3d 448 (2010), are all boilerplate. *City of Medina v. T-Mobile USA, Inc.*, 123 Wn. App. 19, 24, 95 P.3d 377 (2004), includes a boilerplate discussion of deference to the City's hearing examiner. *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 130, 186 P.3d 357 (2008), suggests that the court would defer to the City Council over the contrary opinions of staff and the hearing examiner. *Keller v. City of Bellingham*, 92 Wn.2d 726, 732, 600 P.2d 1276 (1979), did not involve an administrative process at all, but the court commented that the legislative body of the City had tacitly approved of the project. *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 38, 252 P.3d 382 (2011), merely clarifies that local agencies are not entitled to deference in the interpretation of state statutes. *Seatoma Convalescent Center v. Dep't of Social & Health Svcs.*, 82 Wn. App. 495, 518, 919 P.2d 602 (2007), involved a challenge to Medicaid rules adopted by DSHS, not a challenge to the department's interpretation of those rules.

which suggest that Gibson's crushing machines be moved to the back of his property, but those letters do not support Gibson's assertion that crushing has occurred in the past or that such crushing was lawful. *See* CP 189-190. Gibson's assertion that the Board considered or relied on the alleged "established activities" is meritless.

The County resorts to mischaracterizing ECP's argument. The County argues that the word "processing" is not limited to agricultural products, that other things "can legally be processed" in the County, and that ECP's argument relies on a "limited definition of 'processing.'" *County Br.* at 24-25. ECP is *not* proposing or relying upon a definition of the generic term "processing." Nor has ECP argued that other types of "processing" are illegal in the County. The issue is whether the specific use "processing of products produced on the premises" in KCC 17.29.020(13) refers to (i) agricultural products or (ii) any type of product, including industrial products. The County notes that the term "processing" appears in other parts of the zoning code. *County Br.* at 24 n. 4. But the fact that the generic term "processing" appears in other parts of the zoning code in reference to other uses confirms that the use "processing of products produced on the premises," which only appears in the agricultural zones, is not as broad as the respondents suggest.

Ignoring the fact that "processing of products produced on the

premises” is only permitted in agricultural zones, Gibson suggests that ECP is asking the Court to rewrite the zoning code by adding the word “agricultural” to KCC 17.29.020(13). *Gibson Br.* at 28. ECP is only asking the Court to interpret the term “products produced on the premise” to be consistent with the language and structure of the zoning code, which shows that KCC 17.29.020(13) only refers to agricultural products.¹²

Gibson argues that “ECP fails to acknowledge that processing operations are limited to ‘processing of products produced on the premises,’” that the intent of KCC 17.29.020(13) is to “consolidate extraction and processing of products at a single location,” and that it is more “efficient, economic and practical to consolidate operations.” *Gibson Br.* at 26 n. 18, 27-29. As ECP as already explained, Gibson’s argument regarding the source of the rock to be crushed is not consistent with the zoning code. If Gibson were correct, then “processing of products produced on the premises” would be a permitted use in all zones. But that use is only permitted in the four agricultural zones. In rural zones outside established mining districts, “rock crushing” is only a conditional use regardless of the source of the rock. *See App. Br.* at 14 (Table).

¹² The use classification “[p]rocessing of products produced on the premises” is allowed in the A-20 zone and the County’s three other agricultural zones. KCC 17.28.020(14) (A-3 zone); KCC 17.28A.020(15) (A-5 zone); KCC 17.31.020(9) (Commercial Agriculture zone).

Gibson completely fails to explain why “processing of products produced on the premises” is only permitted in the County’s agricultural zones. This is a fundamental flaw in the respondents’ analysis of the zoning code.

Gibson argues that the County’s administrative official has “considerable latitude” in permitting unlisted uses under KCC 17.29.020(18) where a use is “nearly identical to a listed use.” *Gibson Br.* at 16 n. 11. Gibson made this argument for the first time in his LUPA brief. CP 443, 490. Neither County staff nor the Board relied on this provision. Neither made a determination that rock crushing was “nearly identical” to “processing of products.” Furthermore, Gibson’s argument is essentially circular. If, as ECP asserts, “processing of products” refers to agricultural products then rock crushing is not “nearly identical” to “processing of products.” Processing of rock products is simply not “nearly identical” to harvesting and processing crops.¹³

Both the County and Gibson argue that land use ordinances must be “strictly construed in favor of the landowner.” *County Br.* at 26-29 (citing *Sleasman*, 159 Wn.2d at 643 n. 4); *Gibson Br.* at 32-33 (same).

¹³ For the first time on appeal, Gibson cites KCC 17.04.020(2), which provides that “The administrator ... may permit in a zone any use **not described in this title** and deemed to be of the same character and in general keeping with the uses authorized in such zone.” (Emphasis added). *Gibson Br.* at 31. Neither County staff nor the Board relied on this provision, which is clearly inapplicable because “rock crushing” is explicitly listed as a permitted or conditional use in Title 17 KCC.

Both respondents neglect to mention that the cited passage in *Sleasman* is dicta in a footnote. *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956), relied on by respondents, does not invite the Court to rely on “strict construction” to the exclusion of all other considerations. *Morin* recited the principle of strict construction only after concluding that the zoning ordinance did not prohibit the use at issue. 49 Wn.2d at 279. Since *Morin*, Washington courts have rejected “strict construction” where the correct interpretation of an ordinance requires a different outcome.¹⁴

Morin also states that land use ordinances “should not be extended by implication to cases not clearly within their scope and purpose.” 49 Wn.2d 279. Yet respondents’ “strict construction” argument here is advanced to expand a permitted use that is only listed in agricultural zones to allow processing of virtually anything extracted from agricultural lands, including the minerals and petroleum. The respondents’ “strict construction” argument is also incompatible with KCC 17.08.550(3), which defines “prohibited use” as “those uses not specifically enumerated as permitted uses.” “Rock crushing” is expressly listed as either a

¹⁴ See *Mall, Inc. v. City of Seattle*, 108 Wn.2d 369, 378, 739 P.2d 668 (1987) (rejecting argument that strict construction required interpreting “lot area” in favor of developer); *Friend v. Friend*, 92 Wn. App. 799, 804 n.3, 964 P.2d 1219 (1998) (rejecting argument that strict construction required approval of partition of real property); *Development Services of America, Inc. v. City of Seattle*, 138 Wn.2d 107, 116-17, 979 P.2d 387 (1999) (rejecting strict construction where Court agreed that helipad was not necessary to the appellant owner’s business); *Griffin v. Thurston County*, 165 Wn.2d 50, 66, 196 P.3d 141 (2008) (Sanders, J., in dissent, citing *Morin*, supra, for “strict construction”).

permitted or conditional use in zones other than agricultural zones. Therefore, under KCC 17.08.550(3) “rock crushing” is prohibited in other zones. No amount of “strict construction” can change that.

In its opening brief, ECP pointed out that the County already has been found in violation of the Growth Management Act, Chap. 36.70A RCW (“GMA”), by allowing impermissible uses of agricultural lands, including sand and gravel excavation as conditional uses, *Kittitas County v. Eastern Washington Growth Management Hearings Board*, 172 Wn.2d 144, 170-72, 256 P.3d 1193, 1205 (2011), and that rock crushing is even less appropriate in agricultural zones. *App. Br.* at 25. In response, the County notes that the court lacks jurisdiction to find the County in violation of GMA in this case. *County Br.* at 32-33. But ECP has not argued otherwise. In a footnote, Gibson objects that ECP’s argument is misleading because the Gibson property is designated A-20, and not the Commercial Agriculture designation at issue in *Kittitas County*. Both respondents have missed the point—rock crushing is not an appropriate use in agricultural lands.

Finally, the County cites *Valentine v. Board of Adjustment for Kittitas County*, 51 Wn. App. 366, 753 P.2d 988 (1988) for the bizarre proposition—made for the first time on appeal to this Court—that “[c]rushing is a form of processing as a matter of settled law.” *County Br.*

at 30. *Valentine* held (pursuant to statutes subsequently amended) that “rock crushing” was *not* included in “surface mining” for purposes of the exclusive jurisdiction of the Department of Natural Resources (DNR). 51 Wn. App. at 372. *Valentine* rejected the mine operator’s argument that DNR’s issuance of a surface mining permit precluded local zoning regulations against rock crushing. 51 Wn. App. at 373.

Valentine does not address, much less support the County’s argument that the term “processing of products produced on the premises,” which only appears in the County’s agricultural zones, must include rock crushing. On the contrary, *Valentine* indirectly confirms that “gravel extraction” and “rock crushing” are not the same use, and that rock crushing is a separate activity from the extraction of rock from the ground. 51 Wn. App. at 372. *Valentine* also establishes that rock crushing is subject to local zoning restrictions, 51 Wn. App. at 369, but sheds no light on the interpretation of such restrictions. For example, *Valentine* does not explain why rock crushing would be a permitted use in agricultural zones but a conditional use in rural zones. For that matter, neither the County nor Gibson has explained that curious discrepancy.

In sum, the Board erroneously concluded that rock crushing is a permitted use in the A-20 zone. The language, context and overall structure of the zoning code clearly shows that “Processing of products

produced on the premises” refers to agricultural products. “Rock crushing” is a distinct use recognized and permitted in other zones, but it is not permitted in agricultural zones. Because rock crushing is neither a permitted nor conditional use in the A-20 zone, Gibson’s application for rock crushing must be denied.

B. The County’s issuance of a DNS was must be reversed.

1. The County violated the SEPA rules governing the use of existing environmental documents (WAC 197-11-600 et seq.)

It is undisputed that the SEPA checklist submitted by Gibson for the CUP application was merely a copy of the 2008 DNR checklist that had been altered to change the size of the proposal and to add new uses, including rock crushing. *Compare* CP 129-135 *with* CP 268-274. Given the undisputed fact that the County reused Gibson’s 2008 checklist to issue its DNS, the County was required to comply with the specific SEPA regulations regarding the use of existing environmental documents. *See* WAC 197-11-600 et seq. Under those rules, an agency must use one (or more) of four formal methods: (a) “Adoption,” (b) “Incorporation by reference,” (c) preparation of an “addendum,” or (d) preparation of a supplemental environmental impact statement (SEIS). WAC 197-11-600(4); *see App. Br.* at 31-32. The County did none of these things.

At the Board level, the County argued that an environmental

checklist was “optional.” CP 202-205. ECP’s LUPA brief explained in detail why a checklist is **mandatory**. CP 356-357. The County completely failed to address the issue in its LUPA response. CP 412-425; *see* CP 492. Nor does the County address the issue in its brief to this Court, thereby conceding that the checklist is mandatory.¹⁵

The County now argues, for the first time on appeal, that the SEPA regulations regarding the use of existing environmental documents, WAC 197-11-600 et seq., are inapplicable because the SEPA checklist is “entirely the responsibility of the applicant” (Gibson), and the applicant is only required to complete the checklist to the best of its knowledge. *County Br.* at 20-22. An appellate court will generally not consider an issue raised for the first time on appeal. *Heg v. Alldredge*, 157 Wn.2d 154, 162, 137 P.3d 9 (2006).

More importantly, the County’s argument—which carelessly paraphrases the instructions to the applicant in the checklist form (WAC 197-11-960)—violates the plain language of the applicable SEPA rules. WAC 197-11-315(1) provides that agencies “*shall*” use the environmental checklist to assist in making a threshold determination. WAC 197-11-100

¹⁵ In a footnote, the County asserts that ECP’s argument about whether a checklist is required “makes no sense” because Gibson submitted an environmental checklist. *County Br.* at 17 n.3. ECP’s argument merely responded to the County’s erroneous argument that an environmental checklist was “optional.” CP 421.

provides that an agency may require the applicant to complete the checklist. But that does *not* relieve the agency of its responsibility to ensure that the agency has sufficient information to make a threshold determination. WAC 197-11-335. If the information provided by the applicant is not sufficient, the agency may require the applicant to provide additional information at the applicant's expense and/or conduct its own studies and investigations. WAC 197-11-100(1); WAC 197-11-335. Contrary to the County's argument, the checklist is an environmental document for purposes of WAC 197-11-600 et seq.

By completely failing to address the SEPA rules for using existing environmental documents, the County concedes, *sub silentio*, that it did not comply with those rules. Furthermore, by attempting to blame Gibson for the deficiencies in the checklist the County also concedes that the checklist provided by Gibson was not sufficient.

Gibson argues that the 2008 DNR surface mining permit and the County application are the same project. Gibson Br. at 5 n.4, 12-13, 35. If that were true, Gibson would have submitted one complete checklist for the entire combined project. But Gibson's 2008 checklist to DNR did *not* include rock crushing, screening, and washing, temporary concrete and asphalt plants or concrete recycling identified as the proposed uses in the 2010 CUP application. *Compare* CP 129-135 *with* CP 268-274.

Furthermore, if the DNR and County permits were considered to be one project, then the SEPA rules would have required a determination of whether DNR or the County was the “lead agency” for purposes of SEPA review. *See* WAC 197-11-50(2) (lead agency is responsible for threshold determination); WAC 197-11-924 (determining lead agency). Under the applicable rules, the County would have been the lead agency. WAC 197-11-932 (county or city is lead agency where permit from more than one agency is required). Yet Gibson submitted the environmental checklist to DNR first, and that agency made a threshold determination based on a checklist that did not include the new uses Gibson proposed.

In his LUPA brief, Gibson argued that the County has discretion to use one of the four procedures for using existing environmental documents in WAC 197-11-600(4), and that the County was not required to “adopt” the prior environmental checklist. CP 447-448. But Gibson never explained which of the four procedures, if any, was used. *Id.*

On appeal, Gibson concedes that the County did not employ any of the four allowable procedures for using existing environmental documents. Gibson now argues, for the first time on appeal, that the County reviewed *both* the 2008 checklist submitted to DNR and the altered checklist submitted to the County. *Gibson Br.* at 35, 36 n.23, 38. Again, the Court should not consider this new argument. *Heg*, 157 Wn.2d

at 162. It is undisputed that both checklists are in the administrative record, but Gibson does not cite anything in the record as support for his assertion that the County actually reviewed both checklists. Gibson entirely relies on the fact that ECP pointed out the flaws in the checklists. *Gibson Br.* at 37 n. 25, 39.

More importantly, both checklists were inadequate for proper SEPA review. The record shows that Gibson simply altered the uses and acreage disclosed on his 2008 DNR checklist and resubmitted it to the County. The recycled environmental checklist submitted by Gibson did not address any of the impacts of rock crushing or any of the other uses proposed by Gibson. If ECP had not objected, this total failure to engage in proper environmental review would have gone unnoticed.

Gibson notes that he eventually amended his application to remove washing operations and temporary concrete and asphalt plants. *Gibson Br.* at 8, 9 n.8, 37, 41. But this occurred **after** Gibson submitted the DNR checklist and **after** the County had issued its notice that it intended to issue a DNS. CP 255, 261. The fact that both Gibson and the County previously ignored the obvious additional impacts of concrete and asphalt plants shows that no real environmental review was ever done.

Gibson cites *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609, 613, 744 P.2d 1101 (1987), for the proposition that a reduction in the

scope of a project does not require a new threshold determination. *Gibson Br.* at 37. In *SEAPC*, a developer deleted a portion of a project after an environmental impact statement for the entire project had been completed. The Court of Appeals agreed with the developer that no additional review was needed where the subsequent proposal had less impacts than the original application. 49 Wn. App. at 613. Unlike *SEAPC*, the County here never conducted proper environmental review in the first instance.

Finally, Gibson argues that the County's failure to comply with the SEPA rules was harmless error under RCW 36.70C.130(1)(a). *Gibson Br.* at 38 n.26, 39-40. The County's failure to prepare a proper SEPA checklist (or to require Gibson to prepare one) was not harmless. As explained in the next subsection, that failure was part of the County's overall failure to consider the environmental impacts of the application.

After briefing the issue twice, the County and Gibson have been unable to present a consistent explanation of how the County processed the SEPA checklist and issued the DNS. In addition to the lack of evidence of actual environmental review in the record, the shifting and inconsistent explanations offered by the respondents confirms that no meaningful SEPA review was done.

2. **The DNS is clearly erroneous because no meaningful SEPA review of the project occurred before the County issued the DNS.**

The County agrees with ECP that the record of the County's DNS must demonstrate that environmental factors were considered in a manner sufficient to amount to prima facie compliance with SEPA. *County Br.* at 17 (citing *Pease Hill Community Group v. County of Spokane*, 62 Wn. App. 800, 810, 816 P.2d 37 (1991)). The record shows that no meaningful environmental review was conducted before the County issued the DNS. The County has not established prima facie compliance with SEPA.¹⁶

On the merits of the DNS, both Gibson and the County make the same three basic points: (i) that County staff reviewed the CUP application and environmental checklist; *County Br.* at 4, 19; *Gibson Br.* at 1, 35-38; (ii) that the County received only minimal comments from the public works department, fire department, DNR and the Department of Ecology; *County Br.* at 18; *Gibson Br.* at 1, 11, 40; and (iii) that neighboring owners did not object; *County Br.* at 3; *Gibson Br.* at 1, 33,

¹⁶ For the first time on appeal, Gibson argues that ECP must present "actual evidence" of probable significant environmental impacts. *Gibson Br.* at 40-42. The cases cited by Gibson do not alter the County's burden to show prima facie compliance with SEPA. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719-720, 47 P.3d 137 (2002), clearly states that the County had the "burden of demonstrating prima facie compliance" with SEPA. After concluding that this burden had been met, *Boehm* noted that the project opponents had not produced evidence of actual impacts. *Id.* Similarly, *Moss v. City of Bellingham*, 109 Wn. App. 6, 23, 31 P.3d 703 (2001), found prima facie compliance, and then noted that the appellants had produced no evidence of significant impacts. Contrary to Gibson's argument, ECP is not required to produce any evidence where, as here, the record fails to establish prima facie compliance with SEPA. That is particularly true where, as here, ECP was not permitted to present any evidence or testimony in the SEPA appeal hearing. Nevertheless, ECP identified a myriad of potential impacts from the expanded gravel pit that were not addressed. CP 213-16.

41. These points do not address, let alone rebut the evidence in the record that no meaningful environmental review was actually done.

The County insists that staff actually reviewed the CUP application and environmental checklist. But the fact remains that the staff overlooked the fact that Gibson's application included numerous uses with significant impacts that were not actually addressed in the SEPA checklist, including washing, temporary concrete and asphalt plants, and concrete recycling. CP 266. Although Gibson later amended his application to delete those uses, leaving only rock crushing, the County indicated its intent to issue a DNS before the application was amended. CP 255, 261. There is nothing in the record to indicate that staff actually examined the impacts of rock crushing or the other proposed uses before issuing a DNS.

Both the County and Gibson rely on the lack of comments from DNR and the Department of Ecology. *County Br.* at 18-19; *Gibson Br.* at 11, 41. Those agencies were not the lead agency, and those agencies are not charged with determining all of the possible impacts of a proposed land use.¹⁷ That was the County's job. The state agencies might be procedurally barred from challenging the County's DNS pursuant to WAC

¹⁷ The County erroneously asserts that RCW 36.70C.130(1)(b) "requires deference to such comment by agencies with expertise." *County Br.* at 19. That statute addresses the review of conclusions of law under LUPA. That statute has absolutely nothing to do with comments from other agencies under SEPA.

197-11-545. But the lack of comments from those agencies does not establish that the County complied with SEPA.

Finally, the absence of objections from neighbors does not establish that a project has no environmental impacts. The neighbors are not agencies charged with complying with SEPA.

Contrary to the County's argument, this case is easily distinguishable from *Pease Hill Community Group v. Spokane County*, 62 Wn. App. 800, 810, 816 P.2d 37 (1991). In that case, the agencies MDNS included ten mitigation measures, and the record indicated that the agency actually performed a "complete and thorough review of the project" prior to issuing the MDNS. 62 Wn. App. 809. In this case, the record indicates that the County merely received an obviously insufficient environmental checklist from Gibson, circulated that checklist to other agencies, and issued a DNS without addressing *any* of the impacts of the proposal. Furthermore, even after ECP explained the defects in Gibson's checklist, the County took no action to address those defects.

Finally, Gibson argues, for the first time on appeal, that the impacts to water and air quality were addressed by a Sand and Gravel General Permit issued by the Department of Ecology (DOE). *Gibson Br.* at 5 n.4, 6 n.6, 12, 17, 41-42. This argument must be rejected because it was raised for the first time on appeal, *Heg*, 157 Wn.2d at 162, and

because the alleged general permit is not in the record. In addition, the general permit cited by Gibson is not automatically available to Gibson; a permittee must file an application with DOE and must meet certain criteria.¹⁸ Gibson cites nothing in the record to establish that he has even filed an application or that his project meets the applicable criteria.

In sum, the record demonstrates that the County did not sufficiently consider the environmental impacts of the proposal, and that the DNS was not based on “information reasonably sufficient to determine the environmental impact of a proposal.” *Pease Hill*, 62 Wn. App. at 810. The DNS is clearly erroneous. The CUP must be reversed and remanded to the County for compliance with SEPA.

C. The County failed to provide an open record hearing on ECP’s SEPA appeal.

It is undisputed that the KCC 15A.07.020 provides for a closed record SEPA appeal but no open record hearing. It is also undisputed that the Board followed this procedure. County Br. at 9-16; Gibson Br. at 43-47. The issue is whether this procedure complies with state law. This question of law is reviewed *de novo*. *Isla Verde Int’l Holdings, Inc., v. City of Camas*, 146 Wn.2d 740; 751, 49 P.3d 867 (2002); RCW 36.70C.130(1)(b).

ECP has explained that under RCW 36.70B.060(6) a closed record

¹⁸ See <http://www.ecy.wa.gov/programs/wq/sand/index.html> (last visited March 29, 2012).

appeal can only occur after an open record hearing has been held. App. Br. at 37-38. Both the County and Gibson argue that that statute merely limits SEPA appeals to no more than one open record hearing, and that the County has elected to not provide such a hearing. *County Br.* at 11-12; *Gibson Br.* at 45. According to the County, that statute “merely limits the number of open record proceedings and does not place a prohibition on other processes that do not incorporate open record hearings.” *County Br.* at 12. Both respondents ignore the plain language of the statute:

(6) 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. **If an appeal is provided after the open record hearing, it shall be a closed record appeal** before a single decision-making body or officer... (Emphasis added)

The first sentence of the statute provides that the first SEPA appeal, if any, must be an **open record hearing**. The second sentence states that no further appeal is required. The third sentence states that if a subsequent appeal is provided that appeal must be a **closed record appeal**. The statute does **not** allow an agency to provide only a closed record appeal.¹⁹

¹⁹ Gibson takes a sentence allegedly from Richard L. Settle, *The Washington State Environmental Policy Act*, E-29 (Lexis 2006) out of context. *Gibson Br.* at 46. The cited

If the County and Gibson were correct, the first sentence of RCW 36.70B.060(6) would allow an agency to provide a closed record appeal followed by yet another closed record appeal. But that nonsensical interpretation is inconsistent with RCW 36.70B.120(2), which provides:

(2) Consolidated permit review may provide different procedures for different categories of project permits, but if a project action requires project permits from more than one category, **the local government shall provide for consolidated permit review with a single open record hearing and no more than one closed record appeal as provided in RCW 36.70B.060.** Each local government shall determine which project permits are subject to an open record hearing and a closed record appeal. (Emphasis added)

This statute clearly states that an agency cannot provide two closed record appeals. Therefore, correctly interpreted, RCW 36.70B.060(6) only allows a closed record appeal after an open record hearing.²⁰ Moreover, how can you have a “closed record appeal” on a “closed record” until you have an open record hearing at which the record of the “open record hearing” is created? Respondent’s position is illogical.

The correct interpretation of RCW 36.70B.060(6) is revealed by the statutory definition of “closed record appeal:”

sentence does not support the argument that an agency may provide only a closed record appeal. Even if it did, Mr. Settle’s characterization of RCW 36.70B.060 would be contrary to the plain language of the statute.

²⁰ ECP is not asking this Court to rewrite RCW 36.70B.060(6), as the County suggests. *County Br.* at 11. The County has simply misread the existing statute.

(1) “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. (Emphasis added)

RCW 36.70B.020(1); *see also* WAC 197-11-721 (“Closed record appeal” means an administrative appeal ... following an open record hearing on a project permit application”). RCW 36.70B.020(1) confirms that a closed record appeal is an appeal that follows an open record hearing. The County argues that the definitions in RCW 36.70B.020 only “apply throughout this chapter.” *County Br.* at 13. But the operative statute—RCW 36.70B.060—is part of that same chapter. Therefore the definition of “closed record appeal” in RCW 36.70B.020(1) applies to the limits on SEPA appeals in RCW 36.70B.060(6).

For the first time on appeal, the County protests that ECP has mischaracterized the SEPA hearing provided by KCC 15A.07.020 as a “closed record appeal.” Both ECP and Gibson have referred to the County’s hearing process as a “closed record appeal,” *Gibson Br.* at 46, because the County’s process meets the definition of “closed record appeal” in RCW 36.70B.020(1) and WAC 197-11-721 except that the County does not provide an open record hearing first.

Gibson argues, for the first time on appeal, that the definitions in

RCW 36.70B.020(1) and WAC 197-11-721 apply to hearings on the underlying project permit but not to an appeal of a SEPA threshold determination. *Gibson Br.* at 46-47. In fact, the term applies to appeals of both the underlying permit and SEPA threshold determination. *See* RCW 36.70B.050(2) (“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.”) Chapter 197-11 WAC only applies to SEPA, so it makes absolutely no sense to suggest that the definition in WAC 197-11-721 does not apply to SEPA appeals.

The County also argues that “[there is no] authority for the proposition that local governments cannot adopt or define processes different from those found in Ch. 36.70B RCW or Ch. 43.21C RCW.” *County Br.* at 13. This argument is nonsense; the relevant “authority” is Chapter 36.70B RCW itself. Chapter 36.70B RCW was adopted by the 1995 legislature for the purpose of reforming local land use and environmental review process. RCW 36.70B.010. Nothing in the statute suggests that its provisions are optional. Indeed, RCW 36.70B.060 clearly states that local agencies “*shall*” establish compliant permit processes by March 31, 1996. The County might wish that it had the authority to establish different processes, but it does not. The County’s argument is a

tacit admission that KCC 15A.07.020 violates state law.²¹

The County notes that RCW 43.21C.075(3)(a) merely limits agencies to “no more than one agency appeal proceeding.” County’s Br. at 7-8. This provision of the SEPA statute does not conflict with or override the specific provisions of Chapter 36.70B which establish permissible appeal processes. Furthermore, the SEPA statute is implemented by the SEPA rules in Chapter 197-11 WAC. Those rules confirm that SEPA appeals are governed by Chapter 36.70B RCW and that a closed record appeal can only occur after an open record hearing. WAC 197-11-721.

ECP also pointed out that KCC 15A.02.030 and KCC 15A.01.040 require an open record hearing. App. Br. at 38. Gibson ignores both provisions. The County ignores KCC 15A.01.040, but asserts, in a footnote, that the County does not actually offer the “closed record appeal” explicitly defined in KCC 15A.02.030. In its LUPA brief, the County asserted that the definition of “closed record appeal” should be

²¹ Both the County and Gibson mistakenly quote WAC 197-11-680(2). *County Br.* at 13; *Gibson Br.* at 45. That section deals with appeals from decisions to condition or deny a proposal under RCW 43.21C.060. (This is so-called “substantive SEPA”). Appeals of SEPA threshold determinations, like the DNS in this case, are authorized by RCW 43.21C.075(3). The County and Gibson not only cite the wrong SEPA rule, but that rule also confirms that the provisions of RCW 36.70B.060 are mandatory. WAC 197-11-680 (“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.”)

deleted. CP 419. Unfortunately, the County's arguments contradict the plain language of the County's own code.

ECP has explained that a meaningful closed record appeal cannot occur unless and until an open record hearing has been held, App. Br. at 29, and the record clearly shows that the closed record appeal was a meaningless exercise. The Board members did not ask any substantive questions or engage in any meaningful discussion before voting to deny the SEPA appeal. CP 33-34. Neither the County nor Gibson have addressed the actual conduct of the SEPA appeal hearing. Both merely note that the Board upheld the DNS and made a finding that the responsible official had followed the proper procedures. *County Br.* at 5; *Gibson Br.* at 16.²²

The County argues that ECP has not explained how the closed record appeal process could be unfair. *County Br.* at 14. But the County does not deny that there was no meaningful discussion of the SEPA appeal by the Board or that the Board excluded ECP's SEPA exhibits and refused to allow any testimony or argument. Indeed, the County argues that ECP

²² The County and Gibson also argue that the closed record appeal complies with procedural and substantive due process. *County Br.* at 14-16; *Gibson Br.* at 44. ECP has never argued otherwise. Furthermore, *substantive* due process has nothing whatsoever to do with the fairness of legal processes. See *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993) (law requiring financial assistance to mobile home tenants when mobile home park is closed violated substantive due process).

violated the County's rules by attempting to present substantive information in the SEPA appeal.²³ The County also argues that the SEPA brief and exhibits offered by ECP were properly excluded, and that these materials should not be considered part of the record under RCW 36.70C.120(2)(b). *County Br.* at 16. The County's argument assumes that the closed record appeal process was lawful. If it was not, as ECP argues, then ECP's SEPA brief and exhibits were "were improperly excluded from the record after being offered by a party to the quasi-judicial proceeding" under RCW 36.70C.120(2)(b) and are properly part of the record before this Court. Their exclusion also demonstrates that the County's process is "unfair" and that there was prejudice to ECP as a result of the County's adherence to an illegal process.

The County's argument would limit the "record" in a SEPA appeal to only the application and the comments received by the agency during the comment period (before a threshold determination is made). *County Br.* at 9. But an applicant or project opponent cannot know before a threshold determination is actually made whether the agency has actually

²³ In a footnote, the County asserts that ECP employed "ambush litigation tactics" by submitting "a mass of information and argument" at the SEPA hearing. *County Resp. Br.* at 5 n.1. These assertions are mere hyperbole. The "mass of information" submitted by ECP consisted of (i) a seven-page brief on SEPA procedures and (ii) five (5) exhibits. Four of the exhibits were nearby residential plats that the County had ignored, and the fifth exhibit was a copy of an earlier letter in which ECP objected to the County's SEPA procedures. CP 370-408.

considered, addressed or mitigated the impacts of a project. Only after a threshold determination is made can an appellant determine what evidence and argument is needed to challenge that determination. Where an agency does not provide any SEPA appeal process whatsoever—which is permitted by RCW 43.21C.075, a party may challenge the agency’s SEPA determination with new evidence and argument in superior court under LUPA. *See* RCW 36.70C.120(1) (judicial review limited to the record only where party has an opportunity to create a record on factual issues before quasi-judicial tribunal). By purporting to close the SEPA record at the end of the comment period and provide only a closed record appeal, the County seeks to prevent parties from effectively challenging its SEPA decisions.

The County provides no factual or legal citation to support its assertion that the Board of County Commissioners intended the SEPA appeal procedure to prevent the “last minute” submission of evidence and argument. County Br. at 5 n.1. The County continues to allow parties to submit evidence, testimony and argument at hearings on project permits. KCC 15A.05.020. Indeed, that occurred in this case. CP 35-69; 136-184. It makes no sense to suggest that “last minute” submission of evidence and argument is a problem in SEPA appeals but not project permit hearings. Even if that were a recurring problem in County SEPA hearings, however,

that is not an excuse for ignoring a clear requirement of state law that there be an open record hearing before there can be a closed record appeal.

Finally, Gibson erroneously asserts that County's SEPA appeal process is "similar to LUPA" because, according to Gibson, the court under LUPA "bases its review upon the administrative record; accepts and considers only legal argument based upon the record; and precludes submission of new evidence." *Gibson Br.* at 44 n.28 (citing RCW 36.70C.120). Gibson misunderstands the LUPA statute. Under LUPA, the superior court's review is limited to the administrative record only where the record was created by quasi-judicial body or officer in a quasi-judicial hearing where the parties may create a record. RCW 36.70C.120(1). In other words, LUPA provides only a closed record appeal where an open record hearing has already occurred. The County's defective SEPA appeal process provides no open record hearing.

The County's failure to provide an open record hearing on ECP's SEPA appeal was erroneous as a matter of law. The CUP must be reversed and remanded to the County for compliance with SEPA.

D. Respondents may be entitled to attorney's fees on appeal.

Both the County and Gibson request an award of attorney's fees on appeal pursuant to RCW 4.84.370. *County Br.* at 35-36; *Gibson Br.* at 49-50. Gibson understands that the respondents may recover (i) reasonable

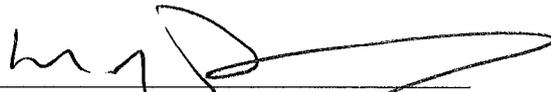
attorney's fees, (ii) on appeal (only), (iii) to the extent that the respondents prevail or substantially prevail in this appeal. Further discussion of reasonable attorney's fees is premature because the respondents have yet to prevail in this appeal.

VI. CONCLUSION

For all these reasons, this Court should reverse the decision of the Board. Rock crushing is neither a permitted nor conditional use in the A-20 zone, and Gibson's application for rock crushing must be denied. In addition, the County failed to comply with SEPA in issuing a DNS for the CUP for the expanded gravel pit operation. The CUP must be reversed and remanded to the County for compliance with SEPA.

Respectfully submitted this 30th day of March, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served on March 30, 2012 a true and correct copy of the foregoing document to the parties listed below, via the method indicated:

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