FILED

FEB 23 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

88165-1

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.

BRIEF OF RESPONDENT – GIBSON

James C. Carmody
Kathryn K. Smith
Velikanje Halverson P.C.
Attorneys for Respondent
Homer L. (Louie) Gibson
405 East Lincoln
Yakima, WA 98901
(509) 248-6030

Table of Contents

I. Introduction 1

II. Issues Pertaining to Assignment of Error 3

III. Statement of Case 3

- A. Land Use Application/Environmental Checklist 3
- B. Review Procedures/Environmental Determination 8
- C. Environmental Appeal – Board of Adjustment Review And Denial of SEPA Appeal 13
- D. Board of Adjustment – Review and Approval of Conditional Use Permit 16

IV. Standard of Review 20

- A. Land Use Petition Act – Standards for Review 20

V. Argument 22

- A. Rock Crushing is a Permitted Accessory Use in the A-20- Agricultural Zone 22
  - 1. Standard of Review for Local Ordinance Interpretation 22
  - 2. KCC 17.29.020(A)(13) is Clear and Unambiguous 25
  - 3. Kittitas County Properly Interpreted its Local Ordinance and Such Interpretation is Entitled to Deference 28
- B. Kittitas County's Issuance of Determination of Nonsignificance was not Clearly Erroneous 34
  - 1. Standard of Review 34
  - 2. Kittitas County Did Not Violate SEPA Rules Regarding Use of Existing Environmental Documents 35
  - 3. ECP Offers No Evidence of Incomplete Review or Lack Of Information 40
- C. Kittitas County Followed Administrative Appeal Procedures and was not Required to Provide an Open Record Hearing 43
- D. ECP Waived the Issues Raised Under Its Assignment of Error Issues IID, E, and F Because It Did Not Brief the Issues 47
- E. Gibson and the County Are Entitled to Attorneys' Fees As Prevailing Parties Under RCW 4.84.370 49

VI. Conclusion 50

Table of Authorities

Statutes

Anderson v. Pierce County
86 Wn. App. 290, 302, 936 P.2d 432 (1997) 34

Boehm v. City of Vancouver
111 Wn. App. 711, 719, 47 P.3d 137 (2002) 40, 41, 42

Caritas Services, Inc. v. Department of Social and Health Services
123 Wn.2d 391, 409, 869 P.2d 28 (1994) 28

Chuckanut Conservancy v. DNR
156 Wn. App. 274, 286, 232 P.3d 1154 (2010) 34

Citizens to Preserve Pioneer Park, LLC v. City of Mercer Island
106 Wn. App. 461, 475, 24 P.3d 1079 (2001) 23

City of Federal Way v. Town & Country Real Estate, LLC.
161 Wn. App. 17, 33, 252 P.3d 382 (2011) 19, 23, 24

City of Medina v. T-Mobile U.S.A., Inc.
123 Wn. App. 19, 24, 95 P.3d 377 (2004) 24

City of Spokane v. Carlson
96 Wn. App. 279, 285, 979 P.2d 880 (1990) 26

Concerned Taxpayers Opposed to Modified Mid-South Sequim Bypass v. Department of Transportation
90 Wn. App. 225, 233, 951 P.2d 812 (1998) 38, 40

Cowiche Canyon Conservancy v. Bosley
118 Wn.2d 801, 815, 828 P.2d 549 (1992) 32

Douglass, Inc. v. City of Spokane Valley
154 Wn. App. 408, 415, 225 P.3d 448 (2010) 24, 29, 34

Eugster v. City of Spokane
118 Wn. App. 383, 410, 76 P.3d 741 (2003) 28

Feil v. Eastern Wash. Growth Mgmt. Hearings Bd.
153 Wn. App. 394, 417, 220 P.3d 1248 (2009) 50

Hawkins v. Casey
38 Wash. 625, 626, 80 P. 792 (1905) 48

HJS Development, Inc. v. Pierce County
148 Wn.2d 451, 471, 61 P.3d 1141 (2003) 25

In re Dependency of M.S.D.
144 Wn. App. 468, 478 n.7, 182 P.3d 978 (2008) 48

Indian Trail Property Owners Assoc. v. City of Spokane
76 Wn. App. 430, 442 886 P.2d 209 (1994) 34, 43

Isla Verde Intern. Holdings, Inc. v. City of Camas
146 Wn.2d 740, 751 49 P.3d 867 (2002) 20, 21

Johnson v. State
164 Wn. App. 740, 753, 265 P.3d 199 (2011) 49

Julian v. City of Vancouver
161 Wn. App. 614, 623, 255 P.3d 763 (2011) 21, 50

Keller v. City of Bellingham
92 Wn.2d 726, 731, 600 P.2d 1276 (1979) 30

Kittitas County v. Eastern Washington Growth Mgmt. Hearings Board
172 Wn.2d 144, 256 P.3d 1193 (2011) 4

McTavish v. City of Bellevue
89 Wn. App. 561, 567-68, 929 P.2d 837 (1998) 26

Milestone Homes, Inc. v. City of Bonney Lake
145 Wn. App. 118, 127-128, 186 P.3d 357 (2008) 23, 26, 29, 32

Morin v. Johnson
49 Wn.2d 275, 279, 300 P.2d 569 (1956) 30, 31, 32, 33

Moss v. City of Bellingham
109 Wn. App. 6, 28, 31 P.3d 703 (2001) 39, 41

Nickum v. City of Bainbridge Island
153 Wn. App. 366, 383-84, 223 P.3d 1172 (2009) 50

Nisqually Delta Ass'n. v. City of DuPont
103 Wn.2d 720, 746, 696 P.2d 1222 (1985) 26

Norway Hill Preserv. & Prot. Ass'n v. King County
87 Wn.2d 267, 273-276, 552 P.2d 674 (1976) 34

Pease Hill Commty. Group v. Spokane County
62 Wn. App. 800, 810, 816 P.2d 37 (1991) 41

Phoenix Dev., Inc. v. City of Woodinville
171 Wn.2d 820, 828, 256 P.3d 1150 (2011) 20, 23, 24, 30

Pinecrest Homeowners Assn. v. Cloninger & Assoc.
151 Wn.2d 279, 288, 87 P.3d 1176 (2004) 21, 23

Pope & Talbot, Inc. v. Department of Revenue
90 Wn.2d 191, 580 P.2d 262 (1978) 27

SEAPC v. Cammack II Orchards
49 Wn. App. 609, 613, 744 P.2d 1101 (1987) 37

Seatoma Convalescent Center v. Dept. of Social and Health Svs.
82 Wn. App. 495, 518, 919 P.2d 602 (2007) 31

Silverstreak, Inc. v. Wash. State Dept. of Labor & Indust.
159 Wn.2d 868, 884, 154 P.3d 891 (2007) 31

Sleasman v. City of Lacey
159 Wn.2d 639, 643, 151 P.3d 990 (2007) 26, 29, 31, 32, 33

Thornton Creek Legal Defense Fund v. City of Seattle
113 Wn. App. 34, 50-51, 52 P.3d 522 (2002) 38, 39, 40

Valley View Indus. Park v. City of Redmond
107 Wn.2d 621, 630, 733 P.2d 182 (1987) 48

Viking Props., Inc. v. Holm
155 Wn.2d 112, 125, 118 P.3d 322 (2005) 24

Vogel v. City of Richland
161 Wn. App. 770, 777, 255 P.3d 805 (2011) 20, 21

Woods v. Kittitas County
162 Wn.2d 597, 610, 174 P.3d 25 (2007) 20

Yakima County v. Eastern Wash. Growth Mgmt. Hearings Bd.
146 Wn. App. 679, 698, 192 P.3d 12 (2008) 47

Statutes

RCW 30.70B.060 46
RCW 30.76B.060 45
RCW 36.70A.170 4
RCW 36.70A.170(1)(c) 4
RCW 36.70B.010 42
RCW 36.70B.020(1) 46, 47
RCW 36.70B.020(4) 47
RCW 36.70B.030(4) 42
RCW 36.70B.050 45
RCW 36.70B.060 10
RCW 36.70B.060(6) 45, 46, 47
RCW 36.70B.070(1) 8, 9
RCW 36.70B.070(2) 9
RCW 36.70C.030(1) 20
RCW 36.70C.120 44
RCW 36.70C.120(1) 21
RCW 36.70C.120(2) 21, 22
RCW 36.70C.130(1) 20, 24
RCW 36.70C.130(1)(a) 39, 43
RCW 36.70C.130(1)(b) 3, 22, 29
RCW 4.84.370 ..... 3, 49
RCW 43.21C.030(2)(c) 7
RCW 43.21C.031(1) 42
RCW 43.21C.075 45
RCW 43.21C.090 ..... 34, 43

RCW 43.21C.240 42
RCW 58.17.065 15
RCW 70.94 6

WAC 197-11 13
WAC 197-11-060(3)(b) 5
WAC 197-11-100 9
WAC 197-11-100(2) 9
WAC 197-11-315(3) 35
WAC 197-11-315(4) 35
WAC 197-11-330(1)(c) 42
WAC 197-11-335 35
WAC 197-11-355 10
WAC 197-11-355(1) 10
WAC 197-11-545 11
WAC 197-11-600 38
WAC 197-11-600(2) 36
WAC 197-11-600(3) 36
WAC 197-11-600(4)(a) 36
WAC 197-11-640 36
WAC 197-11-680(2) 45
WAC 197-11-721 46

I. INTRODUCTION

Homer L. (Louie) Gibson ("Gibson" or "Respondent") owns and operates a sand and gravel excavation and processing business in Kittitas County, Washington. The property is in an area of active mining activities and subject to an existing conditional use permit. Mining and rock operations have been conducted on the site since 1982. Gibson's primary competitor is Ellensburg Cement Products ("ECP" or "Appellant"). This appeal arises from ECP's effort to thwart, delay and impede Gibson's expansion of the existing mine and rock crushing facility.

Gibson submitted an application for expansion of the existing conditional use permit to Kittitas County Community Development Services ("CDS"). Department of Natural Resources (DNR) had previously conducted environmental review and approved the surface mining component of the application. (CP 165-172.) CDS reviewed application materials, permit history, DNR permit and processes, applicable regulations, and circulated the proposal for agency and public comment. Not a single commenting agency or neighboring property owner objected to any aspect of the proposed operation. There was no evidence that the proposed operation would in any way adversely impact the environment. CDS recognized that processing (i.e. rock crushing, screening and sorting) was on authorized use and recommended approval.

The proposal proceeded to public hearing. Kittitas County Board of Adjustment conducted a public hearing and the only independent testimony supported the application and expressed the need for material and fair competition within the industry. BOA approved the permit.

The sole party objecting to the application was ECP. It owns a competing pit within the general geographic area and lodged a series of challenges to the application and process, including a tortured interpretation of the applicable zoning ordinance and petty challenges to environmental and procedural processes. It's standing to lodge complaints is suspect. But its intentions are clear – prevent competition. And so, a project that followed all adopted procedures, presented no significant environmental impacts, received unanimous support from all agencies and the public, is now stalled in a prolonged land use fight with a competitor. This is exactly the case that the legislature sought to remove from the system.

Local jurisdictions have ultimate responsibility for planning, harmonizing and implementing land use rules and regulations. Statutory authority (GMA, SEPA and LUPA) recognizes that land use decisions are inherently local in nature and accord deference to the local decision-maker. It is the local jurisdiction that is in the best position to interpret

and administer its local ordinances. ECP would have this court substitute its judgment for that of the local jurisdiction.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A. Whether CDS and Board of Adjustment erroneously interpreted the clear and unambiguous language of KCC 17.29.020(A)(13) by allowing "processing of products produced on the premises" (i.e. rock crushing) within the Agricultural – 20 zone.

B. Whether CDS and Board of Adjustment interpretation of the local ordinance is entitled to deference under RCW 36.70C.130(1)(b).

C. Whether Kittitas County's adopted procedures for administrative appeals of environmental determinations violate state law.

D. Whether Kittitas County was required to provide an open record administrative hearing for threshold environmental determination appeals.

E. Whether SEPA Responsible Official's threshold environmental determination was clearly erroneous.

F. Whether ECP waived assignment of error issues IID, E, and F by failing to brief such issues.

G. Whether Gibson and Kittitas County are entitled to award of attorneys' fees and costs under RCW 4.84.370.

III. STATEMENT OF CASE

A. Land Use Application/Environmental Checklist.

Gibson owns approximately 84 acres of real property situated on five contiguous parcels in rural Kittitas County. (CP 469-477).[1] The property and immediate geographic area have a long history of mining and rock crushing operations. (CP 38, 116 and 267-276).[2] Mining on the property had been conducted without complaints since 1982. (CP 267). The property also contains the site of an "old county pit." (CP 276). The property is designated "Rural" under the Kittitas County Comprehensive Plan and zoned A-20-Agricultural Zone. (CP 192).[3]

---

[1] Gibson's application specifically identified five (5) tax parcels as part of the proposed project area. (CP 266). Map numbers were identified in the application and each public notice as: 17-20-08010-0003; 17-20-08010-0004; 17-20-08010-0005; 17-20-08010-0011; and 17-20-03010-0006. (CP 111-118).

[2] The project site included both an existing mining operation ("existing pit") and an "old county pit". (CP 276). Topography of the site "pre-existing conditions" were specifically set forth in application maps. *Id.* The map outlined the property, corner coordinates, excavation edges, existing disturbances and access roads. Also identified is a house and pump house for the property.

[3] The property was *not* designated as agricultural lands of long-term commercial significance under Growth Management Act (GMA). ECP admonishes Kittitas County for failures to protect agricultural lands from nonagricultural uses. Brief of Appellant – 25. ECP cites *Kittitas County v. Eastern Washington Growth Mgmt. Hearings Board*, 172 Wn.2d 144, 256 P.3d 1193 (2011) for the proposition that Kittitas County "... had violated the Growth Management Act ... by allowing impermissible uses of agricultural land, including sand and gravel excavation as conditional uses." *Id.* ECP's argument is incorrect and misleading for several reasons. First, the court in *Kittitas County* found KCC Ch. 17.31 (Commercial Agricultural Zone) to be noncompliant with GMA. The determination did not apply to KCC Ch. 17.29 (Agricultural – 20 Zone). *Kittitas County*, 172 Wn.2d at 172. Second, the Gibson property had not been designated agricultural land of long-term commercial significance and was not subject to the GMA mandate for preservation and protection. RCW 36.70A.170. Finally, mineral resource lands (e.g. sand and gravel) must also be preserved and protected under GMA. RCW 36.70A.170(1)(c).

Kittitas County previously issued a Conditional Use Permit for gravel excavation on the property to John Miller on December 18, 1997 (Tax Parcel No. 17-20-0840-0011) (CP 149). Gibson operated under the issued conditional use permit and proposed an expansion of the existing mining and crushing operation. Gibson submitted a Zoning Conditional Use Permit Application ("CUP Application") for the expansion to Kittitas County Community Development Services (CDS) on June 11, 2010. (CP 265-274 and 276-279).[4] The application proposed to amend the existing conditional use permit—Miller Conditional Use Permit (CU-97-17)—to allow for the expansion of 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). Application materials also included topographic mapping of pre-existing conditions (i.e. existing and on old county pit locations); mining plan, sequence and locations; proposed excavation and cross-sections; and final site contours. (CP 454-463). (Attachment A).

---

[4] Mining projects require three (3) specific land use approvals: (1) a 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 The first two project review processes require the submission of an Environmental Checklist. WAC 197-11-060(3)(b) recognizes that "... [p]roposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document." Gibson utilized a similar Environmental Checklist for both applications. (CP 268-274 and 157-163)

In 2008, Gibson submitted and received a surface mining permit for the expanded operation from DNR. (CP 165-172). An Environmental Checklist was submitted with the DNR application. (CP 157-163). The project was described as the "... mining, crushing and removal of approximately 3,000,000 cubic yards of basalt/basalt shale from an area of approximately 60 acres." (CP 158).[5] Any mining and rock processing operations also require air and water quality permits from Department of Ecology.[6] (CP 158). DNR reviewed the application and issued a SEPA Determination of Nonsignificance (DNS) on November 10, 2008, concluding:

> The lead agency for this proposal has determined that it does not have a probable significant impact on the environment. An Environmental Impact Statement (EIS) is

---

[5] Since the DNR application related to a surface mining permit and reclamation responsibilities, the specific area under consideration was only a portion of the total property. DNR reviewed an application for a 60-acre "basalt mine". (CP 158). The materials, however, identified the five (5) subject tax parcels. The CUP Environmental Checklist noted the larger area (i.e. five parcels covering 84 acres). DNR reviews related to the mining excavation area while the CUP included the total parcel area. The total acreage of the property has always been 84 acres. ECP attempts to distinguish between the two descriptions but fails to recognize the reason for the difference between the acreage references.

[6] Washington Department of Ecology (DOE) administers Washington Clean Air Act (Chapter 70.94 RCW) for certain counties including Kittitas County. DOE issued General Order of Approval for Portable Rock Crushers 07-AQG-001 on February 6, 2007. The operation of any portable crusher at the site would require compliance with the General Order including application of Best Available Control Technology (BACT) for controlling particulate matter (PM10) and fugitive air emissions. Emissions may not exceed any state or federal ambient air quality standard. DOE also regulates sand and gravel excavation for discharges of process water, stormwater and dewatering through the Sand and Gravel General Permit as reissued on August 4, 2010. The permit establishes requirements for monitoring discharges and applies best management practices.

> 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 164). No appeal was filed. DNR issued Surface Mining Reclamation Permit No. 70-103123 ("DNR Permit") on December 3, 2008. (CP 166). DNR Permit recognized that (1) the "... total disturbed area will be 60 acres;" (ii) the maximum depth below pre-mining topographic grade is 130 feet; and (iii) maximum depth of excavated mine floor is 1890 feet relative to mean sea level. *Id.* All of this information was provided to, and considered by, Kittitas County in its review process.

Gibson's initial application contemplated expansion of the existing mining operations and proposed inclusion of "... rock crushing, screening, washing operations, temporary concrete and asphalt plants." (CP 266). The project was proposed as follows:

> Mining, crushing and removal of approximately 3 million cubic yards of basalt/basalt shale from an area of approximately 84 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. Also to include rock crushing, screening, washing operations, temporary concrete and asphalt plants.

(CP 269). Kittitas County also prepared locational, zoning, and parcel maps; mining site information; and aerial photographs. (CP 110-118). All notices and processes specifically identified the five tax parcels and property size as 84/85 acres. *See, e.g.* Notice of Application (CP 261-262); Notice of SEPA Decision (CP 182-184); and DNS (DNS) (CP 244). The nature and scope of the proposed operation was clearly identified and served as the basis for environmental review by Kittitas County Community Development Services. There was no confusion or question regarding the scope, location or nature of the proposed operation.

Gibson amended the application on September 15, 2010 and deleted "... washing operations and temporary concrete and asphalt plants ..." from the application. (CP 255). The application was scoped to include "... blasting, screening, rock crushing and extraction of rock." *Id.* Environmental review and application processing went forward with this amended application and scope of proposed use.

B. Review Procedures/Environmental Determination.

Kittitas County followed all applicable notice and land use procedures. The application was deemed complete on June 29, 2010 (CP 264).[7] All notices identified the proposal as an application "for the

[7] Local government review of a project permit application requires an initial review to determine whether the application is complete for purposes of processing. RCW

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). Gibson submitted supplemental information including information regarding environmental review and determinations related to the surface mining permit issued by DNR.[8]

Notice of Application was published, posted and mailed to adjacent property owners and government agencies including DNR, DOE, Kittitas County Fire Marshall and county departments, (CP 192; 261-263; CP 282 and CP 325-326). The Notice of Application identified the five (5) tax parcels; described the nature and location of the proposal; advised that the application and related documents were available for examination; established a comment period; and set forth the procedures for hearing and appeals. Kittitas County provided for a single integrated comment period

---

36.70B.070(1). It should be noted that "... [a] project permit application is complete for purposes of this section when it meets the procedural submission requirements of the local government and is sufficient for continued processing even though additional information may be required or project modifications may be undertaken subsequently." RCW 36.70B.070(2). Kittitas County adopted these processes as part of their project permit application review regulations. KCC 15A.03.040.

[8] An agency may require additional information from an applicant in the form of an environmental checklist or supplemental submission. WAC 197-11-100. An applicant may clarify or revise the checklist at any time prior to a threshold determination. WAC 197-11-100(2). Gibson provided supplemental information and clarified the application with respect to temporary asphalt and concrete batch plant operations on September 15, 2010. (CP 255). These submissions were prior to the issuance of the DNS on October 21, 2010. (CP 244).

under the Optional DNS process established by WAC 197-11-355. See also KCC 15.04.160(3) and KCC 15A.03.060(3). This process requires the lead agency to advise recipients of "... the likely threshold determination for the proposal."[9] Kittitas County included 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.

---

[9] ECP objected to the reference in the notice that Kittitas County "... expected to issue a determination of nonsignificance (DNS) for the CUP application." (Br. of Appellant at 5-6). This disclosure is required under both the regulation and ordinance. WAC 197-11-355 establishes an optional environmental review process that involves a single integrated comment period. The regulation requires the agency to disclose "... the likely threshold determination for the proposal." WAC 197-11-355(1) provides as follows:

> If a GMA county/city with an integrated project review process (RCW 36.70B.060) is lead agency for a proposal and has a reasonable basis for determining significant adverse environmental impacts are unlikely, *it may use a single integrated comment period to obtain comments on the notice of application and the likely threshold determination for the proposal. If this process is used, a second comment period will typically not be required when the DNS is issued (refer to subsection (4) of this section).*

Kittitas County has adopted an integrated project review process. KCC 15A.03.060(3)

(CP 261). Notice was circulated to agencies and neighbors. (CP 282). Affected agencies including Kittitas County Department of Public Works, Kittitas County Fire Marshall, DNR, and Department of Ecology submitted comments. (CP 256-60). Not a single commenting agency objected to the proposal or the proposed issuance of a DNS (DNS).[10]

Neighbors initially asked a series of questions regarding the application. (CP 252-254). Those neighbors ultimately expressed support for the project. (CP 186 and 189-190). An example is the comment of John O. Butterfield (Manager – SDB Development):

> We own parcels of land directly north of the referenced subject. Apparently there has been an appeal (objection) to the use permit (File No.: CU-10-00004). Our land looks over the entire Gibson Pit and we have no complaint to their operation. In fact, we consider Gibson an asset to our area.

(CP 186). Neighbors acknowledged historic rock crushing activities and the absence of noise impacts from operations, and proposed relocation of crushing and sorting equipment. Comments included:

> Where our residences are located we do not hear any of the noises from the pit when in operation. It would be helpful if Mr. Gibson' request to move his crushing and

[10] If a consulted agency does not respond with written comments within the time periods for commenting on environmental documents, the lead agency is authorized to assume that the consulted agency has no information relating to the potential impact of the proposal and the noncommenting agency is barred from alleging any defects in the environmental determination process. WAC 197-11-545.

> separating machines to the back of his property would be approved.

(CP 189-190). No evidence was provided to establish that noise was a significant environmental impact. No evidence was presented that the proposal presented adverse impacts to roads or transportation systems. (Department of Public Works required only the upgrade of two existing access points – CP 256). No adverse impacts were identified regarding air quality. (Department of Ecology – CP 260). No adverse impacts were identified regarding surface or ground water. (CP 260). (DOE noted that proponent had submitted sand & gravel permit application). Critical area site analysis was completed by Staff in compliance with KCC Title 17A (CP 192). There were no critical areas on site. *Id.* (CP 36). And no adverse impacts on farmland or agricultural operations were identified or documented.

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). 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).[11] This is

---

[11] 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).

because the proposal " . . . does not have a probable significant adverse impact on the environment." (CP 164). Independent agencies reviewing the same project information both concluded that information was complete and an Environmental Impact Statement (EIS) was not required. Notice of Decision SEPA Action and Public Hearing was issued on October 21, 2010, and notification was properly published. (CP 246, 322).

C. Environmental Appeal – Board of Adjustment Review and Denial of SEPA Appeal.

ECP appealed the threshold environmental determination (DNS) on November 2, 2010. (CP 293-298).[12] 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.[13]

---

[12] ECP sent a follow-up letter on November 3, 2010. (CP 283-284). The letter represented that James and Deana Hamilton and Larry and Sherrie Miller were also appealing the SEPA threshold determination. This was not accurate. Hamiltons and Millers later advised Kittitas County CDS that they were "not opposed to the Gibson pit"; prior comments were provided "only so we would be advised to any changes to the Pitt [sic], such as Asphalt Plant or Cement Plant"; and that it would help if the crushing and separating machines were moved to the back of the property. (CP 190).

[13] 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

An administrative appeal of DNS is considered by Board of Adjustment. KCC 15.04.210. Appeal procedures are set forth in KCC 15A.07.010 and .020.[14] 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) set 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). The Board had authority to affirm reverse, modify or remand the administrative decision. KCC 14A.07.040.and .050.

---

proposal. ECP's arguments and points were fully considered **before** the issuance of the threshold determination.

[14] Kittitas County revised its administrative and environmental review procedures by Ordinance No. 2010-08, adopted October 5, 2010. Prosecuting Attorney described the appeal process to the Board of Adjustment before the hearing. (CP 108-109).

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 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)).

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 procedure and properly rejected ECP's attempt to submit new evidence. (CP 31-32 and 55).[15] Board of Adjustment considered the SEPA appeal on May 11,

---

[15] ECP sought to introduce a supplemental brief and plat maps for two *preliminary* short plats: Badger Bluff Short Plat (two lots) and Sunny Sage Short Plat (two lots) (CP 31-32 and 367-387). The submission of new evidence was not authorized by the ordinance. While ECP noted that these short plats had been approved, no evidence was offered to establish that the *preliminary* short plats had actually been finalized and recorded. (CP 240). Preliminary short plat approval does not create any lots. RCW 58.17.065 ("Each short plat . . . shall be filed with the county auditor and shall not be

2011. After reviewing the record and briefing, the Board of Adjustment unanimously denied the appeal (CP 35 and 103)

D. Board of Adjustment – Review and Approval of Conditional Use Permit.

Following determinations regarding the SEPA appeal, Board of Adjustment proceeded with an open record hearing on the conditional use permit application. (CP 35-78). Interested parties provided testimony, evidence and argument at the hearing. ECP was the only objecting party.

CDS presented the application and recommended approval of the project proposal. (CP 110-120). Staff described the scope and extent of the application, identified zoning and Comprehensive Plan provisions; summarized critical area analysis; identified mining sites and mineral lands of long-term significance, and summarized review procedures. Staff comments included the following:

> KCC 17.29.030(16): Sand and gravel excavation, provided that noncommercial excavation shall be permitted for on-site use without a conditional use permit; subject to the conditions set forth in Chapter KCC 17.60 Conditional Uses.
>
> B. KCC 17.29.020(13) processing of products produced on the premises is a permitted use in the Ag-20 Zone.

---

deemed 'approved' until so filed."). ECP had also identified the preliminary plats in its earlier comment letter and CDS would have been aware of the information since it was the department approving the short plats. (CP 248).

> E. An administrative critical area site analysis was completed by staff in compliance with Title 17A: Critical Areas. There were no critical areas on-site.

(CP 192). Planner Dan Valoff confirmed this interpretation and application of the zoning ordinance:

> You have before you tonight for consideration a conditional use permit application, Louie Gibson the land owner for a proposed amendment to the Miller conditional use permit application number CU 97, 97-17 for the expansion of an existing rock quarry on 85 acres, and to allow the rock crushing in Ag-20 zone.
>
> The parcel's currently zoned Ag-20. The parcel map – map numbers are contained in your staff report. The total size of the project would be 85 acres. Kittitas County code allows for sand and gravel extraction to be a conditional use in the Ag-20 zone. *And also Kittitas County code in Ag-20 zone allows for the processing of products to be produced on-site to be a permitted use.*

(CP 35-36) (Italics added). 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).

Community Development Services recommended approval of the conditional use permit expansion subject to identified conditions regarding hours of operation, issuance of Ecology Sand & Gravel Permit, retention of storm water and surface runoff on-site in accordance with regulating agency standards, and upgrade of two existing access points to county standards. (CP 193). The only independent public testimony supported

the application; noted huge projects on the interstate and local business needs for rock; identified the value in identifying mineral resources; and emphasized the need and benefits of competition. (CP 43-45). All neighbors provided letters of support. (CP 186, 189 and 190). No one objected except ECP. And ECP offered no evidence, only argument of legal counsel.

Following public testimony, Board of Adjustment closed the public hearing and deliberated on the application. It approved the conditional use permit with adopted findings of fact and conditions. (CP 101-105). Among the pertinent findings are the following:

> 8. The Board of Adjustment finds that immediately following the appeal hearing an open record hearing was held on May 11, 2011 and that testimony was taken from those persons present who wish to be heard. The Board of Adjustment also finds that due notice of this public hearing has been given as required by law, and the necessary inquiry has been made in to the public interest to be served by this proposed project.
>
> 9. The Board of Adjustment finds that the Comprehensive Plan's Land Use Element designates the subject parcel as Rural and the zoning as A-20.
>
> ***
>
> 11. The Board of Adjustment finds that in KCC 17.29.030(16): Sand and gravel excavation, provided that noncommercial excavation shall be permitted for on-site use without a conditional use permit; subject to conditions set forth in Chapter KCC 17.60 Conditional Uses and KCC 17.29.020(13) Processing of products

> produced on premises is a permitted use in the Ag-20 Zone.
>
> ***
>
> 13. The Board of Adjustment finds that proposed use is essential or desirable to the public convenience and not detrimental or injurious to the public health, peace or safety or to the character of the surrounding neighborhood.
>
> 14. The Board of Adjustment finds that the proposed use of the proposed location will not be unreasonably detrimental to the economic welfare of the county and that it will not create excessive public cost for facilities and services by finding that (1) it will be adequately serviced by existing facilities or (2) that the applicant shall provide such facilities and (3) has demonstrated that the proposed use will be of sufficient economic benefit to offset additional public costs or economic detriment.
>
> 15. The Board of Adjustment finds that the proposed development <u>has</u> met the requirements of KCC 17.60.010 (as listed items 12 and 13 of conditions).

(CP 103). ECP registered no objections and has not challenged the Findings of Fact. *City of Federal Way v. Town & Country Real Estate, LLC.*, 161 Wn. App. 17, 33, 252 P.3d 382 (2011) (unchallenged findings of fact in land use proceeding are verities on appeal). Kittitas County applied conditions to the permit based on evidence and ordinance standards and issued a Notice of Decision on May 16, 2011. KCC 17.60A.020. (CP 104, 101, 105). ECP filed a petition for review of the land use decision on May 22, 2011 (CP 86-95).

IV. STANDARD OF REVIEW

A. Land Use Petition Act – Standards for Review.

Land Use Petition Act (LUPA) provides the exclusive means for review of land use decisions in the state of Washington. RCW 36.70C.030(1). *Phoenix Dev., Inc. v. City of Woodinville,* 171 Wn.2d 820, 828, 256 P.3d 1150 (2011); *Woods v. Kittitas County*, 162 Wn.2d 597, 610, 174 P.3d 25 (2007). 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 Intern. Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751 49 P.3d 867 (2002); *Vogel v. City of Richland,* 161 Wn. App. 770, 777, 255 P.3d 805 (2011).

ECP challenges (i) Kittitas County's interpretation of its local ordinance, (ii) the adopted administrative appeal procedures, and (iii) SEPA Responsible Official's environmental review and threshold determination. This appeal is governed by the following standards under RCW 36.70C.130(1):

> (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 such deference as is due the construction of the law by a local jurisdiction with expertise;*

* * *

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

(emphasis added). The petitioner bears the burden to prove violation of one of the applicable standards. *Pinecrest Homeowners Assn. v. Cloninger & Assoc.,* 151 Wn.2d 279, 288, 87 P.3d 1176 (2004); and *Julian v. City of Vancouver*, 161 Wn. App. 614, 623, 255 P.3d 763 (2011).

Judicial review of a land use decision under LUPA is based on the administrative record before the Board of Adjustment. RCW 36.70C.120(1). *See also Vogel v. City of Richland*, 161 Wn. App. at 777; *Isla Verde Inter. Holdings, Inc.* 146 Wn.2d at 751. The record was certified and provided to the superior court. (CP 80-342). Supplementing the record is strictly 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 unilaterally submitted declarations to the superior court. (CP 367-408 – Declaration of Michael J. Murphy) and (CP 502-516 – Declaration of J. Jeff Hutchinson). ECP did not seek leave of court, and the supplemental material was outside the scope of RCW 36.70C.120(2). The trial court properly struck the late and improper declarations.

V. ARGUMENT

A. Rock Crushing is a Permitted Accessory Use in the A-20 – Agricultural Zone.

ECP argues that Kittitas County erroneously interpreted its own ordinance by finding that the processing of excavated on-site sand and gravel constituted the "processing of products produced on the premises" under KCC 17.29.020(A)(13). Kittitas County's interpretation is logical, practical and uncontroverted—except in the mind of one of Gibson's competitors.

1. Standard of Review for Local Ordinance Interpretation.

Interpretation of a local zoning ordinance is reviewed under the error of law standard, "... *after allowing such deference as is due the construction of the law by local jurisdiction with expertise* ... ." RCW 36.70C.130(1)(b). ECP asks the court to ignore the statutory mandate for

deference and substitute its interpretation. This argument is contrary to the clear statutory directive and established case authorities. *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,*151 Wn.2d at 290 (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 ordinance).

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.[16] The court drew an analogy to Growth Management Act (GMA) and elaborated upon the standard of review:

---

[16] Courts distinguish applying the 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.

> 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 a 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 implementing 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. (Supreme Court deferred to the local jurisdiction interpretation of "demonstrated need" under rezone ordinance and consistency with comprehensive plan). See also, *Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 415, 225 P.3d 448 (2010) ("and we must give substantial deference to both the legal and factual determinations of a hearing examiner as the local authority with expertise and land use regulations."); *City of Federal Way v. Town & Country Real Estate, LLC,* 161 Wn. App. 17, 38, 252 P.3d 382 (2011) (noting that *Douglass* directed that deference is afforded a local jurisdiction's interpretation of *local* land use regulations); and *City of Medina v. T-Mobile U.S.A., Inc.*, 123 Wn. App. 19, 24, 95 P.3d 377 (2004) ("RCW 36.70C.130(1) reflects clear legislative intention that this court give substantial deference to both legal and factual determinations of local

jurisdictions with expertise in land use regulation"). Kittitas County's interpretation of its zoning ordinance is entitled to substantial deference.

2. KCC 17.29.020(A)(13) is Clear and Unambiguous.

The beginning point for interpretation is the language of the ordinance. "Sand and gravel excavation" is permitted within the district through a conditional use permit. KCC 17.29.030.[17] ECP acknowledges that this is logical because "... [g]ravel *extraction* must, if necessary, occur where materials are located." (Br. of Appellant at 16). KCC 17.29.020(A)(13) specifically authorizes the "processing of products produced on the premises". Gibson proposed to process – crush, screen and sort -- rock produced through the on-site excavation activities. Gibson did not propose rock crushing or processing of off-site materials.

KCC 17.29.020(A)(13) is unambiguous. The court interprets local ordinances using statutory construction principles. *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 471, 61 P.3d 1141 (2003). An unambiguous ordinance will be applied according to its plain meaning.

---

[17] Noncommercial excavation of sand and gravel for on-site use does not require a conditional use permit. KCC 17.29.030(25). KCC 17.29.030 also recognizes that the following conditional uses are permitted within the zoning district: auction sales of personal property; bed and breakfast business, churches, convalescent homes, daycare facilities, golf courses, government uses essential to residential neighborhoods, guest ranches, hospitals, log sorting yards, museums, private camp grounds, public utilities substations, shooting ranges and stone quarries. Contrary to ECP's analysis and argument, each of the conditional uses is contrary to preservation of agricultural lands.

Sleasman v. City of Lacey, 159 Wn.2d 639, 643, 151 P.3d 990 (2007); *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 126, 186 P.3d 357 (2008). In construing an ordinance, the court must first look to the plain meaning of the words used in the statute and determine legislative intent. *McTavish v. City of Bellevue*, 89 Wn. App. 561, 567-68, 929 P.2d 837 (1998); *Nisqually Delta Ass'n. v. City of DuPont*, 103 Wn.2d 720, 746, 696 P.2d 1222 (1985) ("... when the language of a statute or ordinance is clear and unambiguous, there can be only one meaning and there is no room for statutory interpretation."). An ordinance is ambiguous only if it is susceptible of more than one reasonable interpretation. *City of Spokane v. Carlson*, 96 Wn. App. 279, 285, 979 P.2d 880 (1990).

This ordinance needs no construction. Rock is the product derived from **on-site** mining operations and the product is crushed, screened and sorted **on-site**. Rock crushing is the "processing of products produced on the premises."[18] Product is defined as "something that is the result of a

---

[18] ECP fails to acknowledge that processing operations are limited to "processing of products produced on the premises." Unlike other zoning district references, rock crushing is not authorized as an independent land use. As an example, the Rural-5 Zone authorizes "... [a]ll mining including, but not limited to, gold, rock, sand and gravel excavation, rock crushing, and other associated activities when located within an established mining district; ... ." The definition is all inclusive and does not limit processing operations to "... products produced on the premises." KCC 17.30A.020(7). Similar language is included in the Rural-3 Zone. KCC 17.30.020(7). Such uses are permitted within those zoning districts with a conditional use permit "... when located outside an established mining district." Associated activities include asphalt and concrete

process." MERRIAM WEBSTER ADVANCED LEARNER'S DICTIONARY, 1290 (2008). The verb "Process" means "to change (something) from one form to another by preparing, handling, or treating it in a special way." *Id.* at 1289. A court should not depart from the ordinary meaning of the words in the statute absent some ambiguity or statutory definition. *Pope & Talbot, Inc. v. Department of Revenue*, 90 Wn.2d 191, 580 P.2d 262 (1978). Kittitas County did not choose to limit processing to "agricultural products." Rather, it allowed processing of all on-site materials. The ordinance is clear, unambiguous and certain in its scope and direction.

Second, the plain language of the ordinance is logical. Since sand and gravel excavation is allowed within the zone, the efficient and economic processing of material would naturally occur on-site. The community would benefit from an economic source of processed material near a place of need.

Third, ECP argues that Kittitas County's interpretation is inconsistent with the district's purpose statement to "preserve fertile farmland from encroachment by nonagricultural land uses." (Br. of Appellant at 16). This argument is a *non sequitur*. The fact is that the ordinance clearly allows sand and gravel excavation, a nonagricultural

---

batch plant operations. The activities may be conducted within the zoning district regardless of where the product is produced.

use. The land is disturbed through the allowed excavation process, not the processing. Further, ECP offered no evidence that the property is "fertile farmland" or that excavation or processing was detrimental to farming operations.

Finally, ECP improperly asks the court to rewrite the ordinance language to permit only the " . . . processing of **agricultural** products produced on the premises". The word "agricultural" does not appear in the ordinance. ECP's argument "... impermissibly requires [the court] to add language to the ordinance." *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. The court may not ". . . judicially construct unambiguous ordinances." *Eugster,* 118 Wn. App. at 406.

3. Kittitas County Properly Interpreted its Local Ordinance and Such Interpretation is Entitled to Deference.

Even if the ordinance is ambiguous, Kittitas County properly construed it. The courts will construe only ambiguous ordinances. *Milestone Homes, Inc. v. City of Bonney Lake,* 145 Wn. App. 118, 126, 186 P.3d 357 (2008); *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007). The goal in construing a zoning ordinance is to determine legislative purpose and intent. 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 126-27 (*citing* 8 *Law of Municipal Corporations,* §25.71 at 224). The clear and unambiguous intent here 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.

Since this legal issue involves interpretation of a local ordinance, deference is properly afforded the local decision-maker. *Douglass*, 154 Wn. App. at 415. First, RCW 36.70C.130(1)(b) mandates that a local

decision maker be granted deference in its interpretation of its own laws. Second, the ordinance at issue expressly grants deference to the decision maker to determine permitted uses.[19] Third, courts consistently agree that a "'reviewing court gives considerable deference to the construction of 'the challenged ordinance' by those officials charged with its enforcement.'" *Phoenix Dev.,* 171 Wn.2d at 830;[20] *Keller v. City of Bellingham*, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979) ("considerable judicial deference is given to the construction of legislation by those charged with its enforcement."); and *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956). A court should reject deference only if there is "a compelling indication" that the interpretation "conflicts with legislative

---

[19] KCC 17.29.020 specifically identifies both permitted and conditional uses. The ordinance recognizes and addresses the reality that not every potential use can be identified with specificity. The ordinance affords the administrative official considerable latitude in permitting unlisted uses:

> 18. Any use not listed which is nearly identical to a listed use, **as judged by the administrative official,** may be permitted. In all such cases, all adjacent property owners shall be given official notification or an opportunity to appeal such decisions to the county Board of Adjustment within ten working days of notification pursuant to Title 15A of this code, Project permit application process.

(emphasis added). Kittitas County authorized its *administrative official* to make such determinations.

[20] In *Phoenix Development*, the court reviewed a rezone determination arising from ordinance interpretation. The local ordinance allowed rezone but required that there be a showing of "... demonstrated need for additional zoning as the type proposed." *Phoenix Development, Inc.,* 171 Wn.2d at 831. The city interpreted the "demonstrated need" criterian to require "an objective judgment by the city council based upon plans, goals, policies and timeframes." *Id.* The court properly deferred to the city's determination of what constitutes "demonstrated need" under the zoning ordinance.

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). In fact, "an agency's interpretation should be upheld as long as it reflects *plausible* construction" of a statute or regulation. *Seatoma Convalescent Center v. Dept. of Social and Health Svs.,* 82 Wn. App. 495, 518, 919 P.2d 602 (2007) (emphasis added).

Kittitas County's interpretation is more than plausible. Kittitas County Community Development Services is responsible for Day-to-day interpretation and application of the zoning ordinance. KCC 17.04.020 ("... administrator ... may permit in a zone any use not described in this title and deemed to be of the same character ... ." The planner in this case—Dan Valoff—is an experienced and capable land use planner. His Staff Report recognized that "... [p]rocessing of products produced on the premises is a permitted use in the Ag-20 Zone." (CP 192). Board of Adjustment concurred in this construction. (*See* CP 94 "Processing of products produced on the premises is a permitted use in the Ag-20 Zone."). This interpretation should be upheld because it is a logical, plausible construction of the ordinance.

ECP's reliance on *Sleasman* is misplaced. In *Sleasman,* the court held that the ordinance in question was unambiguous. 159 Wn.2d at 643 (ordinance addressing tree removal from "undeveloped" or "partially

developed" land). The court found that deference was not applicable where the ordinance was unambiguous. *Id.* 159 Wn.2d at 646. The court also noted that if the ordinance were ambiguous, it had to be interpreted in favor of the landowner "because land-use ordinances must be strictly construed in favor of the landowner." *Id.* 159 Wn.2d at 643 n.4 citing *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956). Further, ECP's reference to *Sleasman* is dicta.[21] See *Milestone Homes, Inc. v. City of Bonney Lake,* 145 Wn. App. 118, 127, 186 P.3d 357 (2008) (discussing questionable basis for *Sleasman* deference standard). The subsequent discussion by the court was unnecessary to decide the issue before it because it had already interpreted the ordinance based on its unambiguous language. Thus, the language cited by ECP is dicta, and it should not be followed by this Court.

Board of Adjustment and Planning Staff's interpretations are also supported by well recognized principle that ambiguous ordinances *must* be "... strictly construed in favor of the land owner". *Sleasman v. City of*

---

[21] It is also important to note that *Sleasman* improperly applied the rules set forth in *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 815, 828 P.2d 549 (1992) to the case before it because the case before it involved interpretation of a *local* ordinance. The interpretation in *Cowiche* was one of a state law, not of a local ordinance. *Id.* Thus, the rules requiring deference to a *local* decision maker's interpretation of a *local ordinance* did not apply in *Cowiche,* and *Cowiche* should not have been discussed in *Sleasman,* even as dicta. The language ECP relies on does not apply here. Kittitas County properly interpreted the ordinance and its opinion must be granted deference.

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 also 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). ECP asks the court to limit the scope of ordinance language in a manner that is contrary to the landowner. A use limitation that is not clearly articulated in the ordinance should not be read into the ordinance.

Finally, this property has been mined since 1982. The application expands the area of mining and excavation. The uncontroverted fact is that rock crushing has taken place on the property without objection since inception of mining activities. Neighboring property owners approved the proposal because the processing facilities would be located further away from residences.

> Where our residences are located we do not hear any noises from the pit when in operation. It would be helpful if Mr. Gibson's **request to move his crushing and separating machines** to the back of his property would be approved.

(Ex. 22 and 23). Board of Adjustment's interpretation of the ordinance is consistent with the established activities on this property.

B. Kittitas County's Issuance of Determination of Nonsignficance was not Clearly Erroneous.

ECP contends that Kittitas County's issuance of a DNS (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. (Br. of Appellant at 26). This aspect of the appeal is, quite frankly, frivolous.

1. Standard of Review.

A SEPA threshold determination is reviewed under the "clearly erroneous" standard. *Chuckanut Conservancy v. DNR*, 156 Wn. App. 274, 286, 232 P.3d 1154 (2010). A court will overturn a DNS (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 Preserv. & Prot. Ass'n v. King County*, 87 Wn.2d 267, 273-276, 552 P.2d 674 (1976); *Douglass*, 154 Wn. App. at 422. The agency's threshold decision "... shall be accorded substantial weight." RCW 43.21C.090; *Douglass*, 154 Wn. App. at 423; *Anderson v. Pierce County,* 86 Wn. App. 290, 302, 936 P.2d 432 (1997); *Indian Trail Property Owners Assoc. v. City of Spokane*, 76 Wn. App. 430, 442 886 P.2d 209 (1994).

2. Kittitas County Did Not Violate SEPA Rules Regarding Use of Existing Environmental Documents.

ECP argues that Kittitas County engaged in an improper procedure governing use of existing environmental documents. (Br. of Appellant at 26-35). It claims that the Environmental Checklist submitted and reviewed by Kittitas County was "... merely a copy of the 2008 DNR environmental checklist that had been altered to revise the description of Gibson's proposal." (Br. of Appellant at 26). The fact is that Kittitas County reviewed two environmental checklists that had been prepared for the project—one for the surface mining component before DNR (CP 122-135) and one for the conditional use permit (CP 268-279). The checklists were for the same project.[22]

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

---

[22] ECP makes the odd argument that there was a failure to submit an environmental checklist and that Kittitas County erroneously argued that a SEPA checklist is merely "optional". Brief of Appellant – 27. An extended argument is then provided in support of the proposition that environmental checklists are "mandatory." *Id.* at 27-30. The uncontroverted fact is that Gibson provided two (2) environmental checklists for the project and both were reviewed prior to issuance of the threshold decision. Adopted 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 checklist may be prepared by either the lead agency or applicant. WAC 197-11-315(4). The lead agency makes its threshold determination based upon information *reasonably sufficient* to evaluate the environmental impact of the proposal. WAC 197-11-335.

> 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.*

(emphasis added). Kittitas County combined environmental documents used by each agency with jurisdiction. Two separate permits were required for the operation—a surface mining permit from DNR and a conditional use permit from Kittitas County. Both applications included specific identification of the properties (five identified parcels); topographic mapping of existing and proposed operations; and a mining plan. It is logical and compliant to combine environmental documents in order to reduce duplication and paperwork.[23]

Second, ECP acknowledges that both the 2008 DNR Environmental Checklist and 2010 Kittitas County Environmental Checklist were reviewed by SEPA Responsible Official and available for public review. ECP argues that the proposals were not identical - "...

---

[23] WAC 197-11-600(2) recognizes that "... [a]n agency may use environmental documents that have previously been prepared in order to evaluate proposed actions, alternatives, or environmental impacts. The proposals may be the same as, or different than, those analyzed in the existing documents." An agency acting on the same proposal shall use the environmental documents unchanged except for certain circumstances. WAC 197-11-600(3). Kittitas County did not utilize the "adoption" option because it did not use the existing environmental document "... to meet its responsibilities under SEPA." WAC 197-11-600(4)(a). It independently reviewed the two checklists in the context of the conditional use permit application.

[t]he 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." (Br. of Appellant at 26-27).[24] Kittitas County was fully aware of the purported distinctions prior to issuance of the threshold decision.[25] It should be noted, however, that both checklists were identical in identification of the five (5) parcels (totaling 84 acres) and the sequential mining plans. DNR focused on the *excavation* area of 60 acres. The CUP covered the entire 84 acres. ECP also failed to note that Gibson removed "washing operations and temporary concrete and asphalt plants ..." from the application. (CP 255). The reduction in the scale of the application does not require reprocessing of 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 either a new threshold determination or a new or supplemental draft or final Environmental Impact Statement).

---

[24] ECP argues that the remainder of the 2008 SEPA Checklist was unchanged and that Gibson "... gave no serious consideration to the impacts of his current proposal." (Brief of Appellant – 27). Kittitas County had both the original checklist and a revised checklist. (CP 122-128 - DNR Environmental Checklist; and CP 265-274 – Kittitas County Environmental Checklist). Kittitas County was fully cognizant of both applications and the differences. ECP pointed out the differences prior to the threshold decision. (CP 248-249).

[25] ECP submitted its SEPA comment on August 12, 2010 (CP 247-251). The purported discrepancy and improper reuse of prior environmental documents was noted. CDS issued the Determination of Nonsignificance on October 21, 2010. (CP 244).

Third, ECP tries to make a technical procedural argument that Kittitas County must go through a formal "adoption" process if there has been environmental review by another agency. (Br. of Appellant at 31-33).[26] Kittitas County reviewed prior environmental documents but did not formally *adopt* the document. WAC 197-11-600 recognizes the discretionary use of existing environmental documents and 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 analysis or information about a proposal but does not

---

[26] ECP argues that "... these rules must be followed ..." and cites the case of *Thornton Creek Legal Defense Fund v. Seattle*, 113 Wn. App. 34, 51-52, 52 P.3d 522 (2002). It is argued that *Thornton Creek* stands for the proposition that an "... agency should have adopted existing SEPA document rather than incorporating it by reference." The statement is misleading and inaccurate. The court in *Thornton Creek* specifically held that the failure to circulate a "statement of adoption" was harmless error and not fatal to the environmental review process. *Id.* 113 Wn. App. at 55-56, citing *Concerned Taxpayers Opposed to Modified Mid-South Sequim Bypass v. Department of Transportation*, 90 Wn. App. 225, 233, 951 P.2d 812 (1998) (failure to formally incorporate a report into an FEIS was harmless error when the report was circulated with the FEIS and was considered by transportation commission).

> 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) the new information indicating the proposal's probable significant adverse environmental impacts.

(emphasis added). The method and manner of use of prior environmental review is within the discretion of the reviewing agency. An agency is not required to *adopt* existing environmental documents. *Moss v. City of Bellingham,* 109 Wn. App. 6, 28, 31 P.3d 703 (2001) ("... agencies are not required to formally 'adopt' existing environmental documents to meet SEPA requirements ... .") Kittitas County included prior environmental documents in its review and those documents were available for public review. The court in *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 50-51, 52 P.3d 522 (2002) recognized that incorporation by reference is lesser standard and requires only identification of the incorporated material and that the document be available for review. ECP specifically referenced both checklists in its SEPA comments and each was available for review. (CP 247-251).

Finally, a harmless procedural error may not serve as a basis for reversal of a land use decision. RCW 36.70C.130(1)(a). LUPA is

consistent with SEPA case law. *Concerned Taxpayers Opposed to Modified Mid-South Sequim Bypass v. Department of Transportation,* 90 Wn. App. 225, 233, 951 P.2d 812 (1998) (failure to formally incorporate prior environmental document was harmless error). The court in *Thornton Creek* held that the failure to issue a "statement of adoption" was harmless error.

> Even when there are procedural errors in the decision-making process, a land use decision may not be reversed under LUPA if the court determines the errors were harmless. We "review procedural errors during the EIS process under the rule of reason and where such errors are of no consequence, they must be dismissed."

Thornton Creek Legal Defense Fund, 113 Wn. App. at 54. The fact is that Kittitas County reviewed both checklists, detailed site and operational plans, circulated notice and accepted comment, and received no substantive objections to the proposal. Even if there was an error in the process (which there was not), the error was harmless.

3. ECP Offers No Evidence of Incomplete Review or Lack of Information.

ECP asserts that "... the DNS is clearly erroneous because no meaningful SEPA review of the project occurred before the County issued the DNS." (Br. of Appellant at 33). To meet its burden of proof under LUPA and SEPA, the appellant must present actual evidence of probable significance adverse impacts of the project. *Boehm v. City of Vancouver*,

111 Wn. App. 711, 719, 47 P.3d 137 (2002); and *Moss v. City of Bellingham*, 109 Wn. App. 6, 23, 31 P.3d 703 (2001).

The uncontroverted facts are that planning staff reviewed the application and environmental checklists; was familiar with the existing site and operations; complete critical area assessments; and followed applicable notice and comment procedures. The application and anticipated environmental determination were circulated to adjacent property owners and agencies. Not a single agency with jurisdiction objected to the proposed DNS or identified a probable significant adverse environmental impact. *See Pease Hill Commty. Group v. Spokane County,* 62 Wn. App. 800, 810, 816 P.2d 37 (1991) (holding threshold decision was proper where MDNS circulated to agencies and "... [s]ignificantly, no agency recommended an EIS be required.") Public comment confirmed that the project was not environmentally significant and that there were no issues regarding noise, transportation or air quality. Asphalt and concrete batch plant operations were removed from the application.[27] An Environmental Impact Statement (EIS) is required only for "... major

[27] ECP argued that there "... was no consideration of the effects of ... concrete and/or asphalt plants on noise, dust, toxins, odors, vibration, water or traffic." Brief of Appellant – 35. Asphalt and concrete batch plant operations were removed from the application. (CP 255). Transportation impacts were addressed by Kittitas County Public Works (CP 256-257). Issues related to water and air quality are addressed by Department of Ecology permits. (CP 260). (Sand and Gravel General Permit and General Order of Approval for Portable for Rock Crushers 07-AQG-001).

actions having a probable significant, adverse environmental impact." RCW 43.21C.031(1). ECP offered no evidence of significant adverse impacts of the project. *Boehm v. City of* Vancouver, 111 Wn. App. 711, 719-721, 47 P.3d 137 (2002) (no evidence presented to establish impacts exist). ECP offered no evidence of probable significant adverse environmental impacts.

Second, the legislature sought to address unnecessary, overlapping and redundant environmental review processes. RCW 36.70B.010. Local government environmental review need not duplicate environmental review and mitigation contained in development regulations and other applicable laws. RCW 36.70B.030(4); RCW 43.21C.240; and WAC 197-11-330(1)(c). Kittitas County CDS recognized that air and water quality impacts from rock crushing and mining are addressed by DOE permit processes. See fn.6.

Finally, both Kittitas County and DNR reached the same conclusion regarding the projects environmental impacts. Both concluded that the proposed operation would NOT have a significant adverse environmental impact. It is incongruous to conclude that the threshold determination was "clearly erroneous" when both agencies with jurisdiction came to the same conclusion based upon similar information and material. An agency's threshold environmental determination "...

shall be accorded substantial weight." RCW 43.21C.090. The agency's determination may be reversed only if "clearly erroneous" and the reviewing court "... left with the definite and firm conviction that a mistake has been committed." *Indian Trail Property Owner's Ass'n v. City of Spokane*, 76 Wn. App. 430, 441, 886 P.2d 209 (1994).

C. Kittitas County Followed Administrative Appeal Procedures and was not Required to Provide an Open Record Hearing.

ECP finally contends that Kittitas County was required to provide an "open record hearing" for its SEPA appeal. ECP acknowledges that Kittitas County followed its adopted procedures but seeks to collaterally attack provisions related to administrative review of SEPA threshold determinations—KCC 15.04.210 and Title 15A of the Kittitas County Code. The challenge is under RCW 36.70C.130(1)(a).

First, Kittitas County followed its 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 is based on the administrative record with all parties afforded a full opportunity to present written appellate argument. KCC 15A.07.010 (CP 109). In a manner similar to LUPA, the appeal is based on the administrative record and "...

dealt with completely in writing." (CP 108).[28] BOA considers the appeal under the following rules:

> An administrative appeal 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.

KCC 15A.07.010(3) (emphasis added). Kittitas County followed the adopted procedure, which is the process followed for review of all *administrative decisions*.[29] ECP submitted written argument and has not made any claim that it was denied due process rights.

Second, Kittitas County did not have to permit a SEPA appeal. Local jurisdictions are not required to provide for administrative appeals

---

[28] Kittitas County limited administrative appeal review to the record and allowed only written legal argument. No new evidence could be presented in the appeal process. This procedure is identical to the process that would exist if an administrative appeal was not allowed and the decision was only subject to review under LUPA. The superior court in a LUPA appeal bases its review upon the administrative record; accepts and considers only legal argument based upon the record; and precludes submission of new evidence. RCW 36.70C.120. Kittitas County's process mirrors LUPA.

[29] It should be noted that the administrative appeal procedure relates to all "administrative land use decisions." KCC 15A.07.010. Many land use decisions (including threshold determinations) are made solely by staff and do not require a public hearing process. Administrative decisions include site plan reviews, zoning variances, short plats, segregation/lot line adjustments and similar land use applications. Any appeal of an administrative land use decision follows the same administrative review procedures. KCC 15.A.07.020. The review is on the record and argument is written.

of SEPA determinations. WAC 197-11-680(2) and (3) set forth the 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 30.76B.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 ... ." The adopted process is also consistent with RCW 36.70B.060(6) which provides:

> 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* the open record hearing, it shall be a closed record appeal before a single decision-making body or officer; ... .

Again, the statutory structure recognizes that the local jurisdiction may provide for appeal of threshold determination provided that there shall be no more "than one consolidated open record hearing on such appeal." The statutory directive is a limitation on the number and type of hearings, not a mandate for an open record hearing. In fact, under RCW 30.70B.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 (Lexis 2006). Two appeals are not permitted, and a single closed record appeal is perfectly acceptable.

Third, no statutory authority exists requiring an open record hearing.[30] ECP's convoluted 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) and WAC 197-11-721. A "project permit application" means "... any land use or environmental permit or license

[30] ECP sites no statutory authority for the proposition that an open record hearing is required for administrative appeals. All that is argued is that "... [i]t should be obvious that a meaningful closed record appeal cannot occur unless and until an open record hearing has been held." Brief of Appellant at 39. Reference is made only to WAC 197-11-721 (definition of "closed record appeal") and RCW 36.70B.060(6) (which provides that administrative appeals of threshold determinations "... shall provide for no more than one consolidated open record hearing on such appeal.")

required from a local government for a 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. The referenced language is simply inapplicable to this proceeding.

D. ECP Waived The Issues Raised Under Its Assignment of Error Issues IID, E, and F Because It Did Not Brief the Issues.

ECP raises three issues for which it fails to provide any argument or authority. "If a party raises an issue but fails to provide argument relating to the issue in his or her brief, the party waives any challenge to the alleged issue." *Yakima County v. Eastern Wash. Growth Mgmt. Hearings Bd.,* 146 Wn. App. 679, 698, 192 P.3d 12 (2008). Such

arguments that are not supported by legal argument are considered abandoned. *Valley View Indus. Park v. City of Redmond,* 107 Wn.2d 621, 630, 733 P.2d 182 (1987). The issue must be adequately briefed to avoid waiver. *In re Dependency of M.S.D.,* 144 Wn. App. 468, 478 n.7, 182 P.3d 978 (2008).

Here, ECP assigned error to (1) the trial court's striking the Declaration of Michael J. Murphy; (2) the trial court's striking the Declaration of J. Jeff Hutchinson; and (3) the trial court's denial of ECP's motion to strike alleged false assertions in Gibson's LUPA brief. (Assignments of Error D, E, and F). Yet, ECP's brief never provides argument or legal authority as to why it alleges the trial court erred in striking the declarations. ECP makes an obtuse statement that "... [i]t is not necessary for this Court to address the trial court's decision to strike the declaration as long as the Court ignores Gibson's unsubstantiated and false assertions. . . .." (Br. of Appellant at 13 n.1). This statement, coupled with nothing more than a citation to the trial court record, is insufficient to raise the issue. *Hawkins v. Casey,* 38 Wash. 625, 626, 80 P. 792 (1905) (merely pointing out the pages in the record of alleged error is insufficient to raise the issue and the court will not "enter on an independent investigation."). This Court should refuse the address these issues even if raised in the reply brief because ECP failed to adequately

brief them in its opening brief, and this Court "do[es] not address issues that an appellant raises for the first time in a reply brief." *Johnson v. State,* 164 Wn. App. 740, 753, 265 P.3d 199 (2011).

E. Gibson and the County Are Entitled to Attorneys' Fees as Prevailing Parties Under RCW 4.84.370.

Gibson and the County are entitled to recover attorneys' fees and costs if they are the substantially prevailing parties on appeal. RCW 4.84.370 provides that "reasonable attorneys' fees and costs *shall be awarded* to the prevailing party or substantially prevailing party" for appeals of:

> (1) . . . a decision by a county, . . . to issue, . . a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if [the prevailing party]:
>
> (a) . . . was the prevailing or substantially prevailing party before the county, city, or town ...; and
>
> (b) . . . was the prevailing party or substantially prevailing party in all prior judicial proceedings.

Gibson submitted a conditional use permit application and prevailed before (1) Kittitas County Board of Adjustment and (2) Kittitas County Superior Court. The issuance of the conditional use permit has been affirmed in each instance and, if affirmed again on appeal, entitles

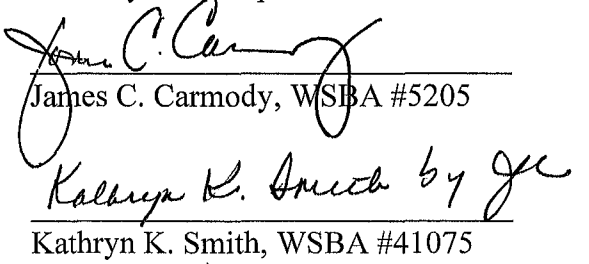
Gibson and the County to fees under the statutory structure. See *Feil v. Eastern Wash. Growth Mgmt. Hearings Bd.*, 153 Wn. App. 394, 417, 220 P.3d 1248 (2009); *Julian v. City of Vancouver*, 161 Wn. App. 614, 633, 255 P.3d 763 (2011); *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 383-84, 223 P.3d 1172 (2009). Because this provision applies to all successful parties on appeal, both Gibson and the County are entitled to attorney fees.

VI. CONCLUSION

For the reasons set forth above, Mr. Gibson respectfully requests this Court to affirm the trial court's decision and award him attorneys' fees and costs.

DATED this 21ST day of February, 2012.

VELIKANJE HALVERSON P.C.
Attorneys for Respondent Gibson



James C. Carmody, WSBA #5205

Kathryn K. Smith by JC

Kathryn K. Smith, WSBA #41075

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 21ST day of February, 2012, I caused to be served via the method indicated below, a copy of the following documents:

- Respondent Brief of 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	☒ Via United States 1st Class Mail ☒ 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	☒ United States 1st Class Mail

DATED this 21ST day of February, 2012.

VELIKANJE HALVERSON P.C.

Tori Durand

Tori Durand
Legal Assistant to James C. Carmody