

70527-0

No. 70527-0

**DIVISION I, COURT OF APPEALS  
OF THE STATE OF WASHINGTON**

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RAY E. GABELEIN and LAURIE J. GABELEIN, husband and wife,

Plaintiffs-Respondents

v.

DIKING DISTRICT NO. 1 of ISLAND COUNTY of the State of  
Washington,

Defendant-Appellant

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ON APPEAL FROM  
ISLAND COUNTY SUPERIOR COURT  
(Hon. Vickie I. Churchill)

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**APPELLANT DIKING DISTRICT NO. 1'S OPENING BRIEF**

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## I. INTRODUCTION

Over the nearly 100 years of its existence, Diking District No. 1 of Island County (the “District”) has used a variety of methods to apportion its operating costs among benefitted properties, including, for many decades, according to acreage. While several benefit rolls have been recently invalidated because of the failure of prior District Board of Commissioners (the “Board”) to follow proper notice and hearing procedures, until now none of the various apportionment methods the District has used over the years has ever been held to be a statutorily impermissible method.

This case is the fifth in a series of lawsuits filed against the District flowing from a contract the District entered into in 2004 to expand its drainage facilities. Two lawsuits challenging assessments made in 2008 and 2010 on procedural grounds (which lead to an order freezing the District’s bank account) prompted the Board to carefully consider and apply the applicable statutory requirements to establish a legally supportable and equitable method for funding the District’s continuing functioning.

In considering and adopting the October 23, 2013 Base Benefit Roll (“2012 Base Benefit Roll” or “2012 Roll”) that is the subject of this appeal, the Board meticulously followed all of the notice and hearing

requirements and devoted significant time and attention to determining continuous base benefits in order to establish an equitable and legally enforceable method to apportion the costs of the District's continuous functioning. Over the course of four days of public hearings the Board considered written objections, heard comments, deliberated, revised the initial criteria, and recalculated and adjusted the draft continuous base benefits before finally adopting the 2012 Roll. In this current lawsuit, a former board chair and his wife, Raymond E. and Laurie J. Gabelein (the "Gabeleins"), whose property was an intended beneficiary of the expanded drainage facilities constructed under the 2004 contract do not dispute that the District followed all the proper procedural requirements. Rather, the Gabeleins challenge the method the Board used to determine the drainage continuous base benefits with respect to a single parcel they own, R32918-348-3990.

The trial court granted the Gabeleins' motion for summary judgment determining that the District failed to properly construe and apply Chapter 85.18 RCW based on an erroneous application of case law construing the term "special benefits" under Chapter 35.44 RCW (which governs cities' funding the one-time cost of construction of local improvements) to construe and apply the term "continuous base benefits" under Chapter 85.18 RCW (which provides a method for diking districts

to finance the district's ongoing continuous functioning). The egregious impact resulting from the trial court's erroneous decision was compounded because it in turn provided the improper and erroneous justification for the trial court's award of \$45,000.00 in attorneys' fees and costs in favor of the Gabeleins, against the District.

The trial court also misunderstood the difference between (1) the "continuous base benefits" determined under RCW 85.18.030, which are a "dollar rate" determined only when a new roll is adopted or an existing roll is modified and (2) the separate calculation each year of an annual estimate of operating costs made under RCW 85.18.160, which budgeted costs the county assessor then levies against property in the district in proportion to the continuous base benefit dollar rates reflected on the current base benefit roll. That misunderstanding lead the trial court to rule in the alternative that, with respect to the one Gabelein parcel at issue, the drainage base benefit on the 2012 Roll violated the requirement in RCW 85.18.030 that the base benefit dollar rates reflected on a roll cannot exceed 100% of a parcel's assessed value. Instead of comparing the parcel's continuous base benefit dollar rate as shown on the roll to the parcel's assessed value (as required by RCW 85.18.030), the court mistakenly focused on the amount of the county's 2013 annual assessment levied under RCW 85.18.160, which amount is not subject to any statutory

limitation. Consequently, the trial court erroneously enjoined the county assessor from ever levying an amount greater than the drainage base benefit dollar rate reflected on the 2012 Roll, not only for the 2013 levy but also for all “calendar years beyond 2013.” CP 8.

Because the Board followed all the statutory notice and hearing requirements, and there was a factual basis for the method the Board used to determine drainage continuous base benefits for the 2012 Roll as applicable to the Gabelein property at issue (a method the District had used before including in a 1960 roll that was also adopted pursuant to RCW Ch. 85.18), the Board requests that this Court reverse the trial court’s orders and judgment and affirm the 2012 Roll as applied to the Gabelein property as having been adopted in conformance with Chapter 85.18 RCW and strike the award of attorneys’ fees.

## **II. ASSIGNMENTS OF ERROR**

1. The Superior Court erred in granting the Gabeleins’ motion for summary judgment.
2. The Superior Court erred in awarding the Gabeleins’ attorneys’ fees.
3. The Superior Court erred in precluding the District from assessing future annual levies against the Gabelein parcel R32918-348-

3990 for drainage “continuous base benefits” in excess of \$201.37 per year for “calendar years beyond 2013.”

### **III. ISSUES PRESENTED**

1. Whether Chapter 85.18 RCW requires that “continuous base benefits” be determined by calculating the difference in each parcel’s fair market value before and immediately after receiving the benefit.

2. Whether Chapter 85.18 RCW precludes the consideration of benefitted acreage on a proportional basis for purposes of determining drainage “continuous base benefits” afforded to properties within the District.

3. Whether RCW 82.18.030 imposes a limit on the amount to be levied against a property under RCW 85.18.160.

4. Whether the trial court’s award of attorneys’ fees was proper when such award was based on the District’s purported failure to comply with dicta in a prior court’s “ruling” on a claim that was expressly determined to be “moot” and not “ripe for adjudication.”

### **IV. STATEMENT OF THE CASE**

#### **A. Statement of Facts.**

- 1. Historically, the District Has Determined “Base Benefits” Based on Various Methods, Including Acreage.**

The District was created in 1914 and proceeded to build a dike and related improvements. CP 620. Its first benefit roll was adopted “pursuant to a judgment entered in Island County Superior Court” on June 26, 1914. CP 621. In this initial, judicially approved benefit roll, “benefits were allocated according to the acreage of benefitted parcels of property, rather than according to the true and fair value of the parcels.” *Id.*

In 1931, the District built its first drainage facilities and, on May 16, 1931, adopted a drainage benefit roll that, like the initial diking benefit roll, allocated base benefits “in accordance with benefits received per acre.” *Id.* Additional drainage facilities were constructed in 1944. Following the construction of those facilities, assessments for the maintenance of the District’s drainage facilities continued to be “levied in ***proportion to the acreage*** of the parcels of property within the benefitted area to be assessed for drainage.” *Id.* (emphasis added) As contemplated by RCW 85.18.080, these benefit rolls remained in place and were used to allocate the annual levy among the benefitted properties year after year, until a roll was “modified, amended, or changed.”

Thus, while the total amount of funds levied to pay for District operating costs changes from year to year, the continuous base benefit assigned to each property used to allocate the levy amount among

benefitted properties does not change unless the Board affirmatively acts to modify, amend or change the roll. Chapter 85.18 RCW, which is just one of several available methods, sets forth the procedures the Board must follow to adopt a valid roll consistent with that statutory scheme.<sup>1</sup>

On October, 28, 1960, the District “undertook the necessary procedures under Chapter 85.18 RCW to modify the diking base benefits, allocating diking base benefits “*in proportion to the true and fair value*” of diking benefitted properties. CP 622 (emphasis added).<sup>2</sup> The District made no revisions to the drainage base benefits, which “continued to be levied *in proportion to the acreage*” of drainage benefitted parcels “rather than the true and fair value” of drainage benefitted parcels. *Id.* (emphasis added).

In 1986, the Board modified the benefit roll for the drainage facilities pursuant to Chapter 85.18 RCW. The 1986 roll added parcels on Sunlight Beach to the roll of drainage benefitted properties (CP 626) and determined that “the continuous base benefits which each of the properties

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<sup>1</sup> Diking districts created after 1985 must adhere to Chapter 85.38 RCW, while districts created before 1985 may elect to use different methods. *See* RCW 85.05.135.

<sup>2</sup> Thus, the diking base benefits established in 1960 pursuant to Ch. 85.18 RCW were *not* based on a determination of property values “before and after” the diking facility improvements were constructed in 1914, despite the trial court’s ruling that is the subject of the current appeal that the District was required to comply with dicta in the trial court’s previous statement in an earlier case suggesting that continuous base benefits are “measured by the difference in value before and after receiving the benefit, if any.” *See* CP 174.

on the roll of the district are receiving and will receive ... are equal to 100% of the true and fair value of such property in money.” CP 627.

**2. The Only Time the District’s Roll Has Been Struck Down Was When Prior Boards Failed to Follow Required Notice and Hearing Procedures.**

This case is one in a series of cases that has flowed from the District’s decision in 2004 to enter into a contract regarding the expansion of the District’s drainage facilities, including building a new pump to provide increased drainage to low lying property, including “agricultural land and open space historical uses” that had been experiencing increased flooding due to increased runoff from upland development. CP 603. The new pump was constructed in 2008 and the Old Board passed a resolution, without notice or public hearing that attempted to resurrect a prior roll that had been adopted in 1995 and was “last used in 2001” as the base for the 2009 levy.

In 2009 Citizens in Support of Useless Bay Community (“Citizens”) a non-profit corporation whose members own land within the District, filed suit (“2009 Lawsuit”) claiming that: (1) that the District’s entering into the 2004 Contract to build the new pump was *ultra vires* and void; (2) the 2008 resolution to reinstate the 1995 Roll to establish the base benefits for the 2009 levy was unlawfully adopted without the requisite notice or public hearing; and (3) that the diking district funding

mechanisms under each of Chapters 85.05, 85.18, and 85.38 are disguised property taxes and, as such, violate the Uniformity Clause of the Washington Constitution. In 2010, while the 2009 Lawsuit was pending, the Old Board adopted a resolution purporting to resurrect a prior roll that had been adopted in 1986 to establish the base benefits for the 2010 annual levy. Citizens filed a second lawsuit (the “2010 Lawsuit”), reasserting its challenge to the 2004 Contract and challenging the 2010 resolution as invalid because it was also adopted without notice or public hearing.

Although the cases were not formally consolidated, the trial court issued a joint ruling covering both cases (CP 377) holding: (1) the District’s execution of the 2004 Contract was “not an ultra vires act” since the District “clearly has the authority to enter into contracts to construct and maintain drainage systems” (CP 381); (2) the 2008 and 2010 resolutions attempting to resurrect prior base benefit rolls were invalid because the Old Board had failed to provide the requisite notice and had not conducted a public hearing as required by statute (CP 379); and (3) Citizens’ challenge to the constitutionality of Chapters 85.05, 85.18, and 85.38 was mooted by the invalidity of the challenged assessment, and “further, the court cannot conclude that the statute in question is unconstitutional.” CP 383. To implement its ruling, the trial court entered

companion judgments in each case as follows: (1) Citizens' claim that the 2004 Contract "is *ultra vires* and void is DISMISSED" (CP 386 and 390); (2) Citizens' declaratory judgment claim that levies for 2009 and 2010 "constitute an unconstitutional tax" were "rendered moot by part 3 of this judgment," were "not ripe" and, accordingly "this claim is DISMISSED" (CP 386 and 390); (3)(a) The District's 2008 and 2010 resolutions adopted without notice and public hearing "are void, are reversed, and are quashed" (b) the 1986 and 1995 rolls "are ineffective to support" levies for years after 2006 and (c) the District was "enjoined" from collecting levies for the years 2009, 2010 and 2011. CP 386-7 and 390-91)

Unfortunately, dicta in the trial court's letter opinion and ensuing Orders and Judgments suggesting what would need to occur in the event of a potential future Uniformity Clause challenge to the constitutionality of a roll adopted pursuant to Ch. 85.18 to become ripe included a statement that has caused substantial confusion and controversy. Implying that "continuous base benefits" under Ch. 85.18 RCW are similar to "special benefits," under Ch. 35.44 Judge Churchill noted that "Washington courts have held that a *special benefit* is measured by 'the difference between the fair market value of the property immediately after the special benefits have accrued and the fair market value of the property before the special benefits have accrued.'" *Doolittle v. City of Everett*, 114

Wn.2d 88, 93, 786 P.2d 253 (1990), citing *In re Schmitz*, 44 Wn.2d 429, 434, 268 P.2d 436 (1954).” CP 382 (emphasis added).

It is this dicta that forms the basis of the trial court’s ruling in this case. CP 57-58; 386; Tr. p. 41, l. 25 to p. 42, l. 3.

**3. A New Board Adopted the 2012 Base Benefit Roll In Accordance with the Requirements of Chapter 85.18 RCW**

In February 2012, Thomas Kraft was elected to the District’s current Board of Commissioners (“New Board”), unseating former Commissioner Raymond E. Gabelein. CP 671. The New Board, being cognizant of the procedural errors committed by the Old Board in its attempts to provide funding for the District’s continuous operations, desired to remedy past procedural defects and adopt a roll in accordance with applicable procedure. The New Board decided to adopt a roll following the procedures in Chapter 85.18 RCW, as the District had done both in 1960 and in 1986 (using different methods for determining drainage base benefits; acreage in 1960 and assessed value in 1986). CP 731. Commencing on July 27, 2012, and continuing until October 23, 2012, the New Board conducted several meetings and public hearings consistent with the provisions of RCW Chapter 85.18 in furtherance of adopting the 2012 Base Benefit Roll. CP 731-34.

In accordance with RCW 85.18.020, on July 27, 2012, the New Board held a special meeting at which it considered and unanimously adopted a “Resolution to consider the filing of Roll required to be prepared and filed with Board pursuant to RCW Chapter 85.18.” CP 736. The same day, the proposed Roll was filed. *Id.* During the July 27 special meeting, the New Board considered, discussed, and received input regarding the criteria to be followed in determining the properties to be included in the Roll, and filed a statement of these criteria with the District. CP 731. The New Board scheduled a public hearing on the proposed Roll for September 1, 2012, and provided timely and proper notice of the time and place of the public hearing to each owner or reputed owner of the property listed on the proposed Roll by mail and publication in accordance with RCW 85.18.040. CP 731-32.

On September 1, 2012, the New Board commenced the public hearing. CP 732. As required by RCW 85.18.030, attendees were informed that the purpose of the hearing was to determine the continuous base benefits received by the properties to be listed on the Roll from the District’s improvements, and that any objections must be in writing and filed with the Board prior to the adoption of the Roll. *Id.* During the

hearing, the New Board received and logged objections to the Roll.<sup>3</sup> *Id.* Throughout the hearing (including three continuations thereof on September 21, October 4, and October 23), the New Board engaged in deliberations and discussions regarding the proposed Roll and the objections thereto. CP 732-34.

On October 23, 2012, after having fully considered all written objections, the Board adopted a revised Roll (the 2012 Roll) determining the continuous base benefits which each of the properties thereon receive from the District's facilities. CP 734-35. Consistent with past rolls that had never been contested,<sup>4</sup> the District's 2012 Roll used acreage to establish drainage base benefits, and used property tax assessed value to establish diking base benefits. CP 735. In addition to being consistent with Chapter 85.18 RCW, the 2012 Roll is also consistent with the alternative method provided in Chapter 85.38, under which the total assigned benefit on all benefited properties must add up to \$1,000. *See* RCW 85.38.160(2).

The New Board's determination of base benefits is based on the proportion of benefited acres to the total acres benefited, and the dollar

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<sup>3</sup> During the hearing, the Gabeleins filed written objections, CP 721-28 as required for their objections to be considered by the both New Board and the court. RCW 85.18.050.

<sup>4</sup> The base benefit roll adopted in 1960 following the procedures in Ch. 85.18 RCW determined drainage base benefits "in proportion to the acreage" of benefitted parcels. CP 622.

amount of the benefits is derived proportionately. *See* CP 765. A simple equation graphically confirms this point. The District’s assessment methodology is computed using the following equation:

$$\text{Benefitted Acreage of Parcel} \div \text{Total Benefitted Acreage} \times \$1,000 = \text{Drainage Base Benefit}$$

*See* CP 765-69. Thus, a property with an assigned base benefit on the Roll of \$1.00 reflects that 0.1% of the benefitted acreage is on that property, and will result in 0.1% of any given year’s levy being billed to that parcel. Applying that equation to the Gabelein property yields a drainage “continuous base benefit” of \$201.37 for each \$1,000 of benefit afforded to all benefitted properties. As noted in the District’s criteria:

The acreage of Property at or below the 5 foot NAVD88 elevation as depicted on the TMI Land Surveying Map dated 5/03/2012 will be used to **apportion** the continuous base benefits to such properties within the District afforded such protection.

CP 765 (emphasis added).

As required by statute, the 2012 Roll identifies the “determined value ... as last assessed and equalized by” the Island County Assessor for each property. *See* RCW 85.18.020. In addition, the 2012 Roll sets forth the “continuous base benefit” to each property as determined by the New Board at the hearing. *See* RCW 85.18.010.

**B. Procedural History.**

On October 31, 2012, the Gabeleins filed a Petition for a Writ of Review in accordance with RCW 85.18.100. CP 770. On November 1, 2012, the Superior Court issued the requested writ, ordering the District to submit a certified transcript of the proceedings to be reviewed. CP 855. On November 8, 2012 the District submitted the certified transcript of proceedings to the Superior Court. CP 714-69.

On March 19, 2013, the Gabeleins filed a motion for summary judgment arguing, *inter alia*, that the New Board improperly determined the continuous base benefits to the properties on the 2012 Roll based on acreage rather than by calculating the difference in fair market value of each drainage benefitted property “before and after” the District’s drainage facilities were constructed. CP 672, 678, 698, and 705. The Gabeleins also argued that a 2013 assessment levied based on the 2012 Roll was improper because it allegedly exceeded 100% of the true and fair value of the benefitted portions of the Gabeleins’ property. CP 691-92, 700-01. On April 8, 2013, the District filed an opposition arguing that the portion of the court’s 2011 final judgment the Gabeleins relied on was, “at best, dicta”, CP 349, and that the determination of drainage base benefits on the 2012 Roll complied with the statutory requirement that *base benefits* – not assessments – must not exceed 100% of the true and fair

value of the property. CP 345-46. Indeed, in a proposed order filed with their motion for summary judgment, the Gabeleins admitted that the drainage base benefits allocated to their property did not exceed the value of the property. CP 150.

Over the District's objection, the Superior Court allowed the Gabeleins to admit extraneous evidence submitted along with their motion for summary judgment.<sup>5</sup> Further, the Superior Court granted the Gabeleins' motion for Summary Judgment, holding that Chapter 85.18 RCW requires continuous base benefits to be calculated based on the "before and after" values of the benefited properties, and that there had been a drainage assessment on the Gabeleins' property that "materially exceed[ed] the determined value...of the only acres...that the District has determined to benefit from the District's drainage facilities." CP 173. This ruling also served as the basis for the Superior Court's award of nearly \$45,000.00 in attorney's fees. CP 173-75, 160; Tr. 41-42.

On May 30, 2013, the District filed a motion for reconsideration, arguing that the Superior Court lacked subject matter jurisdiction to issue its order granting summary judgment because the Superior Court's ruling

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<sup>5</sup> The Gabeleins introduced several hundred pages of supplemental materials into the record, including records of the Old Board's proceedings, portions of the court files from the 2009 and 2010 Lawsuits, and – more problematically, with respect to RCW 85.18.110's requirement that the record be limited to the record that was before the Board when it adopted the Roll – factual materials that had *not* been presented to the New Board at any of the hearings it held on the Roll. CP 360-583; CP 862-928.

that the District “did not comply with” the Court’s 2010 and 2011 final judgments, and/or that the District failed to determine continuous base benefits based on a calculation of the “before and after” value of the properties on the 2012 Roll, were not raised by the Gabeleins in their written objections to the Roll. CP 137-38. Second, the District argued that new evidence of the value of the Gabeleins’ property had been discovered. CP 139. Third, the District argued that the Superior Court erred in awarding the Gabeleins’ attorney’s fees because the alleged “prelitigation bad faith” was the same conduct that served as the basis of the lawsuit, which precludes an award of attorney’s fees, and renewed its assertion that the prior “ruling” the Superior Court relied upon in awarding attorney’s fees was on a claim “rendered moot ... and will not be ripe for adjudication,” and as such was an “advisory opinion.” CP 141. On June 18, 2013, the Superior Court denied the District’s motion for reconsideration. CP 54-56. This appeal followed.

#### **IV. ARGUMENT**

##### **A. Standard of Review.**

This case is before the Court for judicial review by Writ of Review of the District’s 2012 Base Benefit Roll under RCW 85.18.090 to .140, which provide the exclusive means for judicial review of a base benefit roll adopted under Chapter 85.18 RCW. RCW 85.18.090.

Judicial review pursuant to a Writ of Review is limited to the record before the administrative agency. *See* RCW 85.18.110; *see also* *City of Seattle, Seattle Police Dept. v. Werner*, 163 Wn. App. 899, 906, 261 P.3d 218 (2011). Questions of law are reviewed de novo, and the Board's decision in adopting the Roll is reviewed for abuse of discretion.

“An appellate court reviews the administrative decision on the record of the administrative tribunal, not of the superior court operating in its appellate capacity.” *Werner*, 163 Wn. App. at 906 (citing *Hilltop Terrace Homeowner's Ass'n v. Island Cnty.*, 126 Wn.2d 22, 29-30, 891 P.2d 29 (1995)). In addition, RCW 85.18.110 provides that the record for review consists only of the “certified transcript containing such portion of the roll as is subject to review, any written objections thereto filed with the board by the person reviewing before said roll was adopted, and a copy of the resolution adopting the roll.” In accordance with this statute, the writ of review issued by the Superior Court directed the District to certify the record to the Superior Court for its review, further confirming that the record in this case is limited to the record that was before the New Board when it adopted the 2012 Roll. CP 853. Pursuant to RCW 85.18.050, objections not made within the time and in the manner prescribed therein are conclusively presumed to have been waived. Pursuant to RCW

85.18.090 and 85.18.130, judicial review of the New Board's actions is limited to review of the Board's response to the written objections.<sup>6</sup>

Further, in light of the record that was before the Board when it made its decision, the Court may only overturn that decision if it finds that the Board abused its discretion. RCW 85.18.130 (the court "shall determine whether the board has acted within its discretion and has correctly construed and applied the law. If it finds that it has, the finding of the board shall be affirmed[.]"); *cf. Abbenhaus*, 89 Wn.2d at 858-59, (holding that a city council's adoption of a special assessment roll must be upheld "even though a reviewing court may believe it to be erroneous" as long as the adoption of the roll is not "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action."). As the Gabeleins conceded below, "in determining whether the new board acted within its discretion, the trial court *does not independently consider the merits of the issues but rather considers and evaluates the decision-making process. See Abbenhaus v. City of Yakima*, 89 Wn.2d 855, 858-59, 576 P.2d 888 (1978)" CP 693 (emphasis added).

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<sup>6</sup> To the extent the Gabeleins attempt to raise issues not preserved by way of written objections submitted to the District during the public hearing, this Court lacks subject-matter jurisdiction to consider these arguments. *See Skinner v. Civil Serv. Comm'n*, 168 Wn.2d 845, 850, 232 P.3d 558 (2010); *Fay v. Nw. Airlines, Inc.*, 115 Wn.2d 194, 197, 796 P.2d 412 (1990); RCW 34.05.554.

Finally, the Superior Court’s ruling that the District failed to correctly construe a provision in Chapter 85.18 RCW presents a question of statutory interpretation, which is a question of law that is reviewed *de novo*. See *HomeStreet, Inc. v. Dep’t of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009).

**B. The District properly construed and applied RCW Ch. 85.18 when adopting the 2012 Base Benefit Roll.**

**1. RCW Ch. 85.18 does not require any specific method for determining continuous base benefits.**

The proper construction of a statute is a question of law subject to *de novo* review. *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). When determining the meaning of a statute, the court considers “all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Id.*, 146 Wn.2d at 11. Here the Legislature has explained that the purpose of RCW Ch. 85.18 is to enable diking districts “continuously to function effectively.” RCW 85.18.050. To accomplish that purpose, the Legislature authorized an annual levy for operating costs, to be imposed in proportion to “base benefits” determined by the Board of Commissioners. RCW 85.18.010 (“the cost of continued functioning of the district shall be paid through levies of dollar rates made and collected according to this chapter against the land and buildings thus protected, based upon the

determined base benefits”). The Legislature then set out the procedures to be followed by a diking district’s board of commissioners when adopting a continuous base benefit roll. RCW 85.18.020 requires the Board “to cause to be prepared and filed with it” a proposed roll containing various information about each parcel of property served by the district’s facilities. The proposed roll was filed with the District on July 27, 2012. CP 731. It is undisputed that the filed roll contained all of the required information. RCW 85.18.040 requires that the Board provide notice for a hearing on the proposed roll, prescribing both the content and the manner of serving notice (both by mail and publication). It is undisputed that the Board served proper notice of a hearing on the proposed roll, both by mail and publication. CP 731-32. RCW 85.18.030 requires the Board to conduct a public hearing on the proposed roll, at which hearing the Board must “determine the continuous base benefits base benefits which each of the properties thereon are receiving, ... consider all objections made ... correct, revise, lower, change or modify” the roll and ultimately adopt the roll. RCW 85.18.050 similarly requires the Board to “determine the continuous base benefits” to property afforded ‘continuous protection” by the district’s facilities, “hear objections to the adoption of said roll,” which objections “must be in writing and filed with the board during the hearing before the roll is adopted,” make any revisions or adjustments that “as to

the board shall appear equitable and just” and to adopt the roll by resolution. Over the course of four hearing days, on September 1, September 21, October 4, and October 23, 2013, the Board conducted a public hearing in accordance with the requirements of RCW 85.18.030 and 050. During the four days of hearings, the Board received written objections,<sup>7</sup> heard comments on the written objections, engaged in discussions and deliberations regarding the written objections and the proposed roll, made revisions to both the criteria for identifying benefitted property and the calculations of continuous base benefits on the roll. CP 732-34 and 758-65. Then on 2012 after completing its deliberations the Board adopted the 2012 Base Benefit Roll by resolution. CP 735.

The term “continuous base benefit” used in RCW Ch. 85.18 is undefined and is unique to that statute. A keyword search of the RCWs fails to locate the terms “continuous base benefit” or even “base benefit” in any other statute. However, the Legislature has explained the purpose to be served by the “continuous base benefits” determined on the roll. RCW 85.18.080 provides that from the time a roll is adopted and continuing until the roll is modified or amended by an additional or

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<sup>7</sup> The only relevant written objections on this appeal are those filed by the Gabeleins. CP CP 721-728).

supplemental roll adopted following the same procedures,<sup>8</sup> the continuous base benefits determined on the roll “shall serve as the base ... against which dollar rate is levied and collected from time to time for the continued functioning of said diking district.”

RCW 85.18.160 requires a District funding its continuing operations under RCW Ch. 85.18 to “make an estimate of the costs reasonably anticipated to be required for the effective functioning of the district during the ensuing year and until further revenue therefore can be made available.” That annual budget must be certified to the county assessor by November 1 “each year.” *Id.* The county then levies funds to cover the annual budget against the continuous base benefits “as shown by the then complete roll.” *Id.* Thus, “continuous base benefits” do not reflect the amount of money to be collected from protected property but rather *serve as the base for apportionment of the annual budget* across benefitted properties.

Ch. 85.18 RCW does *not* prescribe any particular method the board of commissioners is required to use to determine continuous base benefits. Rather, the Legislature expressly left the determination of continuous base benefits to the judgment of the commissioners,

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<sup>8</sup> RCW 85.18.060 explicitly requires that any modifications or revisions to a validly adopted roll require notice and a hearing “in the same way and manner as herein provided for consideration of the original roll.”

recognizing that conditions within a district will change from time to time.

*See* RCW 85.18.060.

In light of the recent experience of having multiple years of assessments invalidated because the Old Board had changed the method for apportioning the levy without providing notice or a public hearing, the New Board was particularly attentive to following the statutory notice and public hearing requirements in the process of adopting the 2012 Base Benefit Roll. CP 753. In exercising its judgment to determine a just and equitable method of allocating the costs of the District's continuous functioning among the properties within the district, the New Board gave substantial thought and consideration to: methods historically used by the district; the characteristics of land protected by the district's diking and drainage facilities; numerous engineering reports and documents prepared by KPG, Inc.; rainfall data from the National Oceanic and Atmospheric Administration (NOAA); current topographical maps from TMI; Island County records regarding maintenance of county roads within the District; historic correspondence between the District and the Island County engineer regarding fresh water inundation and overflow within the District and a variety of other documents and information. CP 753-57 (describing 33 categories of documents and information considered by the Board in determining the base benefits to be applied under Ch. 85.18 as dollar rates

for the proportional allocation of operating cost levies under RCW 85.18.160).

Recognizing that the purpose of the roll is to provide a base for apportioning the annual budget, the Board was inspired by RCW 85.38.160(2) to articulate the benefits per \$1,000 of budgeted costs. The Board also concluded that determining continuous base drainage benefits based on acreage, similar to the method applied by the District in 1931, 1944, and 1960<sup>9</sup> was a just and equitable method. CP 754 and 621-22. Because the Board followed all of the statutory notice and hearing requirements in developing a method for proportionally allocating its continuing operating costs in a manner that to the Board appeared just and equitable, it properly construed and applied RCW Ch. 85.18 and therefore, the roll should be affirmed. RCW 85.18.130 (if the court finds that the board has “correctly construed and applied the law ... the findings of the board shall be affirmed.”).

**2. RCW Ch. 85.18 does not require continuous base benefits to be calculated as the mathematical difference in the value of property before and immediately after receiving the benefit of the district’s facilities.**

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<sup>9</sup> The base benefit roll adopted in 1960 following the procedures in Ch. 85.18 RCW determined drainage base benefits “in proportion to the acreage” of benefitted parcels. CP 622. Similarly, the 2012 Roll determined drainage base benefits in proportion to acreage. Drainage continuous base benefits were stated in dollar terms reflecting the proportion of land within the drainage benefitted area per \$1,000 of operating costs to be levied. Thus, the parcel at issue, which contains 20.137% of the acreage within the benefitted area received a base benefit of \$201.37 to be used as the dollar rate by which annual levies are allocated among benefitted properties. See Appendices A & B.

In granting summary judgment to the Gabeleins (and awarding them attorneys' fees), the trial court ruled that the District had failed to properly construe and apply Ch. 85.18 RCW on the theory that its prior ruling in the 2009 and 2010 Lawsuits had held that the determination of continuous base benefits "must" be calculated based on the difference in each benefitted parcel's value "before and after" receiving the benefit of the District's drainage improvements. CP 174; 4/18/13 Tr. at 42.

As an initial matter, the judgment should be reversed because the trial court lacked subject matter jurisdiction to have considered that argument. Judicial review of a base benefit roll adopted under ch. 85.18 RCW is restricted to issues raised in written objections filed by the petitioner during the public hearing. RCW 85.18.090. Any objections that were not submitted to the board in writing during the public hearing "shall be conclusively presumed to have been waived." RCW 85.18.050. The written objections filed by the Gabeleins at the public hearing, CP 621-628, make no reference whatsoever to the trial court's rulings in the 2009 and 2010 Litigation and do not assert that continuous base benefits under ch. 85.18 must be calculated by the "before and after" change in property value attributable to the construction of the District's drainage facilities. Those arguments were first raised by the Gabeleins in their

Motion for Summary Judgment and, therefore, were conclusively waived.  
RCW 85.18.050.

Even if the Gabeleins' had raised the issue in written objections so that the claim was properly before the court, the trial court's ruling is erroneous for both of two separate reasons. First, the statement on which it relied from the 2009 and 2010 litigation was merely dicta, casually mentioned after dismissing Citizens' constitutional claim that the statute provides for an unlawful property tax as moot and not ripe for adjudication. *State v. Potter*, 68 Wn.App. 134, 149 n. 7, 842 P.2d 481 (1992) (A statement in an opinion is dicta if it is unnecessary to decide the case). "In considering such statements made in the course of judicial reasoning, one must remember that general expressions in every opinion are to be confined to the facts then before the court and are to be limited in their relation to the case then decided and to the points actually involved." *Peterson v. Hagen*, 56 Wash.2d 48, 53, 351 P.2d 127 (1960). Second, the proposition is erroneous as a matter of law. As discussed in Section B.1. above, RCW Ch. 85.18 does *not* specify any particular method of determining continuous base benefits, let alone the "before and after" change in value method referenced in the trial court's earlier dicta.

The trial court's earlier dicta erroneously applied two cases construing the term "special benefits" used in RCW 35.44 providing a

method for cities to fund the construction costs of “local improvements.” CP 382 (citing *Doolittle v. City of Everett*, 114 Wn.2d 88, 93, 786 P.2d 253 (1990) and *In re Schmitz*, 44 Wn.2d 429, 434, 268 P.2d 436 (1954)). Neither *Schmitz* nor *Doolittle* involves diking districts or base benefit rolls adopted pursuant to Ch. 85.18 RCW. *Schmitz* involved a petition filed under RCW 35.44.200 to vacate an assessment levied to pay for the cost of a city sewer that the City of Seattle installed fronting Schmitz’s property. 44 Wn.2d at 432. At the outset of its analysis, the court noted that “*under the local improvement district statutes* ... the amount of the *special benefits* attaching to the property” is the difference between the fair market value before and “*immediately* after” the construction of the local improvement.” *Id.* at 432-33 (emphasis added).

*Doolittle* likewise involved a challenge to a “special benefit” assessment issued by a city (in that case the City of Everett) to fund the widening of a street, Evergreen Way, under Chapters 35.43 and 35.44 RCW. 114 Wn.2d at 91-2. The issue in *Doolittle* was whether the city would consider “possible future integrated use of separate parcels” that were then being put to separate uses when determining the “special benefit” that would inure to the parcels from widening the street they abutted. *Id.* at 88. At the outset of its analysis, the court identified several “general principles respecting special assessments” including the

“before and immediately after” standard that *Schmitz* held applies to special assessments made by cities for local improvements under Chapters 35.43 and 35.44 RCW. *Id.* at 93.

While *Doolittle* and *Schmitz* involve the proper construction of the statutory phrase “special benefits” under Chapters 35.43 and 35.44, the statute involved in *this* case – Ch. 85.18 RCW – does not use the term “special benefits” but instead uses the terms “continuous base benefits” and “base benefits.” It is axiomatic that, when the Legislature uses certain words in one statute and different words in another statute, a different meaning is intended. *Agrilink Foods, Inc. v. Dep’t. of Revenue*, 153 Wn.2d 392, 397, 103 P.3d 1226 (2005) (“where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent”) (quoting *United Parcel Serv., Inc. v. Dep’t of Revenue*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984)). That rule is particularly apt here, since the Legislature has used the term “special benefit” in numerous other statutes,<sup>10</sup> but chose not to use that term in RCW 85.18.

The trial court’s dicta is contrary to other fundamental principles of statutory construction as well. Limiting the undefined statutory term “continuous base benefits” to exclusively require a determination of the

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<sup>10</sup> *E.g.*, Chapters 35.43, 35.44, 35.92, and 36.61 RCW.

market value of each parcel both before and immediately after an improvement is constructed also violates the well settled maxim that statutes are not to be construed to reach absurd results. *City of Seattle v. Fuller*, 177 Wa 2d 263 270, 300 P. 3d 340 (2103). In the present case, the District has constructed drainage improvements at various times throughout its 100 year existence, with the first drainage ditches being constructed in 1931, and additional improvements in 1944. The most recent improvement, the new pump, was constructed in 2008. Moreover, some of the district's drainage facilities were not even constructed by the District; they were originally constructed by the Useless Bay Golf and Country Club ("UBGCC") which transferred them to the District in 2004 (after which additional improvements were made connecting the former UBGCC ditches to the District's so that all drainage ditches now flow into the North Pond were the new pump was built in 2008). CP 604. It simply was not possible in 2012 to determine how much each of these different improvements increased the market value of each parcel in the District immediately after each improvement was constructed. Indeed, there had been no effort historically to determine a "before and after" change in value when the various drainage facilities were built because in each of the rolls adopted prior to 1986 (including the 1960 roll adopted under ch.

85.18) drainage base benefits had *always* been allocated in proportion to acreage.

It is also axiomatic that an individual word in a statute should not be construed in isolation but rather in context, taking into account all of the words used by the legislature. *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 603, 257 P.3d 532 (2011). Chapter 85.18 was enacted in 1951 as Ch. 45 of the Laws of 1951. When enacting Chapter 85.18 RCW, the Legislature explained that the purpose of the chapter was to provide for a “just and equitable way for all protected property to share the expense of such required protection” – language that focuses on proportionality rather than a rigid mathematically formulaic approach. Moreover, RCW 85.18.060 recognizes that over time, the “condition of land or buildings” will change, which may, in the “judgment of the board of commissioners”, require modifying or amending a prior determination of base benefits, a process completely at odds with the proposition that base benefits are fixed by the difference in market value before and immediately after the construction of facilities that provide protection to benefitted property. That proposition is also contradicted by the clear vesting of discretion with the Board to determine which properties are benefitted by the District’s diking and drainage facilities and to determine those benefits. In short, allocating drainage base benefits in proportion to benefitted acreage is not

prohibited by the plain statutory language of Chapter 85.18 RCW and is well within the reasonable exercise of the board's discretion.

**C. The Trial Court erred in ruling that the October 23 2012 Roll violates the 100% limitation provided by RCW 85.18.030.**

**1. The Drainage Base Benefit of the Gabeleins property determined on the 2012 Base Benefit Roll (\$201.37) complies with RCW 85.18.030; it does not exceed 100% of the true and fair value of their property (\$35,627).**

As previously noted, the base benefit determined on a roll adopted under Ch. 85.18. RCW serves as a "dollar rate" used to proportionally allocate a district's budgeted operating costs among the properties benefitted by the district's facilities. Apart from requiring that the "base benefit" adopted in the roll must be denominated in dollar terms, the only limitation that Ch. 85.18 RCW imposes on the board's determination of base benefits is that the base benefit "shall in no instance exceed one hundred percent of the true and fair value of such property in money." RCW 85.18.030. The Drainage Base Benefit determined by the Board on the 2012 Base Benefit Roll is \$201.37. CP 717, Appendix B. That \$201.37 amount does not represent a one-time or absolute cap of the amount that may be levied or assessed against parcel R32918-348-3990, but rather is a reflection that \$201.27 of each \$1,000 of the District's annual estimate of costs is the dollar rate of the continuous base benefit allocated to parcel R32918-348-3990, against which the District's

operating costs will be levied for the continuous functioning of the District as provided in RCW 85.18.030 and 85.18.160.

It is undisputed that the true and fair value of the Gabeliens' property is greater than \$201.37. As reflected on the Roll and confirmed by the Island County Assessor, the Assessor had determined the true and fair value of the Gabeleins 60+ acre parcel to be \$35,627.<sup>11</sup> It is basic math that \$201.37 does not exceed 100% of \$35,627.<sup>12</sup> Consequently, the trial court's alternative basis for granting summary judgment is also erroneous.

**2. The trial court erred in using the 2013 annual levy assessment as the benchmark for measuring the 100% limitation.**

Failing to recognize that the function of the continuous base benefit is to establish a "dollar *rate*" (RCW 85.18.30, 080) to allocate

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<sup>11</sup> That determination was made before Mr. Gabelein, as the executor of the Estate of Eva Mae Gabelein, sold a topographically similar 35 acre parcel for \$425,000 shortly after the trial court hearing below. CP 122.

<sup>12</sup> On summary judgment, the Gabeleins submitted evidence that had not been presented to the Board during the public hearing in order to make an argument that in arriving at the \$35,627 value for the parcel at issue, the assessor had considered two acres of the parcel to have a value of \$800 per acre and twenty four acres of the parcel to have a value of \$10 per acre. Thus, according to the Gabeleins, the 27 acre portion of the parcel at issue lying within the drainage benefitted area of the District under the criteria established in the roll was only \$310. While that evidence was not properly before the trial court and the District contests the accuracy of that claim (as well as the propriety of attempting to value only a portion of a single parcel of land, which portion is not capable of being separately transferred), it is still basic math that \$201.37 does not exceed 100% of \$310. Therefore regardless of whether the true and fair value of the Gabeleins' property is \$310, \$35,627, or as is more likely, something substantially larger, it is undisputably more than \$201.27 and therefore, the continuous base benefit of \$201.37 determined on the 2012 Base Benefit roll does not exceed the statutory limit of one hundred percent of the true and fair value of the property.

annual operating costs among benefitted properties, not to establish the amount to be paid by the property, the trial court held in the alternative that the 2012 Base Benefit Roll was unlawful based on a comparison of the amount of the 2013 annual levy that the County assessed against parcel R32918-348-3990. CP 13. As previously noted, the \$201.37 states in dollar terms the dollar rate to be applied per \$1,000 of annual operating costs for the continuous functioning of the District's drainage facilities, which costs vary from year to year but currently include repayment of the debt incurred to build the new drainage pump, and attorneys' fees defending the numerous lawsuits that have followed the construction of the pump. The only limitation under Ch. 85.18 RCW on the amount of the annual levy is the amount of costs the district estimates that it will incur, which bears no relationship to the base benefit used to apportion those costs among benefitted properties.

There is simply no statutory basis to compare the mathematical consequence of the apportionment called for in RCW 85.08.160 to the dollar rate used to calculate it. To do so would violate the basic precept that statutes must be construed to avoid absurd results. *Lowy v. PeaceHealth*, 174 Wn.2d 769, 779, 280 P.3d 1078 (2012).

- 3. The trial court erred in enjoining the County from ever collecting more than \$201.37 per year from the Gabelein property for its share of the District's annual**

**costs of maintaining and operating the drainage facilities.**

While Citizens had included the Island County Treasurer (among other Island County officials) as named defendants in the 2009 and 2010 Litigation, the Gabeleins did not. Nevertheless the trial court's judgement below expressly directed the Treasurer to limit the amount of the annual levy collected against parcel R32918-348-3990 to \$201.37 per year, not just for calendar year 2013, but also for "calendar years beyond 2013" apparently in perpetuity. CP 8. Not only was the trial court's directive based on a fundamental misunderstanding of the statute as discussed above, but it is contrary to RCW 85.18.130 which provides that the scope of judgment on Writ of Review of a base benefit roll, if the roll is not affirmed is limited to correcting the base benefit shown on the roll: "The judgment of the court may change, confirm, correct, or modify the values of the property in question as shown upon the roll, and a certified copy thereof shall be filed with the county auditor, who shall change, modify or correct as and if required." RCW 85.18.130.

**D. The Superior Court Erred in Granting the Gabeleins Their Attorney's Fees.**

The Superior Court erred by granting the Gabeleins their attorney's fees. First, because the Superior Court erred in granting summary judgment to the Gabeleins, its judgment for attorney fees must also be

reversed. *See Weiss v. Lonnquist*, 173 Wn. App. 344, 365, 293 P.3d 1264 (2013). Second, even if this Court were to uphold the Superior Court’s grant of summary judgment, the Superior Court’s award of attorney fees was a reversible error for several reasons.

“The standard of review of an award of attorney fees is abuse of discretion.” *Greenbank Beach and Boat Club, Inc., et al. v. Bunney*, 168 Wn. App. 517, 524, 280 P.3d 1133 (2012). “Attorney fees will not be awarded as part of the cost of litigation in absence of a contract, statute, or a recognized ground in equity.” *Id.* Where the award was not based on a contract or statute, a court may, based on CR 11 and its equitable powers, award attorney fees based on bad faith. *Id.*

There are three recognized types of bad faith conduct: substantive bad faith (*i.e.*, bringing a frivolous or harassing claim), procedural bad faith (*i.e.*, vexatious conduct during the course of litigation), and prelitigation misconduct. *Id.* at 525. Prelitigation misconduct is “obdurate or obstinate conduct that necessitates legal action to enforce a clearly valid claim or right.” *Id.* “Prelitigation misconduct may serve as the basis for an award of fees in cases of ‘enforcement of judicial authority, as where misconduct of a party **amounting to contempt of court** has caused the opposing party to incur counsel fees.’” *Id.* at 526 (*quoting State ex rel.*

*Macri v. City of Bremerton*, 8 Wash.2d 93, 105, 111 P.2d 612 (1941)) (emphasis added).

The Superior Court found that “the District was aware of the decisions” in the 2009 and 2010 Lawsuits and that the 2012 Roll, which it adopted afterward, “did not comply with the court rulings in the prior cases.” CP 59. Specifically, the Superior Court held that the District was required to comply with the language in its previous letter ruling and orders and judgments that continuous base benefits “must be measured by the difference in value before and after receiving the benefit from the District’s drainage improvements.” CP 174, 13-15. Even if this ruling was correct – which it is not – the Superior Court erred in granting the Gabeleins their attorney’s fees because the adoption of the 2012 Roll did not constitute “prelitigation bad faith.”

First, as explained above, the language in the final judgments regarding the “before and after” value of the benefited properties was dicta that was not controlling – and in any case, the New Board reasonably understood it as such. The portion of the 2011 final judgment that the Gabeleins relied on is pure dicta on its face: the court stated that Citizens’ declaratory judgment claim regarding the validity of the Old Board’s benefit assessment roll “is **rendered moot** ... and **will not be ripe for adjudication** until such subsequent time as DD-1 provides notice, holds

hearings, and enters Findings of Fact” based on “before and after” property values. CP 387 (emphasis added). This precludes a finding that the District Board’s adoption of the 2012 Roll based on acreage rather than “before and after” value was a “disregard of judicial authority” that “amount[s] to contempt of court,” as is required for an attorney’s fees award. *Greenbank Beach and Boat Club, Inc. v. Bunney*, 168 Wn. App. 517, 526, 280 P.3d 1133 (2012).

Moreover, there has been no finding of “bad faith conduct” in this matter that would support an award of attorney’s fees, and the New Board’s failure to comply with dicta regarding a claim that was “moot” and not “ripe for adjudication” could not conceivably constitute “bad faith conduct.” Thus, the trial court committed error by awarding attorney’s fees to the Gabeleins.

Second, the Gabeleins asserted in their motion for summary judgment that the District’s decision adopting the Roll under RCW 85.18 amounted to “prelitigation bad faith” under *Greenbank*. CP 704-05. However, *Greenbank* makes clear that attorney’s fees cannot be awarded based on the decision to adopt the 2012 Roll because that decision was the very basis of the action brought in the Superior Court.

In *Greenbank*, the defendants were alleged to have engaged in “bad faith conduct” when they disregarded their Homeowners’

Association's restrictive covenant and built a home that exceeded its height limitation. The Association sued to enjoin the construction. The Superior Court granted the injunction and awarded the Association its attorney's fees based on the "bad faith conduct." However, the Court of Appeals reversed the attorney's fees award, holding that "[t]o allow an award of attorney fees based on bad faith in the act underlying the substantive claim would not be consistent with the rationale behind the American Rule regarding attorney fees." *Id.* at 527 (quoting *Shimman v. Int'l Union of Operating Eng'rs, Local 18*, 744 F.2d 1226, 1231 (1984), *cert. denied*, 469 U.S. 1215 (1985)). Indeed, the Court held that the *only* time prelitigation misconduct is sanctionable is when there is "some disregard of judicial authority" that "amount[s] to contempt of court[.]" *Id.* at 526.

Here, the adoption of the Roll was the entire basis of this action: it is the administrative action that the Gabeleins challenged in their petition for a writ of review to the Superior Court. This is exactly the type of prelitigation conduct that the court in *Greenbank* held cannot serve as the basis for an award of attorney's fees. Therefore, the Superior Court erred in awarding the Gabeleins their attorney's fees here.

Moreover, the adoption of the Roll does not meet the exceedingly high standard set forth in *Greenbank*: this was not "misconduct . . .

amounting to contempt of court.” *Id.* Rather, as described above, the New Board meticulously followed every statutory procedural requirement to ensure that its adoption of the 2012 Roll was in full compliance with Chapter 85.18 RCW.

In addition, as in *Greenbank*, the issue decided by the Superior Court was unsettled until it issued its ruling in this case, as the Superior Court itself recognized. CP 167 (“[T]he matters at issue in this case may fairly be described as ‘novel’ and difficult, in the sense that there are no reported cases construing ch. 85.18 RCW (or ch. 85.38 RCW, for that matter).”). Indeed, the Superior Court’s dicta suggesting that continuous base benefits *must* be determined by calculating the difference in the value of the property “before and after” receiving the benefit was the *first* statement to that effect. Therefore, the New Board could not have known prior to this ruling what was required of it, and even if it misconstrued the applicable law in a way that fell outside its broad discretion, the Superior Court’s award of attorney’s fees was improper and should be reversed.

Finally, *after* the District filed a brief in opposition to the Gabeleins’ request for attorney’s fees, CP 215, the Gabeleins increased the amount of attorney’s fees they requested, via a supplemental declaration of their attorney, Carolyn Cliff. CP 74. In her original declaration, filed on May 8, 2013, Ms. Cliff represented that the Gabeleins were seeking

fees based on a rate of \$200 per hour. On May 14, 2013, the District filed its brief opposing the request for attorney's fees. CP 215. Then, on June 10, 2013, Ms. Cliff represented that the Gabeleins were now seeking based on a rate of \$250 per hour. CP 74. This left the District without an opportunity to respond to the request for an award based on an increased fee amount. The Superior Court's award of fees based on the increased hourly rate, to which the District had no opportunity to respond, is reversible error.

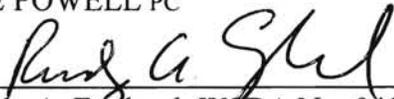
#### V. CONCLUSION

For the reasons set forth above, appellant Diking District No. 1 of Island County respectfully requests that the Court reverse the orders and judgments below, including the award of attorneys' fees against the District in favor of the Gabeleins and affirm the Drainage Base Benefit dollar rates for parcel number R32918-348-3990 as shown on the 2012 Roll.

RESPECTFULLY SUBMITTED this 21st day of October, 2013.

LANE POWELL PC

By

  
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*Attorneys for Defendant-Appellant Diking  
District No. 1 of Island County of the State  
of Washington*

**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury that on October 21, 2013, I caused to be served a copy of the foregoing document on the following person(s) in the manner indicated below at the following address(es):

Carolyn Cliff, Esq.  
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- by **CM/ECF**
- by **Electronic Mail**
- by **Facsimile Transmission**
- by **First Class Mail**
- by **Hand Delivery**
- by **Overnight Delivery**

  
Amanda Lund

2013 OCT 21 PM 4:51  
COMMUNICATIONS SECTION

**The District's Assessment Methodology**

The following equation confirms that the District's assessment methodology computes the continuous base benefit in terms of dollars.

$$\begin{array}{ccccccc} \text{Benefitted Acreage} & \div & \text{Total Benefitted} & \times & \$1,000 & = & \text{Drainage Base} \\ \text{of Parcel} & & \text{Acreage} & & & & \text{Benefit} \end{array}$$

A property with an assigned base benefit on the 2012 Roll of \$1.00 reflects that 0.1% of the benefitted acreage comprises that property and 0.1% of any given year's levy will apply to that benefitted property.

Island County Diking District #2  
Benefit Assessment Roll

BUDGET

Diking District # 1 Roll as Revised from Roll filed July 27, 2012															Continuous Base Benefit	
Prop. Id	geo. id	group cd	group desc	last name	first name	Mail Name	Street Address	City	State	Zip	Land Value	Building Value	Total Value	Drainage	Diking	
126116	R32907-022-4760	D01B	Benefitted	ALCORN	ROBERT	ROBERT ALCORN	16515 E WELLESLEY AVE	SPOKANE VALLEY	WA	99216	\$53,950	\$0	\$53,950	\$000	\$0.74	
808245	R32907-032-4310	D01B	Benefitted	RIENSCH	LENORE	LENORE RIENSCH	2784 LONE CREEK RD	LANGLEY	WA	98260	\$102,000	\$245,275	\$347,275	\$000	\$0.52	
801166	R32918-014-3510	D01B	Benefitted	GABEILEIN ET AL	ALBERT	C/O RAY GABEILEIN	5785 BAYVIEW RD	LANGLEY	WA	98260	\$7,650	\$0	\$7,650	\$000	\$0.10	
801165	R32918-054-3730	D01B	Benefitted	GABEILEIN ET AL	ALBERT	C/O RAY GABEILEIN	5785 BAYVIEW RD	LANGLEY	WA	98260	\$211,924	\$17,553	\$229,477	\$000	\$2.12	
132234	R32918-067-2360	D01B	Benefitted	GABEILEIN	RAYMOND	C/O SANDY MARSHALL	22242 NE 31ST ST	SAMMAMISH	WA	98074	\$43,013	\$0	\$43,013	\$19148	\$0.64	
528307	R32918-070-1100	D01B	Benefitted	UBG&CC		UBG&CC	5725 COUNTRY CLUB DR	LANGLEY	WA	98260	\$12,168	\$0	\$12,168	\$1836	\$0.10	
757853	R32918-087-3750	D01B	Benefitted	GABEILEIN	RAYMOND	C/O SANDY MARSHALL	22242 NE 31ST ST	SAMMAMISH	WA	98074	\$203,060	\$156,984	\$360,044	\$000	\$2.04	
132314	R32918-103-3750	D01B	Benefitted	GABEILEIN	RAYMOND	C/O SANDY MARSHALL	22242 NE 31ST ST	SAMMAMISH	WA	98074	\$201,700	\$0	\$201,700	\$000	\$1.96	
504804	R32918-139-3750	D01B	Benefitted	GABEILEIN	RICHARD	RICHARD GABEILEIN	5900 BAYVIEW RD	CLINTON	WA	98236	\$235,445	\$174,059	\$409,504	\$5201	\$2.39	
132449	R32918-152-2520	D01B	Benefitted	GABEILEIN, EVA MAE		C/O SANDY MARSHALL	22242 NE 31ST ST	SAMMAMISH	WA	98074	\$9,527	\$0	\$9,527	\$7393	\$0.14	
572623	R32918-165-4440	D01B	Benefitted	GABEILEIN	JENNIE GRACE	JENNIE GRACE	5856 BAYVIEW RD	CLINTON	WA	98236	\$307,080	\$15,380	\$322,460	\$1662	\$1.75	
572632	R32918-180-4440	D01B	Benefitted	GABEILEIN	JENNIE GRACE	JENNIE GRACE	5856 BAYVIEW RD	CLINTON	WA	98236	\$307,080	\$52,808	\$359,968	\$1955	\$1.78	
572641	R32918-196-4200	D01B	Benefitted	GABEILEIN	JENNIE GRACE	JENNIE GRACE	5856 BAYVIEW RD	CLINTON	WA	98236	\$204,080	\$0	\$204,080	\$1773	\$1.50	
132555	R32918-216-3790	D01B	Benefitted	GABEILEIN	DORA	DORA GABEILEIN - TRUSTEE	1767 ALLIANCE AVE APT 202	FREELAND	WA	98249	\$205,100	\$30,141	\$235,241	\$2921	\$2.15	
132608	R32918-242-3790	D01B	Benefitted	GABEILEIN	DORA	DORA GABEILEIN - TRUSTEE	1767 ALLIANCE AVE APT 202	FREELAND	WA	98249	\$206,630	\$0	\$206,630	\$2294	\$2.32	
132715	R32918-333-2870	D01B	Benefitted	H&H Prop		WILLIAM H SIEVERS	PO BOX 1191	FREELAND	WA	98249	\$19,309	\$0	\$19,309	\$1338	\$0.29	
132733	R32918-346-0940	D01B	Benefitted	UBG&CC		UBG&CC	5725 COUNTRY CLUB DR	LANGLEY	WA	98260	\$547,029	\$681,389	\$1,228,418	\$1583	\$16.11	
810940	R32918-348-3990	D01B	Benefitted	GABEILEIN, RAYMOND E	LAURIE J GABEILEIN	LAURIE J GABEILEIN	5785 BAYVIEW RD	LANGLEY	WA	98260	\$35,827	\$0	\$35,827	\$20137	\$0.53	
687224	R32918-349-0150	D01B	Benefitted	UBG&CC		UBG&CC	5725 COUNTRY CLUB DR	LANGLEY	WA	98260	\$100,400	\$0	\$100,400	\$000	\$0.40	
132760	R32918-374-2370	D01B	Benefitted	UBG&CC		UBG&CC	5725 COUNTRY CLUB DR	LANGLEY	WA	98260	\$363,550	\$301,500	\$665,050	\$10702	\$9.63	
132797	R32918-378-1960	D01B	Benefitted	H&H Properties		WILLIAM H SIEVERS	PO BOX 1191	FREELAND	WA	98249	\$9,499	\$0	\$9,499	\$1219	\$0.14	
132877	R32918-447-5220	D01B	Benefitted	HENNY	DAVID	DAVID HENNY	6290 BAYVIEW RD	CLINTON	WA	98236	\$485,621	\$222,815	\$708,436	\$2193	\$3.25	
132939	R32918-485-3700	D01B	Benefitted	ALEXANDER	HOWARD	DIANE ALEXANDER	2636 MILLS DRIVE	LANGLEY	WA	98260	\$308,000	\$71,428	\$379,428	\$1219	\$1.82	
810032	R32918-499-3250	D01B	Benefitted	RATCLIFF	NATHANIAL	NATHANIAL RATCLIFF	2598 MILLS DR	LANGLEY	WA	98260	\$105,000	\$0	\$105,000	\$000	\$0.71	
133940	R32919-331-3720	D01B	Benefitted	RODRIGUEZ, MARY C		MARY C RODRIGUEZ	620 W MERCER PLACE #3A	SEATTLE	WA	98119	\$50,000	\$0	\$50,000	\$000	\$0.53	
565196	R32919-342-3480	D01B	Benefitted	DOUGHERTY	CAROL	CAROL DOUGHERTY	1707 3RD AVE N	SEATTLE	WA	98109	\$566,397	\$183,551	\$749,948	\$000	\$11.17	
133420	R32919-342-3700	D01B	Benefitted	HANIFY	THOMAS	THOMAS HANIFY	2682 SUNLIGHT BEACH RD	CLINTON	WA	98236	\$200,000	\$221,442	\$421,442	\$000	\$6.28	
565445	R32919-343-3580	D01B	Benefitted	SHAFFER	JOYCE A	JOYCE A SHAFFER	2680 SUNLIGHT BEACH ROAD	CLINTON	WA	98236	\$200,000	\$301,753	\$501,753	\$000	\$7.47	
565187	R32919-345-3430	D01B	Benefitted	SPENCER, SAMUEL J	DIANA K SHEINESS	DIANA K SHEINESS	17608 CLOVER RD	MILL CREEK	WA	98012	\$566,397	\$150,671	\$717,068	\$000	\$10.68	
133466	R32919-347-3760	D01B	Benefitted	YEDOR ITWROS	WILLIAM	ADRIENNE F MILLICAN	521 MCGILVRA BLVD E	SEATTLE	WA	98112	\$30,000	\$0	\$30,000	\$000	\$0.45	
133484	R32919-347-3830	D01B	Benefitted	YEDOR ITWROS	WILLIAM	ADRIENNE F MILLICAN	521 MCGILVRA BLVD E	SEATTLE	WA	98112	\$200,000	\$216,186	\$416,186	\$000	\$2.98	
133518	R32919-349-3400	D01B	Benefitted	MCCAULEY	CATHRINE	CATHRINE MCCAULEY	285 DOUBLE RIVER RD	WALLA WALLA	WA	99362	\$464,983	\$45,075	\$510,058	\$000	\$7.59	
133536	R32919-351-3350	D01B	Benefitted	PARSONS TRUSTEE	JUDITH	JUDITH PARSONS TRUSTEE	6 WESLEYAN COURT	RANCHO MIRAGE	CA	92270	\$2,039	\$0	\$2,039	\$000	\$0.03	
133572	R32919-352-3700	D01B	Benefitted	YEDOR WILLIAM M	ADRIENNE F MILLICAN	ADRIENNE F MILLICAN	521 MCGILVRA BLVD E	SEATTLE	WA	98112	\$81,000	\$0	\$81,000	\$000	\$1.21	
565427	R32919-354-3600	D01B	Benefitted	MARTIN	JEAN	JEAN MARTIN	2678 SUNLIGHT BEACH RD	CLINTON	WA	98236	\$125,000	\$78,971	\$203,971	\$000	\$3.04	
133616	R32919-377-4180	D01B	Benefitted	KOHLWES TRUSTEE	ROBERT	ROBERT KOHLWES TRUSTEE	2597 SUNLIGHT BEACH RD	CLINTON	WA	98236	\$361,600	\$0	\$361,600	\$000	\$1.31	
133661	R32919-409-3170	D01B	Benefitted	KOHLWES ET AL	ROBERT H	ROBERT KOHLWES ET AL	2597 SUNLIGHT BEACH RD	CLINTON	WA	98236	\$206,520	\$0	\$206,520	\$000	\$2.82	
133714	R32919-441-3270	D01B	Benefitted	HODGES	KENT	KENT HODGES	6054 SNAPDRAGON LN	CLINTON	WA	98236	\$206,920	\$113,236	\$320,156	\$000	\$1.68	
133741	R32919-466-2050	D01B	Benefitted	KOHLWES ET AL	ROBERT	ROBERT KOHLWES ET AL	2597 SUNLIGHT BEACH RD	CLINTON	WA	98236	\$22,726	\$40,990	\$63,716	\$1464	\$0.95	
466454	R32919-468-3280	D01B	Benefitted	SWAFFIELD ET AL	ROBERT A	ROBERT A SWAFFIELD	2680 SUNSHINE LN	CLINTON	WA	98236	\$192,592	\$28,964	\$221,556	\$000	\$2.35	
133812	R32919-472-1460	D01B	Benefitted	COUNTNER	WILLIAM	WILLIAM COUNTNER	4550 47TH AVE NE	SEATTLE	WA	98105	\$3,886	\$0	\$3,886	\$1836	\$0.06	
466427	R32919-485-3280	D01B	Benefitted	SWAFFIELD	ROBERT	ROBERT SWAFFIELD	2680 E SUNSHINE LN	CLINTON	WA	98236	\$187,172	\$190,302	\$377,474	\$000	\$2.23	
133867	R32919-507-3270	D01B	Benefitted	ARNOLD	STEPHEN	KRISTIE I ARNOLD	2684 GABEILEIN RD	CLINTON	WA	98236	\$206,520	\$561,588	\$768,108	\$000	\$2.05	
133885	R32919-512-1490	D01B	Benefitted	GABEILEIN	EVA MAE	C/O SANDY MARSHALL	22242 NE 31ST ST	SAMMAMISH	WA	98074	\$3,305	\$3,019	\$6,324	\$1678	\$0.09	
290232	57300-00-00001-0	D01B	Benefitted	COUNTNER	WILLIAM	WILLIAM COUNTNER	4550 47TH AVE NE	SEATTLE	WA	98105	\$166,000	\$169,043	\$335,043	\$000	\$4.99	
290250	57300-00-00003-0	D01B	Benefitted	COUNTNER	WILLIAM	WILLIAM COUNTNER	4550 47TH AVE NE	SEATTLE	WA	98105	\$165,000	\$91,287	\$256,287	\$000	\$3.82	
290278	57300-00-00004-0	D01B	Benefitted	COUNTNER	WILLIAM	WILLIAM COUNTNER	4550 47TH AVE NE	SEATTLE	WA	98105	\$83,000	\$0	\$83,000	\$000	\$1.24	
290296	57300-00-00005-0	D01B	Benefitted	SKUBI	RONDA	RONDA SKUBI	3055 NW CUMBERLAND RD	PORTLAND	OR	97210	\$17,000	\$0	\$17,000	\$000	\$0.25	
290312	57300-00-00006-0	D01B	Benefitted	VANMUYDEN	JAN	JOAN L WATSON	2527 SUNLIGHT BEACH RD	CLINTON	WA	98236	\$165,000	\$150,646	\$315,646	\$000	\$4.70	
486478	57300-00-00007-1	D01B	Benefitted	CRUISE III	LEO C	LEO C CRUISE III	2538 EAST SUNLIGHT BEACH	CLINTON	WA	98236	\$83,000	\$0	\$83,000	\$000	\$1.24	
483792	57300-00-00008-0	D01B	Benefitted	SLB PTRS LLC		SLB PARTNERS LLC	1810 91ST PL NE	CLYDE HILL	WA	98004	\$83,000	\$0	\$83,000	\$000	\$1.24	
290358	57300-00-00009-0	D01B	Benefitted	KENWORTHY	DOROTHY	DOROTHY KENWORTHY	2551 SUNLIGHT BEACH RD	CLINTON	WA	98236	\$250,000	\$121,697	\$371,697	\$000	\$5.53	
290376	57300-00-00011-0	D01B	Benefitted	KENWORTHY	DOROTHY	DOROTHY KENWORTHY	2551 SUNLIGHT BEACH RD	CLINTON	WA	98236	\$83,000	\$0	\$83,000	\$000	\$1.24	
290394	57300-00-00012-0	D01B	Benefitted	KOHLWES	GARY	GARY KOHLWES	5960 CEDAR ST	FREELAND	WA	98249	\$79,000	\$0	\$79,000	\$000	\$1.18	
290410	57300-00-00013-0	D01B	Benefitted	KOHLWES	ROBERT	ROBERT KOHLWES	2597 SUNLIGHT BEACH RD	CLINTON	WA	98236	\$79,000	\$0	\$79,000	\$000	\$1.18	
290438	57300-00-00014-0	D01B	Benefitted	WINQUISTS INV LLC		WINQUISTS INV LLC	2311 5TH AVE N	SEATTLE	WA	98109	\$79,000	\$4,273	\$83,273	\$000	\$1.24	
290456	57300-00-00015-0	D01B	Benefitted	WARE, SHANNON	NATHAN WARE	NATHAN WARE	8815 NE 148TH PL	KENMORE	WA	98028	\$165,000	\$128,000	\$293,000	\$000	\$4.36	
290474	57300-00-00016-0	D01B	Benefitted	MCGRATH ET AL	JEFFREY	JEFFREY MCGRATH	2117 19TH AVE S	SEATTLE	WA	98144	\$165,000	\$93,964	\$258,964	\$000	\$3.86	
290517	57300-00-00018-0	D01B	Benefitted	BERRY	RAYMOND L / SALLY S	SALLY S BERRY TRUSTEE	2587 SUNLIGHT BEACH RD	CLINTON	WA	98236	\$165,000	\$103,123	\$268,123	\$000	\$3.90	
290535	57300-00-00019-0	D01B	Benefitted	TRESSLET	KIRBY	DEBORAH A TRESSLET	2593 SUNLIGHT BEACH RD	CLINTON	WA	98236	\$165,000	\$118,269	\$283,269	\$000	\$4.22	
290553	57300-00-00020-0	D01B	Benefitted	KOHLWES	ROBERT	ROBERT KOHLWES	2597 SUNLIGHT BEACH RD	CLINTON	WA	98236	\$165,000	\$124,890	\$289,890	\$000	\$4.32	
290571	57300-00-00021-0	D01B	Benefitted	WITSOE	MARY J K	MARY J WITSOE	2601 SUNLIGHT BEACH RD	CLINTON	WA	98236	\$165,000	\$80,736	\$245,736	\$000	\$3.60	

ORIGINAL  
 CLERK OF THE BOARD  
 BUDGET DIRECTOR

OCT 24 2012

BUDGET

Island County Diking District #1  
Benefit Assessment Roll

Diking District # 1 Roll as Revised from Roll filed July 27, 2012

Table with columns: Prop. Id, geo. Id, group cd, group desc, last name, first name, Mail Name, Street Address, City, State, Zip, Land Value, Building Value, Total Value, Drainage, Diking. Contains 296 rows of property data.

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EXHIBIT B

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