NO. 1036515

IN THE WASHINGTON STATE SUPREME COURT

COURT OF APPEALS

CAUSE NO. 59456-1-II

UNIVERSAL MORTGAGE & FINANCE, INC.,
Petitioner

vs.

STATE OF WASHINGTON,
DEPARTMENT OF FINANCIAL INSTITUTIONS,
Respondent

PETITION FOR REVIEW OF PETITIONER UNIVERSAL MORTGAGE & FINANCE, INC.

Dated: November 26, 2024

BEVERIDGE & DIAMOND, PC

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I. INTRODUCTION

In accordance with RAP 13.4, Universal Mortgage & Finance, Inc. ("Universal") seeks review of the lower courts' rulings that "strict compliance" applies uniquely to service requirements under the Administrative Procedures Act ("APA"). The lower courts' decisions directly conflict with this Court's decision in *Kenmore MHP LLC v. City of Kenmore*, 1 Wn.3d 513, 528, 531, 528 P.3d 815 (2023), which held that appeals are perfected by substantial compliance with service of process rules, and that an appeal cannot be dismissed without a showing of prejudice, which is absent here.

Although *Kenmore* follows this Court's consistent holdings dating back to Washington's territorial history, the lower court's decision here, like this Court's decision in *Stewart v. State Dep't. of Emp. Sec.*, 191 Wn.2d 42, 419 P.3d 838 (2018), and multiple decisions of the Courts of Appeals, relies on dicta in *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 958 P.2d 962 (1998), suggesting that strict compliance is required, a suggestion this Court has repeatedly rejected. The Court should grant review to finally put to rest this persistent misreading of *Skagit*.

II. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Universal Mortgage & Finance, Inc. ("Universal") seeks review of *Universal Mortg. & Fin., Inc. v. State of Washington, Dep't of Fin. Inst.'s,* No. 594561-1-II, 2024 WL 4603583 (Wash. Ct. App. Oct. 29, 2024) (unpublished). A copy of the opinion is attached as Appendix A ("App. A").

III. ISSUES PRESENTED FOR REVIEW

1. Is the Administrative Procedures Act subject to a unique exception from Washington's universal rule of substantial compliance?

2. Is the Attorney General the "attorney of record" for Administrative Procedures Act appeals involving the agencies that the Attorney General is statutorily required to represent?

IV. STATEMENT OF THE CASE

In 2022, the Department of Financial Institutions ("DFI") imposed substantial fines on Universal for operating without a license even though Universal had terminated its Washington operations and left the state long before the order was issued. DFI served its Final Decision and Order ("Order") by mail, but not electronically, on November 9, 2022. Universal received the Order on November 14, 2022. *See* Decl. of Christopher

Staiti, CP 103. On Friday, December 9, 2022, Universal served its Notice of Appeal on the AG's office at the email address specified on the Attorney General's website. CP 98-99. On that same day, Universal provided a paper copy of its Notice of Appeal to ABC Legal Messenger, a process server, which ABC delivered on the following Monday, December 12. CP 95. The Assistant Attorney General ("AAG") representing DFI filed a notice of appearance on December 13, 2022, the second business day after ABC served the notice of appeal on the Office of Attorney General. CP 15-16.

After seeking to force Universal to pay more than $26,000 for transcripts of the administrative record, CP 130 & n.1, DFI filed a motion to dismiss Universal's appeal, asserting that Universal did not "strictly comply" with the APA's procedural requirements. CP 24-26. Universal responded, noting that substantial compliance, not strict compliance, is the rule in Washington, and that DFI could not demonstrate that it suffered any prejudice from the supposed failure to strictly comply. CP 87-91.

On May 4, 2023, this Court issued its opinion in *Kenmore*, emphasizing that the prevailing policy in our state is that "substantial compliance with procedural rules is sufficient, because delay and even the loss of lawsuits should not be

occasioned by unnecessarily complex and vagrant procedural technicalities." *Kenmore*, 1 Wn.3d at 529 (citations omitted, quotes cleaned up). In addition, *Kenmore* requires a showing of prejudice before an appeal can be dismissed for purported failure to properly serve process. *Id*. at 528-29.

On June 2, 2022, the Thurston County Superior Court dismissed Universal's appeal, insisting, despite *Kenmore,* that strict compliance applies to the APA and refusing to consider whether DFI was prejudiced by supposed errors in Universal's service of its notice of appeal. CP 114. After its petition for reconsideration was rejected, CP 189-91, Universal sought direct appeal in this Court, which this Court transferred to the Court of Appeals. The Court of Appeals affirmed, relying on dicta in *Skagit* that this Court has repeatedly concluded does not mandate strict compliance, improperly concluding that Washington's universal rule of substantial compliance is limited to administrative appeals, and again refusing to consider whether DFI was prejudiced. App. A.

V. ARGUMENT

The Court should grant review to reconcile this Court's conflicting decisions, to correct lower court decisions that conflict with this Court's decisions and that conflict with other

lower court decisions, and because the APA and the application of the universal rule of substantial compliance are matters of extreme public importance. RAP 13.4(b). The Court has repeatedly found that *Skagit* does not impose a rule of strict compliance unique to the APA. But the lower courts, and even this Court in *Stewart*, fail to even consider those cases let alone the context of the statements in *Skagit,* with the result that *Skagit*'s dicta has become received wisdom. The Court should grant review and put an end to the persistent failure to honor its decisions concluding that *Skagit* does not create a rule of strict compliance applicable to the APA but no other Washington statutes.

A. This Case Raises Issues of Fundamental Importance.

The APA "sets forth the procedures that state agencies must provide when they engage in two of their key functions: promulgating rules and presiding over adjudicatory proceedings. In addition, it details the procedures associated with judicial review of administrative decisions." 24 Wash. Prac., Environmental Law and Practice § 25.11 (2d ed.). Hundreds of reported cases in Washington construe the APA, which governs administrative actions by state agencies governing nearly every aspect of life in our state, ranging from

economic regulation to environmental protection, education, and social services. This case raises a question fundamental to appeals in which citizen seek to rein in arbitrary government action—what is necessary to perfect an appeal under the APA?

Further, since 1854, the Washington Code has provided: "The provisions of this code shall be liberally construed, and shall not be limited by any rule of strict construction." RCW 1.12.010. As this Court has long made clear, the rule of substantial compliance "eliminate[s] or at least minimize[s] technical miscarriages of justice inherent in archaic procedural concepts once characterized by Vanderbilt as 'the sporting theory of justice.'" *Curtis Lumber Co. v. Sortor*, 83 Wn.2d 764, 767, 522 P.2d 822 (1974).

And "when the legislature adopted the 1988 APA, it expressly chose to break with prior practice and . . . therefore eliminated many of the formalities associated with the initiation of an action in superior court and instead crafted service and filing rules that would allow pro se litigants to seek judicial review without the need to hire an attorney or process server." *Diehl v. W. Wash. Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 215, 103 P.3d 193 (2004). Failure to apply substantial compliance to the APA therefore not only threatens

fundamental interests of justice but also defeats the Legislature's intentions in adopting the APA.

As University of Washington law professors have observed, "[j]udicial review helps to provide vital legitimacy to actions of administrative agencies in our system of government," but "[d]isposing of cases for procedural error before reaching the merits of the underlying claim of improper governmental behavior reduces the public's belief in the rule of law, and encourages governmental entities to elevate form over substance, using technical impediments as 'gotcha's,' rather than defending their actions on the merits, or coming into compliance with the law**."** Brief of Amicus Curiae University of Washington Professors of Environmental and Administrative Law at 18-19, *Diehl v. W. Wash. Growth Mgmt. Hearings Bd*., (Wash. Sup. Ct. Docket No. 74768-7, filed Aug. 31, 2004) (attached as Appendix B) ("UW Amicus"). The Court should grant review to uphold the critical value of government accountability to citizens and the courts and to eliminate pointless barriers that have been erected to vindicate that value.

B. Substantial Compliance, Not Strict Compliance, Has Been the Law of Washington Throughout Its History.

As this Court's decision in *Kenmore* makes clear, substantial compliance, not strict compliance, with statutes governing service of process is sufficient to invoke appellate jurisdiction. *Kenmore*, 1 Wn.3d at 528. *Kenmore* relies on RCW 1.12.010, a statute that has been in place since before statehood, which requires substantial compliance, not strict compliance, with state statutes. *Id.* at 528.

Kenmore also follows 140 years of this Court's consistent precedent making clear that substantial compliance is sufficient to invoke the appellate jurisdiction of the courts. *See*, e.g., *Skinner v. Civil Serv. Comm'n*, 168 Wn.2d 845, 854, 232 P.3d 558 (2010); *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 319-20, 76 P.3d 1183 (2003) (the "distinct preference of modern procedural rules to allow appeals to proceed to a hearing on the merits in the absence of substantial prejudice to other parties") (citation omitted); *Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 553-55, 933 P.2d 1025 (1997) ("substantial compliance with procedural rules, other than those which constitute the most basic steps, is sufficient" to invoke appellate jurisdiction (citation omitted)); *Sheldon v. Fettig*, 129

Wn.2d 601, 609, 919 P.2d 1209, 1212 (1996); *Vaughn v. Chung*, 119 Wn.2d 273, 280, 830 P.2d 668 (1992) ("…the civil rules contain a preference for deciding cases on their merits rather than on procedural technicalities"); *In re Saltis*, 94 Wn.2d 889, 895-96, 621 P.2d 716 (1980); *First Fed. Sav. & Loan Assoc. v. Ekanger*, 93 Wn.2d 777, 781, 613 P.2d 129 (1980) ("whenever possible, the rules of civil procedure should be applied in such a way that substance will prevail over form"); *Curtis Lumber*, 83 Wn.2d at 767 ; *Whitney v. Knowlton*, 33 Wn. 319, 322–23, 74 P. 469, 469–70 (1903) ("In matters of formal procedure, even though it be in proceedings so highly important as the process by which a party is brought into court, this court has never exacted anything more than a substantial compliance with the statute"; "Any other [rule] usually leads to a sacrifice of substance to form, and to decisions which shock the sense of justice and right even in minds trained to the technicalities of the law"); *Parker v. Denny,* 2 Wash. Terr. 176, 177, 2 P. 351, 351 (1883) ("substantial compliance" with statutory requirements for notice of appeal is sufficient to invoke appellate court's jurisdiction).

C. This Court Should Grant Review to Resolve Multiple Conflicts in Its Own Case Law.

The Court of Appeals' erroneous conclusion here relied on this Court's *Stewart* decision, App. A, slip op. at 4, which in turn cited *Skagit* and *Union Bay Pres. Coal. v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 902 P.2d 1247 (1995), to support the conclusion that "Stewart was required to comply strictly with the APA's perfection deadline" to bring an APA appeal. *Stewart,* 191 Wn.2d at 52. *Stewart* does not survive *Kenmore*'s conclusion that "the prevailing policy in our state is that controversies be determined on the merits" and that "substantial compliance with procedural rules is sufficient" to perfect appeals. *Kenmore,* 1 Wn.3d at 529 (citations omitted; quote cleaned up).

Worse, *Stewart* does not address RCW 1.12.010, which has now been the law in Washington for 170 years. Nor does *Stewart* even reference this Court's multiple opinions making clear that *Skagit* and *Union Bay* cannot be read to require strict scrutiny and that "substantial compliance with service requirements is generally sufficient to invoke a superior court's appellate jurisdiction." *Skinner*, 168 Wn.2d at 854.

As a group of University of Washington law professors has explained, despite the "straightforward nature of the

analysis" in *Union Bay* and *Skagit*, "the Court stated, in dicta, that 'substantial compliance with the service requirements of the APA is not sufficient to invoke the appellate. . . jurisdiction of the superior court.'" But "[a] careful reading of *Skagit Surveyors,*" together with other cases we cite here, "strongly suggest[s] that the court's statement was an incorrect over-simplification of the holding of the case," and, accordingly, it is incorrect to conclude that substantial compliance does not apply to APA appeals. UW Amicus, App. B at 17-18.

A careful reading of *Skagit Surveyors* and *Union Bay* leaves no doubt that the law professors were correct. *Union Bay* concluded that service on the attorneys of record alone, and not the parties of record, was insufficient to perfect an appeal based on the specific definition of "party" in the APA as it existed in 1995, which demonstrated that the legislature intentionally excluded "attorneys of record" from the definition of "parties of record." *Union Bay*, 127 Wn.2d at 618-20. *Skagit* followed *Union Bay's* holding that, "[b]ased on the statutory definition of 'party' contained in the APA," the "appellant was required to file a petition for review and serve the petition on the parties of record, not just their attorneys." *Skagit*, 135 Wn.2d at 555-56. But *Skagit* makes clear this Court would

have rejected this "harsh result" if the appeal had been governed by the APA as it now exists. *Id.* at 557.

Further, in the passage immediately following *Skagit*'s misleading dicta, this Court "decline[d] to hold that strict compliance" with RCW 34.05.546(5) "is a jurisdictional prerequisite." *Id.* at 557. That provision requires a petition for review to "set forth . . . [i]dentification of persons who were parties in any adjudicative proceeding that led to agency action." The Court concluded that a petition for review should not be dismissed for failure to identify all those parties because they were listed in the order attached to the petition. Hence, *Skagit* does create a rule of strict compliance uniquely applicable to the APA.

Any doubt that *Skagit* and *Union Bay* were limited to their specific facts was eliminated by this Court in *Skinner,* 168 Wn.2d at 854. As this Court made clear, "[t]he analysis in *Union Bay* focused on the legislature's deletion, as opposed to mere omission, of approval for service on a party's attorney of record," and "[i]t was only in light of this fact that that the court declined to apply the doctrine of substantial compliance." *Id.* at 854-55 (emph. added). In fact, *Union Bay* made clear that its specific holding had "no bearing on other . . . requirements of service." *Id*. at 855 (citing *Union Bay*, 127 Wn.2d at 620).

Therefore, "*Union Bay* and *Skagit Surveyors* do not preclude application of the doctrine of substantial compliance," *Id*., and "*substantial compliance with service requirements is generally sufficient to invoke a superior court's appellate jurisdiction*." *Id*. at 854 (emph. added). *See also Black*, 131 Wn.2d at 556 ("In the present case there is no evidence that the Legislature explicitly meant to exclude service on the attorney general to the extent it did in *Union Bay*. *Union Bay* is therefore not applicable"); *Cont'l Sports Corp. v. Dep't of Lab. & Indus*., 128 Wn.2d 594, 604, 910 P.2d 1284 (1996) (*Union Bay* arises from "Legislature's clear expression of intent that service be made only on the parties of record," and that situation is "vastly different" from "less specific requirement that the notice of appeal be sent by 'mail'").

Stewart is also inconsistent with *Diehl,* where this Court rejected the Court of Appeals' conclusion, relying on *Skagit*, that "substantial compliance with the service requirements of the APA is not sufficient to invoke the appellate . . . jurisdiction of the superior court." *Diehl,* 153 Wn.2d at 221. This Court instead concluded that "failure to serve the attorney general's office is not grounds for dismissal when it is clear that the attorney general has actual notice." *Id.* at 219.

Finally, *Stewart* cannot be squared with other decisions of this Court reaching the exact opposite conclusion on the same facts. To start with, the appellant in *Kenmore*, like *Universal*, timely served its notice of appeal electronically and also provided the notice to a process server, who delivered the notice to the City of Kenmore on the thirty-first day after the agency's decision. *Kenmore,* 1 Wn.3d at 518. This Court concluded that the appellant "substantially complied with the statutory requirements under RCW 36.70A.290(2) when it electronically filed its petition for review and provided notice of service to all required parties within the statutory" time limit, and that it was arbitrary and capricious to reject the appeal without considering whether the City was prejudiced by delivery of the paper notice to the City one day after the statutory period. *Id.* at 529-31.

Similarly, both *Skinner* and *Continental Sports* involved appeals under statutes requiring the notice of appeal to be served within 30 days of the agency decision. In both cases, this Court rejected claims that the failure to deliver the notice to the agency within thirty days barred the appeal. In *Skinner*, this Court concluded that, although the appellant served its notice of appeal to the Superior Court to the city instead of its civil service commission as the statute required, and it was unclear

whether the notice was filed within the statute's thirty-day time limit, the appeal was properly perfected because "the Commission filed a notice of appearance in the superior court six days after Skinner served the Medina city clerk," and the City "does not and cannot argue that the Commission was prejudiced by Skinner's manner of service." *Skinner,* 168 Wn.2d at 856-57. In *Continental,* this Court held that Continental substantially complied the statute requiring required delivery of the notice of appeal "by mail" within 30 days of the agency decision even though Continental's notice of appeal was not sent by mail, as the statute required, but was instead sent by Federal Express, which did not arrive until the 31st day after the agency's decision. *Cont'l Sports Corp.,* 128 Wn.2d at 602-04. This Court nonetheless concluded that the appeal was properly perfected because the agency "was *in as good a position as it would have been* had the notice of appeal been sent to the Board 'by mail'." *Id.* at 604 (emph. added); *see also Black,* 131 Wn.2d at 552-53; *In re Saltis*, 94 Wn.2d at 895-96 ("even if an appellant must strictly comply with the statute, service 'by mail ... on the director' must be considered accomplished if there is evidence that the director actually received notice of appeal").

The Court of Appeals disregards these cases, claiming that petitions for judicial review require strict compliance, unlike petitions for administrative review. App. A at 5. This conflicts with multiple decisions of this Court. *See Skinner*, 168 Wn.2d at 854 ("substantial compliance" is sufficient to invoke "a superior court's appellate jurisdiction" of agency action); *Black*, 131 Wash.2d at 552–53 ("The doctrine of substantial compliance in appellate matters has been a part of Washington law since territorial days"); *Dougherty*, 150 Wn.2d at 319 ("substantial compliance with the filing requirements 'is sufficient to invoke the superior court's appellate jurisdiction'" (citation omitted)); *In re Saltis*, 94 Wn.2d at 896 ("Our acceptance of the sufficiency of 'substantial compliance' with procedural rules has as much application to this special jurisdictional notice requirement as it has to the more general provisions of the rules of civil procedure. Direction of the notice of appeal to the Department in a manner reasonably calculated to give the director actual notice of the pending appeal is sufficient to perfect subject matter jurisdiction under RCW 51.52.110").

The lower court's holding also disregards one of the Legislature's fundamental purposes in enacting the APA, which was to remove formalistic procedural barriers to Washington

citizens seeking to hold their government accountable in court and that citizens should not be forced to hire attorneys to seek such judicial accountability. *Diehl*, 153 Wn.2d at 215. And it makes very little sense to conclude that a different standard applies to statutory provisions for administrative review of agency decisions and judicial review of agency decisions.

The Court should grant review to resolve the conflicts between *Stewart* and *Kenmore,* and its own precedent making clear that *Stewart* is based on an unsound reading of *Skagit* and *Union Bay.*

D. The Court Should Grant Review to Correct the Lower Courts' Failure to Follow Kenmore and This Court's Precedents Rejecting the Claim That Skagit Creates a Strict Compliance Requirement Unique to the APA.

The decisions of the lower courts, including the lower courts' decisions here, reflect "the unfortunate confusion created by dicta in [this Court's] decision in *Skagit Surveyors*." UW Amicus, App. B at 17. Like this Court in *Stewart,* the lower courts here relied the dicta in *Skagit* and *Union Bay* to conclude that strict compliance is required for APA appeals, but failed to address any of this Court's jurisprudence making clear that *Skagit* and *Union Bay* are limited to the specific language contained in the APA when those cases were decided, which

has been removed, and that the cases do not create a rule of strict compliance.

Unfortunately, the lower courts repeatedly commit these same errors. *See, e.g., Clark Cnty. v. Growth Mgmt. Hearings Bd.,* 10 Wn.App.2d 84, 95, 448 P.3d 81 (2019); *In re Matter of Botany Unlimited Design & Supply, LLC*, 198 Wn.App. 90, 94, 391 P.3d 605 (2017); *Muckleshoot Indian Tribe v. Washington Dep't of Ecology*, 112 Wn.App. 712, 728, 50 P.3d 668, 677 (2002); *Cheek v. Emp. Sec. Dep't*, 107 Wn.App. 79, 82-84, 25 P.3d 481 (2001); *Ryan v. Washington State Univ.*, No. 25339-9-II, 2000 WL 713935 (Wash. Ct. App. June 2, 2000).

But, reflecting the "confusion" about whether this Court "rejected the substantial compliance doctrine in favor of one of strict compliance," *Lawson v. City of Mukilteo*, No. 37599–7–I, 1997 WL 408411, at *1 & n. 1 (Wash. Ct. App. July 21, 1997) (unpublished), some courts have interpreted *Skagit* to support substantial compliance, not strict compliance. *Id*.; *Ruland v. Dep't of Soc. & Health Serv*., 144 Wn.App. 263, 274-75, 182 P.3d 470 (2008); *City of Spokane v. Salmon*, No. 22534–8–III, 2005 WL 225401 (Wash. Ct. App. Feb. 1, 2005) (unpublished). *Cf.* 24 Wash. Prac., Environmental Law and Practice § 25.27 (Citing *Skagit Surveyors*, concluding that "substantial compliance" with APA service requirements "*is not sufficient*

to invoke the appellate. . . jurisdiction of the Superior Court") (emph. added); *Id*. at § 24.27 & n.17 (citing *Skagit Surveyors,* "[t]he petition for review *substantially complies*" with the APA requirement to name all parties before the agency "if the party seeking review attaches and incorporates the Board's order to its petition") (emph. added).

The Court should therefore grant review to clear up the confusion created by its dicta in *Skagit* and make clear, once again, that *Skagit* did not create a rule of strict compliance unique to APA appeals.

E. The Court Should Accept Review to Resolve Split Authority Interpreting RCW 34.05.542(6).

To address the "harsh result" of *Union Bay* and *Skagit,* which held that service of process on a party's attorney did not satisfy the APA's requirement for service of process on the party itself, the Legislature in 1998 added subsection six to RCW 34.05.542, which provides that "[f]or purposes of this section, service upon the attorney of record of any agency . . . constitutes service upon the agency." *Skagit,* 135 Wn.2d at 557 & n. 7. Here, Universal timely served its notice of appeal on the Attorney General at the email address specified on the Attorney General's website on December 9, 2022, CP 98-99, and there is no doubt that AAG Manning, who

represented DFI in the agency proceedings below, received the notice of appeal because he filed his notice of appearance two business days after the December 9 email. CP 15. This constitutes "service upon the attorney of record" for DFI, and Universal therefore strictly complied with the service requirements of RCW 34.05.542 because service on DFI's attorney of record "constitutes service upon the agency." RCW 34.05.542(6).

In addition, RCW 34.05.542(3) provides that "the time [for service of process] is extended during any period that the petitioner did not know and was under no duty to discover or could not reasonably have discovered that the agency had taken the action." Here, DFI mailed its decision, which was not received by Universal's attorney until November 14, 2022. CP 103. Under the plain language of RCW 34.05.542(3), Universal's time for filing its appeal was extended to December 14, 2022, and it therefore strictly complied with the APA's service of process rules under this provision, as well. The lower courts simply ignored this provision.

Despite conceding that: (a) RCW 43.10.040 requires the Attorney General to represent state agencies such as DFI in all courts and administrative tribunals; (b) that Assistant Attorney General Manning was DFI's "attorney of record"; and, (c)

service was effective to notify Manning of Universal's appeal, the Court of Appeals nonetheless held that email service at the website designated by the Attorney General was insufficient to satisfy RCW 34.05.542(6), and that Universal was also required by some unwritten rule to email Manning directly. App. A at 6-8.

This conclusion has no support in the language of RCW 34.05.542(6) and elevates "procedural requirements to the level of jurisdictional imperative" which violates *Kenmore* and other cases requiring substantial compliance because it "encourages trivial procedural errors to interfere with the court's ability to do substantive justice." *Dougherty*, 150 Wn.2d at 319. It is also inconsistent with *Black*, 131 Wn.2d at 553, which held that "service on the assistant attorney general assigned to handle the case is reasonably calculated to give notice to" the agency represented by that AAG, and *Diehl*, which held that strict compliance with the requirement to serve the Attorney General is not fatal to an appeal where "the attorney general had actual notice" as evidenced by the AAG's notice of appearance and substantive filings. *Diehl*, 153 Wn.2d at 218.

The Court of Appeals decision is also inconsistent with other decisions of the lower courts. It is inconsistent with another Division 1 opinion, *Ricketts v. Washington State Bd. of*

Acct., 111 Wn. App. 113, 43 P.3d 548 (2002), which held that mailing of a petition for review to the AAG who appeared for the agency was sufficient to establish the Superior Court's appellate jurisdiction even though the agency itself was never served. It is also inconsistent with Division 3's opinion in *Botany Unlimited,* which concluded that an AAG's "participation in the administrative proceedings was sufficient to qualify him as an 'attorney of record'" RCW 34.05.542(6) even though the AAG never filed a formal appearance in the agency proceedings. 198 Wn.App. at 95-97. In contrast, sixteen years earlier, Division 3 in *Cheek*, 107 Wn.App. 79, like the Court of Appeals here, concluded that electronic service on the Office of Attorney General did not comply with the requirement for service on the "attorney of record." These decisions are inconsistent with this Court's decisions making clear that an appeal cannot be dismissed absent a showing that an errant filing prejudiced the appellee. *Kenmore,* 1 Wn.3d at 531("[a] showing of prejudice" is "the key factor when considering dismissal of a petition for review for procedural error"); *Black*, 131 Wn.2d at 553; *Dougherty*, 150 Wn.2d at 319-20 ("It is the distinct preference of modern procedural rules to allow appeals to proceed to a hearing on the merits in the absence of substantial prejudice to other parties").

The Court should therefore accept review both to ensure that the lower courts follow this Court's precedent and to resolve the conflicting opinions of the lower courts regarding the interpretation of RCW 34.05.542(6).

VI. CONCLUSION

Following 140 years of precedent, this Court in *Kenmore* found the substantial compliance principle is necessary to prevent the "technical miscarriage of justice inherent in archaic procedural concepts," *Kenmore*, 1 Wn.3d at 529, like those indulged in by lower courts here, and by many other lower courts. This Court should accept review to clarify that the rule of substantial compliance applies to the APA as it does to any other statute. The Court should also accept review to ensure that the lower courts properly follow this Court's precedents concerning service of the Attorney General as the statutory representative of state agencies like DFI.

RESPECTFULLY SUBMITTED this 26th day of November, 2024.

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This document contains 4,670 words, excluding the parts of the document exempted from the word count by RAP 18.17.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I am employed at the law firm of Beveridge & Diamond, P.C., over the age of eighteen, and not a party to the within cause. On the date written below, a true and correct copy of the foregoing document was served on the following attorneys, via US mail and Email.

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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this declaration was executed on the 26th day of November, 2024 in Seattle, Washington.

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Sydney Prall
Legal Administrative Assistant

BEVERIDGE & DIAMOND, P.C.

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Filing Petition for Review

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Appendix A

2024 WL 4603583
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NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 2.

UNIVERSAL MORTGAGE
& FINANCE, INC., Appellant,
v.
STATE of Washington, Department
of Financial Institutions, Respondents.

No. 59456-1-II
|
October 29, 2024

Appeal from Thurston Superior Court, Docket No: 22-2-03366-2, Honorable Allyson S. Zipp, Judge

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UNPUBLISHED OPINION

Veljacic, J.

***1** Universal Mortgage & Finance, Inc. (Universal) appeals the superior court's dismissal of a petition for judicial review. Universal raises three issues on appeal. First, it argues the court erred in concluding that the timely service on the Attorney General's Office (AGO) did not satisfy RCW 34.05.542(6). Second, Universal claims the court erred in holding that strict, not substantial, compliance applies to the service requirements in the Administrative Procedure Act (APA). Third, Universal argues that the court erred in dismissing the case when the Department of Financial Institutions (Department) could not demonstrate prejudice by the alleged failure to serve the agency in a timely manner. Because the APA requires strict compliance with service requirements when seeking judicial appellate review of agency decisions in superior court, and Universal failed to serve the AGO or Department in accordance with RCW 34.05.542, we affirm the dismissal of the petition for judicial review.

FACTS

I. BACKGROUND

In January 2021, the Department issued a statement of charges against Universal. The Department alleged Universal conducted a mortgage loan business without being licensed and engaged in deceptive practices violating the Consumer Loan Act, chapter 31.04 RCW. Universal sought review through the administrative process. At the outset, Assistant Attorney General (AAG) Jong Lee was the agency representative for the Department. Following an initial order on summary judgment by an administrative law judge (ALJ) with the Office of Administrative Hearings, AAG Stephen Manning was listed as the agency representative. Manning continued to represent the Department at several stages of the administrative process. The ALJ ultimately found Universal liable and assigned monetary fines. On November 9, 2022, the director of the Department affirmed the ALJ's decision in a final decision and order (Order) and mailed it that same day. Universal received the Order on November 14, 2022.

II. UNIVERSAL'S PETITION FOR JUDICIAL REVIEW

Universal filed a petition for judicial review with the Thurston County Superior Court on Thursday, December 8, 2022. On Friday, December 9, 2022, Universal e-mailed a copy of the petition to a general service e-mail address for the AGO at serviceATG@atg.wa.gov. Shortly thereafter, Universal received an automatic response from the AGO. [1] Universal also e-mailed a process server a copy of the petition to deliver to the Department. The copy of the petition was delivered on Monday, December 12, 2022. Manning filed a notice of appearance on Tuesday, December 13, 2022.

III. THE DEPARTMENT'S MOTION TO DISMISS

***2** The Department moved to dismiss the petition, arguing that service was untimely under RCW 34.05.542. The superior court granted the motion. Universal moved for reconsideration, which the court denied. Universal then moved for direct review before the Washington Supreme Court. The Supreme Court transferred the case to this court. We affirm the dismissal of the petition.

ANALYSIS

I. WHETHER UNIVERSAL SERVED THE PETITION FOR JUDICIAL REVIEW IN ACCORDANCE WITH RCW 34.05.542.

Universal contends that the superior court erred in dismissing its petition for judicial review. We disagree.

A. Standard of Review

Under CR 12(b)(1), a court may dismiss for a lack of subject matter jurisdiction. *See Pitoitua v. Gaube*, 28 Wn. App. 2d 141, 146, 534 P.3d 882 (2023). Whether a trial court has subject matter jurisdiction is a question of law we review de novo. *Davis v. Dep't of Lab. & Indus.*, 159 Wn. App. 437, 441, 245 P.3d 253 (2011).

B. Legal Principles

Under the APA, a party may petition for judicial review after exhausting all administrative remedies. RCW 34.05.534. A superior court reviewing an administrative decision acts in a " 'limited appellate capacity.' " *Union Bay Pres. Coal. v. Cosmos Dev. & Admin. Corp.*, 127 Wn.2d 614, 618, 902 P.2d 1247 (1995) (quoting *City of Seattle v. Pub. Emp. Rel. Comm'n*, 116 Wn.2d 923, 926, 809 P.2d 1377 (1991)). Before invoking the superior court's appellate jurisdiction, "all statutory procedural requirements must be met." *Id.* Failure to do so requires a court to dismiss the case for lack of subject matter jurisdiction. *See Stewart v. Dep't of Emp. Sec.*, 191 Wn.2d 42, 52-53, 419 P.3d 838 (2018).

1. Strict Compliance Applies to RCW 34.05.542

Universal argues that substantial compliance is the standard for evaluating adherence to RCW 34.05.542. We disagree.

The APA "establishes the exclusive means of judicial review of agency action." RCW 34.05.510. "A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order." RCW 34.05.542(2); *see also Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 555, 958 P.2d 962 (1998). Critically, "[s]ubstantial compliance with the service requirements of the APA *is not sufficient* to invoke the appellate, or subject matter, jurisdiction of the superior court." *Skagit Surveyors*, 135 Wn.2d at 556 (emphasis added); *Stewart*, 191 Wn.2d at 53-54.

Unlike other statutory frameworks regulating specific agencies, the APA has different requirements for petitions of judicial review. *Compare Black v. Dep't of Lab. & Indus.*, 131 Wn.2d 547, 555, 933 P.2d 1025 (1997) (explaining substantial compliance supports the notion that courts construe "provisions of the Industrial Insurance Act ... liberally ... to achieve its purpose of providing compensation to all covered employees."), *Skinner v. Civil Service Comm'n*, 168 Wn.2d 845, 850, 855, 232 P.3d 558 (2010) (promoting substantial compliance with appeals arising out of RCW 41.12.090, a statute addressing the Police Civil Service Commission), *with Stewart*, 191 Wn.2d at 53-54 (promoting strict compliance for the service requirements of RCW 34.05.542). Therefore, under the APA, a more exacting review is necessary to determine if all requirements have been satisfied. *Stewart*, 191 Wn.2d at 52-54.

***3** Relying on *Kenmore MHP, LLC v. City of Kenmore*, 1 Wn.3d 513, 528 P.3d 815 (2023), Universal argues that substantial compliance is sufficient. Universal's reliance on *Kenmore* is misplaced. In *Kenmore,* Kenmore MHP (MHP) appealed a dismissal of their petition by the Growth Management Hearings Board (GMHB). 1 Wn.3d at 517-18. The Supreme Court reversed, holding that MHP substantially complied with the service requirements outlined in RCW 36.70A.290(2). *Id.* at 518, 531. Unlike the facts before us, *Kenmore* focused on the dismissal of a case where the appellant sought review by a GMHB; it did not focus on a petition for judicial review before a superior court acting in its statutory appellate capacity. *Id.* at 517; *contra Skagit Surveyors*, 135 Wn.2d at 552-53; *Union Bay*, 127 Wn.2d at 616-17.

Nonetheless, Universal claims *Kenmore* renders *Skagit Surveyors* and *Union Bay* inapplicable, but we disagree. As recently as 2018, the Supreme Court relied on strict compliance to affirm the dismissal of a petition for judicial review under RCW 34.05.542. *See Stewart*, 191 Wn.2d at 54-55. We observe that *Skagit Surveyors*, *Union Bay*, and *Stewart* all specifically reference petitions for judicial

review under RCW 34.05.542, while *Kenmore* addresses an appellant seeking administrative review under chapter 36.07A RCW and the GMHB dismissing the matter under the Washington Administrative Code. *Kenmore*, 1 Wn.3d at 517; *Skagit Surveyors*, 135 Wn.2d at 552-53; *Union Bay*, 127. Wn.2d at 616-17; *Stewart*, 191 Wn.2d at 45. *Kenmore* does not mention RCW 34.05.542, *Skagit Surveyors*, or *Union Bay*. *See* *Kenmore*, 1 Wn.3d at 519-29. This is so because petitions for *judicial* review under RCW 34.05.542 are treated differently than petitions for *administrative* review. As our Supreme Court explained in *Skagit Surveyors*, a party seeking judicial review seeks to invoke the appellate subject matter jurisdiction of the superior court, a limited statutory jurisdiction. 135 Wn.2d at 555. Our Supreme Court has required strict compliance to invoke this jurisdiction while not requiring strict compliance for review before administrative agencies. *Stewart*, 191 Wn.2d at 57.

Accordingly, *Kenmore* does not apply to the petition for judicial review. The court did not err in concluding RCW 34.05.542 requires strict compliance. [2]

2. Universal Did Not Properly Serve the AGO

Next, Universal argues it properly served the AGO, satisfying RCW 34.05.542(6). We disagree.

The APA requires a party to file a petition "with the court" and serve it upon "the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order." RCW 34.05.542(2). The term "party" is either an individual "to whom the agency action is specifically directed" or "[a] person named as a party to the agency proceeding or allowed to intervene or participate as a party in the agency proceeding." RCW 34.05.010(12). A party may serve a petition through the United States (U.S.) mail, in person, or electronic service. *See* RCW 34.05.010(19); RCW 34.05.542. If a party serves a petition through the U.S. mail, service "is complete upon deposit," evidenced by a postmark. *See* RCW 34.05.010(19). Also, agencies "may, by rule, authorize service by electronic transmission, or by commercial parcel delivery company." RCW 34.05.010(19).

***4** "[S]ervice upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record." RCW 34.05.542(6). [3] The attorney general can qualify as the attorney of record for a specific agency. *See* *In re Matter of Botany Unlimited Design & Supply, LLC*, 198 Wn. App. 90, 97, 391 P.3d 605 (2017) (holding that an assistant attorney general constituted an "attorney of record" for the purposes of RCW 34.05.542(6)).

Universal argues RCW 43.10.040 results in the AGO being the per se "attorney of record" for RCW 34.05.542(6). We disagree. At least some involvement in the administrative process has to occur for the AGO to qualify as the "attorney of record" under RCW 34.05.542(6). *See* *Cheek v. Emp. Sec. Dep't*, 107 Wn. App. 79, 85, 25 P.3d 481 (2001) (holding the appellant's reliance on RCW 43.10.040 to cure defective service on the Employment Security Department was "without merit."); *Botany Unlimited*, 198 Wn. App. at 97 n.3 (holding the AAG could qualify as the "attorney of record" because they had *previously represented* the agency). There is nothing in the cases cited that suggests the AGO, as a whole, is the attorney of record.

Manning, however, does qualify as an "attorney of record" for the Department. As in *Botany Unlimited*, multiple AAGs represented the Department throughout the administrative process. *See* *Botany Unlimited*, 198 Wn. App. at 92-94. While Manning was not representing the Department at the initial stages, he was listed as the agency representative on the ALJ's initial order, and the Department's Order. Manning continued to represent the Department and ultimately filed the notice of appearance. On these facts, Manning's representation of the Department during the administrative process is sufficient to qualify him as an "attorney of record" for the purposes of RCW 34.05.542(6).

While Manning is the "attorney of record," Universal's delivery of the petition was nevertheless insufficient. [4] Universal sent the petition to a general e-mail address for the AGO. This is problematic because this was a general address, not AAG Manning's specific e-mail address. *See* *Botany Unlimited*, 198 Wn. App. at 93. Moreover, the language of the automatic reply from the AGO's service address expressly stated that an "auto-reply" without a "[w]aiver

or acknowledgement of personal service" from "an email authored by an Assistant Attorney General ... *does not serve as a waiver or acknowledgment of personal service*." CP at 99 (emphasis added). Nothing in the record suggests the AGO sent an e-mail waiving or acknowledging personal service.

***5** We conclude that Universal did not strictly comply with the service requirements when serving the AGO and, therefore, did not satisfy RCW 34.05.542(6).

3. Universal Did Not Timely Serve the Department.

Universal argues that it substantially complied with RCW 34.05.542 and properly served the Department. Again, we disagree.

Under the APA, an agency's final decision and order is effective upon deposit in the U.S. mail. RCW 34.05.473. A party has thirty days to file and serve a petition on all relevant parties. RCW 34.05.542(3). There are several methods of serving petitions. *See* RCW 34.05.542(4). The APA, however, "explicitly provides that '[s]ervice of the petition on the agency shall be by *delivery*.' " *Stewart*, 191 Wn.2d at 47 (emphasis in original) (quoting RCW 34.05.542(4)). While "[s]ervice of a copy by mail ... [is] complete upon deposit in the United States mail," RCW 34.05.542(4), "service on the agency is complete only *when it is* '*delivered*' to the board." *Clark County v. Growth Mgmt. Hr'gs Bd.*, 10 Wn. App. 2d 84, 97, 448 P.3d 81 (2019) (emphasis added) (quoting RCW 34.05.542(4)).

Universal's argument encouraging substantial compliance is unpersuasive. "It is impossible to substantially comply with a statutory time limit. ... It is either complied with or it is not." *City of Seattle*, 116 Wn.2d at 928-29. The Department's Order was issued on November 9, 2022. Therefore, the petition must have been filed and served on all parties by December 9, 2022. Universal opted to utilize a process server to deliver the petition. Consequently, service was effective only upon delivery, not dispatch. *See Stewart*, 191 Wn.2d at 47; *Clark County*, 10 Wn. App. 2d at 97. The process server delivered the petition to the Department on December 12, 2022, three days late. As a result, the petition was not served timely.

We conclude that service on the Department did not satisfy RCW 34.05.542. Therefore, the superior court lacked subject matter jurisdiction to hear the petition for judicial review, requiring dismissal.

CONCLUSION

Accordingly, we affirm the superior court's dismissal of Universal's petition for judicial review.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

Maxa, J.

Cruser, C.J.

All Citations

Not Reported in Pac. Rptr., 2024 WL 4603583

Footnotes

1 The e-mail address serves as an avenue to obtain a "waiver or acknowledgement of personal service of original service of process." Clerk's Papers (CP) at 99. This is only available for cases involving the "State of Washington, its state agencies and state officials sued in their official capacities." CP at 99. Additionally, the message stresses that an "auto-reply" without a "[w]aiver or acknowledgement of personal service." from

"an email authored by an Assistant Attorney General ... does not serve as a waiver or acknowledgment of personal service." CP at 99.

2 Because *Kenmore* is inapplicable, we need not evaluate Universal's third assignment of error, regarding the superior court's failure to conduct a prejudice analysis for untimely service. Other cases utilizing strict compliance have not required a showing of prejudice for untimely service of process. *See* *City of Seattle*, 116 Wn.2d at 925 (dismissing a petition served three days late without a showing of prejudice); *Stewart*, 191 Wn.2d at 45, 52-55 (upholding the dismissal of a petition for being served one day late without a showing of prejudice).

3 Since its adoption, there have been various interpretations of RCW 34.05.542(6). In *Cheek*, the attorney general did not qualify as the "attorney of record" because the Employment Security Department had not yet filed "a formal notice of appearance through the Office of the Attorney General" until after the petition had been served. *Cheek v. Emp. Sec. Dep't*, 107 Wn. App. 79, 84, 25 P.3d 481 (2001). In *Botany Unlimited*, however, the AAG qualified as the "attorney of record" despite filing a notice of appearance after the petition had been served. *See* *In re Matter of Botany Unlimited Design & Supply, LLC*, 198 Wn. App. 90, 97, 391 P.3d 605 (2017). This was based on the fact that the AAG represented the relevant department throughout the administrative process. *Id.*

4 Universal relies on *Diehl v. Western Washington Growth Management Hearings Board*, contending Manning had actual notice of the petition, removing the necessity for proper service. 153 Wn.2d 207, 210-12, 219, 103 P.3d 193 (2004). But *Diehl* primarily focused on whether CR 4 or RCW 34.05.542 governed service requirements of petitions for judicial review. 153 Wn.2d at 213-17. Therefore, *Diehl* is inapplicable.

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Appendix B

No. 74768-7

SUPREME COURT OF THE STATE OF WASHINGTON

JOHN E. DIEHL,

Appellant,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, an agency of the State of Washington; and MASON COUNTY, a municipal corporation,

Respondents.

BRIEF AMICUS CURIAE OF ADMINISTRATIVE AND ENVIRONMENTAL LAW PROFESSORS IN SUPPORT OF APPELLANT, SUPPORTING REVERSAL AND REMAND

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I. INTEREST OF AMICI CURIAE

Amici are law professors at the University of Washington School of Law,[1] each of whom teaches and conducts research in the fields of administrative law and environmental law. As set forth more fully in the accompanying motion for leave to file this amicus brief, Amici have substantial expertise relevant to the questions of administrative law presented in this case, and strong professional interests in helping to ensure that the Administrative Procedure Act (APA), Chapter 34.05 RCW, is correctly interpreted and administered. See Motion for Leave to File Amicus Brief (filed concurrently).

II. FACTS

The relevant facts in this case have been set forth in the parties' Supplemental Briefs, and will not be repeated here. Rather, Amici take this opportunity to highlight for the Court the fact that the superior court non-suited Mr. Diehl--dismissing his petition for review for insufficiency of service without ever addressing the merits of the case--even though: (i) there does not appear to be any indication in the record that any party to the agency proceedings came forward with evidence that contradicted Mr. Diehl's assertion that he had timely served them in a manner

[1] Although Amici are employed by the University of Washington School of Law, they do not represent or speak for that institution in this matter, and institutional affiliations are listed for identification purposes only.

consistent with the APA[2]; (ii) there is no indication in the record that any party to the agency proceedings came forward to articulate any prejudice suffered as a result of Mr. Diehl's alleged service failures; and (iii) that the case had already been briefed on the merits and was apparently about to be argued on the merits when Mason County first raised the question of sufficiency of service. See Verbatim Report of Proceedings of June 7, 2002.

III. SUMMARY OF ARGUMENT

The Court of Appeals misread the APA when it based, in part, the dismissal of Mr. Diehl's petition for review, on his alleged failure to serve the petition for review upon: (i) the auditor or deputy auditor for Mason County (rather than its attorney of record); and (ii) the office of the attorney general. Neither of these purported failures provides a proper basis upon which to dismiss a petition for review.

The Court of Appeals also misconstrued the exclusive nature of judicial review under the APA when it added the service of process requirements of CR 4 to the APA's procedures concerning service. The Legislature squarely faced the question of how to address the

[2] The record is unclear whether the complaining party, Mason County, indicated how it was served and/or how it became aware of the appeal. See Verbatim Report of Proceedings of June 7, 2002 (VT) at 7-8 (Mason County counsel stating "we have no idea, the county has no idea whether Mr. Diehl properly served all parties or any party for that matter. His certificate is very inconclusory.") See also ACP 20 (noting Mason County raised an objection regarding whether the necessary parties were properly served); ACP 13 ("in the instant case there is no verification that Mr. Diehl properly served the respondent nor any of the parties to this case.").

procedures rules for initiation of judicial review, including service, when it adopted the APA. Guided by a specially created Task Force,[3] the Legislature expressly chose to break with both prior practice (which was largely silent) and with the model act (which provided for an explicit cross reference to the applicable rules of civil procedure) in crafting detailed filing and service requirements specific to the APA. In order to facilitate judicial review of agency action, the Legislature eliminated many of the formalities associated with the initiation of a civil action in superior court.[4] Simply stated, the Legislature intentionally crafted service and filing rules that would not encumber citizens with the many procedural formalities so common to our courts. In view of this history, and the plain language of the APA, the lower courts erred when they imported, as "ancillary procedural matters," the service requirements from CR 4 concerning sworn statements, proofs of service, and personal delivery. Even to the extent that such rules might be considered "ancillary," they are nonetheless "inconsistent with" the plain meaning and language of the APA. RCW 34.05.510(2). Accordingly, the decision of the Court of Appeals should be reversed, and the matter remanded to

[3] See William R. Andersen, The 1988 Washington Administrative Procedure Act—An Introduction, 64 Wash. L. Rev. 781, 782 (1989)

[4] For example, rather than filing a summons and complaint, see CR 3 and 4, an aggrieved party need only file a "petition for review." Similarly, service upon parties of record and the office of the attorney general may be effected in person or by mail—and if mailed is "deemed complete upon deposit in the United States mail, as evidenced by the postmark." RCW 34.05.542(6).

the superior court for additional fact finding to determine whether Mr. Diehl in fact complied, or substantially complied, with the APA's filing and service requirements.

IV. THE STATUTORY FRAMEWORK: THE APA REQUIREMENTS FOR FILING AND SERVING PETITIONS FOR REVIEW

As this Court has observed on numerous occasions, the APA establishes, with certain limited exceptions, the "exclusive means" of judicial review[5] of agency action. RCW 34.05.510. One such exception, and the only exception pertinent to this case, is that "[a]ncillary procedural matters before the reviewing court . . . are governed, to the extent not inconsistent with this chapter, by court rule." RCW 34.05.510(2) (emphasis added).

In general, the APA sets out exclusive procedures for the filing of a "petition for review" including requirements governing: where a petition shall be filed, RCW 34.05.514; the contents of a petition for review, RCW 34.05.546; the issues that may be raised, RCW 34.05.554; and most importantly for purposes of this case, the timing and methods for filing and serving a petition for review, RCW 34.05.542.

More specifically, judicial review is "instituted by paying the fee required under RCW 36.18.020 and filing a petition with the superior court . . . ." RCW 34.05.514(1). The petition must be filed with the court and served

[5] The Washington Constitution directs that appellate jurisdiction in the superior court exists "as may be prescribed by law." Const. art. IV, § 6.

on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order." RCW 34.05.542(2). Subsection 4 directs that service of the petition "shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or the chairperson of the agency, at the principle office of the agency." RCW 34.05.542(4) (emphasis added). Service of a copy of the petition upon the other parties of record and the office of the attorney general may be effected in person or by mail, and if mailed "shall be deemed complete upon deposit in the United States mail, as evidenced by the postmark." RCW 34.05.542(4). The APA also provides that "service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record." RCW 34.05.542(6).

V. ARGUMENT

Amici will begin with an analysis of the errors that result directly from the Court of Appeals' misreading of the APA's service provisions, and then will turn to an analysis of the lower courts' errors resulting from their misunderstanding of the relationship between the APA and CR 4. Finally, Amici will discuss the relationship between these concepts, the Court's developing jurisprudence concerning subject matter jurisdiction, and the doctrine of substantial compliance. Given the strict page limitation on amicus briefs, each discussion is necessarily limited, and

Amicus would welcome the opportunity to provide further briefing or respond to questions at oral argument if their motion for leave to present oral argument is granted.

A. THE APA DOES NOT REQUIRE A PETITIONER TO SERVE THE COUNTY AUDITOR WITH A PETITION FOR REVIEW

The Court of Appeals erred when, as one of the grounds for affirming the dismissal of Mr. Diehl's petition for review, it held that pursuant to RCW 4.28.080—a general statutory provision setting out the procedures for serving a summons in an action against a county[6]—Mr. Diehl was required to serve his petition on the Mason County auditor or deputy auditor, rather than the County's attorney of record.[7] See Diehl v. W. Wash. Growth Mgmt. Hearings Bd., 118 Wn. App. 212, 220, 75 P.3d 975 (2003). The unambiguous language of the APA, RCW 34.05.542(6), states that for the purpose of filing a petition for review, "service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record." And, the Legislature has made it abundantly clear that the APA provides the "exclusive means of judicial review of agency action." RCW 34.05.510. Consequently, to the extent

[6] RCW 4.28.080 provides in pertinent part:
"The summons shall be served by delivering a copy thereof, as follows:
(1) If the action be against any county in this state, to the county auditor or, during normal office hours, to the deputy auditor . . . ."

[7] Mr. Diehl asserted that he personally served the county prosecutor's office. ACP 22. Assuming that the County prosecutor was the attorney of record for Mason County in the administrative proceeding, and that service was timely served, Mr. Diehl's service would comply with the APA.

that the provisions of RCW 4.28.080 were even applicable in an appeal seeking judicial review of agency action,[8] they are inconsistent with the plain language of the more specific and exclusive provisions of the APA which expressly provide for service upon the "attorney for the party of record." Accordingly, the Court of Appeals' reliance upon RCW 4.28.080 was in error.

B. FAILING TO TIMELY SERVE THE ATTORNEY GENERAL IS NOT GROUNDS FOR DISMISSAL OF A PETITON FOR REVIEW

The Court of Appeals also erred when it held that dismissal of Mr. Diehl's petition for review was warranted because Mr. Diehl purportedly failed "to indicate that he served" the office of the attorney general. See Diehl, 118 Wn. App. at 220. The Court of Appeals' decision is in error for at least three reasons.

First, as Mr. Diehl explains in his briefing, the Court erred as a factual matter when it stated that "neither Diehl's certificate nor his letter to the court indicates that he served his letter on [the office of the attorney general]." Diehl, 118 Wn. App. at 220. Mr. Diehl's letter to Superior Court Judge Haberly, ACP 22, plainly indicates that the office of the attorney general was served by mail, as permitted by RCW 34.05.542(2)

[8] Earlier in this case Mason County distanced itself from this argument, writing "since Petitioner Diehl's action was not against Mason County, the county does not contend that RCW 4.28.080(1) is applicable . . . ." ACP 20. But see Supplemental Brief of Respondent Mason County at 20-21 (noting "the failure to serve the county auditor" was a jurisdictional defect that should not be waived).

and 34.05.010(19) (service by mail permitted and complete upon mailing).

Second, and more fundamentally, RCW 34.05.542(5) unambiguously states that the "failure to timely serve a petition on the office of the attorney general " RCW 34.05.542(5) (emphasis added). In light of this unambiguous statutory language, the Court of Appeals erred in holding that Mr. Diehl's petition should have been dismissed for an alleged failure to timely serve the office of the attorney general.[9]

C. THE SERVICE REQUIREMENTS OF CR 4(c) AND 4(g) ARE INAPPLICABLE TO, AND INCONSISTENT WITH, THE APA

> "A system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity."

Reed v. Allen, 286 U.S. 191, 209 (1932) (J. Cardozo, dissenting).

The parties have spent a great portion of their briefing discussing the applicability of CR 4, and have already discussed many of the most salient points. Amici will not repeat that analysis here. See RAP 10.3(e) ("Amicus must review all briefs on file and avoid repletion of matters in

[9] Amicus do not contend that a petitioner need not serve the attorney general, but rather that a court may not dismiss a petition for failure to timely serve the attorney general. Presumably, there is a distinction to be drawn between failure to timely serve, and refusal to serve. Here, in contrast, Mr. Diehl not only asserted that he timely served the office of the attorney general, ACP 22, but there is nothing in the record to suggest that her office was not served, was unaware of the litigation, or was prejudiced in any manner.

other briefs). Amici will instead focus on what they perceive as three main gaps in that briefing and the decisions below.

First, when the Legislature passed the APA, it enacted a system of rules concerning judicial review that included carefully crafted and detailed filing and service requirements for "instituting" judicial review. These filing and service requirements departed significantly from past practice, from the general service rules governing the initiation of an original action in the superior court set forth in CR 4, and from the model act from which our APA was drawn. Indeed, even a cursory review of the APA demonstrates that the Legislature, guided by the Task Force,[10] set forth explicit rules and procedures for the initiation of an action, including the timing and manner of service. These rules are very different from, indeed inconsistent with, CR 4—a rule of civil procedure that is directed to the initiation of an a civil action through the filing and service of a complaint and summons is. The lower courts seem to have simply sidestepped the fact that by its very terms[11] CR 4 is directed, in full, to proceedings utilizing a summons and complaint. As such, the provisions

[10] See Andersen, n. 3, supra.

[11] CR 4(c) provides: "By Whom Served. Service of Summons and process, except where service is by publication, shall be by the sheriff of the county wherein the service is made or by his deputy, or by any person over 18 years of age who is competent to be a witness in the action, other than a party. (emphasis added).

of CR 4 are inapplicable to actions under the APA where these methods are expressly not utilized, let alone required.[12]

Second, even if this Court were to find that the provisions of 4(c) and 4(g) could be considered applicable (presumably by reading "summons and complaint" out of those provisions), they would still not "govern" because neither rule is ancillary. RCW 34.05.210(2). For example, CR 4(c) which requires a summons and personal service, is in no way "auxiliary or subordinate" to the corresponding APA service provisions. King Cy. v. Central Puget Sound Growth Mgmt. Hearings Bd., 138 Wn.2d 161, 178 n.6, 979 P.2d 374 (1999) (quoting Black's Law Dictionary 85 (6th Ed. 1990). Rather than "subordinate to", or "aiding another proceeding," the requirements of CR 4(c) are themselves service requirements, that if applicable, would replace or override the requirements of the APA.

Third, even if the service requirements from CR 4(c) and (g) were deemed auxiliary, they are inconsistent with the letter and intent of the APA's service requirements. The Legislature was well aware of the many requirements in the Civil Rules concerning service, including non-party service and sworn proofs of service. They were also well aware of

[12] Moreover, even if the service requirements of CR 4(c) were not explicitly inapplicable, they could in no way be properly viewed as "auxiliary or subordinate" to the APA's service requirements. CR 4(c) provides service requirements themselves, not ancillary rules that would be subordinate to the APA's service requirements.

the fact that the 1981 Model APA, from which the Washington Act was drawn[13], provided for a specific cross reference to the civil rules or to another statute for substantive service requirements. Uniform (1981), §5-101(2) (An excerpted copy of which is attached at Appendix A-1). Armed with this knowledge, the Legislature chose a different path. With the assistance of the Task Force, the Legislature crafted detailed filing and service requirements specific to the APA. Well aware that, given the breadth of matters reviewed under the APA, there would be many pro se appeals, the Legislature hoped that the APA would provide a guide to facilitate the reviews of such matters without ensnaring litigants in procedural traps and unnecessary formalities. See 1987 Sen. Journal 628 (comments on section 75 of SSB 5090).

It is clear from this context--and from the statute's statement that the APA review process is "exclusive"--that the Legislature intended compliance with the APA to be the maximum required of a petitioner seeking judicial review. Of course, general rules for proving compliance with the APA can be imposed. Thus, a petitioner can be required to prove that he had provided the service the APA required. However, the lower courts in this case, went beyond that, imposing the specific additional requirements of Rule CR 4 (c) and (g). This is plainly

[13] See Andersen, n.3, supra.

inconsistent with the APA and the Court of Appeals was in error not to so declare. Amici respectfully request that the Court take this opportunity to correct the superior court's error, and to make clear to prospective litigants and to the lower courts that the provisions of CR 4, including CR 4(c) in particular, are not requirements of the APA.

D. THIS MATTER SHOULD BE REMANDED TO THE SUPERIOR COURT

Reviewing the briefing in this matter it is easy to forget that the underlying merits of this case involve Mr. Diehl's contention that Mason County failed to comply with its obligations under the Growth Management Act ("GMA").[14] Rather than proceeding toward a decision on the merits of that claim, the parties have spent years arguing over procedural technicalities regarding proof of service--in a case in which no party came forward to demonstrate that it had not received timely service, or that it was injured or prejudiced in any way.

To give effect to the Legislature's expressed intent to provide citizens with access to the courts to ensure their government's compliance with the law, and consistent with notions of fair play and justice, Amici

[14] The Legislature adopted the GMA to control urban sprawl and to ensure that "citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning." RCW 36.70A.010. The GMA expressly provides for "early and continuous public participation in the development and amendment of comprehensive land use plans." RCW 36.70A.140. The arguments in this case have raised form over substance and stand in sharp contrast to the Legislature's stated purposes with respect to the GMA, and providing citizens with access to the courts under the APA.

respectfully suggest that this matter should be remanded to the superior court with instructions to determine whether Mr. Diehl served the parties as required by the APA. Such a remand will provide Mr. Diehl, a pro se litigant, with a real[15] opportunity to demonstrate whether he effected service consistent with the APA. If Mr. Diehl is able to demonstrate compliance—whether through submission of an affidavit, admission or acknowledgement of service, or through testimony at a hearing other otherwise—then the court will proceed to the merits of his case. Alternatively, if he is unable to demonstrate that he complied, or substantially complied, with the APA's service requirements the court may properly dismiss his petition for failure to demonstrate compliance with the APA.[16]

In contrast, affirming the Court of Appeals' dismissal in the face of the confusion that existed concerning which rules applied, runs counter to the principle that procedural rules should be interpreted to eliminate procedural traps and to allow cases to be decided on their merits. See

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[15] The Court of Appeals and Respondent Mason County correctly point out that the *superior court gave Mr. Diehl an opportunity to cure.* They *fail to recognize, however,* that this opportunity was largely illusory. As Judge Haberly herself noted, although she gave Mr. Diehl an opportunity to cure, she knew that he could not comply because she had already found CR 4(c) applicable.

[16] Where a party to the administrative proceeding raises a real issue regarding sufficiency of service, the burden should shift to a petitioner to present a prima facie case that service had been effected consistent with the APA, for example by declaration, other testimony, or acknowledgement or admission of service. Then, consistent with analogous cases involving insufficiency of service, the burden of proof would properly shift to a party challenging the service to demonstrate that service had not been effected in the manner asserted.

In re Detention of Turay, 139 Wn.2d 379, 390, 986 P.2d 790 (1999), cert. denied, 531 U.S. 1125, 121 S. Ct 880 (2001), and flies in the face of this Court's many pronouncements directing the courts to strive to elevate substance over form, and decide cases on their merits.[17]

E. THE RELATIONSHIP BETWEEN THIS CASE, THE COURT'S DEVELOPING JURISPRUDENCE CONCERNING SUBJECT MATTER JURISDCITION, AND THE DOCTRINE OF SUBSTANTIAL COMPLIANCE

Relying on the general rule that objections to subject matter jurisdiction can be raised by a party or the court at any time, both the Court of Appeals and the superior court summarily dismissed Mr. Diehl's contention that Mason County had waived its objection to sufficiency of service. Amici respectfully suggest that the lower courts' treatment of the waiver question reflects their fundamental misunderstanding of subject mater jurisdiction, and is inconsistent with this Court's evolving jurisprudence regarding subject matter jurisdiction.

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[17] See Dougherty, 150 Wn.2d 310, 320-321 76 P.3d 1183 (2003) (noting the "distinct preference of modern procedural rules to allow appeals to proceed to a hearing on the merits in the absence of substantial prejudice to other parties.") (citing Black v. Department of Labor & Indus., 131 Wn.2d 547, 552, 933 P.2d 1025 (1997)); Vaughn v. Chung, 119 Wn.2d 273, 280, 830 P.2d 668 (1992) (holding "that the civil rules contain a preference for deciding cases on their merits rather than on procedural technicalities"); First Fed. Sav. & Loan Assoc. v. Ekanger, 93 Wn.2d 777, 781, 613 P.2d 129 (1980) (holding that "whenever possible, the rules of civil procedure should be applied in such a way that substance will prevail over form"). See also In re Saltis, 94 Wn.2d 889, 896, 621 P.2d 716 (1980) (substantial compliance with procedural rules is sufficient because " 'delay and even the loss of lawsuits [should not be] occasioned by unnecessarily complex and vagrant procedural technicalities.' " (alteration in original) (quoting Curtis Lumber, 83 Wn.2d 764 767, 522 P.2d 822 (1974)).

As the Court noted a decade ago in Marley v. Department of Labor and Indus.,

> The term 'subject matter jurisdiction' is often confused with a court's 'authority to rule in a particular manner. This has led to improvident and inconsistent use of the term.
>
> * * *
>
> 'If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction.'

Marley v. Department of Labor and Indus., 125 Wn.2d 533, 539, 886 P.2d 189 (1994) (quoting Robert J. Martineau, Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse, 1988 BYU L. Rev. 1, 28 (1988)).

Three years after Marley, Justice Durham again took up the issue, explaining in a scholarly concurrence that "the jurisdiction of a trial court exercising appellate authority should not rest on a party's compliance with procedural technicalities." Okanogan Wilderness League Inc. v. Town of Twisp,133 Wn.2d 769, 791-92, 947P.2d 732 (1997) (Durham, C.J., concurring). Justice Durham opined that non-compliance with a technical service requirement does not affect the Court's subject matter jurisdiction, and she warned that transforming procedural defects into a subject matter issue allows the party to raise the issue at anytime, which

"could result in abuse and cause a huge waste of judicial resources." Okanogan, 133 Wn.2d at 790.

And just last year, the Court again picked up the thread, stating, in an analogous case, that jurisdiction—"the power and authority of the court to act"—does not depend on procedural rules. Dougherty, 150 Wn.2d at 315 (citations omitted). A natural corollary of these decisions is that is that *once the court is vested with subject mater jurisdiction, it is possible* for the parties to waive a procedural defect, such as insufficiency of service.

Thus, while the Court need not address this issue to grant the relief Mr. Diehl requests, or to remand the matter to the superior court as Amici respectfully urge, the lower courts' continued confusion in this area suggests that additional direction from the Court may be helpful to clarify the relationship between subject matter jurisdiction and challenges to sufficiency of service under the APA.

F. THIS COURT HAS NOT HELD THAT A PARTY MAY NOT SUBSTANTIALLY COMPLY WITH THE SERVICE REQUIREMENTS OF THE APA

The Court may remand this matter to the superior court for additional fact finding without reaching the issue of "substantial compliance,"[18]

[18] "Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of [a] statute." City of Seattle v. Public Employment Relations Comm'n, 116 Wn.2d 923,928, 809 P.2d 1377 (1991) (quotations omitted).

Amici urge the Court, however, to take this opportunity to address the unfortunate confusion created by dicta in its decision in Skagit Surveyors, 135 Wn.2d at 556. That case, like Union Bay Preservation Coalition v. Cosmos Dev. & Admin. Corp.,127 Wn.2d 614, 902 P.2d 1247 (1995),[19] turned on the rather straightforward proposition that a party could not substantially comply with the then-existing APA requirement that required service of a petition for judicial review upon the "parties of record," by serving opposing counsel.[20] Despite the straightforward nature of the analysis, in expressing its conclusion the Court stated, in dicta, that "substantial compliance with the service requirements of the APA is not sufficient to invoke the appellate, or subject matter, jurisdiction of the superior court.

A careful reading of Skagit Surveyors together with this Court's decisions in, inter alia, 94 Wash.2d 889, 895, 621 P.2d 716 (1980)[21]and Continental Sports Corp. v. Department of Labor & Indus.,

[19] See Skagit Surveyors at 556-557 (noting that the issue raised in that case was identical to the issue raised in Union Bay).

[20] Service of the petition upon opposing counsel was not substantial compliance because the term "party" was explicitly defined in RCW 34.05.010(11), and furthermore the provision allowing service on "attorneys of record" had been repealed by the Legislature.

[21] Like the requirement of notice contained in Washington's Industrial Insurance Act, RCW 51.52.110, that the Court addressed in Saltis, the requirement for notice of the appeal from the GMHB "is a practical one meant to insure that interested parties receive actual notice of appeals of Board decisions." Saltis at 895. Moreover, the process for handling court appeals for decisions of the Board of Industrial Insurance Appeals is directly analogous to the court's review of decisions of administrative agencies under the APA.

128 Wn.2d 594, 910 P.2d 1284 (1996)[22]strongly suggest that the court's statement was an incorrect over-simplification of the holding of the case. Nevertheless, the statement has unfortunately become a part of the lexicon that that litigants and courts, including the Court of Appeals in this case, have seized upon. Given the confusion among litigants and the courts, and the potential that substantial compliance might well become an issue in this case on remand, Amici respectfully suggest that public interest would be well served if the Court were, at a minimum, to clarify that it has not previously held that substantial compliance is unavailable with respect to service under the APA, and that any statement to suggest otherwise is incorrect.

VI. CONCLUSION

It has been long recognized that judicial review of agency action serves important societal purposes, broadly embodied in notion of the rule of law. Judicial review helps to provide vital legitimacy to actions of administrative agencies in our system of government. See Peter H.A. Lehner, Note, Judicial Review of Agency Inaction, 83 Colum. L. Rev. 627 (1983). Disposing of cases for procedural error before reaching the merits of the underlying claim of improper governmental behavior

[22] In Continental Sports, 128 Wn.2d 594, the Court held that although the statute required an appeal from the board to be mailed via U.S. Postal Service, and that Federal Express was not U.S. mail for purposes of the statute, the party had nonetheless substantially complied thereby vesting the court with jurisdiction.

reduces the public's belief in the rule of law, and encourages governmental entities to elevate form over substance, using technical impediments as "gotcha's," rather than defending their actions on the merits, or coming into compliance with the law.

For the reasons set forth in the preceding sections of this brief, the Court should reverse the decision of the Court of Appeals, and remand this case to the superior court for further proceedings to determine whether Mr. Diehl complied with the service requirements of the APA. In so deciding, Amici respectfully suggest the Court hold that:

1. Under the APA, a petitioner need not serve the county auditor or deputy county auditor in order to effect service. Instead, service of a petition for review on a county may be effected by serving the attorney of record in the administrative proceeding;

2. The failure to timely serve the office of the attorney general with a petition for review is not a valid basis for dismissal of a petition for review, and the Court of Appeals erred in relying upon Mr. Diehl's purported failure to serve the office of the attorney general to dismiss his petition for review; and

3. The requirements of CR 4, including CR 4(c) (service be by a summons served by the sheriff or other non-party over the age of 18) and CR 4(g)(7) (setting forth the requirements for proof of service that relate to summons and complaint) are inconsistent with the APA, and

are not specifically required to institute an action for review of agency action under the APA.

In addition, Amici respectfully urge the Court to address its previous decisions, and the resulting confusion among the lower courts and litigants, concerning both the relationship between subject matter jurisdiction and waiver, and the availability of substantial compliance under the APA.

RESPECTFULLY submitted, this 31st day of August, 2004.

FILED AS ATTACHMENT
TO E-MAIL

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APPENDIX

http://www.nmcpr.state.nm.us/acr/presentations/1981MSAPA.htm

Excerpts from the Model State Administrative Proc.Act 1981 Art. I

ARTICLE V. JUDICIAL REVIEW AND CIVIL ENFORCEMENT

ARTICLE V. CHAPTER I. JUDICIAL REVIEW

§ 5-101. [Relationship Between this Act and Other Law on Judicial Review and Other Judicial Remedies].

This Act establishes the exclusive means of judicial review of agency action, but:

(1) The provisions of this Act for judicial review do not apply to litigation in which the sole issue is a claim for money damages or compensation and the agency whose action is at issue does not have statutory authority to determine the claim.

(2) Ancillary procedural matters, including intervention, class actions, consolidation, joinder, severance, transfer, protective orders, and other relief from disclosure of privileged or confidential material, are governed, to the extent not inconsistent with this Act, by other applicable law.

(3) If the relief available under other sections of this Act is not equal or substantially equivalent to the relief otherwise available under law, the relief otherwise available and the related procedures supersede and supplement this Act to the extent necessary for their effectuation. The applicable provisions of this Act and other law must be combined to govern a single proceeding or, if the court orders, 2 or more separate proceedings, with or without transfer to other courts, but no type of relief may be sought in a combined proceeding after expiration of the time limit for doing so.

* * *

§ 5-109. [Petition for Review--Filing and Contents].

(a) A petition for review must be filed with the clerk of the court.

(b) A petition for review must set forth:

(1) the name and mailing address of the petitioner;
(2) the name and mailing address of the agency whose action is at issue;
(3) identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action;
(4) identification of persons who were parties in any adjudicative proceedings that led to the agency action;
(5) facts to demonstrate that the petitioner is entitled to obtain judicial review;
(6) the petitioner's reasons for believing that relief should be granted; and
(7) a request for relief, specifying the type and extent of relief requested.

§ 5-110. [Petition for Review—Service and Notification].

(a) A petitioner for judicial review shall serve a copy of the petition upon the agency in the manner provided by [statute] [the rules of civil procedure].

(b) The petitioner shall use means provided by [statute] [the rules of civil procedure] to give notice of the petition for review to all other parties in any adjudicative proceedings that led to the agency action.

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2004, pursuant to agreement of the Parties and with permission of the Court, I concurrently filed and served a true and correct copy of the MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF and the accompanying *AMICUS CURIAE BRIEF* of Administrative and Environmental Law Professors, as set forth below:

Appellant John E. Diehl,
Martha Lantz, counsel for Respondent Western Washington Growth Management Board; and
Darren Nienaber, counsel for Respondent Mason County were all served by email, concurrent with the movants' filing of the referenced pleadings with the Court.

FILED AS ATTACHMENT
TO E-MAIL

/s

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Filing Petition for Review

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