

# EXHAUSTION OF ADMINISTRATIVE REMEDIES IN WASHINGTON STATE

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*Abstract:* The doctrine of exhaustion of administrative remedies requires plaintiffs to exhaust all available administrative appeals before challenging an agency’s action in court. Washington courts describe exhaustion requirements, thresholds, and exceptions with varying degrees of consistency and frequent muddled overlap. Despite the fact that administrative exhaustion widely impacts Washington litigants, the secondary literature on the topic is fairly sparse. And, given the doctrine’s confusing and harsh nature, it can bar judicial review of valid claims. This article aims to address both of these issues. First, we offer a comprehensive review of the doctrine as it currently stands, with the intent of assisting Washington lawyers navigating this tricky area of law. Second, we propose that Washington courts protect valid claims and preserve the integrity of administrative processes by equitably tolling the statute of limitations while a plaintiff pursues administrative remedies.

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## INTRODUCTION

The administrative exhaustion doctrine is well established in Washington.<sup>1</sup> The doctrine generally requires a plaintiff to exhaust all administrative remedies before seeking judicial review.<sup>2</sup> Substantial policy interests produce a strong bias in favor of the exhaustion doctrine.

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1. *S. Hollywood Hills Citizens Ass’n for Pres. of Neighborhood Safety & Env’t v. King Cty.*, 101 Wash. 2d 68, 73, 677 P.2d 114, 117 (1984).

2. *Id.*

Exhaustion: (1) prevents premature interruption of the administrative process; (2) allows the agency to develop the factual background necessary for its decision; (3) allows the agency to exercise its expertise; (4) provides a more efficient process; (5) protects agency autonomy by allowing it to correct its own errors; and (6) protects agency autonomy by ensuring individuals are not encouraged to ignore agency procedure by resorting to the courts.<sup>3</sup>

However, not every claim is subject to the exhaustion requirement; rather, there are certain conditions precedent that must be satisfied before the requirement attaches.<sup>4</sup> In other words, if any condition precedent is absent, exhaustion is not required. Even where the requirement attaches to a claim, a plaintiff may also be excused for failing to exhaust administrative remedies if the court finds that an exception applies.<sup>5</sup> Specifically, courts may excuse the failure to exhaust administrative remedies if fairness and practicality outweigh exhaustion's substantial policy interests.<sup>6</sup>

#### I. EXHAUSTION DOES NOT APPLY TO A CLAIM UNLESS FOUR CONDITIONS PRECEDENT ARE SATISFIED

Exhaustion applies:

(1) when a claim is cognizable in the first instance by an agency alone; (2) when the agency's authority establishes clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties; and (3) when the relief sought . . . can be obtained by resort to an exclusive or adequate administrative remedy.<sup>7</sup>

Said another way, these conditions precedent excuse the failure to exhaust when an agency lacks jurisdiction over the claim, lacks clear review procedures, or cannot provide any requested relief. And, if any of these conditions precedent is absent, the agency cannot issue a final, appealable order. As explained below, final, appealable orders have additional requirements, and there is no obligation to exhaust unless the agency issues a final, appealable order.<sup>8</sup>

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3. *Id.* at 73–74, 677 P.2d at 118.

4. *See id.* at 73, 677 P.2d at 117–18.

5. *See id.* at 74, 677 P.2d at 118.

6. *Id.*

7. *Id.* at 73, 677 P.2d at 117–18 (internal citations omitted).

8. *See Valley View Indus. Park v. City of Redmond*, 107 Wash. 2d 621, 635, 733 P.2d 182, 190–91 (1987).

A. *Exhaustion Is Not Required If the Agency Lacks Jurisdiction*<sup>9</sup>

No exhaustion requirement arises unless an agency has jurisdiction over a claim.<sup>10</sup> For example, in *State v. Tacoma-Pierce County Multiple Listing Service*,<sup>11</sup> the trial court dismissed antitrust actions filed by the Attorney General under the Washington Consumer Protection Act (CPA)<sup>12</sup> for, among other things, failure to pursue an administrative remedy with either the Department of Licensing or the Real Estate Commission.<sup>13</sup> The Supreme Court of Washington reversed and found the exhaustion doctrine did not apply because neither the Department nor the Commission was authorized to review CPA violations.<sup>14</sup> Thus, the plaintiff could not be faulted for failing to exhaust, because exhaustion did not apply.<sup>15</sup>

B. *Exhaustion Is Not Required If the Agency Lacks Clear Review Procedures*<sup>16</sup>

Only clearly defined exhaustion requirements are binding.<sup>17</sup> A good example of this is found in *Smoke v. City of Seattle*.<sup>18</sup> There, the plaintiff property owners challenged the denial of a building use permit.<sup>19</sup> The applicable municipal code stated that the denial of the particular permit type—a “Type 1” master use permit (MUP)—was nonappealable.<sup>20</sup> Still, the City argued the plaintiffs should have obtained a building site code interpretation, which would have been appealable.<sup>21</sup> Although the plaintiffs could have obtained the interpretation, the Supreme Court of

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9. This discussion overlaps with the adequate remedy discussion in section I.C.

10. *S. Hollywood*, 101 Wash. 2d at 73, 677 P.2d at 117–18.

11. 95 Wash. 2d 280, 622 P.2d 1190 (1980).

12. WASH. REV. CODE § 19.86 (2016).

13. *Tacoma-Pierce*, 95 Wash. 2d at 282–83, 622 P.2d at 1191–92.

14. *Id.* at 284, 622 P.2d at 1192.

15. *Id.*; see also *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wash. 2d 861, 868, 947 P.2d 1208, 1212 (1997) (excusing plaintiff’s failure to exhaust remedies with Growth Management Hearings Board because the Board lacked jurisdiction to review the city council determination at issue).

16. This discussion overlaps with the final, appealable order discussion in section I.D.2.

17. *Smoke v. City of Seattle*, 132 Wash. 2d 214, 224, 937 P.2d 186, 190 (1997).

18. *Id.*

19. *Id.* at 219, 937 P.2d at 189.

20. *Id.* at 217–18, 223, 937 P.2d at 187, 190.

21. *Id.* at 223, 937 P.2d at 190.

Washington rejected the City's argument they were required to do so.<sup>22</sup> The Court reasoned that such a requirement was not clearly defined:

[T]he ordinance itself expressly states that Type I MUP decisions are nonappealable. *See* [Seattle Municipal Code] 23.76.004(B). No provision of the code suggests or requires that an applicant obtain an interpretation as an administrative remedy for a decision denying a Type I MUP application. The ordinance itself indicates that once the permitting decision has been made there are no other administrative remedies available.<sup>23</sup>

In sum, the City could not hold the plaintiffs to an optional appeal procedure that was not described as mandatory in the code.<sup>24</sup>

C. *Exhaustion Is Not Required If the Agency Cannot Provide an Adequate Remedy*

Plaintiffs must seek administrative review only if the agency can provide an adequate remedy.<sup>25</sup> This may be the most significant inquiry for courts.<sup>26</sup> The bar for an adequate remedy is quite low; incomplete relief may be an adequate remedy.<sup>27</sup> The test for an adequate remedy is whether the agency is "empowered to entertain the type of claim and enforce its decision."<sup>28</sup>

Despite the low bar, the perceived inadequacy of a remedy is insufficient to escape the exhaustion requirement. Plaintiffs must pursue remedies thought to be unavailing because the lack of an adequate remedy cannot be speculative.<sup>29</sup> For example, in *Northwest Ecosystem Alliance v.*

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22. *Id.* at 227, 937 P.2d at 192.

23. *Id.*

24. *Id.*

25. *See* *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wash. 2d 635, 642, 310 P.3d 804, 808 (2013).

26. *See id.* ("The primary question in exhaustion cases, however, is whether the relief sought can be obtained through an available administrative remedy.")

27. *See, e.g.,* *Dioxin/Organochlorine Ctr. v. Dep't of Ecology*, 119 Wash. 2d 761, 777, 837 P.2d 1007, 1016 (1992) (concluding that adequate remedy existed where the agency could grant only declaratory relief even though the appellants sought both declaratory and injunctive relief).

28. *Credit Gen. Ins. Co. v. Zewdu*, 82 Wash. App. 620, 626, 919 P.2d 93, 97 (1996). Consequently, there is substantial overlap between an agency's lack of jurisdiction and its inability to provide relief. *See id.*; *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wash. 2d 861, 868, 947 P.2d 1208, 1212.

29. *See, e.g.,* *Dils v. Dep't of Labor & Indus.*, 51 Wash. App. 216, 219, 752 P.2d 1357, 1359 (1988) (rejecting plaintiff's claim of inadequacy where plaintiff could have objected to agency's claim processing procedures but did not).

*Washington Forest Practices Board*,<sup>30</sup> a group of environmentalists sued several state agencies for their failure to promulgate regulations that protected forests.<sup>31</sup> The agencies alleged that the environmentalists failed to exhaust their administrative remedy of petitioning for rule making.<sup>32</sup> The environmentalists argued that this was unnecessary due to the agencies' historic reluctance to address conservation issues.<sup>33</sup> The Supreme Court of Washington agreed with the agencies, reasoning that it would not assume the agencies would ignore environmental issues.<sup>34</sup> Thus, an adequate remedy existed, and exhaustion was required.<sup>35</sup>

*D. There Is No Obligation to Exhaust Without a Final, Appealable Order*

Finally, “[n]o exhaustion requirement arises without the issuance of a final, appealable order.”<sup>36</sup> The term “final, appealable order” is redundant: an order is not appealable unless it is final, and vice versa.<sup>37</sup> A final, appealable order will be found where the order (1) clearly asserts a legal relationship and (2) makes clear it is the final determination of rights.<sup>38</sup> Doubts as to finality are resolved against the agency and in favor of the plaintiff.<sup>39</sup>

*1. Final, Appealable Orders Can Be Informal*

Final orders can be informal letters.<sup>40</sup> In *Bock v. State*,<sup>41</sup> the plaintiff sought a writ of mandamus to compel the State Board of Pilotage Commissioners to issue him a pilot's license.<sup>42</sup> The plaintiff failed his license exam and appealed the result, which was affirmed by a review

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30. 149 Wash. 2d 67, 66 P.3d 614 (2003).

31. *Id.* at 69, 66 P.3d at 614.

32. *Id.* at 71–72, 66 P.3d at 616.

33. *Id.* at 78, 66 P.3d at 619.

34. *Id.*

35. *Id.*

36. *Valley View Indus. Park v. City of Redmond*, 107 Wash. 2d 621, 634, 733 P.2d 182, 190 (1987).

37. *See Smoke v. City of Seattle*, 132 Wash. 2d 214, 222–24, 937 P.2d 186, 189–90 (1997).

38. *Valley View*, 107 Wash. 2d at 634, 733 P.2d at 190.

39. *Id.*

40. *See, e.g., Bock v. State*, 91 Wash. 2d 94, 99–100, 586 P.2d 1173, 1176 (1978) (finding that agency's letter to plaintiff constituted final order because the letter denied a right and fixed a legal relationship).

41. 91 Wash. 2d 94, 586 P.2d 1173 (1978).

42. *Id.* at 95, 586 P.2d at 1174.

panel.<sup>43</sup> The Board then informed the plaintiff by letter that it would take no further action on his case.<sup>44</sup> In response, the plaintiff sued, rather than participating in the Board's administrative appeal procedures.<sup>45</sup>

The trial court dismissed the case because the plaintiff failed to exhaust available remedies, and the Supreme Court of Washington affirmed.<sup>46</sup> The Court acknowledged that the letter was informal, but ultimately deemed it a final action because it denied a right and clearly communicated the end of administrative review.<sup>47</sup> The Court stated that a more formal denial would be "preferable" but reasoned that the informality did not harm the plaintiff where he had actual notice of the Board denying his application.<sup>48</sup>

## 2. *Final, Appealable Orders Require Clear Appeal Procedures and Consistent Agency Action*

The lack of clear administrative decision-making procedures prevents a finding of a final order.<sup>49</sup> In *Valley View Industrial Park v. City of Redmond*,<sup>50</sup> the plaintiff submitted several building permit applications to the City of Redmond.<sup>51</sup> After repeatedly requesting additional information from the plaintiff, the City downzoned the plaintiff's land and rejected by letter the plaintiff's request to modify the rezone.<sup>52</sup> The following year, the City informed the plaintiff it deemed the building permit applications abandoned and lapsed, but city officials later assured the plaintiff it could proceed under the permits.<sup>53</sup> The city council then denied another of the plaintiff's applications to rezone the property.<sup>54</sup> After the City refused to

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43. *Id.* at 95–96, 586 P.2d at 1174.

44. *Id.* at 96, 586 P.2d at 1175.

45. *Id.* at 97–98, 586 P.2d at 1175.

46. *Id.* at 97, 100, 586 P.2d at 1175, 1177.

47. *Id.* at 99, 586 P.2d at 1176.

48. *Id.*; see also *Smoke v. City of Seattle*, 132 Wash. 2d 214, 222–23, 937 P.2d 186, 190 (1997) (finding an informal letter from a city attorney was a final, appealable order, even though the letter stated it was not an appealable legal determination, because the agency explicitly denied an application); *Harrington v. Spokane Cty.*, 128 Wash. App. 202, 214, 114 P.3d 1233, 1240 (2005) (finding the grant of a permit constituted a final order because it fixed a legal relationship, and related interim communications were not final determinations of rights).

49. See *Valley View Indus. Park v. City of Redmond*, 107 Wash. 2d 621, 634, 733 P.2d 182, 190 (1987).

50. 107 Wash. 2d 621, 733 P.2d 182 (1987).

51. *Id.* at 628, 733 P.2d at 187.

52. *Id.* at 628–29, 733 P.2d at 187.

53. *Id.* at 629, 733 P.2d at 187–88.

54. *Id.*

allow the plaintiff to proceed with a modified proposal, the plaintiff appealed that denial to superior court.<sup>55</sup>

On review, the Court found the letter informing the plaintiff of the lapsed building permits was not a final order because it did not fix a clear end to the administrative process.<sup>56</sup> This was so for two reasons. First, the City lacked a clear administrative decision-making process regarding building permit lapses.<sup>57</sup> Second, the officials assured the plaintiff its rights had vested after the City sent the letter to the contrary.<sup>58</sup> The “unclear and inconsistent nature of the permit lapse process” prevented a finding that the letter was a final order, so no exhaustion requirement arose.<sup>59</sup>

### 3. *Final, Appealable Orders Must Be Issued in Compliance with Code Requirements*

In addition, an agency’s failure to comply with relevant code provisions may render its decision insufficient to constitute a final order.<sup>60</sup> This was the case in *WCHS, Inc. v. City of Lynnwood*.<sup>61</sup> There, plaintiff WCHS was an operator of opiate substitution treatment centers.<sup>62</sup> The city planning manager informed WCHS that Lynnwood zoning laws permitted construction of a new treatment center at a particular site.<sup>63</sup> Consequently, WCHS entered into a lease for that site and filed applications for a building permit and business license.<sup>64</sup> That same day, the city council held an emergency meeting regarding opiate substitution treatment centers and, four days later, changed the zoning laws so the proposed site would be illegal.<sup>65</sup> The City denied both WCHS’s building permit and business license in separate letters that did not inform WCHS of its right

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55. *Id.*

56. *Id.* at 634–35, 733 P.2d at 190–91.

57. *Id.*

58. *Id.*

59. *Id.* at 635, 733 P.2d at 190–91.

60. *See, e.g., WCHS, Inc. v. City of Lynnwood*, 120 Wash. App. 668, 679–80, 86 P.3d 1169, 1174–75 (2004).

61. 120 Wash. App. 668, 86 P.3d 1169 (2004).

62. *Id.* at 671, 86 P.3d at 1170.

63. *Id.*

64. *Id.*

65. *Id.* at 672, 86 P.3d at 1171.



to a review hearing.<sup>66</sup> WCHS then sued for declaratory judgment and a writ of mandamus.<sup>67</sup>

In finding for WCHS, the Washington Court of Appeals rejected the City's argument that the denial letters were final orders that should have been appealed administratively.<sup>68</sup> The court reasoned that neither letter complied with the city code provisions governing who should receive notice of decisions and requiring disclosure of the right to appeal.<sup>69</sup> Given this non-compliance, the letters could not give rise to exhaustion.<sup>70</sup>

4. *Final, Appealable Orders May Need Facial Evidence of Both Finality and a Direct Response to the Filed Request*

A denial letter may not be a final, appealable order unless it has language demonstrating its finality and its direct response to the filed request.<sup>71</sup> For example, the *WCHS* court noted that the denial letters did not use words like "decision," "final," or "appealable."<sup>72</sup> Instead, one letter stated that the plaintiff's application was "'incomplete' but would remain open for 180 days."<sup>73</sup> This inconsistent and unclear language left doubt as to the decisions' finality and thus the letters were not clearly understandable as final determinations of rights.<sup>74</sup>

Furthermore, the Supreme Court of Washington recently held that final orders must directly respond to the filed request.<sup>75</sup> In *Cost Management Services, Inc. v. City of Lakewood (CMS)*,<sup>76</sup> a corporation believed it mistakenly paid a city tax during 2004 and September 2008, so it stopped paying the tax and filed a refund claim.<sup>77</sup> The City responded by issuing an order to pay past-due taxes from October 2008 forward.<sup>78</sup> Although the City's administrative procedures could have provided relief, the plaintiff could not access those procedures because the City failed to respond

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66. *Id.* at 673, 86 P.3d at 1171.

67. *Id.* at 673–74, 86 P.3d at 1171.

68. *Id.* at 679–80, 86 P.3d at 1174–75.

69. *Id.*

70. *Id.* at 680, 86 P.3d at 1175.

71. *See id.* at 679–80, 86 P.3d at 1175.

72. *Id.*

73. *Id.* at 679, 86 P.3d at 1174.

74. *Id.* at 680, 86 P.3d at 1175.

75. *See Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wash. 2d 635, 645, 310 P.3d 804, 810 (2013).

76. 178 Wash. 2d 63, 310 P.3d 804 (2013).

77. *Id.* at 638, 310 P.3d at 806.

78. *Id.*

directly to its application.<sup>79</sup> The *CMS* Court held that the failure to respond thus obviated the administrative exhaustion requirement.<sup>80</sup>

## II. EXCEPTIONS TO EXHAUSTION APPLY WHEN FAIRNESS AND PRACTICALITY OUTWEIGH THE SUBSTANTIAL POLICY INTERESTS SUPPORTING EXHAUSTION

Even where all conditions precedent exist and the exhaustion requirement attaches, courts will excuse the failure to exhaust if fairness and practicality concerns outweigh the policies supporting exhaustion.<sup>81</sup> These policy interests loom large when courts evaluate whether to excuse exhaustion.<sup>82</sup> Accordingly, exceptions to exhaustion are rare. The only circumstances where courts have excused the failure to exhaust have been when exhaustion was futile,<sup>83</sup> the plaintiff's claim involved only legal issues,<sup>84</sup> and when due process demanded it.<sup>85</sup>

### A. *Futility Excuses the Failure to Exhaust When the Requested Relief Cannot Be Granted as a Matter of Law*

Exhaustion of remedies will be excused as futile when “the available remedies are inadequate, or if they are vain and useless.”<sup>86</sup> Futility is decided as a matter of law.<sup>87</sup> The burden borne by the party asserting futility has not been precisely defined. In *Estate of Friedman v. Pierce County*,<sup>88</sup> the Supreme Court of Washington explained that the burden is lower than uncontroverted evidence, which the Court called “exceedingly high” and “virtually impossible” to meet.<sup>89</sup> However, the *Friedman* Court did not explore the issue further.<sup>90</sup>

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79. *Id.* at 643, 310 P.3d at 809.

80. *Id.* at 645, 310 P.3d at 810.

81. *See* S. Hollywood Hills Citizens Ass'n for Pres. of Neighborhood Safety & Env't v. King Cty., 101 Wash. 2d 68, 73–74, 677 P.2d 114, 118 (1984).

82. *Id.* at 74, 677 P.2d at 118.

83. *See* Orion Corp. v. State, 103 Wash. 2d 441, 693 P.2d 1369 (1985).

84. *See* Credit Gen. Ins. Co. v. Zewdu, 82 Wash. App. 620, 919 P.2d 93 (1996).

85. *See* Wash. Teamsters Welfare Trust Fund v. DePiano, 26 Wash. App. 52, 612 P.2d 805 (1980).

86. Orion Corp. v. State, 103 Wash. 2d 441, 458, 693 P.2d 1369, 1379 (1985) (quoting 4 ROBERT M. ANDERSON, ZONING § 26.10 (2d ed. 1977)). This overlaps with the adequate remedy discussion in section I.C.

87. Beard v. King Cty., 76 Wash. App. 863, 871, 889 P.2d 501, 506 (1995).

88. 112 Wash. 2d 68, 768 P.2d 462 (1989).

89. *Id.* at 77, 768 P.2d at 466.

90. *See id.*

Futility excuses exhaustion only in “rare factual situations.”<sup>91</sup> Thus far, Washington courts have approved the futility defense in only two situations: when the requested relief is prohibited by legislation or a statewide policy,<sup>92</sup> and when evidence supports an inference of bias on the part of appeal decision-makers.<sup>93</sup>

The most well-known Washington futility case is *Orion Corporation v. State*.<sup>94</sup> There, a developer brought an inverse condemnation action against the State, alleging that state and county shoreline management policies rendered its property effectively useless.<sup>95</sup> The record demonstrated that the State made a “conscious policy choice” to preserve the area owned by the developer and that the State planned to create an estuarine sanctuary that required the developer’s property.<sup>96</sup> Because these decisions forced the developer to keep the land in its natural state, the Supreme Court of Washington found that applying for a conditional use permit would be futile.<sup>97</sup> The Court acknowledged that the futility exception was rare, but reasoned that it applied on these facts because the “willingness to consider an application is irrelevant if there is no hope of success if one is submitted.”<sup>98</sup> The Court has since characterized the holding in *Orion* as applying to cases where “legislation or statewide policy” prevents relief.<sup>99</sup>

In reaching its conclusion, the *Orion* Court stated that “futility addresses more than a direct showing of bias or prejudice on the part of discretionary decision makers.”<sup>100</sup> This is consistent with the general rule that a plaintiff’s subjective belief is insufficient to establish futility.<sup>101</sup> For

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91. *Dils v. Dep’t of Labor & Indus.*, 51 Wash. App. 216, 219, 752 P.2d 1357, 1359 (1988); *see also* *Spokoiny v. Wash. St. Youth Soccer Ass’n*, 128 Wash. App. 794, 802, 117 P.3d 1141, 1145–46 (2005) (finding no futility where plaintiff was concerned the administrative process would not provide timely relief); *KSLW by Wells v. City of Renton*, 47 Wash. App. 587, 591–92, 736 P.2d 664, 667–68 (1986) (finding no futility where plaintiff abandoned its administrative appeal purportedly after the City agreed a court should resolve the dispute).

92. *Orion Corp. v. State*, 103 Wash. 2d 441, 457–60, 693 P.2d 1369, 1379–80 (1985).

93. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wash. 2d 127, 133, 769 P.2d 298, 301 (1989).

94. 103 Wash. 2d 441, 693 P.2d 1369 (1985).

95. *Id.* at 443, 456, 693 P.2d at 1371, 1378.

96. *Id.* at 457, 693 P.2d at 1378.

97. *Id.* at 460, 693 P.2d at 1380.

98. *Id.* at 457–58, 693 P.2d at 1379.

99. *Dioxin/Organochlorine Ctr. v. Dep’t of Ecology*, 119 Wash. 2d 761, 778, 837 P.2d 1007, 1016 (1992).

100. 103 Wash. 2d at 458, 693 P.2d at 1379.

101. *See* *Buechler v. Wenatchee Valley Coll.*, 174 Wash. App. 141, 154, 298 P.3d 110, 117 (2013); *Beard v. King Cty.*, 76 Wash. App. 863, 871, 889 P.2d 501, 505 (1995).

example, in *Beard v. King County*,<sup>102</sup> a police officer under investigation for rape did not apply for a promotion after he was told he would not be considered for the job by the sheriff who personally made promotion decisions.<sup>103</sup> After being cleared of the rape charge, the officer sued for unfair employment practices and alleged the sheriff's statement rendered any administrative appeal futile.<sup>104</sup> The Washington Court of Appeals found futility did not apply because the sheriff could have been forced to change his off-the-record position in light of the formal selection process if the plaintiff was the most qualified candidate.<sup>105</sup> *Beard* suggests futility will not be found when there is the slightest chance the administrative process could provide relief.

However, in *Baldwin v. Sisters of Providence in Washington, Inc.*,<sup>106</sup> the Supreme Court of Washington found futility may apply when the facts support an inference of the decision-makers' bias.<sup>107</sup> There, the plaintiff was fired from the defendant hospital after an investigation into whether he sexually assaulted a patient.<sup>108</sup> The plaintiff sued the hospital for wrongful termination without first pursuing the contractually required four-step grievance procedure.<sup>109</sup> The plaintiff argued that the procedure would be futile because it required him to appeal to the hospital administrator, whose assistant was instrumental in the underlying investigation.<sup>110</sup> Finding in the plaintiff's favor, the Court reasoned that the evidence showed people from each step of the appeal procedure made the initial decision to fire him.<sup>111</sup> The Court thus found that the plaintiff raised a genuine issue of bias.<sup>112</sup>

Although this decision may appear contrary to the statement in *Orion* and the rule against speculative futility, it is important to note the precise issue before the *Baldwin* Court. The question was whether to affirm the denial of the hospital's motion for a directed verdict, meaning the Court viewed the evidence in the light most favorable to the plaintiff and could reverse the denial "only if no evidence or reasonable inference exist[ed]

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102. 76 Wash. App. 863, 889 P.2d 501 (1995).

103. *Id.* at 864–65, 869, 889 P.2d at 502–03.

104. *Id.* at 869–70, 889 P.2d at 504–05.

105. *Id.* at 871, 889 P.2d at 505–06.

106. 112 Wash. 2d 127, 769 P.2d 298 (1989).

107. *Id.* at 133, 769 P.2d at 301.

108. *Id.* at 129–30, 769 P.2d at 299–300.

109. *Id.* at 130, 769 P.2d at 300.

110. *Id.* at 132–33, 769 P.2d at 300–01.

111. *Id.* at 133, 769 P.2d at 301.

112. *Id.*

which would be sufficient to sustain a verdict for” the hospital.<sup>113</sup> In other words, the Court did not find that futility was conclusively established; rather, it found that there was sufficient evidence of futility to survive a motion for directed verdict.<sup>114</sup> Importantly, the *Baldwin* Court also stated that the “principle that a subjective belief of futility is sufficient to invoke the exception would conflict with the strong bias toward requiring exhaustion in Washington.”<sup>115</sup>

Ultimately, futility remains an extraordinary remedy that courts are reluctant to grant.<sup>116</sup>

*B. Failure to Exhaust May Be Excused When the Issue Is Legal, Not Factual*

“If a lawsuit presents only issues of law, the court may excuse exhaustion because the agency’s usual fact finding task is not implicated, and, in any event, the courts have ultimate authority to interpret statutes.”<sup>117</sup> This exception often arises in the context of constitutional challenges.<sup>118</sup> As-applied constitutional challenges require factual determinations, meaning that administrative exhaustion is appropriate.<sup>119</sup> By contrast, facial constitutional challenges are purely legal questions and typically fall outside an agency’s expertise and authority, meaning exhaustion is generally not required.<sup>120</sup> For example, a facial constitutional challenge may appear as a challenge to an agency’s jurisdiction.<sup>121</sup> However, if the “agency is charged with interpreting and

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113. *Id.* at 132, 769 P.2d at 300–01.

114. *See id.* at 133, 769 P.2d at 301.

115. *Id.*

116. *See, e.g.,* Buechler v. Wenatchee Valley Coll., 174 Wash. App. 141, 154, 298 P.3d 110, 117 (2013); Spokoyny v. Wash. St. Youth Soccer Ass’n, 128 Wash. App. 794, 802, 117 P.3d 1141, 1145–46 (2005); Dils v. Dep’t of Labor & Indus., 51 Wash. App. 216, 219, 752 P.2d 1357, 1359 (1988); KSLW by Wells v. City of Renton, 47 Wash. App. 587, 592–93, 736 P.2d 664, 667–68 (1986). *But see* Prisk v. City of Poulsbo, 46 Wash. App. 793, 798, 732 P.2d 1013, 1017 (1987) (concluding that fairness and practicality outweighed policies supporting exhaustion, in part because “the only avenue of appeal would have been to the city council, a body which had itself previously imposed these fees directly upon” the plaintiff).

117. Credit Gen. Ins. Co. v. Zewdu, 82 Wash. App. 620, 628–29, 919 P.2d 93, 98 (1996).

118. *See, e.g.,* Presbytery of Seattle v. King Cty., 114 Wash. 2d 320, 337, 787 P.2d 907, 916 (1990) (discussing plaintiff’s as-applied challenge to the ordinance and its relationship to the exhaustion requirement).

119. *See id.*

120. *See id.;* Zewdu, 82 Wash. App. at 628–29, 919 P.2d at 98–99; Schreiber v. Riemcke, 11 Wash. App. 873, 875, 526 P.2d 904, 906 (1974).

121. *See, e.g.,* Spokane Cty. v. State, 136 Wash. 2d 644, 652, 966 P.2d 305, 309 (1998).

applying a particular statute, that agency expertise usually assists the court in performing the judicial function.”<sup>122</sup> Thus, even facial constitutional challenges may require exhaustion.

*C. Procedural Due Process Violations Excuse the Failure to Exhaust*

Finally, it can be argued that the exhaustion requirement violates due process, although this argument should be a last resort.<sup>123</sup> Due process arguments may excuse exhaustion if a plaintiff was wrongfully denied meaningful access to appeal procedures.<sup>124</sup> In *Washington Teamsters Welfare Trust Fund v. DePiano*,<sup>125</sup> insurance trusts sued a patient for medical claims that the trusts alleged they mistakenly paid.<sup>126</sup> The patient countersued for wrongful denial of claims.<sup>127</sup> The trusts alleged the patient’s claims should be dismissed for failure to exhaust contractual remedies before filing his court action.<sup>128</sup> The Washington Court of Appeals rejected this argument, reasoning that “[e]xhaustion is excused not only when resort to such procedures would be futile, but also when a claimant has been wrongfully denied meaningful access to those procedures and where the available remedy is inadequate.”<sup>129</sup> The court found the patient lacked meaningful access to the procedures because he was “denied benefits by both trusts and had been called into court by both trusts shortly after those denials.”<sup>130</sup> Thus, the court did not punish the patient for pursuing a counterclaim rather than administrative remedies.<sup>131</sup>

Due process will also excuse exhaustion when the plaintiff received no notice of the agency’s determination. For example, in *Gardner v. Pierce County Board of Commissioners*,<sup>132</sup> a landowner appealed a commission’s

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122. *Zewdu*, 82 Wash. App. at 629, 919 P.2d at 98; *accord* Retail Store Emp. Union, Local 1001 Chartered By Retail Clerks Int’l Ass’n, AFL-CIO v. Wash. Surveying & Rating Bureau, Wash. Bureau, 87 Wash. 2d 887, 907 n.7, 558 P.2d 215, 227 n.7 (1976).

123. *Cf. Rosen v. City of Tacoma*, 24 Wash. App. 735, 741, 603 P.2d 846, 850 (1979) (holding that arbitrary and capricious municipal agency actions are not a basis for relief without exhaustion).

124. *See, e.g., Washington Teamsters Welfare Trust Fund v. DePiano*, 26 Wash. App. 52, 57, 612 P.2d 805, 808 (1980).

125. 26 Wash. App. 52, 612 P.2d 805 (1980).

126. *Id.* at 53, 623 P.2d at 806.

127. *Id.* at 54, 623 P.2d at 806.

128. *See id.*

129. *Id.* at 57, 623 P.2d at 808.

130. *Id.* at 58, 623 P.2d at 808.

131. *See id.*

132. 27 Wash. App. 241, 617 P.2d 743 (1980).

approval of a preliminary plat adjacent to his home.<sup>133</sup> The County conceded that it did not provide notice of its determination and that the plaintiff was unaware of the determination until he attended a subsequent hearing.<sup>134</sup> The Washington Court of Appeals held that the landowner did not fail to exhaust, because “[w]here one has not enjoyed a fair opportunity to exhaust the administrative process . . . exhaustion of administrative remedies will not be required.”<sup>135</sup>

### III. WASHINGTON LAW CURRENTLY INVOLVES ELEMENTS THAT OVERLAP AMONG THE PRECONDITIONS AND EXCEPTIONS TO EXHAUSTION

In sum, courts require exhaustion when four conditions precedent are met: (1) the agency has jurisdiction over the claim; (2) the agency has clear review procedures; (3) the agency can provide an adequate remedy; and (4) the agency issues a final, appealable order. If these conditions precedent are satisfied, the exhaustion requirement attaches to a claim. Once the exhaustion requirement attaches, courts may excuse a failure to exhaust if matters of fairness and practicality outweigh the policy interests supporting exhaustion.

Many of these concepts overlap, which contributes to the murky discussion of administrative exhaustion currently found in Washington case law. For example, although we frame the adequate remedy requirement as a condition precedent, the agency’s ability to provide an adequate remedy also permeates the exception analysis. Whether an agency can provide an adequate remedy is also relevant to jurisdiction, futility, and the ability to issue a final, appealable order. The unifying principle is the agency’s ability to provide relief, a crucial piece of the exhaustion analysis.

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133. *Id.* at 242, 617 P.2d at 744.

134. *Id.* at 243, 617 P.2d at 745.

135. *Id.* at 243–44, 617 P.2d at 745. We note that *Gardner* precedes the enactment of the Land Use Petition Act (LUPA), WASH. REV. CODE § 36.70C (1996). “LUPA does not require that a party receive individualized notice of a land use decision in order to be subject to the time limits for filing a LUPA petition.” *Samuel’s Furniture, Inc. v. Dep’t of Ecology*, 147 Wash. 2d 440, 462, 54 P.3d 1194, 1205 (2002).

#### IV. EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS WHILE A PLAINTIFF PURSUES ADMINISTRATIVE REMEDIES WOULD PROTECT VALID CLAIMS AND PRESERVE THE INTEGRITY OF ADMINISTRATIVE PROCESSES

Given the exhaustion doctrine's lack of clarity, it can be difficult for plaintiffs—and their attorneys—to know whether the exhaustion requirement applies. Moreover, if a plaintiff chooses to pursue administrative remedies, the process can be time-consuming.<sup>136</sup> While the plaintiff maneuvers the administrative process, the clock is running on his or her claim.<sup>137</sup> This can result in an otherwise valid claim being barred from judicial review, a harsh result that does not truly serve the rationales underlying the exhaustion doctrine.

Accordingly, this article proposes that Washington courts expand the current equitable tolling doctrine and implement an approach that California and other states have used to protect such claims: tolling the statute of limitations while a plaintiff pursues administrative remedies.

Under Washington law, a court “may toll the statute of limitations when justice requires such tolling but it must use the doctrine sparingly.”<sup>138</sup> As set forth in *Douchette v. Bethel School District No. 403*,<sup>139</sup> equitable tolling is available only where there is (1) an exercise of diligence by the plaintiff and (2) bad faith, deception, or false assurances by the defendant.<sup>140</sup> Thus, in the absence of a showing of bad faith on the part of the defendant, a plaintiff who diligently pursues administrative remedies cannot have the statute of limitations tolled on his or her claim. This effectively punishes a plaintiff who takes timely action but must undergo the administrative process before seeking judicial relief.

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136. See, e.g., *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wash. 2d 635, 640, 310 P.3d 804, 807 (2013) (plaintiff waited six months for agency action that was ultimately unresponsive); *Smoke v. City of Seattle*, 132 Wash. 2d 214, 218, 937 P.2d 186, 187 (1997) (plaintiff engaged in more than a year of dispute with City about permit status); *Valley View Indus. Park v. City of Redmond*, 107 Wash. 2d 621, 629, 733 P.2d 182, 187–88 (1987) (plaintiff negotiated with City for three months after zoning request denial).

137. Equitable tolling would not be necessary if completing the administrative process preserved the claim as it existed at the time of filing the administrative appeal. However, we have not found a case that has so held. Alternatively, the legislature could address this issue by passing a statute that provides: “Statutes of limitations will be tolled during an administrative appeal that is exhausted.”

138. *Nickum v. City of Bainbridge Island*, 153 Wash. App. 366, 378, 223 P.3d 1172, 1177–78 (2009).

139. 117 Wash. 2d 805, 818 P.2d 1362 (1991).

140. *Id.* at 812, 818 P.2d at 1365.



California courts address this issue by applying equitable tolling “[w]hen an injured person has several legal remedies, and reasonably and in good faith, pursues one.”<sup>141</sup> Under California law, where the exhaustion requirement applies, “equitable tolling is automatic.”<sup>142</sup> As the California Supreme Court explains, tolling has many benefits:

Tolling eases the pressure on parties “concurrently to seek redress in two separate forums with the attendant danger of conflicting decisions on the same issue.” By alleviating the fear of claim forfeiture, it affords grievants the opportunity to pursue informal remedies, a process we have repeatedly encouraged. The tolling doctrine does so without compromising defendants’ significant “interest in being promptly apprised of claims against them in order that they may gather and preserve evidence” because that notice interest is satisfied by the filing of the first proceeding that gives rise to tolling. Lastly, tolling benefits the court system by reducing the costs associated with a duplicative filing requirement, in many instances rendering later court proceedings either easier and cheaper to resolve or wholly unnecessary.<sup>143</sup>

Other courts around the country have also recognized that equitable tolling constitutes prudent public policy in similar contexts.<sup>144</sup>

*A. Equitable Tolling Is Consistent with the Policies Supporting Exhaustion*

Along with these advantages, we note that equitable tolling would be consistent with the policies underlying exhaustion that have been articulated by Washington courts. These policies include preserving the administrative process and agency autonomy; allowing the agency to develop the factual record and exercise its expertise;

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141. *McDonald v. Antelope Valley Cmty. Coll. Dist.*, 194 P.3d 1026, 1031 (Cal. 2008) (quoting *Elkins v. Derby*, 525 P.2d 81, 84 (1974)).

142. *McDonald*, 194 P.2d at 1032.

143. *Id.* at 1032 (internal citations omitted).

144. *See, e.g., Am. Marine Corp. v. Sholin*, 295 P.3d 924, 927 (Alaska 2013) (quoting *Gudenau & Co. v. Sweeney Ins., Inc.*, 736 P.2d 763, 768 (Alaska 1987)) (“The equitable tolling doctrine is applicable ‘when a plaintiff has multiple legal remedies available’ so that ‘[c]ourts will not force a plaintiff to simultaneously pursue two separate and duplicative remedies.’”); *Weidow v. Uninsured Emp’rs’ Fund*, 2010 MT 292, ¶ 28, 359 Mont. 77, 246 P.3d 704 (noting that equitable tolling should be applied sparingly, but “reject[ing] any one-size-fits-all approach that would serve only to undermine the purpose of the equitable tolling doctrine and could deprive a plaintiff of his or her rights when such an approach would serve no policy purpose”); *Enron Oil & Gas Co. v. Freudenthal*, 861 P.2d 1090, 1094 (Wyo. 1993) (“The doctrine acts to toll the statute of limitations for the one remedy while the party is pursuing the other.”).

promoting efficiency; and discouraging individuals from ignoring agency procedure by resorting to the courts.<sup>145</sup> Tolling the statute of limitations addresses these concerns by encouraging claimants to pursue administrative remedies without fear of losing access to judicial review.

Moreover, the application of equitable tolling would create fair outcomes for plaintiffs who diligently pursue their claims: “[i]n deciding whether to grant an equitable remedy, courts often ‘balance the equities’ between the parties, taking into consideration the relief sought by the plaintiff and the hardship imposed on the defendant.”<sup>146</sup> Tolling the statute of limitations strikes an appropriate balance between awarding a plaintiff complete relief and the relatively minor hardship a defendant suffers from an extended limitations period.<sup>147</sup> *CMS* provides a clear example of this. There, the plaintiff became aware of its claim in November 2008 but did not file suit until June 2009 because it was waiting for the City to respond to its appeal for administrative relief.<sup>148</sup> Ultimately, the City’s action was nonresponsive.<sup>149</sup> The Supreme Court of Washington held that the failure to respond obviated the administrative exhaustion requirement.<sup>150</sup> However, the three-year statute of limitations prevented the plaintiff from recovering any taxes paid before June 2006.<sup>151</sup> Had the statute of limitations been tolled, the plaintiff’s claim would include seven months more of back taxes. Equitable tolling in this and similar circumstances would eliminate “the potential for abuse which legal process may serve in the hands of public officials, bankrolled with public funds, who seek to achieve by delay and the necessity for costly court suits or administrative hearings what they cannot achieve on the merits[.]”<sup>152</sup>

With these considerations in mind, we propose that Washington courts apply equitable tolling where the plaintiff exercises diligence in pursuing

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145. See *S. Hollywood Hills Citizens Ass’n for Pres. of Neighborhood Safety & Env’t v. King Cty.*, 101 Wash. 2d 68, 73–74, 677 P.2d 114, 117 (1984).

146. *Douchette v. Bethel Sch. Dist.* No. 403, 117 Wash. 2d 805, 812, 818 P.2d 1362, 1365 (1991) (citing 27 AM. JUR. 2d § 107 (1966)).

147. We further address this hardship below in our discussion of the rationales behind statutes of limitation. See *infra* section IV.B.

148. *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wash. 2d 635, 639–40, 310 P.3d 804, 807–08 (2013).

149. *Id.* at 639, 310 P.3d at 807.

150. *Id.* at 645, 310 P.3d at 810.

151. See *id.*

152. *City of Seattle v. Blume*, 134 Wash. 2d 243, 259, 947 P.2d 223, 230 (1997) (quoting *King v. City of Seattle*, 84 Wash. 2d 239, 252–53, 525 P.2d 228, 236 (1974)).

administrative remedies, without requiring a showing of bad faith or deception on the administrative body's behalf.<sup>153</sup>

*B. Equitable Tolling Is Consistent with the Policies Supporting Statutes of Limitation*

We acknowledge that, unlike California, Washington requires bad faith as a predicate for equitable tolling.<sup>154</sup> It should be noted that bad faith as a requirement—rather than simply a relevant factor—is fairly new and unexplored. The *Douchette* Court established it as such in 1991.<sup>155</sup> But, the case *Douchette* relies upon, *Copeland v. Desert Inn Hotel*,<sup>156</sup> recognized bad faith as only one possible ground—not a prerequisite—for granting equitable relief.<sup>157</sup> Historically, Washington courts evaluating equitable remedies align with the *Copeland* Court's treatment of bad faith.<sup>158</sup> Without further explanation or citation, the *Douchette* Court elevated its importance, stating, “[i]n the absence of bad faith on the part of the defendant and reasonable diligence on the part of the plaintiff, equity cannot be invoked.”<sup>159</sup> The basis for requiring this element is thus unclear.

Nonetheless, we recognize that the bad faith element has been embraced by Washington courts.<sup>160</sup> Still, given the positive effects of our

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153. While we argue that bad faith should not be required, we note that the failure to equitably toll the statute of limitations has the potential to incentivize bad faith on the part of the administrative body. For example, if the statute of limitations is running while the agency processes a claim, the agency may be incentivized to delay so as to limit liability.

154. *Douchette v. Bethel Sch. Dist.* No. 403, 117 Wash. 2d 805, 812, 818 P.2d 1362, 1365 (1991).

155. *See id.* at 811–12, 818 P.2d at 1364–65.

156. 673 P.2d 490 (Nev. 1983).

157. *Id.* at 826.

158. *See, e.g., Dodge v. Scripps*, 179 Wash. 308, 317, 37 P.2d 896, 900 (1934) (characterizing bad faith as a “foundation for equitable relief,” but not establishing it as a requirement); *Niemi v. Brewster*, 154 Wash. 181, 186–87, 281 P. 488, 489–90 (1929) (discussing bad faith as one possible ground for rejecting plaintiff's claim, along with undue prejudice to defendant); *Morris v. Hillman Inv. Co.*, 99 Wash. 276, 283, 169 P. 837 (1918) (discussing various bases for applying equitable estoppel, one of which was bad faith); *Young v. Jones*, 72 Wash. 277, 282–83, 130 P. 90, 92–93 (1913) (same). It is also well-established that a party's own bad faith precludes a grant of equitable relief in his or her favor. *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wash. 2d 939, 949, 640 P.2d 1051, 1057 (1982) (“He who seeks equity must do equity . . . he who comes into equity must come with clean hands.”). But it does not follow from this principle that the opposing party's bad faith should be required.

159. *Douchette*, 117 Wash. 2d at 812, 818 P.2d at 1365.

160. *See, e.g., Millay v. Cam*, 135 Wash. 2d 193, 206, 955 P.2d 791, 796 (1998) (citing *Douchette* as basis for requiring bad faith); *Danzer v. Dep't of Labor & Indus.*, 104 Wash. App. 307, 318, 16 P.3d 35, 40 (2000) (same); *Prekeges v. King Cty.*, 98 Wash. App. 275, 283, 990 P.2d 406, 410 (1999)

equitable tolling proposal, we urge the courts to carve out an exception to *Douchette* in the administrative exhaustion context. As argued above, we believe this would serve the interests underlying exhaustion and lead to better outcomes for Washington claimants. Moreover, it would be otherwise consistent with Washington law.

For example, we acknowledge the principle that the “statute of limitations is ‘a legislative declaration of public policy which the courts can do no less than respect.’”<sup>161</sup> Generally, Washington courts will not read into statutes of limitation an exception that has not been embodied therein.<sup>162</sup> Thus, “[i]n Washington equitable tolling is appropriate when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations.”<sup>163</sup> Otherwise, equitable tolling would “essentially allow[] a judicial branch officer to override a legislative determination.”<sup>164</sup>

In this circumstance, however, the application of equitable tolling would not invade the province of the legislature. “The policy behind statutes of limitation is ‘protection of the defendant, and the courts, from litigation of stale claims where plaintiffs have slept on their rights and evidence may have been lost or witnesses’ memories faded.’”<sup>165</sup> But where a plaintiff diligently pursues administrative remedies, these concerns are not implicated. The Montana Supreme Court articulated this principle well, noting that “limitations periods are designed to ensure justice by preventing surprise, but no surprise exists when defendants are already on notice of the substantive claims being brought against them.”<sup>166</sup> By engaging in the system of administrative appeals, a plaintiff gives timely notice to a defendant and moves the claim forward, fulfilling the purposes of the statute of limitations.

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(same); *Finkelstein v. Sec. Props., Inc.*, 76 Wash. App. 733, 739–40, 888 P.2d 161, 166–67 (1995) (same).

161. *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wash. 2d 635, 651, 310 P.3d 804, 813 (2013) (quoting *J.M. Arthur & Co. v. Burke*, 83 Wash. 690, 693, 145 P. 974, 975 (1915)).

162. *Id.* at 651, 310 P.3d at 813.

163. *Millay*, 135 Wash. 2d at 206, 955 P.2d at 797 (citing *Douchette*, 117 Wash. 2d at 812, 818 P.2d at 1365).

164. *Rekhter v. Dep’t of Social and Health Servs.*, 180 Wash. 2d 102, 150, 323 P. 3d 1036, 1059 (Stephens, J., dissenting) (citing *Leschner v. Dep’t of Labor & Indus.*, 27 Wash. 2d 911, 926, 185 P.2d 113, 121–22 (1947)).

165. *Douchette*, 117 Wash. 2d at 813, 818 P.2d at 1365 (citing *Hosogai v. Kadota*, 700 P.2d 1327 (Ariz. 1985)).

166. *Stevens v. Novartis Pharms. Corp.*, 2010 MT 282, ¶ 33, 358 Mont. 474, 247 P.3d 244.

We find support for this assertion in *Ames v. Department of Labor & Industries*,<sup>167</sup> a landmark Washington case on equitable tolling. There, the Supreme Court of Washington tolled the statute of limitations for a workman's claim because the claimant was mentally incapacitated during the limitations period.<sup>168</sup> The Court recognized that the legislature "has always been well advised of the uses and the purposes of equity," which "relieve[s] under special circumstances from the harshness of strict legal rules."<sup>169</sup> On those facts, the Court concluded that a strict application of the statute of limitations would be contrary to public policy and legislative intent.<sup>170</sup> We argue that our approach serves similar goals: equitable tolling would promote good public policy by preserving valid claims and incentivizing the pursuit of administrative remedies, and it would serve the legislative intent behind limitations periods by giving notice to defendants and avoiding stale claims.

*C. The Supreme Court of Washington Has Recognized the Tension Between Exhaustion and Statutes of Limitation*

Although no Washington court has explicitly applied equitable tolling in the exhaustion context, the Supreme Court of Washington has invoked an equitable analysis to allow a claim that would have otherwise been barred by the statute of limitations.<sup>171</sup> In *Valley View*, the plaintiff property developer failed to appeal the City's denial of his permit applications within 30 days as provided by city code.<sup>172</sup> The Court rejected the City's argument that the statute of limitations barred relief, reasoning that the plaintiff believed in good faith, based on the City's representations, that it had a vested right to develop its property.<sup>173</sup> The plaintiff pursued administrative relief in reliance on the City's assurances and sought judicial review once the City issued its final denial.<sup>174</sup> Without expressly conducting an equitable tolling analysis, the Court found the plaintiff did not lose its right to obtain relief "simply because it took more than 30 days

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167. 176 Wash. 509, 30 P.2d 239 (1934).

168. *Id.* at 513–14.

169. *Id.* at 513.

170. *Id.*

171. *See Valley View Indus. Park v. City of Redmond*, 107 Wash. 2d 621, 632, 733 P.2d 182, 189 (1987).

172. *Id.* at 629, 631, 733 P.2d at 189.

173. *Id.* at 629, 632, 733 P.2d at 187–89.

174. *Id.* at 632, 733 P.2d at 189.

to seek some accommodation from the City.”<sup>175</sup> *Valley View* demonstrates the justice of applying equitable tolling in appropriate circumstances, as well as the Court’s willingness to do so.

In *CMS*, the Court more explicitly addressed the relationship between the administrative process and statutes of limitation. *CMS* was a dispute over taxes the plaintiff alleged it mistakenly paid to the City of Lakewood.<sup>176</sup> The plaintiff sought repayment of taxes paid outside of the three-year limitations period, but the trial court ruled that the statute of limitations barred recovery.<sup>177</sup> The plaintiff then attempted to recover those taxes by seeking a writ of mandamus to force the City to respond to its corresponding refund claim.<sup>178</sup> The Court disapproved of this tactic:

CMS seeks mandamus for the express purpose of reaching back beyond the legal statute of limitations. We do not think the statute of limitations can be overcome by such a use of the administrative process. Under the circumstances of this case, we hold that CMS cannot choose first to pursue recovery through the courts and then attempt to bypass the statute of limitations that necessarily applies as a result of that choice by seeking relief through the administrative process.<sup>179</sup>

One might argue that this holding signals disapproval of the approach advocated here. We disagree. Importantly, the issue in *CMS* was not equitable tolling of a claim after a plaintiff diligently pursues administrative remedies. Instead, the question was whether the plaintiff could use the administrative process to circumvent the statute of limitations and revive stale claims after receiving an adverse ruling from the court. Thus, factually speaking, *CMS* is inapposite. Moreover, like our proposal, the *CMS* holding demonstrates respect for the timely and appropriate pursuit of claims.<sup>180</sup> Unlike the writ of mandamus in that case, equitable tolling of a timely pursued claim is not a work-around.

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175. *Id.*

176. *See Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wash. 2d 635, 638, 310 P.3d 804, 806 (2013).

177. *Id.* at 640, 310 P.3d at 807.

178. *Id.*

179. *Id.* at 652, 310 P.3d at 813.

180. *See id.* at 651–52, 310 P.3d at 813 (“[The plaintiff] sought mandamus only after the trial court informed it that its recovery in superior court was constrained by the three year statute of limitations. In essence, CMS seeks to use the administrative process to revive a claim otherwise barred by the three year statute of limitations.”).

*D. Equitable Tolling Is Consistent with Existing Washington Precedent*

The issue of equitable tolling and administrative remedies also arose in *Rekhter v. Department of Social and Health Services*.<sup>181</sup> In that case, the plaintiffs brought suit challenging determinations made by the Department of Social and Health Services (DSHS), but failed to do so within the 90 days required by statute.<sup>182</sup> The trial court concluded that equitable tolling of the deadline was justified by the plaintiffs' vulnerability and the nature of the administrative appeal process.<sup>183</sup> Upon review by the Supreme Court of Washington, the majority did not reach this issue. However, the dissent criticized the trial judge for reaching a "conclusion [that] would completely eviscerate the statute of limitations . . . for each and every DSHS client."<sup>184</sup>

While this opinion is not binding, we find it helpful to explain how it is also consistent with our proposal. Unlike a plaintiff who timely and diligently exhausts administrative remedies, the plaintiffs in *Rekhter* sat on their claims far beyond the statutory time limit.<sup>185</sup> The dissent reasoned that this ran afoul of the legislature's intent to limit the state's exposure to liability.<sup>186</sup> What we propose would not implicate these concerns. The pursuit of administrative remedies notifies a defendant of a claim, and tolling still sets a fixed time period for liability, but does so without leaving the plaintiff at the mercy of the administrative process.

Finally, we note that our proposal does not contradict the Supreme Court of Washington's recently expressed "reluctan[ce] to apply exceptions to legislative time limits"<sup>187</sup> or to extend equitable tolling standards "beyond the traditional standard."<sup>188</sup> Notably, these sentiments were both articulated in the personal restraint petition (PRP) context, which implicates specific policies that apply to collateral attacks of criminal convictions.<sup>189</sup> The Court also recognized that RCW 10.73.100

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181. 180 Wash. 2d 102, 323 P.3d 1036 (2014).

182. *Id.* at 149, 323 P.3d at 1059 (Stephens, J., dissenting).

183. *Id.* at 150–51, 323 P.3d at 1059–60 (Stephens, J., dissenting).

184. *Id.* at 153, 323 P.3d at 1061 (Stephens, J., dissenting).

185. *See id.* at 109, 323 P.3d at 1039–40 (suit brought in 2007 challenging determinations made as early as April 2003).

186. *Id.* at 149–50, 323 P.3d at 1059–60 (Stephens, J., dissenting).

187. *In re Bonds*, 165 Wash. 2d 135, 143, 196 P.3d 672, 677 (2008).

188. *In re Haghghi*, 178 Wash. 2d 435, 447–48, 309 P.3d 459, 465–66 (2013).

189. Those policies include undermining the finality of convictions, which would prevent a prisoner from obtaining federal habeas corpus relief. *See Haghghi*, 178 Wash. 2d at 448, 309 P.3d at 465–66; *Bonds*, 165 Wash. 2d at 143, 196 P.3d at 677.

provides petitioners with multiple grounds for tolling the statute of limitations, such as newly discovered evidence, facial invalidity of the judgment and sentence, and double jeopardy violations.<sup>190</sup> The Court distinguished this from other “normal” contexts, where “equitable tolling might be the only way in which a party is not deprived of his or her remedy.”<sup>191</sup> Exhaustion of administrative remedies is one of those “normal” contexts in which equitable tolling may be the only device by which to preserve a valid claim.

## CONCLUSION

The doctrine of administrative exhaustion does not apply to every claim, but it can have severe results when it does. Plaintiffs should exhaust their administrative remedies when required because courts excuse the failure to exhaust only in exceedingly rare circumstances. Yet, when exhaustion is a prerequisite to judicial review, the attendant delay can result in the statute of limitations barring just relief, either in whole or in part. To preserve the integrity of the administrative process and ensure that plaintiffs are made whole when pursuing valid claims, we propose that Washington courts equitably toll the statute of limitations while a plaintiff pursues administrative remedies.

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190. *Haghighi*, 178 Wash. 2d at 448, 309 P.3d at 466.

191. *Id.*