

No. 302415-III

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

PROSSER HILL COALITION, LISA WATTS-MCKEE, DANIEL  
SPISAK, JACQUELYN OLSON, JACK WILCOX, TOM  
WHITFIELD, JANICE WHITFIELD, ROBERT HEINEMANN,  
MELAINE ZIMMERMAN, ROY WILSON, STEVE BAIRD,  
RANDY SUNDERLAND, RICK OLSON, and CINDY PHILLIPS,

Respondents/Cross Appellants,

v.

COUNTY OF SPOKANE, SILVERBIRD LLC, and DENNIS P.  
REED, DENNIS E. and DAWNA REED, husband and wife,

Appellants/Cross Respondents.

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**APPELLANTS' OPENING BRIEF**

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## I. INTRODUCTION

This is a land use case. It comes before the Court under the Land Use Petition Act (“LUPA”) and involves an appeal filed by a coalition of neighbors opposed to a conditional use permit for a private airstrip which was approved by the Spokane County Hearing Examiner.

The private airstrip is located northeast of the City of Cheney, on 151 acres of property located between Spokane - Cheney Road and Jensen Road, in an area that is zoned Rural Traditional. The area surrounding the subject property is also zoned Rural Traditional and is thinly populated with residences interspersed within large agricultural tracts. A “Private Airstrip” is a use that is allowed in the rural areas of Spokane County through the issuance of a conditional use permit. The purpose of a conditional use permit is to allow Spokane County to evaluate the proposed use and impose conditions upon its existence to ensure that the use is compatible with the surrounding uses in the area to the greatest extent possible.

After a three day hearing that spanned over two weeks, the Spokane County Hearing Examiner approved the conditional use permit. In approving the conditional use permit, the Hearing Examiner considered all of the objections and concerns of the residents on the surrounding properties and imposed strict conditions on the permit. These conditions include restrictions such as limitations on the number of personal aircraft allowed,

the hours of operation, number of flights allowed, and the flight path of the approaching and departing aircraft. The Hearing Examiner's approval of the permit was also made contingent upon the Applicant receiving approval from the Federal Aviation Administration for the location and design of the airstrip.

In attempting to initiate its LUPA petition in the Superior Court of Spokane County, Respondents Prosser Hill Coalition et al (hereinafter "Coalition" or "Respondents") filed a Land Use Petition ("Petition") with the court; however, the Coalition's Petition failed to name the property owners as parties, which is required under RCW 36.70C.040(2)(b)(ii). The Petition was also improperly served because it was not accompanied by a summons. Respondents filed a Motion to Dismiss the Petition for failure to name necessary parties and for improper service; however, the trial court granted a collateral Motion to Amend Caption filed by the Coalition to include the property owners in the caption.

The matter was then heard on the merits before the Honorable Judge LeVeque. Following oral argument, the trial court did not render a decision on the merits of the case, but instead remanded the matter to the Spokane County Hearing Examiner for a new public hearing, finding that notice of the public hearing was deficient. An appeal to this Court followed.

## **II. ASSIGNMENTS OF ERROR**

Appellants assign error to the Superior Court's decision denying Appellants' Motion to Dismiss the Petition based upon the Respondents' (Petitioners in the Superior Court action) failure to name required parties in the Petition as required by RCW 36.70C.040(2)(b)(ii) and failure to properly serve a summons with the Petition.

Appellants further assign error to the Superior Court's decision to remand the matter to the Hearing Examiner for a new public hearing because of deficient notice. Appellants assert that the decision of the Spokane County Hearing Examiner, which is before the Court, was not based on unlawful procedure; is supported by substantial evidence; and does not include any misapplication of the law to the facts.

## **III. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

The issues related to the assignments of error in this action are:

1. Whether the Coalition failed to timely and properly initiate the LUPA petition when it failed to name parties that are required to be named as parties in the LUPA petition pursuant to RCW 36.70C.040(2)(b)(ii) and by failing to properly serve a Summons with the Land Use Petition?

2. Whether the Spokane County Hearing Examiner engaged in unlawful procedure/abused his discretion by denying Respondents' request for continuance of the public hearing to allow more time to prepare for the hearing regarding the Conditional Use Permit when Respondents were aware of the proposed project for more than one year, were zealously represented by legal counsel, and presented a significant

volume of testimony and evidence during the hearing that lasted three days and spanned over two weeks?

3. Whether the Spokane County Hearing Examiner's decision is supported by evidence that is substantial in the record before the Hearing Examiner as a whole?

4. Whether the Spokane County Hearing Examiner correctly applied the law to the facts when he approved the application for a Conditional Use Permit for a private air strip in the Rural Traditional Zone?

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

Appellant Dennis P. Reed ("Reed") owns 151 acres of property located in south Spokane County, in the Cheney area, which is zoned Rural Traditional. HR<sup>1</sup> 254. In November of 2009, Reed submitted an application to the Spokane County Planning Department to develop a Private Airstrip on a portion of the property. HR 134 – 178. Under the Spokane County Zoning Code, a Private Airstrip is allowed as a Conditional Use Permit. CP 97, Finding of Fact No. 104, HR 258.

The Conditional Use Permit application ("Application") was routed to various county, state and federal agencies for review and comment, with none of the agencies recommending denial of the Application. HR 226, 231-253, 254-275. Public notice of the Application was also mailed to property owners of record within 400 feet

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<sup>1</sup> In the body of this brief, the designation "HR" indicates the Administrative Record created before and relied upon by the Spokane County Hearing Examiner. In the Court's record the HR is identified as "Certified Copy of Hearing Examiner Record" pages 1 - 1290.

of the subject property and posted at the access road to the project, with a fourteen (14) day comment period provided. HR 227-230. A “Notice of Application” is required under the Spokane County Code and is required to be issued within 28 days of receipt of a complete application. SCC 13.500. For this Application, the Notice of Application was mailed and posted on December 17 and 23, 2009, respectively, which was approximately one year before the public hearing on the Application. HR 227 -230, CP 84 - 85.

The Planning Department also reviewed the Application under the State Environmental Policy Act (SEPA) to determine if the proposal would create a significant adverse impact on the environment. HR 237 – 253. The Staff determined the proposal would not create any adverse impacts on the environment and issued a Determination of Nonsignificance (“DNS”). HR, 237-38. No appeal of the environmental determination was filed. CP<sup>2</sup> 79.

After review by the County Planning Department and various agencies with expertise, the Planning Department submitted a staff report recommending approval of the Application with conditions. HR 254 – 275. The Spokane County Hearing Examiner (“Hearing Examiner”)

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<sup>2</sup> In the body of this brief, the designation “CP” indicates the Clerk’s Papers maintained in the Superior Court files and transmitted to this Court by the Superior Court based upon the designation of clerk’s papers pursuant to RAP 9.6.

conducted an open record hearing on the application over the course of three days: on October 27, 2010, November 3, 2010 and November 10, 2010. CP 79, Finding of Fact No. 7. In total, the Hearing Examiner heard approximately 16 hours of testimony. CP 425 – 908, Amended Verbatim Transcription of CUS-11-09 Hearings.

After four weeks of deliberation and analysis, the Hearing Examiner issued a thorough and thoughtful decision on December 21, 2010, approving the Application with conditions. CP 79 -126. The Hearing Examiner's decision is 47 pages long, contains 231 Findings of Fact, 24 Conclusions of Law, and 48 Conditions of Approval. CP 79 – 126. As approved by the Hearing Examiner, the Reed Airstrip would be limited to a maximum of 15 planes; would be privately owned; would not allow any commercial activity or cargo service; would not be open to the general public; and use of the airstrip would be limited to daylight hours only. CP 120 -121.

The Coalition appealed the Hearing Examiner's decision to the Superior Court under the Land Use Petition Act on January 6, 2011. CP 1-129.

## V. ARGUMENT

### A. STANDARD OF REVIEW

This LUPA action is governed by the standards of review set forth in RCW 36.70C.130(1). Reviewing the land use decision of the Hearing Examiner in this case, this Court stands in the same position as the superior court. *Phoenix Development, Inc. v. City of Woodinville*, 171 Wn.2d 820, 828, 256 P.3d 1150 (2011). An appellate court's review under LUPA is limited to a review of the record created by the Hearing Examiner. *Pinecrest Homeowners Ass'n v. Cloninger*, 151 Wn.2d 279, 288, 87 P.3d 1176 (2004); RCW 36.70C.120. As the parties seeking relief from the Hearing Examiner's decision, the Coalition bears the burden of establishing one of the standards for relief found in RCW 36.70C.130(1)(a)-(f) before this Court. *Id.*

Respondents may be granted relief only if one of the following standards is met:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
- (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

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

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1)(a)-(f).

Respondents' Land Use Petition challenges to the Hearing Examiner's decision on four grounds:

- 1) RCW 36.70C.130(1)(a): alleging the Hearing Examiner engaged in an unlawful procedure;
- 2) RCW 36.70C.130(1)(b): alleging the Hearing Examiner made an erroneous interpretation of the law;
- 3) RCW 36.70C.130(1)(c): challenging the sufficiency of the evidence in support of the Hearing Examiner's decision; and
- 4) RCW 36.70C.130(1)(d): challenging the Hearing Examiner's application of the Spokane County Code to the facts in the record.

As set forth herein, the Respondents cannot meet the heavy burden upon it to demonstrate that grounds for reversal or remand exists; therefore, their Petition should be denied.

Under the "clearly erroneous application" test, the court applies the law to the facts and will overturn the land use decision only if the court is left with a "definite and firm conviction" that the decision maker

committed a mistake. *Citizens to Pres. Pioneer Park, LLC v. City of Mercer Island*, 106 Wn.App. 461, 473, 24 P.3d 1079 (2001). Regarding questions of fact, the Court is to view the evidence in the light most favorable to the party who prevailed before the Hearing Examiner, granting deference to the Hearing Examiner's view of the credibility of the witnesses and evidence. *Phoenix Development, Inc. v. City of Woodinville*, 171 Wn.2d 820, 828, 256 P.3d 1150 (2011); *Lanze G. Douglas, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 415, 225 P.3d 448 (2010), citing *City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001).

Spokane County is entitled to determine all questions of how its own ordinances and procedures should be interpreted and applied. See *Citizens to Preserve Pioneer Park LLC v. City of Mercer*, 106 Wn.App. 461, 474 24 P.3d 1079 (2001); RCW 36.70C.130(1)(b). The Hearing Examiner's expertise and decision are entitled to deference in the interpretation of the ordinances and procedures of Spokane County. See *Pinecrest Homeowners Ass'n v. Glen a. Cloninger & Assocs.*, 151 Wn.2d 279, 290, 288 P.3d 1176 (2004); *Citizens to Preserve Pioneer Park LLC v. City of Mercer*, 106 Wn.App. 461, 474 24 P.3d 1079 (2001); RCW 36.70C.130(1)(b).

B. THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR BY FAILING TO DISMISS THE LAND USE PETITION FOR FAILURE TO NAME AND SERVE A NECESSARY PARTY AND GRANTING PETITIONERS MOTION TO AMEND THEIR PETITION TO INCLUDE A NECESSARY PARTY AFTER THE 21-DAY STATUTORY FILING DEADLINE.

The Hearing Examiner's decision approving the Conditional Use Permit application was published and mailed to all parties of record on December 21, 2010. CP 125. The Hearing Examiner's decision lists the applicants for the permit as Dennis P. Reed and Silverbird LLC and the property owners subject to the conditional use permit as Dennis E. and Dawna Reed (Mr. Reed's parents). CP 79.

On January 7, 2011, the Coalition filed their Petition in Spokane County Superior Court, naming only Spokane County, Dennis P. Reed and Silverbird LLC as Respondents in the caption. CP 1. Regardless of their status as a party to the land use appeal, Respondents' attorney mailed a copy of the Petition to each person that participated in the hearing before the Spokane County Hearing Examiner. CP 130-133. A summons was not filed or served on any of the parties named in the caption. Index to Clerks Papers.

The Petition failed to include the property owners of record [Dennis E. and Dawna Reed] as necessary parties, as required by RCW 36.70C.040. The statute of limitations for naming and serving all

necessary parties expired on January 11, 2011. Furthermore, Respondents failed to properly serve the Land Use Petition because it was not accompanied with a summons.

The Petition should be dismissed for lack of personal and subject matter jurisdiction as a result of Respondents' failure to comply with the service requirements of LUPA, RCW 4.28 and CR 4.

1. The Land Use Petition Should Be Dismissed Because Respondents Failed to Name the Property Owners as Required Under RCW 36.70C.040.

LUPA clearly identifies the necessary parties for a Land Use Petition. Under RCW 36.70A.040(2), the property owner is required to be named as a party to the appeal.

A land use petition is barred, and the court may not grant review, unless the petition is timely filed with the court and timely served on *the following persons who shall be parties to the review of the land use petition.*

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(b)(ii) Each person identified by name and address in the local jurisdiction's written decision as an owner of the property at issue.

RCW 36.70A.040(2)(b)(ii) (Emphasis added).

Under LUPA, each person identified by name and address as an owner of the property must be named as a party to the Petition and must be properly served. RCW 36.70C.040(2)(b)(ii). Conducting a LUPA review, the superior court acts in its limited appellate capacity. *Overhulse*

*Neighborhood Ass'n v. Thurston County*, 94 Wn. App. 593, 596-97 (1999). All statutory requirements of LUPA must be met before appellate jurisdiction is invoked. *Id.*; *Citizens to Preserve Pioneer Park LLC, v. City of Mercer Island*, 106 Wn. App. 461, 467, 24 P.3d 1079 (2000). The determination of whether a court has jurisdiction is a question of law that is reviewed de novo. *Bour v. Johnson*, 80 Wn. App. 643, 647, 910 P.2d 548 (1996); *In re Marriage of Kastanas*, 78 Wn. App. 193, 197, 896 P.2d 726 (1995).

The Respondents failed to name Dennis E. and Dawna Reed, the owners of the property, as parties to the Land Use Petition. Respondents were well aware that the Reeds were the owners of the property yet Respondents failed to identify and name Dennis E. and Dawna Reed as parties. CP 1,5. The Respondent's failure to include a necessary party is fatal and the Petition must be dismissed.

*a. A reference to Dennis E. and Dawna Reed in the Petition's Statement of Facts Does Not Make Them a Party.*

Consistent with the requirements of LUPA, the Coalition's Petition includes a section identifying the parties. Specifically, Section II of the Petition sets forth the "Identification of the Parties." CP 2 -5. Neither Dennis E. Reed nor Dawna Reed is listed as party.

The only reference to Dennis E. and Dawna Reed in the Petition is in the Statement of Fact section, which states:

#### IV. STATEMENT OF FACTS

4.1 On November 24, 2009, *the Respondent*, Dennis Reed (“Reed” or “Applicant”), submitted an application seeking approval for a CUP application to allow the construction and operation of an airfield facility in a rural residential area. The application for the airfield involves two parcels identified and currently referenced as County Assessor’s tax parcel no. 23052.9080 and 24326.9079.

4.2 The current owners of the concerned parcels are Dennis E. and Dawna Reed. Dennis E. Reed is the Applicant’s father.

CP 5 (Emphasis added).

In contrast to Paragraph 4.2 of the Petition, Paragraph 4.1 specifically refers to Dennis Reed as the *Respondent*: Paragraph 4.2 merely mentions Dennis E. and Dawna Reed without any indication that they are required as parties to the action.

Dennis E. and Dawna Reed were not listed as parties in the Petition; they were not listed in the caption as a Respondent to the Petition; nor were they served with a summons; therefore, Dennis E and Dawna Reed were not made parties to the Petition. CP 1-23, 130-133.

The controlling law on this issue is *Suquamish Indian Tribe v. Kitsap County*, 92 Wash. App. 816, 965 P.2d 636 (1998). The facts presented in this case are on point with *Suquamish*. In *Suquamish*, the Court of Appeals

affirmed dismissal of a land use petition filed by the Suquamish Indian Tribe, on grounds that the Tribe's petition failed to name the North Kitsap Coordinating Council, a required party, within the 21-day LUPA statute of limitations.

The Suquamish Indian Tribe filed a land use petition, but did not name the North Kitsap Coordinating Council as a party. *Suquamish*, 92 Wash. App. at 821. After the 21-day statute of limitations for filing and serving a Land Use Petition, the Tribe filed an amended petition, which listed the North Kitsap Coordinating Council (and several of its members) as additional named parties. *Id.* Kitsap County and the developer filed motions to dismiss the Tribe's petition on grounds that the North Kitsap Coordinating Council was a necessary party and that the Tribe's amended petition was too late to cure the defect. *Id.* The superior court dismissed the Tribe's petition on those grounds and the Court of Appeals affirmed.

The *Suquamish* holding was restated in *Quality Rock Products v. Thurston County*, 126 Wash. App. 250 (2005). In *Quality Rock*, the court stated: “Similarly, *if the body of the land use petition fails to name a necessary party, the petition does not comply with RCW 36.70C.040,*” *Quality Rock Products, Inc. v. Thurston County*, 126 Wash.App. 250, 267, 108 P.3d 805 (2005), *review denied*, 163 Wash.2d 1018, 180 P.3d 1292

(2008), citing *Suquamish Indian Tribe*, 92 Wash. App. at 825. (Emphasis added).

There is no dispute that Dennis E. and Dawna Reed, as the owners of the subject property, are necessary parties to this proceeding; are required to be named as parties; and are required to be properly served. RCW 36.70C. The Petition did not name Dennis E. and Dawna Reed as parties either in the caption or in the body of the Petition itself. CP 1-23. The failure to name necessary parties is jurisdictional; therefore, the court lacks jurisdiction to hear the Petition and it should be dismissed.

2. The Trial Court Committed Reversible Error by Granting Petitioners' Motion to Amend the Caption.

The Respondents sought approval from the superior court to add Dennis E. and Dawna Reed to the caption of their Petition by filing a Motion to Amend Caption<sup>3</sup>. The Motion to Amend Caption was in fact a request to retroactively add a necessary party and circumvent the requirements of LUPA.

As discussed above, *Suquamish Indian Tribe v. Kitsap County*, *supra*, is the controlling law on this issue. In that case, the superior court dismissed a Land Use Petition on grounds that the North Kitsap Coordinating Council was a necessary party and that the Tribe's amended

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<sup>3</sup> It should be noted that an Amended Petition was never filed identifying Dennis E. and Dawna Reed as parties in the body of the Petition.

petition was too late to cure the defect and that decision was affirmed by the Court of Appeals. *Id.*

Notwithstanding the Tribe's argument that its amended petition and amended caption should relate back under Civil Rule 15(c), the Court of Appeals held that the relation back doctrine could not cure their defective petition. The Tribe's amended petition naming the North Kitsap Coordinating Council as a party did not relate back to the original Land Use Petition under CR 15(c). *Id.* at 823.

Respondents cannot dispute that Dennis E. and Dawna Reed are necessary parties who are required to be named and that no summons was filed or served in this action.

In the proceedings below, the Respondents relied on *Quality Rock Products, Inc. v. Thurston County*, 126 Wash.App. 250, 108 P.3d 805 (2005), *review denied*, 163 Wash.2d 1018, 180 P.3d 1292 (2008), to support their Motion to Amend Caption. However, such case is not applicable.

*Quality Rock* is distinguished from the instant case because in *Quality Rock*, the party (Black Hills Audubon Society) who was sought to be included in the caption of the case was specifically named as a party in the petition itself. Specifically, the petition in *Quality Rock* stated:

Parties to this Action.

6.01 Necessary Parties: The following parties are deemed necessary parties by the Petitioners. [The County] is a necessary

party since they are the local jurisdiction whose action is at issue. Black Hills Audubon Society is a necessary party pursuant to RCW 36.70A.040(2)(d) since they were the named party.....

*Quality Rock Products, Inc.*, 126 Wash.App. at 255.

Even though Black Hills was not included in the caption of either the petition or the summons, the Court of Appeals decided that because Black Hills was properly identified in the petition as a necessary party and was properly served, an amendment of the caption was permissible in that specific case<sup>4</sup>. The holding in *Quality Rock* is limited to those instances where the party sought to be added to the caption was *identified in the petition as a necessary party to the action*. Stated another way, the *Quality Rock* court was merely allowing the petitioner to conform the body of its petition to the caption.

*Quality Rock* is inapposite because Dennis E. and Dawna Reed were not named in the Petition as parties. CP 1-23. Therefore, Respondents' request to Amend the Caption should have been denied by the superior court.

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<sup>4</sup> "we interpret Overhulse's language regarding strict compliance with RCW 36.70C.040 to hold that an error in the caption, coupled with proper identification of all necessary parties in the body of the petition and service on those parties, does not dictate the conclusion that a petitioner has failed to invoke the superior court's appellate jurisdiction under RCW 36.70A.040." *Quality Rock Products, Inc.*, 126 Wash.App. at 264.

3. The Petition is Barred on Jurisdictional Grounds Because Respondents failed to serve the Necessary Parties with a Summons.

Respondents filed their Petition in the superior court without ever filing or serving a summons to accompany the Petition. Service of a summons is jurisdictional under LUPA, RCW 4.28 and Civil Rules 3 and 4. Because Respondents failed to serve the Necessary Parties with a summons, the superior court (and this Court) lacked jurisdiction to hear the Petition.

A superior court does not have jurisdiction over a defendant until the plaintiff satisfies the service requirements in RCW 4.28.080, and CR 4. *Painter v. Olney*, 37 Wn.App. 424, 427, 680 P.2d 1066, review denied, 102 Wn.2d 1002 (1984).

*a. LUPA and RCW 4.28 require that a Defendant be Served with a Summons.*

RCW 36.70C.040 articulates the procedure for commencing review of a land use petition. RCW 36.70C.040(2) provides: “***A land use petition is barred***, and the court may not grant review, ***unless the petition is*** timely filed with the court and ***timely served*** on the following persons who shall be parties to the review of the land use petition.” RCW 36.70C.040(2).

RCW 36.70C.040(5) specifies the method for serving a land use petition on a local jurisdiction:

***'Service on the local jurisdiction must be*** by delivery of a copy of the petition to the persons identified by or ***pursuant to RCW 4.28.080*** to receive service of process.'

RCW 36.70C.040(5) (Emphasis added.)

RCW 4.28.080 establishes the method of serving a *summons* on parties, as follows:

Service made in the modes provided in this section is personal service. ***The summons shall be served by delivering a copy thereof, as follows:***

(1) If the action is against any county in this state, to the county auditor or, during normal office hours, to the deputy auditor, or in the case of a charter county, summons may be served upon the agent, if any, designated by the legislative authority.

RCW 4.28.080(2). (Emphasis added).

The superior court does not have jurisdiction over a defendant until the plaintiff satisfies the service requirements of RCW 4.28.080, and CR 4. *Painter v. Olney*, 37 Wn.App. at 424. 0

In this case, Respondents filed their Petition with the Spokane County Superior Court without ever filing a summons, nor is there any evidence in the Record that a summons was served on any of the necessary parties; therefore, the superior court (and this Court) lack jurisdiction and the Petition should be dismissed.

b. *Civil Rules 3 and 4 require a Summons be Served.*

Under the Civil Rules, any complaint filed in the superior court and served on a party must be accompanied by a summons. CR 3, 4. The courts have held that the Civil Rules are incorporated into the Land Use Petition Act under RCW 36.70C.040(5). *Suquamish Indian Tribe*, 92 Wash. App. at 823. Furthermore, the courts have held that a summons is required under LUPA, even though the statute simply states that a land use petition must be filed and served and omits any reference to a summons. *Quality Rock Products, Inc.*, 126 Wash.App. at 264.

Civil Rules CR 4(a) and (b) govern the form and content of a summons. “The purpose of a summons is to give certain notice of the time prescribed by law to answer and to advise the defendant of the consequences of failing to do so.” *Sprincin King St. Partners v. Sound Conditioning Club, Inc.*, 84 Wash.App. 56, 60, 925 P.2d 217 (1996). CR 4(a)(1) provides:

The summons must be signed and dated by the plaintiff or his attorney, and directed to the defendant requiring him to defend the action and to serve a copy of his appearance or defense on the person whose name is signed on the summons.

CR 4(b) provides:

(1) *Contents.* The summons for personal service shall contain:

(i) The title of the cause, specifying the name of the court in which the action is brought, the name of the county

designated by the plaintiff as the place of trial, and the names of the parties to the action, plaintiff and defendant;  
(ii) A direction to the defendant summoning him to serve a copy of his defense within a time stated in the summons;  
(iii) A notice that, in case of failure so to do, judgment will be rendered against him by default. It shall be signed and dated by the plaintiff, or his attorney, with the addition of his post office address, at which the papers in the action may be served on him by mail.

In this case, Respondents merely mailed a copy of the Land Use Petition to all parties of record in the hearing before the Hearing Examiner. CP 130-133. Respondents did not even limit their mailing of the Petition to those named as parties in the petition. CP 130-133. Respondents mailed a copy to over 20 individuals. CP 130-133. This fact, coupled with the omission of a summons, failed to put any person on notice that it may be a party to the action and what, if anything, was expected of them in response. Respondents did not ever file or serve any of the parties to the action with a summons, as required by the Civil Rules. Therefore, the Court lacks jurisdiction over the parties or to hear the Petition; therefore, the Petition must be dismissed.

C. THE HEARING EXAMINER DID NOT ENGAGE IN UNLAWFUL PROCEDURE WHEN HE FOUND THAT PUBLIC NOTICE OF THE HEARING WAS PROPERLY GIVEN.

In their Petition, Respondents assert that the Hearing Examiner engaged in unlawful procedure when he found that notice of the public

hearing was properly given. CP<sup>5</sup> 13, Land Use Petition, Paragraphs 6.2 and 6.3. They request relief under RCW 36.70A.130(a) which states:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

When requesting relief under RCW 36.70A.130(a), the court will review the matter de novo. *Phoenix*, 154 Wash.App. at 502, 229 P.3d 800; *HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs.*, 148 Wash.2d 451, 468, 61 P.3d 1141 (2003). But in doing so, the court will view the evidence, and reasonable inferences arising therefrom, in the light most favorable to the party who prevailed at the highest fact-finding authority. See *RCW 36.70C.120(1)*; *Ahmann-Yamane, LLC v. Tabler*, 105 Wn.App. 103, 111, 19 P.3d 436, review denied, 144 Wn.2d 1011 (2001). Harmless error is one that is “not prejudicial to the substantial rights of the party assigning [error,]” and does not affect the outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000) (citations omitted).

In this case, the Court must view the facts in the light most favorable to Reed and Silverbird LLC as it was the prevailing party before the Hearing Examiner.

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<sup>5</sup> In the body of this brief, the designation “CP” indicates the Clerk’s Papers maintained in the Superior Court files and transmitted to this Court by the Superior Court based upon the designation of clerk’s papers pursuant to RAP 9.6.

1. The Hearing Examiner Did Not Engage in Unlawful Procedure when he determined that the Notice of Hearing Sign was Properly Posted.

The public hearing regarding the Application was scheduled to be heard on October 27, 2010. The Spokane County Code requires a Notice of Public Hearing be issued fifteen (15) days prior to the public hearing. SCC 13.700.102. In this case, notice of the hearing was given on or before October 12, 2010. HR 85.

On October 26, the day before the hearing, several of the Respondents requested through letters or e-mails to the Hearing Examiner that the hearing be continued to give them more time to prepare for the public hearing. HR 439 – 498. At the beginning of the hearing on October 27, 2010, the Hearing Examiner allowed nearly three hours of testimony regarding Respondents' request for a continuance. Respondents argued, individually and through their attorney Michael Whipple, that the sign posted at the proposed project site did not comply with the requirements of the Spokane County Code and thus impacted their ability to adequately prepare for the hearing. CP 436 – 491. The Hearing Examiner denied the request for continuance, finding that there was no evidence that any neighbors were confused by the sign posted at the project site and further finding that notice had been properly given under the Spokane County Code. CP 83 -86, CP 489 – 419.

a. *The Notice of Hearing Sign Was Properly Posted At the Site Entrance and Jensen Road.*

The Petition alleges that that the posted sign failed to comply with SCC 13.700.106(2)(b). CP 13. Respondents do not allege error under any other provision of the Spokane County Code.

SCC 13.700.106(2)(b) requires the following notice:

**A sign** a minimum of sixteen square feet (four feet in width by four feet in height) in area **shall be posted** by the applicant **on the site along the most heavily traveled street lying adjacent to the site.** The sign shall be provided by the applicant. The sign shall be constructed of material of sufficient weight and reasonable strength to withstand normal weather conditions.

The sign shall be lettered and spaced as follows:

1. A minimum of two-inch border on the top, sides and bottom of the sign;
2. The first line(s) in four-inch letters shall read “NOTICE OF HEARING”;
3. Spacing between all lines shall be a minimum of three-inches; and
4. The text of the sign shall include the following information in three-inch letters:
  - Proposal:
  - Applicant:
  - File number:
  - Hearing: (Date) (Time)
  - Location: [of the hearing location]
  - Review Authority:

SCC 13.700.106(2)(b). (Emphasis added.)

Respondents do not challenge the content or size of the sign, nor do they assert that the sign was untimely posted. The Respondents’ sole

claim is that the sign should have been posted along Cheney-Spokane Road, rather than Jensen Road.

The subject property is not located adjacent to a public street. CP 85. The private easement/driveway access to the proposed project site commences at Jensen Road. CP 85, Findings N. 26 & 27. Jensen Road is a public road. Accordingly, the required Notice of Public Hearing Sign was posted at the driveway entrance to the airstrip, at Jensen Road<sup>6</sup>. *Id.*; SCC 13.700.106(2)(b).

Respondents assert that the sign should have been posted on Cheney-Spokane Road, claiming it is more frequently traveled by residents in the community. CP 13, paragraph no. 6.2. Respondents claim that their constitutional due process rights were denied because they were not given an opportunity to be adequately heard by the Hearing Examiner. *Id.* As noted above, testimony related to the location of the sign posting and Respondents' request for continuance stretched over three hours.

The Hearing Examiner's finding states that the sign posted pursuant to SCC 13.700.106(2)(b) was located "along the south side of Jensen Road; at the entrance to the long driveway that extends southerly from Jensen Road to the northwest corner of the site, through land owned by the current site owners (Dennis and Dawna Reed) and their son, Denny

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<sup>6</sup> It should be noted that the Notice of Hearing sign was posted in the same location as the Notice of Application sign, which was posted 10 months prior. CP 228.

Reed.” The finding goes on to state that the posting of the sign along Jensen Road was reasonable and proper under the circumstances. CP 85, Finding of Fact No. 27. The access to Jensen Road is a requirement imposed upon the approval of the conditional use permit, thus the access is actually part of the project site. CP 87, Finding of Fact 46(c) & (d); CP 124, Spokane County Division of Engineering and Roads: condition 8.

Spokane County Staff Planner, Tammy Jones, testified regarding the placement of the sign along Jensen Road, as follows:

Tammy Jones:

I’m sorry. First of all there was a question about whether the notice had been published in the newspaper. It has been published in the newspaper. There is a copy in the file of the newspaper listing. Excuse me. I had this up here and then I started looking for something else. There is a photocopy of a newspaper listing. It was published in the legal notice ad of the Spokesman Review I believe on October 12th, 2010, and that’s in accordance with our procedural regulations that require it be posted in the newspaper of wide circulation as chosen by Spokane County, and that happens to be the Spokesman Review, which is the official county newspaper for posting of legal notices. **And then, as far as posting the sign on site, the notice of hearing requirements under section 13 700 106 B states that a sign shall be posted on the site so it has to be on the property or adjacent owned property along that most heavily traveled street lying adjacent to the site, so the applicant did meet the posting requirements, even though Jensen Road is a very rural road and there is not a lot of neighbors there; the sign was posted as required under the procedural regs on the subject property along the access road,** I believe, that goes back to this piece of property, and it was done in a timely matter and I do have an affidavit of posting on behalf of the applicant, too, that has been signed

saying it was posted on or October 12th, which was the deadline for posting.

[Hearing Examiner] Dempsey: Okay. And does any part of the site abut Cheney- Spokane Road?

Tammy Jones: No, it does not.

[Hearing Examiner] Dempsey: **All right, so that would not have been an appropriate place to post, even though I understand it would have arguably provided notice to people who drive that more busy road.**

Tammy Jones: That's correct.

CP 472 – 473, Amended Verbatim Transcript CUS-11-09 Hearings (emphasis added).

As illustrated on the aerial view drawing of the proposed project it is clear that there is no public street that runs adjacent to the subject property. HR 174 & 177. The only access to the subject property is at Jensen Road: there is no connection to the project site by Cheney-Spokane Road. HR 174 & 177.

The Spokane County Code requires that the sign be posted on the site or adjacent owned property. SCC 13.700.106(2)(b). No portion of the subject property is located adjacent to or at Cheney-Spokane Road; therefore, the Applicant had no legal right or requirement to post a sign along Cheney-Spokane Road. CP 85. The access to the subject property is from Jensen Road across property owned by Dennis Reed and Silverbird LLC. CP 85. The Applicant properly posted the sign at Jensen Road, on

property which he owns, and which provides the access to the proposed airstrip. CP 85.

The Hearing Examiner's finding that the Notice of Hearing Sign was properly posted at the entrance to the site along Jensen Road is supported by evidence that is substantial in the record as a whole. The Respondents claim that the Hearing Examiner engaged in unlawful procedure must fail.

2. The Hearing Examiner Rules of Procedure Declare That When a Person Appears At the Hearing or Submits Written Comment on the Application, that Person is Deemed To Received Notice.

Pursuant to Resolution No. 96-0294, the Spokane County Board of Commissioners adopted Rules of Procedure for the Office of the Hearing Examiner. Appendix I. These rules set forth uniform procedures applicable to all matters coming before the Hearing Examiner.

With respect to Notice of Hearings and its effect, the County's rules state:

- C. **A person is deemed to have received notice if the person appears at the hearing or submits written information regarding the merits of the application, even if notice was not properly mailed or posted.**

Appendix I, Rules of Procedure, Pg. 5 (Emphasis added.)

In this case, the Record reflects that each of the Respondents either appeared at the public hearing on October 27, 2010 or submitted written

information regarding the merits of the application (See CP 425 – 429, 318-326); therefore, each of the Respondents is deemed to have received notice, notwithstanding actual notice received or not.

The Respondents appeared at the hearing before the Hearing Examiner and presented testimony and evidence over a period of more than two weeks, therefore any claim that Respondents were denied due process or an opportunity to be heard is contradicted by the Record.

3. Any Error Made by the Hearing Examiner Was Harmless.

Assuming, *arguendo* that an error was made by the Hearing Examiner when he denied the request for a continuance or found that notice of the hearing was compliant with the County Code, such error was harmless.

Under LUPA, a harmless error does not allow the court to provide the relief requested. As noted above, Respondents seek relief under RCW 36.70A.130(a), which states:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, **unless the error was harmless;**

RCW 36.70A.130(a). (Emphasis added.)

Harmless error is one that is “not prejudicial to the substantial rights of the party assigning [error,]” and does not affect the outcome of

the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000) (citations omitted).

In this case, the “outcome” of the case is approval of the Application by the Hearing Examiner. There is no evidence in the Record that another hearing or new notice would have affected the outcome<sup>7</sup>. Indeed, the evidence in the Record indicates that the hearing before the Hearing Examiner lasted for three days over the course of two weeks. CP 425 & 430. Respondents were represented at the hearing by an attorney, Michael Whipple (CP 429, HR 604); they filed legal briefs and numerous evidentiary documents with the Hearing Examiner at the hearing (HR 439 – 574, 578 – 1236); presented testimony personally (CP 436 – 488, 633 – 681, 740 - 785) or through their attorney; and presented expert witness testimony regarding their theory of the case (CP 682 - 739).

Viewing all facts and inferences therefrom most favorably to Reed and Silverbird LLC, this Court can reasonably conclude that Respondents received notice or are deemed to have received notice of the hearing, participated zealously at the hearing in person and through their attorney, and suffered no prejudice. Any error in finding that notice was proper was harmless and did not affect the outcome.

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<sup>7</sup> It is significant to note that the Respondents, at the time, did not request new public notice be given: they simply requested a continuance to have more time to prepare their case.

D. THE HEARING EXAMINER'S DECISION  
DEMONSTRATES THAT THE APPLICATION MEETS ALL  
THE CRITERIA FOR APPROVAL OF THE PROPOSED  
CONDITIONAL USE PERMIT.

1. A Conditional Use is an Allowed Use Upon Which Specific  
Restrictions and Conditions May be Imposed.

The subject property consists of 151 acres and is zoned Rural Traditional. HR 79. The surrounding area is also zoned Rural Traditional, which allows a variety of uses such as a golf course, commercial recreational area, gun and archery range, kennel, churches, winery, schools, etc. CP 40. The Zoning Code also allows Private Airstrips as a conditional use in the Rural Traditional Zone. CP 96 - 97. A Private Airstrip is defined under Section 14.300.100 of the Zoning Code as "...a landing area for more than 1 aircraft." CP 97.

The Spokane County Zoning Code explains that "[t]he intent of a conditional use permit is to establish criteria for determining the conditions under which a conditional use(s) may be permitted in the zone. A conditional use is subject to specific review during which conditions may be imposed to assure compatibility of the use with other uses in the area and the public welfare." SCZC 14.404.000.

In Spokane County, a proposed conditional use permit ("CUP") must comply with a set of general criteria before the use is permitted. SCZC 14.404.100. In addition to the general criteria applicable to all conditional

use permit applications, the Spokane County Code also includes specific criteria which must be satisfied for a Private Airstrip. SCZC 14.618.240(2).

Under SCZC 14.404.100(1), the Hearing Examiner must find that:

- a. The special standards set forth for the conditional use in the underlying zone of the Zoning Code are met; and
- b. Adequate conditions and restrictions on the conditional use are adopted to ensure that the conditional use will be compatible with the other permitted uses in the area, and will not be materially detrimental to the public health, safety and general welfare.

If the Hearing Examiner approves the conditional use permit, he/she may stipulate restrictions and conditions, including but not limited to any of the following provisions:

- a. Control of use.
- b. Provision for front, side, or rear setbacks greater than the minimum standards of the zone in which the property is located.
- c. Special landscaping, screening, fencing, signing, off-street parking, public transit and/or high occupancy vehicle facilities or any other general development standards.
- d. Requirements for street dedications and/or roadway and drainage improvements necessary as a result of the proposed use.
- e. Control points of vehicular ingress and egress.
- f. Control of noise, vibration, odor, glare, and other environmental contaminants.
- g. Control of operating hours.

- h. Duration or time limitations for certain activities.
- i. Any other reasonable restrictions, condition, or safeguards that will uphold the purpose and intent of the Zoning Code and the Comprehensive Plan and mitigate any adverse impact upon the adjacent properties by reason of the use, extension, construction, or alteration allowed.

SCZC 14.404.100(2).

In this case, the Hearing Examiner issued a detailed and thorough 47-page decision, containing 231 Findings of Fact, 24 Conclusions of Law, and 48 restrictions and/or conditions upon the proposed Private Airstrip. CP 79 - 126. A land use decision granting a CUP allows a use at the discretion of local government subject to any conditions that the local decision makers deem appropriate. *Timberlake Christian Fellowship v. King County*, 114 Wn.App. 174, 181, 61 P.3d 332 (2002), *review denied sub nom.*; *Citizens for a Responsible Rural Area Dev. v. King County*, 149 Wn.2d 1013, 69 P.3d 874 (2003). When such decisions are reviewed on appeal, courts must recognize the broad range of discretion the local decision makers have in determining whether to grant a CUP application and when determining what conditions are appropriate in that particular case. *Id.* Community displeasure cannot form the basis to deny the requested permit. *Maranatha Min., Inc. v. Pierce County*, 59 Wash.App. 795, 801 P.2d 985 (1990).

2. The Hearing Examiner Properly Found the Private Airstrip Meets the Special Criteria.

Under the Spokane County Code, for a Private Airstrip, the specific criteria for approval are:

- a. A minimum unobstructed runway area of 250 feet in width by 1,500 feet in length is required for single-engine airplanes<sup>8</sup>.
- b. A minimum unobstructed runway area of 250 feet in width by 2,500 feet in length is required for multi-engine airplanes<sup>9</sup>.
- c. *The airstrip or heliport shall be located and/or designed with the full consideration to its proximity to, and effect on, adjacent land use.*
- d. The exterior property ownership boundaries shall be at least ¼ mile from any incorporated city or urban growth area boundary<sup>10</sup>.
- e. The use shall be subject to restrictions and conditions, as may be imposed by the Hearing Examiner under chapter 14.404.

SCZC 14.618.240(2). (Emphasis added).

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<sup>8</sup> The Record establishes by uncontroverted evidence that the runway for the proposed private airstrip is at least 250 feet by 2,500 feet, which far exceeds the dimensions required by the Spokane County Code<sup>8</sup> HR 87 (Findings of Fact No. 46, HR 169 – 170, 181 – 183, 257 -258, HR 497, lines 10 - 15.

<sup>9</sup> The Decision of the Hearing Examiner includes a Condition which prohibits multi-engine aircraft.

<sup>10</sup> It is uncontested that the proposed private airstrip is located more than ¼ mile from the UGA boundary and from any incorporated city.<sup>10</sup> HR 86 (Finding of Fact No. 38), HR 259, HR 499, lines 8 - 13.

The only criterion that has been challenged in the Coalition's Petition is (c): the airstrip or heliport shall be located and/or designed with the full consideration to its proximity to, and effect on, adjacent land use.

- a. *The Airstrip is Located, Designed and Conditioned by the Hearing Examiner in Full Consideration of its Proximity to and Effect on the Adjacent Land Uses.*

The Hearing Examiner's decision is detailed, thorough, and clearly mindful of the concerns expressed by the Coalition during the public hearing. To ensure the Private Airstrip was located and/or designed in full consideration of its proximity to and effect on adjacent land uses, the Hearing Examiner imposed 48 conditions of approval on the Application. CP 118 - 125. Accordingly, the Hearing Examiner adopted a Conclusion of Law, holding:

The proposed private airstrip, *as conditioned*, is located and designed with full consideration to its proximity to, and effect on, adjacent land use.

CP 61 (Emphasis added).

The Application, evidence provided by the Applicant, the Staff Report, and Hearing Examiner's Conditions of Approval clearly demonstrate and support the Hearing Examiner's finding and conclusion that the Private Airstrip, *as conditioned*, has been located and/or designed in full consideration of the proximity of land uses that exist adjacent to the project and the potential impacts of the project upon those uses. HR 134 – 177. The

Hearing Examiner clearly understood the concerns identified at the hearing by the Respondents and addressed those concerns by the conditions imposed upon the proposed airstrip. CP 92 (Finding of Fact No. 68); CP 114 – 125. The Hearing Examiner methodically considered the evidence and testimony presented regarding each concern expressed. CP 86 – 116. Responding to the concerns that the Hearing Examiner found to have some basis in fact (see Finding of Fact No. 192, CP 110; cf. Finding of Fact No. 102, CP 97), he carefully crafted conditions to be imposed upon the conditional use, pursuant to SCZC 14.404.100, that would ensure that the conditional use will be compatible with other permitted uses in the area, and will not be materially detrimental to the public health, safety and general welfare. CP 116 – 125. See also CP 117, Conclusion of Law No. 13.<sup>11</sup>

The Staff Report includes the following description of adjacent land uses:

The subject site is located in a rural area surrounded with scattered residences on lots ranging from 5 to over 10 acres in size, agricultural uses and undeveloped land. In addition, the site has a higher elevation than most of the surrounding

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<sup>11</sup> 13. ***The conditions of approval recommended by the various public agencies, as modified and supplemented by the Hearing Examiner below, and as supported by the above findings of fact, are reasonable, necessary, and adequate to ensure that the proposed airstrip is located and designed with full consideration to its proximity to, and effect on, adjacent land use; will be compatible with other permitted uses in the area; will not be materially detrimental to the public health, safety or general welfare; and ensure compliance with the County Zoning Code and all other applicable development regulations.***  
AR 61. (Emphasis added).

properties. However, there are residential uses located on parcel adjacent to the south ½ of the subject site and the residences are located near the southwest and northeast ends of the airstrip runway. The applicant has shown in the application materials that the take-offs and landings will be oriented so that the aircraft will not be flying directly over either of these residences and has stated that noise levels will be kept to a minimum and that safety procedures will be followed.

HR 259.

Based upon such adjacent land uses, the Hearing Examiner was required to find that the Private Airstrip was located and/or designed in full consideration of such uses. SCC 14.618.240(2)(c). The conditions imposed by the Hearing Examiner address all of the allowed and applicable restrictions found in the Spokane County Zoning Code; e.g. control of the use, special landscaping, screening, fencing, off-street parking, control points of vehicular ingress and egress, control of noise, vibration, odor, glare and other environmental contaminants, control of operating hours, duration or time limitation of certain activities, and restrictions, conditions or safeguards that will uphold the purpose and intent of the zoning code.<sup>12</sup> CP 116 – 118; CP 119 – 125.

The Record demonstrates that in making a determination that “full consideration” was given to impacts on adjacent land uses, the Hearing Examiner imposed conditions to limit the number of aircraft, the number of

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<sup>12</sup> See SCZC 14.404.100

landings and take-offs, the approach and landing pattern to the airstrip and take-off path away from the airstrips was and flight patterns, as follows:

13. The aircraft that are based on or visit the airstrip shall be limited to single-engine small aircraft (land based), light sport aircraft (LSAs), and ultra light vehicles; as defined in the FAA regulations. The total number of such aircraft based on the airstrip shall not exceed fifteen (15). Twin engine and multi-engine aircraft shall not be based on or land on the airstrip.

14. Helicopters shall not be based or land on the runway; except on an emergency basis for search and rescue, fire and other emergencies, by helicopters that are sized and designed to safely land on the runway.

16. Landings and takeoffs shall be limited to civil daylight and civil twilight hours, and shall not occur outside such hours except for in-flight and civil emergencies. Landing by appointment or FAA flight plan outside such hours is prohibited

17. Touch and go landings and takeoffs on the runway or site are prohibited.

18. Simultaneous departures and/or arrivals on the runway are prohibited.

19. Approaches to and departures from the runway shall avoid the over flight of houses, unless necessitated by safety reasons or emergencies on a case-by-case basis.

20. Takeoffs and landings shall generally be limited to 25 flights per week throughout the year, including visiting aircraft.

21. Commercial flight or freight operations are prohibited on the runway.

CP 120 - 121.

In addition, approaching aircraft are required to maintain a height of 750 feet as long as possible on approach and departing aircraft are required to achieve a height of 750 feet soon as possible. CP 496 – 499; HR 1244.

Based upon written and oral testimony, the Hearing Examiner found that the permitted aircraft would not exceed allowable limits under the Washington Administrative Code for noise levels:

144. The noise levels generated by the small aircraft referenced above, during takeoffs and landings, range from 51-72 dBA; and for the most part appear to be at or somewhat below the maximum permissible noise levels established by WAC 173-60-040, for the generation of noise by non-exempt commercial or industrial uses at the property line of a residential use (57 or 60 dBA); subject to the 5, 10 and 15 dBA reduction allowances being applied, for noises respectively generated over a total of 1.5, 5 and 15 minutes within a 1-hour period, between the hours of 10:00 p.m. and 7:00 a.m. See WAC 173-60-040.

CP 103 (Finding of Fact No. 144).

The Record, when viewed in its entirety, supports the finding of the Hearing Examiner that the Private Airstrip has been located and/or designed with full consideration of its proximity to, and effect on, adjacent land use. The Hearing Examiner limited the number of aircraft allowed, the type of aircraft, the number of flights permitted, and the flight patterns in order to mitigate the noise, safety and compatibility concerns expressed by the Coalition.

3. The Hearing Examiner Properly Found the Private Airstrip Meets the General Criteria of the Spokane County Zoning Code.

In approving a conditional use permit application under SCZC 14.404.100(1), the Hearing Examiner must find that:

- a. The special standards set forth for the conditional use in the underlying zone of the Zoning Code are met; and
- b. Adequate conditions and restrictions on the conditional use are adopted to ensure that the conditional use will be compatible with the other permitted uses in the area, and will not be materially detrimental to the public health, safety and general welfare.

As discussed in the preceding section, the Hearing Examiner properly found the specific standards for a Private Airstrip were met.

The Coalition's Petition asserts that the proposed Private Airstrip is not compatible with other permitted uses in the area and will be materially detrimental to the public health, safety and general welfare, referring to SCZC 14.404.100(1)(b).

In his 47-page decision, the Hearing Examiner determined that:

***The conditions of approval recommended by the various public agencies, as modified and supplemented by the Hearing Examiner below, and as supported by the above findings of fact, are reasonable, necessary, and adequate to ensure that the proposed airstrip is located and designed with full consideration of its proximity to, and effect on,***

adjacent land use; ***will be compatible with other permitted uses in the area; will not be materially detrimental to the public health, safety or general welfare***, and ensure compliance with the County Zoning Code and all other applicable development regulations.

CP 117. (Emphasis added).

The determination of whether a project is compatible with the surrounding area is a factual determination and should be affirmed on appeal if supported by substantial evidence in the record. *Timberlake Christian Fellowship*, 114 Wn.App at 186 (citing *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 34, 891 P.2d 29 (1995)).

It should be emphasized that a use which requires a conditional use permit is not required to be free of any detriment to any specific use or specific occupant of the surrounding properties. The Spokane County Zoning Code (SCZC) requires that “[a]dequate conditions and restrictions on the conditional use are adopted to ensure that the conditional use will be compatible with the other permitted uses in the area, and will not be materially detrimental to the *public health, safety and general welfare*. SCZC 14.404.100(1); *Taylor v. Stevens County*, 11 Wn.2d 159, 163, 759 P.2d 447 (1988)<sup>13</sup> Consideration of the health, safety and welfare of the public generally is distinct from that of any specific individual. *Id.* When

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<sup>13</sup> An obligation to the public in general is not an obligation to any specific individual, citing *J&B Dev. Co. v. King Cy.*, 100 Wn.2d 299, 304, 669 P.2d 468 (1983).

weighing the sufficiency of the conditions and restrictions placed upon the Private Airstrip, the Hearing Examiner and this Court must consider whether the proposed use is materially detrimental to the *public health, safety and general welfare* and not to that of only one specific use or occupant of the surrounding properties. SCZC 14.404.10(1)( b).; *Taylor v. Stevens County*, supra.

The Record demonstrates that adequate conditions and restrictions were imposed upon the Application to ensure it is compatible with other permitted uses in the area and will not be materially detrimental to the public health, safety and general welfare. As noted previously, the Hearing Examiner limited the number of aircraft allowed, the type of aircraft, the number of flights permitted, and the flight patterns in order to mitigate the noise, safety and compatibility concerns expressed by the Coalition.

- a. *The Record demonstrates that accident potential was considered and that conditions of approval were placed upon the airstrip to address safety concerns.*

With respect to safety in particular, the Hearing Examiner made 4 Findings of Fact:

197. Any approval of the proposed airstrip should include conditions that FAA Form 7480-1 for the proposed airstrip be filed as required, disclose the presence of the adjacent personal airstrip, be consistent with FAA

regulations and the conditions attached to the conditional use permit, disclose that a county government “license” (conditional use permit) was required for the airstrip, and attach a copy of the Hearing Examiner’s decision approving the conditional use permit. The approval should also be contingent on Denny Reed completing and filing a FAA Form 7480-1 for the existing personal airstrip, before or at the same time that a FAA Form 7480-1 is filed for the proposed airstrip.

198. Operation of the proposed airstrip should be made contingent on flight patterns being adopted for the personal airstrip and proposed airstrip that are compatible from a safety and operational standpoint; guest and student owned or controlled aircraft being prohibited from landing on or departing from the personal airstrip, except for infrequent and occasional use by invited guests; and only one (1) aircraft owned or possessed by Denny Reed being based on the personal airstrip. See Zoning Code definition of “personal airstrip”, and Section 14.618.230(6) of County Zoning Code.
199. Operation of the proposed airstrip should be made contingent on implementation of any final conditions specified by the FAA in making its determination on FAA Form 7480-1 submitted for the proposed airstrip, or on FAA Form 7480-1 submitted for the personal airstrip that are intended to ensure the safe operation of the proposed airstrip; subject to the administration modification requirements set forth in Section 14.504.400 of the County Zoning Code.
200. Operation of the proposed airstrip should be made contingent on complying with all applicable FAA regulations; and on implementation of a displacement threshold and slip maneuver for landing on the proposed airstrip, unless found by the FAA or operators of the airport to be unsafe. It is noted that the FAA heavily regulates the airworthiness and certification of aircraft and pilots.

CP 111 - 112.

As a result of safety concerns expressed by the Coalition and expert testimony, the following conditions of approval were imposed on the airstrip.

11. The “runway” of the airstrip for the purpose of these conditions shall include the entire 250-foot wide “safety landing zone” illustrated on the site plan of record (“site plan”).
17. Touch and go landings and takeoffs on the runway or site are prohibited.
18. Simultaneous departures and/or arrivals on the runway are prohibited.
19. Approaches to and departures from the runway shall avoid the over flight of houses, unless necessitated by safety reasons or emergencies on a case-by-case basis.
22. A displacement threshold and slip maneuver shall be used during landings on the airstrip to mitigate noise impacts, and all takeoffs shall originate at the approach end of the runway; consistent with safety and FAA recommendations or requirements.
23. The airstrip shall display visual markings on the runway indicating that turns should be made to the right during departures and approaches, instead of the standard left pattern.

CP 120 – 121.

The Hearing Examiner’s decision to approve the proposed conditional use under 48 specific conditions and finding that the use would not be materially detrimental to the public health, safety and general welfare

is supported by substantial evidence. CP 117, Conclusion of Law No. 13. The evidence in the record indicates that the Hearing Examiner carefully addressed each of the concerns of the neighboring property owners. CP 79 – 125, Revised Findings of Fact, Conclusions of Law, and Decision. The Record is void of any evidence of a material detriment to the public health, safety and general welfare. Respondents cannot carry the heavy burden of proving that the evidence in the Record, when considered as a whole, does anything other than support the Hearing Examiner’s decision.

## **VI. CONCLUSION**

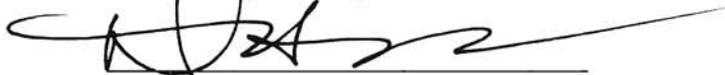
As discussed herein, the Petition should be dismissed for lack of jurisdiction. The Superior Court’s decision denying Appellants’ Motion to Dismiss the Petition based upon the Respondents’ failure to name required parties in the Petition as required by RCW 36.70C.040(2)(b)(ii) and failure to properly serve a summons with the Petition was in error and should be reversed.

The Hearing Examiner’s decision clearly demonstrates how the Application complied with the requirements of the decision criteria set forth in Spokane County Zoning Code. The Hearing Examiner’s decision demonstrates the affirmative findings of fact relative to each criteria; does not contain an erroneous interpretation of law, and is supported by substantial evidence when viewed in light of the whole record. Petitioners

have failed in their burden and the Hearing Examiner's decision to approve the Application should be affirmed.

DATED this 6<sup>th</sup> day of April, 2012.

STEVEN J. TUCKER  
Prosecuting Attorney



DAVID W. HUBERT, WSBA #16488  
Civil Deputy Prosecuting Attorney  
Attorneys for Spokane County

*PARSONS/BURNETT/BJORDAHL/HUME, LLP*

By: 

STACY A. BJORDAHL, WSBA #32217 Attorneys  
for Dennis P. Reed and Silverbird, LLC

**PROOF OF SERVICE**

I hereby declare under the penalty of perjury and the laws of the State of Washington that the following statements are true.

On the 6th day of April, 2012, I caused to be served a true and correct copy of the Appellants' Brief by the method indicated below, and addressed to the following:

Rick Eichstaedt  
Center For Justice  
35 West Main, Ste 300  
Spokane, WA 99201

- Personal Service
- U.S. Mail
- Hand-Delivered
- Overnight Mail
- Facsimile

Michael D. Whipple  
Attorney at Law  
905 West Riverside, Ste 408  
Spokane, WA 99201

- Personal Service
- U.S. Mail
- Hand-Delivered
- Overnight Mail
- Facsimile

**DATED** this 6th day of April, 2012 in Spokane, Washington.

  
LORI ZAAGMAN-BACON

# Appendix I

BEFORE THE BOARD OF COUNTY COMMISSIONERS  
OF SPOKANE COUNTY, WASHINGTON

IN THE MATTER OF ADOPTING RULES )  
OF PROCEDURE FOR THE OFFICE OF ) R E S O L U T I O N  
THE HEARING EXAMINER )

WHEREAS, pursuant to the provisions of the Revised Code of Washington, Section 36.32.120(6), the Board of County Commissioners of Spokane County has the care of County property and the management of County funds and business; and

WHEREAS, pursuant to the provisions of Resolution No. 96-0171 passed and adopted on the 13th day of February, 1996, the Board of County Commissioners adopted a Hearing Examiner Ordinance which established the Office of the Hearing Examiner, effective March 29, 1996; and

WHEREAS, pursuant to the provisions of RCW Section 36.70.970 the Board of County Commissioners shall prescribe procedures to be followed by the hearing examiner; and

WHEREAS, pursuant Section 6 of the Hearing Examiner Ordinance, the Board of County Commissioners may adopt interim procedures to be followed by the hearing examiner; and

WHEREAS, the Division of Building and Planning and the Hearing Examiner recommend the Board of County Commissioners adopt the attached Rules of Procedure;

NOW, THEREFORE, BE IT RESOLVED by the Board of County Commissioners that the Chairman of the Board or the majority hereby adopts the attached Rules of Procedure to be followed by the Hearing Examiner.

PASSED AND ADOPTED this 26 day of March, 1996.

BOARD OF COUNTY COMMISSIONERS  
OF SPOKANE COUNTY, WASHINGTON

ATTEST:

WILLIAM E. DONAHUE,  
Clerk of the Board

By: Dianne Montoya  
Deputy Clerk

[Signature]  
Philip D. Harris, Chair  
[Signature]  
John Roskelley  
[Signature]  
Steve Hasson

SPOKANE COUNTY HEARING EXAMINER

## RULES OF PROCEDURE

Sections:

1	Authority for Rules of Procedure
2	Definitions
3	Ex Parte Communications
4	Disqualification
5	Hearing Examiner-Authority
6	Scheduling of Hearings
7	Timeliness of Hearings
8	Hearing Backlog
9	Notice of Hearing-Effect of Notice
10	Staff Reports on Applications
11	Site Inspections
12	Presentation of Evidence
13	Reopening or Continuing Hearings
14	Dismissal of Applications
15	Record of Hearing
16	Decision of the Hearing Examiner
17	Reconsideration
18	Compliance with Law

## 1. Authority for Rules of Procedure.

These rules are adopted pursuant to section 6 of the Spokane County Hearing Examiner Ordinance, which ordinance was adopted as an attachment to County Resolution No. 96-0078. These rules set forth uniform procedures applicable to all matters coming before the hearing examiner.

## 2. Definitions.

For the purposes of these rules:

A. "Application" shall mean the application for a permit or approval, or any appeal, within the jurisdiction of the hearing examiner.

B. "Division of building and planning" or "division" means the Division of Building and Planning, Spokane County Public Works Department.

C. "Examiner", "chief hearing examiner", "deputy hearing examiner" and "examiner pro tempore" shall have the meanings assigned to such terms in the Hearing Examiner Ordinance.

D. "Ex parte communication" means any oral or written communication made by any person, including a county employee or official, pertaining to a matter that is or will be within

the jurisdiction of the hearing examiner and that is made outside of a public hearing and is not included in the public record.

E. "Party" means any person who has appeared at a public hearing conducted by the examiner.

**3. Ex Parte Communications.**

A. No person may communicate ex parte, directly or indirectly, with the hearing examiner. The hearing examiner may not communicate ex parte with opponents or proponents of any application unless the hearing examiner makes the substance of such communication part of the public record and provides the opportunity for any party to rebut the substance of such communication as provided by law. The hearing examiner may reopen the hearing or record prior to a final decision to address such matter.

B. This section does not prohibit ex parte communication regarding procedural matters, communication by the hearing examiner with his\her staff or the county prosecuting attorney's office, communication by the examiner for the sole purpose of conveying information regarding the specifics of an application, or communication by the examiner with county departments for the purpose of obtaining information or clarification, so long as the information or clarification received by the examiner is made part of the record.

**4. Disqualification.**

A. The hearing examiner may enter an order disqualifying the examiner from consideration of an application in the event of a conflict of interest.

B. Prior to the taking of evidence, the hearing examiner shall disclose publicly and on the record any conflict of interest the hearing examiner may have regarding the application.

C. Anyone seeking to rely on the appearance of fairness doctrine or conflict of interest to disqualify the hearing examiner from participating in a decision must raise the challenge as soon as the basis for disqualification is known.

D. The hearing examiner shall rule on the issue of disqualification in each instance when it is raised.

**5. Hearing Examiner-Authority.**

A. The hearing examiner shall have the general duties and powers set forth in the Hearing Examiner Ordinance and applicable law. Public hearings shall be conducted by the duly appointed chief examiner, deputy examiner or examiner pro tempore.

B. The hearing examiner shall have such powers as are necessary to carry out the intent of the Hearing Examiner Ordinance, including the authority to:

- (1) conduct pre-hearing conferences;
- (2) require the submittal of information;
- (3) schedule and continue hearings;
- (4) rule on all evidentiary and procedural matters, including motions and objections appropriate to the proceedings;
- (5) receive evidence and cause preparation of a record;
- (6) regulate the course of hearings and the conduct of the parties and their agents;
- (7) maintain order;
- (8) render decisions and enter written findings and conclusions;
- (9) include in a decision the conditions of approval necessary to ensure that the application complies with the applicable criteria for its approval; and
- (10) revoke any approval for failure to comply with the conditions imposed by the hearing examiner.

**6. Scheduling of Hearings.**

A. The division of building and planning shall coordinate the scheduling of public hearings with the chief examiner. The chief examiner shall prepare a weekly agenda indicating the dates and times that matters will be heard during the week, which shall be the official agenda for hearings conducted during the week.

B. To provide a convenience to the public, when practical, minor applications such as variances or conditional use permit applications shall be scheduled at the beginning of the day's agenda, followed by more complex matters such as rezone and preliminary plat applications. The hearing examiner shall reasonably limit the number of complex matters that will be scheduled for hearing on a single day.

C. When practical and not in violation of ordinance or prejudicial to the rights of any party, the hearing examiner may consolidate for hearing applications under the jurisdiction of the hearing examiner involving the same or related properties.

D. The chief examiner shall notify the division in advance of his\her intent to take authorized leave, to facilitate scheduling and to arrange for a deputy examiner or examiner pro tempore if necessary to conduct hearings during the chief examiner's absence.

**7. Timeliness of Hearings.**

A. To ensure compliance with RCW 36.70B.090, the division of building and planning shall, at the time an application is ready to be scheduled for hearing, advise the chief examiner in writing of the number of days that have elapsed since the applicant was notified by the division that the respective project permit application was complete. Such advisement shall state the period(s) of time, if any, that were excluded in determining the number of elapsed days and the reason for any excluded period(s).

B. The chief examiner shall, if possible, schedule a hearing on the project permit application within a sufficient period of time to assure compliance with the 120 day period specified in RCW 36.70B.110. If the 120 day time period is not complied with, the hearing examiner shall provide written notice to the project applicant stating the reasons for noncompliance and the estimated date for issuance of the notice of final decision.

C. This section shall apply only to project permit applications within the examiner's jurisdiction and filed on or after April 1, 1996.

**8. Hearing Backlog.**

The division of building and planning shall notify the chief examiner when it appears that the hearing of any application will be delayed for more than six weeks or cannot be scheduled to meet the time limit provided for in RCW 36.70B.110, due to the number of hearings already scheduled before the examiner. The chief examiner shall call for additional hearings, or arrange for a deputy examiner or examiner pro tempore, if necessary to address such concerns.

**9. Notice of Hearing-Effect of Notice.**

A. Each public notice required for the hearing of an application shall conform to applicable statutory and ordinance requirements. The notice should contain a statement that the hearing will be held pursuant to the rules of procedure adopted by the hearing examiner.

B. Failure of a person entitled to notice to receive notice does not affect the jurisdiction of the hearing examiner to hear the application when scheduled and render a decision, if the notice was properly mailed and posted.

C. A person is deemed to have received notice if the person appears at the hearing or submits written information regarding the merits of the application, even if notice was not properly mailed or posted.

D. If required notice is not given and actual notice is not received, the hearing examiner may reschedule the hearing or keep the record open on the matter to receive additional evidence.

10. Staff Reports on Applications.

A. The division of building and planning shall coordinate and assemble the comments and recommendations of other county departments and commenting agencies, and shall make a written staff report to the hearing examiner on all applications.

B. At least seven calendar days prior to the date of the scheduled public hearing, the staff report shall be filed with the office of hearing examiner and mailed by first class mail or provided to the applicant. At such time, the division shall also make the report available for public inspection. Upon request, the division shall provide or mail a copy of the report to any requesting person for the cost of reproduction indicated in chapter 1.42 of the Spokane County Code plus the cost of mailing if applicable.

C. If the staff report is not timely filed or furnished, the hearing examiner may at his\her discretion continue the hearing, considering the prejudice to any party and the circumstances of the case.

D. The staff report shall succinctly include the following information, as relevant to the application:

- (1) a description of the application;
- (2) the names and current addresses of the applicant, the owners of the subject property and any technical advisor or agent representing the applicant;
- (3) the name and office of the staff person preparing the report;
- (4) the location and general physical characteristics of the site, including size, dimensions, topography and existing uses;
- (5) the comprehensive plan designation and current zoning, and a brief history of past zoning and land use actions involving the site;

- (6) a technical data summary of the minimum lot sizes, allowable density, permitted site coverage and comparison of allowable uses under the existing and proposed zoning of the site;
- (7) the general character, land use and zoning of the surrounding area; including a brief summary of recent land use actions or development trends in the surrounding area;
- (8) the application's compatibility and impact on the zoning and character of the surrounding area;
- (9) a summary of the relevant and material provisions of the comprehensive plan, and the consistency of the application with such provisions, the county zoning code and applicable development regulations;
- (10) the proposed conditions for approval of the application under applicable land use codes and controls;
- (11) a summary of the type and service capacities of existing facilities and infrastructure, and the impact of the application thereon;
- (12) a summary or transmittal of the reports and recommendations of other agencies or departments commenting or consulted;
- (13) pertinent information regarding the State Environmental Policy Act and chapter 11.10 of the Spokane County Code;
- (14) analysis of the benefits offered by the application to the community;
- (15) if a rezone, a summary of the changed circumstances if any that support approval of the application;
- (16) the current population density in the general vicinity;
- (17) the division's conclusions and recommendations regarding approval of the application and SEPA; and
- (18) a zoning map and comprehensive plan map for the site and vicinity; and a copy of the proposed site plan, if any, for the application.

E. The chief examiner may make recommendations to the division on the format and content of staff reports submitted to the hearing examiner.

#### 11. Site Inspections.

A. The hearing examiner may make site inspections, which may occur at any time after the staff report on an application has been filed with the hearing examiner and before the examiner renders a final decision. The hearing examiner need not give notice of the intention to make an inspection.

B. The inspection and the information obtained from it shall not be construed as new evidence or evidence outside the

record. If an inspection reveals new and unanticipated information, the hearing examiner may upon notice to all parties of record request written response to such information or reopen the hearing to consider the information.

**12. Presentation of Evidence.**

A. The format of the public hearing shall be organized so that the testimony and written evidence can be presented quickly and efficiently. The format will generally be as follows:

- (1) a brief introduction of the matter by the hearing examiner;
- (2) a report by division staff including introduction of the official file on the application and its procedural history, an explanation of the application, including the use of visual aids, and the recommendation of the division on the application;
- (3) the submittal of testimony and documents by the party with the burden of proof at the hearing, typically the applicant on an initial application or the appellant in the case of an appeal; followed by persons in support of such party's position;
- (4) the submittal of testimony and documents by opposing parties;
- (5) rebuttal;
- (6) questions and clarifications;
- (7) closure of the hearing;
- (8) closure of the record and continuation of the matter for final decision.

B. All reasonably probative evidence is admissible by the hearing examiner. The hearing examiner may exclude all evidence that is irrelevant, immaterial or unduly repetitious. The judicial rules of evidence are not strictly applied, but may be used by the examiner for guidance. The hearing examiner shall accord such weight to the evidence as he/she deems appropriate.

C. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference, at the hearing examiner's discretion. The examiner may require that the original of a document be produced. A party submitting documentary material at the hearing should make copies available at the hearing for review by the opposing party.

D. The hearing examiner may take official notice of judicially cognizable facts; federal, state and local laws, ordinances or regulations; the county's comprehensive plan and other adopted plans or policies of the county; and general, technical and scientific facts within the examiner's

specialized knowledge; so long as any noticed facts are included in the record and referenced or are apparent in the examiner's final decision.

E. The hearing examiner may require that testimony be given under oath or affirmation. All testimony taken by the hearing examiner in an appeal under section 11.10.170 of the Spokane County Code shall be under oath.

F. The hearing examiner may allow the cross-examination of witnesses. The hearing examiner is authorized to call witnesses and request written evidence in order to obtain the information necessary to make a decision. The hearing examiner may also request written information from or the appearance of a representative from any county department having an interest in or impacting an application.

G. The hearing examiner may impose reasonable limitations on the number of witnesses to be heard and the nature and length of their testimony to avoid repetitious testimony, expedite the hearing or avoid continuation of the hearing.

H. The hearing examiner may cause the removal of any person who is being disruptive to the proceedings, or continue the proceedings if order cannot be maintained. The examiner shall first issue a warning if practicable.

I. No testimony or oral statement regarding the substance or merits of an application is allowable after the close of the public hearing. No documentary material submitted after the close of hearing will be considered by the hearing examiner unless the examiner has left the record open for the submittal of such material and all parties are given an additional time to review and rebut such material.

### 13. Reopening or Continuing Hearings.

A. The hearing examiner may reopen or continue a hearing to take additional testimony or evidence, or other compelling cause, provided a final decision has not been entered.

B. If the hearing examiner announces the time and place of the continued hearing on the record before the hearing is closed, no further notice is required. If the hearing is reopened after the close of the hearing, all parties must be given at least five days notice of the date, time, place and nature of the reopened hearing.

C. Motions by a party for continuance or to reopen a hearing must state the reasons therefore and be made as soon as reasonably possible. The motion must be submitted in writing

unless made at the hearing. The hearing examiner may continue or reopen a hearing on his\her own motion, citing the reasons therefore.

**14. Dismissal of Application.**

A. The hearing examiner shall conduct the public hearing based on the completed application. If the hearing examiner deems that the application has been substantially changed since it was deemed complete, the examiner shall dismiss the application without prejudice and direct that a new application be submitted by the applicant and appropriate fees paid therefore. If the hearing examiner determines that the proposal has been changed but not substantially, the examiner shall not take action on the application until all reviewing agencies have been given an opportunity to review the changes made and make recommendations deemed to be necessary under applicable rules and regulations.

B. The hearing examiner may dismiss an application pursuant to a request by the applicant to withdraw an application, or for failure of the applicant to attend required hearings or provide requested information. If the applicant notifies the division of building and planning in writing of the desire to withdraw an application prior to notice of hearing being mailed to the persons entitled thereto, the dismissal shall be allowed without prejudice, and noted in the application file. If the request for withdrawal of an application is received after such notice being mailed and before a final decision is rendered, the application shall be dismissed with prejudice with the same effect as a denial of the application on the merits, in that the same or similar application cannot be considered by the hearing examiner for a one year period commencing with the date the initial application was deemed complete.

**15. Record of Hearing.**

A. The hearing examiner shall establish and maintain a record of all proceedings and hearings conducted by the examiner, including an electronic recording capable of being accurately transcribed and reproduced. Copies of the recording and any written portions of the record shall be made available to the public on request for the cost of reproduction or transcription, as determined by the chief examiner.

B. The record of hearing shall include, but is not limited to:

- (1) the application;
- (2) department staff reports;

- (3) all evidence received or considered by the hearing examiner;
- (4) the final written decision of the hearing examiner;
- (5) affidavits of notice for the hearing;
- (6) the environmental determination regarding the application;
- (7) the electronic recordings of the hearings and proceedings by the hearing examiner; and
- (8) the departmental file for the application, if incorporated into the record by the examiner.

C. For purposes of appeal to court or to the board of county commissioners, the electronic recording shall be transcribed at the cost of the appellant. The transcript shall be a verbatim transcript, unless the hearing examiner, the appellant and the applicant, if different from the appellant, agree that only certain portions of the hearing and other proceedings need be transcribed. The hearing examiner shall in all cases certify the official record and transcript for the purpose of appeal.

D. The hearing examiner may authorize a party to have the proceedings reported by a court reporter and have a stenographic transcription made at the party's expense. The hearing examiner may also cause the proceedings to be reported by a court reporter and transcribed.

E. The hearing examiner shall have custody of the hearing record and shall maintain such record until the period for appeal of the examiner's final decision has expired or the record is transmitted to court or the board of county commissioners pursuant to an appeal of the examiner's final decision.

#### 16. Decision of the Hearing Examiner.

A. The decision of the hearing examiner shall include at least the following:

- (1) a description of the application;
- (2) the location of the property;
- (3) a statement regarding the status of SEPA review for the application;
- (4) the date and location of the hearing;
- (5) a list of the persons who testified at the hearing or a summary thereof;
- (6) a list of exhibits, or summary of such list;
- (7) a statement identifying the ordinance or criteria governing approval of the application; and
- (8) written findings of fact, conclusions, and a final decision based on such findings and conclusions, granting, denying or granting the application with such

conditions, modifications and restrictions as the examiner deems appropriate.

B. The final decision of the hearing examiner shall be rendered within ten (10) working days after the record is closed by the hearing examiner on an application, or such longer period of time as the applicant and the examiner agree in writing. The hearing examiner shall provide a copy of the final decision to the division of buildings as soon as possible.

C. No later than three (3) working days following the rendering of the final decision, copies of the final decision shall be mailed by certified mail to the applicant and by first class mail to other parties of record in the case.

D. Appeals from the hearing examiner's final decision must be taken in the manner and within the time frames established by the Hearing Examiner Ordinance.

**17. Reconsideration.**

The hearing examiner shall have limited authority to reconsider or clarify a final decision, which shall be confined to addressing exceptional circumstances such as correcting clerical errors, fraud or obvious ambiguity.

**18. Compliance with Law.**

The hearing examiner may modify these rules on a case by case basis to comply with applicable law.