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SUPREME COURT OF WASHINGTON

PALMER D. STRAND and PATRICIA N. STRAND

Appellant,

v.

VICKY HORTON
SPOKANE COUNTY ASSESSOR

Respondent.

BRIEF OF APPELLANT

Presented by:

Patricia Strand, pro se
Mailing: PO Box 312
Physical: 13206 W. Charles Rd.
Nine Mile Falls, WA 99026
(509) 467-0729 (phone/fax)

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I. INTRODUCTION

People accept what government says it does. We may criticize the quality of the job but not that the job is done. The Spokane County Assessor (Assessor) pronounced comparable sales as the basis of my assessment. I believed this and submitted administrative appeals to the Washington State Board of Tax Appeals (BTA) based on this. My appeals analyzed the quality of the work the Assessor did as so poor it was not comparable sales methodology. The BTA upheld the Assessor. I couldn't fathom their Conclusions. This happened in 2008 and 2009. But I've finally figured something out. The Assessor did not do comparable sales and the BTA has a rule that explained their Conclusions.

An assessment has 2 parts – land and improvements. My 2008 land assessment was increased from \$100,000 to \$200,000 and stayed the same for 2009. My 2009 improvement assessment increased \$32,800 based on a May/7/2009 inspection of my property and my answering the questions of the Assessor's agent as part of my 2008 assessment appeal.

Assessment year 2008 is Jan/1-Dec/31/2009. Assessments based on comparable sales methodology would have *Analyses*¹ (WAC 458-07-015)

¹ *King County ... Mass Appraisal Report* – CP 127-164; CP 129 *Characteristics*; CP 135 neighborhoods analyzed, CP 136 *Sales Screening for Improved Parcel Analysis*, CP 137 *Land Update*, CP 145-154 *Improved Sales Used in this Annual Update Analysis*, CP 155-157 *Improved Sales Removed ...*, CP 158 *Vacant Sales Used ...*, CP 162 *Assumptions*, CP 164 references ..., USPAP, etc. and signature
(NOTE 1: Mass Appraisal & Comparable Sales have same basis – USPAP Standards 6)

county-wide neighborhood-specific of comparable sales from Jan/1/2004 through Dec/31/2008; cutoff Jan/1/2009 (RCW 84.40.030). 2009 assessment *Analyses* spans Jan/1/2005 to Dec/31/2009; cutoff Jan/1/2010.

I requested 'all' 2008 and 2009 assessment support multiple times (A1-2 Table 1). No *Analyses* were provided (RCW 84.48.150).

Comparable sales methodology is per appraisal industry standards (WACs 308-125-010, 308-125-200, 458-07-015, 458-10-060) which I researched². I made public records requests (*PRRs*) for the Assessor's comparable sales methodology³, "No Records...".

II. ASSIGNMENT of ERRORS to BTA FINDINGS OF FACT (Docket 10-258 "*Finding of Fact*" (*FoF*) by Number)

5. " ...: *the above-ground living area and finished basement area are each 2,048 square feet*"

is physical reality (A2-38, A2-5) and *Appraisal*⁴ (Ex. 2) would show this

1 sFr	or	1 sFr
B-wo 2048		B 2048

 if BTA statement were true. Statement is an error. Assessor Appraisals state two above-ground levels^{4(b)} and show:

² A1-4 to A1-5; A2-98 to A2-112 & A2-128 to A2-129; A6-1 to A6-4 & A6-33 to A6-46; CP 3 lines 10 – 15; CP 249-251; CP 395-396

³ CPs 230 (# 3-5) and 231 (# 3-7) are *PRRs* and 232 is responses – "No Records"

⁴ (a) How to read *Appraisal*: A2-24, A2-116 to A2-119, CPs 31-36

(b) *Appraisal's* "L=Below Grade Component ... Lower" (A2-116). Ex. 10 proves "L" is Above Ground. A2-24 and Ex. 2 show "896=Wood Framed" (wood is an above ground framing component because wood and earth, aka Below Grade, rot in contact). CONCLUSION: 'THE APPRAISAL'S PROBLEMS #5 (page 16)

(c) A2-118 does not distinguish a basement as 'Daylight' just walkout. And L is above ground and B is below ground for different elevations.

- A2-24²⁰⁰⁹ assessment and Ex. 2²⁰¹² assessment

1 s Fr
L 896

 “1s=1 story, Fr=Wood/metal stud ... , Base Area 2048^{sf}, Floor 1, Finished Sq Ft 2048” (1st above-ground level) → over → “L=lower level, L=Below Grade Component, 896^{sf}, Finished Sq Ft 800” (2nd above-ground level^{4(b)}) →

1 s Fr
B 1152

 “1sFr” is also over B=basement 1152^{sf}, Construction Concrete, Finished Sq Ft 1100”.
- CP 35#14, “The Appraisal house drawings’s”
- Footnote ^{5(a)} also refutes *FoF* #5 as “unfinished basement”

7. *“The subject’s quality of construction is “average-”... The error, however, is not substantial and does not materially affect adjustments in the Assessor’s sales comparison approach.”*

is an error regarding: (1) violates USPAP Rule 1-1 on errors, (2) Ex. 8 shows a 7% quality of construction adjustment (247,500-235,100) of \$12,400 as a material amount, and (3) my quality of construction and that of other Assessor comps was a materially false statement (violating RCW 9A.72.010) on 3 successive Assessor Reports (A1-22 Table 17, A1-21 line 22 through A1-28 line 19).

8. *“On May 7, 2009, the Owners denied the Assessor access to conduct an interior inspection of the subject property”*

is an error as reported on page 26 #2.

⁵ (a) *Assessor’s Answer to Real Property Petition BE-10-0126* assessment year 2010 included BTA Docket 09-121, *Initial Decision*. It highlighted A2-93 line 19 through A2-94 line 5 “...The Owner refusal denies the Assessor the ability to **verify if the unfinished basement space is now finished ...**” ;

(b) RP page 19 lines 2-9, “The fact that they didn’t allow an interior inspection of their home resulted in the hearing officer assigning less weight to the value regarding improvements that only the Strands knew about. ...their attempt to challenge Mr. Hollenbeck’s qualifications, again, go to the ability of the hearing Board to assign weight to the credibility of the witnesses.”

ERRORS: There was only one witness. I didn’t appeal improvements.

9. ⁽¹⁾*“The Owners claim numerous inaccuracies in the Assessor’s sales grid...bullet points on pages 4 through 6...”* ⁽²⁾*“... have emphasized trivial, minor mistakes ...”* ⁽³⁾*“refused to work with the Assessor ...”*

are errors. ⁽¹⁾Inaccuracies are on A1-4 through A1-78. ⁽²⁾USPAP Standards Rule 1-1 (b) and (c) is intolerant of mistakes by appraisers. WACs 308-125-010, 308-125-200, 458-10-010, 458-10-060 state USPAP applies to accredited appraisers. ⁽³⁾CP 220-222 recounts my resolution conference. On Jan/19/2010 I gave Spokane County Prosecutor Ronald Arkills (Prosecutor) A2-38 to prove my 2,048^{sf} finished basement. This act resulted in multiple false reportings of unfinished, nearly finished and no basement (*FoF* #15).

10. ⁽¹⁾*“The Owners’ repeated use of the word “fraud” ... is unsupported by any credible evidence” ...* ⁽²⁾*“Any alleged errors... mostly minor ... do not affect the valuation” ...* ⁽³⁾*“There has been no fraud...”*

are errors as shown in **III.A.** (pages 12-14) and *THE APPRAISAL’S PROBLEMS* (pages 16-23).

11. *“The alleged errors do not diminish ... cited by ... are trivial, irrelevant, and immaterial”*

is an admission of official misconduct and failure of duty (RCWs 9A.80.010, 42.20.100). It recognizes the errors (aka matters) presence but grades effects as “trivial, irrelevant and immaterial”. If errors exist they are not “alleged”. Errors violate USPAP Standards Rule 1-1.

12. ⁽¹⁾*“Before 2009, the Assessor’s records indicated a finished basement area of 896 square feet” ...* ⁽²⁾*“Based on the Owners’ assertion of a “full-finished basement, ... additional square footage to the basement*

on the tax roll as new construction for the 2009 assessment year in accordance with RCW 36.21.080” are errors.

- The basement has never been 896^{sf}. 896^{sf} is the *Appraisal’s* L^{4(b)(c)} =lower level (addressed on page 2 #5 top of page 3).
 - A2-22²⁰⁰⁸ assessment

1 s Fr
L 896

 L 896^{sf} (above-ground level) Finished Sq Ft 380”. Basement/B 1152^{sf}

1 s Fr
B 1152

 ,Finished Sq Ft 0”.
 - A2-24²⁰⁰⁹ assessment (Jan/1-Dec/31/2009) (top of page 3).
- My final building permit (A1-85 and A1-86 in Docket 09-121) was issued Dec/16/2003 not 2009. It required these basement finishes: bathroom, wiring, plumbing, framing, HVAC. It was based on a 2048^{sf} basement not 896^{sf} lower level.
- Ex. 8 shows an assessment for more than the equivalent of a full-finished basement in assessment year 2008.
- RCW 36.21.080 does not apply to this action by Assessor.

13 & 14. “*The residence’s alleged siding defect is not apparent ... The Owners present no documentary evidence...*”

are both errors in their totality based on the Prosecutor’s error and apparently referencing BTA Docket 09-121 Analysis:

- *Respondent’s Trial Brief* - Formal Docket 10-258 – page 3 lines 13-14, “(3) a deduction of \$20,000 for the cost to repair allegedly defective vinyl siding on their house.”
- BTA Docket 09-121 A2-94 lines 21-22, “Owner’s requested adjustment of \$20,000.”
- The only reference to siding in A1 (Docket 10-258 A1-70 line 10):
““The subject house has vinyl siding defects.⁵ The Assessor said he would consider the bids.” The assessor never said this to us! So this is the reporting of an ex parte conversation on the subject between Mr. Sebring and the assessor?”

15. “*The Assessor’s witness, Joseph Hollenbeck, is ...* ⁽¹⁾*skilled ...* ⁽²⁾*adheres to standard industry practices in the appraisal ...*”

“Skill: ¹ the ability to do something well arising from talent, training, or practice. ² special competence in performance; expertness, dexterity. ⁴ *Obs. Discernment.*”

Random House Webster’s College Dictionary

are erroneous statements shown by violating various laws.

- Mar/16/2009, Feb/26 and after Jul/22/2010 Mr. Hollenback prepared *Reports (RC-08-2020, BTA-09-121, BE-09-0265)* with materially false statements that in total are false reportings (RCWs 9A.72.010 and 42.20.040) proven false by *Appraisals* and Listing literature from when properties sold. The *Reports* included *Sales Grids* (appraisals⁴). For example on A1-39 Table 36:

(1) I erroneously have a 2,048^{sf} lower level; no basement (refuted in *FoFs #5 and #12*;

(2) Comps 1-4 erroneously all have lower levels; no basements.

- Comp 1 - A2-25 has a basement

1 s Fr
B (Fin) 1777

 A2-6 “Bsmt, Outside Ent” (middle of page on left). Appraisal is erroneous not showing walkout (Fin means finished)!
 - Comp 2 - A2-26 has a basement too

1 s Fr
B-wo 1242

 .
 - Comp 3 - A2-27 has a basement

1 s Fr (Fin)
B (Fin) 1244

 . A2-10 (picture top right) shows basement door. Appraisal is erroneous not showing walkout!
 - Comp 4 - A2-30 has a basement

1 s Fr
B 1803

 . A2-12 “Full Finished Daylight Walkout Lower Level”. Appraisal is erroneous not showing walkout!
- Apr/12/2010 page 17 “Appraisal Supervisor, Mr. Hollenback, cannot read ... ”.

- Apr/12/2010 Mr. Hollenback's perjury about comp 17355.9028 being waterfront (A1-20 line 3 to 25)(violates 9A.72.020).
- BACKGROUND FACTS to prove illegal acts
 - May/7/2009 (CP 221 2nd ¶) "... showed them around the outside of their house." (CP 221 #5) Hollenback: "Is the basement finished?" Strand "Yes. And don't you have our records showing we filed the permit for a finished basement?"
 - Sep/1/2009 (A1-66 lines 7 through A1-68 line 8) and (CP 222) "**The damage:** ... *Official Valuation Notice* for 2010 taxes changing their Building value from \$217,100 to \$249,900 based on this interview."
 - Jan/19/2010 I gave the Prosecutor A2-38 to prove I have a full finished basement of 2,048^{sf} as of 2003.
 - Apr/12/2010 my testimony about my basement being finished preceded the Assessor's witness testimony.
 - (CP 413 lines 6) Strand: ... We have a ranch house with a full finished basement, 2,048...
 - (CP 413 line 15) Strand: ... shows the residence, 2,048 square feet. Underneath it is a basement and it says an F next to the basement. That F means finished. ...
 - (CP 414 line 2) Strand: We have a ranch with a full finished basement...
- Apr/12/2010 (CP 433 lines 7-19) Prosecutor's suborning perjury and Mr. Hollenback's perjury (violating RCWs 10.37.140, 9A.72.020). I was assessed prior to 2008 for the equivalent of a full-finished basement (Ex. 8) and over-assessed on Sep/1/2009 for another equivalent full-finished basement. Prosecutor knew directly of full-finished basement on Jan/19/2010.

Hollenback: Well, we are talking about the home, of course, the frame constructed residence. Total living space on the main

floor is 2,048. The lower level or basement level which is you add the lower level and basement together and in essence 2,048 ...

Arkills: Okay. And how does that, **why does it show a portion of 1200 square feet and a portion of 896 feet?**”

Hollenback: Yeah and that is a good question. Some of the appraisers will go ahead and put it in to show the elevation^{4(b)(c)} change ... But it shows what is potentially a daylight^{4(c)} portion of it as opposed to just not a daylight portion. ...

Arkills: “Without going inside the building is it possible to determine whether the **whole 2,048 is a finished basement?**”

Hollenback: “It’s impossible.”

- Apr/12/2010 All USPAP Standards are violated in Mr. Hollenback’s *Reports, Sales Grids* (appraisals), testimony, etc. as shown in pages 12-14. CP 425 lines 12-14 have the Prosecutor suborning perjury and Mr. Hollenback’s perjury about USPAP.

Arkills: And in the performance of appraisals do you adhere to the uniform standards of professional appraisal practice?

Hollenback: Yes.

A6-47 (lines 13-16) show the BTA’s history upholding USPAP contradicting the Referee’s CONCLUSIONS OF LAW #6,

“The Assessor errors in not signing, dating, and certifying her answer to the Spokane County Board of Equalization are irrelevant and immaterial. The Owners' claims that these errors are not in compliance with USPAP (Uniform Standards of Professional Appraisal Practice) are also irrelevant. The errors committed did not erode the credibility of the Assessor's evidence for this appeal, nor the testimony of the Assessor's witness.”

(violations of USPAP Standards Rule 1-2 and 2-3).

- *BTA-09-121* errors on A1-11 line 13 to A1-12 line 7 prove a lack of skill (violate USPAP Standards Rule 1-1).

- Mr. Hollenback preparer of *BE-09-0265* includes new/different materially false statements (violating RCW 9A.72.010) and proving Apr/12/2010 materially false statements and perjury:

A2-126 – **B** “... the taxpayer testified under oath before the State Board of Tax Appeals that her basement was fully finished or nearly finished ...” **D** “It should be noted that there has been confusion with the taxpayer in regards to basement/lower level. It should be noted that our office understands that there is just one elevation^{4(b)(c)} to the basement/lower level. However, we have identified 1152 sf to be non-daylight^{4(c)} and 896 sf to be day light or lower level. ... it is impossible to determine whether the breakdown between the daylight & non-daylight portion of the basement is accurate.”

BE-09-0265 page 9 is A2-38 modified by Mr. Hollenback, “Permit information provided by taxpayer. This information indicates the basement/lower level to be 100% finished.”

- Aug/8/2011 Mr. Hollenback’s perjury (RCW 9A.72.020) about preparers of *BE-09-0265* (CP 350 - 351 through line 22). A2-39 #C is Assessor’s false reporting of preparers (CP 264 lines 11-17).
16. *“A sufficient number of sales were presented ... relies on the sales comparison approach”*
is an error ignoring A1 standards for comparable sales methodology.
The Assessor did not do sales comparisons (**III**. Pages 11-23)
 17. *“The use of Zillow data is not in accord with standard appraisal practice. The data is too general to be of any reliance”*
is an error. I used Zillow to refute the Assessor’s incredible sales statistics as stated; not for my cost estimate (A1-80 lines 7-24).
 18. *“Both parties rely on land sales to determine ...subject’s land value”*

is an error. The Assessor documents “other methods” (pages 24-25) were used to develop the land value. *BTA-09-121* land sales were not the assessment basis (**III. A.** pages 12-14).

19. *“Listings offer little insight to market value of the subject property and are, therefore, given little weight”*

is a violation of RCW 42.20.100 because Listings (A2-6 to A2-8, A2-12, A2-130 to A2-134) are proof of exterior structures on these properties that were unidentified/unvalued/unassessed and proved errors in Assessors Appraisals (*FoF #15* page 6 (2)). Listings prove what is actually being sold versus Assessor’s *Appraisal* assumptions.

20. *“The Owners make adjustments to the Assessor’s sale to determine the sales’ adjusted prices”*

is an ambiguous misstatement. My analysis of the sales grids required correcting the Assessor’s erroneous adjustments. The Assessor’s adjustments violated USPAP Standards 1-1.

CONCLUSION II.: The only *FoFs* I’ve not corrected are those previously corrected based on my evidence: my address (A2-21; page 21 #7), purchase price and sale date (CP 273 line 7 to CP 276 line 6), building completion date (A2-38), driveway (*Respondent’s Trial Brief* 10-258 page 2 line 10; A3-3 lines 1-6). All others *FoFs* (A2-95 to A2-96) are so egregiously wrong that they have to be sheltering under a BTA *RULE* (page 25).

III. STATEMENT of CASE AGAINST THE ASSESSOR

The Assessor and Prosecutor pronounced these bases for 2008/2009 valuation/assessments (assessment).

- A. Comparable sales methodology⁶ (aka sales comparison) was basis.
- B. Mass appraisal methodology^{6(a), 7} was basis.
- C. Marshall & Swift cost tables are basis of improvement assessment^{8(a)}.
- D. “Other methods” were used “to develop land portion of value” for assessments.⁹ I assert this was the 2008 assessment.
- E. 2009 assessment was based on Assessor documents submitted to the BTA under Docket 09-121 for assessment year 2008.^{9(b)}

⁶ (a) CP 43 “3/16/9” recitation of events (Docket 09-121 pages A1-110 to A1-111);

(b) A2-120 to A2-122 #7 ‘*Brief Description of Exhibit*’ – ‘*Sales Comparison Approach to Value ...*’

⁷ (a) A2-123 - A2-124 lines 20 and 19 respectively.

NOTE: Correction to page Header of A2-124 – It should be, “UnCertified, UnSigned, UnDated – 2009: <i>Assessor’s Answer to Real Property Petition to BOE BE-09-0265</i> ” 2

(b) CP 264 lines 14-16 “the mass appraisal”; (c) CP 270 lines 7-8 “for mass appraisal”;

(d) CP 284 lines 3-6 “We used, in this particular presentation package we used the sales comparison approach which seemed to establish and justify our **initial mass appraisal models** and/or approach which corresponds to a cost-based approach calibrated to the local market, plus market sales to help derive what that statistical neighborhood and/or area is doing from a valuation standpoint.”

⁸ (a) CP 172 3rd ¶ “Embedded in the ProVal ... through The Improvement Data Sheet that you reference was prepared utilizing Pro Val.”; (b) CP 284 lines 2 through 6, ‘cost-based approach’; (c) PRRs and responses: CP 342-343, Ex. 1 (page bottom);

(d) CP 374 line 23 - *Respondent’s Reply Brief* (Docket 09-121), “The Respondent computed improvement value utilizing CAMA software with embedded cost tables compiled by the Marshall Swift valuation service. ...”;

(e) CPs 36-38 Marshall & Swift cost tables dollar-per-square-foot (*\$PSF*)

⁹ (a) A2-39 is Assessor PRR response (B3);

(b) A1-2 – Table 1 #7

III. A. PROOFS of NO COMPARABLE SALES METHODOLOGY

1. Appraisal Supervisor Hollenback prepared the Assessor's *Reports* (USPAP Standards 2) to the BOE and BTA (by assessment year):

- *Assessor's Answer to Real Property Petition to the Spokane County Board of Equalization Petition No. – BE-09-0265* (2009) and *RC-08-2020* (2008)
- *Spokane County Assessor's Opinion of Value to Washington Board of Tax Appeals Petition No. BTA-09-121* (2008).

Each *Report* has a sales grid (aka appraisal; A2-14 to A2-18) which should be a snapshot/excerpt of Assessor's county-wide neighborhood-specific *Analyses* of comparable sales.

NOTE 3: Sales Grid in PRRs aka: sales comparison, grid sheet, sales comparison grid, Pro Val Cost Buildup.
--

CP 265 line 13 (and A5-4 line 14)

Strand: Mr. Hollenback, what documents are the bases of the 2009 Assessor's Answer to the Real Property Petition ... It's BOE 090265.

Hollenback: I can tell you, the (inaudible) value is predicated based upon the original petition package, which is Comps 1 through 4 or 5 here, I don't have the final page here, but that was our substantial value at least from the ...

Hollenback: Ms. Strand, there is not a formal document when it comes to the formal appeal process on a document that ties that in. We look at the total presentation package and determine whether those independent (inaudible) case hearing are defensible or not. So we're making a, in some regards a subjectively-based opinion on the basis of that, on the basis of the data, but there is not a formal document that ties that in.

Strand: And the only person deriving that subjective opinion is whom?

Hollenback: I--in this particular case it was myself.

Mr. Hollenback testified that *BE-09-0625* is his subjective creation; not based on *Analyses*^{8(b)} (formal document) spanning Jan/1/2005 to Dec/31/2009 and by extension no *Analyses* exists for Jan/1/2004 to Dec/31/2004. It is reasonable to assume that no *Analyses* mean all of his *Reports* are his subjective opinion and creation (violating WAC 458-07-015 and RCW 42.20.040).

2. All of the *Reports* are undated (violating USPAP Standards 1 and 2).

All were prepared after their respective assessment year cutoff dates:

- *RC-08-2020* (2008) (A2-16) was prepared Mar/16/2009^{6(a)}; cutoff Jan/1/2009.
- *BTA-09-121* (2008) (A2-18) was prepared after Feb/12/2010 (CP 15 line 12); cutoff Jan/1/2009, “to shore things a little more with this Type A personality we probably need to provide some land sales (preferably high bank) if you have them....”).
- *BE-09-0625 Uncertified and Unsigned* didn't exist on Jun/15/2010 or Jul/19/2010 (Ex. 1 top of page); cutoff Jan/1/2010. The Prosecutor co-prepared *BE-09-0265* (CP 351 through CP 352 line 22). It is uncertified and unsigned because of criminal charges I filed (A1-63 lines 10-17). It violates all USPAP Standards.

3. A1 is an exhaustive analysis of every line on every sales grid per generally accepted appraisal standards for sales comparison methodology². The grids are not standard appraisal practice:

- The properties are not comparable (CP 325 line 18 to CP 327).
- The sales grid arithmetic should start at comp's sale price +/- adjustments to derive subject's market value (thousand = k).
 - A1-5 Table 3 is a standard comparable sale analysis:
(65k^{comp}+500-1k-5k-2k-1k+500+3k-4k-500=55.5k^{subject})

- A2-14 is Assessor's comparable sale analysis:
 $(635k^{\text{comp 1}} - 18k - 25k + 13.5k + 3k + 6.5k + 1.4k + 1.2k - 1.5k - 2.7k - 1k = 612.4k)$
 Subject's value is \$449,900 not \$612,400. This means the sales grid adjustments are way too small and comp 1 and subject are not comparable by \$162,500!
- Every sales grid (a purported market value analysis) line for land value (*Site Value/Adjustment*) is the land assessment value which illegally (RCW 84.40.030) mixes market values and assessments (A1-15 Table 9 and A1-16 line 21 through A1-19).

4. A1-2 Table 1 - Assessor's PRR responses for the assessment bases. If an *Analyses* existed I should have gotten it (RCW 84.48.150).
5. **III.** A through D (page 11) are mutually exclusive methodologies violating RCW 84.40.030. This unique assessment system should have been disclosed (RCWs 42.56.040, 84.40.030, 84.48.150).

CONCLUSION **III. A.** All of the *Reports (sales grids)* are acts of Fraud (9A.72.010, 9A.80.010, 42.20.040, 42.20.100).

III. B. PROOFS OF NO MASS APPRAISAL METHODOLOGY

NOTHING (A1-2 Table 1 and footnotes^{6(a),7)}) supports the Assessor's staffs' repeated pronouncements of mass appraisal practices.

A2-39 (Assessor's response was photocopied PRR with responses added; top of page) explains Appraiser Larry Splater's mass appraisal work^{7(a)}, "The mass appraisal assistance I provided was in helping to prepare the answer to the appeal, see page 9...." "Page 9 is pictures of

comps 4 & 5 with their address ... How do pictures of properties comprise “mass appraisal assistance”?” There was no further Assessor response.

I have 15 PRRs for the Assessor’s mass appraisal documentation. All have been responded to with ‘what are you talking about’ (Ex. 9).

Assessor staff use ‘mass appraisal’ terminology with no idea of what the methodology is (violating RCW 42.20.040 and USPAP Competency).

III. C. PROOFS IMPROVEMENT ASSESSMENT BASIS is a SET of MARSHALL & SWIFT COST TABLES^{8(e)} MANIPULATED by the ASSESSOR on their APPRAISAL; the APPRAISAL has PROBLEMS

An appraisal is an estimate of a property’s value (RCW 84.40.030). Fannie Mae 2005 is the standard residential ‘exterior’ appraisal form (<https://www.efanniemae.com/sf/formsdocs/forms/pdf/sellingtrans/1004.pdf>).

I assert the \$32,800 increase in my improvements assessment for 2009 is fraud and this is why. Ex. 8 (block on right) is the computation of the value (\$195,986) of my house using a 2007 set of Marshall & Swift cost tables. A2-22 is the 2008 assessment *Appraisal* with a dwelling (house) value of \$206,100. I attribute the difference (\$206,100–\$195,986 = \$10,114) to not having the Assessor’s set of Marshall & Swift tables after repeated requests¹⁰ (the tables change constantly) and the following:

¹⁰ PRR and responses for Marshall & Swift cost tables: ^(a)CP 238 #2 and CPs 239-241;
^(b)Ex. 1 bottom,

THE APPRAISAL'S PROBLEMS

1. The *Appraisal*¹¹ (*It*) is an incomprehensible mix of jargon, acronyms and recombinant arithmetic¹². Since Mar/2009 the Assessor has eked out some PRR responses to explain the jargon and acronyms^{4(a)} but there has been no explanation of the recombinant arithmetic. The Assessor has never provided any Marshall & Swift cost tables¹⁰ (violating RCW 84.48.150).

NOTE: <i>Appraisal</i> in PRRs is aka: <i>Residential Valuation Record</i> [$\frac{1}{2}$ <i>Appraisal</i> label], <i>Improvement Data</i> [$\frac{1}{2}$ <i>Appraisal</i> label], ladder, pricing ladder, Pro Val property record card, card, Pro Val cost buildup, field sheet, data information sheet
--

2. *It* has 2 parts¹¹ (land and improvement) that cannot be connected without another Assessor database (the website). *It* has no identifying year (violating USPAP Standards Rule 1-2). The Assessor's website database shows the year, land and improvement assessments. These are the basis for connecting *Its* halves and assigning *It* a year. Some *Its* will not have the website land and improvement values; they have other values. These *Its* compound the incomprehensibility problem.

¹¹ (a) A2-21 to A2-37, Ex. 2; (b) CP 30-36 are my house and the *Appraisal's* my house,

¹² Recombinant arithmetic – CP 36-38 Marshall & Swift \$PSF improvements are recombined by the Assessor into *Values* on the *Appraisal* (Ex. 2 bottom of page arrow) that can go to zero and negative (A1-48 to A1-50).

3. The Assessor's staff does not know how to read *It*. I first requested *Its* on Feb/19/2009 (received Apr/3/2009). I have made multiple PRRs for *Its* or information on *It*⁴. Each PRR response was this routine:

- On Aug/24/2009 I made my 2nd PRR for 8 parcel *Appraisals* for 3 years each (the Assessor's and my current comparables for assessment year 2008). This should have produced 48 pages.
($8^{\text{parcels}} \times 3^{\text{years}} \times 2^{\text{land + improvement}} = 48$).
It took from Aug/28 through Sep/14/2009; 300+ pages; 6 attempts – to get this right (Ex. 3 – 5) because of wrong year, *Its* with no *Value* data just pictures and values different than website.
- CP 270 line 12 through CP 272 – Appraisal Supervisor, Mr. Hollenback, cannot read (violating WACs 458-10-010, 458-10-060 and USPAP Competency rule).

Strand: Thank you. On A2-21 again. There is a section at the top right, it's called **transfer of ownership**.

Strand: **Could you explain how to read that?** I need to know the transfer of ownership according to that statement.

Hollenback: Well, if you look at the first, the first transfer there, that was a transfer from I guess when you had purchased the property, is that correct, Ms. Strand? (skip to line 22)

Hollenback: **I don't have the excise affidavits** right here in front of me, Ms. Strand, to identify that other than the grantor ... (skip to next page line 2)

Felizardo: I think, Mr. Hollenback, if you look at that transfer of ownership you have **on the first line September 5th 2000, Barker, Robert and Patricia J.** I guess what she wants is how the ownership transfer came through. Who would be the first in line, second, third, I mean when it came up to purchasing this property.

Hollenback: You know, based on the date itself I don't—if **I had the excise affidavit** and the warranty deed that was conveyed I would be able to answer that. Of course we're dealing with a document that is about 12 years old.

Felizardo: Okay. At this point, Ms. Strand, he doesn't have the evidence to present that information.

Strand: Actually that's not the question I asked. **I asked, reading document A221,** the transfer of ownership, to tell me,

reading this document and reading that section, how the property changed hands, which is literally just to read this document and tell me the chain of ownership. (skip to line 14)

Hollenback: Yeah, I think I understand. I think what she's trying to ask is how do I chain this if I don't have a warranty deed to tie in. Was there a contract? Did she buy it on an owner contract? I don't have--

Strand: That's not what I'm asking.

Felizardo: No. All she wants is for you to explain who was the first person who purchased this property to the next one. **In this case it looks like Mr. Palmer Strand is right in the middle**, and just to explain that to her. She just wants you to repeat it to put it on the record. (skip to line 22)

Hollenback: All I can tell you is we have two--if you look at the two documents that are probably she's trying (next page line 3)

Hollenback: The document 9-5-2000, there was conveyed to a Robert Barker, Patricia Barker for \$100,000. Once again, **I do not have the excise affidavit** to identify a little bit more, nor the warranty deed, that ties this in. I do have, I see the other document which is four days prior to this which is (inaudible) Strand, I don't have the document to that to look at the warranty deed nor the excise affidavit. ... (skip to line 12)

Felizardo: Well, **he gave you the first two** then. Can you give her the last one, Mr. Hollenback? Who's the last--

NOTE: The Referee answered 2 questions for the witness: "September 5th 2000, Barker, Robert and Patricia J. ... Mr. Palmer Strand is right in the middle". The Referee posits her testimony is that of witness, "Well, he gave you the first two then."
Mr. Hollenback also cannot read, "... excise affidavits ..." (CP 262 lines 3-5 and CP 273 lines 7 through CP 276 line 10).

4. An Assessor practice that staff can change anything on *It* at anytime for any reason and no record other than, maybe, *It* shows the change.
 - Aug/4/2010 meeting of former Appraisal Supervisor Byron Hodgson (current Chief Deputy Assessor) and Ms Mendoza. All answers are by Hodgson; questions are by me shorthand recorded.

Question: So each appraiser is able to make final changes to the main computer data?

Answer: 21 appraisers can go into the data base and make changes?

Question: Does anyone check to see if changes fit a standard?

Answer: Yes. A supervisor reviews the data in the aggregate.

Question: What does that mean?

Answer: Data is in the computer and a series of reports are generated at the end of the cycle. The Supervisor is looking for obvious errors, values on an aggregate level.

- A1-7 through A1-9 is the Assessor practice of unknown staff on unknown dates changing parcels' neighborhoods¹³ to manipulate comparables on *Reports*. One of many resultant problems was different Assessor databases showed the same property in different neighborhoods simultaneously. This practice and action violate RCWs 9A.72.010, 9A.80.010, 42.20.040; USPAP Ethics Rule for Conduct and Record Keeping and Standards Rule 1 and 2.

Neighborhood. The environment of a subject property that has a direct and immediate effect on value. A geographic area (in which there are typically fewer than several thousand properties) defined for some useful purpose, such as to ensure for later multiple regression modeling that the properties are **homogeneous** and share important locational characteristics.

Property Appraisal and Assessment Administration by the International Association of Assessing Officers (page 654)

It is important for the appraiser to establish and justify neighborhood boundaries for each subject property that is appraised.” *Real Estate Appraisal Principles & Procedures, 3rd Ed, Huber, Messick & Pivar (page 149)*

¹³ CP 338 Hodgson email response (arrow)

5. *It* is the only record of property inspections. A property inspection (RCWs 84.41.030 and 84.41.041) should have standards for performance, evaluation and documentation by Assessors. My PRRs for inspection “reports/analysis/write-ups” were responded to with Ex. 6-7, the *LIST* and *Its* – NO reports/analysis/write-ups. I compared my *Its* (I have multiple print date *Appraisals* on 37 properties) to the *LIST*. Some *LIST* dates were not on *Its*. So where did the *LIST* dates come from (RCW 42.20.040)? Some *Its* had dates not on the *LIST*.

- My property was 1st inspected by Appraiser Chuck Hutchisons on Oct/7/2002. This information is in my 2002 daily diary. Oct/7/2002 does not appear on any *Its* or the *LIST*. But it is the date when a majority of the errors on my *It* probably began.
- The *LIST* shows an inspection on 3/11/2004. This date is on none of my *Its* to assessment year 2005. Where did 3/11/2004 come from? My diary shows on 3/22/2004 we moved into the finished house at 17355.9014. It also shows on 3/11/2004 we were working on spray painting basement doors, a job done outside in front of the house. Painting is a big set-up and breakdown job starting early and taking all day. No-one from the Assessor’s office came onto the property on 3/11/2004. It’s not in my diary.
- On May/7/2009 my property was inspected – not on the *LIST*.

6. All of my 37 parcel *Its* have ERRORS (violating USPAP Standards 1). My *It* has 19+ errors of fact and *Value* (CP 30-36). Every ERROR has been reported to the Assessor since 2009 (RCW 84.41.041). Two ERRORS have been corrected: (1) 17355.9014 is in Nine Mile Falls not Spokane (CP 31-33 ③ and A2-23); (2) the \$320 assessment for a non-existent fireplace is gone (CP 31-35 ①⑥ and A2-22 vs. A2-24). These 19+ errors prove my *It* is not my property's fair market value and violates RCWs 42.20.040, 42.20.100 and 84.40.030.
- Ex. 8 is the computation of my house value juxtaposed to the Assessor's 2009 *Appraisal*. It shows me over-assessed \$39,114. The Assessor raised my 2009 improvement assessment \$32,800. This action violated RCWs 9A.72.010, 9A.80.010, 42.20.040!
 - Page 17 "CP 270 line 12 ..." is Mr. Hollenback's attempt to read *Its' Transfer of Ownership* section which reports this:
 - Aug/16/99 the Wang bought 17355.9014 for \$120,000;
 - Sep/1/2000 Palmer Strand bought it from them for \$0
 - Sep/5/2000 Palmer Strand sold it to the Barker for \$100,000
- Per the 2005-2013 *Its* I do not own 17355.9014. This entire section is an error (CP 31-33 ④). I testified to error on Apr/12/2010 (CP 412 lines 2-20). Pertinent information submitted to this Assessor has no effect (violates RCWs 9A.80.010, 42.20.100).

7. My 37 parcels *Its* have a common error – unidentified/unvalued/unassessed exterior improvements¹⁴ that inflate the land assessment (violate RCWs 42.20.040, 42.20.100, 84.40.030 and USPAP Standards Echics Rule and Rule 1). CP 201-203 shows the intent of RCW 84.40.030 was to assess land exclusive of ‘improvements’.

This issue was my appeal. I didn’t have these improvements present on the Assessor’s comparables and present on my unsold neighbors property. On May/7/2009 I showed the Assessor’s agents the Listing documents on their sold comparables, the improvements on my neighbors’ properties and the absence of the improvements on my property. It made no difference (violates RCW 84.41.041).

CONCLUSION III. C.: My improvement assessment is based on an Assessor manipulated set of Marshall & Swift cost tables. I was fraudulently over-assessed in 2009 on improvements by \$39,114 and:

1. The Assessor has no quality control over *Appraisals*. My *It* does not reflect: (A) the physical reality of my house (*FoF* #5) or its value; (B) my 6^{ft}x12^{ft} dock or its value; (C) the market value of my land; (D) any uniqueness in its ERRORS from my 37 other parcels’ *Its*. This practice violates RCWs 9A.80.010, 42.20.040, 42.20.100.

¹⁴ (a) A1-15 line 14 through A1-16 line 20; (b) A1-79; (c) A5-8 to A5-10 line 10; (d) CP 3 line 16 to CP 4 line 9; (e) CP 269 line 17 through CP 270 line 11

2. The Assessor will not correct *Appraisal* errors without court action. I have filed multiple complaints on the Assessor's practices with the Department of Revenue (DOR), Attorney General, County Commissioners, etc. The complaints were ignored or produced 'what's the problem' responses (CP 242-244).
3. The Assessor has no performance standard because there is no oversight/regulation of their actions. The DOR is either complicit with the Assessor in practices violating the law or has a total 'hands off' policy so RCWs 84.08 are rules without regulators. The Assessor is also protected in illegal practices by the Prosecutor.

The Prosecutor has constantly presented *University Village Ltd v. King County*; 106 Wash. App. 321, 23 P.3d 1090 (2001) as a defense for everything the Assessor does. CP 177-179 shows *University Village* is proof of another Assessor violation of 84.40.030. If the criteria of *University Village* are applied I cannot be assessed more than 78.9% of the Marshall & Swift cost tables (CP 179 Table 1). That's the effect of Assessor and Prosecutor enabling in Spokane.

III. D. PROOFS 'OTHER METHODS'⁹ were BASIS for LAND ASSESSMENT

By a process of elimination of all other assessment bases this is the only thing left. The Assessor derived my land value based on '*Other Methods*'. The problem is WHAT were the Other Methods (violating RCWs 84.40.030 – valuation is comparable sales, cost or income – 84.48.150). The Assessor has presented nothing to support my \$200,000 land assessment increase or any land assessment value.

My land value estimate¹⁵ is handicapped by an Assessor with NO county-wide neighborhood-specific records identifying/valuing/assessing:

1. Land (topographical features) elements of comparison (A1-4): waterfront by high/medium/low-bank, non-waterfront, acreages, distance from city center, neighborhood, etc.
2. Land improvement elements of comparison: septic systems (CP 50-53), electric power, private roads, driveways, docks, boat lifts/slips, landscaping, fencing, other, etc. (violating RCWs 84.40.030).

“The Health District will not release a septic system installation permit without evidence of an adequate water supply for any project requiring a building permit.” (CP 52)

These omissions on the *Appraisal* prove they are hidden in the land assessment. This is why my land assessment doubled.

¹⁵ (a) A1-81 line 17 to A1-84 and A2-1 to A2-4; (b) CP 3 line 16 to CP 4 line 9; (c) CP 201-205; (d) Ex. 11

3. These elements of comparison are the basis of comparable land valuation methodology (CPs 111-124, 129 'Characteristics', 158-159, 226-229, 249-252, 395-396).

CONCLUSION III. D.: Ex. 11 is my comparable analysis on the Assessor's purported land comparables (A2-18). This analysis resulted in a range of values from \$92,125 to \$139,620. A1-81 to A1-83 shows my abstraction valuation for 17355.9014 at \$120,000; in the middle.

IV. STATEMENT of CASE ABOUT the BTA's RULE

The BTA has an illegal-longstanding *RULE* that is now used by Assessor's and Prosecutors everywhere. The *RULE* is applied arbitrarily and capriciously by everyone. Here are the proofs the *RULE* exists, its' illegality, its' arbitrary and capricious use, its' omnipresence.

1. Applying the *RULE* when my appeal was about issues outside my house is textbook arbitrary and capricious (RCW 34.05.570(3)(i). Feb/2009 through the present my appeal is about my land value not my house's interior. The Assessor complicated my issue by producing:
(1) 17355.9014's *Appraisals* with 21+ errors; (2) comparables' *Appraisals* with unidentified/unvalued/unassessed docks, private roads, exterior improvements, and lots of errors; (3) *RC-08-2020*

alleging I committed fraud (A2-16 “Owner purchased...”) and its lots of errors and the subsequent *Reports* with more errors and allegations.

I accepted the Assessor value of my house. I was not accepting the errors on the *Appraisals* or *Reports*. In attempting to correct the errors I made PRRs for more Assessor documents. The Assessor ignored the PRRs (violating RCW 42.56) which led to my *Motion for Discovery* before the BTA and to the Prosecutor acting.

2. The actuator of the *RULE* was the Prosecutor’s Jan/25/2010 letter (A6-20) demanding entry to my house or else. A6-20 is the only time entry to my home was requested or demanded.

- The purported number of ‘requests’ to enter my home since A6-20 have multiplied like rabbits based on this ambiguous lie:

CP 361 line 18, “On May 7, 2010 two members of the Respondent’s staff walked the Subject Property, took pictures, and examined the *exterior* of the Appellant’s home. However, the Appellants did not permit Respondent’s staff to conduct an *interior* inspection.”

and its erroneous date (correct date May/7/2009). A6-20 was concocted by the Prosecutor and/or Assessor (violating RCWs 9A.72.010, 9A.80.010, 42.20.040).

- CP 220-222 is a true recounting of the events of May/7/2009 (purported resolution conference). On May/7/2009 I did not invite the Assessor’s agents into my home; they did not request entry.

On May/8/2009 I wrote up and sent copies of the May/7/2009 event to James Camden of the Spokesman Review (CP 222 1st ¶) and to Louise Splater, a friend. My May/8/2009 recitation makes no mention of a request for entry. I am a diarist such a request would have been written-up.

- In response to A6-20 I denied access to my home because: A6-20, every reference to A6-20, every reference to access/inspect my home is unconstitutional (state Sections 2, 3, 7 and federal) and illegal (violating 9A.72.010 and defined by 9A.80.010).
- A6-20's 'or else' is a clear and present threat.

“In any case of refusal to such access, the assessor shall request assistance from the department of revenue which may invoke the power granted by chapter 84.08 RCW.”

A threat I inferred of malicious prosecution by a Prosecutor to/for a regulatory agency full of lawyers (violating RCW 9.62.010 and 9A.80.010). The threat reverberates every time the Assessor's right to access/inspect the interior of my home appears:

3. The *RULE*, Mar/9/2010 *BTA Discovery Motion* Docket 09-121:

(CP 310 line 21) Sebring: Well, first of all the board visits this issue of inspection of property on a fairly frequent basis. **There's a specific statute that authorizes the assessor to inspect property, both exterior and interior.** It's a statutory right, it's separate from the discovery procedures, and I just wanted to know, it has nothing to do with a threat.

(CP 311 line 19) Strand: And I'm asking, what is it in the interior of my home that is relevant to this case?

Arkills: You made a huge issue out of the **data information sheet**^(Note 4 page 16) and the correctness of the information on that sheet, and a lot of the information on that sheet has to do with the interior of your home, so--

Strand: Can you tell me specifically what?

Arkills: **The interior walls, the heating, etc,**

(CP 312 line 17) Sebring: I just wanted to make sure the taxpayer understood, **when you refused then it has consequences because it's a statutory authority** they have.

(CP 312 line 23) Sebring: And I guess if there is disagreement over what the interior is, by refusing them inspection of the interior then that will limit your ability to contest those issues, and that is unfortunate, but that's been the **long-time ruling of the board because of that statute**, and--

NOTE: The Prosecutor just based the Assessor's *Appraisal* errors (CP 6 31-36 and all the other parcel errors I reported to date) on my interior walls and heating (violating 9A.72.010, 9A.72.020, 9A.80.010, 42.20.040).

The data information sheet has nothing to do with the inside of my home. The data information sheet, appraisal, has to do with the Assessor's corrupted records. This statement is a lie.

BTA Chairman Sebring just threatened, let the Assessor in your house or else because of our "long-time ruling". He did not listen to or question the exchange that preceded his pronouncement.

4. The *RULE* is illegal because RCWs 84.40.025 and 84.41.041 legislate property inspection and property access. The DOR¹⁶ in writing confirmed there is NO RCW legislating access/inspection of the interior of a residence by/for Assessor's/assessments. And the DOR has the authority to state this is the law (RCW 84.08). I insured the Assessor, Prosecutor and BTA knew the *RULE* was illegal. Neither

¹⁶ (a) A1-69 lines 2-17; (b) A6-21 to A6-23 with specific on A6-23

the RCW nor the DOR writings effect the BTA^(FoF #8), Assessor^{5(a)} and Prosecutor^{5(b)}. They cite fairness¹⁷, due process^{17(b)}, statutory right^{(CP 310 line 21 and 17(c))}, discretionary right^(CP 134 line 24), etc. as justifications for their use of the *RULE*.

5. The *RULE* is unconstitutional and illegal because of caselaw:
Seymour v. Dep't of Health, Dental Quality Assurance Comm., 152 Wn. App. 156; 216 P.3d 1039 (2009)
On appeal, the court found that the warrantless inspection was invalid under Wash. Rev. Code § 18.130.080(2) ...
The Fourth Amendment protection against unreasonable searches and seizures applies to administrative inspections ...
Edelman v. Washington; 116 Wn. App. 876; 68 P.3d 296 (2003)
However, the PDC was not authorized to promulgate rules that amended or changed legislative enactments, pursuant to Wash. Rev. Code § 34.05.570(2)(c).
6. The BTA *RULE* is everywhere:
 - The *RULE* is in Spokane County Board of Equalization (BOE) BE 08-1298 & 1299 Jul/30/2009 – Timothy & Patrice Walters
Rey Amundson: ... Rey Amundson representing the Spokane County Assessor's office for Joe Hollenback. I'd like to read into the record this information that Joe's highlighted. ... Joe inspected the property, began an interior inspection of the property. However, the homeowner requested only exterior inspection to be made.
...(skip) And 11/14/08 the owner was contacted at 10:18 AM for a **request for an interior inspection** and the home's exterior to make sure the assessor records were up to date. To show a reflection of 2008. Now. **The taxpayer owner denied the inspection ...** (skip) ...

¹⁷ (a) BTA Initial Decision Docket 10-258 page: 14 lines 1, 5;
(b) Prosecutor: Respondent's Trial Brief 09-121 (CP 369 lines 23-26); Respondent's Trial Brief 10-258 page 9 line 23 (two briefs have exactly same statement)
(c) Assessor: BTA Initial Decision Docket 10-258 page 10 lines 5 through 8

Kjolseth, Vice Chair BOE: Can you take measurements from outside. You don't always have to go in do you?

Amundson: ... **But according to RCW 84.40.025 we are guaranteed the right to make that inspection of the property and we would like to do that to resolve this issue...**

- The *RULE* is in King County – BTA Formal Docket 09-020, *Initial Decision*, Mar/9/2010, Pierson vs. Hara, King County Assessor

[Page 2 lines 14-20] 2.3 The Assessor attempted to conduct a physical inspection of the subject for the 2008 assessment in accordance with the statutory requirement that each property be physically inspected by the Assessor at least once every six years. At the date and time set for the Assessor's deputy to view the interior of the home to ascertain the condition and view, the Owner refused to permit the Assessor's deputy to enter the home. The Assessor changed the coding for the Olympic Mountain view from "good" to "excellent" because it is an excellent view compared to the others in the neighborhood."

[Page 8 lines 6-12,] 4.2 84.40.025 requires that the Assessor be given access to property ...^{17(c)} 4.3 **When an appellant denies an assessor's request for access to property to investigate a condition or characteristic that is the grounds for an appeal, this Board is not inclined to accept the owner's arguments concerning the condition or characteristic."** ...

NOTE 7: A view is substantially the same inside & outside a house.

7. The *RULE* is illegal because the BTA did not comply with RCW 34.05 on rule making. The Washington State Register shows No *RULE* <http://apps.leg.wa.gov/documents/laws/wsr/AgencyWac.htm>. No *RULE* is posted on the BTA website.
8. Only a *RULE* allows sanctions (aka: 'or else') (RCW 34.05.010(16)).

Sebring: I just wanted to make sure the taxpayer understood, **when you refused then it has consequences because it's a statutory authority** they have. (CP 312 line 17)

9. The *RULE* is arbitrary. It allowed the BTA to show material bias for the Assessor in the proceeding and the decision ignoring the evidence I submitted and violating RCW 34.05.461 and 34.05.476. My BTA hearings have been a travesty of violated rights by the Assessor, Prosecutor and BTA. My administrative appeal process was a sham! I am not alone in this victimization, Mr. Pierson.

Neah Bay Chamber of Commerce v. The Dept. of Fisheries; 119 Wn.2d 464; 832 P.2d 1310 (1992)

- the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment
- First the court inquires if the agency's explanation of its own rule is clear. Second, the court must ask if the agency utilized the appropriate statutory framework, whether it used correct factors in deciding the rule, and if it avoided improper factors. Third, the court must decide if a decision-maker could have reached the conclusion reached by the agency (taking the foregoing into account) by some reasonable process.

V. ARGUMENT

- A. My Petition for Review was denied with, "We conclude that the issues raised by the Appellant were adequately addressed in the Initial Decision and that the evidence was properly considered". I hope this brief shows the *Record* and the BTA *RULE* prove otherwise.

B. The trial court did not overturn the BTA Decision because, “The Final Decision ... is not contrary to law and is adequately supported by substantial evidence in the record.”

RCW 34.05.570 Judicial Review, A Superior Court’s subject matter jurisdiction is reviewed de novo Indoor Billboard v. Washington, Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 71, 170 P.3d 10 (2007) and Tapper v. The Employment Security Department, 122 Wn.2d 397; 858 P.2d 494 (1993):

Judicial review of a final administrative decision of the Commissioner of the Employment Security Department is governed by the Washington Administrative Procedure Act (WAPA). The WAPA allows a reviewing court to reverse an administrative decision when, inter alia: (1) the administrative decision is based on an error of law; (2) the decision is not based on substantial evidence; or (3) the decision is arbitrary or capricious. Wash. Rev. Code § 34.05.570(3). In reviewing administrative action, the court sits in the same position as the superior court, applying the standards of the WAPA directly to the record before the agency.

The process of applying law to facts is a question of law and is subject to de novo review.

When findings of fact are not explicitly delineated or where those findings are buried or hidden within conclusions of law, it is within the prerogative of an appellate court to exercise its own authority in determining what facts are actually found below.

Agency action is presumptively reviewable under the Administrative Procedures Act, and there is no exception that changes that presumption in this case. I meet the requirements for judicial review under APA. The BTA issued a final decision and all

administrative remedies are exhausted. I am the “aggrieved or adversely affected” party under RCW 34.05.530 because the BTA ruling is a significant burden.

The trial court addressed neither: the Assessor’s violations of law, the unconstitutional and illegal BTA *RULE* nor the facts presented by me as evidence to the BTA under RCW 34.05.570(1)(c).

C. I request the award of attorney fees under RCW 84.68.030.

VI. CONCLUSIONS

1. My 2009 improvement assessment based on Marshall & Swift cost tables (page 15 **III. C.**) is \$206,986. I was over assessed \$39,114 (Ex. 8). The \$206,986 is a 100% assessment value ignoring: the Assessor’s under-assessment practice (CP 179 at 78.9%), 148^{sf} of non-living space in the basement per the Assessor and a declining real estate market in Spokane County.
2. My 2009 land assessment of \$200,000 was based on an unsubstantiated/undocumented “other methods” from the Assessor. My substantiated/documented land value is \$120,000. I was over assessed \$80,000 (**III. D.** page 24).
3. The Assessor, Mr. Hollenback and the Prosecutor (page 9 “Aug/8/2011 Mr. Hollenback’s perjury...”) committed fraud in the

preparation and presentation of *BE-09-0265* and comparable sales methodology as the basis of my 2009 assessment (**III.** pages 11 to 15; 24 to 25) (violating RCWs 9A.72.010, 9A.80.010, 42.20.040, 42.20.100).

A2-39 (3rd arrow down) shows 2200 residential petitioners are also the victims of the same fraud for this period alone.

4. The Assessor and Mr. Hollenback committed fraud in the presentation of *RC-08-2020* and *BTA-09-121* (basis of 2009 assessment; A2-39 #B3) and comparable sales methodology as the basis of my 2008/2009 assessment (RCWs 9A72.010, 9A80.010, 42.20.040, 42.20.100). I do not know the numbers of other taxpayers victimized.
5. The Spokane Assessor's office lack of standards of practice and deficiencies in staff competency violate the law as shown in the evidence I submitted to the BTA, the trial court and this brief (RCWs 9A.72.010, 9A.80.010, 42.20.040, 42.20.100, 42.56.040, 84.08.120, 84.40.030, 84.41.041, 84.48.150; WACs 308-125-200, 458-07-015, 458-10-010, 458-10-060 and USPAP).
6. Appraisal Supervisor Hollenback cannot read, is an incompetent accredited appraiser and has committed multiple acts of perjury, material false statement and false reportings (page 6 #15) (violating

- RCWs 9A.72.010, 9A.72.020, 9A.80.010, 42.20.040; WACS 308-125-010, 308-125-200, 458-07-015, 458-10-010, 458-10,060 and USPAP).
7. The Prosecutor committed perjury (page 27 #3, “Arkills”), suborned perjury (page 7, “Apr/12/2010 (CP 433 ...” and page 8, “Apr/12/2010 All USPAP ...”), made materially false statements (page 26 #2), committed official misconduct (all evidence: to BTA, trial court and this brief), failed to perform his duty as an officer of the court (all evidence: to BTA, trial court and this brief), threatened malicious prosecution (page 27, “A6-20’S ‘or else’ is a ...”) (page A2-39 #B3) and violated my constitutional rights^{18(b)}. These actions violate RCWs 9.62.010, 9A.72.010, 9A.80.010, 10.37.140, 42.20.100.
8. The BTA has an unconstitutional^{18(b)}-illegal¹⁸ *RULE* (IV. page 25-31). The *RULE* is the basis for applying illegal sanctions (pages 2-10). The sanctions in my case were these:
- BTA Chairman Sebring and Referee Felizardo did more than misinterpret the law¹⁸ and ignore the evidence¹⁹ when they conducted their proceedings.

¹⁸ (a) RCWS 84.40.025 legislates property access not the interior of residences – BTA Docket 09-121 Final Decision A2-93 lines 19-21; BTA Docket 10-258 Final Decision page 13 lines 19 through page 14 line 1

(b) 4th Amendment (A2-93 lines 21 through A3 line 2) and Washington Constitution Sections 1, 2, 3, 7

(c) Both proceedings ignore DOR writings footnote 16

¹⁹ *FoF* pages 2-10

- BTA Chairman Sebring and Referee Felizardo advocated for the Assessor (page 29 top, “they cite fairness ...”). They do not cite the interior improvements I am appealing that justify application of the *RULE* because there are none. They testified for the Assessor²⁰ and posited their testimony as that of Assessor and witness^{20 & 21}.
- BTA Chairman Sebring and Referee Felizardo ignored every violation of every Assessor and appraisal standard of performance. They ignored the law.
- BTA Chairman Sebring and Referee Felizardo violated the law: 9A.72.010, 9A.80.010, 42.20.040, 42.20.100.

The *RULE* is being cited in Spokane and King County by Assessors and Prosecutors. The BTA *Final Decision* in 10-258 is based in this *RULE*. The Final Decision was illegal, arbitrary and capricious.

²⁰ Page 17 “CP 270 line 12...” through page 18 “NOTE”

²¹ BTA Docket 10-258 Final Decision page 15 lines 7-20. The Referee’s introduction of this entire methodology has no basis in the evidence presented by Assessor, Assessor’s witness or Appellant in Dockets 09-121 and/or 10-258.

CERTIFICATE OF SERVICE

I certify that on the 21st of August, 2012 the Brief of Appellant was served by the indicated method:

Counsel for Respondent Hand Delivered
Prosecutor Ronald Arkills
1100 W. Mallon Avenue
Spokane, WA 99260

Supreme Court Clerk Certified Mail
Hon. Ronald R. Carpenter
Temple of Justice
PO Box 40929
Olympia, WA 98504



Patricia N. Strand, Appellant

Presented by:

Patricia Strand, pro se
Mailing: PO Box 312
Physical: 13206 W. Charles Rd.
Nine Mile Falls, WA 99026
(509) 467-0729 (phone/fax)

RESPECTFULLY SUBMITTED: This 21st day of August 2012.


Palmer D. Strand, Appellant


Patricia N. Strand, Appellant

Presented by:

Patricia Strand, pro se
Mailing: PO Box 312
Physical: 13206 W. Charles Rd.
Nine Mile Falls, WA 99026
(509) 467-0729 (phone/fax)

EXHIBITS

This Assessor document establishes when BE-09-0265 for 2009 assessment was prepared – after Jun/15/2010. It was prepared after the Dec/31/2009 cutoff for assessment data.

afbpng@fastlane-i.com

From: Best, Kevin [KBEST@spokanecounty.org]
Sent: Tuesday, June 15, 2010 3:30 PM
To: 'afbpng@fastlane-i.com'
Cc: Emacio, James; Baker, Ralph; Hodgson, Byron; Hollenback, Joseph
Subject: Strand 6-6-10 Public Records Request
Attachments: Strand 6-10-10 PRR.pdf

Dear Mr and Mrs Strand,

I received your public records request dated June 6, 2010 (attached). Your numbered paragraph 1 requesting the Assessor's Answer to Real Property Petition contained in your 2009 assessed value appeal (BE-09-0625) does not currently exist. Therefore, it will be created and provided to you as per BOE guidance which is estimated to be 7-20-10. As per your numbered paragraphs 2 and 3 requests, we are in the process of compiling the data and estimate it will take until 6-29-10 to respond.

Sincerely,

Kevin E. Best
Chief Deputy Assessor
509-477-5902
kbest@spokanecounty.org

This Assessor document proves the recombinant Arithmetic on the Assessor's *Appraisals*. I attempted performing this reconstruction of the dollar per square foot. It proved impossible.

afbpng@fastlane-i.com

From: Hodgson, Byron [BHODGSON@spokanecounty.org]
Sent: Tuesday, June 14, 2011 4:58 PM
To: 'afbpng@fastlane-i.com'
Subject: RE: STRAND PRR: Marshall Swift Manuals

RE: Cost per square foot

Dear Mrs. Strand,

As I have stated, Marshall & Swift manuals cannot be copied and provided to you by our office. Marshall and Swift cost information is loaded into ProVal by Manatron. Marshall & Swift cost information is modified by ProVal based on the characteristics of each parcel, such as; size, quality, market adjustment, and the lineal feet of the exterior walls. A value is derived based on the unique components of ProVal.

Using the field sheets and pricing ladder that our office has provided to you, the cost per square foot can be determined by dividing the value (cost) of each segment (listed in the pricing ladder) by the size. The Summary of Improvements at the bottom of the field sheet lists the overall size and value. For example, \$496,040 divided by 5,808 square feet is \$85.40 per square foot. Hope this is helpful.

Byron Hodgson

Assessor's Appraisal printed June 8, 2012 proves the Assessor still shows my property as having multiple above-grade levels contradicting the BTA 'FINDINGS OF FACT' #5 Docket 10-258.

17355.9014 STRAND, PATRICIA N 13206 W CHARLES RD 511

ADMINISTRATIVE INFORMATION: PARCEL NUMBER 17355.9014, Parent Parcel Number, Property Address 13206 W CHARLES RD, Neighborhood 231720, Property Class 511, TAXING DISTRICT INFORMATION, etc.

OWNERSHIP: STRAND, PATRICIA N, PO BOX 312, NINE MILE FALLS, WA 99026-

TRANSFER OF OWNERSHIP: BARKER, ROBERT & PATRICIA J, STRAND, PALMER D, WANG, GEORGE & CEAN J

RESIDENTIAL

Assessment Year	05/18/2006	05/08/2007	05/06/2008	07/31/2009	05/02/2010	05/13/2011	05/02/2012
Reason for Change							
VALUATION	L 100000	100000	200000	200000	200000	200000	200000
Posted True Tax	B 174200	206100	217100	249900	214700	199300	187700
	T 274200	306100	417100	449900	414700	399300	387700
VALUATION	L 0	0	0	0	0	0	0
Assessed Value	B 174200	206100	217100	249900	214700	199300	187700
	T 174200	206100	217100	249900	214700	199300	187700

Rating	Measured Soil ID	Table	Prod. Factor	Base Rate	Adjusted Rate	Extended Value	Influence Factor	Value
	1152	5.0000	1.00	40000.00	40000.00	200000		200000

Appr: Appraisal Notes
 7/13/10 Consider resketching as sft/basement w/o with full basement finish.
 6/9/10 jh(98) BE-09-0265 Reviewed transcripts from past BTA case, provided by the appellant, and taxpayers admitted in testimony they have a "full finished basement" or basement/lower level, by our definition. Is 102 placed 1900 sq ft of basement/11 finish for the 2009/2010 appeal. This information/transcript is retained in Mr. Arkills file for further review.
 5/18/10 jh(98) BTA Case 09-121 SBTA ruled in assessor's favor.
 4/10 Took appeal to formal state appeal. Not sure of outcome.
 7/31/09 Add basement finish as NC
 5/09 (102) Appeal RC-08-2020 Met appellants at their residence with v Joe Hollenbeck. Discussed appeal, rechecked exterior

Supplemental Cards
 MEASURED ACREAGE 5.0000
 TRUE TAX VALUE 200000

Inspections 3/11/04, 4/15/10 per

Supplemental Cards
 TOTAL LAND VALUE 200000

PHYSICAL CHARACTERISTICS	IMPROVEMENT DATA	Summary of Improvements																																																																																																																																																																																																																																																			
<p>Style: 49 Ranch 1800-2299 Occupancy: Single family Story Height: 1.0 Finished Area: 3948 Attic: None Basement: 1/2</p> <p>ROOFING Material: Metal Type: Gable Framing: Std for class Pitch: Not available</p> <p>FLOORING Slab: B, L Sub and joists: 1.0 Base Allowance: B, L, 1.0</p> <p>EXTERIOR COVER Vinyl siding: B, L, 1.0</p> <p>INTERIOR FINISH Drywall: 1.0</p> <p>ACCOMMODATIONS Finished Rooms: 9 Bedrooms: 3 Family Rooms: 1 Formal Dining Rooms: 1</p> <p>HEATING AND AIR CONDITIONING Primary Heat: Forced hot air-elec Lower: Full Part /Bsmt: 1 Upper Upper</p> <p>PLUMBING 5 Fixt. Baths: 1 5 4 Fixt. Baths: 1 4 3 Fixt. Baths: 2 6 Kit Sink: 1 1 Water Heat: 1 1 Extra Fixt: 1 1 TOTAL: 18</p> <p>REMODELING AND MODERNIZATION Amount Date</p>	<p>17355.9014 13206 W CHARLES RD Property Class: 511</p> <table border="1"> <thead> <tr> <th>Construction</th> <th>Base Area</th> <th>Floor Area</th> <th>Sq Ft</th> <th>Value</th> </tr> </thead> <tbody> <tr> <td>1 Wood frame</td> <td>896</td> <td>L</td> <td>800</td> <td>23620</td> </tr> <tr> <td>1 Wood frame</td> <td>2048</td> <td>1.0</td> <td>2048</td> <td>161400</td> </tr> <tr> <td>6 Concrete</td> <td>1152</td> <td>Bsmt</td> <td>1100</td> <td>29490</td> </tr> <tr> <td></td> <td></td> <td>0 Crml</td> <td>----</td> <td>0</td> </tr> <tr> <td colspan="4">TOTAL BASE</td> <td>214510</td> </tr> <tr> <td colspan="4">Roof Type Adjustment</td> <td>1.00%</td> </tr> <tr> <td colspan="4">SUB-TOTAL</td> <td>214510</td> </tr> <tr> <td colspan="4">0 Interior Finish</td> <td>18450</td> </tr> <tr> <td colspan="4">0 Ext Lvg Units</td> <td>0</td> </tr> <tr> <td colspan="4">0 Basement Finish</td> <td>25130</td> </tr> <tr> <td colspan="4">Fireplace(s)</td> <td>0</td> </tr> <tr> <td colspan="4">Heating</td> <td>0</td> </tr> <tr> <td colspan="4">Air Condition</td> <td>0</td> </tr> <tr> <td colspan="4">Frame/Siding/Roof</td> <td>3220</td> </tr> <tr> <td colspan="4">Plumbing Fixt: 18</td> <td>18480</td> </tr> <tr> <td colspan="4">Other Features</td> <td>240</td> </tr> <tr> <td colspan="4">SUB-TOTAL ONE UNIT</td> <td>280030</td> </tr> <tr> <td colspan="4">SUB-TOTAL 0 UNITS</td> <td>280030</td> </tr> <tr> <td colspan="4">Exterior Features</td> <td></td> </tr> <tr> <td colspan="4">Description Value</td> <td></td> </tr> <tr> <td colspan="4">EFP 4930</td> <td></td> </tr> <tr> <td colspan="4">Garages</td> <td></td> </tr> <tr> <td colspan="4">0 Integral</td> <td>0</td> </tr> <tr> <td colspan="4">576 Att Garage</td> <td>15370</td> </tr> <tr> <td colspan="4">0 Att Carports</td> <td>0</td> </tr> <tr> <td colspan="4">0 Bsmt Garage</td> <td>0</td> </tr> <tr> <td colspan="4">Ext Features</td> <td>4930</td> </tr> <tr> <td colspan="4">SUB-TOTAL</td> <td>30</td> </tr> <tr> <td colspan="4">Quality Class/Grade</td> <td>1</td> </tr> <tr> <td colspan="4">GRADE ADJUSTED VALUE</td> <td>279310</td> </tr> </tbody> </table> <p style="border: 1px solid black; padding: 5px; display: inline-block;">Finding of Fact Wood Frame L = Lower Level</p> <p style="border: 1px solid black; padding: 5px; display: inline-block;">Recombinant Arithmetic Values column</p> <p style="border: 1px solid black; padding: 5px; display: inline-block;">Tax year 2013 is assessment year 2012</p>	Construction	Base Area	Floor Area	Sq Ft	Value	1 Wood frame	896	L	800	23620	1 Wood frame	2048	1.0	2048	161400	6 Concrete	1152	Bsmt	1100	29490			0 Crml	----	0	TOTAL BASE				214510	Roof Type Adjustment				1.00%	SUB-TOTAL				214510	0 Interior Finish				18450	0 Ext Lvg Units				0	0 Basement Finish				25130	Fireplace(s)				0	Heating				0	Air Condition				0	Frame/Siding/Roof				3220	Plumbing Fixt: 18				18480	Other Features				240	SUB-TOTAL ONE UNIT				280030	SUB-TOTAL 0 UNITS				280030	Exterior Features					Description Value					EFP 4930					Garages					0 Integral				0	576 Att Garage				15370	0 Att Carports				0	0 Bsmt Garage				0	Ext Features				4930	SUB-TOTAL				30	Quality Class/Grade				1	GRADE ADJUSTED VALUE				279310	<table border="1"> <thead> <tr> <th>Description</th> <th>Value</th> <th>ID</th> <th>Use</th> <th>Stry Hgt</th> <th>Const Type</th> <th>Grade</th> <th>Year Const</th> <th>Eff Year</th> <th>Cond</th> <th>Base Rate</th> <th>Feat-ures</th> <th>Adj Rate</th> <th>Size or Area</th> <th>Computed Value</th> <th>Phys Obsol</th> <th>Market Depr</th> <th>Market Adj</th> <th>Comp</th> <th>Value</th> </tr> </thead> <tbody> <tr> <td>D :DISPOSER</td> <td>240</td> <td></td> <td></td> <td></td> <td>D</td> <td>DWELL</td> <td>3.00</td> <td></td> <td></td> <td>Avq-</td> <td>2002</td> <td>2002</td> <td>AV</td> <td>0.00</td> <td>Y</td> <td>0.00</td> <td>4096</td> <td>5</td> <td>0</td> <td>65</td> <td>100</td> <td>172500</td> </tr> <tr> <td>01 :C</td> <td>0</td> <td></td> <td></td> <td></td> <td>GCL</td> <td>ATTGAR</td> <td>0.00</td> <td>1</td> <td></td> <td>AV</td> <td>20.60</td> <td>H</td> <td>26.68</td> <td>24x 24</td> <td>15370</td> <td>0</td> <td>0</td> <td>100</td> <td>100</td> <td>0</td> <td>0</td> </tr> <tr> <td></td> <td></td> <td></td> <td></td> <td></td> <td>01</td> <td>POLEBLDC</td> <td>10.00</td> <td></td> <td></td> <td>Avq</td> <td>2006</td> <td>2006</td> <td>AV</td> <td>9.97</td> <td>Y</td> <td>13.46</td> <td>30x 40</td> <td>6</td> <td>0</td> <td>100</td> <td>100</td> <td>15200</td> </tr> </tbody> </table> <p>Data Collector/Date: 102 04/15/2010 Appraiser/Date: 102 04/22/2010 Neighborhood: Neigh 231720 Supplemental Cards: AV TOTAL IMPROVEMENT VALUE: 187700</p>	Description	Value	ID	Use	Stry Hgt	Const Type	Grade	Year Const	Eff Year	Cond	Base Rate	Feat-ures	Adj Rate	Size or Area	Computed Value	Phys Obsol	Market Depr	Market Adj	Comp	Value	D :DISPOSER	240				D	DWELL	3.00			Avq-	2002	2002	AV	0.00	Y	0.00	4096	5	0	65	100	172500	01 :C	0				GCL	ATTGAR	0.00	1		AV	20.60	H	26.68	24x 24	15370	0	0	100	100	0	0						01	POLEBLDC	10.00			Avq	2006	2006	AV	9.97	Y	13.46	30x 40	6	0	100	100	15200
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Tax Year	Land	Dwelling / Structure	Taxable	Total Value
2013	200,000	187,700	387,700	387,700
2012	200,000	199,300	399,300	399,300

Table at left (off Assessor's website) shows Land/Dwelling values used to assign a year to the Appraisal.

My complaint letter (and emails) [redacted] the Assessor's inability to read its *Appraisals*. The Assessor emails dated: 8/28, 9/1, 9/2, 9/4, 9/13, 9/14 relying on handwritten dates to fix *Appraisals* in time violating USPAP Standard 2, "state the effective date of the appraisal".

Palmer D. and Patricia N. Strand – **Board of Tax Appeals Docket 09-121**
PO Box 312
Nine Mile Falls, WA 99026 – [(509) 467-0729 – afbpbs@fastlane-i.com]
January 12, 2010

Mr. Ronald Arkills, Deputy Prosecuting Attorney
1115 W. Broadway Avenue
Spokane, WA 99260

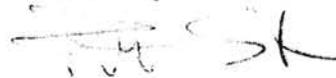
RECEIVED
JAN 14 2010
FACSIMILE

Dear Sir:

I am requesting all future information and documentation responses on my case **not be channeled or censored by and through** Mr. Kevin Best of the Assessor's office. His intervention has resulted in delays, misinformation and denials of information and records. For example Improvement Data Sheets and Valuation Records requested on 8/24/9 took **5** responses when channeled through Mr. Best. These misattempts meant a time span of 8/24 through 9/14/9 for compliance and required I analyze twice as many records as I requested (not just duplications but the wrong documents). All requests channeled through Mr. Best were only complied with under Public Records citations (RCWs 42.56.070 and .520) those requested prior to citations were not honored. Such citations should not have been required once this case was under the Board of Appeals. Lastly my request of 1/28/9 was denied by Mr. Best.

Attachments: Mr. Best's response of 12/28/09 denying my requested documents
A consolidated copy of Mr. Best's 5 responses to the aforementioned 8/24/9 request
I have a log of all communications with the Assessor's office that is not attached

Sincerely



Patricia Strand

Best, Kevin 8/28/9 -- 8-24-09 Public Records Request -- Pat Strand valuation records 8/28/9 (927 kb)

Hi Patricia, -- I believe the attached documents satisfy your August 24, 2009 public records request. I am now considering your request closed. Have a nice weekend. -- Cheers, -- *Kevin E. Best*

Best, Kevin 9/1/9 Public records for 2009 assessment-- Pat Strand valuation records 9/2/9 (419 kb)

Hi Patricia, -- I was out of the office yesterday and I listened to your voicemail today, clarifying the issue. I did some research with my appraisal manager and figured out the mix up. Apparently when placing the "as of" historical date value in the program, it represents the tax year, not the assessment year. Therefore, the mix up on dates and the values being one year off. I'm attaching the 2008 assessment year data cards the program sees as a 1/1/09 data request. Thus, the handwritten 1/1/09 in the upper righthand corner. I apologize for the mix up. Please contact me if you need anything else. If there are no further issues, I am now considering your 8-24-09 public records request closed. -- Sincerely, --
Kevin E. Best

The Assessor emails dated: 8/28, 9/1, 9/4, 9/13, 9/14 explaining all the different excuses for not being able to read the Appraisals and supply the correct ones in response to PRRs (THE APPRAISAL'S PROBLEMS page 16)

Best, Kevin 9/14/9 Re: Public Records -- Pat Strand valuation records 9/1/9 (419 kb)

Kevin E. Best -- Chief Deputy Assessor -- 509-477-5902 -- kbest@spokanecounty.org

From: afbpns@fastlane-i.com [mailto:afbpns@fastlane-i.com] -- **Sent:** Sunday, September 13, 2009 5:03 PM --
To: Best, Kevin -- **Subject:** RE: Public Records -- Mr. Best I'm sorry in that my request remained non-specific on the 2009 missing records. I am missing 13712 W. Charles Rd - 17352.9020 it should show a land value of \$206,000 and improvements of \$188,100 (both in the lower right corners). I have all the other years and parcels requested. Thank you.

From: Best, Kevin [mailto:KBEST@spokanecounty.org] -- **Sent:** Friday, September 04, 2009 9:53 AM -- **To:** 'afbpns@fastlane-i.com' -- **Cc:** Emacio, James -- **Subject:** RE: Public Records -- Hi Patricia, -- The 2009 assessments are attached. They are indicated with the handwritten date of 1/1/10 which is the entering argument in our search. -- Cheers, -- *Kevin E. Best*

From: afbpns@fastlane-i.com [mailto:afbpns@fastlane-i.com] -- **Sent:** Thursday, September 03, 2009 10:26 PM -- **To:** Best, Kevin -- **Subject:** RE: Public Records -- Mr. Best I still do not have Assessment year 2009 for the indicated parcels. Pat Strand

From: Best, Kevin [mailto:KBEST@spokanecounty.org] -- **Sent:** Wednesday, September 02, 2009 9:51 AM -- **To:** 'afbpns@fastlane-i.com' -- **Cc:** Emacio, James -- **Subject:** Public Records -- Hi Patricia, -- After some further research, I wanted to ensure you received the 1/1/10 information reflecting the 2009 assessment. You may already have this data, but I wanted to give you the exact product the program produces with this date as the entering argument. I've attached these cards for your use. Cheers, *Kevin E. Best -- Chief Deputy Assessor -- 509-477-5902 -- kbest@spokanecounty.org*

From: afbpns@fastlane-i.com [mailto:afbpns@fastlane-i.com]

Sent: Sunday, September 13, 2009 5:03 PM

To: Best, Kevin

Subject: RE: Public Records

Mr. Best I'm sorry in that my request remained non-specific on the 2009 missing records. I am missing 13712 W. Charles Rd - 17352.9020 It should show a land value of \$206,000 and improvements of \$188,100 (both in the lower right corners). I have all the other years and parcels requested. Thank you.

From: afbpns@fastlane-i.com [mailto:afbpns@fastlane-i.com]

Sent: Sunday, September 13, 2009 5:32 PM

To: Best, Kevin

Subject: RE: Public Records

I'm confused. Your web site Spokane County Parcel Data Locator has data Assessed Values/Tax Year that I am using as check figures on the Improvement and Valuation data you sent me. If the Assessed Values/Tax Year are Tax years than I am still missing all of the 2009 figures! If the Assessed Values/Tax Year are Assessment Years than I am missing only the data on 13712 for 2009.

- ⇒ On the Improvement sheet the column labeled 5/15/04 shows the assessment year values or tax year values for 2006?
- ⇒ On the Improvement sheet the column labeled 5/18/06 shows the assessment year values or tax year values for 2007?
- ⇒ On the Improvement sheet the column labeled 5/8/07 shows the assessment year values or tax year values for 2008?
- ⇒ On the Improvement sheet the column labeled 5/6/08 shows the assessment year values or tax year values for 2009?
- ⇒ On the Improvement sheet the column labeled 4/2/10 shows the assessment year values or tax year values for 2010?

The Assessor emails dated: 8/28, 9/1, 9/4, 9/13, 9/14 explaining all the different excuses for not being able to read the *Appraisals* and supply the correct ones in response to PRRs (THE APPRAISAL'S PROBLEMS page 16)

afbpng@fastlane-i.com

From: Best, Kevin [KBEST@spokanecounty.org]
Sent: Monday, September 14, 2009 10:50 AM
To: 'afbpng@fastlane-i.com'
Subject: RE: Public Records

Hi Patricia,

When a handwritten date exists in the upper right hand corner of information I printed and sent you, that is the tax year date using the previous year's assessment. On the sheet, the columns indicate a specific date, such as, 5/15/04. This date is an assessment date. Therefore, the 5/15/04 assessment is the value used to calculate taxes to be paid in 2005.

On our website, when a tax year is indicated, it corresponds to the previous year's assessed value. The assessed value graph shows a 2010 value that is actually the 1/1/2009 assessed value for 2010 taxes. The annual taxes graph shows the actual tax amount in the tax year. When we calculate 2010 taxes (in January 2010), the tax graph will show a 2010 value. You'll notice there is currently no 2010 tax on the annual taxes graph. Likewise, there is no annual levy rate for 2010 yet. I hope this clarifies your questions.

Cheers,

Kevin E. Best

Chief Deputy Assessor
509-477-5902
kbest@spokanecounty.org

This PRR and Assessor documents prove nothing but *Appraisal* (Note 4 page 16) documents Inspections.

afbpns@fastlane-i.com

From: afbpns@fastlane-i.com
Sent: Wednesday, July 28, 2010 3:22 PM
To: 'Best, Kevin'
Subject: RE: Strand Pricing Ladders

Clarification of "the Assessor's inspection reports/analysis/write-ups (whatever name they are identified by) for all of the properties in Table 1 from 1/1/07 through 5/31/10". I do not know what Spokane does. But I when inspecting something, an inspector works from some standard information which is contained on some standard form and writes the conclusions of their inspection on that form. This is what I am requesting for all the properties included in my Document Requests #1 and #3.

From: Best, Kevin [mailto:KBEST@spokanecounty.org]
Sent: Monday, July 26, 2010 1:24 PM
To: 'afbpns@fastlane-i.com'; Best, Kevin
Cc: Emacio, James; Baker, Ralph; Arkills, Ron; Hodgson, Byron
Subject: RE: Strand Pricing Ladders

Dear Mr and Mrs Strand,

Attached are the pricing ladders for the two additional parcels you requested. I apologize for not seeing these were added to your original request.

Additionally, there seems to be some confusion regarding your request for "the Assessor's inspection reports/analysis/write-ups (whatever name they are identified by) for all of the properties in Table 1 from 1/1/07 through 5/31/10". Please be more specific. It appears this request is for documents that do not exist. The information provided is comprehensive at the parcel level, which seems to be what you are requesting. Fee appraisals include write-ups and analysis that do not exist in mass appraisal. Do you have a sample report/analysis/write-up showing what you are requesting? If it exists we would be more than happy to provide it. In the meantime, lacking further clarification, I am considering your 6-10-10 public records request, closed.

Sincerely,

afbpns@fastlane-i.com

From: Best, Kevin [KBEST@spokanecounty.org]
Sent: Friday, July 30, 2010 12:00 PM
To: 'afbpns@fastlane-i.com'; Best, Kevin
Cc: Baker, Ralph; Arkills, Ron; Hodgson, Byron; Emacio, James
Subject: RE: Strand Pricing Ladders

Dear Mr and Mrs Strand,

According to my Appraisal Supervisor, the property record cards (already provided) are the only documents that come close to the enclosed request.

Below is Assessor's complete PRR response of Jun/25/2010 to satisfy "The Assessor's inspection reports/analysis/write-ups" for a list of 35 properties from 1/1/07 through 5/31/10," made on Jun/10/10.

parcel	appraiser	inspection date	parcel	appraiser	inspection date
17173.0117	102	11/20/2003	17355.9014	102	3/11/2004
17173.0117	102	10/21/2008	17355.9014	102	4/15/2010
17225.0416	102	3/25/2004	17355.9015	102	3/11/2004
17225.0416	102	10/29/2008	17355.9015	102	4/15/2010
17225.0420	102	3/25/2004	17355.9016	102	3/11/2004
17225.0420	102	10/29/2008	17355.9016	102	4/15/2010
17274.9110	102	3/4/2004	17363.9043	102	3/11/2004
17274.9110	102	4/14/2010	17363.9043	102	4/15/2010
17275.9017	102	3/4/2004	17363.9044	102	3/16/2004
17275.9023	102	3/4/2004	17363.9044	102	4/15/2010
17276.9099	102	3/4/2004	26201.0922	100	5/10/2006
17276.9099	102	4/15/2010	26201.0923	100	5/10/2006
17276.9100	102	3/4/2004	26201.0923	113	8/12/2008
17276.9100	102	4/15/2010	27323.0108	102	4/9/2004
17276.9101	102	3/4/2004	27323.0108	102	3/23/2010
17276.9101	102	4/15/2010			
17352.9006	102	3/11/2004			
17352.9006	102	4/15/2010			
17352.9007	102	3/11/2004			
17352.9007	102	4/15/2010			
17352.9017	102	3/11/2004			
17352.9017	102	4/15/2010			
17352.9018	102	3/11/2004			
17352.9018	102	4/15/2010			
17352.9019	102	3/11/2004			
17352.9019	102	4/15/2010			
17352.9020	102	3/11/2004			
17352.9020	102	4/15/2010			
17352.9021	102	3/11/2004			
17352.9021	102	4/15/2010			
17352.9022	102	3/11/2004			
17352.9022	102	4/15/2010			
17354.0101	88	10/11/2002			
17354.0101	102	2/10/2004			
17354.0101	102	4/15/2010			
17354.0102	102	2/10/2004			
17354.0102	102	4/15/2010			
17354.0103	102	2/10/2004			
17354.0103	102	4/15/2010			
17354.0104	102	2/10/2004			
17354.0104	102	4/15/2010			
17354.0105	102	2/10/2004			
17354.0105	102	4/15/2010			
17355.9010	102	3/11/2004			
17355.9010	102	4/15/2010			
17355.9011	102	3/11/2004			
17355.9011	102	4/15/2010			
17355.9012	102	3/11/2004			
17355.9012	102	4/15/2010			
17355.9013	102	3/11/2004			
17355.9013	102	4/15/2010			



My property *Appraisals*
 A2-21, A2-23 do not show 3/11/04

Computation of 17355.90 Improvements per *Appraisal* versus Marshall & Swift Cost Tables.
 Marshall & Swift Cost Tables provided as part of DOR training materials (CP 10-14)

Strand House	
<u>A2-24 Assessor's 2009 Appraisal</u>	<u>2007 Marshall & Swift Computation (CP 10-14)</u>
Main Floor 2,048 ^{sf} : 149,370.	1. Square Foot Costs Average Quality
Interior Finish 16,410.	2. 1-story/residence/stud framed → main floor
Frame/Siding/Roof 2,920.	3. Total Area → 2,000 row
Other Features 205.	4. Metal or Vinyl Siding → \$73.81 ^{sf}
Bath fixtures (15,040/18 ^{fixtures})x13)) 10,862.	2,048 x \$73.81 = \$151,163
Main Floor Total\$179,767.	5. Metal Roof ^{sf} adjustment → 1.13% multiplier
Basement (1100 ^{fin} of 1152 ^{total}) 21,890.	2,048 x 1.13 = 1.03 x \$151,163 = \$155,698
Basement Finish 22,060.	Main Floor: \$155,698
Bath fixtures (15,040 – 10,862) 4,178.	6. Basement: 2,048^{sf} x \$20.89 = \$42,783
Basement Total\$48,128.	7. Basement Outside Entrance & Radon: \$1,575+315
Lower Level (800 ^{fin} of 896 ^{total}) 19,940.	- \$1,890 + 42,783 = \$44,673
Back Porch 5,200.	8. Back Porch w/ceiling & roof: 80 ^{sf} x (\$22.30 + 16.41 = \$38.71) → 80 x \$38.71 = \$3,097
Garage 13,090.	9. Attached Garage/vinyl 600 ^{sf} → \$20.66 ^{sf}
	Garage 576 ^{sf} x \$20.66 = \$11,900
	10. \$215,368 = (\$155,698+\$44,673+\$3,097+\$11,900)
	11. Local Cost Multiplier/Spokane/Frame → 1.03
(179,767+48,128+19,940+5,200+13,090= \$266,125)	→ \$221,829 = \$215,368 x 1.03
(\$68,068 is the equivalent of a \$44,673 basement??) Per Mr. Hollenback	12. 17355.9014 is 'AVG-' Quality of Construction or a 7% reduction or 93%
Sub-Total '-7%' Adjusted for Quality: \$247,500	→ \$206,301 = \$221,829 x .93
Sub-Total '-5%' Depreciation	13. Depreciation Adjustment 5% reduction or 95%
\$235,100	→ \$195,986 = \$206,301 x .95
\$39,114 over-assessment	

CONCLUSION OF THE ABOVE ANALYSIS:

- The assessment value for my house should be \$195,986 based on 2007 Marshall & Swift cost tables – not the Assessor's \$235,100. This computation is based on:
 - 2,048^{sf} on both levels as finished,
 - CP 10-14 are obsolete after February 2008 (per tables) and real property was still depreciating,
 - 148^{sf} of basement per Assessor (CPs 31-32) is not living space: understairs, furnace, pressure tank, water heater, service center, etc. So \$195,986 is \$3,000 over-valuation for 148^{sf} of non-living space basement.
- More materially false statements by Mr. Hollenback, "there's not a huge valuation difference" **between a basement and a lower level** (A2-75 line 12-15; difference is \$23,395=\$68,068-44,673). And this should be increased by the \$3,000 for the 148^{sf} for \$26,395).
- In 2008 (A2-22 the house assessment was \$206,100; Marshall & Swift \$195,986 over-assessment \$10,114).
 2008 & 09 total improvement assessment should be less than: \$195,986^{house}+11,000^{shop}= **\$206,986**

Market Depreciation Not Accounted for!!

Assessor's statement about what **Mass Appraisal** support consisted of. The problem was the assertions of Mr. Hollenback and Appraiser Splater (my appraiser) that they did "Mass Appraisals (III.B. page 14)".

afbpns@fastlane-i.com

From: Arkills, Ron [RArkills@spokanecounty.org]
Sent: Tuesday, January 26, 2010 9:29 AM
To: 'afbpns@fastlane-i.com'
Subject: RE: January 19, 2010 Request for Documents
Attachments: AssessorRefManual_N.pdf, BOEManual.pdf, Strand Waterfront Sales (7.23 KB)

January 26, 2010

Patricia Strand
PO Box 312
Nine Mile Falls, WA 99026

Re: January 19, 2010 Request for Documents

Dear Mrs. Strand:

Pursuant to RCW 42.56.520, this acknowledges the receipt of your January 19, 2010 request for public records, which is set out in full below.

With regard to Items 1 and 3, the Spokane County Assessor requests clarification. Specifically:

1. Item 1. Please clarify the term "Mass Appraisal Reports." I am informed that this record may actually consist of several documents such as the annual tax roll, all documents involved in the tax levy and supporting documents, and a ratio analysis. Additionally, there are approximately 210,000 tax parcels in Spokane County. Finally, you are requesting this information for four years. Please indicate whether you want information for **all** Spokane County tax parcels for **all** four years, or just those parcels in your neighborhood. As you no doubt know, you are responsible to reimburse the County for the costs of all copies at 15 cents (\$0.15) per page.

2. Item 3. Please clarify what you mean by "all guides, worksheets, check sheets, formulations given to appraisers."

With regard Item 2, attached are manuals for County Assessors and Boards of Equalization in the State of Washington. Additionally, the Assessor's office will need an additional reasonable time--not to exceed 14 days--to compile additional documents relating to this item.

With regard to Item 4, attached is a list of comparable sales.

Ron Arkills
Senior Deputy Prosecuting Attorney
1115 W Broadway Avenue
Spokane, WA 99260
Phone: (509)477-5764
Fax: (509)477-3672
rarkills@spokanecounty.org

ATTACHMENTS
① COUNTY ASSESSOR'S MANUAL 119 PGS
② BOR MANUAL 75 PGS

ASSESSMENT YEAR 2009 PER STRANDS	& 2008	IMPROVEMENT DATA	17355.9010 17818 W CHARLES RD, NINE MILE FALLS, WA, US																																																																																																																																												
PHYSICAL CHARACTERISTICS Style: 72 Split Entry 1500-1799 Occupancy: Single family Story Height: 1.0 Finished Area: 1998 Attic: None Basement: None ROOFING Material: Comp sh medium Type: Gable Framing: Std for class Pitch: Not available FLOORING Slab L Sub and joists L, 1.0 Base Allowance L, 1.0 EXTERIOR COVER T 1/1 plywood L, 1.0 INTERIOR FINISH Drywall 1.0 ACCOMMODATIONS Finished Rooms 6 Bedrooms 3 Fireplaces: 1 HEATING AND AIR CONDITIONING Primary Heat: Forced hot air-elec Lower: Full Part /Bsm 1 Upper Upper Air Cond 702 1296 0 0 PLUMBING # 9 3 Fixt. Baths 1 9 Kit Sink 1 1 Water Heat 1 1 Extra Fixt 1 1 TOTAL 12 REMODELING AND MODERNIZATION Amount Date		<table border="1" style="width:100%; border-collapse: collapse;"> <thead> <tr> <th>Construction</th> <th>Base Area</th> <th>Floor Area</th> <th>Finished Sq Ft</th> <th>Value</th> </tr> </thead> <tbody> <tr> <td>1 Wood frame</td> <td>1296</td> <td>L</td> <td>702</td> <td>26270</td> </tr> <tr> <td>1 Wood frame</td> <td>1296</td> <td>1.0</td> <td>1296</td> <td>97740</td> </tr> <tr> <td>0 Crawl</td> <td>---</td> <td>---</td> <td>---</td> <td>0</td> </tr> <tr> <td colspan="4">TOTAL BASE</td> <td>124010</td> </tr> <tr> <td colspan="4">Row Type Adjustment</td> <td>1.00%</td> </tr> <tr> <td colspan="4">SUB-TOTAL</td> <td>124010</td> </tr> <tr> <td colspan="4">0 Interior Finish</td> <td>14860</td> </tr> <tr> <td colspan="4">0 Ext Lvg Units</td> <td>0</td> </tr> <tr> <td colspan="4">0 Basement Finish</td> <td>0</td> </tr> <tr> <td colspan="4">Fireplace(s)</td> <td>2650</td> </tr> <tr> <td colspan="4">Heating</td> <td>0</td> </tr> <tr> <td colspan="4">Air Condition</td> <td>4330</td> </tr> <tr> <td colspan="4">Frame/Siding/Roof</td> <td>-1180</td> </tr> <tr> <td colspan="4">Plumbing Fixt: 12</td> <td>9400</td> </tr> <tr> <td colspan="4">Other Features</td> <td>1570</td> </tr> <tr> <td colspan="4">SUB-TOTAL ONE UNIT</td> <td>155640</td> </tr> <tr> <td colspan="4">SUB-TOTAL 0 UNITS</td> <td>155640</td> </tr> <tr> <td colspan="4">Exterior Features Description Value</td> <td>1360</td> </tr> <tr> <td colspan="4">Garages</td> <td>0</td> </tr> <tr> <td colspan="4">0 Integral</td> <td>0</td> </tr> <tr> <td colspan="4">420 Att Garage</td> <td>9780</td> </tr> <tr> <td colspan="4">0 Att Carports</td> <td>0</td> </tr> <tr> <td colspan="4">0 Bsm Garage</td> <td>0</td> </tr> <tr> <td colspan="4">Ext Features</td> <td>1360</td> </tr> <tr> <td colspan="4">SUB-TOTAL</td> <td>166780</td> </tr> <tr> <td colspan="4">Quality Class/Grade</td> <td>Avg</td> </tr> <tr> <td colspan="4">GRADE ADJUSTED VALUE</td> <td>166780</td> </tr> </tbody> </table>	Construction	Base Area	Floor Area	Finished Sq Ft	Value	1 Wood frame	1296	L	702	26270	1 Wood frame	1296	1.0	1296	97740	0 Crawl	---	---	---	0	TOTAL BASE				124010	Row Type Adjustment				1.00%	SUB-TOTAL				124010	0 Interior Finish				14860	0 Ext Lvg Units				0	0 Basement Finish				0	Fireplace(s)				2650	Heating				0	Air Condition				4330	Frame/Siding/Roof				-1180	Plumbing Fixt: 12				9400	Other Features				1570	SUB-TOTAL ONE UNIT				155640	SUB-TOTAL 0 UNITS				155640	Exterior Features Description Value				1360	Garages				0	0 Integral				0	420 Att Garage				9780	0 Att Carports				0	0 Bsm Garage				0	Ext Features				1360	SUB-TOTAL				166780	Quality Class/Grade				Avg	GRADE ADJUSTED VALUE				166780	<p>means 1 story wood framed above ground; over a lower level of 1296^{sf} also wood framed above ground; all built on a slab. Everything is above ground. 'L' is above ground NOT "Below Grade Components"!!!</p>
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PHYSICAL CHARACTERISTICS Style: 51 1+ Story 1000-1499 0 bsm Occupancy: Single family Story Height: 1.5 Finished Area: 2876 Attic: None Basement: None ROOFING Material: Comp sh medium Type: Gable Framing: Std for class Pitch: Not available FLOORING Slab L Sub and joists L, 1.0, 1.5 Base Allowance L, 1.0, 1.5 EXTERIOR COVER Wood Siding L, 1.0, 1.5 INTERIOR FINISH Drywall 1.0 ACCOMMODATIONS Finished Rooms 5 Bedrooms 3 Fireplaces: 1 HEATING AND AIR CONDITIONING Primary Heat: Forced hot air-elec Lower: Full Part /Bsm 1 Upper Upper PLUMBING # 6 3 Fixt. Baths 2 6 Kit Sink 1 1 Water Heat 1 1 Extra Fixt 2 2 TOTAL 10 REMODELING AND MODERNIZATION Amount Date		<table border="1" style="width:100%; border-collapse: collapse;"> <thead> <tr> <th>Construction</th> <th>Base Area</th> <th>Floor Area</th> <th>Finished Sq Ft</th> <th>Value</th> </tr> </thead> <tbody> <tr> <td>1 Wood frame</td> <td>1178</td> <td>L</td> <td>1178</td> <td>20080</td> </tr> <tr> <td>1 Wood frame</td> <td>1178</td> <td>1.0</td> <td>1178</td> <td>71390</td> </tr> <tr> <td>1 Wood frame</td> <td>1178</td> <td>1.5</td> <td>520</td> <td>11390</td> </tr> <tr> <td>0 Crawl</td> <td>---</td> <td>---</td> <td>---</td> <td>0</td> </tr> <tr> <td colspan="4">TOTAL BASE</td> <td>102860</td> </tr> <tr> <td colspan="4">Row Type Adjustment</td> <td>1.00%</td> </tr> <tr> <td colspan="4">SUB-TOTAL</td> <td>102860</td> </tr> <tr> <td colspan="4">0 Interior Finish</td> <td>32750</td> </tr> <tr> <td colspan="4">0 Ext Lvg Units</td> <td>0</td> </tr> <tr> <td colspan="4">0 Basement Finish</td> <td>0</td> </tr> <tr> <td colspan="4">Fireplace(s)</td> <td>275</td> </tr> <tr> <td colspan="4">Heating</td> <td>0</td> </tr> <tr> <td colspan="4">Air Condition</td> <td>0</td> </tr> <tr> <td colspan="4">Frame/Siding/Roof</td> <td>1520</td> </tr> <tr> <td colspan="4">Plumbing Fixt: 10</td> <td>6760</td> </tr> <tr> <td colspan="4">Other Features</td> <td>795</td> </tr> <tr> <td colspan="4">SUB-TOTAL ONE UNIT</td> <td>144960</td> </tr> <tr> <td colspan="4">SUB-TOTAL 0 UNITS</td> <td>144960</td> </tr> <tr> <td colspan="4">Exterior Features Description Value</td> <td>230</td> </tr> <tr> <td colspan="4">CONCP</td> <td>230</td> </tr> <tr> <td colspan="4">RFX/</td> <td>830</td> </tr> <tr> <td colspan="4">WDDK-RW</td> <td>4700</td> </tr> <tr> <td colspan="4">WDDK-RW/</td> <td>1750</td> </tr> <tr> <td colspan="4">Garages</td> <td>0</td> </tr> <tr> <td colspan="4">0 Integral</td> <td>0</td> </tr> <tr> <td colspan="4">0 Att Garage</td> <td>0</td> </tr> <tr> <td colspan="4">0 Att Carports</td> <td>0</td> </tr> <tr> <td colspan="4">0 Bsm Garage</td> <td>0</td> </tr> <tr> <td colspan="4">Ext Features</td> <td>7510</td> </tr> <tr> <td colspan="4">SUB-TOTAL</td> <td>152470</td> </tr> <tr> <td colspan="4">Quality Class/Grade</td> <td>Avg</td> </tr> <tr> <td colspan="4">GRADE ADJUSTED VALUE</td> <td>152470</td> </tr> </tbody> </table>	Construction	Base Area	Floor Area	Finished Sq Ft	Value	1 Wood frame	1178	L	1178	20080	1 Wood frame	1178	1.0	1178	71390	1 Wood frame	1178	1.5	520	11390	0 Crawl	---	---	---	0	TOTAL BASE				102860	Row Type Adjustment				1.00%	SUB-TOTAL				102860	0 Interior Finish				32750	0 Ext Lvg Units				0	0 Basement Finish				0	Fireplace(s)				275	Heating				0	Air Condition				0	Frame/Siding/Roof				1520	Plumbing Fixt: 10				6760	Other Features				795	SUB-TOTAL ONE UNIT				144960	SUB-TOTAL 0 UNITS				144960	Exterior Features Description Value				230	CONCP				230	RFX/				830	WDDK-RW				4700	WDDK-RW/				1750	Garages				0	0 Integral				0	0 Att Garage				0	0 Att Carports				0	0 Bsm Garage				0	Ext Features				7510	SUB-TOTAL				152470	Quality Class/Grade				Avg	GRADE ADJUSTED VALUE				152470	<p>1-1/2 s Fr L (Fin) means 1 - 1/2 story wood framed above ground; over a lower level of 1178^{sf} finished (also wood framed and above ground); all built on a slab. Everything is above ground. 'L' is above ground NOT "Below Grade Components"!!!</p>
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ANALYSIS WATERFRONT LAND SALE COMPARABLES

Assessor ID	Subject	1/25/10	Comp 1	Comp 2	Comp 3
Correct Address	13206 W Charles Rd; Nine Mile Falls	(Appellant Comp) 12514 W Charles Rd; Nine Mile Falls	(Assessor's A2-18) 9104 N. Riverside, Spokane	(Assessor's A2-18) 9208 N. Riverside, Spokane	(Assessor's A2-18) 19716 N. South Bank; Nine Mile Falls
Parcel #	17355.9014	17354.0103	26201.9022	26201.0923	17173.0117
Exhibits	A2-14 to A2-17	A1-81 to A1-83 A1-135 to A1-136	A1-13, A2-18, A9-31	A1-13, A2-18, A9-31	A2-18
Miles from Spokane (A2-3)	16.1	15.6	5.8	5.8	20.9
Water frontage	> 140ft above water & 300ft away from residence	approx 100ft above water & 250ft away from residence	approx. 10ft above water & 40ft away from residence	approx. 10ft above water & 40ft away from residence	approx. 6ft above water & 25ft away from residence
Sale Date	Appellant	05/05/06	4/26/07	4/27/07	4/26/07
Sale Type		land + improvements	land	land	land
(A) Sale Price		\$195,000	\$190,000	\$210,000	\$265,000
(B) Improvements sold with Land		2 docks, gravel driveway, in-property road, deck on shore, electric power in property, septic, water well, lean-to, trailer - Total Value estimate \$75,000 (A1-82)			
(A-B=C) Land Value		\$120,000	\$190,000	\$210,000	\$265,000
(D) Land Size	5 acres	4 acres	1.48 acres	1.48 acres	5.68 acres
(C/D) Price/Acre		\$30,000	\$128,378	\$141,892	\$46,655
(E) Comparative Price/acre		$1. 4 - 1 = 3$ $2. \frac{1}{1.1235^3} = .7051$ $3. \frac{\$30,000}{.7051} = \$42,547$ \$42,547	$1. 1.48 - 1 = .48$ $2. \frac{1}{1.1235^{.48}} = .9456$ $3. \frac{\$128,378}{.9456} = \$135,763$ \$135,763	$1. 1.48 - 1 = .48$ $2. \frac{1}{1.1235^{.48}} = .9456$ $3. \frac{\$141,892}{.9456} = \$150,055$ \$150,055	$1. 5.68 - 1 = 4.68$ $2. \frac{1}{1.1235^{4.68}} = .5798$ $3. \frac{\$46,655}{.5798} = \$80,467$ \$80,467
(F) "Comparative Price/acre" for 5 acres (appellant) at each site		$1. 5 - 1 = 4$ $2. \frac{1}{1.1235^4} = .627$ $3. .627 \times \$42,547 = \$26,677$ \$26,677	$1. 5 - 1 = 4$ $2. \frac{1}{1.1235^4} = .627$ $3. .627 \times \$135,763 = \$85,123$ \$85,123	$1. 5 - 1 = 4$ $2. \frac{1}{1.1235^4} = .627$ $3. .627 \times \$150,055 = \$94,084$ \$94,084	$1. 5 - 1 = 4$ $2. \frac{1}{1.1235^4} = .627$ $3. .627 \times \$80,467 = \$50,453$ \$50,453
(G) "Distance Adjustment" for each site characteristic if situated 16.1 miles out of city (A2-3)		NONE (.5 miles from appellant)	$[16.1 - 5.8 = 10.3]$ $[10.3 \times 2.89\% = .2977]$ $[100 - .2977 = .7]$ $[\$85,123 \times .7 = \$59,586]$ $\frac{\$59,586}{5} \rightarrow$ (A8-7 line 16) \$25,264 per acre	$[16.1 - 5.8 = 10.3]$ $[10.3 \times 2.89\% = .2977]$ $[100 - .2977 = .7]$ $[\$94,084 \times .7 = \$65,859]$ $\frac{\$65,859}{5} \rightarrow$ (A8-7 line 16) \$27,924 per acre	$[16.1 - 20.9 = 4.8]$ $[4.8 \times 2.89\% = .1387]$ $[100 - .1387 = .86]$ $[\$50,453 \times .86 = \$43,455]$ $\frac{\$43,455}{5} \rightarrow$ (A8-7 line 16) \$18,425 per acre
Value Range (adjusted for 5 acres)		$\frac{\$26,677}{5}$ \$133,385	$\frac{\$25,264}{5}$ \$126,320	$\frac{\$27,924}{5}$ \$139,620	$\frac{\$18,425}{5}$ \$92,125

APPENDIX

Washington State Constitution
PREAMBLE

We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution.

ARTICLE I
DECLARATION OF RIGHTS

SECTION 1 POLITICAL POWER. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

SECTION 2 SUPREME LAW OF THE LAND. The Constitution of the United States is the supreme law of the land.

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

RCW 9.62.010 Malicious prosecution.

Every person who shall, maliciously and without probable cause therefor, cause or attempt to cause another to be arrested or proceeded against for any crime of which he or she is innocent:

- (1) If such crime be a felony, is guilty of a class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years; and
- (2) If such crime be a gross misdemeanor or misdemeanor, shall be guilty of a misdemeanor.

RCW 9A.72.010 Definitions. ...

- (1) "Materially false statement" means any false statement oral or written, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of the proceeding; whether a false statement is material shall be determined by the court as a matter of law;

RCW 9A.72.020 Perjury in the first degree.

- (1) A person is guilty of perjury in the first degree if in any official proceeding he makes a materially false statement which he knows to be false under an oath required or authorized by law.
- (2) Knowledge of the materiality of the statement is not an element of this crime, and the actor's mistaken belief that his statement was not material is not a defense to a prosecution under this section.
- (3) Perjury in the first degree is a class B felony.

9A.80.010 Official misconduct.

- (1) A public servant is guilty of official misconduct if, with intent to obtain a benefit or to deprive another person of a lawful right or privilege:
 - (a) He intentionally commits an unauthorized act under color of law; or ...
- (2) Official misconduct is a gross misdemeanor.

RCW 10.37.140 Perjury — Subornation of perjury — Description of matter. In an indictment or information for perjury, or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the crime was committed, and in what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment or information need not set forth the pleadings, record or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed.

RCW 34.05.010 – Definitions. ...

- (16) "Rule" means any agency order, directive, or regulation of general applicability (a) the violation of which subjects a person to a penalty or administrative sanction; (b) which establishes, alters, or revokes any procedure, practice, or requirement relating to agency hearings; ...

RCW 34.05.210 Code and register — Publication and distribution — Omissions, removals, revisions — Judicial notice. (1)(a) The code reviser shall cause the Washington Administrative Code to be compiled, indexed by subject, and published. All current, permanently effective rules of each agency

RCW 34.05.220 Rules for agency procedure — Indexes of opinions and statements.

- (1) In addition to other rule-making requirements imposed by law:
- (2) Each agency may adopt rules governing the formal and informal procedures prescribed or authorized by this chapter and rules of practice before the agency, together with forms and instructions. If an agency has not adopted procedural rules under this section, the model rules adopted by the chief administrative law judge under RCW 34.05.250 govern procedures before the agency.
- (4) To the extent not prohibited by federal law or regulation, nor prohibited for reasons of confidentiality by state law, each agency shall keep on file for public inspection all final orders, decisions, and opinions in adjudicative proceedings, interpretive statements, policy statements, and any digest or index to those orders, decisions, opinions, or statements prepared by or for the agency.
- (7) To the extent practicable, any rule proposed or adopted by an agency should be clearly and simply stated, so that it can be understood by those required to comply.

RCW 34.05.455 Ex parte communications.

- (1) A presiding officer may not communicate, directly or indirectly, regarding any issue in the proceeding other than communications necessary to procedural aspects of maintaining an orderly process, with any person employed by the agency without notice and opportunity for all parties to participate, except as provided in this subsection:

RCW 34.05.461(4) Entry of orders... (4) Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order.

RCW 34.05.476 Agency record... (3) Except to the extent that this chapter or another statute provides otherwise, the agency record constitutes the exclusive basis for agency action in adjudicative proceedings under this chapter and for judicial review of adjudicative proceedings

RCW 34.05.530 Standing. A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present:

- (1) The agency action has prejudiced or is likely to prejudice that person;
- (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
- (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

RCW 34.05.570 Judicial Review

- (1) Generally. Except to the extent that this chapter or another statute provides otherwise:
 - (a) The burden of demonstrating the invalidity of agency action is on the party asserting invalidity;
 - (b) The validity of agency action shall be determined in accordance with the standards of review provided in this section, as applied to the agency action at the time it was taken;
 - (c) The court shall make a separate and distinct ruling on each material issue on which the court's decision is based; and
 - (d) The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.
- (2) Review of rules. (a) A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding.
 - (b)(i) The validity of any rule may be determined upon petition for a declaratory judgment addressed to the superior court of Thurston county, when it appears that the rule, or its threatened application, interferes with or impairs or immediately threatens to interfere with or impair the legal rights or privileges of the petitioner. The declaratory judgment order may be entered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.
- (3) Review of agency orders in adjudicative proceedings. The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:
 - (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
 - (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
 - (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
 - (d) The agency has erroneously interpreted or applied the law;
 - (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
 - (i) The order is arbitrary or capricious.
- (4) Review of other agency action.
 - (a) All agency action not reviewable under subsection (2) or (3) of this section shall be reviewed under this subsection.
 - (b) A person whose rights are violated by an agency's failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance. Within twenty days after service of the petition for review, the agency shall file and serve an answer to the petition, made in the same manner as an answer to a complaint in a civil action. The court may hear evidence, pursuant to RCW 34.05.562, on material issues of fact raised by the petition and answer.
 - (c) Relief for persons aggrieved by the performance of an agency action, including the exercise of discretion, or an action under (b) of this subsection can be granted only if the court determines that the action is:
 - (i) Unconstitutional;
 - (ii) Outside the statutory authority of the agency or the authority conferred by a provision of law;
 - (iii) Arbitrary or capricious; or
 - (iv) Taken by persons who were not properly constituted as agency officials lawfully entitled to take such action.

RCW 36.21.080 New construction building permits — When property placed on assessment rolls. The county assessor is authorized to place any property that is increased in value due to construction or alteration for which a building permit was issued, or should have been issued, under chapter 19.27, 19.27A, or 19.28 RCW or other laws providing for building permits on the assessment rolls for the purposes of tax levy up to August 31st of each year. The assessed valuation of the property shall be considered as of July 31st of that year.

RCW 42.20.040 False report. Every public officer who shall knowingly make any false or misleading statement in any official report or statement, under circumstances not otherwise prohibited by law, shall be guilty of a gross misdemeanor.

RCW 42.20.100 Failure of duty by public officer a misdemeanor. Whenever any duty is enjoined by law upon any public officer or other person holding any public trust or employment, their wilful neglect to perform such duty, except where otherwise specially provided for, shall be a misdemeanor.

42.56.010 Definitions. (effective until Jan/01/12) The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

- (1) "Agency" includes all state agencies and all local agencies. "State agency" includes every state office, department, division, bureau, board, commission, or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.
- (2) "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.
- (3) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

RCW 42.56.030 Construction. The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

RCW 42.56.040 Duty to publish procedures. (1) ... each local agency shall prominently display and make available for inspection and copying at the central office of such local agency, for guidance of the public: (a) Descriptions of its central and field organization and the established places at which, the employees from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain copies of agency decisions; (b) Statements of the general course and method by which its operations are channeled and determined, including the nature and requirements of all formal and informal procedures available; (c) Rules of procedure; (d) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency ... (2) Except to the extent that he has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published or displayed and not so published or displayed.

RCW 84.08 General powers and duties of department of revenue

- 84.08.010 Powers of department of revenue -- General supervision -- Rules and processes -- Visitation of counties. The department of revenue shall:
Exercise general supervision and control over the administration of the assessment and tax laws of the state, over county assessors, and county boards of equalization, and over boards of county commissioners, county treasurers and county auditors and all other county officers, in the performance of their duties relating to taxation, ...
- 84.08.020 Additional powers -- To advise county and local officers -- Books and blanks -- Reports. The department of revenue shall: Confer with, advise and direct assessors, boards of equalization, county boards of commissioners, county treasurers, county auditors and all other county and township officers as to their duties under the law and statutes of the state, relating to taxation, and direct what proceedings, actions or prosecutions shall be instituted to support the law relating to the penalties,
- 84.08.080 Department to decide questions of interpretation. The department of revenue shall, with the advice of the attorney general, decide all questions that may arise in reference to the true construction or interpretation of this title, or any part thereof, with reference to the powers and duties of taxing district officers,
- 84.08.120 Duty to obey orders of department of revenue. It shall be the duty of every public officer to comply with any lawful order, rule or regulation of the department of revenue made under the provisions of this title,

RCW 84.40.025 Access to property required. For the purpose of assessment and valuation of all taxable property in each county, any real or personal property in each county shall be subject to visitation, investigation, examination, discovery, and listing at any reasonable time by the county assessor of the county or by any employee thereof designated for this purpose by the assessor.

RCW 84.40.030 Basis of valuation, assessment, appraisal – One hundred percent of true and fair value ... All property shall be valued at one hundred percent of its true and fair value in money and assessed on the same basis unless specifically provided otherwise by law. ... The true and fair value of real property for taxation purposes ... shall be based upon the following criteria: (1) **Any sales of the property being appraised or similar properties with respect to sales made within the past five years.** ... (2) In addition to sales as defined in subsection (1) of this section, consideration may be given to cost, cost less depreciation, reconstruction cost less depreciation, or capitalization of income ... In the case of property of a complex nature ... or property not having a record of sale within five years and not having a significant number of sales of similar property in the general area, the provisions of this subsection shall be the dominant factors in valuation. When provisions of this subsection are relied upon for establishing values the property owner shall be advised upon request of the factors used in arriving at such value. (3) In valuing any tract or parcel of real property, **the true and fair value of the land, exclusive of structures thereon** shall be determined; also the true and fair value of structures thereon, but the valuation shall not exceed the true and fair value of the total property ...

RCW 84.41.030 Revaluation program to be on continuous basis -- Revaluation schedule ... revaluation of all taxable real property within the county at least once each four years and physical inspection of all taxable real property within the county at least once each six years

RCW 84.41.041 Physical inspection and valuation of taxable property required -- Adjustments during intervals based on statistical data. Each county assessor shall cause taxable real property to be physically inspected and valued at least once every six years in accordance with RCW84.41.030, and in accordance with a plan filed with and approved by the department of revenue. ... **The assessor may require property owners to submit pertinent data respecting taxable property in their control** including data respecting any sale or purchase of said property within the past five years, the cost and characteristics of any improvement on the property and other facts necessary for appraisal of the property.

RCW 84.48.150 **Valuation criteria including comparative sales to be made available to taxpayer.** ... The assessor shall, upon the request of any taxpayer who petitions the board of equalization for review of a tax claim or valuation dispute, make available to said taxpayer a compilation of comparable sales utilized by the assessor in establishing such taxpayer's property valuation. If valuation criteria other than comparable sales were used, the assessor shall furnish the taxpayer with such other factors and the addresses of such other property used in making the determination of value.

RCW 84.68.030 Judgment — Payment — County tax refund fund. In case it be determined in such action that said tax, or any portion thereof, so paid under protest, was unlawfully collected, judgment for recovery thereof and interest thereon at the rate specified in RCW 84.69.100 from date of payment, together with costs of suit, shall be entered in favor of plaintiff. In case the action is against a county and the judgment shall become final, the amount of such judgment, including interest at the rate specified in RCW 84.69.100 and costs where allowed, shall be paid out of the treasury of such county by the county treasurer upon warrants drawn by the county auditor against a fund in said treasury hereby created to be known and designated as the county tax refund fund. Such warrants shall be so issued upon the filing with the county auditor and the county treasurer of duly authenticated copies of such judgment, and shall be paid by the county treasurer out of any moneys on hand in said fund. If no funds are available in such county tax refund fund for the payment of such warrants, then such warrants shall bear interest in such cases and shall be callable under such conditions as are provided by law for county warrants, and such interest, if any, shall also be paid out of said fund.

WAC 308-125 Real estate appraisers.

WAC 308-125-010 Definitions. ...

- (4) "Appraisal standards board" means a board established by the appraisal foundation for the purpose of developing, publishing, interpreting and amending the *Uniform Standards of Professional Appraisal Practice*.
- (5) "The *Uniform Standards of Professional Appraisal Practice* (USPAP)" means the current edition of the publication in force of the appraisal standards board (ASB) of the appraisal foundation. USPAP is the applicable standard for all appraisal practice in the state of Washington regulated under the provisions of chapter 18.140 RCW.

WAC 308-125-200 ... The standard of practice governing real estate appraisal activities will be the edition of the *Uniform Standards of Professional Appraisal Practice* (USPAP) of the Appraisal Foundation in effect on the date of the appraisal report.

WAC 458-07-015 Revaluation of real property — Annual counties.

- (1) Appropriate statistical data defined. ... "appropriate statistical data" means the data required to accurately adjust real property values and includes, but is not limited to, data reflecting costs of new construction and real property market trends.
- (2) Comparable sales data. ... determining real property market trends, the assessor must consider current sales data. "Current sales data" means sales of real property that occurred within the past five years of the date of appraisal and may include sales that occur in the assessment year. To the extent feasible, and in accordance with generally accepted appraisal practices, the assessor shall compile the statistical data into categories of comparable properties. ...
- (4) Physical inspection cycles.
 - (a) For purposes of this chapter, "physical inspection" means, at a minimum, an exterior observation of the property to determine whether there have been any changes in the physical characteristics that affect value. **The property improvement record** must be appropriately documented in accordance with the findings of the physical inspection. ...
 - (b) ... valuing unique or **nonhomogeneous properties**,

WAC 458-10-010 Accreditation of real property appraisers ... (1) Implementation of accreditation requirements. ... the accreditation of persons responsible for valuing real property for purposes of taxation. To the extent practical, these rules coordinate accreditation requirements with the requirements for certified and licensed real estate appraisers under chapter 18.140 RCW. The purpose of these rules is to promote uniformity and consistency throughout the state in the education and experience qualifications and maintain minimum standards of competence and conduct of persons responsible for valuing real property for purposes of taxation.

WAC 458-10-060 – Standards of practice. The standards of practice adopted by the department and governing real property appraisal activities by accredited appraisers are the generally accepted appraisal standards as evidenced by the current appraisal standards promulgated by the Appraisal Standards Board of the Appraisal Foundation.

Uniform Standards of Professional Appraisal Practice 2008-2009 USPAP

U-4 DEFINITIONS

MASS APPRAISAL: the process of valuing a universe of properties as of a given date using standard methodology, employing common data, and allowing for statistical testing.

REPORT: any communication, written or oral, of an appraisal, appraisal review, or appraisal consulting service that is transmitted to the client upon completion of an assignment.

SIGNATURE: personalized evidence indicating authentication of the work performed by the appraiser and the acceptance of the responsibility for content, analyses, and the conclusions in the report.

WORKFILE: documentation necessary to support an appraiser's analyses, opinions, and conclusions.

U-7 ETHICS RULE

To promote and preserve the public trust inherent in professional appraisal practice, an appraiser must observe the highest standards of professional ethics. This ETHICS RULE is divided into four sections: Conduct, Management, Confidentiality, and Record Keeping. The first three sections apply to appraisal practice, and all four sections apply to appraisal practice performed under STANDARDS through 10.

Comment: This Rule specifies the personal obligations and responsibilities of the individual appraiser. However, it should also be noted that groups and organizations engaged in appraisal practice share the same ethical obligations.

Compliance with USPAP is required when either the service or the appraiser is obligated by law, regulation, or by agreement with the client or intended users, to comply. In addition to the requirements, an individual should comply any time that individual represents that he or she performing the service as an appraiser.

An appraiser must not misrepresent his or her role when providing valuation services that are outside appraisal practice.²

Comment: Honesty, impartiality, and professional competency are required of all appraisers under these *Uniform Standards of Professional Appraisal Practice* (USPAP). To document recognition and acceptance of his or her USPAP-related responsibilities in communicating an appraisal, appraisal review, or appraisal consulting assignment completed under USPAP, an appraiser is required to certify compliance with USPAP. (See Standards Rules 2-3, 3-3, 5-3, 6-9, 8-3, and 10-3.)

Conduct:

An appraiser must perform assignments ethically and competently, in accordance with USPAP.

An appraiser must not engage in criminal conduct.

An appraiser must perform assignments with impartiality, objectivity, and independence, and without accommodation of personal interests.

An appraiser must not advocate the cause or interest of any party or issue.

An appraiser must not accept an assignment that includes the reporting of predetermined opinions and conclusions.

An appraiser must not communicate assignment results in a misleading or fraudulent manner. An appraiser must not use or communicate a misleading or fraudulent report or knowingly permit an employee or other person to communicate a misleading or fraudulent report.

U-9 ETHICS RULE

Record Keeping:

An appraiser must prepare a workfile for each appraisal, appraisal review, or appraisal consulting assignment. The workfile must include:

- the name of the client and the identity, by name or type, of any other intended users;
- true copies of any written reports, documented on any type of media;
- summaries of any oral reports or testimony, or a transcript of testimony, including the appraiser's signed and dated certification; and
- all other data, information, and documentation necessary to support the appraiser's opinions and conclusions and to show compliance with this Rule and all other applicable Standards, or references to the location(s) of such other documentation.

An appraiser must retain the workfile for a period of at least five (5) years after preparation or at least two (2) years after final disposition of any judicial proceeding in which the appraiser provided testimony related to the assignment, whichever period expires last.

An appraiser must have custody of his or her workfile, or make appropriate workfile retention, access, and retrieval arrangements with the party having custody of the workfile.

Comment: A workfile preserves evidence of the appraiser's consideration of all applicable data and statements required by USPAP and other information as may be required to support the appraiser's opinions, conclusions, and recommendations.

A photocopy or an electronic copy of the entire actual written appraisal, appraisal review, or appraisal consulting report sent or delivered to a client satisfies the requirement of a true copy. As an example, a photocopy or electronic copy of the Self-Contained Appraisal Report, Summary Appraisal Report, or Restricted Use Appraisal Report actually issued by an appraiser for a real property appraisal assignment satisfies the true copy requirement for that assignment.

Care should be exercised in the selection of the form, style, and type of medium for written records, which may be handwritten and informal, to ensure that they are retrievable by the appraiser throughout the prescribed record retention period.

A workfile must be in existence prior to and contemporaneous with the issuance of a written or oral report. A written summary of an oral report must be added to the workfile within a reasonable time after the issuance of the oral report.

A workfile must be made available by the appraiser when required by state enforcement agencies or due process of law. In addition, a workfile in support of a Restricted Use

Appraisal Report must be sufficient for the appraiser to produce a Summary Appraisal Report (for assignments under STANDARDS 2 and 8) or an Appraisal Report (for assignments under STANDARD 10), and must be available for inspection by the client in accordance with the Comment to Standards Rules 2-2(c)(viii), 8-2(c)(viii), and 10-2(b)(ix).

U-11 COMPETENCY RULE

Prior to accepting an assignment or entering into an agreement to perform any assignment, an appraiser must properly identify the problem to be addressed and have the knowledge and experience to complete the assignment competently; or alternatively, must:

- 1. disclose the lack of knowledge and/or experience to the client before accepting the assignment;**
- 2. take all steps necessary or appropriate to complete the assignment competently; and**
- 3. describe the lack of knowledge and/or experience and the steps taken to complete the assignment competently in the report.**

Comment: Competency applies to factors such as, but not limited to, an appraiser's familiarity with a specific type of property, a market, a geographic area, or an analytical method. If such a factor is necessary for an appraiser to develop credible assignment results, the appraiser is responsible for having the competency to address that factor or for following the steps outlined above to satisfy this COMPETENCY RULE.

The background and experience of appraisers varies widely, and a lack of knowledge or experience can lead to inaccurate or inappropriate appraisal practice. The COMPETENCY RULE requires an appraiser to have both the knowledge and the experience required to perform a specific appraisal service competently.

The COMPETENCY RULE requires recognition of, and compliance with, laws and regulations that apply to the appraiser or to the assignment.

If an appraiser is offered the opportunity to perform an appraisal service but lacks the necessary knowledge or experience to complete it competently, the appraiser must disclose his or her lack of knowledge or experience to the client before accepting the assignment and then take the necessary or appropriate steps to complete the appraisal service competently. This may be accomplished in various ways, including, but not limited to, personal study by the appraiser, association with an appraiser reasonably believed to have the necessary knowledge or experience, or retention of others who possess the required knowledge or experience.

In an assignment where geographic competency is necessary, an appraiser preparing an appraisal in an unfamiliar location must spend sufficient time to understand the nuances of the local market and the supply and demand factors relating to the specific property type and the location involved. Such understanding will not be imparted solely from a consideration of specific data such as demographics, costs, sales, and rentals. The necessary understanding of local market conditions provides the bridge between a sale and a comparable sale or a rental and a comparable rental. If an appraiser is not in a position to spend the necessary amount of time in a market area to obtain this understanding, affiliation with a qualified local appraiser may be the appropriate response to ensure development of credible assignment results.

Although this Rule requires an appraiser to identify the problem and disclose any deficiency in competence prior to accepting an assignment, facts or conditions uncovered during the course of an assignment could cause an appraiser to discover that he or she lacks the required knowledge or experience to complete the assignment competently. At the point of such discovery, the appraiser is obligated to notify the client and comply with items 2 and 3 of this Rule.

U-15 STANDARD 1: REAL PROPERTY APPRAISAL, DEVELOPMENT

In developing a real property appraisal, an appraiser must identify the problem to be solved, determine the scope of work necessary to solve the problem, and correctly complete research and analyses necessary to produce a credible appraisal.

Comment: STANDARD 1 is directed toward the substantive aspects of developing a credible appraisal of real property. The requirements set forth in STANDARD 1 follow the appraisal development process in the order of topics addressed and can be used by appraisers and the users of appraisal services as a convenient checklist.

Standards Rule 1-1

In developing a real property appraisal, an appraiser must:

- (a) **be aware of, understand, and correctly employ those recognized methods and techniques that are necessary to produce a credible appraisal;**

Comment: This Standards Rule recognizes that the principle of change continues to affect the manner in which appraisers perform appraisal services. Changes and developments in the real estate field have a substantial impact on the appraisal profession. Important changes in the cost and manner of constructing and marketing commercial, industrial, and residential real estate as well as changes in the legal framework in which real property rights and interests are created, conveyed, and mortgaged have resulted in corresponding changes in appraisal theory and practice. Social change has also had an effect on appraisal theory and practice. To keep abreast of these changes and developments, the appraisal profession is constantly reviewing and revising appraisal methods and techniques and devising new methods and techniques to meet new circumstances. For this reason, it is not sufficient for appraisers to simply maintain the skills and the knowledge they possess when they become appraisers. Each appraiser must continuously improve his or her skills to remain proficient in real property appraisal.

- (b) **not commit a substantial error of omission or commission that significantly affects an appraisal; and**

Comment: An appraiser must use sufficient care to avoid errors that would significantly affect his or her opinions and conclusions. Diligence is required to identify and analyze the factors, conditions, data, and other information that would have a significant effect on the credibility of the assignment results.

- (c) **not render appraisal services in a careless or negligent manner, such as by making a series of errors that, although individually might not significantly affect the results of an appraisal, in the aggregate affects the credibility of those results.**

Comment: Perfection is impossible to attain, and competence does not require perfection. However, an appraiser must not render appraisal services in a careless or negligent manner. This Standards Rule requires an appraiser to use due diligence and due care.

Standards Rule 1-2

- (d) identify the effective date of the appraiser's opinions and conclusions;⁹
- (e) identify the characteristics of the property that are relevant to the type and definition of value and intended use of the appraisal,¹⁰ including:
 - (i) its location and physical, legal, and economic attributes;
 - (ii) the real property interest to be valued;
 - (iii) any personal property, trade fixtures, or intangible items that are not real property but are included in the appraisal;
 - (iv) any known easements, restrictions, encumbrances, leases, reservations, covenants, contracts, declarations, special assessments, ordinances, or other items of a similar nature; and

Standards Rule 1-4

In developing a real property appraisal, an appraiser must collect, verify, and analyze all information necessary for credible assignment results.

- (a) When a sales comparison approach is necessary for credible assignment results, an appraiser must analyze such comparable sales data as are available to indicate a value conclusion.
- (b) When a cost approach is necessary for credible assignment results, an appraiser must:
 - (i) develop an opinion of site value by an appropriate appraisal method or technique;
 - (ii) analyze such comparable cost data as are available to estimate the cost new of the improvements (if any); and
 - (iii) analyze such comparable data as are available to estimate the difference between the cost new and the present worth of the improvements (accrued depreciation).

STANDARD 2: REAL PROPERTY APPRAISAL, REPORTING

U-21

In reporting the results of a real property appraisal, an appraiser must communicate each analysis, opinion, and conclusion in a manner that is not misleading.

Comment: STANDARD 2 addresses the content and level of information required in a report that communicates the results of a real property appraisal.

STANDARD 2 does not dictate the form, format, or style of real property appraisal reports. The form, format, and style of a report are functions of the needs of intended users and appraisers. The substantive content of a report determines its compliance.

Standards Rule 2-1

Each written or oral real property appraisal report must:

- (a) **clearly and accurately set forth the appraisal in a manner that will not be misleading;**
- (b) **contain sufficient information to enable the intended users of the appraisal to understand the report properly; and**
- (c) **clearly and accurately disclose all assumptions, extraordinary assumptions, hypothetical conditions, and limiting conditions used in the assignment.**

Standards Rule 2-2

Each written real property appraisal report must be prepared under one of the following three options and prominently state which option is used: Self-Contained Appraisal Report, Summary Appraisal Report, or Restricted Use Appraisal Report.¹⁶

Comment: When the intended users include parties other than the client, either a Self-Contained Appraisal Report or a Summary Appraisal Report must be provided. When the intended users do not include parties other than the client, a Restricted Use Appraisal Report may be provided.

The essential difference among these three options is in the content and level of information provided. The appropriate reporting option and the level of information necessary in the report are dependent on the intended use and the intended users.

An appraiser must use care when characterizing the type of report and level of information communicated upon completion of an assignment. An appraiser may use any other label in addition to, but not in place of, the label set forth in this Standard for the type of report provided.

The report content and level of information requirements set forth in this Standard are minimums for each type of report. An appraiser must supplement a report form, when necessary, to ensure that any intended user of the appraisal is not misled and that the report complies with the applicable content requirements set forth in this Standards Rule.

A party receiving a copy of a Self-Contained Appraisal Report, Summary Appraisal Report, or Restricted Use Appraisal Report in order to satisfy disclosure requirements does not become an intended user of the appraisal unless the appraiser identifies such party as an intended user as part of the assignment.

(a) **The content of a Self-Contained Appraisal Report must be consistent with the intended use of the appraisal and, at a minimum:**

(i) **state the identity of the client and any intended users, by name or type;¹⁷**

Comment: An appraiser must use care when identifying the client to ensure a clear understanding and to avoid violations of the Confidentiality section of the ETHICS RULE. In those rare instances when the client wishes to remain anonymous, an appraiser must still document the identity of the client in the workfile but may omit the client's identity in the report.

Intended users of the report might include parties such as lenders, employees of government agencies, partners of a client, and a client's attorney and accountant.

(ii) **state the intended use of the appraisal;¹⁸**

(iii) **describe information sufficient to identify the real estate involved in the appraisal, including the physical and economic property characteristics relevant to the assignment;¹⁹**

Comment: The real estate involved in the appraisal can be specified, for example, by a legal description, address, map reference, copy of a survey or map, property sketch and/or photographs or the like. The information can include a property sketch and photographs in addition to written comments about the legal, physical, and economic attributes of the real estate relevant to the type and definition of value and intended use of the appraisal.

(iv) **state the real property interest appraised;**

Comment: The statement of the real property rights being appraised must be substantiated, as needed, by copies or summaries of title descriptions or other documents that set forth any known encumbrances.

(v) **state the type and definition of value and cite the source of the definition;**

Comment: Stating the definition of value also requires any comments needed to clearly indicate to intended users how the definition is being applied.²⁰

When reporting an opinion of market value, state whether the opinion of value is:

- in terms of cash or of financing terms equivalent to cash, or
- based on non-market financing or financing with unusual conditions or incentives.

When an opinion of market value is not in terms of cash or based on financing terms equivalent to cash, summarize the terms of such financing and explain their contributions to or negative influence on value.

(vi) state the effective date of the appraisal and the date of the report;²¹

Comment: The effective date of the appraisal establishes the context for the value opinion, while the date of the report indicates whether the perspective of the appraiser on the market and property as of the effective date of the appraisal was prospective, current, or retrospective.

(vii) describe the scope of work used to develop the appraisal;²²

Comment: Because intended users' reliance on an appraisal may be affected by the scope of work, the report must enable them to be properly informed and not misled. Sufficient information includes disclosure of research and analyses performed and might also include disclosure of research and analyses not performed.

When any portion of the work involves significant real property appraisal assistance, the appraiser must describe the extent of that assistance. The signing appraiser must also state the name(s) of those providing the significant real property appraisal assistance in the certification, in accordance with Standards Rule 2-3.²³

(viii) describe the information analyzed, the appraisal methods and techniques employed, and the reasoning that supports the analyses, opinions, and conclusions; exclusion of the sales comparison approach, cost approach, or income approach must be explained;

Comment: A Self-Contained Appraisal Report must include sufficient information to indicate that the appraiser complied with the requirements of STANDARD 1. The amount of detail required will vary with the significance of the information to the appraisal.

The appraiser must provide sufficient information to enable the client and intended users to understand the rationale for the opinions and conclusions, including reconciliation of the data and approaches, in accordance with Standards Rule 1-6.

When reporting an opinion of market value, a summary of the results of analyzing the subject sales, options, and listings in accordance with Standards Rule 1-5 is required.²⁴ If such information is unobtainable, a statement on the efforts undertaken by the appraiser to obtain the information is required. If such information is irrelevant, a statement acknowledging the existence of the information and citing its lack of relevance is required.

- (ix) state the use of the real estate existing as of the date of value and the use of the real estate reflected in the appraisal; and, when an opinion of highest and best use was developed by the appraiser, describe the support and rationale for that opinion;
- (x) clearly and conspicuously:
 - state all extraordinary assumptions and hypothetical conditions; and
 - state that their use might have affected the assignment results; and
- (xi) include a signed certification in accordance with Standards Rule 2-3.

Standards Rule 2-3

Each written real property appraisal report must contain a signed certification that is similar in content to the following form:

I certify that, to the best of my knowledge and belief:

- the statements of fact contained in this report are true and correct.
- the reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions and are my personal, impartial, and unbiased professional analyses, opinions, and conclusions.
- I have no (or the specified) present or prospective interest in the property that is the subject of this report and no (or the specified) personal interest with respect to the parties involved.
- I have no bias with respect to the property that is the subject of this report or to the parties involved with this assignment.
- my engagement in this assignment was not contingent upon developing or reporting predetermined results.
- my compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal.
- my analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the *Uniform Standards of Professional Appraisal Practice*.
- I have (or have not) made a personal inspection of the property that is the subject of this report. (If more than one person signs this certification, the certification must clearly specify which individuals did and which individuals did not make a personal inspection of the appraised property.)⁴¹
- no one provided significant real property appraisal assistance to the person signing this certification. (If there are exceptions, the name of each individual providing significant real property appraisal assistance must be stated.)

Comment: A signed certification is an integral part of the appraisal report. An appraiser who signs any part of the appraisal report, including a letter of transmittal, must also sign this certification.

In an assignment that includes only assignment results developed by the real property appraiser(s), any appraiser(s) who signs a certification accepts full responsibility for all elements of the certification, for the assignment results, and for the contents of the appraisal report. In an assignment that includes personal property, business or intangible asset assignment results not developed by the real property appraiser(s), any real property appraiser(s) who signs a certification accepts full responsibility for the real property elements of the certification, for the real property assignment results, and for the real property contents of the appraisal report.

When a signing appraiser(s) has relied on work done by appraisers and others who do not sign the certification, the signing appraiser is responsible for the decision to rely on their work. The signing appraiser(s) is required to have a reasonable basis for believing that those individuals performing the work are competent. The signing appraiser(s) also must have no reason to doubt that the work of those individuals is credible.

The names of individuals providing significant real property appraisal assistance who do not sign a certification must be stated in the certification. It is not required that the description of their assistance be contained in the certification, but disclosure of their assistance is required in accordance with Standards Rule 2-2(a), (b), or (c)(vii), as applicable.⁴²

STANDARD 6: MASS APPRAISAL, DEVELOPMENT AND REPORTING

In developing a mass appraisal, an appraiser must be aware of, understand, and correctly employ those recognized methods and techniques necessary to produce and communicate credible mass appraisals.

Comment: STANDARD 6 applies to all mass appraisals of real or personal property regardless of the purpose or use of such appraisals.⁶² STANDARD 6 is directed toward the substantive aspects of developing and communicating credible analyses, opinions, and conclusions in the mass appraisal of properties. Mass appraisals can be prepared with or without computer assistance. The reporting and jurisdictional exceptions applicable to public mass appraisals prepared for ad valorem taxation do not apply to mass appraisals prepared for other purposes.

A mass appraisal includes:

- 1) identifying properties to be appraised;
- 2) defining market area of consistent behavior that applies to properties;
- 3) identifying characteristics (supply and demand) that affect the creation of value in that market area;
- 4) developing a model structure that reflects the relationship among the characteristics affecting value in the market area;
- 5) calibrating the model structure to determine the contribution of the individual characteristics affecting value;
- 6) applying the conclusions reflected in the model to the characteristics of the property(ies) being appraised; and
- 7) reviewing the mass appraisal results.

The JURISDICTIONAL EXCEPTION RULE may apply to several sections of STANDARD 6 because ad valorem tax administration is subject to various state, county, and municipal laws.

Standards Rule 6-1

In developing a mass appraisal, an appraiser must:

- (a) **be aware of, understand, and correctly employ those recognized methods and techniques necessary to produce a credible mass appraisal;**

Comment: Mass appraisal provides for a systematic approach and uniform application of appraisal methods and techniques to obtain estimates of value that allow for statistical review and analysis of results.

This requirement recognizes that the principle of change continues to affect the manner in which appraisers perform mass appraisals. Changes and developments in the real property and personal property fields have a substantial impact on the appraisal profession.

To keep abreast of these changes and developments, the appraisal profession is constantly reviewing and revising appraisal methods and techniques and devising new methods and techniques to meet new circumstances. For this reason it is not sufficient for appraisers to simply maintain the skills and the knowledge they possess when they become appraisers.

Each appraiser must continuously improve his or her skills to remain proficient in mass appraisal.

- (b) **not commit a substantial error of omission or commission that significantly affects a mass appraisal; and**

Comment: An appraiser must use sufficient care to avoid errors that would significantly affect his or her opinions and conclusions. Diligence is required to identify and analyze the factors, conditions, data, and other information that would have a significant effect on the credibility of the assignment results.

- (c) **not render a mass appraisal in a careless or negligent manner.**

Comment: Perfection is impossible to attain, and competence does not require perfection. However, an appraiser must not render appraisal services in a careless or negligent manner. This Standards Rule requires an appraiser to use due diligence and due care.

Standards Rule 6-2

In developing a mass appraisal, an appraiser must:

- (a) **identify the client and other intended users;**⁶³
 (b) **identify the intended use of the appraisal;**⁶⁴

Comment: An appraiser must not allow the intended use of an assignment or a client's objectives to cause the assignment results to be biased.

- (c) **identify the type and definition of value, and, if the value opinion to be developed is market value, ascertain whether the value is to be the most probable price:**
- (i) **in terms of cash; or**
 - (ii) **in terms of financial arrangements equivalent to cash; or**
 - (iii) **in such other terms as may be precisely defined; and**
 - (iv) **if the opinion of value is based on non-market financing or financing with unusual conditions or incentives, the terms of such financing must be clearly identified and the appraiser's opinion of their contributions to or negative influence on value must be developed by analysis of relevant market data;**

Comment: For certain types of appraisal assignments in which a legal definition of market value has been established and takes precedence, the JURISDICTIONAL EXCEPTION RULE may apply.

- (d) **identify the effective date of the appraisal;**⁶⁵

- (e) **identify the characteristics of the properties that are relevant to the type and definition of value and intended use⁶⁶, including:**
- (i) **the group with which a property is identified according to similar market influence;**
 - (ii) **the appropriate market area and time frame relative to the property being valued; and**
 - (iii) **their location and physical, legal, and economic characteristics;**

Comment: The properties must be identified in general terms, and each individual property in the universe must be identified, with the information on its identity stored or referenced in its property record.

When appraising proposed improvements, an appraiser must examine and have available for future examination, plans, specifications, or other documentation sufficient to identify the extent and character of the proposed improvements.⁶⁷

Ordinarily, proposed improvements are not appraised for ad valorem tax. Appraisers, however, are sometimes asked to provide opinions of value of proposed improvements so that developers can estimate future property tax burdens. Sometimes units in condominiums and planned unit developments are sold with an interest in unbuilt community property, the pro rata value of which, if any, must be considered in the analysis of sales data.

- (f) **identify the characteristics of the market that are relevant to the purpose and intended use of the mass appraisal including:**
- (i) **location of the market area;**
 - (ii) **physical, legal, and economic attributes;**
 - (iii) **time frame of market activity; and**
 - (iv) **property interests reflected in the market;**
- (g) **in appraising real property or personal property:**
- (i) **identify the appropriate market area and time frame relative to the property being valued;**
 - (ii) **when the subject is real property, identify and consider any personal property, trade fixtures, or intangibles that are not real property but are included in the appraisal;**
 - (iii) **when the subject is personal property, identify and consider any real property or intangibles that are not personal property but are included in the appraisal;**
 - (iv) **identify known easements, restrictions, encumbrances, leases, reservations, covenants, contracts, declarations, special assessments, ordinances, or other items of similar nature; and**

- (v) **identify and analyze whether an appraised fractional interest, physical segment or partial holding contributes pro rata to the value of the whole;**

Comment: The above requirements do not obligate the appraiser to value the whole when the subject of the appraisal is a fractional interest, physical segment, or a partial holding. However, if the value of the whole is not identified, the appraisal must clearly reflect that the value of the property being appraised cannot be used to develop the value opinion of the whole by mathematical extension.

- (h) **analyze the relevant economic conditions at the time of the valuation, including market acceptability of the property and supply, demand, scarcity, or rarity;**
- (i) **identify any extraordinary assumptions and any hypothetical conditions necessary in the assignment; and**

Comment: An extraordinary assumption may be used in an assignment only if:

- it is required to properly develop credible opinions and conclusions;
- the appraiser has a reasonable basis for the extraordinary assumption;
- use of the extraordinary assumption results in a credible analysis; and
- the appraiser complies with the disclosure requirements set forth in USPAP for extraordinary assumptions.

A hypothetical condition may be used in an assignment only if:

- use of the hypothetical condition is clearly required for legal purposes, for purposes of reasonable analysis, or for purposes of comparison;
- use of the hypothetical condition results in a credible analysis; and
- the appraiser complies with the disclosure requirements set forth in USPAP for hypothetical conditions.

- (j) **determine the scope of work necessary to produce credible assignment results in accordance with the SCOPE OF WORK RULE.⁶⁸**

Standards Rule 6-3

When necessary for credible assignment results, an appraiser must:

- (a) **in appraising real property, identify and analyze the effect on use and value of the following factors: existing land use regulations, reasonably probable modifications of such regulations, economic supply and demand, the physical adaptability of the real estate, neighborhood trends, and highest and best use of the real estate; and**

Comment: This requirement sets forth a list of factors that affect use and value. In considering neighborhood trends, an appraiser must avoid stereotyped or biased assumptions relating to race, age, color, gender, or national origin or an assumption that race, ethnic, or religious homogeneity is necessary to maximize value in a neighborhood. Further, an appraiser must avoid making an unsupported assumption or premise about neighborhood decline, effective age, and remaining life. In considering highest and best use, an appraiser must develop the concept to the extent required for a proper solution to the appraisal problem.

- (b) **in appraising personal property: identify and analyze the effects on use and value of industry trends, value-in-use, and trade level of personal property. Where applicable, analyze the current use and alternative uses to encompass what is profitable, legal, and physically possible, as relevant to the type and definition of value and intended use of the appraisal. Personal property has several measurable marketplaces; therefore, the appraiser must define and analyze the appropriate market consistent with the type and definition of value.**

Comment: The appraiser must recognize that there are distinct levels of trade and each may generate its own data. For example, a property may have a different value at a wholesale level of trade, a retail level of trade, or under various auction conditions. Therefore, the appraiser must analyze the subject property within the correct market context.

Standards Rule 6-4

In developing a mass appraisal, an appraiser must:

- (a) **identify the appropriate procedures and market information required to perform the appraisal, including all physical, functional, and external market factors as they may affect the appraisal;**

Comment: Such efforts customarily include the development of standardized data collection forms, procedures, and training materials that are used uniformly on the universe of properties under consideration.

- (b) **employ recognized techniques for specifying property valuation models; and**

Comment: The formal development of a model in a statement or equation is called model specification. Mass appraisers must develop mathematical models that, with reasonable accuracy, represent the relationship between property value and supply and demand factors, as represented by quantitative and qualitative property characteristics. The models may be specified using the cost, sales comparison, or income approaches to value. The specification format may be tabular, mathematical, linear, nonlinear, or any other structure suitable for representing the observable property characteristics. Appropriate approaches must be used in appraising a class of properties. The concept of recognized techniques applies to both real and personal property valuation models.

- (c) **employ recognized techniques for calibrating mass appraisal models.**

Comment: Calibration refers to the process of analyzing sets of property and market data to determine the specific parameters of a model. The table entries in a cost manual are examples of calibrated parameters, as well as the coefficients in a linear or nonlinear model. Models must be calibrated using recognized techniques, including, but not limited to, multiple linear regression, nonlinear regression, and adaptive estimation.

Standards Rule 6-5

In developing a mass appraisal, when necessary for credible assignment results, an appraiser must:

- (a) **collect, verify, and analyze such data as are necessary and appropriate to develop:**
- (i) **the cost new of the improvements;**
 - (ii) **accrued depreciation;**
 - (iii) **value of the land by sales of comparable properties;**

- (iv) **value of the property by sales of comparable properties;**
- (v) **value by capitalization of income or potential earnings—i.e., rentals, expenses, interest rates, capitalization rates, and vacancy data;**

Comment: This Standards Rule requires appraisers engaged in mass appraisal to take reasonable steps to ensure that the quantity and quality of the factual data that are collected are sufficient to produce credible appraisals. For example, in real property, where applicable and feasible, systems for routinely collecting and maintaining ownership, geographic, sales, income and expense, cost, and property characteristics data must be established. Geographic data must be contained in as complete a set of cadastral maps as possible, compiled according to current standards of detail and accuracy. Sales data must be collected, confirmed, screened, adjusted, and filed according to current standards of practice. The sales file must contain, for each sale, property characteristics data that are contemporaneous with the date of sale. Property characteristics data must be appropriate and relevant to the mass appraisal models being used. The property characteristics data file must contain data contemporaneous with the date of appraisal including historical data on sales, where appropriate and available. The data collection program must incorporate a quality control program, including checks and audits of the data to ensure current and consistent records.

- (b) **base estimates of capitalization rates and projections of future rental rates and/or potential earnings capacity, expenses, interest rates, and vacancy rates on reasonable and appropriate evidence;**⁶⁹

Comment: This requirement calls for an appraiser, in developing income and expense statements and cash flow projections, to weigh historical information and trends, current market factors affecting such trends, and reasonably anticipated events, such as competition from developments either planned or under construction.

- (c) **identify and, as applicable, analyze terms and conditions of any available leases; and**
- (d) **identify the need for and extent of any physical inspection.**⁷⁰

Standards Rule 6-6

When necessary for credible assignment results in applying a calibrated mass appraisal model an appraiser must:

- (a) **value improved parcels by recognized methods or techniques based on the cost approach, the sales comparison approach, and income approach;**
- (b) **value sites by recognized methods or techniques; such techniques include but are not limited to the sales comparison approach, allocation method, abstraction method, capitalization of ground rent, and land residual technique;**
- (c) **when developing the value of a leased fee estate or a leasehold estate, analyze the effect on value, if any, of the terms and conditions of the lease;**

Comment: In ad valorem taxation the appraiser may be required by rules or law to appraise the property as if in fee simple, as though unencumbered by existing leases. In such cases,

market rent would be used in the appraisal, ignoring the effect of the individual, actual contract rents.

- (d) **analyze the effect on value, if any, of the assemblage of the various parcels, divided interests, or component parts of a property; the value of the whole must not be developed by adding together the individual values of the various parcels, divided interests, or component parts; and**

Comment: When the value of the whole has been established and the appraiser seeks to value a part, the value of any such part must be tested by reference to appropriate market data and supported by an appropriate analysis of such data.

- (e) **when analyzing anticipated public or private improvements, located on or off the site, analyze the effect on value, if any, of such anticipated improvements to the extent they are reflected in market actions.**

Standards Rule 6-7

In reconciling a mass appraisal an appraiser must:

- (a) **reconcile the quality and quantity of data available and analyzed within the approaches used and the applicability and relevance of the approaches, methods and techniques used; and**
- (b) **employ recognized mass appraisal testing procedures and techniques to ensure that standards of accuracy are maintained.**

Comment: It is implicit in mass appraisal that, even when properly specified and calibrated mass appraisal models are used, some individual value conclusions will not meet standards of reasonableness, consistency, and accuracy. However, appraisers engaged in mass appraisal have a professional responsibility to ensure that, on an overall basis, models produce value conclusions that meet attainable standards of accuracy. This responsibility requires appraisers to evaluate the performance of models, using techniques that may include but are not limited to, goodness-of-fit statistics, and model performance statistics such as appraisal-to-sale ratio studies, evaluation of hold-out samples, or analysis of residuals.

Standards Rule 6-8

A written report of a mass appraisal must clearly communicate the elements, results, opinions, and value conclusions of the appraisal.

Each written report of a mass appraisal must:

- (a) **clearly and accurately set forth the appraisal in a manner that will not be misleading;**
- (b) **contain sufficient information to enable the intended users of the appraisal to understand the report properly;**

Comment: Documentation for a mass appraisal for ad valorem taxation may be in the form of (1) property records, (2) sales ratios and other statistical studies, (3) appraisal manuals and documentation, (4) market studies, (5) model building documentation, (6) regulations, (7) statutes, and (8) other acceptable forms.

- (c) **clearly and accurately disclose all assumptions, extraordinary assumptions, hypothetical conditions, and limiting conditions used in the assignment;**

Comment: The report must clearly and conspicuously:

- state all extraordinary assumptions and hypothetical conditions; and
 - state that their use might have affected the assignment results.
- (d) **state the identity of the client and any intended users, by name or type;**⁷¹
- (e) **state the intended use of the appraisal;**⁷²
- (f) **disclose any assumptions or limiting conditions that result in deviation from recognized methods and techniques or that affect analyses, opinions, and conclusions;**
- (g) **set forth the effective date of the appraisal and the date of the report;**

Comment: In ad valorem taxation the effective date of the appraisal may be prescribed by law. If no effective date is prescribed by law, the effective date of the appraisal, if not stated, is presumed to be contemporaneous with the data and appraisal conclusions.

The effective date of the appraisal establishes the context for the value opinion, while the date of the report indicates whether the perspective of the appraiser on the market and property as of the effective date of the appraisal was prospective, current, or retrospective.⁷³

- (h) **state the type and definition of value and cite the source of the definition;**

Comment: Stating the type and definition of value also requires any comments needed to clearly indicate to intended users how the definition is being applied.⁷⁴

When reporting an opinion of market value, state whether the opinion of value is:

- In terms of cash or of financing terms equivalent to cash; or
- Based on non-market financing with unusual conditions or incentives.

When an opinion of market value is not in terms of cash or based on financing terms equivalent to cash, summarize the terms of such financing and explain their contributions to or negative influence on value.

- (i) **identify the properties appraised including the property rights;**

Comment: The report documents the sources for location, describing and listing the property. When applicable, include references to legal descriptions, addresses, parcel identifiers, photos, and building sketches. In mass appraisal this information is often included in property records. When the property rights to be appraised are specified in a statute or court ruling, the law must be referenced.

- (j) **describe the scope of work used to develop the appraisal;⁷⁵ exclusion of the sales comparison approach, cost approach, or income approach must be explained;**

Comment: Because intended users' reliance on an appraisal may be affected by the scope of work, the report must enable them to be properly informed and not misled. Sufficient information includes disclosure of research and analyses performed and might also include disclosure of research and analyses not performed. ,

When any portion of the work involves significant mass appraisal assistance, the appraiser must describe the extent of that assistance. The signing appraiser must also state the name(s) of those providing the significant mass appraisal assistance in the certification, in accordance with Standards Rule 6-9.⁷⁶

- (k) **describe and justify the model specification(s) considered, data requirements, and the model(s) chosen;**

Comment: The appraiser must provide sufficient information to enable the client and intended users to have confidence that the process and procedures used conform to accepted methods and result in credible value conclusions. In the case of mass appraisal for ad valorem taxation, stability and accuracy are important to the credibility of value opinions. The report must include a discussion of the rationale for each model, the calibration techniques to be used, and the performance measures to be used.

- (l) **describe the procedure for collecting, validating, and reporting data;**

Comment: The report must describe the sources of data and the data collection and validation processes. Reference to detailed data collection manuals must be made, as appropriate, including where they may be found for inspection.

- (m) **describe calibration methods considered and chosen, including the mathematical form of the final model(s); describe how value conclusions were reviewed; and, if necessary, describe the availability of individual value conclusions;**

- (n) **when an opinion of highest and best use, or the appropriate market or market level was developed, discuss how that opinion was determined;**

Comment: The mass appraisal report must reference case law, statute, or public policy that describes highest and best use requirements. When actual use is the requirement, the report must discuss how use-value opinions were developed. The appraiser's reasoning in support of the highest and best use opinion must be provided in the depth and detail required by its significance to the appraisal.

- (o) **identify the appraisal performance tests used and set forth the performance measures attained;**

- (p) **describe the reconciliation performed, in accordance with Standards Rule 6-7; and**

- (q) **include a signed certification in accordance with Standards Rule 6-9.**

Standards Rule 6-9

Each written mass appraisal report must contain a signed certification that is similar in content to the following form:

I certify that, to the best of my knowledge and belief:

- the statements of fact contained in this report are true and correct.
- the reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions, and are my personal, impartial, and unbiased professional analyses, opinions, and conclusions.
- I have no (or the specified) present or prospective interest in the property that is the subject of this report, and I have no (or the specified) personal interest with respect to the parties involved.
- I have no bias with respect to any property that is the subject of this report or to the parties involved with this assignment.
- my engagement in this assignment was not contingent upon developing or reporting predetermined results.
- my compensation for completing this assignment is not contingent upon the reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal.
- my analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the *Uniform Standards of Professional Appraisal Practice*.
- I have (or have not) made a personal inspection of the properties that are the subject of this report. (If more than one person signs the report, this certification must clearly specify which individuals did and which individuals did not make a personal inspection of the appraised property.)⁷⁷
- no one provided significant mass appraisal assistance to the person signing this certification. (If there are exceptions, the name of each individual providing significant mass appraisal assistance must be stated.)

Comment: The above certification is not intended to disturb an elected or appointed assessor's work plans or oaths of office. A signed certification is an integral part of the appraisal report. An appraiser, who signs any part of the mass appraisal report, including a letter of transmittal, must also sign this certification.

In an assignment that includes only assignment results developed by the real property appraiser(s), any appraiser(s) who signs a certification accepts full responsibility for all elements of the certification, for the assignment results, and for the contents of the appraisal report. In an assignment that includes personal property assignment results not developed by the real property appraiser(s), any real property appraiser(s) who signs a certification accepts full responsibility for the real property elements of the certification, for the real property assignment results, and for the real property contents of the appraisal report.

In an assignment that includes only assignment results developed by the personal property appraiser(s), any appraiser(s) who signs a certification accepts full responsibility for all elements of the certification, for the assignment results, and for the contents of the appraisal report. In an assignment that includes real property assignment results not developed by the personal property appraiser(s), any personal property appraiser(s) who signs a certification accepts full responsibility for the personal property elements of the certification, for the

ADVISORY OPINION 32 (AO-32)

This communication by the Appraisal Standards Board (ASB) does not establish new standards or interpret existing standards. Advisory Opinions are issued to illustrate the applicability of appraisal standards in specific situations and to offer advice from the ASB for the resolution of appraisal issues and problems.

SUBJECT: Ad Valorem Property Tax Appraisal and Mass Appraisal Assignments

APPLICATION: Real Property, Personal Property

THE ISSUE:

Ad valorem is Latin for “according to value.” In ad valorem taxation assignments, the appraisal or mass appraisal is used to establish a value basis for a political subdivision’s tax burden. This guidance is provided to address the application of USPAP to appraisal and mass appraisal assignments for ad valorem taxation.

As used in this Advisory Opinion, “appraisal assignments” are those covered by STANDARDS 1 and 2 or STANDARDS 7 and 8. “Mass appraisal assignments” are those covered by STANDARD 6.

ADVICE FROM THE ASB ON THE ISSUE**Application of Standards**

Ad valorem taxation assignments include both appraisal assignments and mass appraisal assignments.

- STANDARDS 1 & 2 address the requirements for development of an appraisal and reporting of appraisal results for a particular real property interest as of a given date.
- STANDARD 6 addresses the requirements for development of a mass appraisal and reporting of mass appraisal results for real property and personal property. Mass appraisal is the valuation of a universe of properties (many properties) as of a given date using standard methodology, employing common data, and allowing for statistical testing. Mass appraisal provides for a systematic approach and uniform application of appraisal methods and techniques to obtain estimates of values that allow for statistical review and analysis of results.
- STANDARDS 7 & 8 address the requirements for development of an appraisal and reporting of appraisal results for a particular personal property interest as of a given date.

The keys to distinguishing a mass appraisal are: 1) the subject of the appraisal is a “universe” of properties, meaning more than one property; and 2) the assignment involves standard methodology employing common data that allows for statistical testing. These models may be based on the cost approach, the income approach and/or the sales comparison approach to value.

Identification of Intended Users

In ad valorem taxation assignments, the client is typically the government or taxing authority that engages the appraiser. As defined in USPAP, the intended users include the client. Through communication with the client, the appraiser may identify other intended users. A party receiving a copy of a report in order to satisfy disclosure requirements does not become an intended user of the appraisal or mass appraisal unless the appraiser identifies such party as an intended user as part of the assignment.

1 of 1 DOCUMENT

ROBERT EDELMAN, Appellant, v. THE STATE OF WASHINGTON on the relation of The Public Disclosure Commission, Respondent.

No. 28563-1-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

116 Wn. App. 876; 68 P.3d 296; 2003 Wash. App. LEXIS 958

May 13, 2003, Filed

SUBSEQUENT HISTORY: [***1] Counsel Amended June 5, 2003.
Review granted by Edelman v. State ex rel. Public Disclosure Comm'n, 150 Wn.2d 1025, 82 P.3d 242, 2004 Wash. LEXIS 2 (Wash., Jan. 7, 2004)

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant individual challenged a decision from the Superior Court from Thurston County, Washington, which dismissed a petition against respondent Washington Public Disclosure Commission (PDC) that was seeking to repeal Wash. Admin. Code § 390-16-311.

OVERVIEW: The PDC promulgated Wash. Admin. Code § 390-16-311 in order to resolve a perceived ambiguity in Wash. Rev. Code §§ 42.17.640, 42.17.660. Wash. Admin. Code § 390-16-311 released local affiliates from having to combine their contributions towards a single limit when a parent or umbrella of an organization made no contribution to a campaign. The individual contended that Wash. Admin. Code § 390-16-311 improperly modified Wash. Rev. Code §§ 42.17.640, 42.17.660. He filed a petition against the PDC, which sought to repeal Wash. Admin. Code § 390-16-311. After the petition was dismissed, the individual sought review. In reversing, the court determined that the PDC had the authority to implement rules involving campaign limits. However, the PDC was not authorized to promulgate rules that amended or changed legislative enactments, pursuant to Wash. Rev. Code § 34.05.570(2)(c). The court noted that Wash. Rev. Code § 42.17.660(2) was not ambiguous. The court found that Wash. Admin. Code § 390-16-311 was invalid because it negated the plain language of Wash. Rev. Code § 42.17.660(2) and subverted an intention to reduce the influence of large organizational contributions in state campaigns.

OUTCOME: The dismissal of the individual's petition was reversed.

CORE TERMS: entity, campaign, campaign contribution, labor union, affiliated, initiative's, ambiguity, election, umbrella, subsidiary, statutory authority, political campaign, ambiguous, invalid, public disclosure, collective bargaining, organizational, promulgating, contributors, affiliate, exceeded, sentence, amend, plain language, unambiguous, aggregation, capricious, Administrative Law, contributing, candidate

LexisNexis(R) Headnotes

Governments > State & Territorial Governments > Elections

[HN1] Wash. Rev. Code § 42.17.640(1) limits individual campaign contributions to \$ 500 per candidate.

Governments > State & Territorial Governments > Elections

116 Wn. App. 876, *; 68 P.3d 296, **;
2003 Wash. App. LEXIS 958, ***

[HN2] Wash. Rev. Code § 42.17.660(2) provides that a contribution by a national, state, or single local unit of an organization or entity will be attributed to all other parts of the organization or entity for purposes of determining Wash. Rev. Code § 42.17.640's \$ 500 individual contribution limit to a political campaign in the State of Washington.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Communications Law > Content Regulation > Advertising

Governments > State & Territorial Governments > Elections

[HN3] The Legislature has empowered the Washington Public Disclosure Commission to interpret, to implement, to investigate, and to determine violations of the state's campaign finance requirements and contribution limits, lobbying, political advertising, and public officials' financial affairs reports, and to adopt rules to carry out these tasks. Wash. Rev. Code § 42.17.370(1).

Administrative Law > Separation of Powers > Legislative Controls > General Overview

[HN4] An agency has only the authority that the legislature grants it by statute.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Validity

Administrative Law > Agency Rulemaking > State Proceedings

Administrative Law > Separation of Powers > Legislative Controls > General Overview

[HN5] An agency cannot promulgate rules that amend or change legislative enactments. And the courts must declare an agency's rule invalid if the rule exceeds the agency's statutory power. Wash. Rev. Code § 34.05.570(2)(c).

Administrative Law > Agency Rulemaking > State Proceedings

[HN6] See Wash. Rev. Code § 34.05.570(2)(c).

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Administrative Law > Judicial Review > Standards of Review > De Novo Review

[HN7] An appellate court retains the authority to interpret a statute de novo. A statute is ambiguous if its language is capable of more than one reasonable interpretation. Although a court generally defers to an agency's rule-making application of a statute, when a statute is unambiguous, it accords no such deference to an agency's interpretation.

Governments > State & Territorial Governments > Elections

[HN8] Wash. Rev. Code § 42.17.660 requires aggregation and attribution of contributions by affiliated entities. Section 42.17.660(2) provides that two or more entities are treated as a single entity for purposes of political campaign contribution limits: Two or more entities are treated as a single entity if one of the two or more entities is a subsidiary, branch, or department of a corporation or a local unit, branch, or affiliate of a trade association, labor union, or collective bargaining association. All contributions made by a person or political committee whose contribution or expenditure activity is financed, maintained, or controlled by a trade association, labor union, collective bargaining organization, or the local unit of a trade association, labor union, or collective bargaining organization are considered made by the same person or entity.

Governments > Legislation > Interpretation

Governments > State & Territorial Governments > Elections

[HN9] When read together with its related statutory subsections, Wash. Rev. Code §§ 42.17.640(1), 42.17.660(1), Wash. Rev. Code § 42.17.660(2) clearly provides that where any sub-unit of a corporation or labor union makes a political campaign contribution, this contribution is considered to have been made by its affiliates as well for purposes of determining whether the \$ 500 individual contribution limit of Wash. Rev. Code § 42.17.640(1) has been exceeded. Section 42.17.660 does not carve out an exemption for situations in which the parent organization does not participate in a particular campaign; rather, the focus is on the inter-relationship of affiliated entities.

Governments > Legislation > Interpretation

[HN10] An appellate court will not manufacture ambiguity where none exists.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Administrative Law > Agency Rulemaking > State Proceedings

Admiralty Law > Personal Injuries > Maritime Tort Actions > Multiple Defendants > Contribution

[HN11] An appellate court does not defer to an agency determination that conflicts with a statute. Moreover, an agency's rule that conflicts with a statute is beyond that agency's authority and requires invalidation of the rule.

Administrative Law > Agency Rulemaking > State Proceedings

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Governments > State & Territorial Governments > Elections

[HN12] In promulgating Wash. Admin. Code § 390-16-311, the Washington Public Disclosure Commission exceeded its statutory authority. Following the legislature's mandate in Wash. Rev. Code § 34.05.570(2)(c), Wash. Admin. Code § 390-16-311 is invalid.

SUMMARY: Nature of Action: Action for judicial review of an administrative decision denying a petition to repeal an administrative rule implementing provisions of the Fair Campaign Practices Act. The statutory provisions limited individual campaign contributions to \$ 500 and provided that a contribution by a corporation or labor union, or subentity thereof, would be attributed to all affiliates of the organization. The administrative rule provided that a contribution by a subentity would not be attributed to all affiliates of the organization if the parent or umbrella organization did not also contribute to the campaign in question.

Superior Court: The Superior Court for Thurston County, No. 01-2-00912-2, Richard D. Hicks, J., dismissed the action on March 15, 2002.

Court of Appeals: Holding that the statutory provisions relating to campaign contribution limits were unambiguous and that the administrative rule improperly modified the statutory provisions, the court *reverses* the judgment and *invalidates* the rule.

HEADNOTES WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] **Administrative Law -- Agency Authority -- Source -- Statutory Provisions** An administrative agency possesses only such authority as the legislature grants by statute.

[2] **Administrative Law -- Rules -- Validity -- Conflict With Statute -- Amendment of Statute -- In General** An administrative agency has no authority to adopt a rule that amends or changes a statute.

[3] **Statutes -- Construction -- Review -- Standard of Review** An appellate court retains the authority to interpret a statute de novo.

[4] **Statutes -- Construction -- Ambiguity -- What Constitutes -- In General** A statute is not ambiguous unless its language is capable of more than one reasonable interpretation.

[5] **Administrative Law -- Rules -- Interpretative Rules -- Judicial Deference -- Ambiguity -- Necessity** A court will not defer to an agency's interpretation of a statute as expressed in a rule adopted pursuant to the statute if the statute is unambiguous.

[6] **Statutes -- Construction -- Ambiguity -- What Constitutes -- Creation by Court** A court will not manufacture an ambiguity in a statute where none exists.

[7] **Administrative Law -- Rules -- Validity -- Conflict With Statute -- Effect** An administrative rule is invalid if it conflicts with the language and purpose of the statute it purports to implement.

[8] **Elections -- Fair Campaign Practices Act -- Purposes** One purpose of the campaign contribution provisions of the Fair Campaign Practices Act (RCW 42.17.610-.790) is to reduce the influence of large organizational contributors to campaigns and elections in the state.

[9] **Elections -- Fair Campaign Practices Act -- Campaign Contributions -- Limit For Affiliated Entities -- Contribution by Parent Organization -- Necessity** RCW 42.17.660(2) unambiguously provides that multiple affiliated entities of a corporation or labor union are treated as a single entity and share a single \$ 500 campaign contribution limit

as set by RCW 42.17.640(1), regardless of whether the parent organization also has made a monetary contribution to the campaign. WAC 390-16-311, which requires the aggregation of affiliated entities for a single contribution limit only when the parent organization makes a monetary contribution to the campaign, is inconsistent with RCW 42.17.660(2) and is invalid.

COUNSEL: *John J. White, Jr.*, and *Kevin B. Hansen*, for appellant.

Christine O. Gregoire, Attorney General, and *Nancy J. Krier*, Assistant, for respondent.

JUDGES: WRITTEN BY: Hunt, C.J. CONCURRED IN BY: Morgan, J., Bridgewater, J.

OPINION BY: HUNT

OPINION

[**297] [*878] Hunt, C.J. -- Robert Edelman appeals the trial court's dismissal of his petition to repeal WAC 390-16-311. The Public Disclosure Commission (PDC) promulgated WAC 390-16-311 to resolve a perceived ambiguity in RCW 42.17.640 and RCW 42.17.660 relating to campaign contribution limits for large organizations. The legislature had enacted these statutes to implement voter-approved Initiative 134, the Fair Campaign Practices Act.17, RCW.

Edelman argues that in promulgating WAC 390-16-311, the PDC exceeded its statutory authority. Finding RCW 42.17.640 and RCW 42.17.660 unambiguous, we hold that WAC 390-16-311 improperly modifies the statutes, we invalidate the rule, and we reverse [***2] the trial court.

[*879] FACTS

I. BACKGROUND

A. Initiative 134

Washington voters passed Initiative 134 (I-134), the Fair Campaign Practices Act, on November 3, 1992. LAWS OF 1993, ch. 2, §§ 1-36. The legislature passed laws to implement this initiative in RCW 42.17.640 and RCW 42.17.660. LAWS OF 1993, ch. 2, §§ 4, 6. One of the initiative's primary purposes was to establish campaign contribution limits and to reduce the influence of large organizational contributors. RCW 42.17.620.

[**298] RCW 42.17.640(1) [HN1] limits individual campaign contributions to \$ 500 per candidate. RCW 42.17.660(2) [HN2] provides that a contribution by a national, state, or single local unit of an organization or entity will be attributed to all other parts of the organization or entity for purposes of determining RCW 42.17.640's \$ 500 individual contribution limit to a political campaign in the State of Washington.

B. Public Disclosure Commission [HN3]

The legislature has empowered the PDC ¹ to interpret, to implement, [***3] to investigate, and to determine violations of the state's campaign finance requirements and contribution limits, lobbying, political advertising, and public officials' financial affairs reports, and to adopt rules to carry out these tasks. RCW 42.17.370.

¹ The Public Disclosure Commission is a state agency governed by five citizen members. RCW 42.17.350(1).

In December 1992, the PDC began receiving inquiries about what rules it might adopt to implement RCW 42.17.660, especially RCW 42.17.660(2). The questions focused on (1) the effect on the individual campaign contribution limit when a parent or umbrella organization does not contribute to an election campaign governed by RCW 42.17.640 [*880] and RCW 42.17.660; and (2) what qualifies as an entity's "affiliate" within the meaning of the statute for aggregation of contributions subject to a single \$ [***4] 500 limit.

After holding several public meetings and rulemaking hearings, the PDC concluded that RCW 42.17.660 was ambiguous because it did not address how the contribution limit applies to local units when a parent or umbrella organization makes no contributions. To clarify this perceived ambiguity, the PDC adopted WAC 390-16-309 and WAC 390-16-311. WAC 390-16-311 essentially released local affiliates from having to combine their contributions toward a single limit

under RCW 42.17.640 and RCW 42.17.660 when the parent or umbrella of the organization makes no contribution to a particular campaign.

II. ADMINISTRATIVE AND JUDICIAL REVIEW

A. PDC

In December 2000, Robert Edelman petitioned the PDC to amend WAC 390-16-309 and to repeal WAC 390-16-311. On February 27, 2001, the PDC conducted an open public hearing on Edelman's petition.

Edelman argued that (1) WAC 390-16-311 is arbitrary and capricious because it amends RCW 42.17.660 by adding an exception to the single entity requirement; (2) federal laws governing federal elections do not allow a controlled entity [***5] to maintain its own contribution limit; (3) WAC 390-16-311 grants exceptions to selected organizations without authority; and (4) because this rule illegally permits multiple units to have separate contribution limits, it thereby gives organizational contributors a disproportionate influence on elections, contrary to the purpose and intent of the initiative and the statute. The PDC countered that WAC 390-16-311 does not create an exception to the single entity rule but, rather, was a practical application of the statute.

[*881] The PDC rejected Edelman's petition, finding that (1) WAC 390-16-311 does not amend RCW 42.17.660 in an arbitrary and capricious manner; (2) federal law does not preempt the state's implementation of its own rules; (3) the rule does not grant an "exception" but rather is a practical application of the actual statutory language, consistent with the scope of the PDC's authority; and (4) Edelman's petition sought to regulate large organizational contributors in a manner that the PDC deemed to be an unreasonable interpretation of RCW 42.17.660. The PDC recommended that Edelman ask the legislature to impose additional [***6] restrictions on large organizations' ability to contribute to state political campaigns.

Edelman sought review of the PDC's decision by the governor, who rejected the same arguments that Edelman had presented to the PDC.

[**299] B. Judicial Review

Edelman next sought judicial review in Thurston County Superior Court. Edelman argued that (1) WAC 390-16-311 is contrary to I-134; (2) the PDC had exceeded its statutory authority in adopting the rule; (3) the rule is arbitrary, capricious, and inconsistent with federal campaign laws and regulations; and (4) the PDC acted improperly and contrary to law when it denied his petition to repeal the rule.

The superior court dismissed Edelman's petition. Edelman appeals.

ANALYSIS

I. SCOPE OF PDC AUTHORITY

[1] [HN4] An agency has only the authority that the legislature grants it by statute. *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 901, 64 P.3d 606, 613 (2003). The legislature created the PDC following voter approval of the public disclosure act. Laws of 1973, ch. 1, [*882] § 35. Its powers include adoption and promulgation of suitable administrative rules to carry out the policies and purposes of the [***7] public disclosure act. LAWS OF 1973, ch. 1, § 37.

WAC 390-05-010 proclaims the PDC's purpose in promulgating rules as follows:

The purpose of these regulations is to implement the provisions of 42.17 RCW (Initiative 276), hereinafter referred to as the Public Disclosure Act or act, by declaring the policies of the commission, particularly with regard to the interpretation and enforcement of the act by the commission.

[2] But [HN5] an agency cannot promulgate rules that amend or change legislative enactments.² And the courts must declare an agency's rule invalid if the rule exceeds the agency's statutory power. RCW 34.05.570(2)(c).³

² *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 140 Wn.2d 615, 634, 999 P.2d 602 (2000); *Green River Cmty. Coll. v. Higher Educ. Pers. Bd.*, 95 Wn.2d 108, 112, 622 P.2d 826 (1980); *Fahn v. Cowlitz County*, 93 Wn.2d 368, 383, 610 P.2d 857 (1980).

3 RCW 34.05.570(2)(c) provides:

[HN6]

In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that: The rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious.

[***8] II. UNAMBIGUOUS STATUTE

We first address whether RCW 42.17.660(2) is ambiguous and, therefore, in need of interpretation or rule promulgation by the PDC.

A. Standard of Review

[3] [4] [5] [HN7] An appellate court retains the authority to interpret a statute de novo. *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994). A statute is ambiguous if its language is capable of more than one reasonable interpretation. *Vashon Island [*883] Comm. for Self-Gov't v. Wash. State Boundary Review Bd.*, 127 Wn.2d 759, 771, 903 P.2d 953 (1995). Although we generally defer to an agency's rule-making application of a statute, when a statute is unambiguous, we accord no such deference to an agency's interpretation. *Waste Mgmt.*, 123 Wn.2d at 628.

B. Plain Language of Statute

Edelman argues that because RCW 42.17.660(2) is not ambiguous, the PDC acted without authority in promulgating WAC 390-16-311 to clarify a perceived gap. The PDC counters that it was necessary to enact WAC 390-16-311 because the statutory language does not address [***9] what happens when a parent organization "stays out" of a state campaign and, thus, does not subject itself to PDC contribution limits.

[6] [7] [8] [9] RCW 42.17.660 [HN8] requires aggregation and attribution of contributions by affiliated entities. Subsection two provides that two or more entities are treated as a single entity for purposes of political campaign contribution limits:

Two or more entities are treated as a single entity if one of the two or more entities is a subsidiary, branch, or department of a corporation or a local unit, [***300] branch, or affiliate of a trade association, labor union, or collective bargaining association. All contributions made by a person or political committee whose contribution or expenditure activity is financed, maintained, or controlled by a [***301] trade association, labor union, collective bargaining organization, or the local unit of a trade association, labor union, or collective bargaining organization are considered made by the same person or entity.

RCW 42.17.660(2). As the PDC notes, the statute does not further elaborate on its effect when the parent organization does not contribute to a political campaign.

[***10] The statute's plain language already covers this situation. [HN9] When read together with its related statutory subsections, [***884] RCW 42.17.660(2) clearly provides that where any subunit of a corporation or labor union makes a political campaign contribution, this contribution is considered to have been made by its affiliates as well for purposes of determining whether the \$ 500 individual contribution limit of RCW 42.17.640(1) has been exceeded. The statute does not carve out an exemption for situations in which the parent organization does not participate in a particular campaign; rather, the focus is on the interrelationship of affiliated entities.

4 RCW 42.17.640(1) .660(1).

There is no ambiguity in the statute that requires the PDC to read in such an exception, and [HN10] "[w]e will not manufacture ambiguity where none exists." *H&H P'ship v. State*, 115 Wn. App. 164, 171, 62 P.3d 510 (2003), [***11] (citing *Am. Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 134 Wn.2d 413, 428, 951 P.2d 250 (1998)). We hold, therefore, that RCW 42.17.660(2) is not ambiguous and it needs no interpretation by the PDC.

III. PDC EXCEEDS STATUTORY AUTHORITY

We next address whether in promulgating WAC 390-16-311(1), the PDC exceeded its statutory authority under RCW 34.05.570(2)(c). The first sentence of WAC 390-16-311(1) accurately mirrors RCW 42.17.660(2) in reiterating that parent and subsidiary organizations share a single contribution limit:

If two or more entities are affiliated pursuant to WAC 390-16-309(1), *the parent* corporation, national or international labor union or state body of such national or international labor union, trade association or state body of such trade association, national or state collective bargaining organization or national or state membership organization (hereinafter called the parent or umbrella organization) *automatically shares a single contribution limit with each of its subsidiary* corporations, corporate branches or departments or with each of [***12] its local units.

[*885] WAC 390-16-311(1) (emphasis added).

The second and third sentences, however, do not accurately mirror the statute. They read as follows:

[A]bsent satisfying one of the affiliation factors set forth in WAC 390-16-309(3), *a subsidiary corporation or local unit shall maintain its own contribution limit if the parent or umbrella organization does not participate in an election campaign* with respect to a candidate defined in RCW 42.17.630(3). If the parent or umbrella organization engages in any of the following activities, a subsidiary corporation or local unit shares the contribution limit with the parent or umbrella organization with respect to a candidate.

WAC 390-16-311(1) (emphasis added). In essence, these two sentences remove the single statutory contribution limit when the parent organization does not contribute to a political campaign, thus allowing multiple, affiliated, subsidiary units to make multiple contributions subject to multiple, individual, statutory limits.

In other words, the second and third sentences of WAC 390-16-311(1) operate to graft the word "contributing" into RCW 42.17.660(2) [***13] , to modify the large organizations listed in the first sentence, as follows:

Two or more entities are treated as a single entity if one of the two or more entities is a subsidiary, branch, or department of a [*contributing*] corporation or a local unit, branch, or affiliate of a [*contributing*] trade association, labor union, or collective bargaining association.

RCW 42.17.660(2) (emphasis added to illustrate how WAC 390-16-311 alters RCW 42.17.660(2)). This "grafting" effect of WAC 390-16-311(1) limits the statute's aggregation of entities for a single contribution limit *only* when the parent corporation or employee organization makes a monetary contribution in a political campaign. In effect, WAC 390-16-311(1) not only negates the plain language of RCW 42.17.660(2) but also subverts the initiative's purpose to reduce the influence of large organizational contributors on Washington state campaigns and elections. *See* RCW 42.17.620.

[*886] In implementing I-134, the legislature did *not* exempt affiliated entities from the single contribution limit when a parent or umbrella organizations opts out of [***14] a political campaign. RCW 42.17.660(2). Rather, the PDC created this exemption when it promulgated WAC 390-16-311, thereby impermissibly modifying and conflicting with the plain language of RCW 42.17.660(2). [HN11] We do not defer to an agency determination that conflicts with a statute. *H&H P'ship*, 115 Wn. App. at 170, n.14 (citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992)). Moreover, an agency's rule that conflicts with a statute is beyond that agency's authority and requires invalidation of the rule. *H&H P'ship*, 115 Wn. App. at 170 (citing *Wash. Fed'n of State Employees v. State Pers. Bd.*, 54 Wn. App. 305, 308, 773 P.2d 421 (1989)).

Accordingly, we hold that [HN12] in promulgating WAC 390-16-311, the PDC, however well-intentioned, exceeded its statutory authority. Following the legislature's mandate in RCW 34.05.570(2)(c), we therefore declare WAC 390-16-311 invalid.⁵

⁵ *See H&H P'ship*, 115 Wn. App. at 170-71 (although only a subsection was defective, the court held the entire WAC provision invalid).

[***15] Reversed.

Morgan and Bridgewater, JJ., concur.

Review granted at 150 Wn.2d 1025, 82 P.3d 242 (2004).

1 of 1 DOCUMENT

INDOOR BILLBOARD/WASHINGTON, INC., *Individually and on Behalf of a Class of Persons and/or Entities Similarly Situated, Appellant*, v. INTEGRA TELECOM OF WASHINGTON, INC., *Respondent*.

No. 79977-6

SUPREME COURT OF WASHINGTON

162 Wn.2d 59; 170 P.3d 10; 2007 Wash. LEXIS 789

May 29, 2007, Argued
October 18, 2007, Filed

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff, a billboard company/consumer, sued defendant, a competitive telecommunications company (CTC), under Wash. Rev. Code ch. 19.86, alleging that the CTC engaged in an unfair or deceptive act or practice by assessing customers a presubscribed interexchange carrier charge (PICC). The King County Superior Court denied the CTC's motion to dismiss but granted the CTC's motion for summary judgment. The consumer appealed. The CTC cross-appealed.

OVERVIEW: The court first addressed the issue of subject matter jurisdiction. The CTC argued that the Washington Utility and Transportation Commission (WUTC) had exclusive jurisdiction over the rate claim. To the contrary, CTCs were exempted from the immunity granted under Wash. Rev. Code § 19.86.170 and were subject to claims under Washington's Consumer Protection Act (CPA). The consumer clearly alleged a valid claim under Wash. Rev. Code ch. 19.86, and the trial court had subject matter jurisdiction to decide the claim. The consumer established as a matter of law that the CTC, which did not own and operate its own local loop, engaged in an unfair or deceptive act or practice when it labeled the surcharge it imposed on local business service customers a PICC. The use of the term PICC had the capacity to deceive a substantial portion of the public and could have been of material importance to a customer's decision to purchase the company's services. Genuine issues of material fact existed regarding a causal link between the unfair or deceptive acts or practices and the consumer's injury; mere loss of money was not enough. The voluntary payment doctrine was not a defense to CPA claims.

OUTCOME: The court affirmed the trial court's denial of the CTC's motion to dismiss for lack of subject matter jurisdiction. The court reversed the trial court's grant of summary judgment in favor of the CTC, holding that the consumer established as a matter of law that the CTC engaged in an unfair or deceptive act or practice. Summary judgment was precluded. The case was remanded for trial.

CORE TERMS: unfair, deceptive act, causation, summary judgment, telecommunications, customer's, surcharge, invoice, carrier, interexchange, competitive, matter jurisdiction, causal link, proximate cause, public interest, deceptive, regulated, voluntary payment, genuine, deceive, matter of law, issue of material fact, nonmoving party, misrepresentation, telephone, mortgage, moving party, private action, substantial portion, affirmative misrepresentation

LexisNexis(R) Headnotes

Communications Law > Telephone Services > Local Exchange Carriers > Duties of Incumbent Carriers & Resellers
[HN1] Under Federal Communications Commission (FCC) regulations, certain local exchange carriers (LECs), known as incumbent local exchange carriers (ILECs) (ILECs are local exchange carriers that provided telecommunications services prior to February 8, 1996, under the Telecommunications Act of 1996, 47 U.S.C.S. § 251(h)(1)), may impose a

presubscribed interexchange carrier charge (PICC) on interexchange (long distance) carriers. 47 C.F.R. § 69.153(a). The purpose of the PICC is to allow ILECs to recover some of their costs of providing the "local loop." (The "local loop" is the outside telephone wires, underground conduit, telephone poles, and other facilities that link each telephone customer to the telephone network.) The FCC permits interexchange carriers to pass-through to their end-users the PICC that they pay to the ILECs. The FCC also sets the maximum monthly PICC an ILEC may charge but does not dictate the amount an ILEC charges as long as it is under the maximum.

Communications Law > Telephone Services > General Overview

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > General Overview

[HN2] See former Wash. Rev. Code § 80.46.320 (2003).

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants

Civil Procedure > Summary Judgment > Evidence

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

Civil Procedure > Summary Judgment > Standards > Legal Entitlement

[HN3] A trial court's grant of summary judgment is reviewed de novo. A grant of summary judgment is affirmed if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Wash. Super. Ct. Civ. R. 56(c). A reviewing court considers all facts in the light most favorable to the nonmoving party and affirms a grant of summary judgment only if it determines, based on all of the evidence, reasonable persons could reach but one conclusion. The moving party has the burden of showing that there is no genuine issue as to any material fact.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

[HN4] A party may move for summary judgment by setting out its own version of the facts or by alleging that the non-moving party failed to present sufficient evidence to support its case. If the moving party uses the latter method, it must identify those portions of the record, together with the affidavits, if any, which demonstrate the absence of a genuine issue of material fact. Once the moving party has met its burden, the burden shifts to the nonmoving party to present admissible evidence demonstrating the existence of a genuine issue of material fact. If the nonmoving party cannot meet that burden, summary judgment is appropriate.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN5] A challenge to a trial court's subject matter jurisdiction to hear a claim is reviewed de novo.

Governments > Legislation > Interpretation

[HN6] When interpreting a statute, the primary goal is to determine and give effect to the legislature's intent and purpose in creating the statute. A court generally begins its analysis with the text of the statute. If the statute is clear and unambiguous on its face, the court determines its meaning only from the language of the statute and do not resort to statutory construction principles. A statute is ambiguous only if it can be reasonably interpreted in more than one way, not merely because other possible interpretations exist.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

Communications Law > Telephone Services > General Overview

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > General Overview

Energy & Utilities Law > Administrative Proceedings > Public Utility Commissions > Judicial Review

[HN7] The Washington Utility and Transportation Commission (WUTC) regulates the rates, services, facilities, and practices of telecommunications companies. Former Wash. Rev. Code § 80.01.040(3) (1985). The WUTC is vested with exclusive jurisdiction to decide complaints concerning the reasonableness of any rate, toll, rental, or charge for any service performed by any public service company or charge in excess of the lawful rate in force at the time such charge

was made. Wash. Rev. Code § 80.04.220-.240. Actions or transactions regulated by the WUTC are exempt from Washington's Consumer Protection Act claims. Wash. Rev. Code § 19.86.170.

***Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation
Communications Law > Telephone Services > General Overview***

[HN8] Legislation has been enacted that specifically exempts actions or transactions of competitive telecommunications companies (CTCs) from the immunity granted under Wash. Rev. Code § 19.86.170. 1985 Wash. 450, § 8; Wash. Rev. Code § 80.36.360. This legislation results in CTCs being subject to claims brought under Washington's Consumer Protection Act.

***Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation
Communications Law > Telephone Services > General Overview***

[HN9] See Wash. Rev. Code § 80.36.360.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

[HN10] See former Wash. Rev. Code § 19.86.090 (1987).

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

[HN11] Washington's Consumer Protection Act (CPA) is to protect the public from unfair or deceptive acts or practices in the conduct of any trade or commerce. Wash. Rev. Code § 19.86.020. Its purpose is to protect the public and foster fair and honest competition. Wash. Rev. Code § 19.86.920. The CPA is to be liberally construed that its beneficial purposes may be served.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

[HN12] Washington's Consumer Protection Act requires that a private plaintiff show not only that a defendant's practices affect the private plaintiff but that they also have the potential to affect the public interest.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

[HN13] To prevail on a private claim under Washington's Consumer Protection Act, a private plaintiff must show (1) an unfair or deceptive act or practice; (2) that occurs in trade or commerce, (3) a public interest, (4) injury to the plaintiff in his or her business or property, and (5) a causal link between the unfair or deceptive act and the injury suffered. A plaintiff must satisfy all five elements to prevail.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

[HN14] When the issue is whether a party committed a particular act, the court reviews any contested facts under the substantial evidence test. The determination of whether a particular statute applies to a factual situation is a conclusion of law. Where there is no dispute about what the parties did, whether the conduct constitutes an unfair or deceptive act can be decided by the court as a question of law.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

[HN15] An unfair or deceptive act or practice need not be intended to deceive--it need only have the capacity to deceive a substantial portion of the public. The purpose of the capacity-to-deceive test is to deter deceptive conduct before injury occurs. Knowing failure to reveal something of material importance is deceptive within the Washington Consumer Protection Act.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

[HN16] A plaintiff does not establish a causal relationship between the plaintiff's injury and a misrepresentation of fact where the plaintiff does not convince the trier of fact that he or she relied upon that misrepresentation.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

[HN17] It is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

[HN18] In proving a claim under Washington's Consumer Protection Act, causation may not be established merely by a showing that money was lost.

Torts > Negligence > Causation > Proximate Cause > General Overview

[HN19] "Proximate cause" is defined as a cause which in direct sequence unbroken by any new independent cause produces the injury complained of and without which such injury would not have happened. There may be one or more proximate causes of an injury.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

[HN20] Where a defendant has engaged in an unfair or deceptive act or practice, and there has been an affirmative misrepresentation of fact, Washington case law establishes that there must be some demonstration of a causal link between the misrepresentation and the plaintiff's injury.

Civil Procedure > Appeals > Standards of Review > Fact & Law Issues

Torts > Negligence > Causation > Proximate Cause > General Overview

[HN21] Proximate cause is a factual question to be decided by the trier of fact.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

[HN22] The proximate cause standard embodied in Wash. Pattern Instructions Civ. No. 15.01 is required to establish the causation element in a claim under Washington's Consumer Protection Act. A plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

[HN23] The general rule that a voluntary payment cannot be recovered back has no application where the payment was induced by fraud on the part of the payee, for, subject to the general rules as to what constitutes fraud, it is a well settled rule that, where a payment of money which the payee ought not to retain is induced by fraud and deceit, it may be recovered back by the payor, and if the fraud is the inducement for the payment, the rule applies although it is not the sole producing cause.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

[HN24] Washington courts have generally applied the voluntary payment doctrine only in the contract context.

Antitrust & Trade Law > Consumer Protection > Deceptive Acts & Practices > State Regulation

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

[HN25] The voluntary payment doctrine is inappropriate as an affirmative defense in the context of Washington's Consumer Protection Act (CPA), as a matter of law, because the CPA is construed liberally in favor of plaintiffs.

SUMMARY:

WASHINGTON OFFICIAL REPORTS SUMMARY Nature of Action: A corporation that provides local exchange services and that was a customer of a competitive telecommunications company sought damages from the company on a claim that the company committed a Consumer Protection Act violation by unlawfully assessing a presubscribed interexchange carrier surcharge on its customers providing local exchange services. Under Federal Communications Commission rules, certain local exchange carriers, known as incumbent local exchange carriers, may impose a presubscribed interexchange carrier surcharge on interexchange (long distance) carriers and such carriers may pass-through the charge to their end-users. A company providing competitive telecommunications services is not an incumbent local exchange carrier. In contracting with the defendant, the plaintiff did not purchase interexchange services.

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Superior Court: The Superior Court for King County, No. 05-2-27405-1, Mary E. Roberts, J., on July 3, 2006, entered a summary judgment in favor of the defendant.

Supreme Court: Holding that the plaintiff established as a matter of law that the defendant engaged in an unfair or deceptive act or practice, that there remained genuine issues of material fact concerning the existence of a causal link between the unfair or deceptive act or practice and the plaintiff's injury, and that the voluntary payment doctrine does not apply as a matter of law, the court *reverses* the judgment and *remands* the case for further proceedings.

HEADNOTES WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] Judgment -- Summary Judgment -- Review -- Standard of Review. An appellate court reviews a summary judgment de novo, applying the standard of CR 56(c) and viewing the facts submitted in the light most favorable to the nonmoving party. The court will affirm the judgment only if, based on the record as a whole, reasonable persons could reach but one conclusion.

[2] Judgment -- Summary Judgment -- Burden on Moving Party -- Absence of Factual Issue. A party moving for summary judgment has the burden of showing the absence of a genuine issue as to any material fact.

[3] Judgment -- Summary Judgment -- Burden on Moving Party -- Alternative Means. A party may move for summary judgment by (1) setting out its own version of the facts or (2) alleging that the nonmoving party has failed to aver sufficient facts to support its case.

[4] Judgment -- Summary Judgment -- Burden on Moving Party -- Lack of Evidence. A party that moves for summary judgment by alleging that the nonmoving party has failed to aver sufficient facts to support its case must identify those portions of the record, together with the affidavits, if any, demonstrating the absence of a genuine issue of material fact.

[5] Judgment -- Summary Judgment -- Burden on Nonmoving Party -- Averment of Specific Facts -- Necessity. When a party moving for summary judgment makes a showing that no factual dispute exists, the burden shifts to the nonmoving party to set forth facts showing that there is a genuine issue of material fact.

[6] Courts -- Jurisdiction -- Subject Matter -- Review -- Standard of Review. A challenge to a trial court's subject matter jurisdiction to hear a claim is reviewed de novo.

[7] Statutes -- Construction -- Legislative Intent -- In General. A court's primary goal when interpreting a statute is to determine and give effect to the legislature's intent and purpose in creating the statute.

[8] Statutes -- Construction -- Unambiguous Language -- Effect. A court's interpretation of a statute usually begins with an analysis of the statute's text. If the statute is clear and unambiguous on its face, the meaning of the statute is determined from the language of the statute alone without resort to principles of statutory construction.

[9] Statutes ? Construction -- Ambiguity -- What Constitutes -- Conceivable Interpretations. A statute is ambiguous only if it can be reasonably interpreted in more than one way. A statute is not ambiguous merely because other possible interpretations exist.

[10] Telecommunications -- Consumer Protection -- Exemptions -- Competitive Telecommunications Companies. Under RCW 80.36.360, a company classified as a competitive telecommunications company under RCW 80.36.310-.330 is not immune from Consumer Protection Act liability under RCW 19.86.070.

[11] Telecommunications -- Consumer Protection -- Action for Damages -- Competitive Telecommunications Company -- Subject Matter Jurisdiction. A superior court has subject matter jurisdiction to adjudicate a valid Consumer Protection Act claim against a competitive telecommunications company that, by operation of RCW 80.36.360, is not immune from Consumer Protection Act liability under RCW 19.86.070.

[12] Consumer Protection -- Action for Damages -- Effect on Public Interest -- Necessity. A private action for damages under the Consumer Protection Act (ch. 19.86 RCW) requires a showing that the defendant's unfair or deceptive act or practice has the potential to affect the public interest.

[13] Consumer Protection -- Action for Damages -- Elements. In a private action under the Consumer Protection Act (ch. 19.86 RCW), the plaintiff must show (1) an unfair or deceptive act or practice (2) that occurs in trade or commerce, (3) a public interest, (4) an injury to the plaintiff's business or property, and (5) a causal link between the unfair or deceptive act or practice and the injury suffered.

[14] Statutes -- Applicability -- Question of Law or Fact. The determination of whether a particular statute applies to a factual situation is a conclusion of law.

[15] Consumer Protection -- Action for Damages -- Unfair or Deceptive Conduct -- Question of Law or Fact -- Decision as a Matter of Law. For purposes of a private action under the Consumer Protection Act (ch. 19.86 RCW), if the underlying facts are undisputed, the question of whether a particular act or practice is unfair or deceptive may be decided as a matter of law.

[16] Consumer Protection -- Action for Damages -- Unfair or Deceptive Conduct -- Capacity To Deceive -- Intent -- Necessity. The unfair or deceptive act or practice element of a private cause of action under the Consumer Protection Act (ch. 19.86 RCW) is satisfied if the conduct complained of has the capacity to deceive a substantial portion of the public, regardless of the defendant's intent to deceive. The purpose of the capacity-to-deceive test is to deter deceptive conduct before injury occurs.

[17] Consumer Protection -- Action for Damages -- Unfair or Deceptive Conduct -- Failure To Disclose Material Facts -- Knowledge. A knowing failure to reveal something of material importance is a "deceptive" act or practice for purposes of a private action under the Consumer Protection Act (ch. 19.86 RCW).

[18] Telecommunications -- Consumer Protection -- Action for Damages -- Unfair or Deceptive Conduct -- Misidentification of Unauthorized Charge. A competitive telecommunications company commits an unfair or deceptive act or practice as a matter of law by listing under "taxes and surcharges" on its billing statements to local business service customers an item identified as a presubscribed interexchange carrier charge, which, under Federal Communications Commission rules, may be imposed only by incumbent local exchange carriers, not competitive telecommunications companies, and only against interexchange (long distance) carriers, not local business service customers. Such conduct has the capacity to deceive a substantial portion of the public into believing that the charge is required by the Federal Communications Commission when, in fact, it is not.

[19] Consumer Protection -- Action for Damages -- Causation -- Reliance on Misrepresentation of Fact -- Proximate Cause. When the unfair or deceptive act or practice underlying a private action under the Consumer Protection Act (ch. 19.86 RCW) is an affirmative misrepresentation of fact, the causation element of the claim requires proof that the misrepresentation was a proximate cause of the plaintiff's injury. A proximate cause is a cause that, in direct sequence unbroken by any new independent cause, produces the injury and without which the injury would not have occurred; i.e., the plaintiff must establish that, but for the defendant's unfair or deceptive act or practice, the plaintiff would not have suffered an injury.

[20] Consumer Protection -- Action for Damages -- Causation -- Reliance on Misrepresentation of Fact -- Monetary Loss. When the unfair or deceptive act or practice underlying a private action under the Consumer Protection Act (ch. 19.86 RCW) is an affirmative misrepresentation of fact, the causation element of the claim is not established merely by showing that money was lost. The causation element requires proof of a causal link between the misrepresentation and the plaintiff's damages.

[21] Consumer Protection -- Action for Damages -- Causation -- Question of Law or Fact. The issue of proximate cause in a private action under the Consumer Protection Act (ch. 19.86 RCW) is a question of fact.

[22] Consumer Protection -- Action for Damages -- Voluntary Payment Doctrine -- Applicability. The voluntary payment doctrine does not apply in the context of private actions under the Consumer Protection Act (ch. 19.86 RCW); i.e., the voluntary payment of a sum is not a defense to a Consumer Protection Act claim.

COUNSEL: *John D. Stahl* (of *Mundt MacGregor, LLP*), for appellant.

Sarah J. Crooks and *Lawrence H. Reichman* (of *Perkins Coie, LLP*), for respondent.

Robert M. McKenna, Attorney General, and *Shannon E. Smith*, Senior Counsel, on behalf of Attorney General's Office, amicus curiae.

Bryan P. Harnetiaux on behalf of Washington State Trial Lawyers Association Foundation, amicus curiae.

JUDGES: [***1] Justice Mary E. Fairhurst. WE CONCUR: Chief Justice Gerry L. Alexander, Justice Tom Chambers, Justice Charles W. Johnson, Justice Susan Owens, Justice Barbara A. Madsen, Justice Richard B. Sanders, Justice James M. Johnson, Justice Bobbe J. Bridge.

OPINION BY: Mary E. Fairhurst

OPINION

EN BANC

[*63] [**12] ¶1 FAIRHURST, J. -- Indoor Billboard/Washington, Inc. (Indoor Billboard) appeals a trial court order granting summary judgment to Integra Telecom of Washington, Inc. ¹ (Integra). Indoor Billboard asserted a claim for relief in [*64] King County Superior Court under Washington's Consumer Protection Act (CPA), chapter 19.86 RCW, alleging that Integra engaged in an unfair or deceptive act or practice by assessing its Washington local exchange customers a surcharge known as a presubscribed interexchange carrier charge (PICC). Indoor Billboard further claims it established causation under the CPA merely by a showing that it paid the PICC.

¹ Integra is an Oregon corporation that provides telephone and data services to Washington business customers. The caption on Indoor Billboard's complaint erroneously identifies Integra as a Washington corporation.

¶2 Integra argues the trial court properly granted summary judgment in its favor. It [***2] denies that it engaged in an unfair and deceptive act or practice by assessing a PICC surcharge to its local exchange customers and argues Indoor Billboard must establish that it relied on Integra's actions to show causation. It further asserts that the voluntary payment doctrine bars Indoor Billboard's claim for damages because Indoor Billboard knowingly paid the charges. In a cross petition, Integra argues that even if the trial court erred in granting summary judgment in its favor on the CPA issues, the trial court should have dismissed the case on the grounds that the Washington Utilities and Transportation Commission (WUTC) had exclusive jurisdiction over Indoor Billboard's claim.

¶3 We reverse the trial court's grant of summary judgment in favor of Integra and [**13] affirm the trial court's denial of Integra's motion to dismiss for lack of subject matter jurisdiction. We hold that Indoor Billboard established as a matter of law that Integra engaged in an unfair or deceptive act or practice. We hold that genuine issues of material fact exist regarding a causal link between Integra's unfair or deceptive acts or practices and Indoor Billboard's injuries. We also conclude the voluntary payment [***3] doctrine does not apply as a matter of law. We remand the matter for trial.

I. FACTUAL HISTORY

¶4 [HN1] Under Federal Communications Commission (FCC) regulations, certain local exchange carriers (LECs), known [*65] as incumbent local exchange carriers (ILECs), ² may impose a PICC on interexchange (long distance) carriers. FCC PICC rule, 47 C.F.R. § 69.153(a); Clerk's Papers (CP) at 378. The purpose of the PICC is to allow ILECs

162 Wn.2d 59, *; 170 P.3d 10, **;
2007 Wash. LEXIS 789, ***

to recover some of their costs of providing the "local loop."³ CP at 378. The FCC permits interexchange carriers to pass-through to their end-users the PICC that they pay to the ILECs. *Id.* The FCC also sets the maximum monthly PICC an ILEC may charge but does not dictate the amount an ILEC charges as long as it is under the maximum. CP at 379.

2 ILECs are local exchange carriers that provided telecommunications services prior to February 8, 1996 under the Telecommunications Act of 1996, 47 U.S.C. § 251(h)(1).

3 The "local loop" is "the outside telephone wires, underground conduit, telephone poles, and other facilities that link each telephone customer to the telephone network." CP at 378.

¶5 Integra is not an ILEC. Integra is a competitive telecommunications company (CTC)⁴ under former [***4] RCW 80.36.320 (2003)⁵ and, therefore, not subject to the provisions of 47 C.F.R. § 69.153. Nevertheless, in the fall of 2001, after conducting a survey to determine what rates other local competitors charged to their local service customers, Integra began to impose a surcharge of \$4.21 entitled a PICC to all of its customers, regardless of whether they had pre-subscribed to an interexchange carrier. Integra properly [*66] included the PICC surcharge on its price list, as required by former WAC 480-80-204.⁶

4 Washington law defines CTCs by statute. But Integra acknowledges that the telecommunications industry also uses the term "competitive local exchange carrier" or CLEC to refer to such companies. CP at 396.

5 Former RCW 80.36.320 provides:

[HN2] (1) The commission shall classify a telecommunications company as a competitive telecommunications company if the services it offers are subject to effective competition. Effective competition means that the company's customers have reasonably available alternatives and that the company does not have a significant captive customer base. ...

...

(2) Competitive telecommunications companies shall be subject to minimal regulation. ... The commission may also [***5] waive other regulatory requirements under this title for competitive telecommunications companies when it determines that competition will serve the same purposes as public interest regulation. The commission may waive different regulatory requirements for different companies if such different treatment is in the public interest.

6 Former WAC 480-80-204 requires the price list to include such things as where services will be rendered, the effective date of the price list, the complete name, address, phone number, unified business identifier number, and, if available, the mail address and web page address of the issuing utility.

¶6 In March 2005, an Integra sales representative, Erin McCune, met with the vice president of Indoor Billboard, James Shulevitz, to discuss Integra's telephone services. McCune sent Shulevitz a copy of Integra's price list, which included the PICC surcharge. Shortly after their meeting, Shulevitz sent McCune an e-mail informing her that there would be "no need to charge [him] PICC charges" because he was not interested in Integra's interexchange services. CP at 163. McCune responded that the PICC could not be waived "regardless of whether [Indoor Billboard] use[d] Integra [***6] as [its interexchange] carrier." CP at 164.

¶7 A few days later, Shulevitz contacted Frank Westby, a representative of Indoor Billboard's interexchange carrier, Eschelon. Shulevitz informed Westby that Integra had offered to provide Indoor Billboard with local service in Washington and asked Westby whether the PICC charge was federally mandated. [**14] Westby replied that it was "not regulated by the government" and that the price was "determined by the Long distance carrier/Phone company." CP at 171.

¶8 Shulevitz wrote back to McCune to tell her about his discussions with Westby and asked her why Eschelon's PICC was 44 percent lower than Integra's. McCune responded,

[d]ifferent CLECs [competitive local exchange carrier] have different PICC ... charges ... and these can vary by market. Our PICC [is] different in the Oregon market than in Washington, due to different market conditions. *I am unable to change them*, so I would recommend looking at the whole picture (line rate plus all surcharges) to make an accurate comparison.

CP at 174 (emphasis added).

[*67] ¶9 The next month, Shulevitz signed an agreement with Integra for five line local exchange and digital subscriber line services. Integra sent Indoor Billboard its first invoice in [***7] June 2005, which included a PICC surcharge listed under "Taxes and Surcharges." CP at 55-56. Before paying the invoice, Shulevitz conducted some independent research into Integra's PICC surcharge. First, he sent an e-mail to a friend who worked in the telecommunications industry, Mark Berkovitch. Berkovitch suggested that Integra's PICC was a "double dip" and gave Shulevitz a link to the FCC web site. CP at 178-79. Shulevitz checked the FCC web site and called the FCC. The FCC informed Shulevitz that it did not regulate Integra and could not help him. The FCC suggested that Shulevitz contact the WUTC. Shulevitz called the WUTC and the representative he spoke with told him it was "news to [her]" that Integra came under the WUTC's purview. CP at 137. She told him that if he was billed for the surcharge again he should call her back. Finally, Shulevitz spoke with a representative at Integra's customer service department. Shulevitz said the representative left him with the impression that Integra's PICC was "associated with," "approved by," "sanctioned by," and "okay with" the FCC and Integra had "every right to charge it." CP at 146. Shulevitz further claimed that, despite Integra's reassurances, [***8] he continued to be concerned about the PICC surcharge but he did not make a written complaint.

¶10 Despite his ongoing concerns, Shulevitz authorized payment of the June invoice because he "[didn't] like to start things off on a sour note." CP at 148. He also authorized payment of the July invoice, which included another PICC charge, but he did not call the WUTC back as the representative had advised.

¶11 However, the August invoice did not include a PICC charge. It contained a message that stated, "[d]ue to recent FCC rulings, changes to government prescribed fees are reflected in this invoice. The ... PICC will no longer be assessed. Instead, the Interconnection Fee (ICF) will now [*68] recover network costs prescribed and regulated by the FCC and state public utility commissions." CP at 63. Customers were directed to Integra's web site for more information.

II. PROCEDURAL HISTORY

¶12 In its complaint, Indoor Billboard first alleged that Integra had published a price list indicating it would assess a PICC of \$4.21 per line per month to all customers regardless of whether they had presubscribed to an interexchange carrier. CP at 45, ¶ 11. It alleged that in the telecommunications industry, a PICC is [***9] a charge assessed *only* by ILECs on multiline business customer's interexchange carriers to recover costs of providing the ILECs' local loop. *Id.*, ¶ 13. It alleged that an ILEC may assess a PICC *only* against a multiline business customer's interexchange carrier, which may pass the PICC on to its customer, or the ILEC may assess its multiline business customer directly, but only if the customer has not presubscribed to an interexchange carrier. CP at 46, ¶ 13. It alleged that because Integra is not an ILEC and does not own and operate its own local loop, the PICC Integra assessed and collected was not a PICC as the term is defined in the telecommunications industry. *Id.*, ¶ 14. Indoor Billboard further alleged that Integra's price list "wrongfully institute[d] a purported PICC surcharge" and "wrongfully assessed [**15] upon and collected from its customers a surcharge misrepresented to be a PICC." *Id.*, ¶ 15.

¶13 Indoor Billboard claimed (1) Integra was engaged in a trade or commerce as defined in RCW 19.86.110, (2) Integra's practice of assessing and collecting its PICC was an unfair and deceptive act or practice under RCW 19.86.020, (3) Integra's unfair or deceptive act or practice [***10] impacted the public interest, (4) Indoor Billboard and the members of the class had suffered injury in their business or property, and (5) Integra's unfair or deceptive act or practice was the proximate cause of the injuries to Indoor Billboard and the members of the class. CP at 51, ¶¶ 34, 38. [*69] Finally, Indoor Billboard claimed it was entitled to actual damages, treble damages, injunctive relief, and attorney fees and costs under RCW 19.86.090. *Id.*, ¶ 40.

¶14 Integra filed a motion to dismiss under CR 12(b)(1), arguing that the trial court did not have subject matter jurisdiction to hear Indoor Billboard's claims because the WUTC had either exclusive or primary jurisdiction under RCW 80.04.220-.240. The trial court denied Integra's motion without hearing oral argument and without explanation.

¶15 Integra filed a motion for summary judgment, arguing that Indoor Billboard did not establish the unfair or deceptive act or practice element and causation element of its CPA claim. It also asserted the affirmative defense that Indoor Billboard's CPA claim was barred by the voluntary payment doctrine. The trial court granted summary judgment to Integra. The trial court denied Indoor Billboard's [***11] motion for reconsideration.

¶16 Indoor Billboard appealed the trial court order granting summary judgment to Integra to Division One of the Court of Appeals. Integra cross-appealed the trial court's denial of its motion to dismiss for lack of subject matter jurisdiction. To promote the orderly administration of justice, Indoor Billboard's appeal was transferred to this court under RAP 4.4.

III. ISSUES

A. Did the trial court have subject matter jurisdiction to decide Indoor Billboard's CPA claim?⁷

⁷ Although the issue of the trial court's subject matter jurisdiction was raised in the cross appeal, we address it first.

B. Did the trial court err in granting summary judgment in Integra's favor on Indoor Billboard's CPA claim?

IV. ANALYSIS

[1, 2] ¶17 We review [HN3] a trial court's grant of summary judgment de novo. *Vallandigham v. Clover Park Sch. Dist.* [*70] No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 515-16, 799 P.2d 250 (1990)). We will affirm a grant of summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine [***12] issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We consider all facts in the light most favorable to the nonmoving party and affirm a grant of summary judgment only if we determine, based on all of the evidence, reasonable persons could reach but one conclusion. *Vallandigham*, 154 Wn.2d at 26. The moving party has the burden of showing that there is no genuine issue as to any material fact. *Id.*

[3-5] ¶18 [HN4] "A party may move for summary judgment by setting out its own version of the facts or by alleging that the nonmoving party failed to present sufficient evidence to support its case." *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 350, 144 P.3d 276 (2006) (citing *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689 (1993)). "If the moving party uses the latter method, it must 'identify those portions of the record, together with the affidavits, if any, which ... demonstrate the absence of a genuine issue of material fact.'" *Id.* at 350-51 (alteration in original) (quoting *Guile*, 70 Wn. App. at 22). "Once the moving party has [**16] met its burden, the burden shifts to the nonmoving party to present admissible evidence [***13] demonstrating the existence of a genuine issue of material fact." *Id.* at 351 (citing *Vallandigham*, 154 Wn.2d at 26). "If the nonmoving party cannot meet that burden, summary judgment is appropriate." *Id.*

A. Did the trial court have subject matter jurisdiction to decide Indoor Billboard's CPA claim?

[6] ¶19 As a threshold issue, we first determine whether the superior court had subject matter jurisdiction to decide [*71] Indoor Billboard's claim. [HN5] A challenge to a trial court's subject matter jurisdiction to hear a claim is reviewed de novo. *Wright v. Colville Tribal Enter. Corp.*, 159 Wn.2d 108, 118-19, ¶ 23, 147 P.3d 1275 (2006), *cert. dismissed*, 127 S. Ct. 2161 (2007).

¶20 Integra contends the trial court lacked subject matter jurisdiction to decide Indoor Billboard's claims because RCW 80.04.240 vests the WUTC with exclusive original jurisdiction to decide claims that a public service company charged an unreasonable or unlawful rate and Indoor Billboard's claim was that Integra wrongfully or unlawfully collected its PICC.

¶21 Indoor Billboard argues that because RCW 19.86.170 eliminated immunity from CPA claims for CTCs, Integra cannot assert that the WUTC has exclusive jurisdiction over Integra's actions. [***14] Indoor Billboard also argues the trial court had subject matter jurisdiction to decide its claim because the WUTC lacks the authority to adjudicate a CPA claim and the ability to grant the relief afforded under the CPA.

[7-9] ¶22 [HN6] When interpreting a statute, our primary goal is to determine and give effect to the legislature's intent and purpose in creating the statute. *Am. Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004); *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). We generally begin our analysis with the text of the statute. *Steen*, 151 Wn.2d at 518. If the statute is clear and unambiguous on its face, we determine its meaning only from the language of the statute and do not resort to statutory construction principles. *Id.* A statute is ambiguous only if it can be reasonably interpreted in more than one way, not merely because other possible interpretations exist. *Id.*

[10, 11] ¶23 [HN7] The WUTC regulates "the rates, services, facilities, and practices of ... telecommunications companies." Former RCW 80.01.040(3) (1985). The WUTC is vested with exclusive jurisdiction to decide complaints con-

cerning the "reasonableness of any rate, toll, rental, or charge for any service performed [***15] by any public service [*72] company" or "charge[] ... in excess of the lawful rate in force at the time such charge was made." RCW 80.04.220-.240. Actions or transactions regulated by the WUTC are exempt from CPA claims. RCW 19.86.170.

¶24 In 1985, the legislature [HN8] enacted legislation that specifically exempted actions or transactions of CTCs from the immunity granted under RCW 19.86.170. LAWS OF 1985, ch. 450, § 8; RCW 80.36.360. * This legislation results in CTCs being subject to CPA claims.

8 RCW 80.36.360 states, [HN9] "[f]or the purposes of RCW 19.86.170, actions or transactions of competitive telecommunications companies, or associated with competitive telecommunications services, shall not be deemed otherwise permitted, prohibited, or regulated by the commission."

¶25 The superior court has jurisdiction over CPA claims under former RCW 19.86.090 (1987), which provides, in pertinent part:

[HN10] Any person who is injured in his or her business or property by a violation of RCW 19.86.020 [unfair competition, practices] may bring a civil action in the superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable [***16] attorney's fee, and the court may in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained.

¶26 Integra acknowledges it is a CTC under RCW 80.36.310-.330. As a CTC, it is exempt from the immunity granted to regulated [**17] telecommunications companies under RCW 19.86.170. Nevertheless, it argues that Indoor Billboard's claim is subject to the exclusive jurisdiction of the WUTC because the claim was for reimbursement of unreasonable rates and charges rather than damages under the CPA. Integra relies on *D.J. Hopkins, Inc. v. GTE Northwest, Inc.*, 89 Wn. App. 1, 947 P.2d 1220 (1997) for this proposition, but its reliance on *Hopkins* is misplaced for two reasons.

¶27 First, *Hopkins* involved a claim against a regulated noncompetitive telecommunications company, which was [*73] immune from CPA claims. *Id.* at 3. Because Integra is a CTC, it cannot claim the immunity granted to regulated noncompetitive telecommunications companies under RCW 19.86.170.

¶28 Second, *Hopkins* alleged that GTE was engaged in deceptive billing practices when it continued to bill Hopkins for the lease of a desk telephone for nine years after Hopkins chose to use its own telephone rather [***17] than one leased from GTE. 89 Wn. App. at 3. The court concluded that Hopkins' claim was not properly brought under the CPA because it was for services not received rather than deceptive billing practices. *Id.* at 6. Indoor Billboard, in contrast, clearly alleged a valid claim under chapter 19.86 RCW that Integra engaged in the unfair and deceptive act or practice of charging and collecting a surcharge *unfairly or deceptively described* as a PICC.

¶29 We conclude that because Integra is a CTC, and cannot claim immunity from CPA claims under RCW 19.86.170, and Indoor Billboard clearly alleged a valid claim under chapter 19.86 RCW, the trial court had subject matter jurisdiction to decide Indoor Billboard's claim.

B. Did the trial court err in granting summary judgment in Integra's favor on Indoor Billboard's CPA claim?

¶30 The CPA was enacted in 1961, in part, to [HN11] protect the public from "unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. The purpose was to "protect the public and foster fair and honest competition." RCW 19.86.920. The CPA is to be "liberally construed that its beneficial purposes may be served." *Id.*

[12] ¶31 At the time the CPA was enacted, only [***18] the Washington State attorney general (AG) was authorized to bring suit to enforce it. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986). In 1971, the legislature instituted a private right of action to enlist the aid of private individuals in enforcing the CPA. *Lightfoot v. MacDonald*, 86 Wn.2d 331, 335-36, [*74] 544 P.2d 88 (1976). However, this court has construed [HN12] the CPA to require that a private plaintiff show not only that a defendant's practices affect the private plaintiff but that they also have the potential to affect the public interest. *Hangman Ridge*, 105 Wn.2d at 788; *Lightfoot*, 86 Wn.2d at 335-36. Amici curiae the Washington State Trial Lawyers Association Foundation (WSTLA) and the AG urge this court, in deciding this case, to consider the legislature's purpose of protecting the public and the legislature's desire that the CPA be liberally construed.

[13] ¶32 [HN13] To prevail on a private CPA claim, a private plaintiff must show (1) an unfair or deceptive act or practice (2) that occurs in trade or commerce, (3) a public interest, (4) injury to the plaintiff in his or her business or property, and (5) a causal link between the unfair or [***19] deceptive act and the injury suffered. *Hangman Ridge*, 105 Wn.2d at 784-85. A plaintiff must satisfy all five elements to prevail. *Id.* at 793.

¶33 Indoor Billboard appeals the trial court's grant of summary judgment in favor of Integra on only the first and fifth elements, unfair or deceptive act or practice and causation.

1. Unfair or deceptive act or practice

[14, 15] ¶34 [HN14] When the issue is whether a party committed a particular act, the court reviews any contested facts under the substantial evidence test. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 150, [**18] 930 P.2d 288 (1997). "[T]he determination of whether a particular statute applies to a factual situation is a conclusion of law." *Id.* Where there is no dispute about what the parties did, "whether the conduct constitutes an unfair or deceptive act can be decided by this court as a question of law." *Id.* The parties here agree that whether Integra's actions constituted an unfair or deceptive act or practice is a question of law. Br. of Appellant at 27-28; Br. of Resp't/Cross Appellant at 18.

[16, 17] ¶35 [HN15] An unfair or deceptive act or practice need not be *intended* to deceive--it need only have "the capacity [**75] [***20] to deceive a substantial portion of the public." *Hangman Ridge*, 105 Wn.2d at 785. "The purpose of the capacity-to-deceive test is to deter deceptive conduct *before* injury occurs." *Id.* (citing Jeffrey M. Koontz, Recent Development, *Washington Lawyers Under the Purview of the State Consumer Protection Act--The "Entrepreneurial Aspects" Solution--Short v. Demopolis*, 103 Wn. 2d 52, 691 P.2d 163 (1984), 60 WASH. L. REV. 925, 944 (1985)). "[K]nowing failure to reveal something of material importance is 'deceptive' within the CPA." *Robinson v. Avis Rent A Car Sys., Inc.*, 106 Wn. App. 104, 116, 22 P.3d 818 (2001).

¶36 Indoor Billboard claims that Integra's practice had the capacity to deceive a substantial portion of the public, and actually did deceive Indoor Billboard, about the nature of Integra's PICC. Indoor Billboard also argues that the nature of Integra's PICC was of material importance to customers. Integra responds that the use of the term PICC does not suggest it is regulated by the FCC, nor does listing it under "Taxes and Surcharges" suggest it is a "governmentally imposed tax." Br. of Resp't/Cross Appellant at 24. Integra also rejects Indoor Billboard's claim that the nature of its PICC was of material [***21] importance, stating, "[t]here is no such thing as a 'true PICC.'" *Id.* at 22.

¶37 Indoor Billboard relies on two cases from Division One of the Court of Appeals for its arguments: *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn. App. 542, 13 P.3d 240 (2000); *Pickett v. Holland American Line-Westours, Inc.*, 101 Wn. App. 901, 6 P.3d 63 (2000) (*Pickett I*), *rev'd*, 145 Wn.2d 178, 35 P.3d 351 (2001) (*Pickett II*).

[18] ¶38 In *Dwyer*, the court ruled that a mortgage company's practice of including a fax charge on its mortgage payoff statements, without further explanation, deceived customers into thinking they had to pay the fee before their mortgages would be released. 103 Wn. App. at 547. Indoor Billboard argues Integra's actions were comparable to those of the mortgage company because Integra listed its PICC on its invoices in a deceptive manner. Indeed, Indoor Billboard argues, if Integra had properly [**76] disclosed the "true nature" of its PICC, there would be no deception. Br. of Appellant at 39. Integra tries to distinguish its actions from those of the mortgage company in *Dwyer*, arguing it fully disclosed that its PICC was not regulated by the FCC in discussions with Shulevitz, whereas the mortgage company [***22] failed to disclose the fact that the facsimile fee was not part of the mortgage payoff. We agree with Indoor Billboard that Integra's act of listing its PICC under the heading of "Taxes and Surcharges" on its invoices was analogous to the actions of the mortgage company in *Dwyer*. The surcharge was called a PICC and listed on a portion of the invoice that included state and federal tax charges and had "the capacity to deceive a substantial portion of the public" into believing it was regulated by the FCC. *Hangman Ridge*, 105 Wn.2d at 785.

¶39 *Pickett I* involved a class action suit against a cruise ship line for a variety of claims, including a CPA violation. 101 Wn. App. at 906. The plaintiffs had alleged that the cruise ship line misrepresented certain charges as mandatory taxes and fees when the charges were actually retained by the cruise line for corporate purposes. *Id.* A class was certified for settlement purposes and a member of the class intervened, challenging the fairness of the settlement. *Id.* at 905. Although the only issue presented to the Court of Appeals was the fairness of the settlement, the court reached issues related to the merits of the CPA claim, noting the cruise ship [***23] line could not represent the charges as something they [**19] were not. *Id.* at 920. Indoor Billboard argues *Pickett I* is analogous because Integra called its surcharge by the same name as a charge regulated by the FCC when it actually was something else. But this court subsequently reversed *Pickett I*, casting doubt on its precedential value for this case. *See Pickett II*, 145 Wn.2d at 191.

¶40 Integra relies on a different case from Division One, *Robinson*, 106 Wn. App. at 109. *Robinson* involved allegations by rental car lessees who claimed that rental car companies violated the CPA by unbundling and separately [*77] charging airport concession fees that were previously quoted to customers as part of the total rental rate. *Id.* The court held that the lessees did not make the required showing that the car rental companies failed to disclose the separate fees. *Id.* at 117. Integra contends that *Robinson* stands for the proposition that the only relevant time period for determining whether it acted unfairly or deceptively was when it signed the agreement with Shulevitz, *not* when it invoiced Indoor Billboard for its services. Integra argues that because Indoor Billboard did not see the invoice until after it [***24] signed the agreement, Integra could not have deceived Indoor Billboard into paying the PICC. However, Indoor Billboard raised claims that Integra made an affirmative misrepresentation about its PICC *before* Shulevitz signed the agreement as well as on the invoices. It alleged that the information McCune provided to Shulevitz misled him into signing the service agreement. Therefore, *Robinson* does not support Integra's arguments.

¶41 Integra's PICC need only have had the *capacity* to deceive. FCC--regulated PICCs can be charged only by ILECs, but Integra charged a surcharge that it called a PICC even though it is not an ILEC. The purpose of the FCC--regulated PICC is to allow ILECs to recover from their customers the costs of providing interexchange carriers access to the local loop, but Integra's PICC was not associated with the costs of providing interexchange carriers access to the local loop. Integra acknowledged that it used the term PICC even though it knew the term had a specific meaning under the FCC because the marketplace was already familiar with the term and use of the term provided Integra with a competitive advantage. Integra listed its PICC under "Taxes and Surcharges" on its invoices. [***25] Integra's web site described its PICC using language almost identical to the language the FCC used in describing its PICC. Even though Indoor Billboard acknowledged that it did not see Integra's web site prior to purchasing Integra's services, Indoor Billboard and many other customers called Integra to inquire about the PICC and express concern or confusion.

[*78] ¶42 We conclude that Integra engaged in an unfair or deceptive act or practice as a matter of law when it labeled the surcharge it imposed on local business service customers a PICC. The use of the term PICC had the capacity to deceive a substantial portion of the public into thinking the surcharge was FCC regulated and required. Whether the surcharge was FCC regulated and required could be of material importance to a customer's decision to purchase the company's services. The trial court erred in granting summary judgment to Integra on the first element of Indoor Billboard's CPA claim.

2. Causation

¶43 With regard to the causation element of its CPA claim, Indoor Billboard argues it need only show that it paid Integra's invoices to establish a causal link between Integra's unfair or deceptive act or practice and its injury. It further argues [***26] that, even if reliance is required, the evidence here is sufficient to preclude granting summary judgment to Integra. Integra responds that a plaintiff must establish that the plaintiff relied on the defendant's unfair or deceptive act or practice to establish a causal link with the plaintiff's injury and that Indoor Billboard did not do so. Amici curiae urge this court to liberally construe the CPA and hold that the plaintiff need only establish a causal link between the unfair or deceptive act or practice and the injury.

a. What is required to establish causation?

¶44 This court has yet to clearly define the proof required to establish causation in a [**20] CPA claim. *Pickett II*, 145 Wn.2d at 196-97.

¶45 After the legislature authorized a private right of action under chapter 19.86 RCW, this court initially required a plaintiff to establish only three elements. "[T]he conduct complained of must: (1) be unfair or deceptive; (2) be within the sphere of trade or commerce; and (3) impact the public interest." *Anhold v. Daniels*, 94 Wn.2d 40, 45, 614 [*79] P.2d 184 (1980). A plaintiff could establish the public interest element per se by showing that the defendant violated a statute containing a specific legislative [***27] declaration of public interest impact. *Id.* at 43. Alternatively, a plaintiff could show that

(1) the defendant by unfair or deceptive acts or practices in the conduct of trade or commerce has *induced the plaintiff to act or refrain from acting*; (2) the plaintiff suffers damage brought about by such action or failure to act; and (3) the defendant's deceptive acts or practices have the potential for repetition.

Id. at 46 (emphasis added).

¶46 In a subsequent case involving a private dispute, Division Two of the Court of Appeals held that the *Anhold* public interest test required the plaintiff to establish a causal link between the defendant's unfair or deceptive act or practice and the plaintiff's injury. *Nuttall v. Dowell*, 31 Wn. App. 98, 111, 639 P.2d 832 (1982). *Nuttall* described the *Anhold* test as "an inducement offered by the defendant, which has the effect of either producing action or inaction on the part of plaintiff resulting in injury and damage." *Id.* In *Nuttall*, a purchaser of real estate brought a private CPA action against a real estate broker for misrepresenting the property boundary. *Id.* at 103-04. The court concluded that the purchaser did not rely on the broker's word that [***28] the boundary was correct because the purchaser conducted his own independent investigation of the boundary. *Id.* at 111. It held that [HN16] a plaintiff does not establish a causal relationship between the plaintiff's injury and a misrepresentation of fact where the plaintiff does not convince the trier of fact that he or she relied upon that misrepresentation. *Id.*

¶47 *Hangman Ridge* sought to clarify the *Anhold* public interest element of a CPA claim. 105 Wn.2d at 789-90. It noted, "[w]here the transaction [is] essentially a private dispute, it may be more difficult to show that the public has an interest in the subject matter." *Id.* at 790 (citations omitted). It concluded *Anhold's* "inducement-damage-repetition" [*80] test "is not the best vehicle for showing that the public was or will be affected by the act in question." *Id.* at 789. It stated, [HN17] "it is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest." *Id.* at 790 (citing *McRae v. Bolstad*, 101 Wn.2d 161, 166, 676 P.2d 496 (1984)). Instead of the three-pronged public interest test set out in *Anhold*, *Hangman Ridge* [***29] established a five factor test for private CPA claims. *Id.*

¶48 In clarifying the public interest element, *Hangman Ridge* announced two new elements of a CPA claim. *Id.* at 792-93. The fourth element required "a showing that plaintiff was injured in his or her 'business or property'." *Id.* at 792 (quoting former RCW 19.86.090 (1987)). The fifth element required the plaintiff to show causation. *Id.* at 792-93. With regard to causation, the court noted:

A causal link is required between the unfair or deceptive acts and the injury suffered by plaintiff. This causation element, like the injury element, has been foreshadowed by our previous opinions. The *Anhold* "inducement" prong hints at a causation requirement. Moreover, the need to find a causal link between the alleged acts and the plaintiff's injury has been the focus of a number of prior decisions of both this court and the Court of Appeals.

Id. at 793 (emphasis added). In announcing the new causation element, *Hangman Ridge* did not expressly disavow the inducement or reliance requirements applied in *Anhold* and *Nuttall*. However, [**21] *Hangman Ridge* did not apply the new causation element because it held that there had been no unfair or deceptive act [***30] or practice. *Id.* at 794-95. It left open the question of what is required to establish a causal link.

[19-21] ¶49 Indoor Billboard argues that *Hangman Ridge* established that a plaintiff need only show that it lost money to show causation, relying again on *Pickett I*. However, as we have already noted, this court subsequently reversed *Pickett I* on other grounds, finding *Pickett I's* [*81] analysis of causation suspect. See *Pickett II*, 145 Wn.2d at 191. *Pickett I* held that "[c]ausation inheres in the fact that the plaintiffs purchased cruise tickets." *Pickett I*, 101 Wn. App. at 920. It reasoned that because the CPA was to be liberally construed and the cruise ship line had imposed fees that were clearly not what it said they were, "[a]ny other interpretation would effectively undermine class actions based on the Washington CPA." *Id.* *Pickett II* called *Pickett I's* conclusion that causation is established if the plaintiff shows that he or she loses money "debatable" and commented that the cases *Pickett I* cited did not support the appellate court's conclusion. *Pickett II*, 145 Wn.2d at 197. It concluded that "[u]nder the posture of [the] case, ... this is a debatable question without clear answer under Washington [***31] law at the time of the parties' settlement and presented a risk to the Plaintiffs class favoring settlement." *Id.* (emphasis added). Although we agree the CPA is to be liberally construed, *Pickett I* carries this construction too far. Therefore, we reject Indoor Billboard's argument that [HN18] causation may be established merely by a showing that money was lost.

¶50 *Integra* argues that proof that the reliance requirement survives *Hangman Ridge* is found in *Robinson*. However, *Robinson* involved a failure to disclose, not an affirmative misrepresentation, so it does not support *Integra's* argument. 106 Wn. App. at 119.

¶51 WSTLA and the AG suggest that *Hangman Ridge* replaced the reliance/inducement requirement with a proximate cause standard. Br. of Amicus Curiae WSTLA at 8-9 (citing 6A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 310.07, at 274 (5th ed. 2005) (WPI); *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 314, 858 P.2d 1054 (1993); *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 167-68, 795 P.2d 1143 (1990)); Br. of Amicus Curiae AG at 12-13 (citing *Fisons*, 122 Wn.2d at 314; WPI 310.07, at 274-75).

¶52 [HN19] "Proximate cause" is defined in WPI 310.07 as a "cause [***32] which in direct sequence [unbroken by any new [*82] independent cause] produces the injury complained of and without which such injury would not have happened. [There may be one or more proximate causes of an injury.]" In the comments, WPI 310.07 cites this court's holding in *Pickett II* in which we stated, "[w]hether individual reliance is required for causation under the CPA is a 'debatable question without a clear answer under Washington law.'" WPI 310.07, at 274 cmt. (quoting *Pickett II*, 145 Wn.2d at 197). The comments also cite to WPI 15.01 for the traditional definition of "proximate cause." WPI 310.07, at 274 cmt. The comments under WPI 15.01 indicate that this court favors the "direct sequence" and "but for" definitions of "proximate cause." 6 WPI 15.01, at 182 cmt. (5th ed. 2005) (citing *Alger v. City of Mukilteo*, 107 Wn.2d 541, 545, 730 P.2d 1333 (1987) ("direct sequence"); *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000) ("but for") (internal quotation marks omitted) (quoting *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998)). Applying WPI 15.01 to the causation analysis for a CPA claim, a plaintiff would have to establish [***33] that but for the defendant's unfair or deceptive act or practice the plaintiff's injury would not have occurred.

¶53 Two cases that postdate *Hangman Ridge*, *Schmidt* and *Fisons*, applied the proximate cause standard articulated in WPI 15.01.

¶54 *Schmidt* involved a defendant who attempted to sell property that was in disrepair based on an inflated appraisal. 115 Wn.2d at 167. We held that causation was established because the [**22] "[p]laintiffs testified at various stages throughout the litigation that had they not been shown the inflated appraisal, they never would have made the investment which led to the injury now complained of." *Id.* at 168. *Integra* argues *Schmidt* did not eliminate the reliance test because the concept of reliance was implicit in the court's ruling. But *Schmidt's* description is compatible with the definition of "proximate cause" in WPI 15.01 because it effectively concluded that, but for the defendant's inflated appraisal, the plaintiffs would not have made the investment.

[*83] ¶55 *Fisons* involved a physician who brought a claim against a drug company alleging that the drug company had engaged in unfair or deceptive act or practices by failing to warn the physician of the dangers related [***34] to a drug he prescribed to his patients. 122 Wn.2d at 311. The issue was whether the jury was properly instructed that it had to find that the defendant's "unfair or deceptive act or practice was a proximate cause of the injury" to the plaintiff, not whether reliance on the unfair or deceptive act or practice was part of the causation element of a CPA claim. *Id.* at 314. *Integra* argues *Fisons* is not analogous because it involved a failure to warn rather than a claim of affirmative misrepresentation and a failure to warn does not implicate the reliance standard because a party cannot rely on something it was never aware of in the first place. However, *Fisons* clearly acknowledged that a proximate cause jury instruction was appropriate with respect to the causation element of a CPA claim. *Id.*

¶56 We conclude [HN20] where a defendant has engaged in an unfair or deceptive act or practice, and there has been an affirmative misrepresentation of fact, our case law establishes that there must be some demonstration of a causal link between the misrepresentation and the plaintiff's injury. *Indoor Billboard* urges us to adopt a per se rule and hold that payment of *Integra's* invoice is per se sufficient to establish [***35] the proximate cause of plaintiff's damages. We reject *Indoor Billboard's* per se rule because mere payment of an invoice may not establish a causal connection between the unfair or deceptive act or practice and plaintiff's damages. [HN21] Proximate cause is a factual question to be decided by the trier of fact. Payment of an invoice may or may not be sufficient to establish a causal connection between the misrepresentation of fact and damages, but payment of the invoice may be considered with all other relevant evidence on the issue of proximate cause.

¶57 We hold that [HN22] the proximate cause standard embodied in WPI 15.01 is required to establish the causation [*84] element in a CPA claim. A plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury.

b. Are there genuine issues of material fact regarding a causal link between *Integra's* unfair or deceptive act or practice and *Indoor Billboard's* injury, precluding summary judgment for *Integra*?

¶58 Although its primary argument is that it need only show that it paid *Integra's* invoice to demonstrate causation, *Indoor Billboard* alternatively argues that the evidence of record is sufficient to [***36] establish genuine issues of material fact regarding causation to submit the question to a jury. *Indoor Billboard* points primarily to Shulevitz's deposition testimony that he relied on and was confused by information provided by *Integra* in deciding to purchase *Integra's* services. *Indoor Billboard* argues that Shulevitz paid the invoice only because he was "reluctant to contest a charge on his very first bill at the start of a multi-year contractual relationship." Br. of Appellant at 45. It further argues that Shulevitz's actions did not break the causal link between *Integra's* unfair or deceptive act or practice and *Indoor Bill-*

board's injury because the research was only necessary to dispel Shulevitz's confusion and the question should more properly be decided by a jury.

¶59 Integra maintains that Shulevitz knew that Integra's PICC was unrelated to the FCC before it signed the agreement for Integra's services. Integra asserts Shulevitz knew the PICC was charged to all customers regardless of whether they received interexchange [**23] services from Integra and that the PICC was set by the company rather than the FCC. Further, Integra argues that Indoor Billboard did not challenge Integra's PICC until [***37] after it had received the first invoice, even though it could have chosen not to purchase Integra's services in the first place. Lastly, Integra argues that Indoor Billboard based its decision to challenge Integra's PICC on information it obtained primarily from external sources--not from Integra.

[*85] ¶60 We conclude it is not clear whether Integra's actions caused Indoor Billboard's injuries or whether Indoor Billboard's injuries were the result of its reliance on information it obtained from Shulevitz's investigation, as in *Nuttall*. The evidence in the record is sufficient to demonstrate that genuine issues of material fact exist regarding a causal link between Integra's unfair or deceptive acts or practices and Indoor Billboard's injuries. We hold that summary judgment was inappropriate and remand the matter for trial.

3. Is Indoor Billboard's claim barred by the voluntary payment doctrine?

¶61 As an affirmative defense to Indoor Billboard's CPA claim, Integra relies on the voluntary payment doctrine set out in a 1940 case that stated, "money voluntarily paid under a claim of right to the payment, and with full knowledge of the facts by the person making the payment, cannot be recovered back [***38] on the ground that the claim was illegal, or that there was no liability to pay in the first instance." *Speckert v. Bunker Hill Ariz. Mining Co.*, 6 Wn.2d 39, 52, 106 P.2d 602 (1940) (quoting 21 RULING CASE LAW 141-42 (1918)). But there is an exception.

[HN23] "The general rule that a voluntary payment cannot be recovered back has no application where the payment was induced by fraud on the part of the payee, for, subject to the general rules as to what constitutes fraud, it is a well settled rule that, where a payment of money which the payee ought not to retain is induced by fraud and deceit, it may be recovered back by the payor, and if the fraud is the inducement for the payment, the rule applies although it is not the sole producing cause."

Id. at 53 (quoting 48 C.J. *Payment* § 311, at 753-54 (1929)).

¶62 Integra argues that Indoor Billboard paid Integra's invoice knowing that Integra's PICC was charged to all customers, regardless of whether they purchased interexchange [*86] service from Integra, and knowing that the FCC did not set the amount of Integra's PICC. Integra further notes that Shulevitz conducted his own independent investigation into Integra's surcharge before agreeing to purchase Integra's [***39] services or pay Integra's invoices. Integra argues that because Indoor Billboard purchased Integra's services and paid the invoice knowingly, Indoor Billboard is barred under the voluntary payment doctrine from asserting a CPA claim.

¶63 Indoor Billboard questions whether an affirmative defense that is ordinarily asserted only in a contract context can be applied to a CPA claim at all. Nevertheless, it claims that even if we could apply the doctrine in the context of a CPA claim, it cannot be applied here because there is a genuine issue of material fact as to whether Shulevitz had "*full knowledge of all the facts*," as required by the doctrine. Br. of Appellant at 48 (quoting *Speckert*, 6 Wn.2d at 52). It argues adjudication of the voluntary payment doctrine is inappropriate on summary judgment.

¶64 Indoor Billboard is correct that [HN24] Washington courts have generally applied the voluntary payment doctrine only in the contract context. *See, e.g., Hawkinson v. Conniff*, 53 Wn.2d 454, 459-60, 334 P.2d 540 (1959); *Shields v. Schorno*, 51 Wn.2d 737, 739, 321 P.2d 905 (1958); *Speckert*, 6 Wn.2d at 40; *Maxwell v. Provident Mut. Life Ins. Co. of Phila.*, 180 Wash. 560, 575-76, 41 P.2d 147 (1935); *Mut. Sales Agency, Inc. v. Hori*, 145 Wash. 236, 240-41, 259 P. 712 (1927). [***40] One Washington case from the Court of Appeals considered applying the doctrine in a CPA context, although it did not reach the issue because it decided the defendant did not engage in an unfair or deceptive practice. *Robinson*, 106 Wn. App. at 122.

[**24] [22] ¶65 We agree with Indoor Billboard that [HN25] the voluntary payment doctrine is inappropriate as an affirmative defense in the CPA context, as a matter of law, because we construe the CPA liberally in favor of plaintiffs.

[*87] V. CONCLUSION

¶66 We affirm the trial court's denial of Integra's motion to dismiss for lack of subject matter jurisdiction.

162 Wn.2d 59, *; 170 P.3d 10, **;
2007 Wash. LEXIS 789, ***

¶67 We reverse the trial court's grant of summary judgment in favor of Integra and hold that Indoor Billboard established as a matter of law that Integra engaged in an unfair or deceptive act or practice. We also hold that genuine issues of material fact exist regarding a causal link between Integra's unfair or deceptive act or practice and Indoor Billboard's injury.

¶68 Lastly, we conclude the voluntary payment doctrine is not an appropriate affirmative defense to a CPA claim as a matter of law.

ALEXANDER, C.J., and C. JOHNSON, MADSEN, SANDERS, BRIDGE, CHAMBERS, [***41] OWENS, and J.M. JOHNSON, JJ., concur.

Reconsideration denied February 6, 2008.

Annotated Revised Code of Washington by LexisNexis

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1 of 1 DOCUMENT

DOUGLAS A. SEYMOUR, *Appellant*, v. THE DEPARTMENT OF HEALTH, DENTAL QUALITY ASSURANCE COMMISSION, *Respondent*.

No. 61494-1-1

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

152 Wn. App. 156; 216 P.3d 1039; 2009 Wash. App. LEXIS 2279

April 27, 2009, Oral Argument
September 8, 2009, Filed

SUBSEQUENT HISTORY: Reconsideration denied by Seymour v. Dep't of Health, Dental Quality Assurance Comm'n, 2009 Wash. App. LEXIS 3325 (Wash. Ct. App., Oct. 12, 2009)

PRIOR HISTORY: [***1]

Appeal from King County Superior Court. Docket No: 05-2-37263-0. Judgment or order under review. Date filed: March 12, 2008. Judge signing: Honorable Catherine D Shaffer.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant dentist sought review of an order from the King County Superior Court (Washington), which upheld an order from respondent, the Washington Dental Quality Assurance Commission (DQAC), revoking his license, prohibiting him from owning a dental practice for seven years, and fining him \$ 50,000.

OVERVIEW: Two former employees filed complaints against the dentist. The complaints alleged that the dentist had engaged in fraudulent billing practices and that he had provided substandard dental care to some of his patients. The Washington Department of Health (DOH) commenced an investigation into the dental practice that included a warrantless inspection of his office, during which an investigator seized various documents and collected other evidence, without any determination from the DQAC as to the complaints' merit. At an adjudicatory hearing, the panel found that the dentist had provided treatment below the standard of care in four cases and that he had committed 11 acts of fraudulent billing. His license was revoked and he was fined. The trial court upheld the decision. On appeal, the court found that the warrantless inspection was invalid under Wash. Rev. Code § 18.130.080(2) because it was commenced before the determination of merit required by the Washington Uniform Disciplinary Act (UDA) was made, indeed before the commission or a panel thereof was even aware of the complaints. The inspection violated the dentist's constitutional rights.

OUTCOME: The court vacated the judgment of the DQAC and remanded the case to the DQAC for further proceedings.

CORE TERMS: inspection, investigator's, unprofessional conduct, warrantless, warrantless inspection, disciplining, commercial property, dental, disciplinary, seizure, investigate, searches and seizures, commercial premises, regulatory scheme, statutory schemes, presiding officer, license, privacy, warrantless search, investigative, discipline, patient, reasonable grounds, unreasonable searches, evidence introduced, warrant requirement, lawful authority, commission members, patient records, conducting

LexisNexis(R) Headnotes

Administrative Law > Agency Investigations > Constitutional Rights > Search & Seizure

152 Wn. App. 156, *, 216 P.3d 1039, **;
2009 Wash. App. LEXIS 2279, ***

***Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Administrative Searches***

[HN1] A warrantless administrative search is valid only if authorized by a statute that adequately serves as a substitute for the protection afforded by the warrant requirement in the Fourth Amendment to the United States Constitution, U.S. Const. amend. IV.

***Administrative Law > Agency Investigations > Scope > General Overview
Healthcare Law > Actions Against Healthcare Workers > Doctors & Physicians
Healthcare Law > Business Administration & Organization > Licenses > General Overview***

[HN2] Pursuant to Washington's Uniform Disciplinary Act (UDA), Wash. Rev. Code ch. 18.130, before a professional disciplining authority, such as the Washington Dental Quality Assurance Commission (DQAC), may direct the Washington Department of Health (DOH) to investigate a complaint of unprofessional misconduct against a licensed health care professional, the disciplining authority must first determine that the complaint has merit. Wash. Rev. Code § 18.130.080(2).

***Administrative Law > Agency Investigations > Scope > General Overview
Healthcare Law > Actions Against Healthcare Workers > Doctors & Physicians
Healthcare Law > Business Administration & Organization > Licenses > General Overview***

[HN3] Pursuant to the Washington Uniform Disciplinary Act (UDA), the Washington Dental Quality Assurance Commission (DQAC) has the authority to investigate complaints of unprofessional conduct against licensed dentists, prepare a statement of formal charges, conduct administrative disciplinary hearings, and impose sanctions. Wash. Rev. Code §§ 18.130.040(2)(b)(iii).050.090(1).160.

***Administrative Law > Agency Investigations > Scope > General Overview
Healthcare Law > Actions Against Healthcare Workers > Doctors & Physicians
Healthcare Law > Business Administration & Organization > Licenses > General Overview***

[HN4] See Wash. Rev. Code § 18.130.080(2).

***Administrative Law > Agency Investigations > Scope > General Overview
Healthcare Law > Actions Against Healthcare Workers > Doctors & Physicians
Healthcare Law > Business Administration & Organization > Licenses > General Overview***

[HN5] Wash. Rev. Code § 18.130.080(2) prohibits the investigation of a licensed health care professional from proceeding until the disciplining authority reviews the complaint and determines that there are reasonable grounds to believe unprofessional conduct occurred.

***Administrative Law > Agency Investigations > Constitutional Rights > Search & Seizure
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Administrative Searches***

[HN6] It is well established that the prohibition against unreasonable searches in the Fourth Amendment to the United States Constitution, U.S. Const. amend. IV, applies to administrative inspections of private commercial property.

***Administrative Law > Agency Investigations > Constitutional Rights > Search & Seizure
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Administrative Searches***

[HN7] The prohibition on unreasonable searches and seizures in the Fourth Amendment to the United States Constitution, U.S. Const. amend. IV, is applicable to commercial premises, as well as to private homes. An owner or operator of a business thus has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable. This expectation exists not only with respect to traditional police searches conducted for the gathering of criminal evidence but also with respect to administrative inspections designed to enforce regulatory statutes.

***Administrative Law > Agency Investigations > Constitutional Rights > Search & Seizure
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Administrative Searches***

[HN8] The protections of Wash. Const. art. I, § 7 extend to administrative searches coextensively with those of the Fourth Amendment to the United States Constitution, U.S. Const. amend. IV.

***Administrative Law > Agency Investigations > Constitutional Rights > Search & Seizure
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Administrative Searches***

[HN9] The Fourth Amendment to the United States Constitution, U.S. Const. amend. IV, protects the interest of the owner of property in being free from unreasonable intrusions onto his property by agents of the government. Inspections of commercial property may be unreasonable if they are not authorized by law or are unnecessary for the furtherance of government interests. Where Congress has authorized inspection but made no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply. In such cases, a warrant may be necessary to protect the owner from the unbridled discretion of executive and administrative officers by assuring him that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment.

***Administrative Law > Agency Investigations > Constitutional Rights > Search & Seizure
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Administrative Searches***

[HN10] To be valid under the Fourth Amendment to the United States Constitution, U.S. Const. amend. IV, a warrantless regulatory search or administrative inspection must satisfy three criteria. Warrantless administrative searches are constitutional only (1) if there is a substantial governmental interest that informs the regulatory scheme pursuant to which the inspection is made; (2) if warrantless inspections are necessary to further the regulatory scheme; and (3) if the inspection program provides a constitutionally adequate substitute for a warrant, in terms of certainty and regularity of its application.

***Administrative Law > Agency Investigations > Constitutional Rights > Search & Seizure
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Administrative Searches***

[HN11] A regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.

***Administrative Law > Agency Investigations > Scope > General Overview
Healthcare Law > Actions Against Healthcare Workers > Doctors & Physicians
Healthcare Law > Business Administration & Organization > Licenses > General Overview***

[HN12] An investigation under the Washington Uniform Disciplinary Act (UDA) may not proceed until the disciplining authority reviews the complaint and determines that there are reasonable grounds to believe unprofessional conduct occurred. The UDA does not authorize Washington Department of Health (DOH) employees to initiate an investigation unless the disciplining authority first makes a determination of merit and directs the DOH to investigate.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Consent to Search > Sufficiency & Voluntariness

[HN13] When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.

Administrative Law > Agency Adjudication > Hearings > Evidence > Admissibility > Constitutional Protections

[HN14] The Washington Administrative Procedure Act (APA) provides that a presiding officer of an adjudicatory hearing shall exclude evidence that is excludable on constitutional or statutory grounds. Wash. Rev. Code § 34.05.452(1).

***Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review
Administrative Law > Judicial Review > Standards of Review > Substantial Evidence***

[HN15] An appellate court may reverse an administrative order if it is unsupported by substantial evidence or is arbitrary or capricious. Wash. Rev. Code § 34.05.570(3)(e), (h).

***Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof
Healthcare Law > Business Administration & Organization > Licenses > General Overview***

[HN16] Allegations of professional misconduct in a professional license disciplinary proceeding must be proved by clear and convincing evidence.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review

[HN17] An action is arbitrary and capricious if it is made without consideration of and in disregard of the facts and circumstances.

SUMMARY:

WASHINGTON OFFICIAL REPORTS SUMMARY Nature of Action: A dentist sought judicial review of an administrative decision that he had engaged in unprofessional conduct.

Nature of Action: A dentist sought judicial review of an administrative decision that he had engaged in unprofessional conduct.

Superior Court: The Superior Court for King County, No. 05-2-37263-0, Catherine D. Shaffer, J., on March 12, 2008, entered a judgment affirming the administrative decision.

Court of Appeals: Holding that an administrative search of the dentist's office and seizure of records violated the dentist's Fourth Amendment rights, that the presiding officer at the disciplinary proceeding should have excluded the evidence unlawfully obtained, and that it cannot be determined on appeal which evidence introduced at the disciplinary hearing should have been excluded, the court *reverses* the judgment, *vacates* the disciplinary order, and *remands* the case to the Dental Quality Assurance Commission for further proceedings.

HEADNOTES WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] Licenses -- Regulation of Occupations -- Professional Licensing -- Discipline -- Investigation -- Determination of Reasonable Grounds -- Necessity. Under RCW 18.130.080 of the Uniform Disciplinary Act, a licensed professional may not be subjected to an administrative disciplinary investigation upon a complaint of unprofessional conduct unless and until the disciplining authority for the profession reviews the complaint and determines that there are reasonable grounds to believe the professional has engaged in unprofessional conduct.

[2] Searches and Seizures -- Administrative Search -- Constitutional Protection -- Scope -- Commercial Property. The Fourth Amendment protection against unreasonable searches and seizures applies to administrative inspections of private commercial property. The protections of Const. art. I, § 7 also extend to administrative searches and are coextensive with the protections provided by the Fourth Amendment.

[3] Searches and Seizures -- Expectation of Privacy -- Commercial Property -- Administrative Inspection. An owner or operator of a business has a reasonable expectation of privacy in commercial property that exists not only with respect to traditional police searches conducted for the gathering of criminal evidence but also with respect to administrative inspections conducted for the purpose of enforcing regulatory statutes.

[4] Searches and Seizures -- Administrative Search -- Regulatory Inspections -- Warrantless Inspection -- Statutory Procedure -- Sufficiency -- Test. A government agent's warrantless search or administrative inspection of commercial property to find evidence of an alleged violation of administrative regulations or professional conduct rules does not violate the Fourth Amendment if there is a constitutionally valid legislative scheme authorizing such searches and establishing the procedure for their conduct and the legislative scheme is followed. A warrantless regulatory search or administrative inspection is valid under the Fourth Amendment only if (1) there is a substantial governmental interest that informs the regulatory scheme pursuant to which the search or inspection is made, (2) warrantless searches or inspections are necessary to further the regulatory scheme, and (3) the search or inspection program provides a constitutionally adequate substitute for a warrant in terms of certainty and regularity of its application. The primary concern of courts when reviewing such statutory schemes is to rein in the power of the executive branch in conducting administrative searches. The regulatory statute must perform the two basic functions of a warrant: (1) it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope and (2) it must limit the discretion of the inspecting officers.

[5] Searches and Seizures -- Administrative Search -- Regulatory Inspections -- Warrantless Inspection -- Absence of Statutory Procedures. A government agent's warrantless search or inspection of commercial property to find evidence of an alleged violation of administrative regulations or professional conduct rules is invalid under the Fourth Amendment if it was not made pursuant to any statutory scheme providing a valid nonwarrant procedure for conducting administrative searches or inspections.

[6] Licenses -- Regulation of Occupations -- Professional Licensing -- Discipline -- Investigation -- Warrantless Search or Inspection -- Determination of Merit and Authorization To Investigate -- Necessity. The Uniform Disciplinary Act (ch. 18.130 RCW) does not provide authority for a warrantless administrative search or inspection of commercial premises to find evidence of an alleged violation of professional conduct rules unless the disciplining authority has reviewed the complaint of unprofessional conduct and has determined that there are reasonable grounds to believe unprofessional conduct has occurred. Absent a determination of merit and authorization to commence an investigation by the disciplining authority, a warrantless administrative search or inspection of commercial premises is invalid under the Fourth Amendment. The finding of merit is the statutory substitute for a judicial determination of probable cause, and it defines the possible violations, thereby delineating the parameters of reasonableness to be applied to searches and seizures conducted in the course of the investigation. Without such a finding, the discretion of executive branch investigative officials is unchecked.

[7] Searches and Seizures -- Administrative Search -- Regulatory Inspections -- Warrantless Inspection -- Agency Policy -- Sufficiency. A warrantless administrative search or inspection of commercial premises to find evidence of an alleged violation of administrative regulations or professional conduct rules cannot be justified on the basis of an agency policy that a certain category of complaints must always be investigated.

[8] Licenses -- Regulation of Occupations -- Professional Licensing -- Discipline -- Investigation -- Warrantless Search or Inspection -- Determination of Merit and Authorization To Investigate -- Participation of One Agency Member -- Sufficiency. The determination of merit required by the Uniform Disciplinary Act (ch. 18.130 RCW) before an investigation may be conducted into an allegation of unprofessional conduct by a licensed professional may not be satisfied by the participation in the investigation by a single member of the disciplining authority inasmuch as the act does not authorize one agency member to execute the disciplining authority's statutory duties.

[9] Searches and Seizures -- Administrative Search -- Regulatory Inspections -- Consent -- Voluntariness -- Determination -- Acquiescence. An owner or occupier of commercial premises will not be deemed to have voluntarily consented to a warrantless administrative search or inspection of the premises merely by having acquiesced to the investigator's claim of lawful authority to conduct the search or inspection. In seeking to justify the search or inspection on the grounds of consent, the investigating agency must prove that the consent was, in fact, freely and voluntarily given. Where the owner or occupier has a statutory obligation to comply with an administrative investigation, his or her mere acquiescence in the investigator's assertion of lawful authority to conduct the search or inspection does not constitute consent voluntarily given.

[10] Administrative Law -- Hearing -- Evidence -- Suppression -- Necessity. Under RCW 34.05.452(1), the presiding officer of an administrative adjudicatory hearing must suppress evidence obtained by unconstitutional means and any fruit of an unconstitutional entry into a protected place.

[11] Licenses -- Regulation of Occupations -- Professional Licensing -- Discipline -- Degree of Proof -- Clear and Convincing Evidence. A finding of professional misconduct in a professional licensing disciplinary proceeding must be supported by clear and convincing evidence.

[12] Administrative Law -- Judicial Review -- Arbitrary and Capricious -- What Constitutes. An agency action is arbitrary or capricious within the meaning of RCW 34.05.570(3)(i) if it is made without consideration and in disregard of the facts and circumstances.

[13] Administrative Law -- Judicial Review -- Disposition -- Remand to Agency -- Reconsideration of Record. A court reviewing an agency adjudication may remand the matter to the agency for reconsideration if, after ruling that certain evidence in the record must be suppressed, the court is unable to determine whether the remaining evidence provides substantial evidence to support the agency's findings of fact under the applicable standard of proof.

COUNSEL: *Philip A. Talmadge and Sidney C. Tribe (of Talmadge/Fitzpatrick, PLLC); and John C. Versnel III and Vanessa M. Vanderbrug (of Lawrence & Versnel, PLLC), for appellant.*

Robert M. McKenna, Attorney General, and Cindy Gideon, Assistant, for respondent.

JUDGES: Authored by Stephen J Dwyer. Concurring: Ann Schindler, Marlin Appelwick.

OPINION BY: Stephen J Dwyer

OPINION

[*160] [**1041] ¶1 DWYER, J. -- Today we decide whether a warrantless administrative inspection of a dentist's office not authorized by statute violates the Fourth Amendment's prohibition against unreasonable searches. We conclude that it does and, accordingly, reverse.

I

¶2 [HN1] A warrantless administrative search is valid only if authorized by a statute that adequately serves as a substitute for the protection afforded by the Fourth Amendment's warrant requirement. [HN2] Pursuant to Washington's Uniform Disciplinary Act (UDA), chapter 18.130 RCW, before a professional disciplining authority such as the Dental Quality Assurance Commission (DQAC) may direct the Department of Health (DOH) to investigate [***2] a complaint of unprofessional misconduct against a licensed health care professional, the disciplining authority must first determine that the complaint has merit. *See* RCW 18.130.080(2). That was not done here.

¶3 After receiving complaints of unprofessional conduct against Douglas A. Seymour, DDS, DOH commenced an investigation into Dr. Seymour's dental practice that included [*161] a warrantless inspection of his office, during which an investigator seized various documents and collected other evidence, without any determination from DQAC as to the complaints' merit. Subsequently, additional evidence was obtained as the result of the investigator's demands of Dr. Seymour that he produce copies of various business records. Evidence obtained during this investigation subsequently formed much of the basis for DQAC's adjudicative findings that Dr. Seymour had engaged in unprofessional conduct, the imposition of a fine against Dr. [**1042] Seymour, and the revocation of his license to practice dentistry. However, as neither the initial search nor the subsequent seizure of records were authorized by statute, the investigator acted in violation of Dr. Seymour's rights under the Fourth Amendment. Therefore, [***3] pursuant to the provisions of the Administrative Procedure Act (APA), chapter 34.05 RCW, the presiding officer at Dr. Seymour's disciplinary hearing should have granted Dr. Seymour's motion to exclude that evidence unlawfully obtained pursuant to the search and seizures.¹ Due to the rulings made at the hearing, it is not possible to determine on appeal precisely which evidence introduced at Dr. Seymour's hearing should have been excluded. Likewise, it is impossible to determine whether DQAC's findings and conclusions are supported by substantial evidence or whether the sanctions imposed against Dr. Seymour are just. Thus, we vacate DQAC's disciplinary order and remand this matter to the commission for further proceedings.

¹ The APA governs adjudicative proceedings held pursuant to the UDA. RCW 18.130.100. The APA provides that "[t]he presiding officer [of a disciplinary hearing] shall exclude evidence that is excludable on constitutional or statutory grounds." RCW 34.05.452(1).

II

[1] ¶4 [HN3] Pursuant to the UDA, DQAC has the authority to investigate complaints of unprofessional conduct against licensed dentists, prepare a statement of formal charges, [*162] conduct administrative disciplinary hearings, [***4] and impose sanctions. *See* RCW 18.130.040(2)(b)(iii), .050, .090(1), .160. RCW 18.130.080(2) sets forth the procedure that DQAC, as a disciplining authority, must follow in deciding whether to investigate a complaint of unprofessional conduct: [HN4] "If the disciplining authority determines that a complaint ... merits investigation, ... the disciplining authority shall investigate to determine whether there has been unprofessional conduct."² [HN5] This provision of the UDA prohibits the investigation of a licensed health care professional from "proceed[ing] until the [disciplining

authority] reviews the complaint and determines that there are reasonable grounds to believe unprofessional conduct occurred." *Client A v. Yoshinaka*, 128 Wn. App. 833, 843, 116 P.3d 1081 (2005).³

² To perform its duties under the UDA, DQAC may establish a panel consisting of three or more commission members. RCW 18.130.050(18). It may transact business through such a panel by majority vote. RCW 18.32.0357. Further, DQAC may appoint one of its individual members to "direct investigations" into unprofessional conduct complaints, RCW 18.130.050(11), and it may utilize DOH employees to conduct investigations. RCW 18.130.060(4).

³ *Yoshinaka* [***5] involved an investigation into a complaint of unprofessional conduct against a psychologist. Our analysis, however, was not limited to the UDA's application to investigations concerning psychologists. RCW 18.130.080(2) applies to all disciplining authorities charged with assuring "the public of the adequacy of professional competence and conduct in the healing arts." RCW 18.130.010.

¶5 In March 2002, two individuals formerly employed in Dr. Seymour's dental office filed complaints of unprofessional conduct against him. The complaints alleged that Dr. Seymour and his office manager had engaged in fraudulent billing practices and that Dr. Seymour had provided substandard dental care to some of his patients. Pursuant to an internal DQAC policy memorandum directing DOH investigative staff to automatically investigate certain categories of complaints, including fraud and substandard dental care, DOH commenced an investigation into Dr. Seymour's dental practice. It is undisputed that neither the full commission nor a panel thereof evaluated the merit of these particular complaints against Dr. Seymour before the investigation began.

[*163] ¶6 In July, a DOH investigator entered Dr. Seymour's dental office [***6] and requested the production of records for 40 patients. Dr. Seymour complied with the investigator's request and directed his office manager to make copies of the available records. The office manager produced half of the requested documents at that time; the other requested documents were not stored at the office. While waiting for the office manager to copy the requested records, the investigator observed a note behind the front desk indicating that all tooth extractions on adults should be billed as surgical procedures, [**1043] which the investigator believed to be evidence of improper billing conduct.

¶7 In early August, the investigator presented her findings to a member of DQAC, Dr. Lorin Peterson, who served as the "Reviewing Commission Member" for this investigation. In September, a third former employee made allegations similar to those contained in the first two complaints. Later that fall, Dr. Seymour provided the remaining patient records requested by the DOH investigator during the inspection; that winter, he provided additional records in response to an investigative request. In January 2003, a patient of Dr. Seymour's filed a complaint alleging that Dr. Seymour had provided him [***7] with substandard dental care.

¶8 In April 2003, upon Dr. Peterson's recommendation, DQAC authorized the filing of a formal statement of charges against Dr. Seymour alleging inferior dental work, fraudulent billing, and mismanagement of patient accounts. It is undisputed that neither the full commission nor a panel thereof had reviewed the complaints against Dr. Seymour prior to this time. In December 2003, DQAC authorized the filing of an additional charge of unprofessional conduct against Dr. Seymour, arising out of the complaint filed by Dr. Seymour's former patient.

¶9 On July 31, 2006, DQAC commenced an adjudicatory hearing on the charges against Dr. Seymour. A health law judge presided over the hearing, and a separate three-member panel comprised of DQAC members received evidence. Much of the evidence introduced at the hearing [*164] consisted of materials seized from Dr. Seymour's office pursuant to the warrantless July 2002 inspection and observations the DOH investigator made during the inspection. Other evidence introduced was the product of additional investigative demands for records made of Dr. Seymour prior to April 2003. Dr. Seymour testified on his own behalf at the hearing, as did [***8] one of his patients whose record formed part of the evidence in support of the charge of fraud against Dr. Seymour. The panel also heard testimony from dental experts as to accepted accounting and billing practices, as well as the reasonable standard of dental care. In addition, it heard testimony from some of Dr. Seymour's former employees.

¶10 In October 2006, the panel issued findings of fact and conclusions of law. It specifically found that Dr. Seymour had provided treatment below the standard of care in 4 instances and that he had committed 11 acts of fraudulent billing. Taking into account past disciplinary actions involving Dr. Seymour, DQAC sanctioned Dr. Seymour's conduct by revoking his license and prohibiting him from owning a dental practice for seven years. It also imposed a \$ 50,000 fine and required him to retake the credentialing exam before reapplying to practice. On appeal, the superior court affirmed DQAC's decision.

¶11 Dr. Seymour contends that the DOH inspection of his office and demands for his records were made in violation of the Fourth Amendment's prohibition against warrantless searches and seizures. Therefore, he asserts, evidence gathered pursuant to this [***9] inspection and those demands should have been excluded. We agree.

[2, 3] ¶12 [HN6] It is well established that "the Fourth Amendment's prohibition against unreasonable searches applies to administrative inspections of private commercial property." *Donovan v. Dewey*, 452 U.S. 594, 598, 101 S. Ct. 2534, 69 L. Ed. 2d 262 (1981) (citing *Marshall v. Barlow's, Inc.*, [*165] 436 U.S. 307, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978); *See v. City of Seattle*, 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967)). Indeed,

[t]he Court long has recognized that [HN7] the Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises, as well as to private homes. An owner or operator of a business thus has an expectation of privacy in commercial property, which society is prepared to consider to be reasonable. This expectation exists not only with respect to traditional police searches conducted for the gathering of criminal evidence but also with respect to administrative inspections designed to enforce regulatory statutes.

New York v. Burger, 482 U.S. 691, 699-700, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987) (citations omitted).

[**1044] ¶13 [HN8] The protections of article I, section 7 of the Washington Constitution [***10] extend to administrative searches coextensively with those of the Fourth Amendment. *Centimark Corp. v. Dep't of Labor & Indus.*, 129 Wn. App. 368, 375, 119 P.3d 865 (2005); *accord State v. Browning*, 67 Wn. App. 93, 95, 834 P.2d 84 (1992) (analyzing protections against unreasonable searches provided under both the federal and state constitutions).⁴

4 In *Centimark*, Centimark contended that article I, section 7 provided greater protection than the Fourth Amendment in the context of an administrative search. 129 Wn. App. at 374. Centimark failed, however, to offer a complete analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), in support of its contention that these parallel provisions of the state and federal constitutions should be evaluated independently. *Centimark*, 129 Wn. App. at 375. Therefore, we viewed the two provisions as being coextensive. *Centimark*, 129 Wn. App. at 375 (citing *In re Pers. Restraint of Dyer*, 143 Wn.2d 384, 394, 20 P.3d 907 (2001)). Neither party here has offered a *Gunwall* analysis as to why article I, section 7 should be interpreted independently from the Fourth Amendment in this context. Accordingly, we continue to view the two provisions as coextensive.

[4] ¶14 Notwithstanding [***11] this recognized expectation of privacy in commercial establishments, it has been made clear that "legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment." *Donovan*, 452 U.S. at 598 (citing *United States v. Biswell*, 406 U.S. 311, 92 S. Ct. 1593, 32 L. Ed. 2d 87 (1972); *Colonnade Catering [*166] Corp. v. United States*, 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 2d 60 (1970)). That a legislative scheme authorizing the warrantless inspection of a business may be consistent with the Fourth Amendment reflects the belief that an individual's expectation of privacy in commercial property differs from that in one's home. *Burger*, 482 U.S. at 700. As the Supreme Court explained:

The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity afforded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections.

Donovan, 452 U.S. at 598-99.

¶15 Of course, not all [***12] means of conducting administrative searches satisfy the Fourth Amendment.

[T]he Fourth Amendment [HN9] protects the interest of the owner of property in being free from *unreasonable* intrusions onto his property by agents of the government. Inspections of commercial property may be unreasonable if they are not authorized by law or are unnecessary for the furtherance of [government] interests. *Colonnade Catering*[, 397 U.S. at 77]. "Where Congress has authorized inspection but made no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." *Colonnade Catering*[, 397 U.S. at 77]. In such cases, a warrant may be necessary to protect the owner from the "unbridled discretion [of] executive and administrative officers," *Barlow's*[, 436 U.S. at 323], by assuring him that "reasonable legislative or administrative standards for conducting an ... inspection are satisfied with respect to a particular [establishment]." *Camara v. Municipal Court*, 387 U.S. 523, 538[, 87 S. Ct. 1727, 18 L. Ed. 2d 930] (1967).

Donovan, 452 U.S. at 599 (some alterations in original).

¶16 [HN10] To be valid under the Fourth Amendment, a warrantless regulatory [***13] search or administrative inspection must satisfy three criteria. *Burger*, 482 U.S. at 702. The [*167] court in *Beck v. Texas State Board of Dental Examiners*, 204 F.3d 629, 638 (5th Cir. 2000) (citing *Burger*, 482 U.S. 691), succinctly summarized these criteria: Warrantless administrative searches are constitutional only

(1) if there is a substantial governmental interest that informs the regulatory scheme pursuant to which the inspection is [**1045] made, (2) if warrantless inspections are necessary to further the regulatory scheme, and (3) if the inspection program provides a constitutionally adequate substitute for a warrant, in terms of certainty and regularity of its application.⁵

⁵ Our Supreme Court has similarly recognized that, in the context of a statute authorizing warrantless inspections of massage parlors, "when an industry or business is subject to extensive governmental regulation and frequent unannounced inspections are necessary to insure compliance, warrantless inspections are valid if authorized by a statute which sufficiently delineates the scope, time and place of inspection." *Wash. Massage Found. v. Nelson*, 87 Wn.2d 948, 953, 558 P.2d 231 (1976) (emphasis added).

¶17 Reining in the power of [***14] the executive branch in conducting administrative searches is a primary concern of courts reviewing such statutory schemes. Where a statutory scheme is properly formulated and followed, Fourth Amendment concerns are addressed by the elimination of unreasonable searches. In such cases, "it is difficult to see what additional protection a warrant requirement would provide. ... The discretion of Government officials to determine what facilities to search and what violations to search for is thus directly curtailed by the regulatory scheme." *Donovan*, 452 U.S. at 605. A proper regulatory scheme, "rather than leaving the frequency and purpose of inspections to the unchecked discretion of Government officers, ... establishes a predictable and guided ... regulatory presence." *Donovan*, 452 U.S. at 604. Hence, the person subject to the inspection "is not left to wonder about the purposes of the inspector or the limits of his task." *Biswell*, 406 U.S. at 316. [HN11] The "regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the [***15] discretion of the inspecting [*168] officers." *Burger*, 482 U.S. at 703 (citing *Barlow's*, 436 U.S. at 323).

[5] ¶18 Of critical importance to the validity of the warrantless inspection of Dr. Seymour's office is whether it satisfied the criterion of being authorized by a statute providing a constitutionally adequate substitute for the Fourth Amendment's warrant requirement. It did not. Although Dr. Seymour does not contend that the UDA provides inadequate statutory authorization for warrantless administrative inspections, we nonetheless conclude that the inspection herein was not made pursuant to a statutory scheme sufficiently protective of Dr. Seymour's rights because it was not made pursuant to any recognized statutory scheme at all.

[6] ¶19 Well before the commencement of the adjudicatory hearing herein, we made clear that [HN12] an investigation under the UDA "may not proceed until the [disciplining authority] reviews the complaint and determines that there are reasonable grounds to believe unprofessional conduct occurred." *Yoshinaka*, 128 Wn. App. at 843. We also emphasized that the UDA does not authorize DOH employees "to initiate an investigation unless the [disciplining authority] first makes a determination [***16] of merit and directs the [DOH] to investigate." *Yoshinaka*, 128 Wn. App. at 843. Assuming that the UDA's requirements, as construed in *Yoshinaka*, are adequate substitutes for the warrant requirement,⁶ the warrantless inspection herein was invalid because it was commenced before the determination of merit required by the UDA was made, indeed before the commission or a panel thereof was even aware of the complaints. Therefore, the inspection violated Dr. Seymour's rights under the Fourth Amendment.

⁶ We emphasize that we do not reach the question of whether the scheme under the UDA is an adequate substitute for the warrant requirement. Our analysis is limited to the threshold question of whether the warrantless inspection herein was authorized by any statute.

¶20 The irregularity in this case is significant. The requirement that DQAC make a finding of merit in order to [*169] authorize the commencement of an investigation is designed to address two significant Fourth Amendment concerns. First, the finding of merit is the statutory substitute for a judicial determination of probable cause. Second, [**1046] the finding of merit defines the possible violations, thus delineating the parameters of reasonableness [***17] to be applied to searches and seizures conducted during the investigation that follows. Without such a finding, the discretion of executive branch investigative officials is unchecked.

[7] ¶21 The arguments of DOH and DQAC to the contrary are without merit. As to their first contention, that the investigation and the attendant inspection were lawful because they proceeded pursuant to DQAC's internal policy memorandum directing that certain categories of complaints must always be investigated, we rejected a similar argument in *Yoshinaka*, 128 Wn. App. at 844. As to their second argument, that DQAC's policy was a written directive as opposed to an oral one, this fact is of no significance. The UDA requires the disciplining authority to review "the complaint," *Yoshinaka*, 128 Wn. App. at 843 (emphasis added); it does not permit DQAC to declare that all complaints falling within certain categories merit investigation. Moreover, as we also pointed out in *Yoshinaka*, if DQAC seeks to adopt rules delegating to DOH the authority to make merit determinations, "it should engage in procedurally-appropriate rule making." 7 128 Wn. App. at 844.

7 We do not assume that such rule making necessarily addresses the [***18] Fourth Amendment concerns attendant to administrative searches.

[8] ¶22 As to their next argument, that any error was cured by the participation of the reviewing commission member, this contention is similarly without merit. The reviewing commission member's participation in the investigation is no substitute for a determination of merit by DQAC, as the UDA does not authorize a single commission member to execute the disciplining authority's statutory duties. See RCW 18.130.050(18). DQAC may delegate functions [*170] to a panel comprised of fewer members than the entire commission, but the panel must contain at least three members, and any panel action requires a majority vote. RCW 18.32.0357; RCW 18.130.050(18). A single member of DQAC does not constitute such a panel.

[9] ¶23 Nor are we persuaded by the averment that Dr. Seymour voluntarily consented to the inspection of his dental office and the seizure of copies of patient records, or that he subsequently voluntarily provided additional copies of patient records related to the request for production of records made during and after the warrantless inspection. We have previously applied the rule concerning consent announced in *Bumper v. North Carolina*, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968), [***19] in the context of an administrative search. See *Browning*, 67 Wn. App. at 97 (involving a housing inspection that uncovered evidence of a marijuana grow operation).⁸ In *Bumper*, the Supreme Court held that, "[w]hen a prosecutor [HN13] seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." 391 U.S. at 548-49 (footnote omitted). As explained by a leading commentator:

But if the businessman admits the inspector only after being told that the inspector has a right to conduct a warrantless inspection, this is not consent but merely an acquiescence to a claim of lawful authority no different than that involved in *Bumper* ... If the inspector makes such a claim, then, as properly concluded in *Biswell*, [406 U.S. at 315,] "the legality of the search depends not on consent but on the authority of a valid statute."

5 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 10.2(b) at 47 (4th ed. 2004) (footnote omitted).

8 Although the administrative search in *Browning* uncovered evidence that resulted in a criminal prosecution, the same principles apply here, [***20] as this case, too, involves a warrantless administrative inspection.

[*171] ¶24 Here, DQAC and DOH point to nothing to demonstrate that Dr. Seymour did anything other than acquiesce to the investigator's claim of lawful authority. They argue only in passing that he could have refused to cooperate with the investigator's [**1047] requests, as did the psychologist under investigation in *Yoshinaka*. To the contrary, however, Dr. Seymour had a statutory obligation to comply with the investigation. See RCW 18.130.180(8) (making failure to comply with an investigative request unprofessional conduct). His failure to comply with the investigator's demands could have, itself, subjected him to professional discipline. His actions were not voluntary. DQAC and DOH have not carried their burden of proving otherwise.

¶25 In summary, the DOH investigator was a government agent. The investigator launched the investigation of Dr. Seymour without a determination of merit by DQAC, as required by the UDA. Thus, the warrantless inspection of Dr. Seymour's office was not made pursuant to a statutory scheme authorizing warrantless administrative searches. Accordingly, the inspection violated the Fourth Amendment's prohibition against [***21] unreasonable searches. The inspection was a search; the demands for records were seizures. All were made in violation of the Fourth Amendment.⁹

9 Because we view the Fourth Amendment and article I, section 7 as being coextensive in this circumstance, *see supra* note 4, we also hold that the warrantless search violated the state constitution.

IV

[10] ¶26 Turning to the appropriate remedy, we observe that [HN14] the APA provides that the presiding officer of an adjudicatory hearing "shall exclude evidence that is excludable on constitutional or statutory grounds." RCW 34.05.452(1). Dr. Seymour moved for relief, claiming that the search of his office and the seizures of his records were [*172] done in an unconstitutional manner.¹⁰ At the very least, the presiding officer should have excluded all evidence gathered pursuant to the warrantless July 2002 inspection of Dr. Seymour's office, including copies of patient records that were seized during the inspection, as well as the investigator's recollections of what she observed during the inspection. The presiding officer also should have excluded any copies of patient records that Dr. Seymour subsequently produced in response to any request that the investigator [***22] made during this inspection or at any time prior to April 2003, as any such request was made contrary to law.

10 Dr. Seymour requested either that the charges against him be dismissed or that evidence be excluded. Exclusion, not dismissal, is the appropriate remedy.

V

[11-13] ¶27 In light of our holding that at least some evidence should have been excluded, we must consider whether there remains substantial evidence in support of the commission panel's factual findings. RCW 34.05.570(3)(e). [HN15] We may reverse an administrative order if it is unsupported by substantial evidence or is arbitrary or capricious. RCW 34.05.570(3)(e), (h); *Ames v. Dep't of Health, Med. Quality Assurance Comm'n*, 166 Wn.2d 255, 260, 208 P.3d 549 (2009). [HN16] Allegations of professional misconduct in a professional license disciplinary proceeding must be proved by clear and convincing evidence. *Ongom v. Dep't of Health*, 159 Wn.2d 132, 137-38, 148 P.3d 1029 (2006) (citing *Bang D. Nguyen v. Dep't of Health*, 144 Wn.2d 516, 518, 29 P.3d 689 (2001)). Further, [HN17] an action is arbitrary and capricious if it is made without consideration of and in disregard of the facts and circumstances. *Johnson v. Dep't of Health*, 133 Wn. App. 403, 414, 136 P.3d 760 (2006).

¶28 Without relying [***23] on the evidence obtained pursuant to the warrantless search and seizures, it is impossible to say whether the commission's findings are supported by substantial evidence under the clear and convincing evidentiary standard. Although it appears from the record [*173] that not all evidence introduced at the hearing was unconstitutionally derived, we are not in a position to determine which evidence was so derived and then to sift through the remaining evidence, if any, to determine if the panel's findings are substantially supported. Importantly, the parties have not had the opportunity to litigate the question of exactly which evidence must be excluded in light of our holding. Similarly, we cannot determine the validity of the sanctions imposed against Dr. [**1048] Seymour, as they are the products of the evidence introduced at the hearing. Accordingly, further proceedings before the presiding officer and commission consistent with this opinion are required.¹¹

11 Dr. Seymour's contention on appeal that he was denied due process by the investigator's precipitous commencement of the investigation, or otherwise, is entirely without merit.

VI

¶29 The order of the commission is vacated. This case is remanded to [***24] the commission for further proceedings.

SCHINDLER, C.J., and APPELWICK, J., concur.

Reconsideration denied October 12, 2009.

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Washington Administrative Law Practice Manual

Annotated Revised Code of Washington by LexisNexis

1 of 1 DOCUMENT

Neah Bay Chamber of Commerce, et al, Appellants, v. The Department of Fisheries,
Respondent

No. 57870-2

SUPREME COURT OF WASHINGTON

119 Wn.2d 464; 832 P.2d 1310; 1992 Wash. LEXIS 202

July 23, 1992, Decided

July 23, 1992, Filed

SUBSEQUENT HISTORY: [***1] Reconsideration Denied November 5, 1992.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, chamber of commerce and three of its members (collectively as chamber), sought review of a judgment from the Superior Court for Thurston County (Washington), which granted the motion for summary judgment of respondent, the Washington State Department of Fisheries' (department), in the chamber's action requesting that certain regulations involving salmon sport fishing should be overturned.

OVERVIEW: The chamber argued that the trial court erred when it found that the department's actions were proper solely because the expert testimony was in conflict and argued that there was no scientific foundation for closing of a certain fishing area. The court found that the new Administrative Procedures Act (APA), Wash. Rev. Code § 34.05, added a new criteria to the court's review of administrative agency decisions and expanded the review process. The court noted that under the new APA, the trial court's task was 1) to determine if the regulation was reasonable without substituting its own judgment; 2) whether the agency utilized the appropriate statutory framework; 3) and if it reached its decision by some reasonable process. The court found that the trial court erred when it approved the department's actions after determining that a disagreement among the expert witness showed that the department's actions were not arbitrary or capricious. The court held that reversal was necessary because the department failed to provide an adequate record to prove it complied with the new procedures and to show its judgment was exercised properly and fairly pursuant to the new APA requirements.

OUTCOME: The court reversed the trial court's judgment, which granted summary judgment to the department.

CORE TERMS: arbitrary and capricious, fishery, fishing, salmon, standard of review, decisionmaker, rule-making, coho, agency action, administrative law, reasonableness, decision-maker, recreational, catch, conceivably, coastal, sea-son, ocean, fish, administrative record, recommendations, conceive, stock, rationality, irrational, overturned, invalid, angler, trips, administrative procedure

LexisNexis(R) Headnotes

Administrative Law > Judicial Review > Reviewability > General Overview

Administrative Law > Judicial Review > Standards of Review > General Overview

Environmental Law > Litigation & Administrative Proceedings > Judicial Review

[HN1] The Administrative Procedure Act, Wash. Rev. Code § 34.05, specifically Wash. Rev. Code § 34.05.510, establishes the exclusive means of judicial review of agency action, with limited exceptions.

Administrative Law > Agency Rulemaking > General Overview

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Administrative Law > Judicial Review > Standards of Review > General Overview

[HN2] The standards of review under the Administrative Procedure Act (Act), Wash. Rev. Code § 34.05 used to decide if an agency action is valid are prescribed by under § 34.05.570(1)(b) and the party asserting invalidity bears the burden of demonstrating that the action was invalid under § 34.05.570(1)(a) and the Act expressly provides under § 34.05.510 that it is the only method for obtaining review of agency actions.

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Administrative Law > Separation of Powers > Constitutional Controls > General Overview

[HN3] The standards for review of agency rules are found in Wash. Rev. Code § 34.05.570(2)(c): In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that it violates constitutional provisions, exceeds the statutory authority of the agency, was adopted without compliance with statutory rule-making procedures, or could not conceivably have been the product of a rational decision-maker.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

[HN4] Administrative Procedures Act (Act), Wash. Rev. Code § 34.05 provides for a review of the reasonableness of agency regulations. Under the new Act a court should overturn a regulation that could not conceivably have been the product of a rational decision-maker. Wash. Rev. Code § 34.05.570(2)(c).

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review

[HN5] The product of a rational decision-maker standard adopted by the legislature at Wash. Rev. Code § 34.05.570(2)(c) involves an inquiry into the reasonableness of regulations analogous to the application of the arbitrary and capricious standard.

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Governmental Information > Recordkeeping & Reporting

[HN6] Under the Administrative Procedure Act, (APA) Wash. Rev. Code § 34.05, an agency is required to maintain a rule-making file for each regulation proposed or adopted. Wash. Rev. Code. § 34.05.370(1). This file serves as the record of review, although the file need not be the exclusive basis for agency action on that rule. Wash. Rev. Code § 34.05.370(4). In addition to the materials relied on in enacting the regulation, the rule-making file must contain a concise explanatory statement about the rule which identifies the agency's reasons for adopting the rule. Wash. Rev. Code § 34.05.355(1).

SUMMARY: Nature of Action: A chamber of commerce and three of its members challenged Department of Fisheries rules limiting the salmon sport fishing season.

Superior Court: The Superior Court for Thurston County, No. 87-2-00554-0, Robert J. Doran, J., on January 2, 1991, granted a summary judgment upholding the rules.

Supreme Court: Holding that the record was insufficient to determine whether the Department of Fisheries had complied with the requirements of the Administrative Procedure Act, the court *reverses* the judgment and *remands* the case for further proceedings.

HEADNOTES WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] **Statutes -- Construction -- Amendment -- Change in Language -- Effect** A new version of a law that uses language that is markedly different from the former law provides a strong indication of the Legislature's intent to change the law.

[2] **Administrative Law -- Rules -- Validity -- Reasonableness -- Product of a Rational Decisionmaker -- Test**

Judicial review of an administrative rule under RCW 34.05.570(2)(c), which establishes the standard of whether the rule "could not conceivably have been the product of a rational decision-maker", requires an examination into the reasonableness of the rule without allowing the court to substitute its judgment for that of the agency. To determine whether a rule satisfies the statutory [***2] standard, a court must make the following inquiries: (1) is the agency's explanation of its own rule clear? (2) did the agency utilize the appropriate statutory framework and use correct factors and avoid im-

proper factors in adopting the rule? and (3) could a decisionmaker reach the conclusion reached by the agency by some reasonable process?

[3] Administrative Law -- Rules -- Validity -- Determination -- Statutory Standards Administrative rules do not have the same status as legislative enactments and are not reviewed by the same standards.

[4] Administrative Law -- Rules -- Validity -- Reasonableness -- Administrative Record -- Necessity A court's review of the reasonableness of an administrative rule under RCW 34.05.570(2)(c) necessitates scrutiny of the administrative record to determine if the rule was reached through a process of reason. Judicial review cannot take place when the record is silent as to what actually was the basis for the agency's decision to adopt the rule.

[5] Administrative Law -- Rules -- Validity -- Factual Dispute -- Effect The validity of an administrative rule cannot be upheld solely on the basis that there was disagreement concerning [***3] facts underlying the agency's adoption of the rule.

[6] Fish -- Constitutional Law -- Equal Protection -- Fishing -- Territorial Regulations Fishing regulations that establish territories in which all persons are restricted to the same degree do not violate the equal protection clause.

[7] Fish -- Constitutional Law -- Due Process -- Property Interest -- Fishing There is no protected property right for individuals to take fish in public waters.

COUNSEL: *Stiltner, Sinclair, Clement & Foster*, by *Samuel J. Stiltner* and *G. Bruce Clement*, for appellants.

Kenneth O. Eikenberry, Attorney General, and *Frona Woods*, Assistant, for respondent.

William R. Andersen and *Cornelius J. Peck*, amici curiae for appellants.

JUDGES: En Banc. Durham, J. Dore, C.J., and Brachtenbach, Guy, and Johnson, JJ., concur. Dolliver, J. (dissenting). Utter, Andersen, and Smith, JJ., concur with Dolliver, J.

OPINION BY: DURHAM

OPINION

[*466] [**1311] In this case, we are asked to determine the appropriate standard of review for agency rules under the [***4] new Administrative Procedure Act (APA), RCW 34.05. Neah Bay Chamber of Commerce and three of its members (Neah Bay) appeal directly from a trial court order upholding Department of Fisheries' (Department) regulations regarding salmon sport fishing. Neah Bay claims that certain regulations involving the geographic designation of the area are irrational, and should be overturned. We reverse the trial court and remand for further proceedings.

The Department's regulations divide the coastal waters of Washington, including the Strait of Juan de Fuca and Puget Sound, into 13 "catch record" areas and several sub-areas. See WAC 220-47-307, 220-56-190. Areas 1, 2, and 3 are along the Pacific Coast, extending from the Columbia River to Cape Alava. Area 4 extends north from Cape Alava to Cape Flattery, and then east to the Sekiu River. Areas 5 and 6 extend from the Sekiu River to Port Townsend. See appendix (map). The remaining areas are not relevant here.

Area 4 is further divided into two sub-areas along the Bonilla-Tatoosh line -- a line extending from Tatoosh Island [*467] off Cape Flattery to a point on Vancouver Island. Area 4A is on the ocean side of the line, and 4B is [***5] within the Strait. Neah Bay is within area 4B and is the only launching point for all of area 4.

Until about 1982 the Department applied the same regulations for salmon sport fishing to area 4B as it did to areas 5 and 6. However, since then the Department has treated area 4B the same as the rest of area 4 and the remainder of the ocean areas. That is, area 4B is open for salmon fishing only when ocean waters are open (a relatively short amount of time), even though the rest of the Strait is open the entire year. This change has had a substantial and detrimental influence on the tourist trade of Neah Bay. Areas 5 and 6 have apparently profited from this distinction.

The present action was filed in Thurston County Superior Court in 1987. In essence, Neah Bay sought to have the Department's regulations regarding area 4B overturned. In its complaint, Neah Bay requested money damages, as well as

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injunctive and declaratory relief. In July 1990, the trial court denied Neah Bay's motion for a preliminary injunction and set a date for a bench trial. The Department moved for summary judgment in October 1990.

Extensive evidence was submitted to the trial court, including deposition [***6] testimony and lengthy interrogatories. Conflicting expert testimony was presented concerning the distribution of salmon in the Strait, and the impact of closing area 4B. The trial court granted summary judgment to the Department and dismissed the case. Judge Doran, in his oral opinion, held in part as follows:

One of the bases for reviewing decisions made by a department is under the arbitrary and capricious test. Administrative action is arbitrary and capricious only when it is willful and unreasoning action without consideration and in disregard of the facts and circumstances of the case. Whether the Court looks to the rational decisionmaker test or to the [**1312] arbitrary and capricious test, the decision of the Court would be the same.

Having reviewed the extensive affidavits and the opinions of several experts, it is acknowledged that the experts are in disagreement. *Since there is disagreement between the experts, the Court could hardly find that the action on the part of the [468] Director is arbitrary and capricious or the act of an irrational decisionmaker.*

(Italics ours.) Clerk's Papers, at 429.

Neah Bay agrees with the trial court's statement of [***7] the standard of review: the arbitrary and capricious or irrational standard. However, Neah Bay argues that the trial court erred when it found that the Department's actions were proper solely because the expert testimony was in conflict. Neah Bay contends that there was no scientific foundation for closing area 4B, and that the Department was biased in favor of other regional groups.¹ To address Neah Bay's complaint, this court must decide if the trial court was correct when it upheld the Department's rules concerning the sport fishing season. Because the only significant regulations before us are those currently in effect, the new APA applies.² RCW 34.05.902.

¹ Although Neah Bay claims to be contesting an underlying policy of the Department, and not any particular rule, we consider this to be outside the scope of our appellate review in this case. Neah Bay did not properly raise a claim relating to the policies of the Department, nor did it frame the sort of arguments that would present the issue squarely. Rather, we perceive the sole issue in the case as relating to the application of the new APA to the Department's rule-making.

[***8]

² The challenged regulations are those which classify the coastal areas and the Strait, together with those which govern the various fishing seasons in each area. The rules involved are revised regularly, and have a limited duration. Neah Bay correctly points out that the rules change constantly. Nonetheless, we may review their propriety, given the need for future guidance and the likelihood of recurrence present here. *See Hartman v. State Game Comm'n*, 85 Wn.2d 176, 177-78, 532 P.2d 614 (1975).

[HN1] The APA provides that "[t]his chapter establishes the exclusive means of judicial review of agency action," with limited exceptions, not relevant here. RCW 34.05.510. [HN2] The standards of review used to decide if an agency action is valid are prescribed by the act. RCW 34.05.570(1)(b). The party asserting invalidity, here Neah Bay, bears the burden of demonstrating that the action was invalid. RCW 34.05.570(1)(a). The statute expressly provides that it is the *only* [469] method for obtaining review of agency actions. RCW 34.05.510.

Under former [***9] RCW 34.04.070(2):

the court shall declare the rule invalid only if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures.

As our earlier cases made clear, this was a very limited standard of review. Regulations were afforded a presumption of validity, and were overturned only if they were inconsistent with the legislation implemented by the rules. *Omega Nat'l Ins. Co. v. Marquardt*, 115 Wn.2d 416, 423, 799 P.2d 235 (1990) (quoting *Federated Am. Ins. Co. v. Marquardt*, 108 Wn.2d 651, 654-55, 741 P.2d 18 (1987)); *see also Multicare Med. Ctr. v. Department of Social & Health Servs.*, 114 Wn.2d 572, 588-89, 790 P.2d 124 (1990), and cases cited therein.

[1] [2] The APA enacted in 1988 adds a new criterion which significantly expands the review process. [HN3] The standards for review of agency rules are found in RCW 34.05.570(2)(c):

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In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds [***10] that it violates constitutional provisions, exceeds the statutory authority of the agency, was adopted without compliance with statutory rule-making procedures, or could not conceivably have been the product of a rational decision-maker.

In contrast to the former APA, this [HN4] statute provides for a review of the reasonableness of agency regulations. Under the new APA a court should overturn a regulation that "could not conceivably have been the product of a rational decision-maker." [**1313] RCW 34.05.570(2)(c). Such a marked change in the language used by the Legislature in enacting a new version of the APA is strong evidence of its intent to enact a different standard of review than contained in the former APA. *State v. Roberts*, 117 Wn.2d 576, 586, 817 P.2d 855 (1991). Thus, the court's earlier cases providing for a severely limited standard of review of regulations are not controlling. In addition, [*470] the Legislature stated its intention that the new APA clarify existing law and "achieve greater consistency with other states and the federal government in administrative procedure". RCW 34.05.001. In conformity with the [***11] prevailing practice in other jurisdictions, the added standard of review requires judicial review of the reasonableness of regulations, not just of the consistency of those regulations with the statutes being implemented. *See generally Project: State Judicial Review of Administrative Action*, 43 Admin. L. Rev. 571 (1991).

We discern three possible levels of intensity of judicial scrutiny: at one end of the spectrum is de novo review, where a court disregards the judgment of the body it reviews, and substitutes its own opinion. At the other end, a court subjects a question to the least intense review when it asks only if the judgment is authorized; that is, the court inquires only into the constitutional and procedural regularity of the lower body's decision. In between, there exists a middle level, in which the court examines the reasonableness of the question, but does not substitute its judgment for that of the initial decision-maker. *See* Brief of Amicus, at 10-11; *see also* William R. Andersen, *The 1988 Washington Administrative Procedure Act -- An Introduction*, 64 Wash. L. Rev. 781, 831 (1989). We conclude [***12] that the Legislature intended that this middle-tier scrutiny be used in reviewing rule-making.

This approach is wholly consistent with the United States Supreme Court's review of federal agency rule-making under the arbitrary and capricious standard. As noted earlier, the Legislature specifically provided that the APA be interpreted in a manner consistent with other states, model acts, and federal decisions. RCW 34.05.001. In the Supreme Court's leading case in this area, it made clear that agency actions, although entitled to deference, should not be shielded from "thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971). There, in deciding if a [*471] rule was arbitrary and capricious, the Court held that a court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Overton Park*, at 416 (citing cases). It went on to note that "[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a [***13] narrow one. The court is not empowered to substitute its judgment for that of the agency." *Overton Park*, at 416.

In a more recent case, the Supreme Court explained the scope of review under the arbitrary and capricious standard:

the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. . . . [W]e may not supply a reasoned basis for the agency's action that the agency itself has not given. We will, however, "uphold a decision of less than ideal clarity if the agency's path may [***14] reasonably be discerned."

(Citations omitted.) *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983). This is the proper analysis. It begins with the agency's explanation, determines if the agency relied on the appropriate factors without considering improper issues, and then decides if the agency's reasoning is plausible.

The administrative law section of the American Bar Association has published a restatement of federal law on the scope of review in administrative law which provides additional authority for this reading. *A Restatement of Scope-of-Review* [*472] *Doctrine*, 38 Admin. L. Rev. 235 (1985-1986) (approved by the Section of Administrative Law, American Bar Association, February 8, 1986); *see also* Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 Admin. L. Rev. 239 (1985-1986). The restatement notes that agency actions should be overturned if they exceed the legal authority of the agency, or in other circumstances [***15] amounting to an abuse of agency discretion. The restatement specifically points out that an agency regulation should be reversed if "[t]he agency has relied

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on factors that may not be taken into account under, or has ignored factors that must be taken into account under, any of the [relevant] sources of law". 38 Admin. L. Rev. at 235. This "relevant factors" test is derived from *Overton Park*, discussed above. See Levin, at 252.

In contrast, the Department argues that the use of the word "conceivably" in the new standard of review means that "[i]f the court is able to *conceive* of any set of facts that would justify the rule, those facts are presumed to exist." Respondent's Answer to Amicus Brief, at 2. This view, originally expressed in 1935 in *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185-86, 80 L. Ed. 138, 56 S. Ct. 159, 101 A.L.R. 853 (1935), has long since been discredited. See *Overton Park*, 401 U.S. at 415-16; *State Farm*, 463 U.S. at 43; [***16] William Funk, *Rationality Review of State Administrative Rulemaking*, 43 Admin. L. Rev. 147, 149-50 (1991). Although the Department argues that the new standard is somehow less searching than the arbitrary and capricious standard, its argument is not convincing. The Legislature clearly intended to allow inquiry into the rationality of regulations, and we do not perceive any principled way to distinguish between the two phrasings, which both pertain to the middle-tier scrutiny. Moreover, such a standard would be insufficient; it would allow an agency to escape scrutiny so long as it could come up with some possible facts (not necessarily the actual facts in existence) *after* the regulation had been enacted. Finally, this statement of the standard [*473] of review fails to account for the language that was added to the APA, which was clearly meant as a change to the existing standard.

[3] The Department further invokes the rational basis test employed in reviewing statutes, and claims that the same standard applies to regulations. Agency rules, however, are readily distinguished from legislative enactments. First, the Supreme Court has expressed [***17] such a distinction: "We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate." *State Farm*, 463 U.S. at 43 n.9. Second, agencies act differently than legislatures, and serve a different function. See Funk, at 161-63. Agency decision-making is not the product of political bargaining, nor is it responsive to the scrutiny of constituents. Moreover, agencies are not a co-equal branch of government, as is the Legislature, entitled to the greatest deference. The function of an agency is to utilize its particular expertise to fashion sensible regulations in a narrow area. It was never intended that agencies were empowered to act without regard to the particular facts within that expertise. The somewhat more probing review we adopt here for review of regulations than that used in analyzing statutes is justified.

In sum, [HN5] the "product of a rational decision-maker" standard adopted by the Legislature at RCW 34.05.570(2)(c) involves an inquiry into the reasonableness of regulations [**1315] [***18] analogous to the application of the arbitrary and capricious standard. To decide if a regulation should be overturned because it could not conceivably be the product of a rational decision-maker, we hold that the proper analysis is the 3-part test suggested by amicus, Professor Andersen, and utilized by the federal courts. See *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983). The court's task is to determine if a given regulation is reasonable without substituting this court's judgment for that of the agency. First, [*474] the court inquires if the agency's explanation of its own rule is clear. Second, the court must ask if the agency utilized the appropriate statutory framework, whether it used correct factors in deciding the rule, and if it avoided improper factors. Third, the court must decide if a decision-maker could have reached the conclusion reached by the agency (taking the foregoing into account) by some reasonable process.

[4] This analysis requires the court to review the administrative record to determine the factors [***19] employed by the agency and the quality of its reasoning. The court must scrutinize the record to determine if the result was reached through a process of reason, not whether the result was itself reasonable in the judgment of the court.

The APA contains additional pertinent provisions which enable such a review. Indeed, the extent of the record required by the APA is further indication of an intent by the Legislature to provide for meaningful review of agency rule-making action. See William Funk, *Rationality Review of State Administrative Rulemaking*, 43 Admin. L. Rev. 147, 156-59 (1991). [HN6] Under the APA, an agency is required to maintain a rule-making file for each regulation proposed or adopted. RCW 34.05.370(1). This file serves as the record of review, although the file "need not be the exclusive basis for agency action on that rule." RCW 34.05.370(4). In addition to the materials relied on in enacting the regulation, the rule-making file *must contain* a concise explanatory statement about the rule which identifies the agency's reasons for adopting the rule. RCW 34.05.355(1). The agency must also respond to any interested party who requests [***20] the reasons for overruling considerations urged against the adoption of a specific regulation. RCW 34.05.355(2).

Moreover, although under some limited circumstances a court may take new evidence, the validity of agency action is to be determined *as of the time it was taken*. RCW 34.05.562(1); RCW 34.05.570(1)(b). Thus, while additional evi-

dence of an agency's reasoning and the background materials relied upon may be presented on review, such [*475] evidence is only admissible to explain the agency's decision at the time. Funk, at 158. We do not foresee the need for additional testimony in the majority of cases.

[5] Turning to the application of these principles, the trial court ruled that, "[s]ince there is disagreement between the experts, the Court could hardly find that the action on the part of the Director is arbitrary and capricious or the act of an irrational decisionmaker." Although this reasoning may be pertinent to a summary judgment motion, a disagreement among experts is irrelevant to the standards set forth in the APA and discussed above. The court must examine the actions of the agency to ensure that they were only undertaken after proper consideration [***21] of appropriate facts. It need not substitute its judgment, but it must make certain that judgment was in fact exercised properly and fairly. Because there was no record presented of what actually went into the Department's regulations pertaining to area 4B, it is impossible to say whether they were rational or irrational. The mere existence of a disagreement is not sufficient to uphold an agency's regulations.

In addition, the remainder of the procedure set out above was not followed.³ No [**1316] rule-making file is on the record; indeed, the record does not contain any reference to agency files or any other sort of administrative record. The trial court relied solely on deposition and other testimony of experts which was not contemporaneous with the rule-making process. Such evidence is rarely relevant, and should supplement, not replace, the administrative record.

³ Furthermore, the action was not properly brought. To initiate an action under the APA, a party is supposed to file a petition for review. RCW 34.05.514. Here, Neah Bay did not conform precisely with the provisions of the APA. The supplemental complaint did not cite the APA, nor did it identify the specific agency action at issue or include a copy of any rule or order, as required by RCW 34.05.546. Moreover, a declaratory judgment action under RCW 34.05.570 does not seem appropriate, given the precise conditions of that section. Because the problem was not considered by the trial court, nor raised by either party on appeal, we will not address it here.

[***22] [6] [7] None of the other bases presented in the APA for overturning the Department's regulations appear to be present [*476] here. In addition to the standard discussed above, under RCW 34.05.570, a rule may be declared invalid if it is unconstitutional, exceeds the statutory authority of the agency, or was not adopted in compliance with the procedural requirements of the APA. Neah Bay argues that the regulations are unconstitutional, because they violate either equal protection or due process. Regulations pertaining to fishing and hunting are a classification of *territory* only, not *people*. In regard to the areas defined, "all [people] are restricted exactly alike." *McMillan v. Sims*, 132 Wash. 265, 271, 231 P. 943 (1925). Thus, equal protection is not violated. Furthermore, there is no protected property right for individuals to take fish in public waters. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 276, 787 P.2d 562 (1990). The indirect impact the Department's regulations have on the economic interests here are not sufficient to give rise to due process protection.

The [***23] regulations are clearly within the authority delegated by the Fisheries Code of the State of Washington, RCW 75.08. The Department is empowered to "promote orderly fisheries and shall enhance and improve recreational and commercial fishing in this state." RCW 75.08.012. This authority may be exercised in all of the waters at issue here. RCW 75.08.070. The Director is authorized to adopt rules consistent with federal regulations and agreements made in concert with other jurisdictions, including the Pacific Marine Fisheries Commission. RCW 75.08.070. Specifically, the Director may adopt rules pertaining to the types of fish that may be taken, and when and where those fish may be taken. RCW 75.08.080. Thus, the regulations were clearly within the authority delegated to the Department.

Although it is impossible to tell without the administrative record whether or not the procedures of the APA were followed in this case, neither party suggests that they were not, and the trial court did not consider the issue. We note, however, that lack of a rule-making file may itself constitute a sufficient reason to invalidate a regulation. RCW 34.05.375.

[*477] In accordance with the [***24] foregoing, we reverse the trial court and remand for reconsideration.

Appendix

[**1317] [SEE ILLUSTRATION IN ORIGINAL]

DISSENT BY: DOLLIVER

DISSENT

[*478] Dolliver, J. (dissenting)

I must dissent. Review is inappropriate when the plaintiff has failed properly to bring a claim under the Administrative Procedure Act (APA), RCW 34.05. The majority admits this failing in two footnotes but nevertheless proceeds to review the case. See majority, at 468 n.1, 475 n.3. The best and most appropriate action this court could take would be to uphold the trial court and dismiss the entire action.

It is important, however, to confront the position of the majority in its interpretation [**1318] and application of the new standard of review in the APA.

The majority correctly identifies there is a middle tier of scrutiny between de novo review and review of procedural regularity. Majority, at 470. However, the majority does not go far enough in its analysis of the middle tier of scrutiny which examines the rationality of the rule-making procedure.

The majority correctly rejects the Department's interpretation of the new standard of review as meaning that "[i]f the court is able to *conceive of any set* [***25] *of facts* that would justify the rule, those *facts* are presumed to exist." (Some italics mine.) Majority, at 472 (quoting Respondent's Answer to Amicus Brief, at 2). This interpretation should be rejected, however, because it does not comport with the legislative language in RCW 34.05.570(2)(c), not because it has been discredited or that it would allow an agency to "escape scrutiny". Majority, at 472-73. Once the majority rejects this standard of review, it equates the new standard with the arbitrary and capricious test because it "do[es] not perceive any principled way to distinguish between the two phrasings, which both pertain to the middle-tier scrutiny." Majority, at 472.

The Legislature, however, clearly rejected the arbitrary and capricious standard for review of rules. Laws of 1989, ch. 175, § 27, p. 790. First, if the Legislature had intended to adopt the arbitrary and capricious standard, it could easily have used that established phrasing. The difference in language shows the Legislature intended a different meaning. [*479] See *In re Swanson*, 115 Wn.2d 21, 27, 804 P.2d 1 (1990). Second, the Legislature, in [***26] enacting a single standard for review of rules in all procedural contexts, "modified" the three standards of judicial review contained in the 1988 act, which included review under the arbitrary and capricious standard. See *Final Legislative Report*, 51st Legislature 59 (1989); Laws of 1988, ch. 288, § 516(2), (4), p. 1386. Lastly, the Legislature kept the arbitrary and capricious standard for review of adjudicative and other agency action, while eliminating its use for review of rules. See RCW 34.05.570(3)(i); RCW 34.05.570(4)(c)(iii).

I submit the language of the statute provides for a middle tier of scrutiny that is less than the arbitrary and capricious standard, which the Legislature rejected, but more than review of procedural regularity. RCW 34.05.570(2)(c) provides:

In a proceeding involving review of a rule, the court shall declare the rule invalid only if it finds that it . . . could not conceivably have been the product of a rational decisionmaker.

The Legislature is not saying that if, on review, the court can conceive of a set of *facts* which support the rule, it is valid. Rather, the statute provides that, given the facts before the decisionmaker, [***27] if the court can conceive that the rule was the *product* of a rational decisionmaker, then the rule is valid. Thus, if we can conceive of a rational process which leads from the facts to the rule, the rule is valid regardless of whether the decisionmaker *actually* went through that rational process. At one point, the majority does express this view by stating that "the court must decide if a decision-maker *could have reached the conclusion* reached by the agency . . . by *some* reasonable process." (Italics mine.) Majority, at 474. However, in the next paragraph, the majority phrases the inquiry in terms of whether "the result *was reached* through a process of reason . . ." (Italics mine.) Majority, at 474.

This lower middle level of scrutiny honors both the intention of the Legislature to allow inquiry into the rationality [*480] of agency regulations and its clear rejection of the arbitrary and capricious language. See *In re Swanson*, *supra* at 27. This level of scrutiny is more deferential to agency action than the arbitrary and capricious standard under which the court reviews whether the rule was, in fact, reached [***28] through a process of reason. Majority, at 475 ("[The court] must make certain that judgment was in fact exercised properly and fairly.").

However, under the lower middle-tier scrutiny provided for in RCW 34.05.570(2)(c), [**1319] the rule is valid if it could have *conceivably* been the product of a rational decisionmaker. Whether it *actually* was is not controlling. Therefore, the court, in reviewing a rule under the new standard, must have the facts before it that were available to the decisionmaker, but it need not review the actual reasoning process of the decisionmaker.

In this case, the analysis is made more difficult by the fact that Neah Bay has not challenged any particular rule, but the entire fishing scheme for 1990. Even so, the record is replete with the information that was before the Department of Fisheries when it made its decisions regarding area 4B which were adopted for the 1990 season. See, *e.g.*, Clerk's Papers, at 94-127, 128-141, 142-314.

The 1990 emergency rule is State Register 90-13-056 (1990), which provides the public policy rationale for the regulation:

Pursuant to RCW 34.05.350 the agency for good cause finds that immediate adoption, [***29] amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.

Reasons for this Finding: Quotas of coho and chinook are available for harvest in coastal waters. These regulations are adopted to concur with Pacific Fisheries Management Council recommendations.

Effective Date of Rule: 12:01 a.m., June 18, 1990.

The Pacific Fishery Management Council (PFMC) is authorized by 16 U.S.C. § 1852(6) as the National Fishery [*481] Management Program. See generally 16 U.S.C. §§ 1851-1861. RCW 75.08.070 authorizes the Director of Fisheries to "adopt rules consistent with the recommendations or regulations of the Pacific marine fisheries commission . . .". As indicated in State Register 90-13-056 (1990), this has been done.

The development of the PFMC management plans and their adoption for the 1990 fishing season began in November 1989 with a public meeting in Portland, Oregon. During the winter of 1989-90, [***30] a number of public meetings were held in Washington, Oregon, and California; the purpose of these meetings was to review the condition of salmon stocks and to develop regulatory options for 1990. One meeting specifically focused on the distribution of the non-Indian recreational salmon share among different geographical areas. At least some of these meetings were attended by plaintiff Peter F. Hanson. The data which came before the PFMC showed an abundance of coho stocks from the Queets and Skagit Rivers and that certain Columbia River chinook stocks were low in 1990. Ocean Salmon Fisheries off the Coasts of Washington, Oregon, and California, 55 Fed. Reg. 18,894, 18,896 (May 7, 1990) (to be codified in 50 C.F.R. § 661).

In a process parallel to the PFMC meetings, state, federal, and tribal fish managers convened public meetings called "North of Cape Falcon" meetings to discuss distribution of the Skagit River coho catch among Washington fishers. To conserve the scarce Skagit River coho and ensure equitable sharing between treaty and nontreaty fishers, each area and group, including Neah Bay, agreed to accept constraints on fishing.

The 1990 recommendations, [***31] including the decision to regulate area 4B differently from areas 5 and 6, thus, took into account numerous factors. These included the biological concerns which differ for ocean-originating stocks versus the stock contribution of Puget Sound, the social concern of proximity of fishing access, stability of regulations, and orderly fisheries.

[*482] The PFMC also attempted to equitably distribute the conservation impact on the various areas. As to the impact on Neah Bay during the 1990 season, the affidavit of Patrick L. Pattillo, Fisheries Biologist IV with the Department of Fisheries, whose duties include directing the annual management of Washington's ocean salmon fisheries, reveals:

Fisheries' policy is to soften restrictions that might be applied were conservation [**1320] the only factor considered, and to pursue equitable sharing of the conservation burden between all areas. Though all Washington coastal communities have experienced major reductions in season length and salmon catches in the last decade, data compiled by the PFMC indicate that Neah Bay has fared relatively better than the rest. Attached as Exhibit A are excerpts from the "Review of 1989 Ocean Salmon [***32] Fisheries," the PFMC's summary of data relevant to fisheries management. Coho catches at Neah Bay during . . . 1989 totalled 40,100, or 92% of the 1976-80 annual average. In contrast, the 1989 recreational coho catches in Ilwaco, Westport, and La Push, were 40%, 38%, and 7.6%, respectively, of the 1976-80 averages in those areas. Coho catches at Neah Bay during the 1990 season exceeded by 4% the average catch for the 1976-80 period.

. . . The PFMC data show that the "number of angler trips," a measure of how many recreational fishers use an area, has been increasing annually in Neah Bay and compares favorably with historical levels. In 1989, the number of angler trips taken from the port of Neah Bay was 65% of the 1976-80 average, while the number of angler trips in Ilwaco, Westport, and La Push was 35%, 28%, and 6.5%, respectively, of the 1976-80 averages in those areas. In 1990, angler trips in Neah Bay increased 10% over the 1989 level. According to the data, the number of angler trips in Neah Bay has increased severalfold in recent years.

Clerk's Papers, at 132-34. The PFMC review of the 1989 ocean salmon fisheries is attached to Mr. Pattillo's affidavit as exhibit [***33] A. See Clerk's Papers, at 135-41.

Based upon consideration of these numerous factors, an agreement was presented to the PFMC for its consideration as it developed final recommendations. See Clerk's Papers, at 94-99 (Affidavit of Morris Barker, Ph.D., Fisheries Resource Manager for the Department of Fisheries).

The PFMC developed its final 1990 recommendations at public meetings in Eureka, California, in early April. Meeting [*483] Notice, 55 Fed. Reg. 7,522 (Mar. 2, 1990); Meeting Notice, 55 Fed. Reg. 11,240 (Mar. 27, 1990); 55 Fed. Reg. at 18,895. To conserve the weak stocks it had identified, and based in part on the catch levels negotiated in the "North of Cape Falcon" meetings, the PFMC set a 1990 harvest ceiling of 106,200 chinook salmon and 440,000 coho salmon for Washington coastal areas, to be allocated among commercial, recreational, and Indian fishers. 55 Fed. Reg. at 18,898-18,906. The PFMC allocated 37,500 chinook and 245,000 coho to the non-Indian recreational fishery, and further allocated the recreational coho quota among Washington coastal ports. 55 Fed. Reg. at 18,904. [***34] For example, Neah Bay received 24,900 coho, while La Push received 3,300. 55 Fed. Reg. at 18,903.

On June 14, 1990, the Director adopted emergency rules conforming to the PFMC recommendations. State Register 90-13-056 (1990). Beginning July 2, 1990, Washington coastal areas, including area 4B, were opened to recreational salmon fishing until September 20, 1990, or until any quota was reached. State Register 90-13-056 (1990). At the same time, fishing times and bag limits were reduced in areas 5 through 9. State Register 90-12-064 (1990).

Under the arbitrary and capricious standard adopted by the majority, the court would be obligated to review the actual process by which the PFMC and the Department weighed and considered all the detailed and technical factors and information that went into the adoption of the regulations. Under the language adopted by the Legislature, however, if this court can conceive of a process of reasoning which would produce the rule, then the rule is valid. Here, the myriad reasons advanced, and supported by the record, for the adoption of the regulations, while calling for judgment, are clearly "the product of a rational [***35] decisionmaker."

To adopt the more exacting arbitrary and capricious standard will require courts to engage in analyzing technical information that is best evaluated by agencies and, most [*484] importantly, turns a blind eye to [**1321] the Legislature's deliberate rejection of that standard.

I would affirm the trial court's dismissal of Neah Bay's complaint.

1 of 1 DOCUMENT

Karen Y. Tapper, Respondent, v. The Employment Security Department, Petitioner

No. 59802-9

SUPREME COURT OF WASHINGTON

122 Wn.2d 397; 858 P.2d 494; 1993 Wash. LEXIS 240

September 16, 1993, Decided
September 16, 1993, Filed**CASE SUMMARY:**

PROCEDURAL POSTURE: Petitioner Employment Security Department sought review of a judgment from Division Three of the Court of Appeals (Washington), which overturned a decision by petitioner's commissioner denying unemployment benefits to respondent employee pursuant to Wash. Rev. Code § 50.20.060(1). The commissioner had found, in contrast to the administrative law judge, that respondent, who had allegedly violated work rules, was fired for misconduct.

OVERVIEW: Respondent employee was allegedly fired for violating work rules. Claiming the firing was retaliatory, respondent applied for unemployment benefits. After an administrative law judge (ALJ) granted benefits, the commissioner for petitioner Employment Security Department denied benefits under Wash. Rev. Code § 50.20.060(1) of the Employment Security Act on the ground that respondent had been fired for misconduct after ignoring a supervisor's orders. When the court of appeals overturned the decision, petitioner sought review, and the court reversed. Initially, the court held the commissioner was not bound by the ALJ's factual findings because under Wash. Rev. Code §§ 34.05.464(4), 50.32.080, the commissioner had the power to make findings and to set aside the ALJ's findings. Moreover, the court held respondent had been fired for misconduct pursuant to § 50.20.060(1) because he had violated work rules, the rules had been reasonable, the violative conduct had been connected with work, and the violations had been intentional. The court concluded that the violations were intentional because respondent had ignored the supervisor's requests.

OUTCOME: The court reversed a judgment overturning a decision by the commissioner of petitioner Employment Security Department that denied unemployment benefits to respondent employee because the commissioner had been statutorily empowered to set aside an administrative law judge's factual findings and respondent, who had ignored a supervisor's requests, had intentionally violated work rules and thus, had been fired for misconduct.

CORE TERMS: misconduct, unemployment compensation, discharged, supervisor, connected, notice, remedial action, clerk, disqualification, disruptive, question of law, inefficiency, final authority, ordinary negligence, unemployment, work-related, credibility, excessive, modify, mixed, fault, hearing officers, work station, suspended, presided, listen, conclusions of law, administrative decision, denied benefits, substantial evidence

LexisNexis(R) Headnotes

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Environmental Law > Litigation & Administrative Proceedings > Judicial Review

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Review

[HN1] Judicial review of a final administrative decision of the Commissioner of the Employment Security Department is governed by the Washington Administrative Procedure Act (WAPA). The WAPA allows a reviewing court to reverse an administrative decision when, inter alia: (1) the administrative decision is based on an error of law; (2) the decision is

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not based on substantial evidence; or (3) the decision is arbitrary or capricious. Wash. Rev. Code § 34.05.570(3). In reviewing administrative action, the court sits in the same position as the superior court, applying the standards of the WAPA directly to the record before the agency.

Civil Procedure > Trials > Bench Trials

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Eligibility > General Overview

[HN2] The determination of whether a particular employee's behavior constitutes misconduct connected with work is a mixed question of law and fact, in that it requires the application of legal precepts, the definition of misconduct connected with work, to factual circumstances, the details of the employee's discharge. Analytically, resolving a mixed question of law and fact requires establishing relevant facts, determining applicable law, and then applying that law to the facts.

Administrative Law > Judicial Review > Standards of Review > General Overview

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Eligibility > General Overview

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Review

[HN3] The characterization of "misconduct" as a mixed question of law and fact does not mean that the court is free to substitute its judgment for that of an agency as to the facts; instead, the factual findings of the agency are entitled to the same level of deference which is accorded under any other circumstance.

Administrative Law > Judicial Review > Reviewability > Questions of Law

Administrative Law > Judicial Review > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN4] The process of applying law to facts is a question of law and is subject to de novo review.

Administrative Law > Agency Adjudication > Presiding Officers > Administrative Law Judges

Administrative Law > Agency Adjudication > Review of Initial Decisions

[HN5] See Wash. Rev. Code § 34.05.464(4).

Administrative Law > Agency Adjudication > Presiding Officers > Administrative Law Judges

Administrative Law > Agency Adjudication > Presiding Officers > Duties & Powers

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Review

[HN6] Under Wash. Rev. Code § 50.32.080, the Commissioner of the Employment Security Department (commissioner) has the power to review an administrative law judge's (ALJ) decision and is the final authority for departmental determinations as regards unemployment compensation. The commissioner is therefore a reviewing officer for purposes of Wash. Rev. Code § 34.05.464(4). As a reviewing officer, the commissioner may exercise all the decision-making power of an official who presides over an initial agency hearing. Because the ALJ has the power to make findings of fact, the commissioner has the power to make findings of fact and in the process set aside or modify the findings of the ALJ.

Administrative Law > Agency Adjudication > Presiding Officers > Administrative Law Judges

Administrative Law > Agency Adjudication > Review of Initial Decisions

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Review

[HN7] Federal courts interpret the Federal Administrative Procedure Act to allow agency heads to substitute the agency heads' own findings of fact for those made by hearing officers. This federal case law provides persuasive support for reading Wash. Rev. Code § 34.05.464(4) to allow the Commissioner of the Employment Security Department (commissioner) to substitute the commissioner's findings of fact for an administrative law judge's findings.

Administrative Law > Agency Adjudication > Presiding Officers > Administrative Law Judges

Administrative Law > Agency Adjudication > Review of Initial Decisions

[HN8] The familiar rationale for deference to factual findings of a trial court, the ability of the trial court to observe witness' demeanor and to evaluate credibility, would seem to apply with equal force in the administrative context. Pur-

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suant to Wash. Rev. Code § 34.05.464(4), however, final authority for agency decisionmaking rests with an agency head rather than with subordinates and such final authority includes all the decision-making power of a hearing officer.

Constitutional Law > Separation of Powers

[HN9] It is not the court's role to substitute its judgment for that of the legislature.

Administrative Law > Agency Adjudication > Presiding Officers > Administrative Law Judges

Administrative Law > Agency Adjudication > Review of Initial Decisions

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Review

[HN10] It is the findings of fact made by the Commissioner of the Employment Security Department, to the extent the findings modify or replace findings of an administrative law judge, which are relevant on appeal.

Civil Procedure > Trials > Bench Trials

Civil Procedure > Appeals > Standards of Review > General Overview

[HN11] When findings of fact are not explicitly delineated or where those findings are buried or hidden within conclusions of law, it is within the prerogative of an appellate court to exercise its own authority in determining what facts are actually found below.

Civil Procedure > Appeals > Standards of Review > General Overview

[HN12] When a party does not attack findings in the party's appeal, the court treats the findings as verities.

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Coverage & Definitions

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Eligibility > General Overview

[HN13] Under the Employment Security Act, Washington provides partial wage replacement benefits, unemployment compensation, to those workers who are involuntarily out of work and who are seeking further employment. Wash. Rev. Code § 50.20.010. The chief purposes of unemployment compensation are to minimize the disruption caused by involuntary inability to obtain employment and to provide support for unemployed workers as the workers seek new jobs. Wash. Rev. Code § 50.01.010.

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Coverage & Definitions

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Eligibility > General Overview

[HN14] See Wash. Rev. Code § 50.20.060.

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Coverage & Definitions

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Eligibility > Involuntary Unemployment

[HN15] It is well established that the operative principle behind a disqualification for misconduct under Wash. Rev. Code § 50.20.060 is the fault of an employee. An employee is only guilty of misconduct when the employee's behavior is such that unemployment is in effect voluntary. This statutory focus on the fault of an employee serves several purposes. First, the fault principle preserves the use of the state's resources for innocent workers who are involuntarily unemployed and are thus more deserving of compensation. Wash. Rev. Code § 50.01.010. Second, because the unemployment compensation fund is made up in large part of employer contributions, it is unfair to force employers to compensate employees who engage in and are discharged for misconduct. And third, a disqualification for misconduct is penal in nature and serves as a general deterrent against employee misconduct.

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Coverage & Definitions

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Eligibility > General Overview

Torts > Negligence > Gross Negligence

[HN16] The four elements for analyzing on-duty violations of employer rules as misconduct under the Employment Security Act are: (1) the rule which is allegedly violated must be reasonable under the circumstances of employment; (2) the violative conduct of an employee must be connected with work; (3) the conduct of the employee must violate the rule; and, (4) the violations must be intentional, grossly negligent, or continue to take place after notice or warnings. That is, the behavior cannot be characterized as mere incompetence, inefficiency, erroneous judgment, or ordinary negligence.

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Coverage & Definitions

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Eligibility > General Overview

[HN17] Failing to observe office production procedures, refusing to listen to one's supervisor, spending excessive time away from a work station, and engaging in disruptive behavior affects work performance both of an individual and of an employer's work force in general and thus, satisfies the second element for analyzing on-duty violations of employer rules as misconduct under the Employment Security Act. It is not necessary to show that behavior in question has an actual adverse impact, as long as a minimal showing of employer interest in the behavior is shown.

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Coverage & Definitions

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Eligibility > General Overview

[HN18] Inability, inefficiency, and ordinary negligence are excluded from the definition of misconduct under the Employment Security Act because these are generally behaviors society does not consider to be the fault of an employee. Even repeated demands that a particular task be performed correctly does not transform incompetence into misconduct if an employee is basically incapable of the desired level of performance.

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[HN19] While a failure to successfully perform an employer request may not typically constitute misconduct, the same cannot be said of a refusal to even attempt to fulfill the requests. Where findings of fact establish that an employee ignores an employer's reasonable requests, the fourth prong for analyzing on-duty violations of employer rules as misconduct under the Employment Security Act is met.

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[HN20] A question of discharge is independent of a question of misconduct.

SUMMARY: [*1] Nature of Action:** A discharged worker sought judicial review of the denial of her claim for unemployment compensation.

Superior Court: The Superior Court for Stevens County, No. 90-2-00100-6, Fred L. Stewart, J., on November 13, 1990, entered a judgment affirming the claim denial.

Court of Appeals: Holding that the worker's discharge was not based on misconduct that would disqualify her from receiving unemployment compensation, the court *reversed* the judgment and *granted* judgment in favor of the worker at 66 Wash. App. 448.

Supreme Court: Holding that the employee's conduct was willful and constituted misconduct which disqualified her from receiving unemployment benefits, the court *reverses* the decision of the Court of Appeals and *reinstates* the judgment.

[1] Unemployment Compensation -- Judicial Review -- Commissioner's Decision -- Appellate Review Judicial review of a decision of the Commissioner of the Employment Security Department is conducted under the provisions of RCW 34.05, the Administrative Procedure Act. An appellate court reviewing a trial court's determination on review of the Commissioner's decision sits in the same position as the trial court and applies the standards of the APA directly to the record that was before the administrative [***2] decisionmaker.

[2] Unemployment Compensation -- Misconduct Resulting in Discharge -- Misconduct -- What Constitutes -- Question of Law or Fact Whether the behavior of a discharged employee constituted work-related misconduct disqualifying the person from receiving unemployment benefits under RCW Title 50 is a mixed question of law and fact requiring the application of legal precepts to the factual circumstances. Reviewing courts are required to give the administrative factual findings deference, but application of the law to the facts is, as a question of law, subject to de novo review.

[3] Unemployment Compensation -- Administrative Appeal -- Findings of Fact -- Commissioner's Authority The Commissioner of the Employment Security Department, acting under RCW 50.32.080, is the final authority in determining the facts involved in an unemployment compensation case, has the authority to set aside or modify findings of fact made by the administrative law judge who conducted the hearing, and qualifies as a reviewing officer under RCW 34.05.464(4).

[4] Statutes -- Construction -- Federal Statutes -- Similar Federal Statute -- Effect The construction given a federal [***3] statute which is similar to a state statute may be examined and accepted as persuasive when no state construction of the state statute is available.

[5] Appeal -- Findings of Fact -- Review -- Failure to Identify When findings of fact are not explicitly delineated or are mixed within conclusions of law, a reviewing court is permitted to determine, on its own authority, just what facts have been found.

[6] Appeal -- Findings of Fact -- Failure To Assign Error -- Effect An unchallenged finding of fact is accepted as a verity on appeal.

[7] Unemployment Compensation -- Misconduct Resulting in Discharge -- Misconduct -- What Constitutes -- Violation of Employer Rule For purposes of disqualifying a discharged employee from receiving unemployment benefits on the basis of misconduct, an on-duty violation of an employer rule constitutes misconduct when: (1) the rule is reasonable under the circumstances of the employment, (2) the conduct violating the rule is connected with the employee's own work, (3) the conduct violates the rule, and (4) the violation is intentional, grossly negligent, or continues to take place after notice or warnings are given -- inability, inefficiency, [***4] and ordinary negligence are not misconduct for these purposes.

[8] Unemployment Compensation -- Misconduct Resulting in Discharge -- Misconduct -- What Constitutes -- Ignoring Directions Affirmatively ignoring reasonable directions from a superior on a work-related matter qualifies as employee misconduct.

COUNSEL: *Christine O. Gregoire, Attorney General, and Karl F. Hausmann, Assistant, for petitioner.*

Maltman, Reed, North, Ahrens & Malnati, P.S., by Douglass A. North, for respondent.

JUDGES: En Banc. Utter, J. Brachtenbach, Dolliver, Durham, Smith, Guy, Johnson, and Madsen, JJ., concur. Andersen, C.J., concurs in the result only.

OPINION BY: UTTER

OPINION

[*399] [**496] Under the Employment Security Act (Act), a worker who is discharged due to "misconduct connected with his or her work" is disqualified from receiving unemployment compensation benefits. Former RCW 50.20.060(1).

In this case, the Employment Security Department (Department) determined that Karen Tapper, a claimant for unemployment compensation, had been discharged for misconduct and therefore denied benefits. [***5] The Superior Court for Stevens County affirmed the denial of benefits, but Division Three of the Court of Appeals reversed, holding that there had been no misconduct. The Department petitioned for review. We reverse and reinstate the decision of the Superior Court.

[*400] I

Karen Tapper began her employment as a clerk at the Boeing Company in 1984. In June of 1989, while still employed as a clerk, Tapper was briefly suspended for insubordination and disruptive behavior. When she returned to work, Tapper and her supervisor, Gary "Charlie" Brown, executed a document known as a "Notice of Remedial Action". See Clerk's Papers, at 77. This document outlined a number of behavioral goals for Tapper and indicated that a failure to achieve these goals could trigger further suspension or even termination. The notice required Tapper to:

1. FOLLOW STEP BY STEP SET PROCEDURAL GUIDELINES IN PREPARING WORK PACKAGES.
 2. COORDINATE EACH DAY'S ACTIVITIES WITH YOUR PEERS AND WORK TOGETHER TOWARD COMMON GOALS.
 3. LIMIT YOUR TIME AWAY FROM YOUR WORK AREA TO REASONABLE AMOUNTS OF TIME.
 4. INCREASE YOUR OUTPUT TO AN ACCEPTABLE LEVEL.
-
1. LISTEN TO YOUR SUPERVISOR [***6] AND NOT DEVIATE FROM HIS INSTRUCTIONS.
 - [**497] 2. CEASE DISRUPTIVE CONVERSATIONS WITH PERSONS FROM OTHER ORGANIZATIONS.
 3. ELIMINATE SCREAMING OUT-BURSTS DISRUPTIVE TO THE PERSONS IN THE AREA.

Clerk's Papers (Notice of Remedial Action), at 77.

Soon after, Tapper was discharged from Boeing. The specific cause of the discharge has been disputed by the parties from the start. For his part, Brown felt that Tapper was insubordinate, was refusing to follow proper office procedures, was spending excessive time away from her work station, and was interfering with the activities of other workers; in sum, was failing to comply with the notice of remedial action. Tapper, however, has contended that the firing was in retaliation for certain charges of work-related mistreatment which she had filed with the Equal Employment Opportunity Commission.

The day after she was discharged, Tapper applied for unemployment compensation. After a brief initial investigation, [*401] the Department allowed the claim. Boeing requested a hearing asserting that Tapper was disqualified from receiving unemployment benefits because she had been discharged for "misconduct". A hearing on the appeal was [***7] held before an administrative law judge (ALJ), at which Brown and Tapper provided the only testimony with regard to the issue of misconduct.

The ALJ affirmed the Department's initial determination, finding that Tapper had been discharged for "perceived deficiencies" in her work performance, not for misconduct. He concluded that whatever problems Tapper had experienced at Boeing related to her ability (or inability) to relate to others and to follow directions and that these inabilities did not rise to the level of misconduct. See generally Clerk's Papers (Decision of ALJ), at 82.

Boeing petitioned the Commissioner of the Department for review of the ALJ's decision, and, after review of the record, the Commissioner reversed. The Commissioner found that Tapper had failed to pay heed to her supervisor's orders, indeed, had "ignored" these orders, and that this failure was more than a mere deficiency in performance. The Commissioner therefore denied benefits pursuant to the disqualification in former RCW 50.20.060(1). See generally Clerk's Papers (Commissioner's Decision), at 89-90.

Tapper appealed to the Superior Court for Stevens County where she continued to argue that the [***8] actual motivation for her discharge was retaliation for her employment complaints. The Superior Court affirmed the decision of the Commissioner on the grounds that the Commissioner's decision violated none of the standards of judicial review contained within the Washington Administrative Procedure Act. The court did not make a finding or holding with respect to whether Tapper's behavior amounted to misconduct.

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Division Three of the Court of Appeals reversed, holding that the ALJ's decision had been correct. *Tapper v. Employment Sec. Dep't*, 66 Wash. App. 448, 453, 832 P.2d 136 (1992), review granted, 120 Wash. 2d 1024 (1993). The court reasoned [*402] that, under the standards set out in *Macey v. Department of Empl. Sec.*, 110 Wash. 2d 308, 752 P.2d 372 (1988), Tapper's behavior was not misconduct in that it was only an "inability" to get along with others and to follow directions. *Tapper*, 66 Wash. App. at 453. Like the ALJ, the Court of Appeals concluded that this mere "inability" was insufficient to constitute misconduct.

[***9] The Department petitioned for review, and we reverse.

II

[1] [HN1] Judicial review of a final administrative decision of the Commissioner of the Employment Security Department is governed by the Washington Administrative Procedure Act (WAPA). *Macey*, 110 Wash. 2d at 312; *Safeco Ins. Cos. v. Meyering*, 102 Wash. 2d 385, 389, 687 P.2d 195 (1984); *Becker v. Employment Sec. Dep't*, 63 Wash. App. 673, 675, 821 P.2d 81 (1991). The WAPA allows a [**498] reviewing court to reverse an administrative decision when, *inter alia*: (1) the administrative decision is based on an error of law; (2) the decision is not based on substantial evidence; or (3) the decision is arbitrary or capricious. RCW 34.05.570(3). In reviewing administrative action, this court sits in the same position as the superior court, applying the standards of the WAPA directly to the record before the agency. See *Macey*, 110 Wash. 2d at 312 (citing *Farm Supply Distribs., Inc. v. State Utils. & Transp. Comm'n*, 83 Wash. 2d 446, 448, 518 P.2d 1237 (1974)); [***10] *Shaw v. Department of Empl. Sec.*, 46 Wash. App. 610, 613, 731 P.2d 1121 (1987).

A

[2] The first issue raised by this appeal is the appropriate set of factual findings which are to be employed by this court in exercising review. Under our case law, [HN2] the determination of whether a particular employee's behavior constitutes "misconduct connected with his or her work" is a mixed question of law and fact, in that it requires the application of legal precepts (the definition of "misconduct connected with his or her work") to factual circumstances (the details of the employee's discharge). See *Henson v. Employment Sec. Dep't*, [*403] 113 Wash. 2d 374, 377, 779 P.2d 715 (1989); *Macey*, 110 Wash. 2d at 312; *Harvey v. Department of Empl. Sec.*, 53 Wash. App. 333, 336-37, 766 P.2d 460 (1988); see also *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wash. 2d 317, 330, 646 P.2d 113 (1982), cert. denied, 459 U.S. 1106, 74 L. Ed. 2d 954, 103 S. Ct. 730 (1983). [***11] Analytically, resolving a mixed question of law and fact requires establishing the relevant facts, determining the applicable law, and then applying that law to the facts. [HN3] The characterization of "misconduct" as a mixed question of law and fact does not mean that we are free to substitute our judgment for that of the agency as to the facts; instead, the factual findings of the agency are entitled to the same level of deference which would be accorded under any other circumstance. See *Franklin Cy.*, 97 Wash. 2d at 329-30. [HN4] The process of applying the law to the facts, however, is a question of law and is subject to de novo review. *Henson*, 113 Wash. 2d at 377; *Johnson v. Department of Empl. Sec.*, 112 Wash. 2d 172, 175, 769 P.2d 305 (1989). The findings of fact made by the agency below are therefore critical to our resolution of the question of whether Tapper engaged in misconduct connected with her work.

Throughout these proceedings, the facts surrounding Tapper's discharge from Boeing have been bitterly contested. At this stage, the dispute has been [***12] reduced to a disagreement over whether the Commissioner properly and authoritatively modified the findings of fact made by the ALJ. ¹ Tapper has not argued that the Commissioner's findings of fact were not supported by substantial evidence under RCW 34.05.570(3)(e); instead, she has essentially contended that the Commissioner was legally bound by the factual findings of the ALJ who presided over the initial hearing. The Department argues that the Commissioner is the final authority on findings of fact regarding disputes over unemployment compensation and therefore appropriately modified the ALJ's findings.

¹ As noted above, Tapper argued before the Department and to the Superior Court that her discharge was in retaliation for her employment complaints. She has not pressed this contention before this court.

[*404] [3] The WAPA describes the procedures by which subject agencies are to conduct internal review of the adjudicative decisions of lower officials. [HN5] RCW 34.05.464(4) states, in part:

(4) The officer [***13] reviewing the initial order (including the agency head reviewing an initial order) is, for the purposes of this chapter, termed the reviewing officer. *The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing. . . .* In reviewing findings

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of fact by presiding officers, the reviewing officers shall give due regard to the presiding [**499] officer's opportunity to observe the witnesses.

(Italics ours.) [HN6] Under RCW 50.32.080, the Commissioner has the power to review ALJ decisions and is the final authority for departmental determinations as regards unemployment compensation. He or she is therefore a "reviewing officer" for purposes of RCW 34.05.464(4). As a reviewing officer, the Commissioner may "exercise all the decision-making power" of the official who presided over the initial agency hearing. Since the ALJ had the power to make findings of fact, the Commissioner has the power to make his or her own findings of fact and in the process set aside or modify the findings of the ALJ.

[4] While there are no reported Washington cases construing [***14] RCW 34.05.464(4),² the [HN7] federal courts have interpreted a virtually identical provision of the Federal Administrative Procedure Act to allow agency heads to substitute their own findings of fact for those made by hearing officers. See *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364-65, 99 L. Ed. 1147, 75 S. Ct. 855 (1955) (Federal Communications Commission may reverse hearing examiner); *Hazzard v. INS*, 951 F.2d 435, 440 (1st Cir. 1991) (INS Board may reverse factual findings of immigration judge); *Stanley v. Board of Governors*, 940 F.2d 267, 272 (7th Cir. 1991) (courts defer to agency board's factual findings rather than those of ALJ); *Houston v. [**405] Sullivan*, 895 F.2d 1012, 1015 (5th Cir. 1989) (Social Security Appeals Council may reverse credibility findings of ALJ); *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989) (same).³ This federal case law provides persuasive support for our reading of RCW 34.05.464(4). See *Inland Empire Distrib. Sys., Inc. v. Utilities & Transp. Comm'n*, 112 Wash. 2d 278, 283, 770 P.2d 624, 87 A.L.R.4th 627 (1989); [***15] *Clarke v. Shoreline Sch. Dist.* 412, 106 Wash. 2d 102, 118, 720 P.2d 793 (1986). Commentary is also in agreement as to this interpretation of RCW 34.05.464(4). See Andersen, *The 1988 Washington Administrative Procedure Act -- An Introduction*, 64 Wash. L. Rev. 781, 816 (1989).

² This dearth is likely due to the youthfulness of the provision, which was part of the comprehensive 1988 revisions of the WAPA. See Laws of 1988, ch. 288, § 419, p. 1375.

³ Some federal courts have suggested that where the reviewing officer ignores or reverses the credibility findings of the hearing officer, heightened scrutiny should apply to substantial evidence review of any substituted findings of fact. See, e.g., *Sorenson v. Bowen*, 888 F.2d 706, 711 (10th Cir. 1989). Given the particular solicitude of RCW 34.05.464(4) for the credibility findings of the hearing officer, some such rule would seem to be warranted. However, since this is not a substantial evidence case, we do not address the question of what such a rule would look like. Cf. RCW 34.05.461(3) ("Any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified").

[***16] We recognize that the rule prescribed by the statute appears to be somewhat at odds with the ordinary practice of appellate review. See Andersen, 66 Wash. L. Rev. at 816. It would perhaps be more consistent with traditional modes of review for courts to defer to factual findings made by an officer who actually presided over a hearing rather than to findings made by an agency administrator. [HN8] The familiar rationale for deference to the factual findings of a trial court, the ability of the court to observe witness' demeanor and to evaluate credibility, *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wash. 2d 364, 369-70, 798 P.2d 799 (1990), would seem to apply with equal force in the administrative context. In adopting RCW 34.05.464(4), however, the Legislature has made the judgment that the final authority for agency decisionmaking should rest with the agency head rather than with his or her subordinates, and that such final authority includes "all the decision-making power" of the hearing officer. RCW 34.05.464(4). Even were we [**406] inclined to do so, [HN9] it is not our role to substitute our judgment [***17] for that of the Legislature. We hold, therefore, that [HN10] it is the Commissioner's findings of fact, to the extent they modify or replace [**500] the findings of the ALJ, which are relevant on appeal.⁴

⁴ The only authority which Tapper relies on in opposition to the Commissioner's authority to make his or her own findings of fact is *Bajocich v. Department of Empl. Sec.*, 48 Wash. App. 45, 47, 739 P.2d 1155 (1987). *Bajocich* is inapposite. Not only was that case decided prior to the enactment of RCW 34.05.464(4), it did not even hold that the findings of an ALJ were to be given priority over the findings of the Commissioner. Instead, *Bajocich* only concluded that the findings of an ALJ, in the absence of any other findings, were binding in the same manner as those of a trial court. 48 Wash. App. at 47-48. Had the Commissioner made no independent findings of fact, *Bajocich* would be relevant, but that is not the case here.

[5] [***18] In order to resolve the question of misconduct, we must identify the findings of fact actually made by the Commissioner. This task is complicated by the absence of clearly defined findings of fact and conclusions of law

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within the Commissioner's decision. [HN11] When findings of fact are not explicitly delineated, or where those findings are buried or hidden within conclusions of law, it is within the prerogative of an appellate court to exercise its own authority in determining what facts have actually been found below. See *Kunkel v. Meridian Oil, Inc.*, 114 Wash. 2d 896, 903, 792 P.2d 1254 (1990); *Strother v. Capitol Bankers Life Ins. Co.*, 68 Wash. App. 224, 244-45, 842 P.2d 504 (1992), *review granted*, 121 Wash. 2d 1008 (1993).⁵

5 Tapper asserted strenuously at oral argument that, even if the Commissioner's findings are those relevant to this appeal, the Commissioner "adopted" the findings of the ALJ and therefore this court should look only to the ALJ's findings. While it is true that the Commissioner did adopt the ALJ's findings of fact, he did so "subject to the following additions, modifications and comments." Clerk's Papers, at 89. It is clear to us that the Commissioner did in fact make significant modifications to the findings of fact made by the ALJ. To the extent which the Commissioner did not modify the ALJ's findings, those findings are incorporated herein.

[*19]** After reviewing the decisions of the Commissioner and of the ALJ, we conclude that the following relevant facts were found:

1. Tapper was discharged by Boeing not for a specific incident but instead for an "accumulation of problems", [*407] including excessive time away from her work area, failing to listen to her supervisor and abide his instructions, and engaging in disruptive conversations and screaming outbursts.
2. Tapper had been suspended for "insubordination" and had been warned regarding incidents similar to those for which she was suspended.
3. Following the suspension, Tapper was called into Brown's office "6 to 8 times" for deviating from instructions, for creating a disruptive atmosphere, and for excessive time away from her work station.
4. Tapper "ignored" instructions regarding her attitude, promptness, and behavior at the workplace. These instructions were those contained within the notice of remedial action.
5. On July 21, Tapper was 15 minutes late to work and was ordered to record the tardiness on her time card as "leave without pay". Tapper recorded a full 8 hours on her time card.

See Clerk's Papers, at 89-90.

[6] These then are the [***20] facts relevant to the question of whether Tapper was discharged for misconduct connected with her work. [HN12] Because Tapper did not attack any of these findings in her appeal, except to claim that the Commissioner had no legal authority to modify the findings made by the ALJ, we treat them as verities. *Tomlinson v. Clarke*, 118 Wash. 2d 498, 501, 825 P.2d 706 (1992); *Clark v. Luepke*, 118 Wash. 2d 577, 583, 826 P.2d 147 (1992).

B

The next step in resolving the misconduct question is determining the appropriate definition of misconduct to be applied to the facts found by the Commissioner.

[HN13] Under the Act, Washington provides partial wage replacement benefits, *i.e.*, unemployment compensation, to those workers who are involuntarily out of work and who are seeking further employment. See RCW 50.20.010. The chief purposes of [**501] unemployment compensation are to minimize [*408] the disruption caused by involuntary inability to obtain employment and to provide support for unemployed workers as they seek new jobs. RCW 50.01.010; *Macey v. Department of Empl. Sec.*, 110 Wash. 2d 308, 315, 752 P.2d 372 (1988); [***21] *International Shoe Co. v. State*, 22 Wash. 2d 146, 173, 154 P.2d 801, *aff'd*, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154, 161 A.L.R. 1057 (1945).⁶

⁶ It is sometimes also stated that unemployment compensation serves the purpose of economic stability by providing purchasing power during periods of recession. See, *e.g.*, *Macey*, 110 Wash. 2d at 324-25 (Dore, J., dissenting); Burns, *Unemployment Compensation and Socio-Economic Objectives*, 55 Yale L.J. 1, 12 (1945-1946).

Ever since the introduction of unemployment compensation in Washington in 1935, the Act has also provided for disqualification of benefits for individuals who have either voluntarily left their employment or who were discharged due to work-related "misconduct". See *Macey*, 110 Wash. 2d at 313. The latter of these disqualifications [***22] is presently codified at [HN14] RCW 50.20.060, which states in part:

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An individual shall be disqualified from benefits beginning with the first day of the calendar week in which he or she has been discharged or suspended for *misconduct connected with his or her work*. . . .

(Italics ours.) Thus, when it is determined that a claimant for unemployment compensation was discharged from his or her employment for "misconduct", that claimant is denied benefits.

Work-related misconduct is not defined in the statute. *Macey*, 110 Wash. 2d at 313; *Peterson v. Department of Empl. Sec.*, 42 Wash. App. 364, 369, 711 P.2d 1071 (1985), *review denied*, 105 Wash. 2d 1011 (1986). There is, however, a substantial amount of case law construing the term.⁷

⁷ A recent amendment to the Act now defines "misconduct" as "an employee's act or failure to act in willful disregard of his or her employer's interest where the effect of the employee's act or failure to act is to harm the employer's business." Laws of 1993, ch. 483, § 1, p. 2017. However, by the terms of the amendment this definition only applies to employment separations taking place after July 3, 1993. Laws of 1993, ch. 483, § 23(1), p. 2039. Therefore, we do not consider what effect, if any, the new legislation would have on our existing misconduct jurisprudence.

[***23] [*409] [7] [HN15] It is well established that the operative principle behind the disqualification for misconduct is the *fault* of the employee. See *Macey*, 110 Wash. 2d at 318; *Henson*, 113 Wash. 2d at 382 (Durham, J., dissenting); *Johnson v. Employment Sec. Dep't*, 64 Wash. App. 311, 315, 824 P.2d 505 (1992); *Durham v. Department of Empl. Sec.*, 31 Wash. App. 675, 678, 644 P.2d 154 (1982). An employee is only guilty of misconduct when his or her behavior is such that the "unemployment is in effect voluntary". *Macey*, 110 Wash. 2d at 316. This statutory focus on the fault of the employee serves several purposes. First, the fault principle preserves the use of the State's resources for "innocent" workers who are involuntarily unemployed and are thus more deserving of compensation. See RCW 50.01.010; *Safeco Ins. Cos. v. Meyering*, 102 Wash. 2d 385, 388, 687 P.2d 195 (1984). Second, since the unemployment compensation fund [***24] is made up in large part of employer contributions, it is unfair to force employers to compensate employees who had engaged in and were discharged for misconduct. See T. Broden, *Social Security and Unemployment Insurance* § 13.02, at 492 (1962). And third, the disqualification for misconduct is penal in nature, *Peterson*, 42 Wash. App. at 370, and serves as a general deterrent against employee misconduct.

In *Macey*, this court set out what it characterized as a 3-part test for analyzing on-duty violations of employer rules as misconduct under the Act. A careful examination of *Macey*, however, reveals the test in fact has four elements. [HN16] These four elements are: (1) The rule which is allegedly violated must be reasonable under the circumstances of the employment; (2) The [**502] violative conduct of the employee must be connected with his or her work; (3) The conduct of the employee must violate the rule; and, (4) The violations must be intentional, grossly negligent, or continue to take place after notice or warnings. That is, the behavior cannot be characterized as mere incompetence, inefficiency, erroneous judgment, or ordinary [***25] negligence. See *Macey*, 110 Wash. 2d at 318-19. It is appropriate to analyze this case under the standards we set out in *Macey* because the misconduct of which [*410] Tapper was accused involved on-duty violations of employer work rules (*i.e.*, the rules laid out in the notice of remedial action).

C

The final step of the misconduct inquiry is applying these standards to the facts as found by the Commissioner. There is no question but that the first three parts of the *Macey* test are met in this case, and Tapper does not argue otherwise. First, the rules which Tapper allegedly violated were reasonable within the context of her employment. As described in the notice of remedial action, they included observing certain procedures regarding office production, listening to her supervisor, avoiding excessive time away from her work station, and refraining from disruptive behavior. These are all certainly reasonable requirements in the context of Tapper's employment.

Second, the violations of these rules certainly were connected with Tapper's work. [HN17] Failing to observe office production procedures, refusing to listen to one's supervisor, [***26] spending excessive time away from a work station, and engaging in disruptive behavior meet the *Macey* requirement of affecting work performance both of the individual and of the employer's work force in general. It is not necessary under *Macey* to show that the behavior in question had an actual adverse impact, as long as a minimal showing of employer interest in the behavior is shown. *Macey v. Department of Empl. Sec.*, 110 Wash. 2d 308, 318-19, 752 P.2d 372 (1988). Such an interest is manifest here.⁸

⁸ The second step of the *Macey* test is not merely a restatement of the first. While in many cases the circumstances which bear on whether an employer rule is reasonable will also be relevant as to whether violation of the rule is connected with employment, this will not always be

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true. For example, an employee might violate a reasonable employer rule such as "listen to one's supervisor" in a manner unrelated to the employment situation, perhaps by violating the rule in regard to a personal matter. *Cf. Henson*, 113 Wash. 2d at 381-87 (Durham, J., dissenting) (employee's refusal to attend Alcoholics Anonymous meetings was not connected with work).

[***27] Finally, the factual findings of the Commissioner compel the conclusion that Tapper violated the rules contained within the notice of remedial action.

[*411] The only issue in this case with respect to the application of the *Macey* test regards its fourth prong, which excludes inability, inefficiency, and ordinary negligence from the definition of misconduct. *See Kempfer, Disqualifications for Voluntary Leaving and Misconduct*, 55 Yale L.J. 147, 162 (1945-1946) ("It is well established that inefficiency or ordinary negligence is not misconduct"). The Court of Appeals held that Tapper's behavior did not constitute misconduct because this element of the test was unfulfilled. *See Tapper*, 66 Wash. App. at 452-53. [HN18] Inability, inefficiency, and ordinary negligence are excluded from the definition of misconduct because they are generally behaviors society does not consider to be the "fault" of the employee. Even repeated demands that a particular task be performed correctly do not transform incompetence into misconduct if the employee is basically incapable of the desired level of performance. *See*, [***28] *e.g., Becker v. Employment Sec. Dep't*, 63 Wash. App. 673, 674, 677, 821 P.2d 81 (1991) (persistent cash register errors were not misconduct despite warnings). Relying on its decision in *Becker*, the Court of Appeals concluded that Tapper's difficulties at work were the result of her inabilities and thus did not qualify as misconduct. *See Tapper*, 66 Wash. App. at 452-53.

[**503] [8] Under the Commissioner's findings of fact, however, Tapper did not merely fail to perform up to company standards, she acted willfully in refusing to follow her supervisor's instructions. The Commissioner found that Tapper affirmatively "ignored" directions both to follow company procedure with respect to her job tasks and to record her tardiness on her time card. The Commissioner also found that Tapper was repeatedly warned regarding her failure to meet the requirements of the notice of remedial action. We hold that this behavior cannot be characterized as mere incompetence or inefficiency, and that it therefore satisfies the fourth element of the *Macey* test.

This holding is in accord with the decisions of the [***29] Court of Appeals, which has generally declined to apply the inability exclusion when employees have directly and affirmatively [*412] refused to perform tasks demanded by their employers (assuming the requests otherwise meet the *Macey* requirements). *See, e.g., Harvey*, 53 Wash. App. at 342 (employee's refusal to obey direct order to immediately perform task constituted misconduct); *Peterson v. Department of Empl. Sec.*, 42 Wash. App. 364, 370-71, 711 P.2d 1071 (1985) (postal driver directly refusing to answer supervisor's questions regarding absence from work was misconduct), *review denied*, 105 Wash. 2d 1011 (1986). We find this rule to be consistent with the fault basis of the misconduct disqualification. [HN19] While a failure to *successfully* perform an employer request may not typically constitute misconduct, the same cannot be said of a refusal to even attempt to fulfill the requests. Where, as here, findings of fact establish that an employee "ignored" her employer's reasonable requests, the fourth prong of the *Macey* test is met.

III

As a final matter, [***30] we note that our holding is in no way a judgment on the propriety of Boeing's decision to terminate Karen Tapper. [HN20] The question of discharge is independent of the question of misconduct. *See Johnson v. Employment Sec. Dep't*, 64 Wash. App. 311, 314-15, 824 P.2d 505 (1992); *Becker*, 63 Wash. App. at 677; *Ciskie v. Department of Empl. Sec.*, 35 Wash. App. 72, 76, 664 P.2d 1318 (1983). Boeing may or may not have been justified, as a matter of employment law or good business judgment, in terminating Tapper, but those questions are not before the court. Tapper's supervisor may or may not have handled the problems with Tapper as sensitively or capably as another supervisor might have, but that question is also not before the court. The only issue in this case is whether the facts surrounding the discharge, as found by the Commissioner, meet the test for misconduct set out in *Macey*. We hold they do and that the Commissioner was correct in denying benefits to Tapper.

The decision of the Court of Appeals is reversed and the decision of the Superior Court [***31] upholding the denial of benefits [*413] is reinstated. Tapper's request for attorney's fees is accordingly denied.

H

Court of Appeals of Washington,
Division 1.
UNIVERSITY VILLAGE LTD. PARTNERS, Respondents,
v.

KING COUNTY, a political subdivision of the State of Washington; and Scott Noble, King County Assessor, Appellants.
No. 46696-8-I.

April 2, 2001.

Publication Ordered May 29, 2001.

Taxpayer sued county, alleging that county violated uniform taxation clause of state constitution by assessing taxpayer's land for tax purposes at higher value per square foot than land of neighboring parcels. The Superior Court, King County, Robert Alsdorf, J., denied county's motion for summary judgment, and thereafter entered judgment against county. County appealed. The Court of Appeals, Baker, J., held that challenge to assigned land value component of improved real property appraised by income method, without more, is insufficient to sustain constitutional claim of non-uniform taxation.

Reversed.

West Headnotes

[1] Appeal and Error 30 ↪870(2)

30 Appeal and Error
30XVI Review

30XVI(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions

30k869 On Appeal from Final Judgment

30k870 Interlocutory Proceedings Brought Up in General

30k870(2) k. Particular Orders or Rulings Reviewable in General. Most Cited Cases •

Although the Court of Appeals ordinarily does not review an order denying summary judgment after a trial

on the merits, the Court will review such an order if the parties dispute no issues of fact and the decision on summary judgment turned solely on a substantive issue of law.

[2] Taxation 371 ↪2128

371 Taxation

371III Property Taxes

371III(B) Laws and Regulation

371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity

371k2128 k. Discrimination as to Mode of Assessment or Valuation. Most Cited Cases

(Formerly 371k40(8))

Taxpayer failed to show that county violated uniform taxation clause of state constitution, even though county assessed taxpayer's land at higher value per square foot than land of neighboring parcels; land value was only one component of property's total value, taxpayer did not contest validity of total assessed value of its property, assessor complied with statutory mandates by valuing property using income method after ruling out cost and market data approaches as unreliable, assessor then used market data approach to determine percentage of total value that should be allocated to land, and reducing taxpayer's total property value by decreasing its land value would cause unconstitutional disparity in assessment ratio. West's RCWA Const. Art. 7, § 1; West's RCWA 84.40.030(2, 3).

[3] Taxation 371 ↪2128

371 Taxation

371III Property Taxes

371III(B) Laws and Regulation

371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity

371k2128 k. Discrimination as to Mode of Assessment or Valuation. Most Cited Cases

(Formerly 371k40(8))

Under the uniform taxation clause of the state constitution, it is the tax paid, not the numerical values of property, that must be uniform. West's RCWA Const. Art. 7,

§ 1.

[4] Taxation 371 ↪2121

371 Taxation

371III Property Taxes

371III(B) Laws and Regulation

371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity

371k2121 k. Constitutional Requirements and Operation Thereof. Most Cited Cases
(Formerly 371k40(1))

In determining constitutional equity, a tax is uniform if: (1) the taxing authority applies an equal tax rate; and (2) the assessment ratios of the properties at issue are equal. West's RCWA Const. Art. 7, § 1.

[5] Taxation 371 ↪2128

371 Taxation

371III Property Taxes

371III(B) Laws and Regulation

371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity

371k2128 k. Discrimination as to Mode of Assessment or Valuation. Most Cited Cases
(Formerly 371k40(8))

In determining constitutional equity, an assessment ratio is the fractional relationship an assessed value of real property bears to the market value of that property. West's RCWA Const. Art. 7, § 1.

[6] Taxation 371 ↪2128

371 Taxation

371III Property Taxes

371III(B) Laws and Regulation

371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity

371k2128 k. Discrimination as to Mode of Assessment or Valuation. Most Cited Cases
(Formerly 371k40(8))

A property valued at a different assessment ratio than like properties will violate the uniform taxation clause of the state constitution. West's RCWA Const. Art. 7, § 1.

[7] Taxation 371 ↪2128

371 Taxation

371III Property Taxes

371III(B) Laws and Regulation

371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity

371k2128 k. Discrimination as to Mode of Assessment or Valuation. Most Cited Cases
(Formerly 371k40(8))

The statutory definitions of taxes, assessments, and property indicate that assessment ratio relates to the total value of real property, not solely to a component of it, for uniformity clause purposes. West's RCWA 84.04.030, 84.04.090, 84.04.100.

[8] Taxation 371 ↪2128

371 Taxation

371III Property Taxes

371III(B) Laws and Regulation

371III(B)4 Constitutional Regulation and Restrictions Concerning Equality and Uniformity

371k2128 k. Discrimination as to Mode of Assessment or Valuation. Most Cited Cases
(Formerly 371k40(8))

A challenge to the assigned land value component of improved real property appraised by the income method, without more, is insufficient to sustain a constitutional claim of non-uniform taxation, because a difference in land value does not necessarily mean a difference in total assessment ratio in that context. West's RCWA Const. Art. 7, § 1; West's RCWA 84.04.030, 84.04.090, 84.04.100.

[9] Taxation 371 ↪2510

371 Taxation

371III Property Taxes

371III(H) Levy and Assessment

371III(H)5 Valuation of Property

371k2510 k. In General. Most Cited Cases
(Formerly 371k347)

An assessor has the discretion to select the appropriate appraisal method of assessing the value of real property. West's RCWA 84.40.030.

West Codenotes

Recognized as Unconstitutional Laws 1997, ch. 3, § 105
**1091 *322 Jeffrey Iver Tilden, Gordon Murray
Tilden, Seattle, Jeffrey M. Thomas, Seattle, for Re-
spondents.

Margaret A. Pahl, Seattle, for Appellant.

BAKER, J.

King County appeals the trial court's denial of summary judgment on University Village's tax uniformity claim against the County. University Village claimed *323 that the County violated the Washington State Constitution by assessing its land for tax purposes at a higher value per square foot than the land of neighboring parcels. Because land value is only a component of a property's total value upon which an owner is taxed, and

University Village produced no evidence to show that its total assessed value was not uniform, we reverse.

I

In 1994 and 1995, the owners of University Village, an upscale shopping center in Seattle, renovated the property and constructed new retail space at a total investment of \$12.5 million. In 1996, pursuant to its annual evaluation process, the King County tax assessor revalued the property for the 1997 tax year as follows: ^{FN1}

FN1. The new construction statute, RCW 36.21.080, is not at issue in this appeal.

	1995 Value	1996 Value
Land	\$20,786,800	\$25,983,500
Buildings, Etc.	25,600,900	24,628,500
Total Assessed Value:	46,387,700	\$50,612,000

Determining that of the three statutory appraisal methods available, the income approach was the most reliable, the King County assessor derived a total value for the property by capitalizing the estimated 1996 net operating income at a rate of 8.5 percent. In accordance with RCW 84.40.030(3), he then allocated a portion of the total value to the land at a rate of \$25 per square foot. He based this figure on a comparison of sales of adjacent property, namely, Office Depot (\$43 per square foot) and Carnation Dairy (\$23 per square foot).

University Village appealed the assessment to the King County Board of Equalization arguing that the value was excessive. When the board affirmed, the owners appealed to the Board of Tax Appeals. On appeal, King County undertook appraisal of University Village by the other two recognized methods of valuation, the comparable sales *324 approach (market data approach) and the cost approach (cost less depreciation). The appraisals returned values ranging from \$50 million to \$73 mil-

lion and demonstrated the unreliability of those two methods for a property of this type. In contrast, University Village offered no credible testimony as to the value of the land or of the property as a **1092 whole. The Board of Tax Appeals affirmed and University Village did not seek review of its decision.

Concurrent with its administrative tax appeal, University Village filed this action in King County Superior Court, claiming that King County had violated the uniform taxation clause of article VII, section 1 of the Washington State Constitution by valuing its land at \$25 per square foot when the adjacent properties, Office Depot and QFC, were valued at \$20 per square foot. Evidence presented at summary judgment showed that the Office Depot and QFC properties were valued using a cost approach. This approach involves valuing land and the cost of replacement buildings, less depreciation, whereas the income approach does not separately value land, but values the property as improved. University Village did not dispute the validity of the total assessed

value of its property.

The trial court denied King County's motion for summary judgment and after a bench trial, entered judgment against King County. The County appeals.

II

[1] Although we ordinarily do not review an order denying summary judgment after a trial on the merits, ^{FN2} we will review such an order if the parties dispute no issues of fact and the decision on summary judgment turned solely on a substantive issue of law. ^{FN3} Because the parties in this case agree as to all material facts and the summary judgment was based on a legal conclusion, we will review the trial court's order.

FN2. *Johnson v. Rothstein*, 52 Wash.App. 303, 306, 759 P.2d 471 (1988).

FN3. *Bulman v. Safeway, Inc.*, 96 Wash.App. 194, 198, 978 P.2d 568 (1999) *review granted*, 140 Wash.2d 1001, 999 P.2d 1261 (2000).

*325 [2][3] University Village claims that the County's failure to value the land portion of its real property at the same numerical value as the land portion of the neighboring QFC and Office Depot properties violates its state constitutional right to uniform taxation. Article VII, section I of the Washington State Constitution states in relevant part:

All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax ... [a]ll real estate shall constitute one class.

The plain language of the section makes clear that it is the tax paid, not the numerical values of property that must be uniform.

[4][5][6] It is well established that in determining constitutional equity, a tax is uniform if a) the taxing authority applies an equal tax rate; and b) the assessment ratios of the properties at issue are equal. ^{FN4} An assessment ratio is the fractional relationship an assessed

value bears to the market value of the property in question (e.g., if one property is assessed at 80 percent of fair market value, then similar properties must also be valued at the same percentage). ^{FN5} Thus, a property valued at a different assessment ratio than like properties will violate the uniform taxation clause of the state constitution.

FN4. *Belas v. Kiga*, 135 Wash.2d 913, 923, 959 P.2d 1037 (1998).

FN5. *Belas*, 135 Wash.2d at 923, 959 P.2d 1037.

[7] University Village argues that because its land was given a different per square foot value than the land of two of its neighbors' properties, the assessment ratio was different, resulting in non-uniformity of tax. But the statutory definitions of taxes, assessments, and property indicate that assessment ratio relates to total property value, not solely to a component of it. Under RCW 84.04, the term "tax" is defined as the imposition of "burdens upon property in proportion to the value thereof ..." ^{FN6} Real property, for *326 tax purposes, is defined as "the land itself ... and all buildings, structures or improvements or other fixtures of whatsoever kind thereon..." ^{FN7} Assessed value is "the aggregate valuation of the property subject to taxation ..." ^{FN8} These definitions reflect **1093 that taxes are imposed on property as a whole, not on individual parts of it. Indeed, Washington courts have consistently addressed issues of property assessments in that manner. ^{FN9}

FN6. RCW 84.04.100.

FN7. RCW 84.04.090. (Emphasis added).

FN8. RCW 84.04.030.

FN9. *See Folsom v. County of Spokane*, 106 Wash.2d 760, 725 P.2d 987 (1986); *Sahalee Country Club v. Bd. of Tax Appeals*, 108 Wash.2d 26, 735 P.2d 1320 (1987); *Belas v. Kiga*, 135 Wash.2d 913, 959 P.2d 1037 (1998).

[8] To be successful in its challenge, University Village needs to show not only that the value of the land was

not uniform, but that the difference in value effected a disparity in the assessment ratio of the entire subject property relative to similar properties. This it did not do. In fact, University Village does not contest the validity of the total assessed value of its property in this action.^{FN10} We hold that a challenge to the assigned land value component of improved real property appraised by the income method, without more, is insufficient to sustain a constitutional claim of non-uniform taxation, because a difference in land value does not necessarily mean a difference in total assessment ratio in that context.

FN10. University Village appealed the total assessment as excessive, which the Board of Equalization denied and the Board of Tax Appeals affirmed. University Village did not seek review of the decision.

We reject University Village's characterization of the County's practice of assigning land values for property appraised by the income approach. University Village asserts that the County's procedure is unrelated to the facts, and essentially meaningless. RCW 84.40.030(3) requires an assessor to separately determine the values of the land and structures on the land in valuing real property. But the statute goes on to state that the sum of the values may not *327 exceed the fair value of the total property.^{FN11} The subsection thus acknowledges that appraisals are, at best, estimates of value and that valuation of the components could lead to an excessive value of the property as a whole. This necessarily contemplates the potential adjustment of component values in order to keep their sum within a property's total assessed value.

FN11. RCW 84.40.030(3).

[9] The assessor in this case did exactly as the statute mandates. An assessor has the discretion to select the appropriate appraisal method of assessing the value of real property.^{FN12} After ruling out the cost and market data approaches as unreliable, the assessor valued the property using the income method authorized by RCW 84.40.030(2) and approved by the Washington Supreme Court in *Folsom v. County of Spokane*. The income ap-

proach, by its nature, does not derive a total value of real property by first separately determining values for the land and improvements and adding them together. Rather, it determines a total value by capitalizing the income generated from the property.

FN12. *Sahalee*, 108 Wash.2d at 36, 735 P.2d 1320.

To comply with RCW 84.40.030(3), the assessor then used the statutorily authorized market data approach to determine the percentage of total value that should be allocated to the land. The record establishes that the assessor's methodology in doing so was based upon appropriate data and analysis. The fact that the trial court rejected the assessor's conclusion does not mean that the assessor's procedures were arbitrary or meaningless.

Reducing University Village's total property value by decreasing its land value would cause the disparity in assessment ratio the constitution prohibits. In *Belas v. Kiga*, the Washington Supreme Court struck down Referendum 47, which limited the percentage by which property taxes could be increased in any given year. The court held that the limits resulted in lower effective tax rates for owners of rapidly appreciating property and higher effective*328 tax rates for owners of stagnant property, thus violating the constitution's uniform taxation clause.^{FN13} University Village concedes that its total assessed value is not erroneous. Consequently, reducing its tax burden would reduce its effective tax rate as compared to the tax rate paid by its neighboring properties. This result is prohibited by the Washington Constitution.

FN13. *Belas*, 135 Wash.2d at 927, 959 P.2d 1037.

**1094 We decline to consider University Village's federal equal protection claim. In general, arguments or theories not presented to the trial court will not be considered on appeal.^{FN14} This includes questions of constitutional magnitude.^{FN15} University Village abandoned this claim in its first amended complaint, affording the trial court no opportunity to consider the issue. We will not address it here.

23 P.3d 1090

106 Wash.App. 321, 23 P.3d 1090

(Cite as: 106 Wash.App. 321, 23 P.3d 1090)

Page 6

FN14. *Washburn v. Beatt Equipment Co.*, 120
Wash.2d 246, 290, 840 P.2d 860 (1992).

FN15. *Cobb v. Snohomish County*, 86
Wash.App. 223, 235, 935 P.2d 1384 (1997).

REVERSED.

Wash.App. Div. 1,2001.

University Village Ltd. Partners v. King County

106 Wash.App. 321, 23 P.3d 1090

END OF DOCUMENT

Patricia N. Strand
PO Box 312
Nine Mile Falls, WA 99026
September 27 2012

Hon. Ronald R. Carpenter
Supreme Court Clerk
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929

Regarding Correction to: No. 87633-9 – Appellant Brief pagination references

Attached (page 2) is the Board of Tax Appeals Document Index I received on Apr/5/12. It was blank and I did not associate it with the documents I referenced in my brief. I have added the notation I used in the brief. I apologize for my error.

Prosecutor Arkills provided the attached (pages 3 and 4) to explain the pagination references in the Respondent's Brief I received Sep/24/12.

Patricia Strand

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SUPREME COURT
STATE OF WASHINGTON
2012 SEP 27 A 8:23
BY RONALD R. CARPENTER
CLERK

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 ORIGINAL

Palmer Strand and Patricia Strand v.
Vicki Horton, Spokane County Assessor
Board of Tax Appeals Formal Docket No. 10-258

Document Index

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2	ORDER DENYING PETITION FOR REVIEW Date: February 24, 2012		BTA
3	E-mail regarding response to Strand Petition for Reconsideration Date: January 25, 2012		Ronald P. Arkills, Spokane County Deputy Prosecuting Attorney for Spokane County Assessor (Attorney for Assessor)
4	Letter Re: Petition for Reconsideration Date: January 5, 2012		BTA
5	PETITION FOR REVIEW (A5 to A7) Date: January 3, 2012 (Received by BTA)	CP 55 - 176	Palmer D. Strand and Patricia N. Strand, Owners
6	INITIAL DECISION Date: December 13, 2011		BTA
7	Facsimile regarding Docket No. 10-258 Recording of Teleconference Hearing Date: August 8, 2011		Patricia N. Strand, Owner
8	Hearing sign in sheet – August 8, 2011		BTA
9	E-mail regarding Appellant's Reply Brief APPELLANT'S REPLY BRIEF (A3 to A4) Date: August 1, 2011	A3-1 to A3-8 A4-1 to A4-4	Palmer D. Strand and Patricia N. Strand, Owners
10	E-mail regarding Respondent's Submittals RESPONDENT'S DISCLOSURE OF FACT AND EXPERT WITNESSES RESPONDENT'S EXHIBITS (R1 to R4) RESPONDENT'S TRIAL BRIEF Date: July 25, 2011		Ronald P. Arkills, Attorney for Assessor
11	E-mails regarding attachment Date: July 25, 2011		Carol Lien, Clerk of the Board, BTA
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14	E-mail regarding brief and exhibits Date: July 22, 2011		Patricia N. Strand, Owner
15	E-mail regarding Spokane County employee witnesses Date: July 21, 2011		Patricia N. Strand, Owner
16	E-mail regarding submittals Date: July 21, 2011		Carol Lien, Clerk of the Board, BTA



STATE OF WASHINGTON
BOARD OF TAX APPEALS

910 5th Avenue SE • P.O. Box 40915 • Olympia, Washington 98504-0915 • (360) 753-5446 (Voice/TDD)
FAX (360) 586-9020 • E-mail bta@bta.state.wa.us • <http://bta.state.wa.us/>

April 24, 2012

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APR 26 2012

SPOKANE COUNTY
PROSECUTING ATTORNEY
CIVIL DIVISION

PALMER STRAND
PATRICIA STRAND
PO BOX 312
NINE MILE FALLS WA 99026
Sent by e-mail and USPS

RE: Petition for Judicial Review
Spokane County Superior Court Cause No. 12-2-01110-3
Board of Tax Appeals Formal Docket No. 10-258
Palmer D. Strand and Patricia N. Strand v. Spokane County Assessor

Dear Appellants:

Pursuant to the Petition for Judicial Review, certified copies of the record in the above referenced matter were filed with the Spokane County Superior Court. Enclosed for your file are copies of the certificate and document index list.

Sincerely,


Donna Oyama
Legal Secretary

cc: Vicki Horton, Spokane County Assessor (E-mail and USPS)
Ronald Arkills, Spokane County Deputy Prosecuting Attorney (E-mail and USPS)
Spokane County Board of Equalization, Clerk (E-mail)

Enclosures



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SPOKANE COUNTY
PROSECUTING ATTORNEY
CIVIL DIVISION

Palmer Strand and Patricia Strand v.
Vicki Horton, Spokane County Assessor
Board of Tax Appeals Formal Docket No. 10-258

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BEFORE THE BOARD OF TAX APPEALS
STATE OF WASHINGTON

PALMER STRAND and
PATRICIA STRAND,

Appellants,

v.

VICKI HORTON,
Spokane County Assessor,

Respondent.

Docket No. 10-258

RE: Property Tax Appeal

INITIAL DECISION

This matter came before Gilda R. Felizardo, Tax Referee, presiding for the Board of Tax Appeals (Board) on August 8, 2011, in a formal hearing pursuant to the rules and procedures set forth in chapter 456-09 WAC (Washington Administrative Code). Patricia Strand represented herself and Palmer Strand (Owners), by teleconference. Ronald P. Arkills, Senior Deputy Prosecuting Attorney represented Respondent, Vicki Horton, Spokane County Assessor (Assessor), by teleconference. Also in attendance, by teleconference, and testifying on behalf of the Assessor is Joseph Hollenbeck, Appraisal Supervisor.

This Board heard the testimony, reviewed the evidence, and considered the arguments made on behalf of both parties. This Board now makes its decision as follows:

VALUATION FOR ASSESSMENT YEAR 2009

	BOARD OF EQUALIZATION	BOARD OF TAX APPEALS
<u>PARCEL NO.</u>	<u>VALUATION</u>	<u>VALUATION</u>
17355.9014	Land: \$ 200,000 <u>Impr: \$ 249,900</u> Total: \$ 449,900	Land: \$ 200,000 <u>Impr: \$ 249,900</u> Total: \$ 449,900

- 1 1. The Assessor claims the Owners purchased the subject property as unimproved land
2 for \$104,500 on October 3, 2000.⁴ The Owners submit the Real Estate Excise Tax
3 Affidavit (REETA) showing the Owners' purchase of Parcel No. 26271.0526, located
4 at 7523 North Drumheller, for \$104,500 on October 3, 2000.⁵ This is not the subject
5 property. The Owners also submit the subject property's Buyers Closing Statement
6 *Final*⁶ that shows the subject's closing on September 5, 2000, for \$100,000.
7 Therefore, the Assessor's claim of the Owners' purchase price and sale date of the
8 subject property are incorrect.
- 9 2. The Assessor states the subject's residence was constructed in 2002. The Owners
10 submit the Project Summary⁷ to show the initial construction started in May 2001,
11 with final approval for its completion in December 2003.
- 12 3. The Assessor notes the "access to the house is by way of a winding road."⁸ The
13 Owners use Webster's Random House College Dictionary to define a driveway as an
14 "in-property private road leading from a street or other thoroughfare to a house,
15 garage."⁹ The Owners state it is important to distinguish between a road and their
16 500-foot driveway. The Owners cite the Respondent's Trial Brief for the 2008
17 assessment year in which the Assessor inaccurately describes "access to the house is
18 by way of a "winding dirt road running northerly across the property from Charles
19 Road."¹⁰ The Owners assert the subject has a "gravel driveway . . . it is not dirt and
20 not a road."¹¹ The Owners contend that "labeling it in ways other than its function is
21 Fraud."¹²
- 22 4. The Owners refer to the Assessor's statement that the Owners' refused to allow the
23 Assessor to inspect the interior of the subject property. The Assessor notes it was
24 impossible for her "to confirm or deny any inaccuracies claimed by the [Owners]."
25 Therefore, the Assessor was "forced to utilize information from previous assessment
26

27 ⁴ Exhibit R3-5/10, line 12.

28 ⁵ Exhibit A4-1.

29 ⁶ Exhibit A4-2

30 ⁷ Exhibits A4-3 and A4-4,

⁸ Respondent's Trial Brief, page 2, lines 10 and 11.

⁹ Exhibit A3-3, lines 2 and 3.

¹⁰ Exhibit A3-3, lines 7 and 8.

¹¹ Exhibit A3-3, lines 12 and 13.

¹² Exhibit A3-3, lines 15 and 16.

1 years to determine value.”¹³ For example, the Owners claim the subject residence
2 does not have a fireplace, although the Assessor has placed a value of \$320 towards
3 the improvement value.¹⁴ The Owners enumerate “inaccuracies” on the subject’s
4 records that should have been corrected by the Assessor, regardless of the access
5 issues. Based on the inaccuracies, the Owners claim the Assessor has committed
6 fraud as the basis for the 2009 assessment. The Owners rely on the *Collins English*
7 *Dictionary*, 10th edition, to define “fraud” as “deceit, trickery, sharp practice, or
8 breach of confidence, perpetrated for profit or to gain some unfair or dishonest
9 advantage.”¹⁵

10
11 The Owners submit documentary evidence for steps¹⁶ used in the sales comparison
12 approach.¹⁷ The Owners reviewed the Assessor’s sales data¹⁸ and found “fraud”
13 because the steps were not followed in the following areas:

- 14 • Neighborhood: the subject is located in Neighborhood 231720. The Assessor
15 claims, “It was necessary to expand the search beyond the immediate time
16 frame to locate sales which were comparable in waterfront, utility and/or
17 appeal.”¹⁹ The Owners assert the Assessor’s expansion of sales beyond the
18 subject’s neighborhood impacts the subject’s 2009 assessed value.
- 19 • Land Type: the Assessor’s sales physical features should also be similar to
20 the subject property. Features should include the type of frontage, view, land
21 size, land characteristics, miles from city center, and miles from the subject
22 property. The Owners contend the Assessor did not compare these features of
23 the sale properties to the subject property.
- 24 • Site Value/Adjustment: the Assessor did not “value/assess structural
25 improvements” on her sales. The Owners submit nine land sales to introduce
26

27
28 ¹³ Respondent’s Trial Brief, page 2, lines 15 – 17.

29 ¹⁴ Exhibit A1-68.

30 ¹⁵ Exhibits A1-3 and A3-1.

¹⁶ The steps are 1) Data collection, 2) Verification of data, 3) Selecting units of comparison, 4) Analysis and adjustments of comparable prices, and 5) Reconciliation of comparable value indicators. Exhibit A1-4.

¹⁷ Exhibits A1-4, A1-5, A2-98 through A2-104.

¹⁸ Exhibits A1-7 through A1-62, and supporting Exhibits A2-1 through A2-137.

¹⁹ Exhibits A1-7 and A1-8.

1 “elements of comparison of land types to determine site values with
2 adjustments.”²⁰

- 3 • Quality of Construction: historically, the subject property has been rated
4 “average-”,²¹ but the subject’s quality is now upgraded to “average.”²²
- 5 • Year Built: the Owners maintain that “the age of a residence is accounted for
6 in depreciation.” It “indicates that a tangible asset has declined in service
7 potential (value) and its cost should be allocated to time.”²³
- 8 • Bathroom: the sales grid is supposed to show the market value of main-floor
9 bathrooms.²⁴ The quality of construction also impacts the value of the
10 bathrooms.
- 11 • Gross Living Area (GLA): the Owners maintain the GLA is supposed to
12 show the market value of the main-floor square footage. The subject is
13 2,048 square feet. The Owners claim the Assessor errs in the adjustment of
14 her sales’ GLA.²⁵
- 15 • Lower Level: the Owners contend the subject’s improvement is a “raised
16 ranch” and not a “ranch.”²⁶ A ranch sits on a slab and there is no basement.²⁷
17 The Owners claim the subject property does not have a lower level,²⁸ but a
18 finished basement area that covers 2,048 square feet.²⁹
- 19 • Heating: Electric heat is the most common form of heat in Nine Mile Falls.
20 But the software used by the Assessor is a Pro Val software that defaults to a
21 gas system.³⁰ The software is not written for Nine Mile Falls. The Assessor
22 did not modify the software to fit the subject’s location.
- 23 • Garage Size: the Owner quotes that “certain building improvements are not
24 included in the calculations of the GLA, but they certainly add to the
25

26 ²⁰ Exhibit A2-3.

27 ²¹ Exhibits A2-22 and A2-24.

28 ²² Exhibits A2-14, A2-16, A2-17, R1-3/10 and R1-4/10.

29 ²³ Exhibit A1-32.

30 ²⁴ Exhibit A1-34.

²⁵ Exhibit A1-36.

²⁶ Exhibit A1-39, line 20.

²⁷ *Id.*

²⁸ Exhibit A1-41, Line 6.

²⁹ Exhibit A1-39, lines 23 and 24.

³⁰ Exhibit A1-48.

1 attractiveness and livability of a residence and increase its market value. In
2 some parts of the country, home owners expect a two-car garage, and the
3 absence of such a feature will affect the price a potential buyer would be
4 willing to pay.”³¹ The subject property has a 576 square foot attached
5 garage.³² Furthermore, the Owners question how the Assessor values an
6 attached garage to a detached garage. The Owners state detached garages
7 “translates to less value in the market,” especially in Spokane, which is
8 considered “snow country.”³³

- 9 • Porches/Patio, Pools, Out Buildings: the Assessor was shown the subject’s
10 8- by 10-foot enclosed back porch addition and 12- by 6-foot new dock
11 planking.³⁴ The Owners question why the miscellaneous improvements were
12 not included in the assessment.³⁵
- 13 • Assessor’s Indicated Value: the Owners submit a table titled “Reconstruction
14 of Sales Comparison Percentages” that shows the net adjustment of the
15 Assessor’s sales between -\$50,500 and \$111,900, or -8.42 to 20.27 percent.
16 The Owners emphasize that the “theory in the Sales Comparison is just skip
17 the lines and look at the percentages. If the percentage is small [then] you
18 have a good comparable and can rely on everything.”³⁶ But the Owners claim
19 this is not the case with the Assessor’s sales, with adjustments between -8.42
20 and 20.27 percent. They assert this is “fraud” by the Assessor.

- 21 5. The Owners contend the subject improvement has a basement and not a lower level.³⁷
22 They submit a document from the Spokane County Building & Planning department
23 to show the Owners’ permit issued on April 18, 2001.³⁸ The document records a
24 2,048 square foot finished basement area.
25
26
27

28 ³¹ Exhibit A1-51, Table 54.

29 ³² Exhibits A2-5, A2-16, A2-17, A2-22, A2-24

30 ³³ Exhibit A1-52.

³⁴ Exhibit A1-56.

³⁵ Exhibits A1-56 through A1-58.

³⁶ Exhibit A1-62.

³⁷ Exhibit A3-5, line 21.

³⁸ Exhibit A2-38.

- 1 6. The Owners disagree with the Assessor's contention that the subject residence is new
2 construction.³⁹ The Owners told the Assessor the subject had a "full-finished
3 basement"⁴⁰ that was documented on the Owners' building permit, a copy of which
4 was delivered to the Assessor's representative on January 9, 2010.⁴¹ At the County
5 Board, the Assessor valued the subject property at \$417,100 for the 2009 assessment
6 year. After learning of the "full-finished basement," she increased the subject's
7 improvement value by \$32,800, for a revised total value of \$449,900.⁴²
- 8 7. The Owners contend the *Assessor's Answer(s) to Real Property Petition to the*
9 *Spokane County Board of Equalization* (BE-09-0265) is not certified, is not signed,
10 and is not dated,⁴³ and therefore, is not in compliance with USPAP (Uniform
11 Standards of Professional Appraisal Practice). The Owners cite Standards 1 and 2 of
12 USPAP as the standards appraisers should adhere to.⁴⁴
- 13 8. The Owners claim the subject "dwelling is currently sided with insulated vinyl siding
14 and it is marred by oval discolorations throughout." The Owners settled their claim
15 in 2008 with Crane Plastics Siding, the manufacturer, for \$7,500.⁴⁵ The Owners
16 assert the cost to remove and dispose the existing siding is \$1,419.62. In addition,
17 they claim the bid to replace the siding with steel is \$19,384.47; the use of a
18 weatherboard replacement is \$20,851.92. The Owners contend it will cost either
19 \$20,804.09 or \$22,271.54 to replace the siding. The average of these values results in
20 an adjustment of \$21,538.⁴⁶ The Owners submit color photographs of the vinyl
21 siding from the east side of the residence.⁴⁷
- 22 9. The Owners question the skills and ability of Mr. Hollenbeck, the Appraisal
23 Supervisor, in his appraisal methodology and valuing of the subject property.
- 24 10. The Owners submit *Strand v. Baker*, BTA Docket No. 09-121 (2010), the subject's
25 appeal for the 2008 assessment year, to bring attention to errors by the Assessor and
26

27 ³⁹ Exhibits A2-125 and R1-2/10.

28 ⁴⁰ Exhibit R1-7/10.

29 ⁴¹ Exhibits A2-38 and R1-6/10.

30 ⁴² Exhibit A1-66.

⁴³ Exhibits A1-63, A1-64, A2-120 through A2-124.

⁴⁴ Exhibits A1-5, A1-6, A2-105 through A2-112.

⁴⁵ Exhibit A3-7.

⁴⁶ *Id.*

⁴⁷ The Spokane County Board of Equalization, Petition No. BE-09-0265, Taxpayer Petition.

1 the decision by the Board.⁴⁸ Also, a transcription of the Board's teleconferenced
2 hearing⁴⁹ and the Board's decision are included.⁵⁰

3
4 To support their contended value, the Owners rely on three improved sales:

- 5 • Owners' Sale No. 1, located at 13620 West Charles Road in Nine Mile Falls, sold for
6 \$505,000 in March 2007. The single-family residence, built in 2004, has 2,876
7 square feet of total living area. The structure's quality is rated good, and its condition
8 is rated very good for the year built. A detached garage covers 576 square feet. The
9 parcel is a 5.1-acre site. The Owners determine the adjusted sale price equals
10 \$339,357.
- 11
12 • Owners' Sale No. 2, located at 14108 West Charles Road in Nine Mile Falls, sold for
13 \$600,000 in June 2007. The single-family residence, built in 1990, has 3,672 square
14 feet of total living area. The structure's quality is rated good, and its condition is
15 rated very good for the year built. An attached garage covers 647 square feet, and a
16 detached garage has 1,680 square feet. The parcel is a 4.26-acre site. The Owners
17 determine the adjusted sale price equals \$375,323.
- 18
19 • Owners' Sale No. 3, located at 12504 West Charles Road in Nine Mile Falls, sold for
20 \$400,000 in November 2005. The single-family residence, built in 1976, has 2,488
21 square feet of total living area. The structure's quality is rated "good-minus," and its
22 condition is rated good for the year built. A detached garage covers 1,080 square
23 feet, and a carport has 540 square feet. The parcel is a 4-acre site. The Owners
24 determine the adjusted sale price equals \$332,970.

25
26 The Owners include three 2007 land sales with sale prices between \$190,000 and
27
28
29

30

⁴⁸ Exhibits A1-70 through A1-77.

⁴⁹ Exhibits A2-50 through A2-82.

⁵⁰ Exhibits A2-89 through A2-96.

1 \$265,000. After the Owners' adjustments, the adjusted sale prices range from \$103,160 to
2 \$131,110.⁵¹

3
4 Three listings are also submitted by the Owners. The listed properties are located on
5 West Charles Road, in the same area as the subject property.⁵²

6
7 The Owners give a separate opinion of value for land and improvement using the cost
8 approach to value. They determine the improvement value using *Marshall & Swift* to determine
9 the base value for a raised ranch with a full-finished basement, a porch, and a pole building.
10 After relying on data from *Zillow.com* that shows a market drop in Nine Mile Falls, the Owners
11 determine the improvement value is \$196,929.⁵³

12
13 The Owners determine the market value of land is \$24,000 per acre. The subject's 5-acre
14 site results in a land value of \$120,000.⁵⁴ The total assessed value of the subject property is
15 \$316,929.⁵⁵

16
17 The Owners make adjustments to the Assessor's characteristics and determine the
18 Assessor's adjusted sale prices as follows:⁵⁶

- 19 • Assessor's Sale No. 1: the Owners determine the total living area (TLA) is 2,665.5
20 square feet. With other characteristic adjustments, the adjusted sale price equals
21 \$375,641.
- 22 • Assessor's Sale No. 2: the Owners determine the TLA is 2,127 square feet. With
23 other characteristic adjustments, the adjusted sale price equals \$370,100.
- 24 • Assessor's Sale No. 3: the Owners determine the TLA is 1,866 square feet. With
25 other characteristic adjustments, the adjusted sale price equals \$332,970.
- 26 • Assessor's Sale No. 4: no adjustment determination was made.

27
28
29 ⁵¹ *Petition No. BE-09-0265, supra*, at 8.

30 ⁵² Exhibits A2-130 through A2-136.

⁵³ Exhibits A1-78 through A1-81.

⁵⁴ Exhibits A1-81 through A1-83.

⁵⁵ Exhibit A1-84.

⁵⁶ *Petition No. BE-09-0265, supra*, at 6.

- 1 • Assessor's Sale No. 5: the Owners determine the TLA is 2,400 square feet. With
2 other characteristic adjustments, the adjusted sale price equals \$355,360.
3

4 Assessor's Evidence

5 The Assessor conducted an exterior inspection of the subject property on May 7, 2009,
6 with the Owners in attendance.⁵⁷ The Owners denied the Assessor access to conduct an interior
7 inspection. The Assessor asserts she has the right to inspect the subject property, in accordance
8 with RCW 84.40.025.⁵⁸ Also, the Assessor claims the Owners testified, in their appeal of the
9 2008 assessment year, that they have "a ranch with a full-finished basement."⁵⁹ In the appeal of
10 the 2008 assessment year, the subject was recorded as having 896 square feet of finished
11 basement area.⁶⁰ For the 2009 assessment year, the subject was recorded with 1,900 square feet
12 of finished basement area.⁶¹ The Assessor's representative received a copy of the subject's
13 building permit on January 19, 2010, indicating a finished basement area is 2,048 square feet.⁶²
14 Due to the Owners' statement of a full-finished basement, the Assessor placed the additional
15 finished basement area as new construction because of the "alteration for which a building
16 permit was issued."⁶³
17

18 The Assessor's witness, Joseph Hollenbeck, Appraisal Supervisor, gives his work
19 experience. Hollenbeck holds an accreditation with the Washington State Department of
20 Revenue, which prescribes standards for the appraisal of real estate. The performance of
21 appraisals includes adherence to USPAP.
22

23 The Assessor contends she should be given the discretion to use the appropriate appraisal
24 methodology to arrive at the total value for the subject property. This includes the use of the
25 sales comparison approach to value and the allocation of value for the land and improvement.
26
27

28 ⁵⁷ Exhibit R3-5/10.

29 ⁵⁸ *Id.*

30 ⁵⁹ Exhibit R1-7/10.

⁶⁰ Exhibit R3-2/10, line 4.

⁶¹ Exhibits R1-3/10 and R1-4/10.

⁶² Exhibit R1-6/10.

⁶³ Exhibit R1-2/10.

1 The Assessor submits *Strand v. Baker*, BTA Docket No. 09-121 (2010), the appeal of the
2 subject property for the 2008 assessment year. She uses the Board's decision to enumerate the
3 same contended issues in the Owners' appeal for the 2009 assessment year.⁶⁴
4

5 The Assessor applies the sales comparison approach, which establishes and justifies the
6 Assessor's initial mass appraisal model. The Assessor further describes the process and how she
7 found similar sales to the subject property. The Assessor relies on ranch-style homes of
8 waterfront property on Long Lake as comparable sales. She also looks for properties that are
9 physically closest to the subject property; but due to a limited number of sales, the Assessor
10 expanded her search of sale properties on Long Lake. To support her assessed value, the
11 Assessor relies on four vacant land sales⁶⁵ and includes the following five improved sales:⁶⁶
12

- 13 • Assessor's Sale No. 1, located at 12920 West Charles Road in Nine Mile Falls, sold
14 for \$635,000 in June 2007. The single-family residence, built in 1977 and with an
15 effective age of 12 years, has 3,554 square feet of total living area: its above-ground
16 living area and finished basement area are 1,777 square feet, each. The structure's
17 quality and condition are rated good. An attached garage covers 850 square feet.
18 Miscellaneous improvements include a shop and shed. The parcel is a 5.6-acre site,
19 with high-bank Long Lake frontage. The Assessor's adjustments of -3.56 percent
20 result in an adjusted sale price of \$612,400.
21
- 22 • Assessor's Sale No. 2, located at 17318 North West Shore Road in Spokane, sold for
23 \$525,000 in July 2007. The single-family residence, built in 1967 and with an
24 effective age of 12 years, has 2,660 square feet of total living area: its above-ground
25 living area is 1,418 square feet, and its finished basement area is 1,242 square feet.
26 The structure's quality is rated average, and its condition is rated good for the year
27 built. An attached garage covers 352 square feet. Miscellaneous improvements
28 include a shed. The parcel is a 0.79-acre site, with low-bank Long Lake frontage.
29

30

⁶⁴ Exhibits R3-1/10 through R3-10/10.

⁶⁵ Exhibits R4-2/3 and R4-3/3.

⁶⁶ Exhibits R1-3/10 and R1-4/10.

1 The Assessor's adjustments of 0.99 percent result in an adjusted sale price of
2 \$530,200.

- 3
- 4 • Assessor's Sale No. 3 is the same parcel as Owners' Sale No. 3. The Assessor's
5 adjustments of 18.50 percent result in an adjusted sale price of \$474,000.
6
 - 7 • Assessor's Sale No. 4, located at 13609 West Charles Road in Nine Mile
8 Falls, sold for \$552,000 in August 2007. The single-family residence, built in
9 1996 and with an effective age of 5 years, has 1,803 square feet of above-
10 ground living area. The structure's quality is rated very good, and its
11 condition is rated good for the year built. An attached garage covers 596
12 square feet. The parcel is a 6.3-acre site. It lacks water frontage. The
13 Assessor's adjustments of 20.27 percent result in an adjusted sale price of
14 \$663,900.
15
 - 16 • Assessor's Sale No. 5, located at 17224 North West Shore Road in Nine Mile
17 Falls, sold for \$600,000 in October 2008. The single-family residence, built in 1966
18 was renovated, and it now has an effective age of 3 years. The residence has 2,400
19 square feet of above-ground living area. The structure's quality and condition are
20 rated good. A garage covers 1,152 square feet. The parcel is a 0.64-acre site, with
21 low-bank Long Lake frontage. The Assessor's adjustments of -8.42 percent result in
22 an adjusted sale price of \$549,500.
23

24 ANALYSIS

25 The Assessor's original value is presumed correct. This presumption can be overcome by
26 the introduction of "clear, cogent and convincing evidence" that the Assessor's value is
27 erroneous.⁶⁷ Clear, cogent, and convincing evidence means a quantum of proof that is less than
28 beyond a reasonable doubt, but more than a mere preponderance of the evidence. It is the
29

30

⁶⁷ RCW 84.40.0301; *Weyerhaeuser Co. v. Easter*, 126 Wn.2d 370, 894 P.2d 1290 (1995).

1 quantum of evidence necessary to convince the decision-maker that the ultimate fact in issue is
2 “highly probable.”⁶⁸

3
4 This Board’s responsibility is to determine whether there is a sufficient amount of
5 relevant evidence to support the Owners’ claim. RCW 84.40.030(1) provides that real property
6 “shall be valued at one hundred percent of its true and fair value” based upon “[a]ny sales of the
7 property being appraised or similar properties with respect to sales made within the past five
8 years.” Appraisals shall be consistent with land use plans, zoning, and “any other governmental
9 policies or practices in effect at the time of appraisal that affect the use of property, as well as
10 physical and environmental influences.”⁶⁹

11
12 For purposes of property tax valuation, “true and fair value” means “fair market value,”
13 which is the price a willing buyer will pay a willing seller, assuming neither party is obligated,
14 and taking into consideration all reasonable uses of the property.⁷⁰

15
16 The Board reviews the evidence submitted to the County Board and all evidence,
17 testimony, and arguments presented to this Board.

18
19 The Owners enumerate various improvement characteristics that differ from those
20 recorded by the Assessor. But, the Board is unable to give substantial weight to the Owners’
21 assertions concerning the subject’s improvements. Access to real property is required for the
22 purpose of assessment and valuation of all taxable property in each county.⁷¹ The property shall
23 be subject to visitation, investigation, examination, discovery, and listing at any reasonable time
24 by the county assessor or by any employee thereof designated for this purpose by the county
25 assessor.⁷² When property owners refuse to allow an assessor to inspect their home prior to an
26 appeal hearing, the Board will decline to consider any claims based on assertions that only the
27
28

29
30 ⁶⁸ *In re Sego*, 82 Wn.2d 736, 513 P.2d 831 (1973).

⁶⁹ RCW 84.40.030.

⁷⁰ WAC 458-07-030; *Cascade Court Ltd. P’ship v. Noble*, 105 Wn. App. 563, 20 P.3d 997 (2001).

⁷¹ RCW.84.40.025.

⁷² *Id.*

1 property owners know about.⁷³ One of the major elements of a fair hearing is the opportunity to
2 respond to the arguments and evidence of the other party. “Although court-type discovery is not
3 required in administrative proceedings, fundamental fairness requires that a party be given the
4 opportunity to know what evidence is offered or considered and a chance to rebut such
5 evidence.”⁷⁴ Contrary to the view of the Owners, fairness is required to allow both sides a
6 reasonable opportunity to examine and contest the evidence offered by the other side prior to the
7 hearing. In this appeal, the Board relies on the subject’s characteristics as provided by the
8 Assessor when analyzing comparable sales to the subject property.

9
10 Both parties cite *Strand v. Baker*, BTA Docket No. 09-121 (2010), the subject’s appeal
11 for the 2008 assessment year. This hearing is considered de novo, or new. The Board reviews
12 each appeal individually, weighing the specific facts, circumstances, evidence, and testimony
13 presented. It determines the value for the specific year under appeal. It is not bound by previous
14 decisions. Therefore, the prior decision for the 2008 assessment year carries no evidentiary weight
15 with this Board when determining the assessed value of the subject property for the 2009
16 assessment year.

17
18 The Owners and the Assessor provide land sales to determine the land value of the
19 subject property. The Washington State Court of Appeals identifies total property value as the
20 important factor in determining a property’s value for tax purposes:⁷⁵

21 Under chapter 84.04 RCW, the term “tax” is defined as the imposition of
22 “burdens upon property in proportion to the value thereof”⁷⁶ Real
23 property, for tax purposes, is defined as “the land itself . . . and all
24 buildings, structures or improvements or other fixtures of whatsoever
25 kind thereon.”⁷⁷ Assessed value is “the aggregate valuation of the
26 property subject to taxation”⁷⁸ These definitions reflect that taxes
27 are imposed on property as a whole, not on individual parts of it. Indeed,
28 Washington courts have consistently addressed issues of property assessments in
29 that manner.⁷⁹

30

⁷³ *Dare v. Clifton*, BTA Docket No. 41953 (1992).

⁷⁴ 2 Am. Jur. 2d, Administrative Law § 327 (1994).

⁷⁵ *University Village Ltd. Partners v. King County*, 106 Wn. App. 321, 23 P.3d 1090 (2001).

⁷⁶ RCW 84.04.100.

⁷⁷ RCW 84.04.090. (Emphasis added.)

⁷⁸ RCW 84.04.030.

⁷⁹ See *Folsom v. County of Spokane*, 106 Wn.2d 760, 725 P.2d 987 (1986); *Sahalee Country Club, supra*; *Belas v.*

1 Thus, this Board considers the combined valuation of land and improvements in determining a
2 total value for the property, not individual land or improvement values. It requires evidence and
3 testimony supporting the total valuation.⁸⁰ The Board, therefore, gives little weight to the
4 Owners' and the Assessor's land sales when determining the true and fair value of the subject
5 property.

6
7 There are different methods for making adjustments to sales comparisons. The values
8 assigned to the elements of comparison are subjective and are based on appraisal judgment. An
9 adjustment is not a precise measure, but the appraiser's best judgment of the value of a particular
10 amenity. By assigning different values to the amenities, the estimated market value of properties
11 can be changed significantly. One method of adjustment is the quantitative analysis technique.
12 The Assessor relies on quantitative adjustments to its sales. This is a process of analyzing
13 differences between sale properties and a subject property. The appraiser determines the dollar
14 or percentage differences between the sales and a subject property, and adjusts the sales
15 accordingly. Another method of adjustments is the qualitative analysis technique, or bracketing
16 of the sale properties. This is a process of analyzing sales and determining if they are inferior,
17 superior, or equal to the subject property in specific characteristics. Based on the analysis, the
18 final value comes from determining where the subject property falls within the bracketed
19 comparison.⁸¹ The Board finds no evidence to indicate the Assessor's use of quantitative
20 adjustments to her sales is incorrect.

21
22 The Assessor placed the finished basement area on the tax roll as new construction for
23 the 2009 assessment year. In accordance with RCW 36.21.080, the Assessor is authorized to
24 place any property that increased in value due to construction or alteration for which a building
25 permit was issued. The Owners' permit shows the finished basement area of 2,048 square feet,
26 instead of the 1,900 square feet previously recorded by the Assessor for the 2009 assessment
27 year. The Board relies on the subject's 2,048 square feet of finished basement area when
28 comparing the square footage to the sales.

29
30
Kiga, 135 Wn.2d 913, 959 P.2d 1037 (1998).

⁸⁰ *University Village Ltd. Partners, supra*, at 325-26.

⁸¹ Appraisal Institute, *The Appraisal of Real Estate* 321 (13th ed. 2008).

1 The Owners claim a vinyl-siding defect impacts the subject's value and that the value
2 should be lowered by the cost to replace the siding with new siding. The Board notes the siding
3 defect is not apparent from the Owners' color photographs. It is unknown to the Board if the
4 vinyl siding ("marred by oval discolorations") would significantly impact the house's resale
5 value to the extent requiring its replacement. The Board notes the Assessor's sales bracket the
6 subject's total valuation of \$449,900. If the Owners' requested vinyl-siding adjustment
7 (estimated at \$20,800 for steel siding or \$22,270 for a weatherboard replacement) was made to
8 the subject's assessment, the Assessor's sales would still support the subject's valuation after the
9 adjustment.

10
11 The Owners question the credentials of the Assessor's representative. RCW 36.21.015
12 outlines the qualifications for persons assessing real property. WAC 458-10-010(2) states "Any
13 person responsible for valuing real property for purposes of taxation must be an accredited
14 appraiser." The "requirement includes persons acting as assistants or deputies to a county assessor
15 who determine real property values or review appraisals prepared by others." An accredited
16 appraiser is a "person who has successfully completed and fulfilled all requirements imposed by the
17 department⁸² for accreditation and who has a currently valid accreditation certificate."⁸³ WAC
18 458-10-020 outlines the application for accreditation. The Board notes the Assessor's appraiser,
19 Mr. Hollenbeck, an Appraisal Supervisor, meets the accreditation requirements for valuing real
20 property in Washington State. The Board also notes that the Owners have no appraisal background;
21 lacking expertise, training, experience, and accreditation in the appraisal of real property.

22
23 The Board reviewed the Owners' contention that the Assessor's Answer to the County
24 Board is not certified, signed, or dated. The Owners' concerns, however, are irrelevant. This
25 hearing is considered de novo. What may have occurred during the County Board's hearing
26 process is not important to this inquiry. The Board's purpose is to find the true and fair value, or
27 market value, of the subject property.

28
29
30

⁸² Washington State Department of Revenue.

⁸³ WAC 458-10-010 (3) (b).

1 The Assessor has “considerable discretion” to decide the proper valuation method.⁸⁴ The
2 Owners provide a sales comparison approach and a cost approach to value. The Board follows
3 the statutory direction in RCW 84.40.030, which uses the word “may” in subsection (2) in
4 reference to considering “cost, cost less depreciation, reconstruction cost less depreciation, or
5 capitalization of income” approaches. This statute is generally cited as indicating that these
6 approaches are given less preference, assuming sales data is available. “When data is available,
7 [the sales approach] is the most straightforward and simple way to explain and support an
8 opinion of market value.”⁸⁵ WAC 458-07-030 also confirms the higher-priority ranking given to
9 market sales. It is only when comparable sales are not available that the other valuation methods
10 have priority. The statute and regulation both emphasize the priority of market sales over the
11 other valuation methods. Since comparable sales are provided, the Board relies on the sales
12 comparison approach, not the cost approach.

13
14 The Assessor’s records document the subject’s quality construction rating as “average-
15 minus.” Thus, the Board relies on this quality rating when comparing it to the sales.

16
17 Listings, which represent an owner’s perception of a property’s value, usually reflect the
18 upper limit of value.⁸⁶ The Owners’ use of listed properties offers little insight into the specific
19 market value of the subject property on January 1, 2009. The Board, therefore, gives little
20 weight to the Owners’ listings when determining the market value of the subject property.

21
22 Sales of similar properties provide a supportable indication of market value when
23 sufficient sales are available.⁸⁷ Washington State law requires that comparable sale properties be
24 “similar” to the subject property.⁸⁸ In its review of sales, the Board gives most weight to those
25 sales nearest and most physically similar to the subject property that are closest to the subject’s
26 January 1, 2009, valuation date.

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29 ⁸⁴ *Sahalee Country Club, Inc. v. Board of Tax Appeals*, 108 Wn.2d 26, 36, 735 P.2d 1320 (1987).

30 ⁸⁵ *The Appraisal of Real Estate*, *supra*, at 300.

⁸⁶ Appraisal Institute, *The Appraisal of Real Estate* 163 (13th ed. 2008).

⁸⁷ *Id.*

⁸⁸ RCW 84.40.030 (2).

1 The Owners make adjustments to the Assessor's sales to generate an adjusted sale price
2 between \$332,970 and \$375,641.⁸⁹ But the Board finds the total living area (TLA) of the
3 Assessor's sale is different from what the Owners use in their adjustments.⁹⁰ For example:

- 4 • Assessor's Sale No. 1 has 3,554 square feet, the Owners use 2,665.5 square feet.
- 5 • Assessor's Sale No. 2 has 2,660 square feet, the Owners use 2,127 square feet.
- 6 • Assessor's Sale No. 3 has 2,488 square feet, the Owners use 1,866 square feet.
- 7 • Assessor's Sale No. 4 has 1,803 square feet, the Owners do not provide a TLA.
- 8 • Assessor's Sale No. 5 has 2,400 square feet, the Owners use the same 2,400 square
9 feet.

10 The Board looks to the Assessor's recorded TLA. The Board finds the Owners'
11 adjustment of the Assessor's sale prices are incorrect and do not provide a reliable indication of
12 the subject property's market value for the assessment date.

13
14 The Owners present adjustments they made to their sales.⁹¹ As noted above, the Owners
15 have no background in the appraisal of real property and their adjustments are unreliable. The
16 Board finds the Owners' methodology, based on the quantitative adjustments to its sales, is given
17 little weight when determining the market value of the subject property as of January 1, 2009.

18
19 The Board finds that that Owners' Sale Nos. 1 and 2 are too dissimilar to the subject
20 property for comparison purposes due to a significant number of adjustments.

21
22 Owners' Sale No. 3 occurred in November 2005, over three years prior to the January 1,
23 2009, assessment date. Markets constantly change; the date the property was sold reflects a
24 different market influence on their prices.⁹² Also, the Board finds more current sales to
25 determine the market value of the subject property.

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30 ⁸⁹ *Petition No. BE-09-0265, supra*, at 6.

⁹⁰ *Id.*

⁹¹ *Id.* at 10.

⁹² International Association of Assessing Officers, *Property Assessment Valuation* 106 (2nd ed. 1996).

1 The Owners' charge is to show by clear, cogent, and convincing evidence the Assessor
2 erred in establishing the original value. The evidence before the Board does not meet this
3 standard. Thus, the Board concludes the Owners have not met the burden of showing it is
4 "highly probable" or "positive and unequivocal"⁹³ that the Assessor overvalued the subject
5 property. The Board finds the evidence supports the Assessor's original value for the 2009
6 assessment year.

7
8 FINDINGS OF FACT

- 9 1. The subject property is located at 13206 West Charles Road in Nine Mile Falls,
10 Washington.
- 11 2. The subject property has the characteristics described above.
- 12 3. The Owners purchased the subject's unimproved land parcel for \$100,000 on
13 September 5, 2000.
- 14 4. With the exception of the finished basement, the subject property's date of building
15 completion is December 2003.
- 16 5. The total living area of the subject residence consists of 4,096 square feet: the above-
17 ground living area and finished basement area are each 2,048 square feet.
- 18 6. Access to the residence is by an approximate 500-foot driveway.
- 19 7. The subject's quality of construction is "average-" as documented in the Assessor's
20 records. The Assessor erroneously used a rating of "average." The error, however, is
21 not substantial and does not materially affect adjustments in the Assessor's sales
22 comparison approach.
- 23 8. On May 7, 2009, the Owners denied the Assessor access to conduct an interior
24 inspection of the subject property.
- 25 9. The Owners claim numerous inaccuracies in the Assessor's sales grid, identified as
26 bullet points on pages 4 through 6, and inaccuracies in the Assessor's records
27 describing the characteristics of the subject property. They allege inaccurate
28 descriptions, faulty appraisal techniques, and invalid comparison characteristics. The
29 Owners conclude that these matters can then be broadly characterized as frauds
30

⁹³ See *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 853 P.2d 913 (1993).

1 committed by the Assessor. The Owners, however, refused to permit access to the
2 residence's interior; have emphasized trivial, minor mistakes; and refused to work
3 with the Assessor to correct any alleged errors that may have affected the value of the
4 subject for the 2009 assessment year.

5 10. The Owners' repeated use of the word "fraud" to describe alleged Assessor errors in
6 the appraisal of the subject is unsupported by any credible evidence. Fraud is "a
7 knowing misrepresentation of the truth or concealment of a material fact to induce
8 another to act to his or her detriment."⁹⁴ Any alleged errors in the description of the
9 subject are mostly minor in nature and do not affect the valuation determination.
10 There has been no fraud committed by the Assessor in the valuation of the Owners'
11 property.

12 11. The alleged errors do not diminish the weight the Board attaches to the Assessor's
13 sales grid. Most of the matters cited by the Owners are trivial, irrelevant, and
14 immaterial.

15 12. Before 2009, the Assessor's records indicated a finished basement area of 896 square
16 feet. Based on the Owners' assertion of a "full-finished basement," the Assessor
17 placed the additional square footage to the basement on the tax roll as new
18 construction for the 2009 assessment year in accordance with RCW 36.21.080.

19 13. The residence's alleged siding defect is not apparent from the Owners' color
20 photographs of the subject. It is unknown if the vinyl siding allegedly "marred by
21 oval discolorations" would significantly impact the house's resale value to the extent
22 of requiring its replacement. The Owners present no evidence on the matter to
23 corroborate their assertions of market impact.

24 14. The Owners present no documentary evidence to corroborate their estimate of
25 \$20,800 or \$22,270 to replace the allegedly defective siding.

26 15. The Assessor's witness, Joseph Hollenbeck, is an accredited, skilled, and experienced
27 appraiser, who adheres to standard industry practices in the appraisal of the subject
28 property. His position is Appraisal Supervisor for the Spokane County Assessor.
29
30

⁹⁴ B. A. Garner, *Black's Law Dictionary* 670 (7th ed. 1999).

- 1 16. A sufficient number of sales were presented for comparison purposes. The Board,
2 therefore, relies on the sales comparison approach.
- 3 17. The Owners cost approach to valuation uses data from *Marshall & Swift* and
4 *Zillow.com*. The use of *Zillow.com* data is not in accord with standard appraisal
5 practice. The data is too general to be of any reliance.
- 6 18. Both parties rely on land sales to determine the subject's land value.
- 7 19. Listings offer little insight to market value of the subject property and are, therefore,
8 given little weight.
- 9 20. The Owners make adjustments to the Assessor's sale to determine the sales' adjusted
10 prices.

11
12 Any Finding of Fact that should be deemed a Conclusion of Law is hereby adopted as
13 such.

14 From these findings, this Board comes to these

15
16 CONCLUSIONS OF LAW

- 17 1. The Board has jurisdiction over this appeal (RCW 82.03.130).
- 18 2. The Assessor's original value is presumed correct (RCW 84.40.0301).
- 19 3. Clear, cogent, and convincing evidence is required to overcome the Assessor's
20 presumption of correctness (RCW 84.40.0301).
- 21 4. The Owners purchase of the subject in 2000 for \$100,000 is irrelevant information
22 (RCW 84.40.030). Any disagreement between the parties as to the precise date of
23 purchase or the purchase price is meaningless to this inquiry.
- 24 5. The hearing before the Board is de novo, or new; the Board's prior decision for the
25 2008 assessment year⁹⁵ is entitled to no evidentiary weight. Each assessment-year
26 appeal must be evaluated upon the evidence presented in that appeal.
- 27 6. The Assessor errors in not signing, dating, and certifying her answer to the Spokane
28 County Board of Equalization are irrelevant and immaterial. The Owners' claims that
29 these errors are not in compliance with USPAP (Uniform Standards of Professional
30

⁹⁵ *Strand v. Baker*, BTA Docket No. 09-121 (2010).

1 Appraisal Practice) are also irrelevant. The errors committed did not erode the
2 credibility of the Assessor's evidence for this appeal, nor the testimony of the
3 Assessor's witness.

- 4 7. The Assessor has the right to inspect the subject property (RCW 84.40.025).
- 5 8. The Assessor placed the finished basement area on the tax roll as new construction
6 for the 2009 assessment year (RCW 36.21.080).
- 7 9. The Board's duty is to set the total value for the property, not just one of the sub-
8 allocation values: improvements or land; see *University Village Ltd. Partners v. King*
9 *County*, 106 Wn. App. 321, 23 P.3d 1090 (2001).
- 10 10. Mr. Hollenbeck is a credible witness. (RCW 36.21.015).
- 11 11. The Owners have no appraisal background and lack expertise, training, experience,
12 and accreditation in the appraisal of real property.
- 13 12. The Board relies on the market, or sales comparison approach, to determine the value
14 of the subject. (RCW 84.40.030)
- 15 13. The Assessor's sales data provides the best indicator of value for the subject property.
- 16 14. The Owners' sales and listings do not provide a fair indication of the subject's value.
- 17 15. The Owners' adjustments to the sale prices of their comparison properties and to
18 those of the Assessor are not reliable indicators, and are given little weight due to the
19 Owners' methodology.
- 20 16. The Owners' reliance on the cost approach to value is not favored when there is
21 sufficient sales evidence to support a valuation determination (RCW 84.40.030).
- 22 17. The errors claimed by the Owners in the Assessor's documents and assessment
23 history are largely irrelevant to the subject's January 1, 2009, valuation.
- 24 18. The Assessor presented a sufficient number of sales to support the assessment.
- 25 19. The Owners fail to meet the burden of proof.

26
27 Any Conclusion of Law that should be deemed a Finding of Fact is hereby adopted as such.
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29 From these conclusions, this Board enters this
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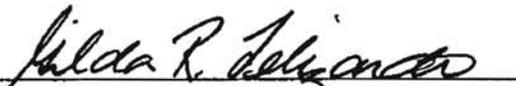
DECISION

In accordance with RCW 84.08.130, this Board sustains the determination of the Spokane County Board of Equalization and orders the value as shown on page one of this decision.

The Spokane County Assessor and Treasurer are hereby directed that the assessment and tax rolls of Spokane County are to accord with, and give full effect to, the provisions of this decision.

DATED this 13th day of December, 2011.

BOARD OF TAX APPEALS


GILDA R. FELIZARDO, Tax Referee

1 **Right of Review of this Initial Decision**

2 Pursuant to WAC 456-09-930, you may file a petition for review of this Initial
3 Decision. You must file an original and four copies of the petition for review
4 with the Board of Tax Appeals within 20 calendar days of the date of mailing of
5 the Initial Decision. You must also serve a copy on all other parties or their
6 representatives. The petition for review must specify the portions of the Initial
7 Decision to which exception is taken and must refer to the evidence of record that
8 is relied upon to support the petition. The other parties may submit one original
9 and four copies of a reply to the petition with the Board of Tax Appeals within 10
business days of the date of service of the petition. Copies of the reply must be
served on all other parties. The Board will then consider the matter and issue a
Final Decision.

10 If a petition for review is not filed, the Initial Decision becomes the Board's Final
11 Decision 20 calendar days after the date of mailing of the Initial Decision.

12 Please be advised that a party petitioning for judicial review of a Final Decision is
13 responsible for the reasonable costs incurred by this agency in preparing the
14 necessary copies of the record for transmittal to the superior court. Charges for
15 the transcript are payable separately to the court reporter.

CERTIFICATE OF MAILING

I certify that on December 13, 2011, I personally forwarded by United States mail or e-mailed, a true and correct copy of the attached document to the following:

PALMER STRAND
PATRICIA STRAND
PO BOX 312
NINE MILE FALLS WA 99026

SPOKANE COUNTY PROSECUTING ATTORNEY
ATTN: RONALD ARKILLS
W 1115 BROADWAY AVE
SPOKANE WA 99260

SPOKANE COUNTY ASSESSOR
ATTN: VICKI HORTON
W 1116 BROADWAY
SPOKANE WA 99260

SPOKANE COUNTY BOARD OF EQUALIZATION
ATTN: LINDA KOVICK
BROADWAY CENTRE BLDG
N 721 JEFFERSON #201
SPOKANE WA 99260



Carol Lien, Clerk of the Board

OFFICE RECEPTIONIST, CLERK

To: afbpns@fastlane-i.com
Subject: RE: 87633-9 Appellant Brief pagination references

Rec. 9-27-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: afbpns@fastlane-i.com [mailto:afbpns@fastlane-i.com]
Sent: Wednesday, September 26, 2012 7:16 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: 87633-9 Appellant Brief pagination references

Patricia N. Strand

PO Box 312
Nine Mile Falls, WA 99026
September 27 2012

Hon. Ronald R. Carpenter
Supreme Court Clerk
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929

Regarding Correction to: No. 87633-9 – Appellant Brief pagination references

The *letter* attached above includes the Board of Tax Appeals Document Index I received on Apr/5/12. It was blank and I did not associate it with the documents I referenced in my brief. I have added the notation I used in the brief. I apologize for my error.

Prosecutor Arkills provided the attached (Board of Tax Appeals Document Index) he received to explain the pagination references in the Respondent's Brief I received Sep/24/12.

Patricia Strand

From: Arkills, Ron [mailto:RArkills@spokanecounty.org]
Sent: Wednesday, September 26, 2012 2:01 PM
To: 'afbpns@fastlane-i.com'
Cc: Emacio, James
Subject: RE:

Mrs. Strand:

This is in response to your voicemail message received today.

As noted in the Brief of Respondent, at page 5, paragraph 1, "AP" refers to the Certified Record of Administrative Proceedings. It is the record that BTA certified to Superior Court.

I have attached a copy of the BTA transmittal letter and Document Index for your reference.

The Document Index references documents, and the page numbers assigned to each document.

Document No. 6 is the BTA's Initial Decision. It contains pages 129 through 153 of the Certified Record of Administrative Proceedings(AP).

When I cite AP 135, it is page 135 of the Certified Record of Administrative Proceedings per the Document Index.

Attached is a copy of the Initial Decision, which contains AP 135.

Regards.

Ronald P. Arkills
Senior Deputy Prosecuting Attorney
Spokane County Prosecutor--Civil Division

From: afbyps@fastlane-i.com [mailto:afbyps@fastlane-i.com]
Sent: Wednesday, September 26, 2012 12:50 PM
To: Arkills, Ron
Cc: Emacio, James
Subject: