

FILED

AUG 11 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**Superior Court No. 13-2-04741-6
Court of Appeals No. 331113**

COURT OF APPEALS DIVISION III
OF THE STATE OF WASHINGTON

**City of Spokane,
*Respondent***

v.

**Blayne L. Dutton,
*Appellant.***

Appeal from the Superior Court of Spokane County

APPELLANT'S OPENING BRIEF

Attorney for Appellant: Blayne Dutton
Douglas D. Phelps, WSBA #22620
Phelps & Associates
N. 2903 Stout Rd.
Spokane, WA 99206
(509) 892-0467

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I. MOVING PARTY

Mr. Dutton appeals from a Spokane County Superior Court decision affirming the ruling of the City of Spokane Hearing Examiner holding that the City of Spokane has the authority to impose liens on property without filing in the court of original jurisdiction. Additionally, the appellant challenges the enforcement actions conducted in violation of the 4th Amendment and Article 1 §7 of Washington Constitution that provides that the Superior Court has original jurisdiction in nuisance actions.

II. STATEMENT OF RELIEF SOUGHT

The appellant moves the court to find that the building official lacked jurisdiction to file a lien against the property in violation of Article IV § 6 of Washington Constitution, which provides nuisance must be brought in Superior Court.

III. FACTS

On April 15, 2013 the appellant was sent a letter entitled “Notice of Building Official Hearing.” Ex. A. The document informed Mr. Dutton that property inspections had been conducted by Code Enforcement and Building Department staff of his property at 1914 E. 11th Avenue in Spokane due to a complaint received by Code Enforcement on February 4, 2013. (RP 11 September 24, 2013). It also informed Mr. Dutton that the inspector had made findings regarding the condition of the property. Specifically, the inspector found the

property substandard and in violation of SMC 17F.070.400. Essentially, the inspector found that the house was a nuisance. The findings listed various responsibilities of Mr. Dutton, including keeping the property secure and filing a “Rehabilitation Plan.” Further, it established that a fee of \$1,500.00 would be assessed if Mr. Dutton failed to do these responsibilities, as well as a fee of \$300.00 for “property monitoring” if a determination was made that the building was open, the site did not appear to be looked after, or there were nuisance conditions present. These fees would be assessed as liens against the property. Lastly, it provided that the city could board up the building and “lien the property for the costs” if the building was not secure.

The hearing was scheduled for May 14, 2013 but was continued to June 4, 2013. At this hearing, Mr. Dutton was advised he must establish a “rehabilitation plan” for the real property. Mr. Dutton advised he planned to attempt to sell the real property and placed a for sale sign on the property. Mr. Dutton challenged the government’s illegal entry upon the property without a warrant pursuant to the Fourth Amendment and Article I § 7 of the Washington State Constitution. Mr. Dutton also challenged the determination of the property’s condition. At the hearing, it was reported that a site visit had been conducted on June 3, 2013 and the buildings were found to be secure. Ex. B.

An order was issued by the Building Official after the hearing and served upon Mr. Dutton on June 18, 2013. Ex. B. This order upheld the findings of the

inspectors and ordered Mr. Dutton to prepare and file a “Rehabilitation Plan,” ordered that the \$1,500.00 fee and the \$300.00 “property monitoring” fee be assessed, and ordered that Mr. Dutton keep the building secure. It provided that Mr. Dutton could appeal the matter to the City Hearing Examiner.

Appeal was set for August 20, 2013 and was continued to September 24, 2013. At that hearing, Mr. Dutton continued to challenge the government’s entry onto the property and the determination of the property’s condition. (RP 3-8 September 24, 2013). Additionally, Mr. Dutton challenged the jurisdiction of the City Hearing Examiner for maintaining the action based upon the Washington State Constitution, and that the fees assessed and possibility of the city ordering demolition of the buildings amounts to an unlawful taking of real property. (RP 8-20 September 24, 2013).

The City Hearing Examiner issued an Order, which was served on Mr. Dutton on October 31, 2013. Ex. C. This Order upheld the decision of the Building Official that the house was a nuisance and advised Mr. Dutton that he could appeal to Superior Court.

On November 23, 2013, the city entered onto Mr. Dutton’s property without notifying him and boarded up the buildings. Ex. D.

Mr. Dutton timely filed an appeal in the Superior Court of Spokane County making the same arguments as outlined above. On December 16, 2014,

Spokane Superior Court Judge O'Connor issued an Order upholding the lower courts decisions. Ex. E. This appeal timely follows.

IV. GROUNDS FOR RELIEF

Mr. Dutton is entitled to review of the Superior Court decision under RAP 2.2 (a) (1) because the decision of the Superior Court is a final judgment in a proceeding. Under RCW 34.05.570 (3)(a), (b), Mr. Dutton is entitled to a review of agency orders and the court shall grant relief if (a) the order is in violation of a Constitutional provision or (b) the order is outside the jurisdiction of the agency conferred by any provision of law.

V. ISSUES

- A. Was the inspection performed by Code Enforcement on Mr. Dutton's property performed in violation of Mr. Dutton's Fourth Amendment and Article 1, Section 7 of Washington State Constitutional rights?**
- B. Did the Building Official and the City Hearing Examiner have jurisdiction in an action to prevent or abate a nuisance or in a case involving title or possession of real property where Article IV § 6 of the Washington Supreme Court places "original jurisdiction in all cases" of this type with the Superior Court?**
- C. Does the Building Official and City Hearing Examiner have jurisdiction to impose fines and liens against real property pursuant to Washington State Constitution Article IV § 6, which requires "original jurisdiction" in Superior Court?**

VI. ARGUMENT

- A. The inspection performed by Code Enforcement was performed in violation of Mr. Dutton's Fourth Amendment and Article 1, Section 7 of Washington State constitutional rights.**

“It is clear that the warrant requirement of the fourth amendment applies to entries onto private land to search for and abate suspected nuisances. *Michigan v. Tyler*, 436 U.S. 499, 504-07, 98 S.Ct. 1942, 1947-49, 56 L.Ed.2d 486 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 530, 87 S.Ct. 1727, 1731, 18 L.Ed.2d 930 (1967).” *Conner v. City of Santa Ana*, 897 F.2d 1487 at 1490 (9th Cir. 1990). “While the probable cause necessary to secure the warrant in this case may have been qualitatively different from that required for search warrants in criminal cases, a warrant was still required.” *Bosteder v. City of Renton*, 155 Wn.2d 18 at 36 (2004).

The *Conner* case is particularly *en pointe* as to this case. In that case, officials entered onto the curtilage of a property (and not into the property itself) in order to inspect a potential nuisance in the form of broken-down automobiles on a person’s lawn. No warrant was secured prior to this entry. The Ninth Circuit quoted at length the United States’ Supreme Court in *Michigan v. Tyler*, 436 U.S. 499, 504-07, 98 S.Ct. 1942, 1947-49, 56 L.Ed.2d 486 (1978). This section is worth re-quoting here in full:

“The decisions of this Court firmly establish that the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime. As this Court stated in *Camara v. Municipal Court*, 387 U.S. 523, 528 [87 S.Ct.

1727, 1730, 18 L.Ed.2d 930], the "basic purpose of this Amendment ... is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." The officials may be health, fire, or building inspectors. Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a routine periodic inspection. The privacy that is invaded may be sheltered by the walls of a warehouse or other commercial establishment not open to the public. *See v. Seattle*, 387 U.S. 541 [87 S.Ct. 1737, 18 L.Ed.2d 943]; *Marshall v. Barlow's, Inc.*, [436 U.S. 307], at 311-313 [98 S.Ct. 1816, 1819-21, 56 L.Ed.2d 305]. These deviations from the typical police search are thus clearly within the protection of the Fourth Amendment."

Conner, 897 F.2d 1487 at 1490, *quoting Tyler*, 436 U.S. at 504-05, 98 S.Ct. at 1947-48.

For the building inspector to perform an "inspection" of Mr. Dutton's property, without first obtaining a warrant to do the same, is a clear violation of the Fourth Amendment. For the building department to act on the same is also a violation. Evidence is not clear that all inspections were conducted from the public right-of-way, and certainly any site visit to determine if the buildings are secure and actions to board up the buildings are entries onto the property. At no time has a warrant been secured to conduct these inspections, visits, and activities.

B. The Building Official and the City Hearing Examiner did not have jurisdiction in an action to prevent or abate a nuisance or in a case involving title or possession of real property where Article IV § 6 of the Washington Supreme Court places “original jurisdiction in all cases” of this type with the Superior Court.

Washington State Constitution at Article IV § 6 sets out the Jurisdiction of the Superior Court: “The Superior Court shall have original jurisdiction in all cases which involve the title or possession of real property, or the legality of any tax, import, assessment, toll, or municipal fine, . . . of action to prevent or abate a nuisance; . . . and for such special cases and proceedings as are not otherwise provided for.”

The Revised Code of Washington defines an Actionable Nuisance at RCW 7.48.010 as: “The obstruction of any highway or the closing of the channel of any stream used for boating or rafting logs, lumber or timber, or whatever is injurious to health or indecent or offensive to the senses, or an obstruction to free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance and the subject of an action for damages and other further relief.” The Revised Code further defines a public nuisance at RCW 7.48.130 as an action “which affects” equally the rights of an entire community or neighborhood. RCW 7.48.280 addressed the method for collecting damages and costs in abating a nuisance and does not allow for an administrative action.

The “Findings of Fact” entered on June 18, 2013 by the Building Official and upheld by the City Hearing examiner amount to a determination that 1914 E.

11th Spokane, Washington is a nuisance. It lists specifically dilapidation, structural defects, defective and inoperable plumbing, inadequate weather proofing, no active utility service for one year, and defects increasing the hazard of fire, accident or other calamity. Ex B.

The Washington Supreme Court has further defined a nuisance as “a substantial and unreasonable interference with use and enjoyment of land.” *Lahey v. Puget Sound Energy, Inc.*, 176 Wn.2d 989, 296 P.3d 860, 867 (2013). Here, the City of Spokane violated Article I § 16 by taking the defendant’s real property through an action to abate a nuisance in an administrative proceeding contrary to Washington State Constitution Article IV § 6 requiring that the Superior Court has original jurisdiction in cases of abatement of a nuisance. Testimony from the September 24, 2013 appeal demonstrates that the property is considered a nuisance, which properly should have been addressed via RCW 7.48 and in the Superior Court and not through administrative action. (RP 10 September 24, 2013). As a result the building official and hearing examiner are without legal authority in this action to abate a nuisance.

C. The Building Official and the City Hearing Examiner do not have jurisdiction to impose fines and liens against real property pursuant to Article IV § 6 which requires “original jurisdiction” in Superior Court.

Article IV § 6 places original jurisdiction with the Superior Court “in all cases which involve the title or possession of real property or the legality of any

tax, impost, assessment, toll.” The Spokane Building Official and City Hearing Examiner may not take action involving the “title or possession of real property” because the Superior Court has original jurisdiction over these issues.

The process used here allows for the administrative proceedings to order the property owner to take certain action to “rehabilitate” his real property. Additionally, the building official can impose fees and lien the real property through the administrative procedure. Where the property owner fails to take steps to “rehabilitate” the property the City of Spokane may administratively take steps to demolish the property. These actions are reserved to Superior Court by Article IV § 6.

Further, Article I § 3 of the Washington State Constitution requires that a citizen may not be deprived of property without due process of law. The Washington State Constitution requires that a citizen may not be deprived of property without due process of law. The Washington State Constitution requires a specific form of due process in cases involving abatement of a nuisance or in cases involving the “title or possession of real property” and as the building official’s action involves the “title or possession of real property” the matter must properly be held in the Superior Court.

IV. CONCLUSION

Mr. Dutton was given a notice that says, in short, “We got a complaint from an unknown person, we invaded your privacy by trespassing on your

property, and we came to the conclusion that we are going to use the power of the state to require certain performance from you” in regards to that real property. This is a mockery of the requirements of the Washington State Constitution which requires the original jurisdiction be before the Superior Court.

This case must be remanded back to the Department of Code Enforcement for filing a proper action before the Superior Court where the issues must be heard as required by the Washington State Constitution as noted *supra*.

Respectfully submitted this 14th day of August, 2015.



Douglas D. Phelps, WSBA #22620
N. 2903 Stout Rd.
Spokane, WA 99206
(509) 892-0467

EXHIBIT A



OFFICE OF
NEIGHBORHOOD SERVICES
CODE ENFORCEMENT
808 W. SPOKANE FALLS BLVD.
SPOKANE, WASHINGTON 99201-3343
(509) 625-6083
FAX (509) 625-6802
beautifyspokane.org

April 15, 2013.

**NOTICE OF BUILDING OFFICIAL
ADMINISTRATIVE HEARING
CERTIFIED**

Blayne Dutton
7918 E Utah
Spokane Valley, WA 99212

**RE: BUILDING OFFICIAL ADMINISTRATIVE HEARING ON A SUBSTANDARD AND
ABANDONED HOUSE AND GARAGE AT 1914 E 11th, SPOKANE, WASHINGTON
PARCEL NO: 35213.1310
LEGAL DESCRIPTION: WOODLAWN PLACE L10 B13**

You have been identified as owner or party of interest in the above mentioned property. This letter serves as notice that an administrative hearing will be conducted on the conditions of this building on May 14, 2013 1:30 p.m., located in the Council Briefing Center, Lower Level, Spokane City Hall, 808 W. Spokane Falls Blvd., Spokane, WA. Note: the City has implemented new security procedures. You must enter the building on the Post Street side and stop at the front desk for a temporary ID badge.

As a result of a property inspection by the Code Enforcement staff on March 8, 2013, and the Building Department on April 10, 2013 the house and garage are scheduled for a hearing before the City Building Official to determine if the buildings are substandard under Spokane Municipal Code 17F.070.400.

The following findings have been submitted for review at the hearing on this matter:

VIOLETION OF SMC 17F.070.400 SUBSTANDARD BUILDING

- A. Dilapidation: Exterior decay, water damage. Findings: The house roofing is deteriorated and has water damage and moss growth. The eaves over the rear entry room are decayed and water damaged. Fascia on the garage is pulling away from the structure and is highly weathered. Siding has peeling paint on the garage and house.
- B. Structural defects. Foundation, wall and roof framing. Findings: The rear entry room on the house has inadequate or no structural support and the structural members are sagging.
- D. Defective/Inoperable plumbing. Findings: The water has been shut off since February 9, 2005, therefore there is no operable plumbing for sinks, bathing facilities, sanitation, etc.
- E. Inadequate weatherproofing: Siding, roofing and glazing. Findings: The house roof is highly weathered dislodged shingles, and has holes; this is allowing weather to penetrate the structure. A front window also appears to be open or broken.
- F. No activated utility service for one year. Findings: The water has been shut off since February 9, 2005.

- L. Defects increasing the hazards of fire, accident or other calamity. Findings: The house appears to be abandoned as defined in Section 17F.070.030 of the Spokane Municipal Code in that it gives indications no one is currently in possession such as by disconnection of utilities, disrepair, and other circumstances, increasing the chance of fire or other calamity in the house. The rear entry steps have fallen apart to the point of being hazardous.

The building official or hearing examiner may determine that the building/structure is unfit for human habitation and orders demolition if any of the substandard conditions listed in SMC 17F.070.400 are found to exist to such an extent as to be dangerous or injurious to the health or safety of the buildings occupants or community.

FEE INFORMATION

A fee of \$1,500.00 may be assessed at this hearing if the property owner or their representatives fail to provide an acceptable rehabilitation plan and building permits, or plan for the demolition of a building at least one week prior to the hearing date. Upon presentation of your documents to Code Enforcement, you may request a postponement of the hearing. At the hearing the City of Spokane Building Official may determine the conditions of the building meet the criteria of 17F.070.400 Substandard Building or 17F.070.410 Unfit Building or under SMC 17F.070.030 Abandoned. This determination qualifies the property to be assessed the \$1,500.00 fee which will be placed as a lien at the Spokane County Assessor's Office on the subject property.

This fee is to cover the costs of the Building Official Processes. This fee is a yearly fee and will be assessed each year the building remains in the Building Official Process. Up to \$500.00 of the annual fee may be reduced if the Building Official is able to determine that the quantity and extent of substandard conditions no longer warrant remaining in the Building Official hearing process or the structure(s) is demolished and can be removed from the Building Official process within one year of the fee being assessed.

The Building Official /Deputy Building Official may also assess a property monitoring fee of \$300.00 if the determination is made that the building(s) is open, the site does not appear to be looked after by the property owner or there are solid waste or other nuisance conditions present.

To review the written documentation in the file, please contact the Code Enforcement Department at 808 W. Spokane Falls Blvd., Spokane, WA 99201 no less than seven (7) days prior to the hearing. Copies of the documents may be obtained for the cost to make copies. Complete copies of the file will require a public records request to be filed with the City Clerk's Office. Please be aware that City may take up to five days to respond to the request.

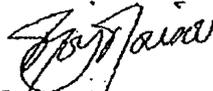
Please be advised that property owner has responsibility to maintain a secure building. If it becomes necessary to secure the building from entry the following standards apply:

- All basement, first story and other readily access points are to be closed against intrusion.
- This must be done using a ½-inch exterior grade plywood and in a manner acceptable to this department.
- If the building(s) are not secure from entry the city will board up the buildings(s) and will place a lien against the property for the costs.
- "No Trespassing" signs placed on the front and back of the house and/or garage.

Please note: Prior to any demolition activity, contact Spokane Regional Clean Air Agency at (509) 477-4727. The inspection results are required by the Washington State Department of Labor and Industries to be maintained on file and available upon request by the Department of Labor and Industries (WAC 296-62-07721).

Property Notice: A notice of this hearing will be filed with the Spokane County Auditor's Office on the property. A release document for the property notice will be prepared for the owner when the case is directed to be closed by the City Building Official.

Please call (625-6083) if you have questions or need additional information. Thank you for your cooperation in the resolution of this matter, it is greatly appreciated.



Boris Borisov
Code Enforcement

BB:ch/E1914.11th.doc CERTIFIED #7196 9008 9115 5609 6211

Enclosure: Administrative Procedures of the Building Official and Rehabilitation Plan form
All meetings and hearing will be conducted in facilities that are accessible to disabled individuals. If any person needs accommodations for a sensory-related disability, that person should contact Code Enforcement at 625-6083 at TTD NO.625-6694 for hearing impaired, 48 Hours before the meeting to arrange for accommodations.

PC: D Skindzier, Deputy Building Official

CITY OF SPOKANE



OFFICE OF
NEIGHBORHOOD SERVICES
CODE ENFORCEMENT
304 W. SPOKANE FALLS BLVD.
SPOKANE, WASHINGTON 99201-5513
(509) 625-6085
FAX (509) 625-6802
beautifyspokane.org

Property Owner: _____
Mailing Address: _____
Phone: () _____

REHABILITATION PLAN FOR: _____
ADDRESS: _____
Contractor Name _____ Business License # _____
Address: _____
City: _____ State: _____ Zip Code: _____ Phone: _____

(If there is more than one contractor, please provide additional information on back)

COST ESTIMATES

Indicate type of work to be done:

| | | | |
|------------|----------|---------------------|----------|
| structural | \$ _____ | siding | \$ _____ |
| mechanical | \$ _____ | windows and doors | \$ _____ |
| electrical | \$ _____ | interior finishing | \$ _____ |
| plumbing | \$ _____ | accessory structure | \$ _____ |
| foundation | \$ _____ | roof | \$ _____ |

GRAND TOTAL \$ _____

Estimated starting date _____ Estimated completion date _____

I am aware that an asbestos survey may be required prior to beginning this rehabilitation plan.

I certify by signature that I have the financial resources
To complete the rehabilitation: _____

Contact the City Building Department at 625-6300 for
Information on required permits.

Office Use

PLAN APPROVED
BY _____

DATE: _____



OFFICE OF
NEIGHBORHOOD SERVICES
CODE ENFORCEMENT
808 W. SPOKANE FALLS BLVD.
SPOKANE, WASHINGTON 99201-3545
(509) 625-6883
FAX (509) 625-6802
beautifulspokane.org

Administrative Procedures of the Building Official

The hearing of the Building Official is an administrative hearing to review buildings that have been submitted to the Building or Code Enforcement Department for potential violations. Properties are submitted either by complaint from citizens or by other departments and agencies. These buildings are reviewed by building, fire or code enforcement staff to determine if they appear to meet the criteria of Spokane Municipal Code 17F.070.400 Substandard Building, 17F.070.410 Unfit, and/or 17F.070.030 Abandoned Building.

If the staff concludes that the building would meet the above referenced criteria, it is scheduled for an administrative hearing before the building official. Please be aware of your rights with regard to this hearing and the procedures:

- I. **Rights and Responsibilities.**
 - A. **Right to Represent Yourself.** As the property owner you have the right to represent yourself or be represented by Counsel or other witnesses.
 - B. **Right to Submit Evidence.** You may submit evidence regarding your property including whether the property is substandard, unfit, abandoned, unsecured, your progress in the repair of the property in question, or challenge the City's evidence. Evidence can include but is not limited to the following: pictures, contractor agreements, receipts of purchase, witness testimony, building permits etc. Under SMC 17F.070.060(D), the rules of evidence for a Judicial Tribunal do not apply.
 - C. **Review Evidence.** You may view the staff report and pictures in the file. The pictures are typically presented on an overhead screen during the hearing. The staff report is available the day before the hearing.
 - D. **May Start Rehabilitation Prior to Hearing.** If you wish to rehabilitate the building(s), please submit a rehabilitation plan to this office before the hearing. Rehabilitation plans must include a reasonable date of completion of the work required to bring the building up to the minimum standards required by code. You should also contact contractors for estimates and indicate financial responsibility.
 - E. **Testimony.** At this hearing the Building Official will hear testimony from all concerned parties and hear evidence presented by the Hearing Secretary. Based on testimony and inspection evidence the Building Official will issue a directive for this property.
 - F. **Demolition.** The Building Official may order demolition of the building if determined to be substandard to such an extent as to be unfit as defined by Spokane Municipal Code 17F.070.410. If the owner does not demolish the building within the time period established by the Building Official, the City will demolish the building and place a lien against the property for all costs including administrative fees.
- II. **Procedures.**
 - A. **Introduction.** The Building Official will introduce the staff and go over the procedures. This includes the order of hearing items and a request to turn off cell phones or make them inaudible.
 - B. **Order of Hearing Items.** Hearing items will be reviewed first based on those items that have an owner or representative signed up to speak. This is to accommodate people who wish to testify. Remaining items will be reviewed based on their order on the Building Official Agenda.
 - C. **Order of Testimony.** Staff reports will be heard first, followed by testimony of the property owner or their representatives, and then the testimony of interested neighbors or citizens.
 - D. **Final Comments.** Anyone may speak following the order above including additional testimony by the owners, their representatives or citizens and neighbors.
 - E. **Orders and Directives.** Following testimony, the Building Official will make a decision on the conditions of the property, findings, and an order or directive will be issued.
 - F. **Notice of the Order or Directive.** The order or directive will be mailed to the property owner and their representatives within one week of the administrative hearing.
 - G. **Appeals.** The order or directive of the Building Official is appealable to the City Hearing Examiner within 30 days of the date of the order with the payment of the applicable appeal fee.
 - H. **Fees.** Fees cannot be appealed; however, the property owner can request a reconsideration of the fee to the Building Official within 30 days of the order or directive.

EXHIBIT B

6-19-13 mailed to:
Douglas D Phelps
2903 N Stout Rd
Spokane WA 99206-4373
CERT #7196 9008 9115 5841 1272

CITY OF
SPOKANE



OFFICE OF
NEIGHBORHOOD SERVICES
CODE ENFORCEMENT
808 W. SPOKANE FALLS BLVD.
SPOKANE, WASHINGTON 99201-3343
509.625.6831
FAX 509.625.6802
beautifyspokane.org

June 18, 2013

ORDER OF BUILDING OFFICIAL
CERTIFIED MAIL

Blayne Dutton
7818 E Utah
Spokane Valley, WA 99212

PHELPS & ASSOCIATES
Attorneys At Law

RE: BUILDING OFFICIAL'S HEARING ON COMPLAINT OF A SUBSTANDARD AND
ABANDONED HOUSE AND GARAGE AT 1914 E 11th, SPOKANE, WASHINGTON
PARCEL NO: 35213.1310
LEGAL DESCRIPTION: WOODLAWN PLACE L10 B13

On June 4, 2013, a hearing was held before me as Building Official for the City of Spokane, regarding the substandard and abandoned house and garage at 1914 E 11th, City of Spokane, County of Spokane, State of Washington. The hearing was held in accordance with Section 17F.070.440 of the Spokane Municipal Code.

At the hearing, evidence of ownership and condition of this property was presented by the Spokane Code Enforcement Department.

After careful review and deliberation on the above I concluded as follows:

FINDINGS OF FACT

Staff reported as a result of a property inspection by the Code Enforcement on March 8, 2013, and the Building Department on April 10, 2013 the house and garage were scheduled for a hearing before the City Building Official to determine if the buildings are substandard under Spokane Municipal Code 17F.070.400.

The following findings have been submitted for review at the hearing on this matter:

Violation of Spokane Municipal Code Section 17F.070.400 Substandard Building

- A. Dilapidation: Exterior decay, water damage. Findings: The house roofing is deteriorated and has water damage and moss growth. The eaves over the rear entry room are decayed and water damaged. Fascia on the garage is pulling away from the structure and is highly weathered. Siding has peeling paint on the garage and house.
- B. Structural defects. Foundation, wall and roof framing. Findings: The rear entry room on the house has inadequate or no structural support and the structural members are sagging.
- D. Defective/inoperable plumbing. Findings: The water has been shut off since February 9, 2005, therefore there is no operable plumbing for sinks, bathing facilities, sanitation, etc.
- E. Inadequate weatherproofing: Siding, roofing and glazing. Findings: The house roof is highly weathered dislodged shingles, and has holes; this is allowing weather to penetrate the structure. A front window also appears to be open or broken.
- F. No activated utility service for one year. Findings: The water has been shut off since February 9, 2005.
- L. Defects increasing the hazards of fire, accident or other calamity. Findings: The house appears to be abandoned as defined in Section 17F.070.030 of the Spokane Municipal Code in that it gives indications no one is currently in possession such as by disconnection of utilities, disrepair, and other circumstances, increasing the chance of fire or other calamity in the house. The rear entry steps have fallen apart to the point of being hazardous.

Staff reported this property was in the Building Official process in 2007. A Building Official hearing was held on September 11, 2007 and October 16, 2007 and appealed to the Hearing Examiner. The appeal hearing was held on November 8, 2007. The Hearing Examiner remanded the matter back to the Building Official for another hearing which was to be held as soon as possible but not before a criminal matter associated with the property was to be resolved. No new hearing was held after this. The June 4, 2013 hearing is the result of a new complaint on the property which code enforcement staff received on February 4, 2013. A site inspection occurred as a response to this complaint and prompted the property to be put into the Building Official process due to substandard conditions listed above. Staff reported all photographs were obtained from the public right of way. A certified letter was sent to Blayne Dutton, the property owner dated April 15, 2013 identifying the complaint, the conditions noted, and a scheduled hearing date of May 14, 2013. Douglas D. Phelps, attorney for the property owner contacted a city attorney prior to the hearing and requested additional time to put the house up for sale. The first hearing was re-scheduled to June 4, 2013, but Mr. Phelps was informed by City Attorney Tim Szambelan that the Building Official would not continue delaying the hearing to sell the house.

Staff reported a site visit was conducted on June 3, 2013 and the house and garage were found secure. There is a "for sale by owner" sign in the front yard. The condition of the structures is the same as described above. There are no active building permits on file.

Douglas D. Phelps, attorney for Blayne Dutton, the property owner asked staff what findings were used to determine the property is abandoned. Staff explained the property is abandoned as it gives indications that no one is presently in possession such as by disconnection of utilities and disrepair. Mr. Phelps asked what disrepair staff was referring to and staff explained the dilapidated roof on the house, siding with peeling paint, rear entry room with inadequate structural support and sagging structural members, fascia peeling away from the garage, and the openings in the roof all constitute disrepair. Mr. Phelps asked staff how the determination was made that water is penetrating the house. Staff explained the determination was made based on evidence collected from the public right of way showing the roof has holes due to deterioration. Mr. Phelps asked if an interior inspection was conducted to make these findings to which staff answered there was not.

Mr. Phelps also asked if the determination that the heating was inoperable was made from an interior inspection. Staff explained that the heating system was not part of the findings and is not listed as a violation. Mr. Phelps asked how the determination was made that the plumbing was defective/inoperable. Staff explained the findings show the water has been shut off since February of 2005 according to City utility records. Mr. Phelps asked if plumbing could be operable if potable water was carried into the house and staff explained that the condition of the plumbing system was not inspected as there has been no interior inspection; plumbing is not currently operable due to a lack of running water. Mr. Phelps asked if staff checked if taxes are current. Staff explained this information can be obtained from the Spokane County Assessor, and currently the status of taxes does not affect the findings related to the physical condition of the structures in the hearing process.

Mr. Phelps further asked if only one window pane on the front window was broken and/or open. Staff further explained that the finding the house is inadequately weatherproofed was made based on the overall condition of the structure which includes the missing glazing on the front window as well as the holes in the roof, all of which is allowing weather to penetrate the structure. Mr. Phelps asked when the complaint came in for the property. Staff explained code enforcement received the complaint on February 4, 2013. Mr. Phelps asked who the complainant was and staff explained this information cannot be disclosed however, a public records request can be made on the file.

Mr. Phelps testified the property owner, Mr. Dutton has removed some items from the interior of the house in preparation for showing and the plan is to sell the property.

In conclusion the building(s) is found to be substandard as defined by Section 17F.070.400 of the Spokane Municipal Code, due to dilapidation, structural defects, inoperable plumbing, inadequate weatherproofing, no activated utility service for one year, and defects increasing the hazards of fire, accident, or other calamity as described above. The building(s) is also found to be abandoned as defined by Section 17F.070.30 of the Spokane Municipal Code in that it gives indications no one is presently in possession such as by disconnection of utilities and disrepair.

BUILDING OFFICIAL'S ORDER

ORDER TO PROVIDE A REHABILITATION PLAN

You are hereby ordered to prepare a rehabilitation plan providing a time line, costs, and estimates from professional tradesmen or contractors and indicate your financial ability to carry out the program. You must acquire all necessary permits for the rehabilitation including structural, electrical, mechanical, and plumbing. The rehabilitation plan must be submitted when known. A standard rehabilitation plan is enclosed for your information.

ORDER TO ASSESS ANNUAL HEARING PROCESS FEE

The annual hearing processing fee of \$1,500.00 is being assessed per authority of Spokane Municipal Code 8.02.067. This fee is assessed to the land owner where the substandard or unfit building is located for all costs and expenses incurred by the City in administration of and enforcement of this code. A new fee will be assessed at the beginning of each twelve month period that the building remains substandard, unfit or abandoned as determined by the Building Official. The annual hearing process fee is a lien under SMC 17F.070.500 and filed with the Spokane County Treasurer. Up to five hundred dollars of the annual fee may be refunded if the property is repaired and removed from the building official process within one year from the first hearing. The building official or his designee is authorized to officially remove a property from the building official process and authorize the refund, or release of a lien, of a portion of the fee.

ORDER TO ASSESS PROPERTY MONITORING FEE

The property monitoring fee of \$300.00 is being assessed. The property has been found to contain nuisance conditions which need to be monitored for one year under SMC 17F.070.040. The monitoring fee is filed as a lien.

ORDER TO KEEP SECURE

You are hereby ordered to keep the building secure so that it cannot be entered. The property owner or their contractor may enter to make repairs.

FURTHER INSTRUCTIONS

Obtain any necessary permits prior to beginning work and call for inspections. Do not occupy until substandard conditions have been alleviated. Board up open pane on the front window if it is open to the elements. We will monitor your progress. This matter will be reviewed on December 10, 2013.

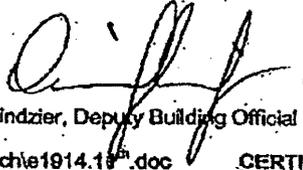
ASBESTOS *An asbestos inspection is required, per State Law, before authorizing or allowing any construction, renovation, remodeling, maintenance, repair or demolition. The inspection results are required to be documented by written report, maintained on file and made available upon request to the Director, Washington State, Department of Labor and Industries (WAC 296-62-07721). For detailed information contact Spokane Regional Clean Air Agency at (509) 477-4727.*

NOTICE OF RIGHT TO APPEAL

You have the right to appeal the decision of the Building Official to the City Hearing Examiner within 30 days from the date of this letter. Appeal forms are available by contacting the Office of Neighborhood Services and Code Enforcement Department @ 625-6083. Pursuant to Spokane Municipal Code 08.02.087 an appeal fee of \$ 250 must accompany a completed appeal form. **THE DATE OF THE LAST DAY TO APPEAL IS JULY 18, 2013 AT 4:30 pm.**

If you have any questions please call Boris Borisov at 625-6083.

SO ORDERED



Dan Skindzier, Deputy Building Official

DS:BB:chie1914.18th.doc CERTIFIED #7196 9008 9115 5841 1203
Enclosure: Rehabilitation Plan
PC: D. Skindzier, Deputy Building Official



OFFICE OF
 NEIGHBORHOOD SERVICES
 CODE ENFORCEMENT
 808 W. SPOKANE FALLS BLVD.
 SPOKANE, WASHINGTON 99201-3343
 (509) 625-6083
 FAX (509) 625-6802
 beautifyspokane.org

Property Owner: _____
 Mailing Address: _____
 Phone: () _____

REHABILITATION PLAN FOR: _____
 ADDRESS: _____
 Contractor Name _____ Business License # _____
 Address: _____
 City: _____ State: _____ Zip Code: _____ Phone: _____

(If there is more than one contractor, please provide additional information on back)

COST ESTIMATES

Indicate type of work to be done:

| | | | |
|------------|----------|---------------------|----------|
| structural | \$ _____ | siding | \$ _____ |
| mechanical | \$ _____ | windows and doors | \$ _____ |
| electrical | \$ _____ | interior finishing | \$ _____ |
| plumbing | \$ _____ | accessory structure | \$ _____ |
| foundation | \$ _____ | roof | \$ _____ |

GRAND TOTAL \$ _____

Estimated starting date _____ Estimated completion date _____

I am aware that an asbestos survey may be required prior to beginning this rehabilitation plan.

I certify by signature that I have the financial resources
 To complete the rehabilitation: _____

Contact the City Building Department at 625-6300 for
 information on required permits.

| |
|--|
| <p>Office Use</p> <p>PLAN APPROVED BY _____</p> <p>DATE: _____</p> |
|--|

EXHIBIT C

CITY OF SPOKANE HEARING EXAMINER

Re: Appeal by Blayne Dutton, Inc. of an) FINDINGS, CONCLUSIONS, AND
Order of the Building Official) DECISION
determining that 1914 E. 11th Avenue)
is a substandard building) FILE NO. AP-13-02

I. SUMMARY OF APPEAL AND DECISION

Summary of Appeal: Blayne Dutton has filed an appeal of a decision by the Building Official concluding that Mr. Dutton's property, located at 1914 E. 11th Avenue, Spokane, Washington, and designated as Tax Parcel No. 35213.1310, is substandard pursuant to SMC 17F.070.400.

Decision: The decision of the Building Official is upheld.

**II. FINDINGS OF FACT
BACKGROUND INFORMATION**

RECEIVED

OCT 31 2013

PHELPS & ASSOCIATES
Attorneys At Law

Appellant: Blayne Dutton
7918 E. Utah
Spokane Valley, WA 99212

Represented by: Douglas Phelps, Attorney at Law
Phelps and Associates, P.S.
2903 North Stout Road
Spokane Valley, WA 99206

Respondent: City of Spokane, Office of Neighborhood Services and Code Enforcement
c/o Dan Skindzier, Deputy Building Official
808 West Spokane Falls Boulevard
Spokane, WA 99201

Represented by: Timothy E. Szambelan, Assistant City Attorney
City of Spokane City Attorney's Office
808 West Spokane Falls Boulevard
Spokane, WA 99201

Authorizing Ordinances: SMC 17G.050.010 et seq.; SMC 17F.070.010 et seq.

Date of Decision being Appealed: June 18, 2013

Date of Appeal: July 11, 2013

Hearing Date: May 23, 2013

Testimony:

Timothy E. Szambelan
Assistant City Attorney
City of Spokane City Attorney's Office
808 West Spokane Falls Boulevard
Spokane, WA 99201

Boris Borisov
Neighborhood and Housing Specialist
Code Enforcement
808 West Spokane Falls Boulevard
Spokane, WA 99201

Dan Skindzier
Deputy Building Official and Inspector
Supervisor
Building Department
808 West Spokane Falls Boulevard
Spokane, WA 99201

Heather Trautman
Director of Neighborhood Services and
Code Enforcement
City of Spokane Office of
Neighborhood Services
808 West Spokane Falls Boulevard
Spokane, WA 99201

Douglas Phelps
Attorney at Law
Phelps and Associates, P.S.
2903 North Stout Road
Spokane Valley, WA 99206

Blayne Dutton
7918 E. Utah
Spokane Valley, WA 99212

Exhibits:

1. Request for Appeal
 - 1A Order of Building Official dated 06-18-13
2. Email dated 07-16-13 to parties of record acknowledging receipt of appeal and suggesting hearing dates
3. Letter dated 07-24-13 to Blayne Dutton setting the hearing date
4. Appellant's Memorandum of Law received on 08-08-13
5. City's Response brief received on 08-15-13 including:
 - 5A Declaration of Dan Skindzier
 - 5B Declaration of Boris Borisov
 - 5C Response to Appeal of Building Official Order
 - 5D 1914 E. 11th Timeline
 - 5E 4 photos of structure located at 1914 E. 11th Ave taken by Dan Skindzier on 04-10-13
 - 5F 10 photos of structures located at 1914 E. 11th Ave taken by Boris Borisov on 03-08-13
 - 5G 6 photos of structures located at 1914 E. 11th Ave taken by Boris Borisov on 06-03-13
6. Letter dated 08-21-13 to Douglas Phelps setting the continued hearing date
7. Appellant's Supplemental brief received on 10-07-13
8. City's Supplemental response brief received on 10-16-13

III. FINDINGS AND CONCLUSIONS

A. *Introduction*

The Building Department received a complaint about the dilapidated condition of the residence located at 1914 E. 11th Avenue. The Building Department investigated the complaint and thereafter initiated the administrative process in order to determine whether the property would be declared to be substandard. The city sent notice of the complaint to the property owner, Mr. Blayne Dutton, identifying the complaint, the defective conditions of the residence, and scheduling a public hearing on the matter.

Mr. Dutton contested the complaint. Mr. Dutton and his attorney attended the hearing and presented evidence and testimony in support of Mr. Dutton's case. After the hearing was concluded, the Deputy Building Official issued his decision concluding that the building was substandard pursuant to several of the factors listed in SMC 17F.070.400. The decision provided that Mr. Dutton was entitled to appeal the matter to the City Hearing Examiner. Mr. Dutton did so within the time frame stated in the Building Official's decision.

A hearing was held on the appeal to the Hearing Examiner on September 24, 2013, in the Conference Room 2B, Spokane City Hall. At that time testimony and arguments were presented and exhibits were entered into the record. Mr. Dutton (the "Appellant") was represented by Douglas Phelps, Attorney at Law, Phelps & Associates, P.S.. The City of Spokane was represented by Timothy E. Szambelan, Assistant City Attorney.

Based upon the record, the testimony at the hearing, and the memoranda submitted by the parties, the Hearing Examiner makes the following findings and conclusions and renders this decision.

B. *Standard of Review*

Review of an administrative decision by the Hearing Examiner is governed by SMC 17G.050.320. Subsections B and C of that section state:

B. The Hearing Examiner may affirm, modify, remand or reverse the decision being appealed. In considering the appeal, the Examiner must act in a manner that is consistent with the criteria for the appropriate category of action being appealed.

C. The original decision being appealed is presumptively correct. The burden of persuasion is upon the appellant to show that the original decision was in error and relief sought in the appeal should be granted.

C. *Background Facts*

On February 4, 2013, the city received a complaint regarding the substandard conditions of the building located at 1914 E. 11th Avenue, Spokane, Washington (the "Dutton Property"), owned by Mr. Blayne Dutton. See Exhibit 1A (Order of Building Official, p. 2). In response to the

complaint, staff from Code Enforcement and the Building Department investigated the matter. See id.

Code Enforcement conducted a site visit on March 8, 2013. See Exhibit 5C. (Response to Appeal). At that time, Mr. Boris Borisov made a visual inspection of the Dutton Property, and took photographs to memorialize the condition of the property. See Exhibit 5B (Declaration of B. Borisov ¶¶ 3). The photographs taken by Mr. Borisov are part of the record. See Exhibit 5F. Mr. Borisov made his observations and took the photographs while standing in the public right-of-way. See id. Mr. Borisov did not enter into the Dutton Property in order to conduct his inspection or gather evidence. *Testimony of B. Borisov.*

On April 10, 2013, the Building Department conducted a site visit at the Dutton Property. See Exhibit 5C (Response to Appeal). Mr. Dan Skindzier, Deputy Building Official, did a visual inspection of the property at that time. See Exhibit 5A (Declaration of D. Skindzier ¶¶ 3). Mr. Skindzier took photographs of the building, which are part of the record. See Exhibit 5E. All observations of the Dutton Property were made from the public right of way, and the conditions observed were in plain view. See Exhibit 5A (Declaration of D. Skindzier ¶¶ 3); *Testimony of D. Skindzier.* Mr. Skindzier did not enter into the Dutton Property to inspect the property or gather evidence. *Testimony of D. Skindzier.*

On or about April 15, 2013, the city sent a certified letter to Mr. Dutton, advising him that a complaint was received and specifying the substandard conditions that the city believed existed at the Dutton Property. See Exhibit 5D. Through that same letter, the city scheduled a hearing to provide Mr. Dutton with the opportunity to address the alleged conditions of this property. See id. The letter was also posted at the property. See Exhibit 5D (Timeline).

On April 24, 2013, Code Enforcement received a copy of the certified mail receipt, signed by Mr. Dutton, for the certified letter sent on April 15, 2013. See Exhibit 5D (Timeline).

The hearing before the Building Official was originally scheduled for May 14, 2013. See Exhibit 1 (Order of Building Official, p. 2). However, Mr. Dutton requested and was granted a continuance. See id. As a result, the hearing did not take place until June 2013. See id.

On June 3, 2013, Code Enforcement conducted another site visit of the Dutton Property, in preparation for the hearing scheduled for the next day. See Exhibit 5D (Timeline). Mr. Boris Borisov again visually inspected the premises and took photographs. See Exhibit 5B (Declaration of B. Borisov ¶¶ 3). The observations were made and the photographs were taken while Mr. Borisov was standing in the public right-of-way. See id. The photographs taken on June 3, 2013 are part of the record of this appeal. See Exhibit 5G. Mr. Borisov did not enter into the Dutton Property in order to conduct the inspection or gather evidence. *Testimony of B. Borisov.*

On or about June 4, 2013, a hearing was conducted by Mr. Dan Skindzier, Deputy Building Official, regarding the complaint of substandard conditions at the Dutton Property. See Exhibit 1A (Order of Building Official). The purpose of the hearing was to determine whether the building on the Dutton Property was substandard within the meaning of SMC 17F.070.400. See id.

At the hearing, Mr. Dutton was represented by Douglas Phelps, Attorney at Law, of Phelps & Associates, P.S. See id. Both the city and Mr. Dutton presented evidence on the matter. See id. Mr. Dutton, through his counsel, also had the opportunity to cross examine witnesses. See id.

On or about June 18, 2013, the Building Official issued its decision on the matter, in the form of an "Order of Building Official." See id. The Building Official's order is also posted at the Dutton Property. See Exhibit 5D (Timeline). In the order, the building official determined as follows:

In conclusion the building(s) is found to be substandard as defined by Section 17F.070.400 of the Spokane Municipal Code, due to dilapidation, structural defects, inoperable plumbing, inadequate weather proofing, no activated utility service for one year, and defects increasing the hazards of fire, accident or other calamity as described above. The building(s) is also found to be abandoned as defined by Section 17F.070.030 of the Spokane Municipal Code in that it gives indications no one is presently in possession such as by disconnection of utilities and disrepair.

See Exhibit 1A (Order of Building Official).

The Building Official's order required Mr. Dutton to prepare a "...rehabilitation plan providing a time line, costs, and estimates from professional tradesmen or contractors and indicate your financial ability to carry out the program." See id.

The Building Official's order also assessed fees against Mr. Dutton. First, the Building Official imposed a hearing processing fee of \$1,500, pursuant to SMC 8.02.067. See id. Second, the Building Official imposed a property monitoring fee of \$300.00, pursuant to SMC 17F.070.040. See id. These fees will be imposed annually as long as the substandard conditions exist. See id. In addition, the fees are filed as a lien against subject property. See id.

On June 24, 2013, Code Enforcement received a copy of the certified mail receipt, signed by Mr. Phelps, verifying delivery of the Order of Building Official to the owner's attorney. See Exhibit 5D (Timeline). On June 25, 2013, Code Enforcement received a copy of the certified mail receipt, signed by Mr. Dutton, verifying delivery of the Order of Building Official to the property owner. See Exhibit 5D (Timeline).

On July 11, 2013, Mr. Dutton filed a Request for Appeal or Reconsideration of the Building Official's decision. See Exhibit 1. In the appeal document, Mr. Dutton primarily asserted that the decision violated his constitutional rights. See id. More specifically, he claimed that the decision constituted an unlawful taking of his property without due process. See id. He also contended that the fees and assessments were an unlawful taking of his property, and would eventually result in the City of Spokane acquiring his property. See id. Mr. Dutton noted that he would "also bring other challenges after review of the entire record." See id.

On or about July 24, 2013, the Hearing Examiner's office notified the parties that the hearing on Mr. Dutton's appeal would be heard on August 20, 2013. See Exhibit 3. The notice also provided a schedule for the submission of briefing by the parties. See id.

On August 8, 2013, Mr. Dutton, through his counsel, submitted a Memorandum of Law in support of his appeal. See Exhibit 4. In his memorandum, Mr. Dutton claimed that city officials trespassed upon his property to inspect the same, and that city officials violated Mr. Dutton's Fourth Amendment rights by entering his property without a warrant. See id. Mr. Dutton claimed that the illegally obtained evidence could not be used against him at the hearing. See id. The memorandum submitted by Mr. Dutton did not address the issues raised in the Request for Appeal, i.e. takings and due process. See id.

On August 15, 2013, the City of Spokane submitted the following materials in response to the appeal: (1) Response Brief; (2) Declaration of Dan Skindzier; (3) Declaration of Boris Borisov; (4) Photographs taken by Mr. Skindzier and Mr. Borisov; (5) Response to Appeal of Building Official; and (6) a timeline of events through the date of appeal. See Exhibits 5 – 5F. In the Response Brief, the city addressed two issues. First, the city denied any violation of the Fourth Amendment. See Exhibit 5. Second, the city contended that Mr. Dutton received all the process he was due. See id. There was no discussion of the takings issue referenced in Mr. Dutton's Request for Appeal. See id.

On August 20, 2013, the parties assembled for the scheduled hearing. However, at the commencement of the proceeding, Mr. Dutton requested a continuance based upon the unavailability of his attorney, Mr. Phelps. Another attorney from Mr. Phelps' office was present and willing to proceed, but this was not satisfactory to Mr. Dutton. The city stipulated to a continuance of the matter to allow Mr. Dutton to arrange to have Mr. Phelps present at the hearing. As a result, the Hearing Examiner rescheduled the hearing for September 24, 2013. See Exhibit 6.

On September 24, 2013, the continued hearing on Mr. Dutton's appeal was conducted. At the hearing, the parties were permitted to present argument, submit evidence, and examine witnesses. Mr. Dutton was represented at the hearing by Mr. Phelps, and the city was represented by Timothy Szambelan, Assistant City Attorney.

During the hearing, Mr. Phelps raised an argument that was not included in the briefing of the parties or previously raised in Mr. Dutton's appeal. Specifically, Mr. Phelps argued that, under the Washington State Constitution, the superior court had original jurisdiction to hear any action to abate a nuisance or involving title or possession to real property, and therefore the administrative process to declare a building substandard, impose fines, and file or enforce liens, was outside of the city's authority. At the conclusion of the hearing, the Hearing Examiner held the record open for a specified period of time to allow the submission briefing from the parties on this jurisdictional question.

On October 7, 2013, Mr. Dutton submitted a Supplemental Brief Regarding Jurisdiction Constitution Violations. See Exhibit 7.

On October 16, 2013, the city filed its Supplemental Response Brief on the jurisdictional questions raised by Mr. Dutton. See Exhibit 8.

D. Discussion of Facts and Law

The Appellant claims that the Building Official's decision was erroneous for numerous reasons. The primary issues raised in this appeal are best considered under the following categories: (1) Fourth Amendment; (2) subject matter jurisdiction; (3) due process; and (4) takings. These, and some other matters raised, are discussed in detail below.

1. *The City of Spokane did not violate Mr. Dutton's Fourth Amendment rights when it investigated the condition of the Dutton Property.*

Appellant argues that the inspection of his property by Code Enforcement was performed in violation of his Fourth Amendment rights. See Memorandum of Law, p. 2. In support of this argument, Appellant asserts that government officials illegally entered onto his

property to perform the inspections, and presumably did so without a warrant. See Memorandum of Law, p. 1. Appellant also characterized the inspections as a trespass of his property. See Memorandum of Law, p. 3. Although admittedly no warrant was obtained to search the property, the Hearing Examiner concludes that no Fourth Amendment violations occurred during the city's investigation. The Hearing Examiner reaches this conclusion for the following reasons.

First, there was no "search" of Appellant's property within the meaning of the Fourth Amendment. The mere observation of the condition of the Dutton Property does not necessarily constitute a "search" under the Fourth Amendment. See *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981).

As a general proposition, it is fair to say that when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a "search" within the meaning of the Fourth Amendment.

See *id.* (emphasis added). In this case, the city officials completed their visual inspections and took photographs of the Dutton Property while standing in public right-of-way. See Exhibit 5A (Declaration of D. Skindzer ¶ 3); see also Exhibit 5B (Declaration of B. Borisov ¶ 3). Upon cross examination, these witnesses confirmed that they did not enter onto Appellant's property at any time. *Testimony of B. Borisov; Testimony of D. Skindzer*. Appellant offered no contrary evidence or testimony regarding these facts. As a result, the Hearing Examiner concludes there was no "search" of Appellant's property that would give rise to a Fourth Amendment claim.

Second, assuming *arguendo* that a "search" occurred, the Hearing Examiner nonetheless concludes that the city was not required to obtain a search warrant. It is generally true, as the city acknowledges, that a warrantless search by a building inspector or other governmental official is *per se* unreasonable under the Fourth Amendment. See Exhibit 5 (Response Brief, p. 3). However, one of the specific exceptions to the warrant requirement is embodied in the "open view doctrine." This doctrine recognizes that a reasonable expectation of privacy does not exist with respect to conditions that are exposed and open for public observation. The Washington Supreme Court explained it this way:

In the "open view" situation, however, the observation takes place from a non-intrusive vantage point. The governmental agent is either on the outside looking outside or on the outside looking inside to that which is knowingly exposed to the public. ...The object under observation is not subject to any reasonable expectation of privacy and the observation is not within the scope of the constitution.

See *id.*, at 902. The open view doctrine clearly applies to this case. The city's inspections consisted of making visual observations and taking photographs.¹ It was undisputed that all of these inspections were done while standing in the public right-of-way. There was no evidence presented that a government official ever set foot onto the Dutton Property. Therefore, there is no question that the city officials were lawfully present at the vantage point when making the

¹ Mr. Dutton did not object, in briefing or at the hearing, that the city's use of a camera with a telephoto lens transgressed any Fourth Amendment restrictions. In any event, the photographs themselves merely magnify the conditions of the Dutton Property that were in open view. There was no evidence that the technology was used to invade an area that was private in nature.

observations. Moreover, the city officials only gathered evidence of conditions that were in open view. It is difficult to conceive of a condition that is more open to public view than the exterior condition of a residential structure. The Hearing Examiner concludes that no warrant was necessary for city officials to visually inspect and photograph the roof, siding, porch, and other openly visible portions of the Dutton Property. Under the open view doctrine, no warrant was required for such activity and no Fourth Amendment violation could arise.

Third, the Hearing Examiner disagrees with Appellant's assertion that Conner v. City of Santa Anna supports his Fourth Amendment claim. As the city notes, the facts in Conner are clearly distinguishable from the situation presented here. In Conner, without a warrant or the property owner's permission, the police scaled a fence on the owner's property in order to inspect vehicles that were believed to constitute a nuisance. See Conner v. City of Santa Ana, 897 F.2d 1487, 1489 (9th Cir. 1990). Subsequently, and again without a warrant, city officials broke down the fence surrounding the Conner's property and removed two vehicles from the property. See id. City officials later destroyed those vehicles. See id. In this case, city officials stood in the public right-of-way and made a record of their observations. The conditions observed were in plain sight. There is no fence at the Dutton Property to demark a private area or shield anything from observation. City officials did not enter into the property at any point. The Hearing Examiner concludes that the facts in Conner bear no resemblance to the situation presented here.

Appellant assumes that city officials walked onto his land to complete their inspections. From that premise, Appellant draws an analogy to Conner, noting that in that case "officials entered onto the **curtilage of a property (and not onto the property itself)** in order to inspect a potential nuisance in the form of broken-down automobiles on a person's lawn." See Memorandum of Law, p. 2 (emphasis added). The implication of Appellant's argument is that the city violated the Fourth Amendment, even though there was no entry into Appellant's house, because the city trespassed into the "curtilage" of the property, an area which is also protected under the Fourth Amendment. However, there is no evidence that city officials ever crossed the line between the public right-of-way and Appellant's real estate. Thus, the Appellant did not establish that there was, in fact, an entry into the curtilage of his property.

Even if, hypothetically, city officials stood a foot or two into Appellant's land, it is far from clear that this would be considered a Fourth Amendment violation.

The presence of an officer within the curtilage of a residence does not automatically amount to an unconstitutional invasion of privacy. Rather, it must be determined under the facts of each case just how private the particular observation point actually was. It is clear that police with legitimate business may enter areas of the curtilage which are impliedly open, such as access routes to the house. In so doing, they are free to keep their eyes open. ...An officer is permitted to the same license to intrude as a reasonably respectful citizen. ...However, a substantial and unreasonable departure from such an area, or a particularly intrusive method of viewing, will exceed the scope of the implied invitation and intrude upon a constitutionally protected expectation of privacy.

State v. Seagull, 95 Wn.2d 898, 902-3, 632 P.2d 44 (1981); see also Conner v. City of Santa Ana, 897 F.2d 1487, 1489 (9th Cir. 1990) (defining "curtilage" to include "...areas which harbor intimate activities of domestic life, usually to include fenced-in areas of property."). There was no evidence that city officials entered the curtilage of the Dutton Property. Even if the city officials inadvertently were standing in a part of the yard of the Dutton Property, a fact which is

not in evidence, it would still be necessary to engage in the case-by-case determination as to whether that official had intruded into an area that was private and thus constitutionally protected. Here, there is no evidence warranting such an analysis.

2. *The Appellant did not establish either that city officials trespassed onto the Dutton Property, or that he is entitled to a remedy if such trespass occurred.*

The Appellant stated, in oral argument, that the city trespassed upon his land in violation of Article I § 7 of the state constitution. However, there was no entry by city officials into the Dutton Property, according to the only evidence in this record. Without an entry, there can be no finding of trespass. Moreover, Article I § 7 constitutes the state equivalent of the Fourth Amendment. The Appellant's constitutional claim, based upon an allegedly warrantless entry, has been thoroughly considered and rejected above. The Appellant did not properly raise, discuss, or brief any rights that might exist under the state constitution, over and above those protected by the Fourth Amendment. Therefore, there is no independent basis to sustain the appeal by virtue of Article I § 7.

3. *The Hearing Examiner and Building Official have subject matter jurisdiction over this matter.*

The Appellant claims that the Building Official and the Hearing Examiner lack subject matter jurisdiction because only the superior court has original jurisdiction over any action (1) to prevent or abate a nuisance or (2) involving title or possession to real property, given the provisions of Article IV § 6 of the Washington State constitution. The Appellants also suggests that the nuisance statute, RCW 7.48, precludes any administrative proceeding regarding a nuisance or its abatement. The Hearing Examiner disagrees with the Appellant's contentions, concluding that the city's procedures for addressing substandard buildings, as reflected in the substandard building ordinance, are well within its police power. Further, the Hearing Examiner concludes that both the Hearing Examiner and the Building Official have properly exercised jurisdiction over this matter. These conclusions were reached for the following reasons.

3.1 The City of Spokane was authorized, under state statute and the constitution, to adopt an administrative process to address substandard buildings and structures.

The City has clear legislative and constitutional authority to regulate substandard buildings and structures within its boundaries. This includes the authority to take the necessary steps, at the administrative level, to regulate and remedy nuisance conditions on real property.

The Washington State constitution provides: "Any county, city, town or township may make and enforce within its limits al such local police, sanitary and other regulations as are not in conflict with general laws." Const. art. 11, § 11. This provision is a direct delegation of police powers to municipalities in Washington. See *Haas v. Kirkland*, 78 Wn.2d 929, 932, 481 P.2d 9 (1971) (quoting *Detamore v. Hindley*, 83 Wash. 322, 326, 145 P. 462 (1915)). Municipal police power is very broad and roughly equal, within municipal boundaries, to those of the state itself. See 1A, Thompson, Washington Practice: Methods of Practice § 60.5, at 720 (1997).

The City of Spokane, as a city of the first class, has explicit authority to regulate and abate nuisances. The state legislature granted cities of the first class the power "to provide for the prevention and abatement of nuisances." See RCW 35.22.280(29). Further, first class cities

have been granted the power to "declare what shall be a nuisance, and to abate the same, and to impose fines upon parties who may create, continue, or suffer nuisances to exist..." See RCW 35.22.280(30).

In addition, State statute specifically authorizes the city to enact an ordinance setting forth the administrative process to address substandard buildings and structures. See RCW 35.80.010 *et seq.* The statute describes the initiation of the administrative process; the scheduling of hearing before the appropriate city official; the issuance of the officer's order to take corrective action; and the filing of appeals, among other matters. See RCW 35.80.030. As authorized by this statute², the City of Spokane adopted its substandard building ordinance, entitled the "Existing Building and Conservation Code." See SMC 17F.070.010 *et seq.*

3.2 The Hearing Examiner and the Building Official have express authority to conduct quasi-judicial hearings pursuant to the substandard building ordinance.

The substandard building ordinance establishes the Building Official's authority to respond to a claim that a building or structure is substandard. Initially, a building inspector prepares a written complaint whenever he or she determines that a building is in violation of the substandard building ordinance. See SMC 17F.070.420(A). The complaint includes a notice of a hearing before the director³ of building services, stating a time and place for hearing, and advising that any interested party may file an answer to the complaint and appear and be heard at the hearing. See SMC 17F.070.420(A)(3)-(4). Based upon the complaint, any answer, and the evidence presented at the hearing, the director of building services "...determines whether the building is boarded up, substandard, unfit, abandoned, or otherwise a nuisance..." See SMC 17F.070.440(A)(1). Following the hearing, the director prepares writing findings and an order directing the owner to take corrective action within a specified time period. See SMC 17F.070.440(A)(3).

The ordinance also explicitly sets forth the Hearing Examiner's role in any appeals of the Building Official's decisions. Thus, an interested party may appeal the director's order regarding a boarded-up, substandard, or unfit building to the Hearing Examiner. See SMC 17F.070.460(A)(1); *see also* SMC 17F.070.480(E)(1) (providing that the Hearing Examiner hears appeals from proceedings and orders of the director). The Hearing Examiner, following a hearing, is authorized to affirm, vacate, or modify the director's order. See SMC 17F.070.460(B); *see also* SMC 17G.050.070(B)(2) (stating that the Hearing Examiner has jurisdiction over appeals from decisions of the building official).

3.3 The original jurisdiction of the superior court does not preclude the city from following the administrative process established by the substandard building ordinance.

The Appellant correctly recites that the Washington State constitution confers "original jurisdiction" upon the superior court over "actions to prevent or abate a nuisance." See Const.

² See SMC 17F.070.010(C)(1).

³ "The director is the building official or a designated employee." See SMC 17F.070.480(A).

art. 4, § 6. Based upon this language, the Appellant concludes that only the superior court has jurisdiction to consider the allegation that there is a substandard residence on the Dutton Property. Stated another way, no administrative tribunal has subject matter jurisdiction over this case. The Hearing Examiner rejects the Appellant's contentions, for the reasons that follow.

The language of Article IV § 6 does not support the Appellant's claim that the Building Official and Hearing Examiner lack subject matter jurisdiction over these proceedings. The superior court's original jurisdiction concerns "actions" and "cases at law." An "action" or a "case at law" in this context means litigation in the court system. The constitutional provisions do not directly concern the resolution of controversies in administrative proceedings. More specifically, there is no language in Article IV § 6 that clearly operates to preclude quasi-judicial proceedings, at an administrative level, regarding matters that are traditionally within the police power of a municipality to regulate.

The city did not commence a nuisance action in any court. Rather, it initiated an administrative process, based upon a duly enacted ordinance. The Hearing Examiner concludes that the superior court does not have jurisdiction over the Building Official's process under the substandard building ordinance. That process is an administrative one, governed by state and local legislative enactments. As the city points out, the superior court's jurisdiction over this matter is appellate⁴ in nature, i.e. it will arise only if the Hearing Examiner's decision is appealed to superior court. See Supplemental Response Brief, p. 4.

The Appellant overlooked what appears to be the most relevant authority on the jurisdictional issue raised in this case. To reiterate, the Appellant's argument in this appeal is that Article IV § 6 of the state constitution vests the superior court with original jurisdiction and therefore neither the Building Official nor the Hearing Examiner have subject matter jurisdiction to conduct quasi-judicial proceedings under the substandard building ordinance. The Appellant's argument, however, fails to account for the Washington Supreme Court's conclusions in City of Everett v. Unsworth, 54 Wn.2d 760, 762, 344 P.2d 728 (1959).

In that case, the City of Everett adopted an ordinance establishing a bureau of fire prevention. See Unsworth, 54 Wn.2d at 762. The ordinance set forth a procedure for the inspection of buildings. See id. If the government officers determined that a building or structure created fire hazards due to age, lack of repair, or dilapidated condition, they were authorized to order that the dangerous conditions or materials be removed or remedied. See id. This ordinance was enacted as authorized by state statute, which provided that cities of the first class were empowered to enact regulations for the "...erection and maintenance of buildings or other structures within its corporate limits as the safety of persons or property may require, and to cause all such buildings and places as may from any cause be in a dangerous state to be put in safe condition." See id.

In Unsworth, a property owner claimed that the municipal court lacked jurisdiction because, under the Washington State constitution, the *superior court* had exclusive jurisdiction to hear a nuisance abatement case. See id. In addressing this challenge, the Washington Supreme Court made a number of statements that are pertinent here, as follows:

⁴ The superior court's original jurisdiction over nuisance actions is not impinged by this result. If a neighbor filed a complaint for nuisance regarding the poor conditions of the Dutton Property, that litigation could be prosecuted simultaneously with any administrative proceeding conducted by the city.

It is well settled that the enactment of reasonable ordinances of this kind are well within the police power of a municipality. ...

The appellant may be correct in his contention that an action to abate a nuisance must be brought in the superior court; however, the provisions in question do not purport to authorize the bringing in the justice court of actions to abate conditions which are fire hazards, and therefore nuisances, but merely set up an administrative procedure under which the existence of dangerous conditions can be ascertained and remedied. ...

There can be no doubt that the city, in the exercise of its police power, may declare a nuisance, may abate the same without resort to the courts, and may impose fines upon parties who create, continue or suffer nuisances to exist. RCW 35.22.280(31); *Davison v. City of Walla Walla*, 52 Wash. 453, 100 P. 981, 21 L.R.A., N.S., 454.

See Unsworth, 54 Wn.2d at 763-64 (emphasis added)

The Appellant's challenge to jurisdiction, at its core, implies that the administrative process for the remediation of substandard buildings is extra-constitutional. However, the Appellant fails to cite any authority concluding that Article IV § 6 of the constitution precludes the city from enacting and enforcing its administrative regulations. In reality, the city has broad constitutional and statutory authority, founded on its police power, to regulate and abate nuisance conditions on real property within the city. The result reached in Unsworth confirms that the Washington State constitution does not operate in the manner claimed by the Appellant.

3.4 The administrative process under the substandard building ordinance is not an action concerning title or possession of real property under Article IV § 6.

The Appellant maintains that because the superior court has original jurisdiction over cases that "involve the title or possession of real property," the Building Official and the Hearing Examiner lack subject matter jurisdiction in this matter. The Hearing Examiner disagrees with this argument, for the reasons that follow.

This matter does not concern title or possession of real property. This case does not present a claim for quiet title, unlawful detainer, or some other cause of action that clearly concerns title or possession to real property. The validity of Appellant's title has not been questioned. The Appellant's right to continue to control his property is not in controversy. No question of title or possession has been adjudicated by an administrative decision-maker. The administrative process is not designed or intended to settle controversies over the title to or possession of real estate. Rather, the administrative determination revolves around whether an owner properly cares for his real property, to ensure that no unsafe or unhealthy conditions are allowed to persist.

At oral argument, the Appellant asserted that because the city's fees under the substandard building ordinance were filed as liens, his title to the real property was at issue in the case. The Appellant also claimed that if the lien was enforced, he would lose his property to the city, implicating both his rights to title and possession. The Hearing Examiner does not agree that the existence of a lien transforms the case into one concerning the "title or possession of real property" within the meaning of Article IV § 6.

It is true that a lien, when perfected, does affect title to real property. That does not mean, however, that title or possession is the gravamen of a proceeding to declare a structure substandard. It is also true that a lien, if it remains unpaid and is ultimately enforced, the owner could lose his property. However, the lien would be undoubtedly enforced through a lien foreclosure proceeding in superior court. See SMC 17F.070.500(B) (providing that the lien for administrative costs can be collected in the same manner as property taxes). Thus, there would no jurisdictional objection to consider. In any case, the Building Official's decision merely imposes administrative fees; it does not order a foreclosure sale or otherwise mandate lien enforcement. There is no lien enforcement action or proceeding pending at this time. Therefore, the issue is raised prematurely.

The fact that liens may exist in support of administrative fees does not establish that the administrative process was tantamount to an action concerning title or possession of real property. As a result, the Hearing Examiner concludes subject matter jurisdiction properly lies at the administrative level.

3.5 RCW 7.48 does not preclude the administrative process adopted under the substandard building ordinance.

The Appellant contends that the nuisance statute of Washington precludes the administrative adjudication of a substandard building complaint. See Supplemental Brief, p. 3. This is true, the Appellant asserts, because the nuisance statute sets forth an exclusive "...method for collecting damages and costs in abating a nuisance..." See id. As a result, the Appellant claims that subject matter jurisdiction is lacking. The Hearing Examiner does not agree with these contentions.

The Appellant cites to RCW 7.48.280 for the proposition that the nuisance statute "...does not allow for an administrative action." See Supplemental Brief, p. 3. However, by the Hearing Examiner's review, that statutory provision contains no language that expressly precludes an administrative process such as the one set forth in the substandard building ordinance. See RCW 7.48.280. The statute is describing one method that is available to collect the costs of nuisance abatement. See id. The statute is not promulgating an exclusive means of remediating all conditions that may qualify as a nuisance. Nor does the statute intend to proscribe municipal authority generally or to limit administrative options specifically. If there are any such intentions, it is certainly not apparent from the bare text of the statute. The Appellant does not explain how that text supports its conclusion. The Appellant also fails to draw attention to any case law or other authority to support its expansive interpretation of the statute.

The Hearing Examiner concludes that the terms of the statute do not support Appellant's contentions. The state nuisance statute does not preclude the city from following its established administrative process to address the conditions existing at the Dutton Property. Therefore, the Hearing Examiner rejects the Appellants contention RCW 7.48 deprives the Hearing Examiner or the Building Official of subject matter jurisdiction.

4. The administrative process followed to determine that the Appellant's property was substandard did not violate the Appellant's right to due process.

Based upon the briefing and oral argument, the Hearing Examiner believes⁵ that Appellant's due process claim boils down to three assertions. First, Appellant broadly asserts he was denied some process that he was entitled to, prejudicing his property rights. Second, Appellant asserts that the superior court is the only proper forum to consider any claim that nuisance conditions exist on the Dutton Property, and therefore due process requires that only the superior court may adjudicate the matter. Third, Appellant asserts that the fees imposed by the city exceeded constitutional limits under the due process clause. Each of these assertions will be addressed below.

4.1 The administrative process did not violate the Appellant's right to procedural due process.

Appellant's first two claims are that he was deprived of some process owed to him, and that he has a right to a process other than an administrative adjudication. These assertions suggest that Appellant is making a claim that his *procedural due process* rights have been violated.

Procedural due process requires, in essence, that interested parties be given reasonable notice of a proposed governmental action and an opportunity to be heard. See Motley-Motley, Inc. v. State of Washington, 127 Wn.App. 62, 81, 110 P.3d 812 (2005). Procedural due process is designed to guarantee that the parties receive all the process that is due. This constitutional principle ensures a fair process; it does not guarantee that the parties will agree with the outcome.

The Hearing Examiner rejects Appellant's general allegation that some other or additional process was due to him. The city has followed all the applicable procedures in prosecuting the administrative complaint against him. See e.g. SMC 17F.070.400-510. Appellant has been properly notified of the city's determinations, and has taken advantage of his right to pursue two appeal hearings, one before the Building Official and one before the Hearing Examiner. At no point has the Appellant identified any specific facts demonstrating that he did not receive adequate notice, that he was deprived of an opportunity to be heard, or that the hearings were conducted in a manner that was fundamentally unfair. In fact, the city stipulated to two continuances to allow Appellant additional opportunity to retain and consult with counsel, as well as to better prepare and formulate his arguments. Appellant has not identified any process that was lacking, let alone proven that he was denied the available procedures.

Appellant also asserts, however, that he was entitled to "a specific form of due process"—namely a court adjudication of any nuisance or abatement claims. See Supplemental Brief, pp. 3-4. The Hearing Examiner rejects this claim as a reformulation of his contention that

⁵ The Hearing Examiner has not been able to determine, at least without speculation, precisely how Mr. Dutton's due process rights were implicated in this case. It is not even clear what type of due process claim Mr. Dutton is advancing. There are two distinct types of due process claims: (1) procedural due process; and (2) substantive due process. Each of these concepts applies in different situations. Each claim has its own elements, and separate lines of authority. Except for a very brief reference to Robinson v. Seattle, Mr. Dutton failed to cite to any of the relevant authorities or explain how the facts presented fit within the parameters of either of these two concepts. This fact alone is probably enough to reject Mr. Dutton's due process claims. Even so, the Hearing Examiner endeavored to determine, despite the somewhat cryptic arguments of the Appellant, whether due process concerns are genuinely at issue in this case.

the Building Official and the Hearing Examiner lack subject matter jurisdiction to consider the administrative complaint. The question of subject matter jurisdiction is a separate matter, and is thoroughly addressed elsewhere in this decision. If subject matter jurisdiction is lacking, the administrative proceedings are a nullity. This would render it unnecessary to reach the constitutional question, at least as presented here. If subject matter jurisdiction exists, then this particular due process claim must fail, because it is dependent upon the assertion that administrative bodies have no authority to adjudicate a "nuisance" claim under the substandard building ordinance.

It should be noted that the Hearing Examiner can only provide limited remedies in response to a procedural due process claim.⁶ If the Appellant had established that he was deprived of some process, the Hearing Examiner could remand the matter for further proceedings and thereby correct the omission. The Hearing Examiner can interpret and apply the ordinance, as written, and determine its applicability to a particular case. However, the Hearing Examiner cannot change or invalidate the administrative process that currently exists. That authority lies with the legislature or the courts.

4.2 *The Hearing Examiner lacks jurisdiction to consider the constitutionality of the substandard building ordinance. Therefore, the Hearing Examiner cannot invalidate the ordinance as violating substantive due process.*

Appellant's third due process claim is that the fines imposed upon him were excessive and likely to lead to the city seizing his property in a lien enforcement proceeding. As pertinent to due process concepts, the Appellant appears to be claiming that the fees exceeded constitutional limits and thereby violated his *substantive due process* rights.

There is no question that the city was authorized, under the applicable ordinances, to impose the maintenance and monitoring fees. See SMC 17F.070.440 & 500; see also SMC 08.02.067. The Appellant did not contest the fact that the fees were expressly authorized by ordinance. Instead, the Appellant generally asserted that the fees were unfair, and would likely lead to the seizure of his property when the city's liens were enforced. Since Appellant is attacking the fundamental fairness of the imposition of administrative costs, his claim apparently raises a challenge under substantive due process.

Substantive due process is focused on whether the exercise of police power has exceeded constitutional limits. In most cases, the test for a violation of substantive due process comes down to whether the subject regulation is "unduly oppressive" on the regulated person. See *Robinson v. Seattle*, 119 Wn.2d 34, 51, 830 P.2d 318 (1992). Determining whether a regulation is "unduly oppressive" involves the use of a balancing test, applied on a case-by-case basis, which considers nonexclusive factors such as the harm sought to be avoided, the availability and effectiveness of less drastic measures, and the economic loss by the property owner. See *Presbytery v. King County*, 114 Wn.2d 320, 331, 787 P.2d 907, cert. denied, 498 U.S. 911 (1990). When a regulation violates substantive due process rights, the remedy is invalidation of the regulation. See *Robinson*, 119 Wn.2d at 54.

⁶ To the extent that Appellant intends to assert that the substandard building ordinance is unenforceable because it violates procedural due process, that claim is outside the Hearing Examiner's jurisdiction. The Hearing Examiner has no authority to declare an ordinance is unconstitutional.

The Appellant overlooks an important caveat to asserting this claim at the administrative level, i.e. the remedy for a substantive due process violation is beyond the Hearing Examiner's jurisdictional authority. The Hearing Examiner can certainly determine whether the procedures set forth in an ordinance were followed, and remand a matter for compliance in appropriate cases. The Hearing Examiner can interpret an ordinance as written, in order to decide whether it applies to a given set of circumstances. What the Hearing Examiner cannot do is waive regulatory requirements, change duly adopted procedures, or to hold that an ordinance cannot be enforced because it is unconstitutional. See e.g. Chaussee v. Snohomish County Council, 38 Wn. App. 630, 638, 689 P.2d 1084 (1984) (holding that a hearing examiner had no jurisdiction to exempt a landowner from the adopted road standards). As a result, the Hearing Examiner must deny this basis for appeal.

5. *The Hearing Examiner declines to consider the Appellant's claim that the administrative process resulted in an unlawful taking of his real property.*

The Hearing Examiner will not consider the Appellant's taking claim for two reasons. First, the Hearing Examiner does not have jurisdiction to grant the applicable remedy when an unlawful taking occurs. Second, the Appellant did not sufficiently explain or brief its takings challenge, and therefore the Hearing Examiner was unable to give the matter proper consideration.

The Hearing Examiner's jurisdiction is limited to the powers delegated to it. See HJS Development, Inc. v. Pierce County, 148 Wn.2d 451, 61 P.3d 1141 (2003). Those powers do not include the discretion to award compensatory damages. See SMC 17G.050.010 et seq. However, compensation is precisely what is given to a property owner who establishes that his property has been taken by government action. See Robinson, 119 Wn.2d at 49 (stating that when a regulation results in a taking, the remedy is just compensation). Because the Hearing Examiner lacks jurisdiction to grant the applicable remedy, the Hearing Examiner cannot consider the Appellant's takings challenge.

Even if some authority to consider the takings claim could be inferred, the Appellant's claim has not been sufficiently presented to consider the issue. The takings jurisprudence sets forth a detailed and complex test for analyzing a takings claim. The Appellant did not address any part of the required analysis. In his Request for Appeal, for example, the Appellant asserted that the city had unlawfully taken his property without due process. He also stated that the fees and assessments imposed by the city constituted a taking. No further written submissions serve to explain the Appellant's position, cite to relevant authorities, or describe how the law supports his takings claims given the facts of this case. The Hearing Examiner declines to consider the matter, given that he can only guess how the Appellant would address the multi-step analysis under takings case law.

It should be acknowledged that the Appellant's counsel did briefly make reference to Robinson v. Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992) in oral argument. That case does set forth the applicable takings analysis. However, the Appellant did not actually apply that takings analysis to the facts presented, or demonstrate, through the example of Robinson, how an unlawful taking occurred. Presumably, based upon the limited oral argument, the Appellant cited to the case for the proposition that excessive government fees may constitute an unlawful taking. While that may be true in some circumstances, the Washington Supreme Court in

Robinson rejected the plaintiffs' claim⁷ that Seattle's housing preservation ordinance resulted in an unlawful taking. See Robinson, 119 Wn.2d at 54. Thus, the case does not support the Appellant's claim, at least in its result. Without a more detailed treatment of the issue, it is not clear to the Hearing Examiner how takings law should be applied to this case. Ultimately, the Hearing Examiner concludes that the Appellant did not sufficiently explain its position to allow a reasoned analysis of this difficult area of law.

For the forgoing reasons, the Hearing Examiner declines to consider the Appellant's claim that the city's enforcement of the substandard building ordinance has caused him to suffer an unlawful taking of his real property.

6. *The city's policy against immediately disclosing the identity of the complaining party does not create a defense to a substandard building determination.*

During oral arguments, the Appellant decried the fact that the city refused to disclose the identity of the individual(s) that initially complained about the condition of the Dutton Property. The Appellant suggested that the failure to identify the complainant somehow violated his rights. The Hearing Examiner rejects this contention for the following reasons.

First, the Appellant did not explain how being deprived of the identity of the complaining neighbor prevented him from defending against the complaint. There is no apparent connection between a property owner's responsibility to maintain his property and the identity of a neighbor who complains about the dilapidated conditions. As the city argued, the Appellant did not show that there was any prejudice as a result of the non-disclosure.

Second, the city correctly pointed out that the Appellant could obtain the information, despite the city's policy, by making public records request pursuant to the Public Records Act. See RCW 42.56.010 *et seq.* Therefore, the identity of the complainant can be obtained in due course, with rather minimal effort. Had the appropriate requests been made, the Appellant would have had the information prior to the hearings in this case, especially given the multiple continuances granted to him.

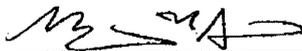
The Hearing Examiner concludes that the city's nondisclosure policy is irrelevant to this appeal. The identity of a complainant is not germane to the Appellant's defense, and he demonstrated no prejudice arising from the nondisclosure. In any event, the desired information can be obtained with little trouble. The Appellant could have easily addressed his concerns by submitting a records request. As a result, the Appellant's argument is rejected.

⁷ The Court in Robinson did find the Seattle's ordinance to be unduly oppressive and therefore invalid under the substantive due process clause. However, the test under substantive due process is distinct from, and an alternative to, the test under the takings clause. The issue of substantive due process, as applied to this case, is separately addressed in this decision.

IV. DECISION

Based upon the findings and conclusions above, as well as the fact that the Director's decision is presumptively correct, the Hearing Examiner finds that the Building Official's decision was correct and therefore should stand.

DATED this 30th day of October 2013.



Brian T. McGinn
City of Spokane Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Appeals of decisions by the Hearing Examiner are governed by Spokane Municipal Code 17G.060.210 and 17G.050.

Decisions by the Hearing Examiner regarding administrative appeals are final. They may be appealed by any party of record by filing a Land Use Petition with the Superior Court of Spokane County. **THE LAND USE PETITION MUST BE FILED AND THE CITY OF SPOKANE MUST BE SERVED WITHIN TWENTY-ONE (21) CALENDAR DAYS OF THE DATE OF THE DECISION SET OUT ABOVE.** The date of the decision is the 30th day of October 2013. **THE DATE OF THE LAST DAY TO APPEAL IS THE 20th DAY OF NOVEMBER 2013.**

In addition to paying any Court costs to appeal the decision, you may be required to pay a transcript fee to the City of Spokane to cover the costs of preparing a verbatim transcript and otherwise preparing a full record for the Court.

EXHIBIT D

Nov 23, 2013

I noticed a policeman and 2 other men over at the house next door. One of the men had a Bar and reached down inside ~~the~~ a opening above the outside entrance to the basement and was prying on some thing, they got the door open and the policeman went inside. I called Mr Dutton at about 10:00 AM and told him that there were the policeman and the other 2 men putting a piece of Ply wood ~~on~~ the roof of the basement entrance area. He told me to go see what was going on, I went out as they were getting ready to leave and asked the phone number of the owner and asked what they were doing. They said they were covering a hole in the roof and ~~were~~ didn't need the owner's phone number. They then left and I went back into my house and called Mr Dutton back and

Let Him Know what Was Going on,
This Took Place on Nov 27, 2015
at around 10:00 In The Morning.

Robert F. Bradley

EXHIBIT E

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

CITY OF SPOKANE,)
Respondent,)
vs.) NO. 13-2-04741-6
)
BLAYNE DUTTON,)
Appellant.)

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DEC 16 2014

LUPA DECISION

SPOKANE COUNTY CLERK

BEFORE: The Honorable Kathleen M. O'Connor
DATE: November 14, 2014

APPEARANCES:

For the Respondent: CITY OF SPOKANE, CITY ATTORNEY'S OFFICE
BY: TIMOTHY SZAMBELAN
808 W. Spokane Falls Boulevard
Spokane, WA 99201

For the Appellant: PHELPS & ASSOCIATES
BY: DOUG PHELPS
2903 N. Stout Rd.
Spokane, WA 99206

REPORTED BY:
MARK SANCHEZ
Official Court Reporter
Spokane County Superior Court, Dept. 4
West 1116 Broadway Ave.
Spokane, WA 99260
(509) 477-4415

1 THE COURT: I had an opportunity to read the
2 record and the briefing and I put a few notes together.

3 This matter was not filed under RCW 36.70C
4 because there was no mention of it in any of the
5 paperwork that was filed by the the petitioner. This is
6 a land use decision. The statute is designed to address
7 administrative decisions Subsection 2(c), which is the
8 defitional section, includes enforcing ordinances that
9 regulate the maintenance of property which is
10 essentially what we have here.

11 Irrespective of whether it is a LUPA
12 petition or an administrative review, this court sits as
13 an appellate court and the parties are bound by the
14 record. Although in a LUPA, you can take additional
15 testimony with the permission of the court through the
16 initial hearing process provisions. However, no initial
17 hearing was held in this case. It is pretty uncommon to
18 allow additional testimony. I have done it on a couple
19 of cases, but it is very unlikely. You still have to
20 live and die by the record that is made at the
21 administrative proceedings below.

22 The standards of review for a LUPA decision
23 are not dissimilar to the Administrative Procedures Act,
24 in that is there substantial evidence to support the
25 finding and is there a proper application of the law.

1 The standard under LUPA is whether there is a clearly
2 erroneous application under the law to the facts, which
3 is a little bit different than the APA. But the bottom
4 line is that my view is that you are using a substantial
5 evidence test for the facts. With regard to the
6 application of the law, the court could look at that *de*
7 *novo*, although arguably under a LUPA it is a clearly
8 erroneous decision. This was not technically filed as a
9 LUPA even though it should have been.

10 Counsel has summarized well the issues that
11 were raised in the briefing and have been raised
12 throughout this proceeding. I am not going to spend any
13 more time on the Fourth Amendment claim. There just is
14 no evidence that there has been a Fourth Amendment
15 violation and improper entry onto the property. The
16 individuals involved specifically testified to that
17 fact. There is no controverting evidence. They got
18 some additional information about the property, which
19 they are entitled to get through other sources, such as
20 the utilities department, which does not require entry
21 onto the property, either. I am satisfied there was no
22 illegal entry onto the property. Taking pictures from
23 the public right of way is perfectly permissible, there
24 is no reasonable expectation of privacy in that.

25 The second issue raised by the petitioner is

1 a constitutional challenge. We have to keep a couple of
2 things in mind. Number one, administrative law judges
3 or hearing examiners do not have the authority to
4 determine if a statute is unconstitutional. As a matter
5 of fact, I just finished a state administrative appeal
6 from the Department of Health. A constitutional issue
7 was raised in the proceedings for the sake of, I call
8 it, a placeholder, but not decided. The Hearing
9 Examiner, Mr. McGinn, wrote a number of pages on this
10 because he does not believe the law is unconstitutional,
11 and neither do I, but he could never find a law
12 unconstitutional. He just could not do that, he does
13 not have the authority. This is what this court needs
14 to do.

15 The other thing that I assume did not happen
16 in this case but should have, whenever anyone, a lawyer
17 or a party, wants a law to be declared unconstitutional,
18 they have to notify the Attorney General. Then you
19 usually get a letter from the Attorney General's Office
20 saying that is very nice, let me know what happens. But
21 that is required.

22 Whenever a party challenges the
23 constitutionality of a statute, the burden of proof is
24 unconstitutional beyond a reasonable doubt. That is the
25 burden of proof. None of this is being addressed. I

1 have been around a long time and I have declared a
2 couple laws unconstitutional in my time. I can tell you
3 that the briefing in that regard is usually very
4 significant in depth because the burden beyond a
5 reasonable doubt is so high.

6 I do not see this as an "as-applied"
7 challenge because Mr. Dutton's situation is not
8 particularly different than any other situation to which
9 the statute applies. This is not an as-applied
10 argument, this is a straight up unconstitutional
11 argument.

12 One of the things I looked to for somebody
13 who has such a high burden of proof is some legal
14 authority that might support their position. There is
15 not any in here of any value in terms of whether this
16 statute is unconstitutional. ~~The most extensive~~ *Plead*
17 discussion is the The City of Everett v. Unsworth, 54
18 Wn2d 760. That case talks about police power. Spokane
19 is a first class city and therefore Spokane has the
20 right, if it so chooses, to adopt a Municipal Code to
21 deal with the state of buildings in the community. They
22 have the authority to do that under RCW 35.22. RCW
23 35.80 is where it specifically talks about structures
24 that are unfit and provides both a definition, which
25 does not use the term nuisance in RCW 35.80.010. More

1 importantly, 35.80.030 goes on for pages and talks about
2 what would an appropriate ordinance look like in that
3 regard. The city has the authority, if they so choose,
4 which they have chosen to do, under Municipal Code
5 17F.070.400, to put this in ordinance form.

6 The *Unsworth* case talks about the police
7 powers. A city like Spokane has police powers and they
8 have the ability to adopt these ordinances. The
9 specific issue in that case, and that is an old Supreme
10 Court case, interestingly enough, was that the ordinance
11 for the City of Everett said if you want to appeal the
12 decision from the building inspector, you go to the
13 Municipal Court. [Unsworth said no, you need to go to
14 the Superior Court because of the nature of what we are
15 talking about. If you read that decision closely, the
16 Supreme Court indicated that it really was not contested
17 by Mr. Unsworth that there was authority to do this.] In
18 other words he did not raise the constitutional issue
19 except as to what court he was supposed to be in for
20 appeal. The court indicated that the police powers
21 allows cities to adopt this type of ordinance.

22 They are not inherently unconstitutional.
23 So the question becomes whether or not how does that fit
24 into the scheme of things with regard to the Washington
25 State constitution that gives the Superior Court

1 original jurisdiction in cases of nuisance.

2 I think that these statutes could be
3 harmonized easily. First of all the fact that the
4 court has original jurisdiction does not mean that there
5 cannot be an administrative proceeding by some
6 governmental entity. [There has been no citation to *look up*
7 authority on the part of the petitioner, who carries the *auth?*
8 burden on this issue, that there is any case law, even
9 around the country.] Sometimes we do not have it. If
10 you are going to really do this and research it, there
11 might be something in some other state that says you
12 cannot have something parallel going on.

13 The fact that a municipality who has the
14 authority, by statute, to create ordinances and enforce
15 ordinances, chooses to do so through administrative
16 process, is not either inherently unfair, or does it
17 necessarily infringe on the Superior Court's
18 jurisdiction. The fact that I have original
19 jurisdiction does not necessarily mean that the
20 administrative agency does not have any jurisdiction.
21 That is what you are trying to get at.

22 One of the points, and Mr. Szambelan picked
23 up on this, is this matter was not commenced as a
24 nuisance action in Superior Court. Essentially that is
25 what the petitioner is arguing. The petitioner is

1 arguing that is what has to happen. In fact, it does
2 not have to happen. You can harmonize these statutes, I
3 think easily, by saying that indeed the first class
4 municipalities do have a right to create an ordinance
5 and create an enforcement mechanism, or a hearings
6 mechanism and an enforcement mechanism, and an appeal
7 which would go to Superior Court. I believe these have
8 all been gathered up now under the Land Use Petition
9 Act, which then moves forward to its own standard of
10 review.

11 To me, that does not offend the
12 constitution. It does not offend the constitution
13 because the constitution does not require the cities to
14 file these cases in Superior Court initially. What it
15 says is ultimately, the Superior Court would have
16 jurisdiction over this if a person like Mr. Dutton were
17 aggrieved and appealed a decision of the city. I have
18 not seen any case law that would support the
19 petitioner's position on this. As I indicate, these can
20 be harmonized. I thought Hearing Examiner McGinn did a
21 really fine job in analyzing this issue and recognizing
22 that it is important to understand the fact that the
23 Superior Court has jurisdiction to do something does not
24 mean that some other process cannot occur.

25 There is quite a bit of discussion about

1 these kinds of things with regard to the Juvenile Court,
2 but that is not analogous because that is court to
3 court. That is not really analogous to what we are
4 talking about today and I respect that. [But the reality
5 is that in looking at the constitution, the fact that
6 there is a proceeding going on administratively, does
7 not add, does not subtract, to the Superior Court's
8 original jurisdiction if a nuisance case is filed in the
9 court.] That is where it is going to come because we are
10 a constitutional court. It is not going to come to the
11 statutory courts, which are the district courts and
12 municipal courts.

13 You have to understand that municipalities
14 aren't the only people who can file nuisance claims. We
15 have a fair amount of civil nuisance and those come to
16 the Superior Court. The fact that the municipality has
17 an initial administrative process does not change that,
18 does not add or subtract to my jurisdiction as a
19 Superior Court judge. [The City of Spokane created it
20 under the authority they have been given by the state
21 legislature under RCW 35.80 and 35.22.] It really is a
22 challenge to those state statutes because nobody has
23 argued that there is something inherently
24 unconstitutional about the Spokane Municipal Code.

25 [I am satisfied that the petitioner has not

1 met his very high burden of demonstrating, beyond a
2 reasonable doubt, that these statutes in the Spokane
3 Municipal Code are unconstitutional }

4 The last issue is the due process issue.

5 First of all as far as procedural due process is
6 concerned, I do not think anyone can argue that Mr.
7 Dutton did not get an opportunity to be heard. He had
8 an opportunity to have counsel, he was able to present
9 witnesses and testimony. There was at least one
10 continuance to accommodate his lawyer. He had an
11 opportunity to question the people involved.

12 This whole issue about a complaining witness
13 wished to remain confidential, that is not an unusual
14 provision. You see that in other statutes because of
15 the retaliation issue. There are occasions when,
16 depending on the circumstances, they have to be
17 disclosed. In this case Mr. Dutton can make a public
18 records claim, that is not that hard. You write a
19 letter, find out who the public records person is with
20 the City. They have to respond, they get fined if they
21 do not respond. It is not an onerous process at all.
22 But more to the point, there was nothing in the record
23 to indicate that there was any hardship to the
24 petitioner because he did not know who the individual
25 was.

1 All of the evidence was produced by the
2 governmental entities. I do not know if there was a
3 theory that the complainant had damaged the property or
4 what, but there was nothing raised in the record about
5 how knowing the complaining person was relevant to what
6 was happening. In some cases it could be relevant, but
7 you would have to make a showing and you could make your
8 public records request. If the city was going to honor,
9 I take it they checked the box that said they did not
10 want to be disclosed, that was the issue. You could
11 have gotten another continuance, made a public records
12 request, checked it out. But there was no mention in
13 the record of anything other than what Mr. Borzof and
14 Mr. Skindzier did and what they observed. They
15 identified who they contacted as well. [That is where
16 the basis of the decision was. My view is there were no
17 procedural due process problems.]

18 The last issue is this (takings issue). It is
19 clear in reading the statute that RCW 35.22.280 allows a
20 city to levy fines to defer costs of the enforcement.
21 It is a flat fine of \$1500 and they have another fee for
22 monitoring. These situations come up. A property owner
23 can certainly fight it. They can work with the City to
24 try to fix the problem. In this case Mr. Dutton put the
25 property up for sale. I do not know if it still is or

1 if it has been sold. The problem is not going away
2 unless something is done about it. There is a process
3 where there a rehabilitation plan can be proposed to fix
4 the property. I suppose in some cases it may not be
5 able to or it may be prohibitively expensive. Really
6 the ball is in the property owner's court. Here there
7 was no rehabilitation plan.

8 In reading this record, it is clear that the
9 City will work with the owner if the owner will work
10 with the City. But if owner of the property does not
11 want to work with the City, does not want to do what is
12 necessary to get the property back to something that is
13 habitable and rehabilitate the property, then the City
14 has to go forward and do something. Initially,
15 oftentimes fines are kind of the carrot and the stick
16 approach; we are going to fine you if you do not do
17 something. Otherwise there is no point in having a
18 process like this because nothing is going to happen.

19 The fact that a fine is levied after
20 appropriate due process and everybody has had a chance
21 to be heard and the building owner knows and has been
22 told what he needs to do and has chosen not to do it, is
23 not a taking of property. That is exercising the police
24 power to levy a fine. It is coercive in nature. In the
25 sense it is like coercive contempt. It is not there to

1 punish people, it is there to get them to deal with the
2 problem that is not going away.

3 I assume this property is probably uninsured
4 because it is vacant, unless somebody is paying a lot of
5 money for insurance on it. Apparently it has not had
6 water service for years. Nothing is going to be done
7 about it. The City cannot just ignore it, they have a
8 statutory duty to do something about it. The first
9 thing you want to do is work with the property owner.
10 If that does not work, maybe a fine to help defer your
11 costs and to get the owner's attention. It is all in
12 the statute. It is not a large amount of money. If
13 that does not work, eventually they City must continue
14 to move through the process, perhaps even demolish the
15 house. That is a different process and it has its own
16 procedures. But at this level, and at this point, the
17 fact that there is a fine levied is not a taking.

18 This is the first salvo across the bow to
19 try to get the attention of the property owner. I am
20 satisfied that this is not a taking of property. It
21 might lead to a taking of property, but there will be
22 other procedures that will happen before that. Again, a
23 lot of this is in the property owner's court, how much
24 they want to work with the City or what is it they want
25 to accomplish with property that has been determined to

1 be substandard and dangerous to the health and welfare
2 of the community.

3 Counsel, I will affirm the Hearing
4 Examiner's decision. In all respects I think he did a
5 thorough analysis. What do you folks need from me at
6 this point? I think my decision needs to be typed up.

7 MR. SZAMBELAN: Yes, your Honor.

8 THE COURT: Normally I would type it up and
9 I would not require findings and conclusions, generally
10 concludes he is affirmed. Once that is signed and
11 filed, that is the law of the case and then it is up to
12 the petitioner if they want to file an appeal after
13 that. That is what I do. I know I will get it done
14 fairly quickly because my last day at work is December
15 19th so I want to get it out of here before then. I
16 will sign it file it and we will send you a copy. That
17 will take care of it at my level. If you want to go
18 from there, you can file a Notice of Appeal after the
19 decision is actually signed and filed.

20 Thank you very much, counsel, I am going to
21 close off my equipment so you can be excused.

22 (In Recess.)

23
24 
25 _____
The Honorable Kathleen M. O'Connor

12/14/2014
Date

ORIGINAL

FILED

AUG 14 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

| | | |
|---------------------|---|------------------------|
| STATE OF WASHINGTON |) | |
| Respondent |) | COA No. 331113 |
| |) | Cause No. 13-2-04741-6 |
| vs. |) | |
| |) | |
| |) | DECLARATION OF |
| BLAYNE L. DUTTON |) | SERVICE |
| Appellant |) | |
| |) | |
| _____ |) | |

I, Amber F. Henry, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as an Attorney in the office of Phelps & Associates, PS, served in the manner indicated below, an original of the Appellant's Opening Brief, on August 14, 2015.

COURT OF APPEALS DIVISION III
500 N. CEDAR
SPOKANE, WA 99201

Legal Messenger
 U.S. Regular Mail

I further declare that I served in the manner indicated below a true and correct copy of the Appellant's Opening Brief, on August 14, 2015.

TIMOTHY E. SZAMBELAN
808 W. SPOKANE FALLS BLVD
SPOKANE, WA 99201

Legal Messenger
 U.S. Regular Mail

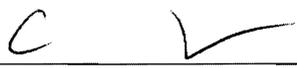
I further declare that I served in the manner indicated below a true and correct copy of the Appellant's Opening Brief, on August 14, 2015.

SPOKANE SUPERIOR COURT
1116 W. BROADWAY AVE.
SPOKANE, WA 99260

Legal Messenger
 U.S. Regular Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Spokane, WA on this 14th day of August, 2015.



AMBER F. HENRY