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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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

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ALLAN and GINA MARGITAN, husband and wife,

Appellants,

v.

SPOKANE REGIONAL HEALTH DISTRICT, a municipal corporation and SPOKANE REGIONAL HEALTH DISTRICT BOARD OF HEALTH, a municipal corporation, and MARK HANNA and JENIFER HANNA, husband and wife,

Respondents.

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**BRIEF OF APPELLANTS  
ALLAN AND GINA MARGITAN**

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## I. INTRODUCTION

In May 2002, Mark and Jenifer Hanna (hereafter "Hannas") purchased Parcel 2 of Short Plat 1227-00 in Spokane County, Washington. The Short Plat contains an exclusive use, dedicated 40 foot easement for ingress, egress and utilities. This easement was a requirement of Spokane Regional Health District (hereinafter "SRHD"). The Hannas were specifically told that parcel 2 had the dedicated 40 foot easement for ingress, egress and utilities for Parcel 3 of the Short Plat.at their closing.

Hannas intentionally installed their on-site septic system (hereafter "OSS") within the 40 foot easement. Mark Hanna testified in his deposition, he told his contractor that the easement was 20 feet and not the actual 40 feet.

In February 2010, Allan and Gina Margitan (hereinafter "Margitans") purchased Parcel 3 of Short Plat 1227-00.

Margitans obtained a remodeling permit for the home on Long Lake and began converting the house into a high-end rental property.

In October 2012, Hannas filed suit against Margitans in Spokane County Superior Court No. 12-2-04045-6, seeking to

reduce the width of the 40 foot easement to 20 feet. In June 2015, Hannas withdrew this claim.

During discovery, Hannas disclosed they intentionally placed their OSS in Margitans easement where their water-line is required to be placed.

In July 2013, Margitans, having safety concerns, contacted the Spokane County Building and Planning. Margitans learned they could not obtain a "Certificate of Occupancy" for their newly remodeled rental due to the OSS being in their easement.

In July 2013, Margitans filed a complaint with SRHD trying to resolve the matter at the lowest possible, least expensive level, requesting Hannas be required to remove their encroaching septic system from their 40 foot utility easement, in compliance with Washington Administrative codes.

The Margitans on several occasions informed SRHD they could not get a "Certificate of Occupancy" for their home due to the OSS encroachment. Mr. Holderby, the Liquid Waste department head for the SRHD, told Margitans that he understood the County's concerns.

During first contact with SRHD, Mr. Holderby assured Margitans that if the complaint was correct they would see test holes for a new system within a month.

Mr. Holderby contacted the Margitans numerous times regarding the complaint filed. Mr. Holderby gave many assurances to Margitans that SRHD would get the illegal septic system out of their utility easement.

Mr. Holderby informed Margitans that he was the department head of the Liquid Waste Division, causing Margitans to rely on his statements. Mr. Holderby promised he was the one to get the job done, SRHD would not allow an OSS to remain within Margitan's easement. As such the Margitans did nothing further, waiting for the SRHD to act. The Margitans relied on these assurances because they had worked with Mr. Holderby in the past. They also knew that an OSS is not permitted within any easement.

The Margitans provided the trial Court telephone records supporting the numerous contacts. SRHD did not dispute that Mr. Holderby gave assurances to the Margitans.

In October 2013, after full knowledge of Margitans' predicament, SRHD entered into an agreement with Hannas allowing their OSS to remain in Margitans' utility easement until the

conclusion of Hanna's lawsuit against Margitans. SRHD stated they did not want Hannas to possibly be at risk of moving their septic system twice.

SRHD's actions forced Margitans to file suit against SRHD with causes of actions for both intentional tort and negligence.

The Margitans also amended their complaint adding causes of action for an unconstitutional tacking and interference with a business expectancy.

SRHD moved for summary judgment against all causes of actions, asserting the public duty doctrine and that there was no cause of action for an intentional tort. The trial court granted the dismissal of all Margitans cause of actions against the SRHD. This appeal was then timely filed.

## **II. ISSUES PRESENTED**

### **1. ERROR OF LAW:**

SRHD IN VIOLATION OF THE MARGITAN'S PROPERTY RIGHTS (UTILITY EASEMENT), EXECUTED AN AGREEMENT WITH THE HANNAS ALLOWING THE SEPTIC ENCROACHMENT TO REMAIN IN THE EASEMENT WHICH CONSTITUTED A TEMPORARY UNCONSTITUTIONAL TACKING.

### **2. ERROR OF LAW:**

THE TRIAL COURT ERRED BY GRANTING SRHD'S MOTION FOR SUMMARY JUDGMENT AND DENYING MARGITAN'S MOTION FOR RECONSIDERATION, DISMISSING

**MARGITAN'S NEGLIGENCE CLAIMS BASED UPON THE  
"PUBLIC DUTY DOCTRINE**

**a.** SRHD'S AGREEMENT WITH THE HANNAS DOES NOT FALL WITHIN THE "PUBLIC DUTY DOCTRINE" AS THE PURPOSE OF AGREEMENT WAS ONLY TO GIVE HANNAS A FINANCIAL BENEFIT.

**b.** LEGISLATIVE INTENT EXCEPTION TO THE PUBLIC DUTY DOCTRINE IS APPLICABLE.

**c.** THE FAILURE TO ENFORCE EXCEPTION TO THE PUBLIC DUTY DOCTRINE IS APPLICABLE

1. Government agents who are responsible for enforcing statutory requirements actually know of a statutory violation,

2. The government agents have a statutory duty to take corrective action but fail to do so,

3. The trial court erred in holding the Hanna "Agreement" was an enforcement Order,

4. The Margitans are within the class the statute is intended to protect.

**d.** THE SPECIAL RELATIONSHIP EXCEPTION TO THE PUBLIC DUTY DOCTRINE IS APPLICABLE

1. There is a direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public,

2. There are express assurances given by a public official,

3. Gives rise to justifiable reliance on the part of the Margitans.

**e.** THE TRIAL COURT ERRED IN HOLDING THERE WAS NO INTENTIONAL TORT CLAIM.

**f.** INTENTIONAL INTERFERENCE WITH BUSINESS EXPECTANCY

- (1) Business Relationship or Expectancy.
- (2) Defendant's knowledge of relationship,
- (3) Intentional interference with relationship,
- (4) Improper purpose or means,
- (5) Damages.

### **III. STANDARD OF REVIEW**

The standard of review for a summary judgment order is de novo, engaging in the same inquiry as the trial court. Mahoney v. Shinpoch, 107 Wn.2d 679, 683, 732 P.2d 510 (1987). Summary judgment is proper if the records on file with the trial court show "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56(c). This court like the trial court, must construe all evidence and reasonable inferences in the light most favorable to the nonmoving party. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

Like summary judgment, the review of the public duty doctrine and its exceptions is a question of law reviewed de novo.

Vergeson v. Kitsap County, 145 Wash.App. 526, 534, 186 P.3d 1140 (2008).

#### **IV. STATEMENT OF FACTS**

On March 19, 2002, Short Plat 1227-00 was approved by Spokane County. (CP 13) Within Short Plat 1227-00, a 40 foot easement for ingress, egress and utilities for the 3 parcels was required and so designated on the Short Plat map. (CP 13) (See Appendix "A") SRHD required the parcels be serviced with public water through this utility easement. (CP 13)(CP 1201-1202)

On May 1, 2002, the Hannas, purchased parcel 2 of Short Plat 1227-00. Soon after purchasing in 2002, the Hannas began building their home and received a permit to install an On-site Septic System. (CP 27-28) During the construction of the Hanna's OSS they knowingly had their contractor install their OSS within the Short Plat's dedicated 40 foot easement which serves Parcel 3. (CP 1090)(CP 65)

On March 11, 2003, SRHD approved Hanna's OSS which was installed within the Margitan's 40 foot easement. (CP 27-28) (CP 65) WAC 246-272A requires an OSS to be a minimum of five (5) feet from any easement. (CP 67)(CP 793) (See Appendix "B")

On February 1, 2010, the Margitans purchased Parcel 3 of Short Plat 1227-00. (CP 990) Parcel 3 had an old house which the Margitans intended to remodel into a rental property. (CP 1043)

October 2012, the Hannas filed suit against the Margitans in Spokane County Superior Court Case No. 12-2-04045-6, seeking to have the trial court reduce the 40 foot ingress, egress and utility easement which serves Parcel 3 of Short Plat 12227-00 to 20 feet in width. (CP 1175) (See Appendix "C")

During discovery and at the deposition of Mr. Hanna it was discovered the Hanna's OSS was in the Margitan's utility easement where the Margitan's water line for Parcel 3 was located. The Hannas had produced a diagram titled "As Built" which indicated where the Hannas' OSS was constructed on Parcel 2. (CP 25) (See Appendix "D") The "As-Built" diagram, confirmed the location of the Hanna's OSS, as being within the Margitan's utility (water line) easement. The "As-Built" diagram designated the 40 foot easement incorrectly as being 20 feet. (CP 25)(CP65)

Due to safety concerns the Margitans contacted SRHD and Spokane Building and Planning stating that the Hanna's OSS was encroaching into their utility easement (water line). (CP 437-440) (CP 1178-1181) The Spokane County Building and Planning

indicated the OSS must be removed from the utility waterline easement as in Margitan's contemporaneous notes. (CP 1072)

Margitans informed SRHD that Hanna's OSS being within the easement, was preventing the Margitans from getting their Certificate of Occupancy for their rental property. (CP 437-440)

The Hannas had a reserve area designated on the "As-Built" as an area the OSS could be moved if necessary. (CP 191)

SRHD determined the Hanna's OSS was within the Margitan's utility easement (water line) and out of compliance with Washington Administrative Codes. (CP 64-68)

The Margitans, on numerous occasions, requested SRHD enforce Washington Administrative Codes and have the Hanna's OSS encroachment removed from their unity (water line) easement. (CP 1247)(CP 438)(CP 439)(CP 1178-1181)

In response to the Margitans requests, SRHD each time assured the Margitans that the Hannas encroachment would be removed shortly or within a few weeks, if it was in the 40 foot utility easement. (CP 438)(CP439)(CP1178-1181)

Unknown to the Margitans, SRHD and the Hannas had entered into an Agreement (hereafter "Agreement") to permit Hannas' encroaching OSS to remain within Margitans' utility

easement, until after the completion of the Hannas' litigation against the Margitans' in Spokane County Superior Court Case No. 12-2-04045-6. (CP 66)(CP 89-91) (See Appendix "E")

The Margitans were not involved in forming the Agreement nor were they parties. (CP 265)(CP 89-91)

SRHD, in executing the Agreement, did not speak with the Margitans, or get permission to leave the OSS in their utility easement. (CP 265)(CP 785)

SRHD, at no time prior to executing the Agreement, or after, spoke with the Hannas regarding their OSS encroachment. (CP 227)(CP 783)

SRHD, in executing the Agreement, did not do a site visit with the Hannas to investigate the encroachment. (CP 261)(CP 784)

SRHD, in executing the Agreement, did not determine if the reserve area was available to move the OSS. (CP 248)

SRHD was/is unable to confirm that Margitans' water-line to Parcel 3 is not impacted by Hanna's OSS encroachment. (CP 323)

SRHD admitted that they never researched which easements impacted the Hanna property. (CP 252)

SRHD admitted the Agreement was simply a way of resolving the Margitan's complaint regarding the encroaching OSS. (CP 265)

SRHD admitted it was their responsibility to enforce compliance. (CP 176)(CP 798)

On December 10, 2013, Margitans requested an administrative hearing, to have the Hanna OSS removed from their easement. (CP 487)

In response Dr. Joel McCullough, the head of the Spokane Reginald Health District, issued a letter decision denying the Margitan's request to require the Hannas to remove their OSS encroachment. (CP 61-62) (See Appendix "F") Dr. Joel McCullough indicated that if the Margitans did not like his decision, as stated in his letter, they would have to appeal his decision. (CP 62) Dr. Joel McCullough testified that his letter decision did not require the Hannas to do anything, as stated "no enforcement ability". (CP 145)

The Margitans appealed Dr. Joel McCullough's letter with the Spokane County Health District Board of Health (hereafter "Board"). (CP 64-68)

The Board sustained Dr. Joel McCullough's letter decision as written. (CP 68)

Due to the Margitans' inability to get SRHD to require the Hannas to move their OSS encroachment out of their utility (water line) easement the Margitans filed a complaint and amended complaint against SRHD. (CP 1-28)(CP1501-1515)

## **V. ARGUMENT**

### **1. THE TRIAL COURT IN ERROR FAILED TO FIND THAT SRHD VIOLATED THE MARGITANS' PROPERTY RIGHTS BY EXECUTING THE AGREEMENT WITH THE HANNAS, ALLOWING THE OSS ENCROACHMENT TO REMAIN IN THE EASEMENT WHICH CONSTITUTED AN UNCONSTITUTIONAL TAKING.**

The trial court on August 1, 2016 erred in the dismissal of the Margitan's Cause of Action for an Unconstitutional Taking and in so doing held

Since a delay in enforcement can't be a taking, since there's no public use or benefit derived from the Health District's actions, and since any actions taken by the Health District have not stopped the Margitans' easements rights, the Health District's motion for summary judgment regarding the taking is granted.  
(RP 95)

The failure to enforce or delay of enforcement was the direct result of the agency's action of executing the Agreement with the Hannas. The governmental action of the SRHD allowed the Hannas to keep their encroachment within the Margitans' utility easement. The Agreement was with the Hannas only. The

Margitans were not a party to the Agreement. The Agreement was executed without authorization from the Margitans or legal authority. SRHD has no legal authority to grant the public (Hannas) a right to interfere permanently or temporarily with the Margitan's easement (property right). The Agreement clearly interfered with the Margitans' use of their utility easement by allowing a non-compliant OSS to encroach in violation of WAC 242-272A-0210. (See Appendix "B")

If the SRHD had required the removal of the Hanna encroachment, the Spokane Building and Planning would not have issued the denial of the Margitans; final inspection (certificate of occupancy) for their rental on parcel 3 of Shot Plat 1227-00. (CP 749) (See Appendix "G")

The court erred in holding there was no public use or benefit. SRHD, by allowing the Hannas to knowingly interfere with the Margitans easement, gave the public (Hannas) a benefit. The agency allowed the interference to remain until the conclusion of the Hannas' litigation against the Margitans, thus giving the Hannas unfair leverage in their litigation. (CP 27-28) (See Appendix "E")

The trial court further erred in holding the interference did not stop the Margitans easement right. However, SRHD by allowing

the encroachment to remain interfered with the Margitans' ability to get a Certificate of Occupancy for their rental property on Parcel 3 of Short Plat 1227-00. (See Appendix "G")

The Margitans in their amended complaint alleged an unconstitutional taking. (CP 1513)

The Margitans have a property interest in their dedicated 40 foot ingress, egress and utility (waterline) easement. Washington law clearly holds that an easement is a property right. Dickson v. Kates, 132 Wash.App. 724, 731, 133 P.3d 498 (2006).

Through the exercise of SRHD's police powers, they executed the Agreement with the Hannas, improperly allowing the Hanna's OSS to remain in the Margitan's utility (water line) easement for an undetermined time.

The requirements placed on Short Plat 1227-00 by SRHD, gave SRHD actual knowledge that the Margitan's easement was used for utilities (water line) to Parcel 3 of Short Plat 1227-00. (CP 459-460)

SRHD also knew that allowing the OSS encroachment to remain would interfere with the Margitans ability to obtain a Certificate of Occupancy for their rental property. (CP 436-437) (See Appendix "H")

The Agreement prevented the Margitans from the full use and enjoyment of their property right (easement). The Margitans' loss of the full use of their property right (easement) by governmental (SRHD) action constituted a taking. Presbytery of Seattle v. King County, 114 Wn.2d 320, 330, 787 P.2d 907, cert. denied, 498 U.S. 911 (1990).

To eliminate confusion regarding a governmental taking claim, our Supreme Court held that it makes no difference if the taking is permanent or temporary. In either case the Margitans are entitled to compensation. In Miotke v. City of Spokane, 101 Wn.2d 307, 347, 678 P.2d 803 (1984) the court stated:

The constitution contains no requirement that the damage be permanent. The plain meaning of the words used in the constitution is that, if a person's property is damaged for public use, he shall be compensated, whether the damage is permanent or is temporary in nature. Although there are some judicial pronouncements to the contrary, this court has generally held compensable damages for a temporary taking under the constitutional provision.

The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. The government may not take property except for public purposes within its constitutional authority and only upon the payment of just compensation for the property that

has been taken. Our Washington Constitution provides in Wash. Const. art. I, § 16, in part, that “[n]o private property shall be taken or damaged for public or private use without just compensation.” Additionally, Article 1, Section 16 expressly prohibits state and local governments from taking private property for a private use.

In Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982) the court held:

A physical invasion of property, no matter how slight, will categorically constitute a taking of that portion of the property occupied for the period that it is occupied.

In the present case, through the action, consent and by contractual agreement, SRHD, in the exercise of its regulatory authority, knowingly allowed the Hannas to physically invade, encroach and occupy a portion of the Margitans’ utility (water line) easement.

WAC 246-272A does not authorize SRHD to impact the legal easement of the Margitans. SRHD’s agreement was done with full knowledge of the Margitans’ property rights and the affect it had on the Margitans ability to obtain a Certificate of Occupancy for their rental property. (CP 1416) (See Appendix “I”)

As such the actions of the SRHD in entering into the Agreement with the Hannas is a governmental taking of private property.

**2. THE TRIAL COURT ERRED BY GRANTING SRHD'S MOTION FOR SUMMARY JUDGMENT AND DENYING MARGITAN'S MOTION FOR RECONSIDERATION, DISMISSING MARGITAN'S NEGLIGENCE CLAIMS BASED UPON THE "PUBLIC DUTY DOCTRINE"**

The trial court erred by granting SRHD's summary judgment motion for dismissal of the Margitan's negligence claim and denying Margitan's motion for reconsideration. (CP 1344-1355)

Under the public duty doctrine, a government's obligation to the public is not a legal duty of care; instead, a government can be liable only for breaching a legal duty owed individually to the plaintiff. Babcock v. Mason County Fire Dist. No. 6, 144 Wash.2d 774, 785, 30 P.3d 1261 (2001). As stated above the duty at issue in this case is owed to the plaintiffs individually.

**a. SRHD's Agreement With The Hannas Does Not Fall Within The "Public Duty Doctrine" As The Purpose Of Agreement Not To Protect The General Public.**

WAC 246-272A reads in part, "The purpose of this chapter is to protect the public health by minimizing...".

However, Mr. Holderby stated the purpose of the Agreement was so the Hannas would not have to possibly move their system twice. (CP 248) SRHD indicated there was no public safety issue. (CP 255) Mr. Holderby stated in his deposition:

13 A Because I felt -- well, we felt that because it was  
14 being litigated that if we were to try putting a reserve  
15 area that may be there are other easements that involved  
16 that the courts needed to resolve before we should ask  
them  
17 to expend the money to put it in the reserve area and  
maybe  
18 have to move it again. At this point, it was just a  
19 resolution to the problem of non-compliance.  
(CP 248)

The nature of the Agreement was not to further the public health but to solely benefit the Hannas at the expense of the Margitans. Entering into the Agreement was not an act to protect the general public.

However the trial court in error held the Public Duty Doctrine barred the Margitan's negligence claim.

The public duty doctrine is subject to four exceptions: (1) the legislative intent exception, (2) the failure to enforce exception, (3) the rescue doctrine, and (4) the special relationship exception. Babcock, 144 Wash.2d at 786, 30 P.3d 1261.

**b. Legislative Intent Exception To The Public Duty Doctrine Is Applicable.**

The trial court erred when it found that the legislative intent exception did not apply to the Public Duty Exception.

If there is a clear statement of legislative intent to identify and protect a particular and circumscribed class of persons, a member of that class has an individual claim for violation of the ordinance or statute creating a duty. Halvorson v. Dahl, 89 Wash.2d 673, 574 P.2d 1190 (1978). In articulating the legislative intent exception Washington's Supreme Court has relied on the express language of the statute or regulation rather than an implied identification of a particular class. Ravenscroft v. Water Power Co., 136 Wn.2d 911, 930 (1998).

In Halvorson the court held that housing codes created a duty to the occupants of certain buildings as an identifiable group. As in Halvorson, supra Washington's Septic System Administrative Codes create clearly identifiable protected groups. These groups are identified in WAC 246-272A-0210 as easement holders and owners of pressurized waterlines. (CP 793-794)

Specific set back requirements in WAC 246-272A-0210 were intended to protect those identified groups. As Mr. Holderby stated at page 18 of his deposition:

11 Q Do you know why there's setback requirements for  
12 pressured waterlines?  
13 A **For protection in case there's a situation where  
there's  
14 leak in the water system, there's just certain built-in  
15 measures in the WAC that allow for protection of the  
water  
16 system. *Emphasis Added***  
(CP 182)(CP 792)

In Campbell v. Bellevue, 85 Wash.2d 1, 530 P.2d 234 (1975)  
the court held that city codes were designed for the benefit of  
persons residing within the area of the danger caused by a  
nonconforming system. In this case the Margitans are a member of  
a particular and circumscribed class of persons who are in the area  
of danger, caused by a nonconforming system.

SRHD owed a duty to protect the Margitans through Code  
enforcement. WAC 246-272A-0430 specifically states:

- (1) The department or the local health officer:
  - (a) Shall enforce the rules of chapter 246-272A WAC;

SRHD had/has an affirmative duty pursuant to the use of the  
word "Shall" to enforce the provisions of WAC 246-272A. Recently,  
in Romney v. Franciscan Medical Group, 186 Wn.App. 728, 743,  
349 P.3d 32 (2015) the court held that in Black's Law Dictionary  
1585 (10th ed. 2014) "shall" means "has a duty to or, more broadly,  
is required to."

This SRHD's duty includes preventing the Hanna's OSS system to endanger the Margitan's pressurized waterline through code enforcement. WAC 246-272A-0210(1) designates the particular and circumscribed class which encompasses the Margitans.

WAC 246-272A-0210(1) clearly identifies protected classes pursuant to required setback requirements.

In support of the protected class designation Mr. Holderby stated in his deposition:

17 So these setback requirements, they actually are for the  
18 purpose of protecting the waterline as opposed to protect  
19 the drain field or another encroachment?

20 A There could be other reasons why. **Mostly with water  
it**

**21 has to do with protection of the water system.**

*Emphasis Added.*

(CP 182)(CP 795)

**c. The Failure To Enforce Exception To The  
Public Duty Doctrine Is Applicable**

The trial Court erred in failing to hold that the failure to enforce exception was applicable. The trial court stated in its written decision:

In the present case, Margitan has alleged a failure to enforce in two (2) instances. The first instance is in regards to the OSS drain field being located within an easement and the second involves the OSS's drain field not having the required horizontal separation from a

water line. In both instances the last requirement is met as Margitan is a part of the general public (the class the statute was intended to protect).

In the first instance, SRHD possesses actual knowledge of a statutory violation **and so the question turns on whether SRHD has failed to take corrective action despite a statutory duty to do so.** . *Emphasis Added.*  
(CP 621)

The trial court indicated the sole question was; did the agency take a statutory mandated corrective action. Or in other words, was the Agreement a statutory corrective order. The Margitans argued that the Agreement is simply an agreement not a corrective order under the statute. (CP 370-373)(CP 620-627) In fact, Mr. Holderby referred to the "Agreement" as an agreement throughout his deposition.

Further, counsel for SRHD also referred to the Agreement as an agreement. (CP 54)

The trial court acknowledged the Margitans' argument by holding:

Margitan alleges that the agreement between SRHD and Hanna does not constitute corrective action, therefore SRHD has failed its statutorily mandated duty.  
(CP 621)(CP 1402)

Under the failure to enforce exception, a government's obligation to the general public becomes a legal duty owed to the

plaintiff when (1) government agents who are responsible for enforcing statutory requirements actually know of a statutory violation, (2) the government agents have a statutory duty to take corrective action but fail to do so, and (3) the plaintiff is within the class the statute intended to protect. Bailey v. Town of Forks, 108 Wash.2d 262, 268, 737 P.2d 1257 (1987). As to the elements:

**(1) government agents who are responsible for enforcing statutory requirements actually know of a statutory violation,**

In this case the agent for SRHD was Mr. Holderby, as the department head for Liquid Waste Management he had specific enforcement authority under WAC 246-272A-0430. (CP 176)

SRHD through Mr. Holderby had clear authority to make compliance decisions. (CP 228) It is clear that SRHD had/has a duty to enforce Administrative Codes, for OSS. (CP 469)

SRHD knew the Hanna's OSS was in violation of WAC 246-272A-0210 and out of compliance with setback requirements. (CP 90-91)(CP 64-68)

**(2) the government agents have a statutory duty to take corrective action but fail to do so,**

The trial court acknowledged SRHD's duty under WAC 246-272A-0020 and WAC 246-272A-0430 to enforce compliance violations of the Washington Administrative Code.

As to the issue of enforcement SRHD cited to WAC 246-272A-0430(2)(b) in their memorandum in support of summary judgment dated November 12, 2015. (CP 53)

WAC 246-272A-0430(2)(b) states:

(2) When a person violates the provisions under this chapter, the department, local health officer, local prosecutor's office, or office of the attorney general may initiate enforcement or disciplinary actions, or any other legal proceeding authorized by law including, but not limited to, any one or a combination of the following:

(b) Orders directed to the owner and/or operator of the OSS and/or person causing or responsible for the violation of the rules of chapter 246-272A WAC;

SRHD argued that compliance orders may include a compliance schedule. (CP 54) SRHD relied upon WAC 246-272A-0430(2)(b) and argued that the Agreement with the Hannas constituted an authorized compliance schedule. (CP 54)

**a. The trial court erred in holding the Hanna "Agreement" was an Order for correction under WAC 246-272A-430(3).**

The trial court in error held the Agreement was an Order of correction and stated;

These orders may include a compliance schedule, which the agreement between SRHD and Hanna is appropriately classified as. WAC 246-272A-430(3). (CP 606)(CP 621)

Authorized Orders are identified in WAC 246-272A-0430(3)

which states in pertinent part:

(3) Orders authorized under this section include the following:

(a) Orders requiring corrective measures necessary to effect compliance with chapter 246-272A WAC which may include a compliance schedule; and

(b) Orders to stop work and/or refrain from using any OSS or portion of the OSS or improvements to the OSS until all permits, certifications, and approvals required by rule or statute are obtained.  
*Emphasis Added.*

The trial court erred in holding that the Hannas Agreement constituted an Order of corrective action under WAC 246-272A. (CP 606)

WAC 246-272A-430(4) and (5) sets forth the statutory requirements of enforcement Orders under that chapter.

The Hanna Agreement does not qualify as an Order of correction pursuant to the clear language of WAC 246-272A-430(4).

The Hanna Agreement did not comply with WAC 246-272A-430(4) as it did not address the requirement of section (e) which reads:

(e) Specify the effective date of the order, with time or times of compliance;

The Hannas Agreement did not give a time of compliance, but rather references an event sometime in the future.

The trial court erred in concluding that the Hanna Agreement by referencing to an event in the future (the conclusion of litigation in Spokane Superior Court Case No. 12-2-04045-6 the Hannas must file an application to bring the septic system into compliance) satisfied the date requirement

The Hanna Agreement at paragraph 2.1 and 2.2 states:

2.1 Within thirty (30) days of the conclusion of the litigation regarding the existence and location of the easements on the Subject t Property, Hanna shall submit an Application to SRHD to relocate the septic system or otherwise bring the on-site sewage system into compliance with the rules and regulations existing at the time of application.

2.2 Within sixty (60) days of SRHD's approval of the Application for a Permit described in paragraph 2.] above, Hanna *will* complete the installation of a conforming system. *Emphasis Added.*  
(Appendix "E") (CP 91)

The Agreement's use of the language "Within thirty (30) days of the conclusion of the litigation" in paragraph 2.1 is an event not tied to any specific date or time of compliance. Additionally, this language does not address any delays the Hannas may take.

Further, this language only requires the submission of an application with no date specified as to the removal of the Hannas OSS. There is simply no specified date of required compliance.

Additionally, paragraph 2.2 indicates that only after SRHD's approval of the Hanna's application are the Hannas required to bring their system into compliance in 60 days. What happens if the Hanna's application is not approved? The Hannas can just sit and are not required to do anything further. The Hannas are not required to file another application or given an additional deadline.

The Agreement fails to comply with the requirements of WAC 246-272A-430(4) which reads:

(f) Provide notice of the consequences of failure to comply or repeated violation, as appropriate. Such notices may include a statement that continued or repeated violation may subject the violator to:

The Agreement is silent as to any "consequences" of the Hannas not having their application approved or even submits a good faith application. Nor is there identified consequences for failing to bring their system into compliance with WAC 246-272A-0210(1). This required element is not addressed in the Agreement. As such this agreement does not qualify as a compliance Order pursuant to WAC 246-272A-430.

The Agreement was not served on the Hannas as required by WAC 246-272A-430(5) which states.

(5) Enforcement orders shall be personally served in the manner of service of a summons in a civil action or in a manner showing proof of receipt.

There is no proof of service upon the Hannas in the record. As such this agreement does not qualify as a compliance order pursuant to WAC 246-272A-430.

The agreement did not identify the name, business address, and phone number of an appropriate staff person to contact regarding the Agreement as required by WAC 246-272A-430(4) which states:

(g) Provide the name, business address, and phone number of an appropriate staff person who may be contacted regarding an order.

The Hanna Agreement is silent as to the name, business address, and phone number of an appropriate staff person of SRHD who may be contacted by the Hannas regarding compliance. As such this agreement does not qualify as a compliance Order pursuant to WAC 246-272A-430.

WAC 246-272A-430 is clear and unambiguous and as such the trial court should have followed the statutory requirements as

written. City of Seattle v. Puget Sound Traction, Light & Power Co.,  
158 P. 252, 91 Wash. 567 (1916).

**b. SRHD admitted that they never issued an order of correction to the Hannas.**

In fact, SRHD argued in bad faith during the summary hearing that the Hanna Agreement was an Order of correction. (CP 53) SRHD knew, or should have known, at the time of the summary argument that the Agreement is not and was not intended to be an Order of correction. Dr. Joel McCullough testified at trial of SRHD's co-defendant, Hannas, that there is no enforcement order issued to the Hannas.

Q. This agreement, did you consider this agreement an enforcement order?

A. Again, this is not an enforcement order, either. It's an agreement.

(RP 145)

A. Health officer orders are something that -- orders that the health officers are legally allowed to give, yes.

Q. Was one of those ever issued in this case?

A. No, not to my knowledge.

(RP 151)

**(3) The Margitans are within the class the statute is intended to protect.**

As discussed above, the trial court found that the Margitans are within the class WAC 246-272A is intended to protect. Specifically WAC 246-272A-0210 imposes a duty to protect the

Margitan's utility (water line) easement, by using the term "shall" regarding horizontal separations of septic systems for both easements and pressurized waterlines. WAC 246-272A-0210 requires SRHD to ensure the Hanna Septic is a minimum of five (5) feet from the Margitan's utility (waterline) easement and a minimum of 10 feet from the Margitan's pressurized waterline.

The Margitans have demonstrated that all three prongs of the Failure to Enforce Exception. The trial court erred in failing to find this exception applied particularly under a summary judgment standard.

**d. The Special Relationship Exception To The Public Duty Doctrine Is Applicable**

The trial court erred in holding the special relationship exception to the Public Duty Doctrine did not apply.

The special relationship exception allows tort actions for negligent performance of public duties if the plaintiff can prove circumstances setting his or her relationship with the government apart from that of the general public. Taylor v. Stevens County, 111 Wash.2d 159, 166, 759 P.2d 447 (1988).

A special relationship imposing an actionable duty to perform arises between the plaintiff and a government entity when "(1) there

is a direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) gives rise to justifiable reliance on the part of the plaintiff.” Beal v. City of Seattle, 134 Wash.2d 769, 785, 954 P.2d 237 (1998). As to the elements:

**(1) there is a direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public,**

The trial court found sufficient contact to satisfy this element and held:

Given the procedural posture of this case, the first element of direct contact or privity is assumed, as it is in keeping with a view of the facts in the light most favorable to the non-moving party and can be reasonably inferred from the exhibits

There were multiple direct contacts between the Margitans and SRHD. This contact was initially through a complaint made by the Margitans. (CP 436-575)(CP 1178-1183). Mr. Holderby, the Liquid Waist Department Head of SRHD, personally handled the complaint filed by the Margitans. (CP 225). It is unchallenged that the Margitans had direct contact including numerous conversations in which they provided documents to SRHD. (CP 436-575) (CP

1178-1183). Further, the negligence claims against SRHD arose from the Agreement they entered into with the Hannas. (CP 10-11)(CP 27-28).

In fact, SRHD admitted the Agreement “was just a resolution to the problem raised by the Margitans of Hannas OSS non-compliance.” (CP 248).

**(2) There are express assurances given by a public official,**

The trial court in error held the assurances given to the Margitans must be incorrect. The trial court in error held:

Margitan fails to point out what incorrect information was given other than a vague assurance that once the easement was finally delineated the OSS drain field would be removed “shortly”. (CP 633-634)

In this case as in Munich v. Skagit Emergency Commc'ns Ctr., 175 Wn.2d 871, 884, 288 P.3d 328 (2012) the express assurance involves a promise of action and as such the Margitans are not required to show the assurance was false or inaccurate in order to satisfy the special relationship exception.

The Margitans provided the trial court with twelve (12) specific assurances SRHD gave to the Margitans and recapped them in their motion for reconsideration on April 21, 2015. (CP 437-

439)(CP 1178-1183) SRHD did not challenge or contest the evidence provided by the Margitans establishing the assurances.

At the December 18, 2015 hearing, the trial court stated:

There's quite a few assertions in Margitan's response arguing that he was assured that this would be immediately corrected and the drain field would have to be moved right away. So why is that at least not an issue of fact that gets us past summary judgment?  
(RP 8) (CP 670).

The trial court then further stated:

... but that's what a genuine issue of fact or dispute of would be. They've asserted they were specifically assured that, "We're going to get this resolved right away, I'm best person to get it resolved," because he was the supervisor. I mean, I think they've made those assertions, haven't they?  
(RP 8) (CP 670)

On December 18, 2015, the trial court was without a doubt that the Margitans undisputed declaration identified SRHD's assurances.

SRHD's assurances included:

- Mr. Holderby confirmed that he was the department head and he was the one who would get this resolved the fastest. (CP 437)
- Mr. Holderby assured it was his department that was responsible for having it removed. (CP 437)
- Mr. Holderby told the Margitans that the Washington Codes would not permit a septic system to be placed

within an easement or allow a septic system remain within an easement. (CP 438)

- Mr. Holderby assured the Margitans that if the system was actually with-in the easement, that within a month, the Margitans would see test holes for the Hanna's new system. (CP 438)
- Mr. Holderby assured the Margitans that if the easement really was 40 feet at the time the septic system was installed, the law allows him to suspend the operation of the septic system. (CP 438)
- Mr. Holderby again assured the Margitans that if the Hanna's Septic System was really within their easement, he would have the system removed within 3 or 4 weeks. (CP 438)
- On July 15, 2013, Mr. Holderby assured the Margitans that Attorney General was SRHD's fastest means of having a system removed from within my easement. (CP 438) (CP 439)
- On several occasions Mr. Holderby assured the Margitans that Hanna's septic system would be removed or decommissioned within just a few weeks. (CP 438)
- On July 22, 2013, Mr. Holderby again reassured the Margitans that if the easement was 40 feet, he would have the septic system removed within a week or so. (CP 439) (CP 472)
- On July 25, 2013, Mr. Holderby again assured the Margitans he would get the septic system out of the easement. But said he had not heard from the Hannas yet. (CP 439) (CP 474)
- On August 7, 2013, Mr. Holderby assured the Margitans that since the court order confirmed the 40 foot easement, the septic system would be removed shortly. Mr. Holderby apologized for not yet having the septic

system removed from the easement. He explained that sometimes the legal system works very slowly. The Margitans again explained that they needed to close-out their construction loans and get a mortgage but could not do so until they obtained a Certificate of Occupancy. (CP 439)(CP 1043-1044)

Mr. Holderby gave specific assurances knowing that the Margitans could not get an occupancy permit until the Hanna Septic was removed from the Margitan's easement. (CP 437) it is clear that SRHDs made numerous assurances to the Margitans.

**(3) gives rise to justifiable reliance on the part of the Margitans.**

The trial court did not address this issue and stated:

The third element "is a question of fact generally not amenable to summary judgment." *Babcock* at 792, 30 P.3d at 1271. As Margitan has failed to show a specific assurance given by SRHD, the question of justifiable reliance need not be reached at this time.  
(CP 634)(CP 608)

The Margitans justifiably relied upon the assurances of Mr. Holderby, as he was the Environmental Resources/Liquid Waste Program Manager of the Spokane County Health District and had a statutory duty to enforce septic system compliance. (CP 436-440)  
(CP 1043-1044)

However, it is important to note that the trial court spoke to SRHD's assurances and the Margitans' reliance at the December 18, 2015 hearing. The trial court stated:

"They've asserted they were specifically assured that, "We're going to get this resolved right away, I'm best person to get it resolved," because he was the supervisor. I mean, I think they've made those assertions, haven't they?  
(RP 8-9)

The Margitans had demonstrated to the trial court that all three prongs of the Special Relationship Exception were/are present, particularly under a summary judgment standard. As stated in Herron v. KING Broadcasting Co., 112 Wn.2d 762, 769, 776 P.2d 98 (1989): "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."

The trial court erred in failing to find the special relationship exception to the Public Duty Doctrine applied and not allowing the case to proceed to the jury.

### **3. THE TRIAL COURT ERRED IN HOLDING THE MARGITANS HAD NO CAUSE OF ACTION FOR AN INTENTIONAL TORT.**

The trial court erred in holding that the Margitans had failed to state a prima facie case for an intentional tort. In so doing the court stated:

Turning to the issue of an intentional tort, Margitan relies on the holding in *Birklid v. The Boeing Co.*, 127 Wn.2d 853 (1995). In that case employees sued their employer based on provisions in RCW 51.24.020. The court rejected a "substantial certainty" test as well as Oregon's "conscious weighing" test and instead deferred to the legislative intent of the statute. *Birklid* at 865. RCW 51.24.020 contains the phrase "deliberate intention" which the Washington Supreme Court found could be construed to give rise to an intentional tort action. *Id.* WAC 246-272A contains no such language from which it can be inferred that the legislature has intended an intentional tort action exists in regards to OSS.  
(CP 609, 639)

The trial court in error held that WAC 246-272A contains no such language from which it can be inferred that the legislature has intended an intentional tort action exists. However, SRHD are liable for their tortuous acts pursuant to RCW 4.96.010 which reads:

(1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation. Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages. The laws specifying the content for such claims shall be liberally construed so that substantial compliance therewith will be deemed satisfactory.

(2) Unless the context clearly requires otherwise, for the purposes of this chapter, "local governmental entity" means a county, city, town, special district, municipal corporation as defined in RCW 39.50.010, quasi-municipal corporation, any joint municipal utility services

authority, any entity created by public agencies under RCW 39.34.030, or public hospital.

(3) For the purposes of this chapter, "volunteer" is defined according to RCW 51.12.035.

Further, this court in Weaver v. Spokane County, 168

Wn.App. 127, 134-125, 275 P.3d 1184 (2012):

" As a result of the enactment in 1967 of RCW 4.96.010, which did away with Washington's shield of absolute sovereign immunity, local governments such as a county may be liable for damages arising out of their tortious conduct or the tortious conduct of its employees."

In Christensen v. Swedish Hospital, 59 Wn.2d 545, 548-549,

368 P.2d 897, (1962) the court held:

A claim is adequately pleaded if it contains a short, plain statement showing that the pleader is entitled to relief, and a demand for judgment based thereon. Sherwood v. Moxee School Dist. No. 90, 158 Wash.Dec. 349, 363 P.2d 138 (1961).

In this case the legal wrong had been pleaded and that is the intentional act of the Hanna Agreement with foreseeable damages. This is coupled with the Margitan's cause of action for the unconstitutional temporary taking. (CP 1513-1514)

The "gist" of an action for this intentional tort "is the unlawful violation of a person's right of personal liberty or the restraint of that person without legal authority." Bender v. City of Seattle, 99 Wn.2d 582, 591, 664 P.2d 492 (1983). SRHD clearly restrained the

Margitans full and expected use of their utility easement by knowingly allowing the Hanna OSS to remain encroaching which caused the Margitans harm.

The court in error misstates the purpose behind the Margitans citing to Birkliid v. The Boeing Co., 127 Wn.2d 853 (1995) as a basis for an intentional tort. The Margitans have argued and plead that the basis for the claim of an intentional tort arose from SRHD intentionally entering into an agreement with the Hannas. CP 590 SRHD knowing that the intentional act (executing the Agreement) would allow the Hanna OSS to remain encroaching upon the Margitan's easement causing harm. The Margitans have plead all the elements for an intentional tort claim. (CP 4-9)

The Margitans cited to the Birkliid court as it described what "deliberate intention" or in another word "what an intentional act was", by stating at page 867:

We hold the phrase "deliberate intention" in RCW 51.24.020 means the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.

In this case it was pleaded and argued that SRHD had actual knowledge that injury was certain to occur and willfully disregarded that knowledge. (CP 4-9)(CP 1347)(CP 1352). SRHD

knew that the Margitans had contacted them about the inability to obtain an occupancy permit due to the Hanna septic system being in their utility easement. (CP 436-441) In response SRHD entered into the agreement to allow the Hanna OSS to remain in the Margitan's easement in violation of the Margitan's property rights and with full knowledge that the Margitans would be unable to obtain an occupancy permit for their rental on Parcel 3 (CP 1043-1044)(See Appendix "E" and Appendix "G").

The trial court erred in holding the Margitans have no cause of action for SRHD's intentional acts.

#### **4. INTENTIONAL INTERFERENCE WITH BUSINESS EXPECTANCY**

The trial court committed error by dismissing the plaintiffs claim for tortious interference with business expectancy by finding that there was no improper purpose or means in entering into the Agreement.

This claim has five elements: (1) Business relationship/ expectancy, (2) defendant's knowledge of relationship, (3) intentional interference with relationship, (4) improper purpose or means, and (5) damages. Pac. Nw. Shooting Park Ass 'n v. City of

Sequim, 158. Wn.2d 342, 351, 144 P.3d 276 ( 2006). The elements are:

**a. Business Relationship or Expectancy.**

The Margitans were/are developing Parcel 3 of Short Plat 1227-00, Spokane County, Washington in to a high-end rental property. The courts have held a developer has protected business expectancy in its projects, which can give rise to a tortious interference claim. Westmark Dev. Corp. v. City of Burien, 140 Wn. App. 540, 557 -58, 166 P.3d 813 (2007), review denied, 163 Wn.2d 1055 (2008). This element was satisfied by the undisputed material facts regarding the Margitans development of their high-end rental.

**b. Knowledge of a Relationship**

The knowledge element is satisfied when a defendant knows of "facts giving rise to the existence of the relationship." Calbom v. Knudtson, 65 Wn.2d 157, 165, 396 P. 2d 148 (1964). This element does not require specific knowledge, only awareness of "some kind of business arrangement." Topline Equip., Inc. v. Stan Witty Land, Inc., 31 Wn. App. 86, 93, 639 P.2d 825, review denied, 97 Wn.2d 1015 (1982). Here, SRHD had actual knowledge of the Margitan's business plans for the high-end rental property they were developing on Parcel 3 of Short Plat 1227-00, Spokane County,

Washington. (CP 1042) SRHD did not contest the evidence of the Margitans regarding SRHD's knowledge. The uncontested facts presented to the trial court were that in February 2010, after newly acquiring Parcel 3, Margitans had several discussions with Mr. Holderby regarding the recorded violations against the property. (CP 1042) At that time, Mr. Holderby questioned why the Margitans needed a second waterfront property. (CP 1042) The Margitans told Mr. Holderby that they intended to develop the property by clearing the violations, remodel the home and then use the property as a high-end rental for week to week rentals. (CP 1042) This was never challenged or contested by SRHD.

July 2013, the Margitans had further conversations with Mr. Holderby regarding the inability to get an occupancy certificate for his rental property due to Hannas' OSS within the easement. (CP 884-886)(CP 1043-1044)

On December 4, 2013, Michelle Fossum attorney for SRHD sent a letter to the Margitans indicating that all communication must be with Ms. Fossum. (CP 1044)(CP 1096) (Appendix "J")

Following that letter the Margitans had several phone conferences with Ms. Fossum at which they discussed that Plaintiffs' were unable to get a Certificate of Occupancy because

Hannas' septic system was within their easement. (CP 1045-1048) (CP 1069-1073) They also discussed the Margitans lost summer rentals and were still not able to rent their home. (CP 1071) This element was satisfied by undisputed or contradicted material facts.

**c. Intentional interference**

It is an undisputed fact that SRHD knew the Margitans have a 40 foot utility easement across parcel 2 of Short Plat 1227-00. (CP 1371-1375) It is an undisputed fact that SRHD knew the Hanna drain field was in the Margitan easement. (CP 1371-1375) It was an undisputed fact that SRHD knew that leaving the drain field in the Margitans' easement affected the Margitan's full use and enjoyment of their easement. (CP 1045-1048)(CP 1069-1073)

It is uncontroverted that SRHD knew that the Margitans were unable to obtain an occupancy certificate for their rental house on Parcel 3. It is undisputed that SRHD knew that Spokane County Building and Planning would not grant a certificate of occupancy until SRHD provided documentation that the plaintiff's water was safe and would not be impacted by Hannas' septic system. (CP 1271) (Appendix "G")

It is undisputed that SRHD intentionally took no enforcement action to bring the Hanna's septic into compliance and instead

intentionally entered into the Hanna Agreement. (CP 89-91)(See Appendix "E") The Hanna Agreement was the intentional act of delaying enforcement to some unspecified date in the future.

**d. Improper purpose / means**

The trial court erred in holding no improper purpose or means was the basis of the SRHD's Agreement. The trial court stated in its oral decision:

Since there's no evidence that Hannas or the Health District were aware of the water line issue until after they had formalized their written agreement to relocate the drain field, there is no evidence that that agreement was entered into for the improper means or the improper purpose of denying the occupancy permit.

...

They knew that the drain field was within the easement, and they knew -- and the purpose of that agreement was to resolve that condition. **Their purpose was to bring the drain field into compliance with the easement.** There is no evidence presented that they did that -- that that

(RP 92) *Emphasis Added.*

agreement was entered for the purpose of having the Margitans' occupancy permit denied because of the water line's proximity to the drain field.

(RP 93)

The trial court only addressed the issue of purpose but failed to address the means. The improper means was the issue stressed by the Margitans. The Hanna Agreement clearly violated the Margitan's protected property right to the full use and enjoyment of

their easement. Washington law is well established that an easement is a property right. 810 Props, v. Jump, 141 Wn. App. 688, 696, 170 P.3d 1209 (2007). Property rights are protected by the due process clause of the United States Constitution. Hague v. Comm. for Indus. Org., 307 U.S. 496, 527, 59 S. Ct. 954, 83 L.Ed. 1423 (1939). In Wong Kee Jun v. City of Seattle, 143 Wash. 479, 482, 255 P. 645, 143 Wash. 479 (1927) the court identifies examples of protected property rights in holding

In State ex rel. Smith v. Superior Court, 26 Wash. 278, 66 P. 385, it was held that the right to light, air, and access necessary to the use of a lot abutting upon a public street is property of the owner within the meaning of the Constitution, and not to be taken except in the manner provided by the Constitution.

SRHD's failure to ensure the Hannas septic was in compliance with WAC 246-272A-0210 and its setback requirements prevented the full use and enjoyment of the utility (water line) easement and issuance of the Margitan's certificate of occupancy.

The trial court erred in holding SRHD didn't know about the Margitan's water line being in the easement at the time of executing the Agreement.

However, SRHD required both the easement and water line during the creation of Short Plat 1227-00 with the statement:

#9 USE OF PRIVATE WELLS AND WATER SYSTEMS IS PROHIBITED.

#10 THE PUBLIC WATER SYSTEM, PURSUANT TO THE WATER PLAN APPROVED BY COUNTY AND STATE HEALTH AUTHORITIES, THE LOCAL FIRE PROTECTION DISTRICT, DIVISION OF BUILDING AND CODE ENFORCEMENT AND WATER PURVEYOR, SHALL BE INSTALLED WITHIN THIS SUBDIVISION AND THE APPLICANT SHALL PROVIDE FOR INDIVIDUAL DOMESTIC WATER SERVICE AS WELL AS FIRE PROTECTION TO EACH TRACT PRIOR TO SALE OF EACH TRACT AND PRIOR TO ISSUANCE OF A BUILDING PERMIT FOR EACH TRACT.

CP 13 (Appendix "A")

During the preliminary plat review SRHD specifically required "Appropriate utility easements...". (CP 459)

SRHD had clear knowledge the easement was a utility easement which included the location of the Margitan's water line. Since property rights are protected by both the United States and Washington constitutions the actions (Hanna Agreement) of SRHD which intentionally restricted and interferes with those rights is an improper means.

The effect of an easement encroachment which violates County and or State Codes was addressed in Littlefair v. Schulze, 169 Wash.App. 659, 971, 278 P.3d 218 (2012) which held:

26 In conclusion, Schulze's fence appears to be a sufficiently permanent structure that could support an adverse possession claim thereby interfering with

Littlefair's use of the easement. Littlefair has the right to protect against such interference. ***But we need not remand to the trial court to address that issue because the fence violates the county ordinance prohibiting such structures in an easement. Accordingly, we reverse and remand for the trial court to enter an order requiring Schulze to remove the fence and other remaining obstructions to the road easement. Emphasis Added.***

As the court in Littlefair held it was not necessary to remand to the trial court as the fence violated county ordinance. In this case, the Hanna's OSS violated Washington Administrative Codes and as such the Hannas should have been required to immediately move the OSS. Not enter into an Agreement allowing it to remain to the Margitan's easement. SRHD argues it did not know about the water line at the time of the Agreement then when they did learn of the water line SRHD should have no longer relied on the Agreement as a basis to do nothing.

## **5. DAMAGES**

The direct result of SRHD's actions in entering into the Hanna Agreement resulted in damages including but not limited to lost rents, increased finance charges, and additional costs.

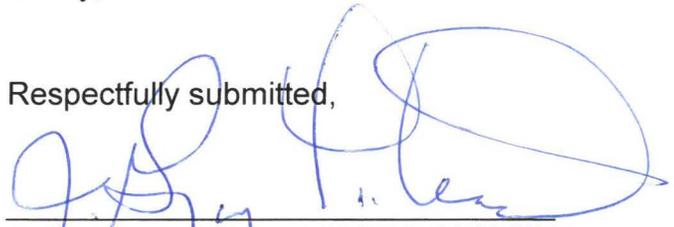
## **VI. CONCLUSION**

The Margitans respectfully request that based upon the above argument as applied to the summary judgment standard, the

Margitan's claims for negligence, intentional tort, unconstitutional temporary tacking and intentional interference with a business expectancy should be remanded to the trial court for presentment to a jury.

Dated this 3<sup>rd</sup> day of February, 2017

Respectfully submitted,



J. Gregory Lockwood WSBA # 20629  
Attorney for Margitans

CERTIFICATE OF SERVICE

I, LORRIE HODGSON, do declare that on February 3, 2017, I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

Stanley E. Perdue	_____	U.S. MAIL
Perdue Law Firm	_____	FACSIMILE
41 Camino Los Angelistos	_____	HAND DELIVERY
Galisteo, NM 87540	<u>  X  </u>	ELECTRONIC
perduelaw@me.com		DELIVERY

Michelle Fossum	_____	U.S. MAIL
Attorney at Law	_____	FACSIMILE
201 W North River Drive, Suite.	_____	HAND DELIVERY
460	<u>  X  </u>	ELECTRONIC
Spokane, WA 99201		DELIVERY
michelle@sayrelaw.com		
gina@sayrelaw.com		

DATED February 3, 2017.

  
\_\_\_\_\_  
LORRIE HODGSON

**APPENDIX**

ALLAN AND GINA MARGITAN

v.

SPOKANE REGIONAL HEALTH DISTRICT, SPOKANE  
REGIONAL HEALTH DISTRICT BOARD OF HEALTH, and MARK  
HANNA and JENIFER HANNA

Court of Appeal, Division III  
Case No. 346064

A. ....	7, 46
B. ....	7, 13
C. ....	8
D. ....	8
E. ....	10, 13, 26, 40, 44
F. ....	11
G. ....	13, 14, 40, 43
H. ....	14
I. ....	16
J. ....	42

# APPENDIX A

# SHORT PLAT 1227-00

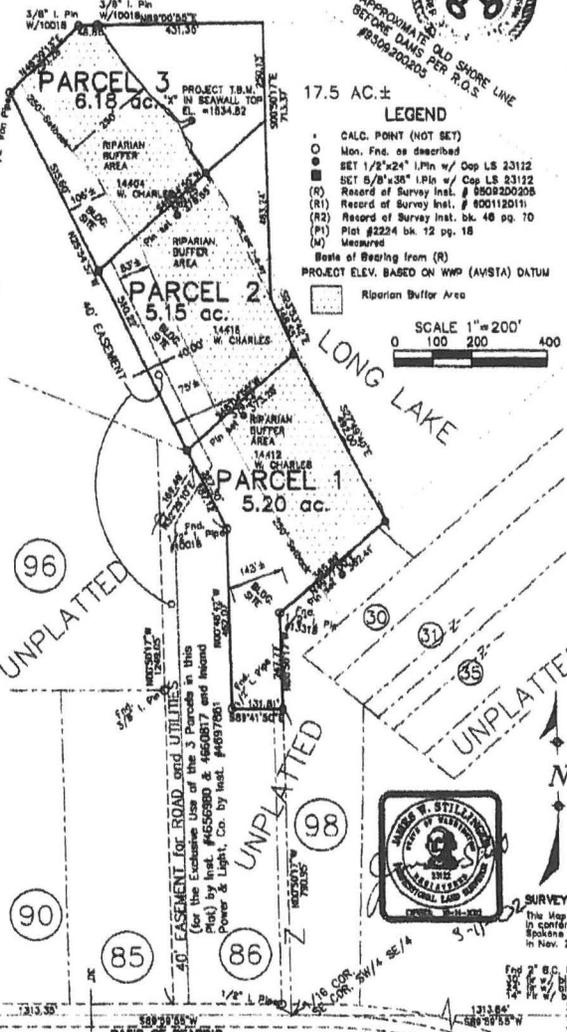
IN SE 1/4 SECTION 27, T.27N., R.41E., W.M.  
SPOKANE COUNTY, WASHINGTON

### OWNER'S DEDICATION

KNOW ALL MEN BY THESE PRESENTS THAT MARION G. BOND, HER HEIRS, ASSIGNS, AND SUCCESSORS, DREW A. BOND AND CAROL A. BOND, HUSBAND AND WIFE, HAVE CAUSED TO BE PLATTED INTO TRACTS, THE LAND SHOWN HEREON AS SHORT PLAT #1227-00 AND FURTHER DESCRIBED AS FOLLOWS:

A Portion of Gov. Lot 8 and the SE 1/4 of Section 27, T.27N., R.41E., W.M. Spokane County, Washington more particularly described as follows:  
Commencing at the SE Corner of the SW 1/4 of the SE 1/4 of said Section 27, thence N02°50'17"W along the East line of said SW 1/4, SE 1/4 a distance of 790.85' to a 5/8" Iron Pin and the true Point of Beginning for this Description, thence S89°14'50"W a distance of 131.81' to a 1/2" Iron Pipe (Inch. N06°48'42"W a distance of 482.07' to an 1/2" Iron Pipe, thence N25°54'57"W a distance of 123.11' to a post, thence N48°29'13"E a distance of 280.28' to an 3/8" Iron Pin, which is 100' South of the North line of the NW 1/4 SE 1/4 of said Section 27, thence N82°05'55"E along said parallel line a distance of 478.21' to a point on the East line of said NW 1/4 SE 1/4, thence S00°50'17"E along said East line, a distance of 713.37' to a point near the present Legal High Water line of Long Lake, thence along said High Water Line the following course S23°53'42"E a distance of 148.58' to an 1/2" Iron Pin, thence S27°59'40"E a distance of 482.00' to an Iron Pin, thence S49°27'00"W a distance of 368.89' to an Iron Pin on the East line of said SW 1/4 SE 1/4, thence S00°50'17"E along said line a distance of 247.27' to the Point of Beginning.  
Containing 719286 square feet or 16.328 acres more or less.  
Subject to the RESTRICTIVE COVENANTS as read in Vol.1120, Pg. 832 Int. #0006220211 BE IT FURTHER KNOWN THAT:

- (1) An Easement (shown hereon) for ingress, egress and utilities over a strip of land 40 feet wide, the Westerly line of said Easement described as follows:  
Commencing at the SE corner of the SW 1/4 SE 1/4 of said Section 27, thence S89°14'50"W along the South line of said SW 1/4 SE 1/4 a distance of 304.03' to a post, thence N00°50'17"W a distance of 30.00' to a point on the Northern Right of Way line of "Charles Road" and the SW corner of a tract of land conveyed to Drew A. Bond et al by deed recorded Feb. 26, 1989 under Recording # 4335570 and the true Point of Beginning for this Description; Thence continuing along said West line of said tract of Land, and the Westerly line of said 40' wide Easement, the following courses N00°50'17"E a distance of 1248.03' to a point, thence leaving said West line of said tract of land, N32°22'10"E a distance of 184.48', more or less, to a point on the South Westerly line of a tract of land conveyed to Ronald J. Bond et al by deed recorded April 8, 1948 under Recording # 9225224 and the East line of the West line of said Easement; the East line of said Easement extends North Eastwary to a point on the South Westerly line of said tract of land;
- (2) SIDE YARD AND REAR YARD SETBACKS SHALL BE DETERMINED AT THE TIME BUILDING PERMITS ARE REQUESTED UNLESS THESE SETBACKS ARE SPECIFICALLY DRAFTED ON THIS SHORT PLAT. THE SETBACKS INDICATED ON THIS PLAT MAY BE VARIED FROM IF PROPER ZONING APPROVALS ARE OBTAINED.
- (3) AT THE TIME OF APPROVAL OF THE FINAL PLAT, THIS PROPERTY FELL UNDER THE JURISDICTION OF THE WASHINGTON STATE SHORELINE MANAGEMENT ACT, RCW 90.068, AND THE SPOKANE COUNTY SHORELINE PROGRAM, WAS 173-19-400. ANY DEVELOPMENT OF THIS PROPERTY SHALL ONLY PROCEED IN STRICT COMPLIANCE WITH THE SHORELINE ACT RULES AND REGULATIONS IN EFFECT AT THE TIME OF PERMIT ISSUANCE.
- (4) ADDITIONAL INFORMATION IN THE FORM OF A GEO-HAZARD MITIGATION PLAN MAY BE REQUIRED PRIOR TO THE ISSUANCE OF BUILDING PERMITS AS PER SECTION 11.20.070(C) OF THE SPOKANE COUNTY CRITICAL AREAS ORDINANCE.
- (5) DEVELOPMENT WITHIN THIS SUBDIVISION SHALL CONFORM TO THE REQUIREMENTS OF NATIONAL FLOOD INSURANCE PROGRAM AND CHAPTER 3.20 OF THE SPOKANE COUNTY CODE. PURCHASERS OF THE PROPERTY WITHIN THIS SUBDIVISION ARE WARNED OF POSSIBLE FLOODING OR POONDING AND THE POTENTIAL REQUIREMENT TO PURCHASE FLOOD INSURANCE. THIS WARNING SHALL BE CARRIED IN EACH AND EVERY DEED DRAWN TO TRANSFER OWNER-SHIP OF ANY AND ALL PROPERTY WITHIN THE PLAT IN THE AREA OF SPECIAL FLOOD HAZARD.
- (6) THAT IN CONSIDERATION OF MUTUAL BENEFITS NOW OR TO BE HEREAFTER DERIVED, DO FOR THEMSELVES, THEIR HEIRS, GRANTEES, ASSIGNS AND SUCCESSOR(S) IN INTEREST HEREBY REQUEST AND AUTHORIZE SPOKANE COUNTY TO INCLUDE THE ABOVE DESCRIBED PROPERTY IN A ROAD IMPROVEMENT DISTRICT (RID) AND TO SUPPORT THE FORMATION OF A ROAD IMPROVEMENT DISTRICT FOR IMPROVEMENT OF THE ROAD(S) DESCRIBED BELOW BY REQUESTING AND AUTHORIZING SPOKANE COUNTY TO PLACE THEIR NAME(S) ON A PETITION FOR THE FORMATION OF A ROAD IMPROVEMENT DISTRICT PURSUANT TO RCW 36.88.030, OR BY REQUESTING AND AUTHORIZING SPOKANE COUNTY TO CAST THEIR BALLOT IN FAVOR OF A RID BEING FORMED UNDER THE RESOLUTION METHOD PURSUANT TO RCW 36.88.030, AND/OR BY NOT FINDING A PROTEST AGAINST THE FORMATION OF A RID BEING FORMED UNDER THE ALTERNATIVE RESOLUTION METHOD PROVIDED FOR IN RCW 36.88.030 AND CHAPTER 36.43 RCW.
- (7) IF A RID IS PROPOSED FOR IMPROVEMENT OF THE ROAD(S) DESCRIBED BELOW, SAID OWNER(S) AND SUCCESSOR(S) FURTHER AGREE: (1) THAT THE IMPROVEMENTS OR CONSTRUCTION CONTEMPLATED WITHIN THE PROPOSED RID ARE FEASIBLE AND (2) THAT THE BENEFITS TO BE DERIVED FROM THE FORMATION OF THE RID BY THE PROPERTY INCLUDED THEREIN, TOGETHER WITH THE AMOUNT OF ANY COUNTY PARTICIPATION EXPENSES TO BE PAID BY THE PROPERTY OWNER(S) OF THIS AND (3) THAT THE PROPERTY WITHIN THE PROPOSED RID IS SUFFICIENTLY DEVELOPED, PROVIDED, THEMSELVES, THEIR HEIRS, GRANTEES, ASSIGNS AND SUCCESSOR(S) SHALL



THE RIGHT, AS AUTHORIZED UNDER RCW 36.88.030, TO OBJECT TO ANY ASSIGNMENT(S) ON THE PROPERTY AS A RESULT OF THE IMPROVEMENTS CALLED FOR IN CONNECTION WITH THE FORMATION OF A RID BY EITHER THE PETITION OR RESOLUTION METHOD UNDER CHAPTER 36.88 RCW AND TO APPEAL TO THE SUPERIOR COURT THE DECISION OF THE BOARD OF COUNTY COMMISSIONERS CONFIRMING THE FINAL ASSESSMENT ROLL; PROVIDED FURTHER, IT IS RECOGNIZED THAT ACTUAL ASSESSMENTS MAY VARY FROM ASSESSMENT ESTIMATES SO LONG AS THEY DO NOT EXCEED A FIGURE EQUAL TO THE INCREASED TRUE AND FAIR VALUE IMPROVEMENT(S) ADD(S) TO THE PROPERTY.

IT IS FURTHER ACKNOWLEDGED AND AGREED THAT AT SUCH TIME AS A RID IS CREATED OR ANY COUNTY ROAD IMPROVEMENT PROJECT IS AUTHORIZED BY SPOKANE COUNTY, THE IMPROVEMENTS REQUIRED SHALL BE AT THE SOLE EXPENSE OF THE OWNER(S) OF PROPERTY WITHIN THE RID OR SERVED BY THE IMPROVEMENTS WITHOUT ANY MONETARY PARTICIPATION BY SPOKANE COUNTY.

THE RID WAIVER CONTAINED IN THIS AGREEMENT SHALL EXPIRE AFTER TEN (10) YEARS FROM THE DATE OF EXECUTION HEREON. THIS PROVISION IS APPLICABLE TO CHARLES ROAD WHICH PROVIDES PUBLIC ACCESS TO THE SHORT PLAT.

(8) SUBJECT TO SPECIFIC APPLICATION APPROVAL AND ISSUANCE OF PERMITS BY THE HEALTH OFFICER, THE USE OF INDIVIDUAL ON-SITE SEWAGE DISPOSAL SYSTEMS MAY BE AUTHORIZED. THE USE OF ALTERNATIVE SEWAGE SYSTEMS MAY BE REQUIRED.

(9) USE OF PRIVATE WELLS AND WATER SYSTEMS IS PROHIBITED.

(10) THE PUBLIC WATER SYSTEM, PURSUANT TO THE WATER PLAN APPROVED BY COUNTY AND STATE HEALTH AUTHORITIES, THE LOCAL FIRE PROTECTION DISTRICT, DIVISION OF BUILDING AND CODE ENFORCEMENT AND WATER PURVEYOR, SHALL BE INSTALLED WITHIN THIS SUBDIVISION AND THE APPLICANT SHALL PROVIDE FOR INDIVIDUAL DOMESTIC WATER SERVICE AS WELL AS FIRE PROTECTION TO EACH TRACT PRIOR TO SALE OF EACH TRACT AND PRIOR TO ISSUANCE OF A BUILDING PERMIT FOR EACH TRACT.

(11) THE PROPERTY OWNERS WITHIN THIS PLAT SHALL BE HELD RESPONSIBLE FOR KEEPING OPEN AND MAINTAINING THE SURFACE PATH OF NATURAL OR MAN MADE DRAINAGE FLOW AND ACROSS THEIR RESPECTIVE LOTS. IF THE PROPERTY OWNER(S) FAIL TO MAINTAIN THE SURFACE PATH OF NATURAL OR MAN MADE DRAINAGE FLOW, OR THE DRAINAGE SWALE, A NOTICE OF SUCH FAILURE MAY BE GIVEN TO THE PROPERTY OWNER(S). IF NOT CORRECTED WITHIN THE PERIOD INDICATED ON SAID NOTICE, SPOKANE COUNTY HAS THE RIGHT TO CORRECT THE MAINTENANCE FAILURE, OR HAVE IT CORRECTED, AT THE EXPENSE OF THE PROPERTY OWNER.

THERE MAY EXIST PROPERTIES LOCATED UPHILL AND ADJACENT TO THIS SUBDIVISION, WHICH PERIODICALLY DISCHARGE STORMWATER RUNOFF ONTO INDIVIDUAL LOTS WITHIN THIS PLAT. RUNOFF FROM NEARBY UPHILL PROPERTIES SHOULD BE EXPECTED, AND DURING SNOWMELT PERIODS OR WET SEASONS THE LOTS MAY BE SUBJECT TO HIGHER AMOUNTS OF STORMWATER RUNOFF THAN WHAT IS NORMALLY OBSERVED OR ANTICIPATED. BECAUSE STORMWATER RUNOFF FROM ADJACENT PROPERTIES HAVE DISCHARGED ONTO THIS PLAT PRIOR TO DEVELOPMENT, STORMWATER RUNOFF WILL LIKELY CONTINUE TO DO SO AFTER DEVELOPMENT. IT IS THE RESPONSIBILITY OF THE INDIVIDUAL LOT OWNERS TO MAINTAIN EXISTING SURFACE PATHS OF RUNOFF THROUGH THEIR RESPECTIVE LOTS AND TO GRADE THE LOTS IN ACCORDANCE WITH APPLICABLE RULES AND REGULATIONS, SO AS TO PREVENT PROPERTY DAMAGE.

ANY BUILDING THAT IS CONSTRUCTED ON A LOT IN THIS PLAT SHALL BE SET AT SUCH AN ELEVATION, SO AS TO PROVIDE POSITIVE DRAINAGE AWAY FROM ANY DRAINAGE ENTRY POINT TO THE BUILDING (INCLUDING BUT NOT LIMITED TO A WINDOW WELL, A WINDOW UNPROTECTED BY A WINDOW WELL, OR A DOORWAY) SAID POSITIVE DRAINAGE SHALL CONSIST OF A MINIMUM SLOPE OF 3% AWAY FROM THE BUILDING FOR A DISTANCE OF AT LEAST 10 FEET FROM THE BUILDING. THE LOTS SHALL BE GRADED SO THAT EITHER (A) ALL RUNOFF IS ROUTED AWAY FROM THE BUILDING AND CONVEYED OVER THE LOT TO A NATURAL DRAINAGE SWALE OR APPROVED DRAINAGE FACILITY, OR (B) DRAINAGE INTERCEPTED ON THE LOT IS DISPOSED OF ON THE LOT IN AN APPROVED DRAINAGE FACILITY. THE APPROVED DRAINAGE FACILITY SHALL BE CONSTRUCTED IN ACCORDANCE WITH ANY APPLICABLE ACCEPTED PLANS ON FILE AT THE COUNTY ENGINEER'S OFFICE. ANY REVISIONS TO THE ACCEPTED DRAINAGE PLANS MUST BE ACCEPTED BY THE COUNTY ENGINEER'S OFFICE PRIOR TO CONSTRUCTION OF SAID REVISIONS.

SPOKANE COUNTY DOES NOT ACCEPT THE RESPONSIBILITY OF MAINTAINING THE DRAINAGE COURSE ON PRIVATE LOTS OR FLOORPLAN AREAS WITHIN PRIVATE LOTS, NOR THE RESPONSIBILITY FOR ANY DAMAGE WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, INADEQUATE CONTRIBUTION TO ANY PROPERTIES DUE TO DEFICIENT CONSTRUCTION AND/OR MAINTENANCE OF DRAINAGE COURSES IN DRAINAGE EASEMENTS ON PRIVATE PROPERTY.

*Marion G. Bond* by *Drew A. Bond*  
MARGON G. BOND (by Drew A. Bond)  
*Drew A. Bond*  
DREW A. BOND  
*Carol A. Bond*  
CAROL A. BOND

ATTORNEY-IN-FACT ACKNOWLEDGMENT  
STATE OF WASHINGTON  
COUNTY OF SPOKANE  
On this 11th day of MARCH 2002, before me, *Drew A. Bond*, who, being by me duly sworn (affirmed), did say that he is the attorney-in-fact of Marion G. Bond, and that said instrument was signed on behalf of said Marion G. Bond, by authority, and said Drew A. Bond consented to me to be his such attorney-in-fact executed the same.  
*Drew A. Bond*  
Notary Public  
My Commission expires July 1, 2003

ACKNOWLEDGMENT  
STATE OF WASHINGTON  
COUNTY OF SPOKANE  
On this 11th day of MARCH 2002, before me, a notary public in and for said State of Washington, personally appeared *Drew A. Bond* and *Carol A. Bond* known to me to be the persons who executed the within and foregoing instrument and acknowledged the same to be their free and voluntary act and deed for the uses and purposes herein mentioned.  
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.  
*Drew A. Bond*  
Notary Public  
My Commission expires July 1, 2003

SURVEYOR'S CERTIFICATE  
This Map correctly represents a survey made by me or under my direction in conformance with the requirements of the Survey Recording Act and the Spokane County Subdivision Ordinance of the State of Washington.  
In Nov. 2001  
James W. Johnson, PLS  
Certificate No. 2412

EQUIPMENT AND PROCEDURES  
A 10" Total Station with a 814' Dist. of 3mm and a PPM of 3 were used for measurements. Radial Procedures were used which normally produce accuracies better than 1:5,000  
K.A. DIRTSCHEL & ASSOC., INC.  
LAND SURVEYING  
P.O. BOX 700  
9751 GOV'T WAY, SUITE 5  
MAYCEN LAKE, IDAHO 83855  
JOB #2080 FILE: ACAD/2000/2080.DWG

SPOKANE COUNTY AUDITOR  
FILED FOR RECORD THIS 11th DAY OF MARCH 2002  
AT THE CITY OF SPOKANE, IDAHO  
AT THE REQUEST OF *Drew A. Bond* & *Carol A. Bond*  
*Marion G. Bond*  
SPOKANE COUNTY AUDITOR

SPOKANE COUNTY ENGINEER  
EXAMINED AND APPROVED THIS 11th DAY OF MARCH 2002  
*Drew A. Bond*  
SPOKANE COUNTY ENGINEER

SPOKANE REGIONAL HEALTH DISTRICT  
EXAMINED AND APPROVED THIS 11th DAY OF MARCH 2002  
*Drew A. Bond*  
SPOKANE REGIONAL HEALTH OFFICER

SPOKANE COUNTY TREASURER  
I HEREBY CERTIFY THAT THE REQUIRED TAXES ON THE HEREON PLATTED LAND HAVE BEEN FULLY PAID THIS 11th DAY OF MARCH 2002  
*Drew A. Bond*  
SPOKANE COUNTY TREASURER  
BY DEPUTY *Drew A. Bond*

SPOKANE COUNTY DIVISION OF PLANNING  
EXAMINED AND APPROVED THIS 11th DAY OF MARCH 2002  
*Drew A. Bond*  
DIRECTOR OF PLANNING

SPOKANE COUNTY ASSESSOR  
EXAMINED AND APPROVED THIS 11th DAY OF MARCH 2002  
*Drew A. Bond*  
SPOKANE CO. ASSESSOR BY DEPUTY

SPOKANE COUNTY UTILITIES  
EXAMINED AND APPROVED THIS 11th DAY OF MARCH 2002  
*Drew A. Bond*  
SPOKANE COUNTY UTILITIES DIRECTOR

SPOKANE COUNTY SHORT PLAT 1227-00  
SE 1/4 S27 T27N R41E

# APPENDIX B

**246-272A-0210****Location.**

(1) Persons shall design and install OSS to meet the minimum horizontal separations shown in Table IV, Minimum Horizontal Separations:

**Table IV**  
**Minimum Horizontal Separations**

Items Requiring Setback	From edge of soil dispersal component and reserve area	From sewage tank and distribution box	From building sewer, and nonperforated distribution pipe
Well or suction line	100 ft.	50 ft.	50 ft.
Public drinking water well	100 ft.	100 ft.	100 ft.
Public drinking water spring measured from the ordinary high-water mark	200 ft.	200 ft.	100 ft.
Spring or surface water used as drinking water source measured from the ordinary high-water mark <sup>1</sup>	100 ft.	50 ft.	50 ft.
Pressurized water supply line	10 ft.	10 ft.	10 ft.
Decommissioned well (decommissioned in accordance with chapter <u>173-160</u> WAC)	10 ft.	N/A	N/A
Surface water measured from the ordinary high-water mark	100 ft.	50 ft.	10 ft.
Building foundation/in-ground swimming pool	10 ft.	5 ft.	2 ft.
Property or easement line	5 ft.	5 ft.	N/A
Interceptor/curtain drains/foundation			

Items Requiring Setback	From edge of soil dispersal component and reserve area	From sewage tank and distribution box	From building sewer, and nonperforated distribution pipe
drains/drainage ditches			
Down-gradient <sup>2</sup> :	30 ft.	5 ft.	N/A
Up-gradient <sup>2</sup> :	10 ft.	N/A	N/A
Other site features that may allow effluent to surface			
Down-gradient <sup>2</sup> :	30 ft.	5 ft.	N/A
Up-gradient <sup>2</sup> :	10 ft.	N/A	N/A
Down-gradient cuts or banks with at least 5 ft. of original, undisturbed soil above a restrictive layer due to a structural or textural change	25 ft.	N/A	N/A
Down-gradient cuts or banks with less than 5 ft. of original, undisturbed soil above a restrictive layer due to a structural or textural change	50 ft.	N/A	N/A
Other adjacent soil dispersal components/subsurface stormwater infiltration systems	10 ft.	N/A	N/A

- 1 If surface water is used as a public drinking water supply, the designer shall locate the OSS outside of the required source water protection area.
- 2 The item is down-gradient when liquid will flow toward it upon encountering a water table or a restrictive layer. The item is up-gradient when liquid will flow away from it upon encountering a water table or restrictive layer.

(2) If any condition indicates a greater potential for contamination or pollution, the local health officer may increase the minimum horizontal separations. Examples of such

conditions include excessively permeable soils, unconfined aquifers, shallow or saturated soils, dug wells, and improperly abandoned wells.

(3) The local health officer may allow a reduced horizontal separation to not less than two feet where the property line, easement line, in-ground swimming pool, or building foundation is up-gradient.

(4) The horizontal separation between an OSS dispersal component and an individual water well, individual spring, or surface water that is not a public water source can be reduced to a minimum of seventy-five feet, by the local health officer, and be described as a conforming system upon signed approval by the health officer if the applicant demonstrates:

(a) Adequate protective site-specific conditions, such as physical settings with low hydro-geologic susceptibility from contaminant infiltration. Examples of such conditions include evidence of confining layers and/or aquatards separating potable water from the OSS treatment zone, excessive depth to groundwater, down-gradient contaminant source, or outside the zone of influence; or

(b) Design and proper operation of an OSS system assuring enhanced treatment performance beyond that accomplished by meeting the vertical separation and effluent distribution requirements described in WAC 246-272A-0230 Table VI; or

(c) Evidence of protective conditions involving both (a) and (b) of this subsection.

(5) Persons shall design and/or install a soil dispersal component only if:

(a) The slope is less than forty-five percent (twenty-four degrees);

(b) The area is not subject to:

(i) Encroachment by buildings or construction such as placement of power poles and underground utilities;

(ii) Cover by impervious material;

(iii) Vehicular traffic; or

(iv) Other activities adversely affecting the soil or the performance of the OSS.

(c) Sufficient reserve area for replacement exists to treat and dispose one hundred percent of the design flow;

(d) The land is stable; and

(e) Surface drainage is directed away from the site.

(6) The local health officer may approve a sewer transport line within ten feet of a water supply line if the sewer line is constructed in accordance with section C1-9 of the department of ecology's "*Criteria For Sewage Works Design*," December 1998.

[Statutory Authority: RCW 43.20.050. WSR 05-15-119, § 246-272A-0210, filed 7/18/05, effective 7/1/07.]

# APPENDIX C

1 can show no harm beyond the current use of the easement from Parcel 2, Hanna may  
2 continue to use the 40 foot easement from the Wickholm property.

3 23. MODIFICATION OF SHORT PLAT EASEMENT. Hanna desires to shorten the width  
4 of the only easement showing on Short Plat 1227 (40 foot wide easement) to a 20 foot  
5 easement. Hanna seeks a declaration from the court that the only method for altering or  
6 modifying an easement on a short plat is pursuant to RCW 58.17 and with the approval of  
7 Spokane County Building and Planning pursuant to Spokane County Code. Hanna also  
8 desires to move the current easement on Short Plat 1227 to his adjacent and contiguous  
9 Wickholm property. This move and desire by Hanna will also require compliance with  
10 RCW 58.17 and approval from Spokane County Building and Planning pursuant to  
11 Spokane County Code.  
12

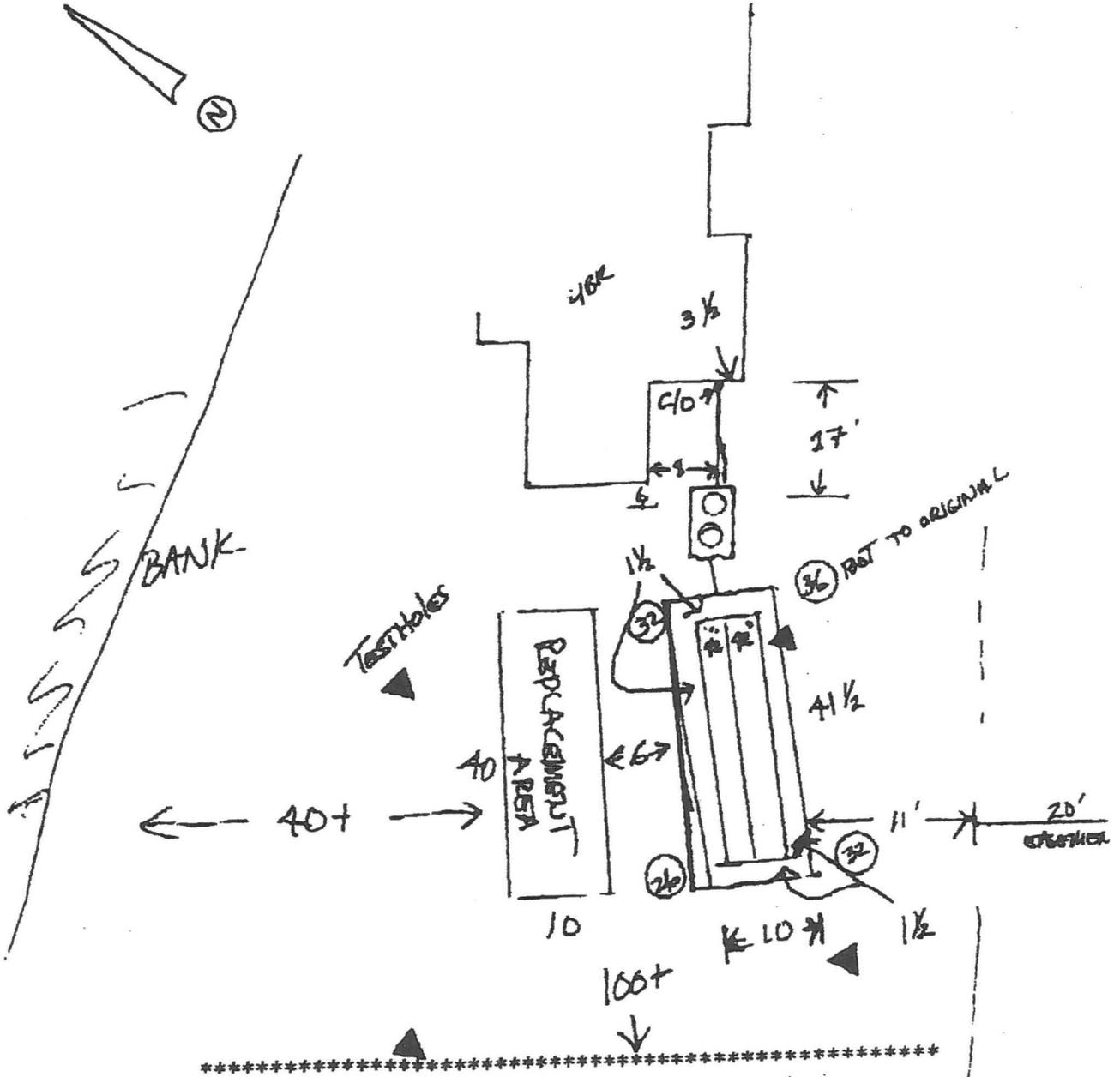
13  
14 24. EASEMENTS IN RIPARIAN BUFFER AREAS. Spokane County Code designates a  
15 Riparian Buffer Area in Short Plat 1227. (Chapter 11.20 "Critical Areas", Spokane  
16 County Code). This designation grows out of Washington's Growth Management Act,  
17 RCW 36.70A.172. Spokane County Code also requires the submission of a habitat  
18 management plan and mitigation plan for all roads located within a critical Riparian  
19 Buffer Area. Further, all roads within a buffer area cannot run parallel to any water body  
20 and can run only at right angles. Margitan claims an easement in a Riparian Buffer Area  
21 without compliance with state statute or Spokane County Code. If such an easement  
22 exists, in the alternative, current use of such an easement by Margitan burdens the  
23 easement and is therefore trespass. Margitan has also constructed a residence in the  
24 Riparian Buffer Area without county approval and outside the area designated in the  
25

26  
27  
28 AMENDED COMPLAINT FOR QUIET TITLE

**PERDUE LAW FIRM**  
41 Camino De Los Angelitos  
Galisteo, New Mexico 87540  
(509) 624-6009  
perduelaw@me.com

# APPENDIX D

### AS BUILT



Installed by Larry Cook Excavating Inc

HANNA / 02-4270 / 14418 W CHARLES RD / 3-11-03

S 3/27/03

# APPENDIX E

When Recorded Return To:

Michelle K. Fossum, P.S.  
528 E. Spokane Falls Blvd., Suite 502  
Spokane, WA 99202

## AGREEMENT

This Agreement is entered into between Mark and Jennifer Hanna [collectively referred to as "Hanna"] and Spokane Regional Health District ["SRHD"].

### I. RECITALS

1.1 On June 6, 2002, Hanna submitted Application For On-Site Sewage System No. 02-4270 to SRHD. Hanna sought to install a septic tank and drain field on property located at 14418 W. Charles Road in Nine Mile Falls, Washington [the "Subject Property"].

1.2 The proposed septic tank and drain field drawing submitted to SRHD indicated there was a 20 foot easement running along the southern side of the Subject Property. Based on SRHD's review of the design plan submitted, SRHD issued Permit No. 02-4270 on January 10, 2003.

1.3 On or about March 11, 2003, Hanna submitted an As-Built drawing for the septic tank and drain field for Permit No. 02-4270. The As-Built drawing also reflects that there is a 20 foot easement running along the southern side of the Subject Property.

1.4 In July 2013, SRHD was made aware that instead of a 20 foot easement, the Subject Property was subject to a 40 foot easement along the southern side of the property. The existing drain field is partially within the 40 foot easement.

1.5 Spokane County Short Plat 1227-00 identifies the 40 foot easement as being for ingress, egress and utilities, and provides the corresponding legal description.

1.6 SRHD has also been made aware that there may be other easements located on the Subject Property. The existence and location of those other easements is currently being litigated in the matter of *Mark and Jennifer Hanna v. Allan and Gina Margitan, Spokane County Superior Court Cause No. 12-2-04045-6*.

1.7 WAC 242-272A-0210 mandates that a drain field be set back at least five feet from any easement line.

1.8 SRHD has notified Hanna that the location of the drain field on the Subject Property may constitute a nonconforming on-site sewage system.

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1.9 There is currently no imminent public health risk presented by existence of the drain field within an easement.

## II. TERMS

Based on the above, the parties agree as follows:

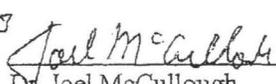
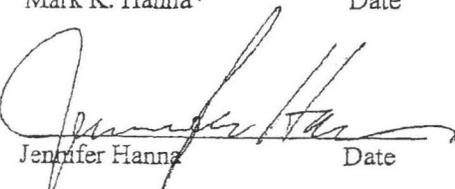
2.1 Within thirty (30) days of the conclusion of the litigation regarding the existence and location of the easements on the Subject Property, Hanna shall submit an Application to SRHD to relocate the septic system or otherwise bring the on-site sewage system into compliance with the rules and regulations existing at the time of application.

2.2 Within sixty (60) days of SRHD's approval of the Application for a Permit described in paragraph 2.1 above, Hanna will complete the installation of a conforming system.

2.3 It is further agreed that if at any time it appears to SRHD that there is a public health risk resulting from the nonconforming on-site sewage system, SRHD may require immediate corrective action from Hanna notwithstanding the terms of this Agreement.

2.4 It is acknowledged by the parties that the basis for this Agreement is the current uncertainty regarding the existence and location of all easements on the Subject Property making it impossible to determine whether relocation of the drain field will comply with setback and other legal requirements until the Court has made a determination on that existence and location of all Easements impacting the Subject Property.

2.5 This Agreement shall be recorded with and made of record in Spokane County.

 Mark K. Hanna	<u>10/17/13</u> Date	 Dr. Joel McCullough	<u>10/18/13</u> Date
		Health Officer, Spokane Regional Health District	
 Jennifer Hanna	<u>10/17/13</u> Date		

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# APPENDIX F

When Recorded Return To:

Michelle K. Fossum, P.S.  
528 E. Spokane Falls Blvd., Suite 502  
Spokane, WA 99202

## AGREEMENT

This Agreement is entered into between Mark and Jennifer Hanna [collectively referred to as "Hanna"] and Spokane Regional Health District ["SRHD"].

### I. RECITALS

1.1 On June 6, 2002, Hanna submitted Application For On-Site Sewage System No. 02-4270 to SRHD. Hanna sought to install a septic tank and drain field on property located at 14418 W. Charles Road in Nine Mile Falls, Washington [the "Subject Property"].

1.2 The proposed septic tank and drain field drawing submitted to SRHD indicated there was a 20 foot easement running along the southern side of the Subject Property. Based on SRHD's review of the design plan submitted, SRHD issued Permit No. 02-4270 on January 10, 2003.

1.3 On or about March 11, 2003, Hanna submitted an As-Built drawing for the septic tank and drain field for Permit No. 02-4270. The As-Built drawing also reflects that there is a 20 foot easement running along the southern side of the Subject Property.

1.4 In July 2013, SRHD was made aware that instead of a 20 foot easement, the Subject Property was subject to a 40 foot easement along the southern side of the property. The existing drain field is partially within the 40 foot easement.

1.5 Spokane County Short Plat 1227-00 identifies the 40 foot easement as being for ingress, egress and utilities, and provides the corresponding legal description.

1.6 SRHD has also been made aware that there may be other easements located on the Subject Property. The existence and location of those other easements is currently being litigated in the matter of *Mark and Jennifer Hanna v. Allan and Gina Margitan, Spokane County Superior Court Cause No. 12-2-04045-6*.

1.7 WAC 242-272A-0210 mandates that a drain field be set back at least five feet from any easement line.

1.8 SRHD has notified Hanna that the location of the drain field on the Subject Property may constitute a nonconforming on-site sewage system.

0050

1.9 There is currently no imminent public health risk presented by existence of the drain field within an easement.

## II. TERMS

Based on the above, the parties agree as follows:

2.1 Within thirty (30) days of the conclusion of the litigation regarding the existence and location of the easements on the Subject Property, Hanna shall submit an Application to SRHD to relocate the septic system or otherwise bring the on-site sewage system into compliance with the rules and regulations existing at the time of application.

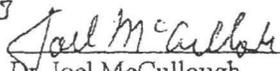
2.2 Within sixty (60) days of SRHD's approval of the Application for a Permit described in paragraph 2.1 above, Hanna will complete the installation of a conforming system.

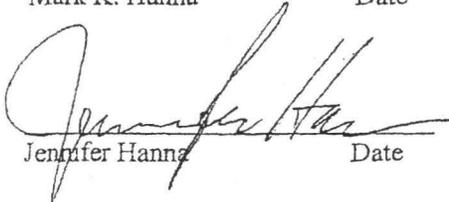
2.3 It is further agreed that if at any time it appears to SRHD that there is a public health risk resulting from the nonconforming on-site sewage system, SRHD may require immediate corrective action from Hanna notwithstanding the terms of this Agreement.

2.4 It is acknowledged by the parties that the basis for this Agreement is the current uncertainty regarding the existence and location of all easements on the Subject Property making it impossible to determine whether relocation of the drain field will comply with setback and other legal requirements until the Court has made a determination on that existence and location of all Easements impacting the Subject Property.

2.5 This Agreement shall be recorded with and made of record in Spokane County.

  
Mark K. Hanna                      Date                      10/17/13

  
Dr. Joel McCullough                      Date                      10/18/13  
Health Officer, Spokane Regional  
Health District

  
Jennifer Hanna                      Date                      10/17/13

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# APPENDIX G



**INSPECTION RESULTS**

Spokane County Building and Planning  
1026 W Broadway Avenue, Spokane WA 99260  
(509) 477-3675  
www.spokanecounty.org/bp

Report run on 09-03-2014 16:15:46

Application # RH-11004657 Parcel # 17274.9110 Application Type RESIDENTIAL ADDITION  
Project Descr DEMOLISH A PORTION OF & REBUILD A PORT Site Address 14404 W CHARLES RD NINE MILE FALLS

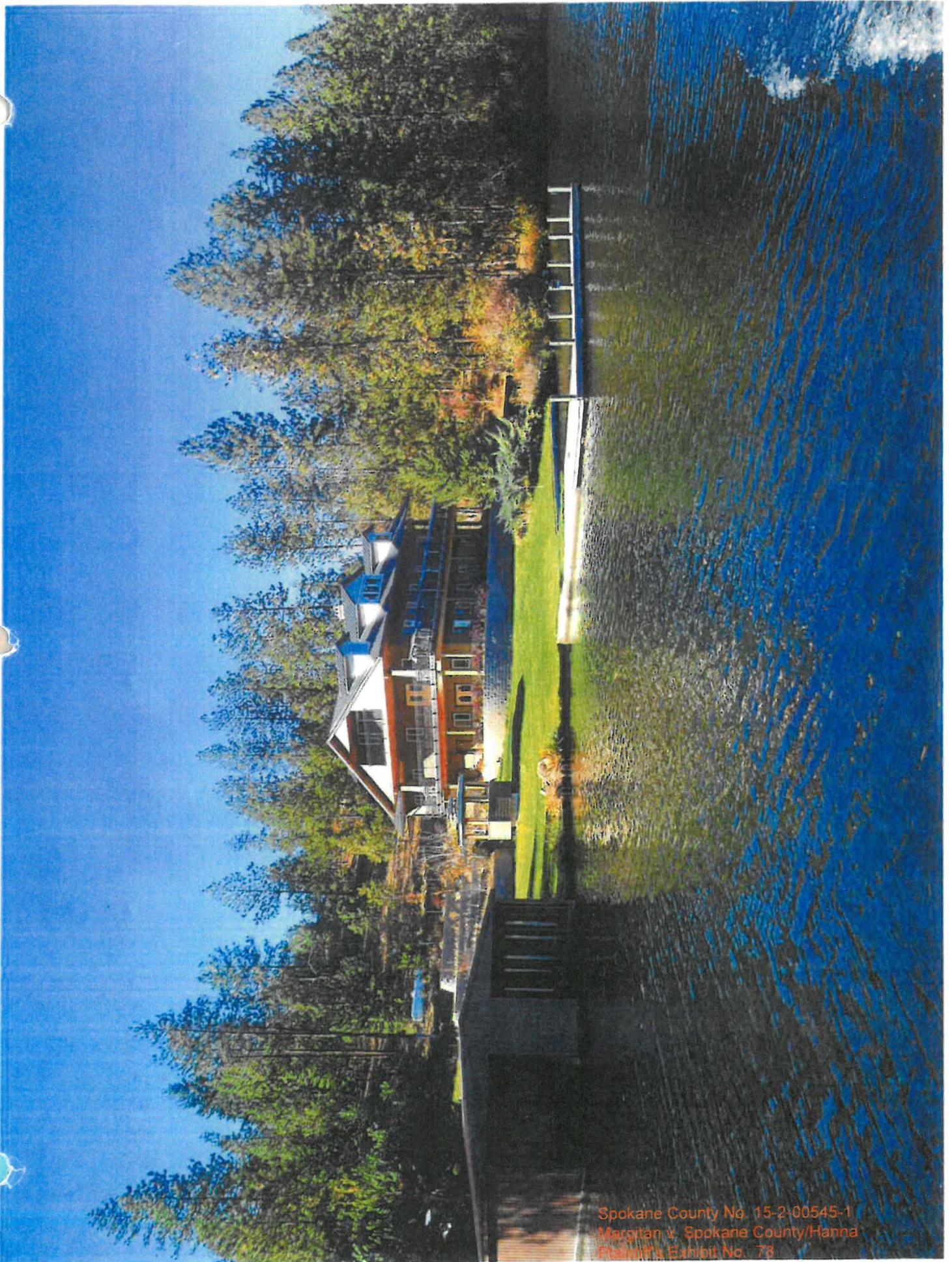
Inspector Inspection Type Date Status Comments  
Tim Utley FINAL 03-Sep-14 Requires Reinspect

Action Description Status Status Date  
Task Description Status Comments  
Inspection Notes Violations found

1) You have notified us of encroachment of a septic drain field into the restricted zone of your water supply line which you claim endangers your potable water supply. You have also provided us corroboration of the issue through copies of SRHD documentation. A Certificate of Occupancy can be issued upon receipt of documentation (SRHD and/or water purveyor) accepting the waterline and it's adequacy for residential use.

Required Correction:

# APPENDIX H



Spokane County No. 15-2-00545-1  
Margitan v. Spokane County/Hanna  
Plaintiff's Exhibit No. 78

Disposition: \_\_\_\_\_

# APPENDIX I

**Jon Sherve**

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**From:** Turner, Leslie C (DOH) <Leslie.Turner@DOH.WA.GOV>  
**Sent:** Friday, June 24, 2016 12:23 PM  
**To:** Jon Sherve; Simmons, Jeremy J (DOH)  
**Subject:** Easement waiver response

Hello John,

Thank you for contacting us regarding the waiver request you have received. You have requested that we review it for consistency with Chapter 246-272A WAC – On-site Sewage Systems. WAC 246-272A-0420 Waiver of state regulations gives the local health officer the authority to grant a waiver from specific requirements of this chapter. Of point here is the issue of a drain field in a legally declared utility easement. My concerns are:

1. WAC 246-272A-0210 (3) gives the local health officer the authority to reduce horizontal separation to not less than two feet from an easement line. Apparently the drain field is approximately 6 feet into a legally declared easement.
2. The easement is a legal document which is not under the authority of WAC 246-272A. The waiver process in WAC 246-272A cannot be used to waive specific requirements in a distinct legal document.

Please let me know if you have any questions.

Leslie

*Leslie Turner, RS  
Department of Health, Environmental Public Health  
PO Box 47824  
Olympia, WA 98504-7824  
Phone: 360-236-3043 Fax: 360-236-2257  
Leslie.Turner@doh.wa.gov*

*Public Health- Always Working for a Safer and Healthier Washington*

# APPENDIX J

December 4, 2013

Allan Margitan:  
P.O. Box 328  
Nine Mile Falls, WA 99206

Re: *Letter Received 12/02/13*

Dear Mr. Margitan:

I am legal counsel for Spokane Regional Health District. Your letter dated November 29, 2013 that was received by the District on December 2, 2013 has been referred to me for a response. Please direct further communication regarding the issues in your letter to my attention.

Thank you for your report of the testimony during the recent deposition of Mark Hanna. If you would like SRHD to consider that testimony, please provide a written transcript of the deposition prepared by the court reporter. While I am sure your recitation is accurate, I hope you understand that SRHD would need to see an official transcription of the testimony. However, SRHD does not agree to bear any expense associated with the deposition or preparation of the transcript.

SRHD is not willing to post a bond for the protection of you and your guests. Nor will SRHD bear any financial responsibility should you choose to have your water turned off.

With respect to your request for public records, please be advised that SRHD will need some additional time to locate the requested information and prepare an exemption log if appropriate. SRHD anticipates that the documentation will be ready for review on Friday, December 13, 2013. When the records are ready, you will be contacted to coordinate a mutually agreeable date and time for review at my office. If the above time estimate for the document production changes, you will be notified.

Regards,

**MICHELLE K. FOSSUM, P.S.**

Michelle K. Fossum

cc: [redacted], SRHD

SCHLMARGITAN.LT.DOC

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