

CASE NO. 29204-5-III

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

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WILLIAM DAVIS and JAMES F. BENTHIN,

Appellants,

v.

CITY OF SPOKANE, and KONSTANTIN VASILENKO,

Respondents.

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**APPELLANTS' OPENING BRIEF**

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## **I. INTRODUCTION**

Neighbors James F. Benthin and William Davis appeal a Memorandum Decision of the Spokane County Superior Court, Judge Kathleen O'Connor, which affirmed the City of Spokane Hearing Examiner.

The Petitioners originally filed an appeal of the decision by the City of Spokane Planning Director approving a conditional use permit under the City's new Cottage Housing Ordinance. That appeal was heard by the Hearing Examiner on June 25, 2009 and a decision was rendered on July 9, 2009. The Hearing Examiner affirmed the City Planning Director's approval of the conditional use permit.

Benthin and Davis filed a Land Use Petition (RCW 36.70C "LUPA") in the Spokane County Superior Court on July 6, 2010. In matters involving LUPA actions, the court independently reviews the agency record. *Twin Bridge Marine Park, LLC v. Dep't of Ecology*, 162 Wn.2d 825, 834, 175 P.3d 1050 (2008). The Superior Court affirmed the City Hearing Examiner at a hearing wholly on the Certified Record.<sup>1</sup>

## **II. STANDARDS OF REVIEW**

The Land Use Petition Act, RCW 36.70C ("LUPA") governs judicial review of Washington land use decisions. *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 467, 61 P.3d 1141 (2003). The Court of Appeals "review[s] the factual record before the hearing examiner, as the

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<sup>1</sup> Pursuant to RCW 36.70C.110(1), the City Hearing Examiner certified an accurate transcript and record of the matter, dated September 17, 2009. This Appeal Packet is cited as "Record" Rec. p.22.

hearing examiner is the local jurisdiction's body or officer for this case with the highest level of authority to make a land use determination.” *Lauer and Tienne v Pierce County*, 38321 - 7 -II (WACA).

Under LUPA, we stand in the shoes of the superior court and limit our review to the record. *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wash.2d 279, 288, 87 P.3d 1176 (2004). As the party seeking relief from the land use decision, neighbors Davis and Benthin bear the burden of meeting one of RCW 36.70C.130(1)'s six standards of review. *Pinecrest*, 151 Wash.2d at 288, 87 P.3d 1176.

Given the facts of this case, RCW 36.70C.130, subsections (1)(b),(c) and (d) are relevant here. Those standards state:

- (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
- (d) The land use decision is a clearly erroneous application of the law to the facts.

Subsection (b) presents an issue of law, which the court reviews *de novo*.

Subsection (c) concerns factual determinations, which the court reviews for substantial evidence. Subsection (d) requires the court to employ a

clearly erroneous standard of review. *Cingular Wireless, LLC v. Thurston County*, 131 Wn.App. 756, 768 (2006).

The Court of Appeals reviews errors of law *de novo* and reviews the City's decision as a whole for substantial evidence supporting the decision. *City of University Place v. McGuire*, 144 Wash.2d 640, 647, 30 P.3d 453 (2001). *Curhan v Chelan County*, 156 Wn.App. 30, 35, 230 P.3d 383 (Wash.App. Div. 3 2010).

### **III. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO**

A. Assignment of Error No. 1. The Hearing Examiner's decision erroneously interpreted the Cottage Housing Ordinance to permit a unified multi-family rental development. RCW 36.70C.130(1)(b).

1. Issue No. 1. Whether Low Income Rental Units is a permitted use under the Cottage Housing Code.

2. Issue No. 2. Multi-family Housing is Not Permitted in a Cottage Housing Permitted Zone.

3. Issue No. 3. Whether the Code requirement of a homeowner's association means that there must be individually owned houses.

B. Assignment of Error No. 2 Does the permit for only two twelve unit parcels defy the Cottage Housing Code description of lot sizes as 600

square feet on the main floor plus 250 square feet of private area surrounding each cottage.

C. Assignment of Error No. 3. The Hearing Examiner's decision that the conditional use is compatible with the neighborhood is not supported by substantial evidence. RCW 36.70C.130(1)(c). The Appellants assign error to the Hearing Examiner's Findings of Fact that the conditional use permit is compatible with the neighborhood. The Appellants further assign error to the Hearing Examiner's Finding of Fact that the surrounding property will not suffer adverse impacts. The Appellants assign error to the Hearing Examiner's Finding of Fact that "no evidence" on impact to property values was submitted.

1. Issue No. 1. *Land Use Petition, Article VII, paragraph 7* [CP-9]: Cottage housing is incompatible with the neighborhood.

2. Issue No. 2. Did the Hearing Examiner make an error of law in not applying rule of collateral estoppel to the facts?

3. Issue No. 3. This development as proposed *violates* the following: Spokane Municipal Code specifically 17G.060.170

4. Issue No. 4. Advise impacts on open space and traffic.

D. Assignment of Error No. 4. The Hearing Examiner erroneously found no adverse impact by virtue of the Boundary Line Adjustment law

for inclusion of two City-owned pieces of property in a single developer's lot, and failed to find that the BLA erroneously included ten and one-half feet of City right of way, for its full length.

E. Assignment of Error No. 5. The Hearing Examiner erred when he refused to apply the aggregation rule under the Development Code to the actual facts of the "two" parcels' design, construction and use as one. RCW 36.70C.130(1)(d).

#### IV. STATEMENT OF THE CASE

This time around, the developer, Konstantin Vasilenko, proposed 24 stand-alone rental "houses" on two parcels, at least 12 of which shall not exceed 650 square feet, with 200 square feet yard under the new and novel "**cottage housing**" *Section 17C.110.350 of Title 17C Land Use Standards* of the Spokane City Code.

In a decision dated May 8, 2009, David Compton, City Planner (hereinafter "Decisionmaker") granted an administrative conditional use permit to Konstantin Vasilenko (hereinafter "Applicant") for a 24 unit cottage housing development on property located at 3405 and 3431 South Cook Street in the City of Spokane, Washington ... Cottage style housing is a new type of housing which has been added to the City's most recent Residential Zoning Regulations update. See generally SMC 17C.110.350. *City of Spokane Hearing Examiner Findings and Conclusions, Record #00012.*

The purpose and intent of "Cottage Housing" is to provide smaller than average size homes, allowing higher residential density than is normally allowed. *SMC Section 17C.110.350(A) Purpose and Intent.*

The neighboring homeowners' opposition and their appeal of the specific proposal stems from the overall scheme that this is an "end-run" on a use already denied in Vasilenko's prior application for a 33-unit apartment building. In 2008, a 33-unit apartment complex proposal on the same location by the same developer was denied by the Staff and City Council based primarily on rentals being incompatibility with the neighborhood. The proponent now rises again with the same multi-family rental use only in a different configuration which misfits under the fundamental concepts of cottage housing, is still incompatible with the neighborhood and fails to comply with Boundary Line Adjustment and State subdivision laws.

## **V. ARGUMENT**

A. Assignment of Error No. 1. The Hearing Examiner's decision erroneously interpreted the Cottage Housing Ordinance to permit a unified multi-family rental development, and failed to meet the standard of RCW 36.70C.130(1) which provides in relevant part:

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise.

1. Issue No. 1. Whether Low Income Rental Units is a permitted use under Cottage Housing Code.

That the applicant continued to pursue a Developer-owned rental housing plan is verified by the developer's Application for Approval of an Administrative Conditional Use Permit (Type II) from the City Planning Director which describes a developer owned single rental project:

I. SUMMARY OF REQUEST AND RECOMMENDATIONS:

DESCRIPTION OF PROPOSAL: The applicant, Konstantin Vasilenko, has requested approval of an Administrative Conditional Use Permit (Type II) from the City Planning Director to allow the construction of a 24 unit cottage housing development on property located at 3405 & 3431 S. Cook Street in the City of Spokane, WA. *Staff Report on Conditional Use Permit File No. Z2009-012-CUP2, Record #000119.*

The City Staff Report unabashedly discloses the low income rental housing component:

Of special note, financing for the first stage of construction for the Southeast Cottage Homes project includes Federal HOME funds from the City of Spokane. The conditions of the HOME funds include limits on rents and tenant household incomes. The seven HOME-assisted units include three that must be affordable to households at or below 50% of the area median income (AMI) and four that must be affordable to households at or below 30% of AMI for at least 20 years. Fifty percent of the 2009 AMI is \$30,100 for a four-person household. Thirty percent of the 2009 AMI is \$18,050 for a four-person household. *Staff Report on Conditional Use Permit File No. Z2009-012-CUP2, Record #000122.*

Not only the City Staff Report, but further, the City's own oral testimony before the Hearing Examiner confirms the restricted rental use of the proposal:

Melora Sharts. I'm with the Community Development department. I deal with the Federal funds that flow through the City for affordable housing ... The **units would have to be rental properties for 20 years** and they're restricted to household incomes of 50% and 30% of the area median income. *Verbatim Transcript, June 25, 2009, (Sharts) Record #000035. Emphasis added.*

Many neighbors testified at the hearing:

So really what we are talking about is rentals within the middle of our single residential family neighborhood. *Verbatim Transcript, June 25, 2009, (Hilderbrand) Record #000030.*

... this development is to be planned as owner occupied condominium type units, however given the current state of the economy there is no guarantee that these units will indeed be owner occupied. *Verbatim Transcript, June 25, 2009, (Hilderbrand) Record #000030.*

Let me articulate what this proposed "Cottage Housing" development really is: a deceptive way to simply build a commercial/rental project in the middle of our single-family residential neighborhood. *Letter by Natalie A. Hilderbrand, Record #000079.*

2. Issue No. 2. Multi-family Housing is Not Permitted in a Cottage Housing Permitted Zone.

"Cottage Housing is allowed by Type II permit in the RA and RSF zones ...." *SMC 17C.110.350(c).*

“Cottage Housing” developments around the state are zoned for medium density. This property is not. *Letter by Natalie A. Hilderbrand, Record #000080.*

Those two zones are “Residential Agricultural – RA” and “Residential Single Family – RSF.” *SMC 17C.110.020. List of residential zones.* Residential Multi-family is “RMF.” *Id.*

Cottage Housing is not permitted in the multi-family zone. Apartments and condominiums are listed in the RMF Zone.

Uses are assigned to the category whose description most closely describes the nature of the use. *SMC 17C.190.030(A)(1).*

3. Issue No. 3. Whether the Code requirement of a homeowner’s association means that there must be individually owned houses.

An initial fundamental precept of cottage housing is that units will be **owner** occupied. The Ordinance requires and describes the “homeowners association.”

SMC 17C.110.350.C(2). A homeowners association is required to be created for the maintenance of the open space, parking area and common use buildings.

“A Homeowners’ Association is required to be created ....” *Staff Report, page 124, No. 3.* There is no evidence that a homeowner’s

association was created at the time of the Hearing Examiner's Decision.

There is no Finding of this Fact.

In addition to oral testimony, the Record contains one of the neighbor objections filed electronically, by email to the City Planning

Director:

From: John Martin ([jmartin2641@spamarrest.com](mailto:jmartin2641@spamarrest.com))  
Sent: Thursday, April 30, 2009 11:53 PM  
To: Compton, David  
Subject: File number Z2009-012-CUP2

This Municipal Code section also mandates, in subsection C.2., a homeowner's association. Additionally, your trip distribution letter for this application states that the units are to be owner-occupied. But this same trip distribution letter states that these units will be allowed to be rental units. I see no justification for this. **You cannot have a homeowner's association if there are no homeowners. The intent of both documents is clear: cottage housing must be owner-occupied. Mr. Vasilenko's intent is also clear: he would not seek this rental variance if he did not want this development to be, in essence, an apartment complex.** Changing from 33 apartment units (Mr. Vasilenko's proposal and application a year ago) to 24 apartment units does little to change the **character** of this proposed development. It is still totally incompatible with the character of my RSF-zoned neighborhood. Mr. Vasilenko's application could also be denied on this basis alone, and should be. *Record Page #000424. Emphasis added.*

This "Cottage Housing" project is basically commercial [meaning multi-family rental] "in-filling" in an already established single-family residential neighborhood .... I understand the City's desire to approve this "Cottage Housing" project and bring this sort of "in-filling" development to Spokane but this proposed building site is simply not

appropriate for this development. “Cottage Housing” developments around the state are zoned for medium density. This property is not. *Letter by Natalie A. Hilderbrand, Record #000080.*

While “homeowner’s association” is not defined in *SMC 17C.110.350*, the term is used in context in state statutes. For example, RCW 46.61.419—Private Roads—Speed Enforcement, provides that:

State, local or county law enforcement personnel may enforce speeding violations under RCW 46.61.400 on private roads within a community organized under chapter 64.38 RCW if:

- (1) A majority of the homeowner’s association’s board of directors votes to authorize the issuance of speeding infractions on its private roads,
- (2) A written agreement regarding the speeding enforcement is signed by the homeowner’s association president,
- (3) The homeowner’s association has provided written notice to all of the homeowners describing the new authority to issue speeding infractions....

This language indicates a plurality of persons (“majority”) and “owners” not renters. The term is also used in the Planning Enabling Act, RCW 36.70A.165, but not defined, referring to a “*bona fide* homeowners association” of lots fronting a greenbelt.

RCW 61.34.020 under Definitions uses the term “homeowner” to refer to one who has “equity” in the dwelling property and “rights of **repurchase.**” RCW 61.34.020(a)(xi). *Emphasis added.*

Poignantly, RCW 61.34.020(a)(c) refers to an arrangement for “a distressed homeowner to **become** a lessee or tenant.”

If a statute's meaning is plain on its face, then we give effect to that plain meaning as an expression of legislative intent. *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004). We discern plain meaning not only from the provision in question, but also from closely related statutes and the underlying legislative purposes. *Murphy*, 151 Wn.2d 637 at 242.

This court interprets words in the Spokane Municipal Code according to rules of statutory construction, the “fundamental objective in statutory interpretation is to give effect to the legislature’s intent.” *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d, 1, 9-10, 43 P.3d 4 (2002).

B. Assignment of Error No. 2. Does the permit for only two twelve unit parcels defy the Cottage Housing Code description of lot sizes as 600 square feet on the main floor plus 250 square feet of private area surrounding each cottage?

*Land Use Petition, Article VII, paragraph 3* [CP-8]: The Conditional Use Permit does not create 24 individual legally described parcels under one of the exclusive state statutory methods of land

segregation: Subdivision by plat, by Binding Site Plan, by condominium, by short plat, by certificate of exemption or by Planned Unit Development. *Record #000004.*

*Land Use Petition, Article VII, paragraph 4 [CP-8]:* SMC 17C.110.350(D)(9)(c) provides that “cottage housing may be developed as condominiums.” The Conditional Use Permit issued by the City of Spokane Planning Department, and affirmed by the Hearing Examiner, does not attempt to comply with any condominium development statutes or ordinances. *Record #000004.*

*Land Use Petition, Article VII, paragraph 10 [CP-9]:* The cottage housing zoning regulations require 250 square feet of private area around each cottage. This Conditional Use Permit does not delineate or create those individual areas. *Record #000005.*

Real Property subdivision is governed by state law with certain authority granted to Counties, determined by sizes. The State preempts County Land Use Laws. RCW 58.17.*et.seq.* defines the only methods by which land may be subdivided to create a new lot(s). RCW 58.17.040 defines the only exceptions.

The purpose of Chapter 58.17 RCW is to provide a uniform process when property is divided in the State of Washington. RCW

58.17.010. *Zunino v. Rajewski*, 140 Wn.App. 215, 218, 165 P.3d 57 (2007).

RCW 58.17.030 requires that any subdivision of property comply with the requirements for approval of plats and subdivision before any division of property may be recorded. *Toulouse v. Board of Comm'rs*, 89 Wn.App. 525, 528, 949 P.2d 829 (1997).

*Land Use Petition, Article VII, paragraph 9* [CP-9]: The Conditional Use Permit does not comply with any subdivision regulation or ordinance or code creating individually owned homes, surveyed, segregated and in a form (legal description) sufficient for conveyance by deed to owners. *Record #000005*. Please see *Appendix A, Record 00068, and Appendix C, Record 00132* attached for convenience. Twenty-four lots are not mapped.

The Hearing Examiner made an error of law allowing the “24 units” with out survey, segregation or boundary lines.

I'm not sure that you and I read (RCW) 58.17.040 in the same way, as far as binding site plans but I understand your argument. *Verbatim Transcript, June 25, 2009, (Smith) Record #000026*.

“Cottage Housing” is not an exception under RCW 58.17.040 to the platting requirements of the land subdivision regime. Yet, please see the site map which is part of the Developer's Application, *Record #00068*,

or #000098, or #138 – not one of the cottage lots is surveyed or legally described or drawn. While this is likely so because it truly is a 24-unit rental project; the site map is not a “record of survey.” Even “divisions of property for lease” as provided for in RCW 58.17.040(5) or as provided for in RCW 58.17.040(7) “... shall be filed with the County Auditor with a record of survey.” RCW 58.17.035. One of the legislated purposes of RCW 58.17 is to require uniform monumenting of land subdivisions and conveyancing by adequate legal description.

While the cottage housing ordinance described a lot size as 600 square feet on the main floor plus 250 square feet surrounding the cottage, there is no measurement, survey perimeter or individual lot on the approved site map, *Record #000068* (or *Record #0098, or #132, or #138*).

Even to the argument that cottage housing is to be developed like condominiums, the Condominium or Horizontal Regime Act, RCW 64.32.100 begins:

Copy of survey map, building plans to be filed – Contents of plans. Simultaneously with the recording of the declaration there shall be filed in the office of the county auditor of the county in which the property is located a survey map of the surface of the land submitted to the provisions of this chapter showing the location or proposed location of the building or buildings thereon.

There also shall be filed simultaneously, a set of plans of the building or buildings showing as to each apartment:

- (1) The vertical and horizontal boundaries, as defined in RCW 64.32.010(1), in sufficient detail to identify and locate such boundaries relative to the survey map of the surface of the land by the use of standard survey methods;
  - (2) The number of the apartment and its dimensions;
  - (3) The approximate square footage of each unit;
- RCW 64.32.100

The land use decision appealed from here is a clearly erroneous application of the law RCW 36.70C.130(1) and should be reversed. The Conditional Use Permit (CUP) approval should be denied.

Under LUPA, the Court may affirm or reverse the land use decision under review or remand it for modification or further proceedings. RCW 36.70C.140. Because the failure to properly subdivide and create the lots prohibits the land use, the Court must reverse. “Laws of 1969, 1<sup>st</sup> Ex. Sess. Ch 271, 2(10), (1) and 17 provide that any parcel of land divided into 5 or more lots [here 24] must have a final plat of such subdivision filed of record.” *Sienkiewicz v. Smith*, 97 Wn.2d 711, 714, 649 P.2d 112 (1982).

C. Assignment of Error No. 3. The Hearing Examiner’s decision that the conditional use is compatible with the neighbor is not supported by substantial evidence. RCW 36.70C.130(1)(c). The Appellants assign error to the Hearing Examiner’s Findings of Fact that the conditional use permit is compatible with the neighborhood. The Appellants further assign error

to the Hearing Examiner's Finding of Fact that the surrounding property will not suffer adverse impacts. The Appellants assign error to the Hearing Examiner's Finding of Fact that "no evidence" on impact to property values was submitted.

1. Issue No. 1. *Land Use Petition, Article VII, paragraph 7 [CP-9]: Cottage housing is incompatible with the neighborhood. Record #000005.*

As a common theme throughout the extensive testimony, evidence and letters, the citizens substantiated **again**, that the current surrounding neighborhood is incompatible with multi-family rentals.

"Residential single family surrounds the entire site area." Staff Report, Findings of Fact, C. *Record #000120*. See also Finding of Fact, E., same *Record #000120*.

City Policy LU 1.3 and 5.5 encourages the character of single family neighborhoods to be "preserved," while directing higher intensity uses to the core designated centers and corridors. The core for Lincoln Heights planning has never been south of Southeast Boulevard but always north of the boulevard. The Lincoln Heights Specific Plan has always designated the area south of Southeast Boulevard as single-family residences. *Letter by Natalie A. Hilderbrand, Record #000081*.

In 2007, the Developer applied to the Spokane Plan Commission and subsequently to the City Council for an amendment of the land use plan map of the City's Comprehensive Plan from "Residential 4-10" to "Residential 15-30" for five parcels located at 3400 S. Southeast Blvd. *Ordinance No. C34263. Land Use Application Z 2007-073-LU.* The 33-unit rezone for apartment use was denied beginning with the City's Staff Report up through the final Spokane City Council decision.

The *Staff Report dated 3-26-08*, pp 9-10, analyzed and concluded:

- b. Map Changes: Changes to the land use plan map (and by extension, the zoning map) may only be approved if the proponent has demonstrated that all of the following are true:
  - i. The designation is in conformance with the appropriate location criteria identified in the comprehensive plan (e.g. **compatibility with neighboring land uses**, proximity to arterials, etc.);

Relevant facts: Two Comprehensive Plan Policies are applicable for this discussion:

Policy L.U. 1.3, "Single-Family Residential Areas," states: "Protect the character of single-family residential neighborhoods by focusing higher intensity land uses in designated centers and corridors."

Discussion: the city's residential neighborhoods are one of its most valuable assets. They are worthy of protection from the intrusion of incompatible land uses. Centers and corridors provide opportunities for complementary types of development and a greater diversity of residential densities. Complementary types of development may include places for neighborhood residents to work, shop, eat, and recreate.

Development of these used in a manner that avoids negative impacts to surrounds is essential. Creative mechanisms, including design standers, must be implemented to address these impacts so the potential conflicts are avoided.

The location of this proposed amendment is within five blocks of the proposed center core of the designated Lincoln Heights District Center. However, this center is yet to go through the Neighborhood Planning process to define the boundaries of the proposed center and the land uses contained within these boundaries. Southeast Boulevard has become a significant barrier essentially separating more intense uses from the single family neighborhoods.

[See *Record, map, Southeast Boulevard, #000099*]

As this parcel sits today it is surrounded by single family residents and its only access is through this existing neighborhood.

Staff concludes that this proposed amendment is **in conflict** with the appropriate location criteria identified in the Comprehensive Plan.

As stated above, Policy LU 1.3, and 5.5, encourages the character of single family neighborhoods to be preserved, while directing higher intensity uses to the core of designated centers and corridors.

Staff concludes that this amendment would **not** implement the Comprehensive Plan better than its current land use. *Emphasis added.*

The City acknowledges that historical support from the neighborhood was for more intense uses north of Southeast Boulevard and single family uses south of Southeast Boulevard. *Verbatim Transcript,*

*June 25, 2009, (Hilderbrand) Record #000023; Record #000099 shows the project south of Southeast Boulevard in the low density single family area.*

Mr. Vasilenko acknowledges what should be collateral estoppel:

And when we in last year tried to change zone and put it into apartment complex and we have same neighborhood came and tried to point that they don't want to have high density or apartments they would welcome if I will do residential. Then after City Council deny ... I have tried to work with my architect engineer and develop project for cottage homes. *Verbatim Transcript, June 25, 2009, (Vasilenko) Record #000032.*

The references to the L.U. sections are in the City of Spokane Comprehensive Plan, revised as of December 5, 2009, Vol. 1, Section 3.4, Goals and Policies, pages 9-21. "Neighborhoods ... [A] variety of compatible uses are allowed." *Id* at p. 10. "The City's residential neighborhoods ... are worthy of protection from incompatible uses." *Supra*, Vol. 1, p. 10, L.U. 1.3. "Development of these uses in a manner that avoids negative impacts to surroundings is essential." *Supra*, Vol. 1, p. 10, L.U. 1.3. The Glossary to the City Comprehensive Plan defines "Compatible Design" as one that "is sensitive to and harmonizes with the community and its character." City of Spokane Comprehensive Plan, Vol. 1, p. 465.

The City acknowledges that historical support from the neighborhood was for more intense uses **north** of Southeast Boulevard and single family uses **south** of Southeast Boulevard. *Verbatim Transcript, June 25, 2009, (Hilderbrand) Record #000023. Emphasis added.* Please see again the Addenda siting this rental project south of Southeast Boulevard. The Developer acknowledges that his prior multi-family apartment project was rejected by the City because of the single family neighborhood location and incompatibility of a rental project.

2. Issue No. 2. Did the Hearing Examiner make an error of law in not applying rule of collateral estoppel to the facts?

In March of last year (2008), the neighborhood strongly rallied in opposition to Mr. Konstantin Vasilenko's first attempt to rezone this particular property and change it from RSF, 4-10 units per acre, to RMF, 15-30 units per acre for the site property. With the support of the Planning Department and the City Council not to approve this change, the neighborhood prevailed and this zoning request was denied. *Letter by Natalie A. Hilderbrand, Record #000079.*

It has already been determined through that prior process that multi-family is specifically incompatible with this neighborhood.

Mr. Vasilenko's previous zoning request change was already deemed by the City of Spokane to be detrimental to the

character of our single-family homes and not compatible with our single-family residential neighborhood. *Letter by Natalie A. Hilderbrand, Record #000079.*

The principal of collateral estoppel was applied to a local government Hearings Board decision under RCW 36.70A involving a City and application of the “substantial evidence” standard. *City of Arlington v. Central Puget Sound Growth Management Hearings Bd.*, 164 Wn.2d 768, 793.

Collateral estoppel works to prevent relitigation of issues that were resolved in a prior proceeding. *City of Arlington v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768, 792, 193 P.3d 1077 (2008).

Collateral estoppel requires:

(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. *Id.* (internal quotation marks omitted) (quoting *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987)). [T]he issue to be precluded must have been actually litigated and necessarily determined in the prior action. *Id.* (quoting *Shoemaker*, 109 Wn.2d at 508). *City of Aberdeen v. Regan*, 82476-2 (WASC).

The Hearing Examiner completely ignored the following evidence when he found, “No evidence was submitted to show there will be any

adverse effects on property values ....” *Hearing Examiner’s Findings, Conclusions and Decision, Record p. 20, paragraph 4*, ignoring the testimony of more than two witnesses. RCW 36.70C.130(1)(c). This was an erroneous finding of fact the opposite of which is well supported in the record. There is **substantial evidence** to support a contrary finding.

“Values in the neighborhood of between \$200,000 and about \$500,000 and low income rental properties will be detrimental to our neighborhood and have an adverse impact on our property values. This development is also inconsistent with the City’s own policies specifically AU 1.3, Au 5.5 which talk about compatible development and DP 3.8 which talks about infill development. The proposed cottage housing is for 24 units on 2 acres more or less.” *Verbatim Transcript, June 25, 2009, (Hilderbrand) Record #000030*.

And, Ms. Chernikov testified:

We came here we built our home and that is our investment. I think for many of us and I have nothing against the profit for one person that is ok but not if that profit cost loss for the whole neighborhood. It is easy to destroy it is really hard to gather it back because people will start selling houses because it will strongly affect our neighborhood ... The housing that the one that you call cottage housing that should be ownership housing but this looks like it is going to be renting housing and it is subsidized renting housing with our own tax money we’re going to destroy our own neighborhood. *Verbatim Transcript, June 25, 2009, (Chernikov) Record #000029*.

3. Issue No. 3.

This development as proposed *violates* the following: Spokane Municipal Code specifically 17G.060.170, “the surrounding property will

not suffer significant adverse impacts.” *Verbatim Transcript, June 25, 2009, (Hilderbrand) Record #000029.*

The County’s provision governing the approval or denial of a conditional use permit or expansion of a nonconforming use, SCC 14.404.100, reads as follows:

1. The Hearing Examiner may approve an application for a conditional use permit if the following criteria are met ...
  - b. Adequate conditions and restrictions on the conditional use are adopted to ensure that the conditional use will be compatible with other permitted uses in the area ... safety or general welfare.

The City of Spokane’s Chapter 17G.060—Land Use Application Procedures, Section 17G.060.170—Decision Criteria reads:

The purpose of the following sections is to establish the decision criteria for all permit types regardless of whether the decision is made by the director, hearing examiner or city council, as applicable.

- A. The burden is upon the applicant to present sufficient evidence relevant to the appropriate criteria in support of the application. The decision-maker must make affirmative findings of fact relative to each criterion or the application must be denied.
- B. The following decision criteria shall be used for Type II and III permit applications:

...

5. The proposal will not have a significant adverse impact on the environment or the surrounding

properties, and if necessary conditions can be placed on the proposal to avoid significant effects or interference with the use of neighboring property or the surrounding area, considering the design and intensity of the proposed use.

Please see again *Appendix B, Record #000099*, “Applicant’s Proposal: 24 Unit cottage (*sic*) housing on 3 parcels.” Twelve restricted income, tenant occupied and partially federally funded units—rental—crammed together on two lots with one private road accommodating a car every five minutes and twelve more units, all surrounded entirely by \$300,000.00 -- \$500,000.00 single family homes below Southeast Boulevard is incompatible and adversely impacting, supported by the above substantial, clear and convincing body of evidence.

4. Issue No. 4. Advise impacts on open space and traffic.

The site development standards in the Spokane Municipal Code are not met because common open space is required. At least 250 square feet per housing unit not counting open space with a dimension of not less than 20 feet. And the common open space is to be landscaped while the required private use open space is provided in the proposal there is not common open space on the site plan. According to our calculations by that code there should be about 6,000 square feet of landscaping required. The SEPA checklist item 4D, proposed landscaping states, landscaping

per plan on the north and south borders, if you check the landscaping plan which I think was provided earlier you will see that there is no landscaping shown on the southern border with the exception of gravel and paving within inches of the property line to the adjacent homes. On the southern end basically. I'm sorry the north end of that property is two trees and a row of shrubs on Southeast Boulevard and that is the extent of the landscaping. (*Verbatim Transcript, June 25, 2009, (Fowler) Record #000028*)

*Land Use Petition, Article VII, paragraph 6 [CP-9]:* The development, if allowed to proceed according to the Conditional Use Permit, will create traffic and emergency vehicle problem impacts. *Record #000005.*

As to the turnaround and the extension I don't really know what kind of vehicles what kind of distribution you'd get between the court and the turnaround, although again when you are looking at 12 to 15 vehicles per hour I don't think that it would be significant. *Verbatim Transcript, June 25, 2009, (Wright) Record #000034.*

The Appellants challenge the Hearing Examiner's Findings of Fact accepting the Applicant's traffic report. The testimony was of more trips and more impacts.

All of the proposed 24 housing units will be occupied by at least one person with a job to commute to daily. Some will be occupied by two wage earners. So we could have 30 or 40 *more* vehicles using 35<sup>th</sup> Ave or Smith St during peak traffic times. We already have a big traffic problem at 35<sup>th</sup> Ave and Regal. Entering Regal from 35<sup>th</sup> Ave eastbound is now really difficult during true peak traffic times. Entering 37<sup>th</sup> Ave from Smith is not quite as bad, but I believe that both these traffic points will become very serious problems if this cottage housing is built. (I rarely drive on Cook, but that intersection must have essentially the same problems as Smith.) Entering the residential area from one of these arterials is also a problem during peak traffic times, if one needs to make a left turn to do so. *Record #000428.*

D. Assignment of Error No. 4. The Hearing Examiner erroneously found no adverse impact by virtue of the Boundary Line Adjustment law for inclusion of two City-owned pieces of property in a single developer's lot, and failed to find that the BLA erroneously included ten and one-half feet of City right of way, for its full length.

The Developer's property originally consisted of five lots. *Record, p. 98.* The City approved a Boundary Line Adjustment ("BLA") which divided the site into three lots. *Record, p. 68.* Two of the three new lots are to be used for the cottage housing development. Each of those two new lots contains approximately one acre in area. *Findings, Conclusions and Decision, Record #000019.*

"Boundary line Adjustment" is defined as: A division made for the purpose of adjusting boundary lines which **does not create any** additional lot, tract, parcel, site, or division nor

create any lot, tract, parcel, **site** or division which contains **insufficient area and dimensions** to meet minimum requirements for width and area for building site.” *(Findings, Conclusions and Decision, Record #000019)* *Emphasis added.*

*Land Use Petition, Article VII, paragraph 5 [CP-8-9]:* Reservation of easement by the City of Spokane and ownership of a portion of unvacated 34<sup>th</sup> Avenue in proposed Cook Street cul-de-sac and ownership of 10 foot strip not vacated by Ordinance for 34<sup>th</sup> Avenue, all within the parcels sought to be developed make private development impossible. *Record #000004-5; #000062 and #000069.*

*Land Use Petition, Article VII, paragraph 1 [CP-8]:* Additionally, the third parcel, that irregular shaped tract, contains a piece of City property (unvacated portion of 34<sup>th</sup> Avenue in a proposed cul-de-sac for Cook Street). *Record #000004.*

Please see Record #00053-54, a fold-out site survey depicting two gores of City-owned right of way. Without any basis, the Hearing Examiner concluded that the City’s ownership of the portion of right of way on Cook Street (brown triangle on site survey) did “not affect the development.” *Hearing Examiner’s Findings, Conclusions and Decision, paragraph 2, Record #000014.* This is an erroneous Finding of Fact. Density may have to be re-calculated. How can the homeowner’s

association take title to City property within the common areas? This also is an error in basic law of ownership by record title. The **City-owned** right of way is included in the Developer's BLA-created lot. *Ordinance N0C32427, Record #000060*. A citizen cannot use a BLA to acquire ten and one-half feet of right of way to make land use of City-owned real property because the BLA can only be made by the owner(s).

The second City-owned parcel (red strip) along Southeast Boulevard garnered more notice from the Examiner: "If the reservation of right-of-way by the City adjacent to Southeast Boulevard affects the overall size of the site then density may also have to be recalculated." *Record paragraph 2, #000014*.

BLA creating the parcels for this cottage housing project was erroneously approved because of descriptions fraught with errors and the accompanying maps erroneously drafted and submitted. *Verbatim Transcript, June 25, 2009, (Benthin) Record #000026*.

Title reports showing owners and encumbrances for the site are erroneously not required. *Verbatim Transcript, June 25, 2009, (Benthin) Record #000026*.

When Dwight Hume, Mr. Hume, mentioned a 10-foot easement along Southeast Boulevard that is not an easement that is an exception to the vacation of 34<sup>th</sup> that is City property not an easement. The area inside the cul-de-sac is City owned

property, also and not an easement. There is an easement in 34<sup>th</sup> Avenue for the entire width asked for utilities and granted in the vacation. That vacation is C-32427.” *Verbatim Transcript, June 25, 2009, (Benthin) Record #000026.*

And now that the map is up this is the 10-foot strip that the City owns from Mt. Vernon, which is a half dedicated street, through here, which is the extent of 34<sup>th</sup> Avenue and this is City owned property that was excepted in the ordinance by means of the stated cul-de-sac. *Verbatim Transcript, June 25, 2009, (Benthin) Record #000026-27.*

Mr. Benthin ... is also correct that the 10-foot it’s not City owned property it’s actually a right-of-way so it’s a continued right-of-way of Southeast Boulevard and that should be shown on the new revised plans. *Verbatim Transcript, June 25, 2009, (Sakamoto) Record #000033.*

The part of the cul-de-sac too that’s still City property. *Verbatim Transcript, June 25, 2009, (Smith) Record #000033.*

Yes it is. It’s actually right-of-way. *Verbatim Transcript, June 25, 2009, (Sakamoto) Record #000033.*

So in order for him to actually get that portion he would need to vacate that portion of right-of-way. *Verbatim Transcript, June 25, 2009, (Sakamoto) Record #000033.*

The whole basis of this process has been on false and erroneous information via the legal descriptions and the subsequent boundary line adjustment. *Verbatim Transcript, June 25, 2009, (Benthin) Record #000038.*

The Appellant James F. Benthin, a retired land surveyor, stresses a point greater than the two “gores” of City property.

The Hearing Examiner's Findings of Fact are prefaced (*Record 000018*) with a list of Exhibits which includes No. 13, the individual parcels' legal descriptions. Prior to the BLA, one of the legal descriptions calls fifty-three feet from the center line of Southeast Boulevard. Please see *Record 000307, line e* of the first two legal descriptions. After the BLA, the map, "Exhibit "A," *Record 000310*, shows "42.5 feet" from the center line of Southeast Boulevard, as legally described on prior two pages, *Record 000308 and 000309*. It is a ten and one-half foot error in Parcel C and a ten foot error in Parcels A & B.

The adverse impacts would be to change the location of structures due to required setback to be measured from the correct boundary of the right of way, resulting in loss of at least three (3) units!

E. Assignment of Error No. 5. The Hearing Examiner erred when he refused to apply the aggregation rule under the Development Code to the actual facts of the "two" parcels' design, construction and use as one. RCW 36.70C.130(1)(d).

The project is defined by the applicant and by the staff in the staff report and the notice of application, etc., as a 24-unit project. *Verbatim Transcript, June 25, 2009, (Hume) Record #000024*. General Application, *Record #000127*.

“Cottage housing developments are allowed on sites ... with a maximum of twelve units.” SMC 17C.110.350.C. The plain language would mean the entire development, which would be derived from the Application. Here, Vasilenko originally applied for 24-units on all of his site.

While the testimony of the applicant and his architect indicates again that this is a two phase project interconnected purposely designed to be interconnected with pathways and roads, etc. Please see *Record #000098*. And therefore it is one project and not 12 units it's 24 and that's a violation of the cottage living ordinance as it is written today. *Verbatim Transcript, June 25, 2009, (Hume) Record #000036*. Please see *Record Maps #000063 and #000067*. A well experienced land use consultant and former Director of a Planning Department, Dwight Hume, so testified before Greg Smith, Hearing Examiner:

There's a provision that I found in the Development Code that says that a lot is, under the definition section, includes a definition where you have a series of lots or portions of lots as one parcel that can be considered a lot so long as there is consensus between the City and proponent as to where the front yard and rear yard are. In this case it would have been pretty simple to say that the overall configuration of lots within this property front on Cook and then the opposite end of the site at the east end would be the rear of the property. That would then allow, by definition of the Development Code a lot. Not withstanding (*sic*) the number of lot lines inside it. It would have been over a two plus acre site and that could have

been used and applied for cottage living. The Development Code is pretty clear that there is a maximum number of units of 12 and its (*sic*) pretty clear that as such it did not intend to allow in excess of that by creating one-acre parcels. First of all they are not allowed in this zone and so it can't be created this way but if it happened that you found a site for infill in the City of Spokane and they were one acre tracts side by side that preexisted as nonconforming lots of record that would be the only means by which I know of that you could then cookie cutter your project as long as they were independent projects. Here we have something that is, as I explained in my brief, codependent. You have a site that has a drainage at the east end, the westerly project relies upon the easterly project for drainage; the easterly project relies upon the westerly project for access and that was not independent projects what-so-ever. In fact, the lot line between these is configured around buildings so that one acre of land is allocated to each set of 12 but nonetheless it's pretty clear here that the intent is to have a common project of 24 units in violation of the code. The staff I would say erred in the boundary line adjustment approval, they erred in the approval of 24 units versus 12 and it needs to be remanded back and created as a 12 unit site. OK? *Verbatim Transcript, June 25, 2009, (Hume) Record #000025.*

The Hearing Examiner rejected this argument on his uncited observation that there are no separation requirements in the Code. *Record #000013, paragraph 6.* But this ignores the aggregation requirements and SMC 17C.110.350 maximum limitation of 12 units per project. See *Record #000099.*

Aggregation is a considered factor for the obvious reason that a developer can, again, obviate such a land use regulation by simply filing for a boundary line adjustment to create two lots from one.

Those one-acre tracts are not consistent whatsoever with the requirements set forth in the ordinance. They don't front individually they don't all front on Cook and are dependent upon Cook as set forth in that ordinance for their access. If the ordinance says they can only have a maximum of 12 units of alternate housing as infill that needs to be respected. It can't be designed around so that I can perpetuate itself side by side by side by side that was not the intent I think reading between the lines and that's all any of us can do is speculate on why the maximum of 12 is in there. *Verbatim Transcript, June 25, 2009, (Hume) Record #000036.*

Most glaring and with added authority and expertise, the City's

verbatim Staff Report:

City Staff presumes that all department comments in favor constitute suitability. However, these comments from other departments are given **without regard to the fact** that the physical characteristics of the site create a **co-dependence** of each lot upon the other. For example:

- a) the easterly lots need the public access frontage of the westerly lot located Cook Street;
- b) The westerly lot needs the easterly lot to allow gravity flow of sanitary sewer;
- c) The westerly lot has no geo-physical capability to have it's own storm pond drainage area;
- d) Both lots need onsite circulation and access to and from each other to serve their respective units.
- e) Required common open space is derived from both lots;

In other words, the site and development are all one project as expressed by the applicant in his application and Notice of Application. A mere irregular and invisible lot line strategically placed between two sets of twelve units does not constitute compliance with the spirit and intent of 17C.110.350 B. which described the qualifying limitations (scope) of cottage housing as no more than 12 units. *Supplement – Appeal of Z2009-012-CUP-2 Record #000043. Emphasis added.*

Petitioner William H. Davis submitted a Supplement to Appeal

Record:

Misinterpretation of Law: The applicant submitted one application for a “24 unit Cottage Living project” on two lots. **This violates SMC 17C.110.350 B.** where a maximum of 12 units are allowed. Staff makes this clear in there (*sic*) pre-development conference notes and then encourages the applicant to do a BLA to create these two one acre parcels. While the creation of the two parcels is perfectly legal, the use of them side by side for two 12 unit projects violates the intent of maximizing the scale and scope of a cottage housing project to just 12 units. Furthermore, the fact that these two lots depend upon each other to fulfill the required services to each makes it even more obvious that these are not two separate and distinct stand alone projects, but instead, just one as implied by both the applicant and the City in the project description and public notice. *Supplement – Appeal of Z2009-012-CUP-2 Record #000043-44, quoting Staff Report at page 4. Emphasis added.*

The Staff Report is compelling evidence of higher weight that the two-acre project is really one parcel. See *Record #000098-99*. When the issue was raised in predevelopment conference, the Developer responded by applying for a BLA to create an imaginary two parcels.

#### **VI. FEES AND COSTS.**

Pursuant to RCW 36.70C.110(4), if the relief sought by Davis and Benthin is granted in whole or in part, the Court should equitably assess the cost of preparing the Record, by awarding costs to Appellants. The Record is before this Court. *Willapa Grays Harbor Oyster Growers Ass’n*

*v. Moby Dick Corp*, 115 Wash.App. 417, 62 P.3d, 912. In addition, Davis and Benthin should be awarded statutory costs which are broader than costs for preparing the Record. *Brown v. City of Seattle*, 117 Wash.App. 781, 72 P.3d 764. Respondents should be denied fees under RCW 4.84.370; Davis and Benthin should be awarded attorney fees under the first sentence of RCW 4.84.370(1) because parts (a) and (b) do not exclude a fee award to a prevailing proponent.

## VII. CONCLUSIONS

The Findings of Fact that the Cottage Housing use was compatible with the neighborhood violated more than one standard of review. First, it was an error of law because the prior denial of the 33-unit apartment application was based on the Finding that multi-family rental was an incompatible use and therefore the Hearing Examiner is collaterally estopped to find the opposite. *Record, p. 20, para. 4.*

Second, the finding of compatibility was not supported by substantial evidence. The record is full of clear and convincing testimony that rental uses are confined to the area **north** of Southeast Boulevard. The Finding of Fact that “No evidence was submitted to show that it will have an adverse effect on property values” is not supported by substantial evidence where there was evidence by testimony of Hilderbrand (*Record,*

p. 29) regarding effects on value of their homes. Standard of Review RCW 36.70C.130(1)(c).

Further, the finding of no adverse impacts on the neighborhood (*Record, p. 20, para. 3*) is not supported by substantial evidence where there was evidence of impacts to open space and traffic. *Record, p. 28; p. 34; and p. 428.*

The Hearing Examiner's decision erroneously applies the Cottage Housing law to permit 24 housing units without survey, segregations or legal description. RCW 36.70C.130(1)(d). This legal conclusion was also an erroneous interpretation of the Boundary Line Adjustment and subdivision laws. RCW 36.70C.130(1)(a).

It was an erroneous Conclusion of Law that "reservations of land and easements on behalf of the City" (*Record, p. 20, para. 2*) would not "affect" the development and thus not have any (adverse) impact, because it was not supported by substantial evidence.

There was no evidence that lack of title would not adversely affect the development, but that "this is an issue for the Applicant to negotiate ...." *Record, p. 20, para. 2.*

There was a Finding that:

"[i]f the reservation of right of way by the City adjacent to Southeast Boulevard affects the overall size of the site then density may have to be recalculated."

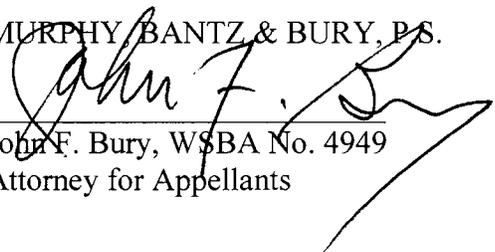
This is an adverse impact.

The Hearing Examiner erroneously applied the Cottage Housing law where he refused to apply the aggregation rule because “there are no separation requirements in the code for different cottage developments.” RCW 36.70C.130(1)(d).

Having met three standards of review, the decision granting the administrative Conditional Use Permit should be reversed.

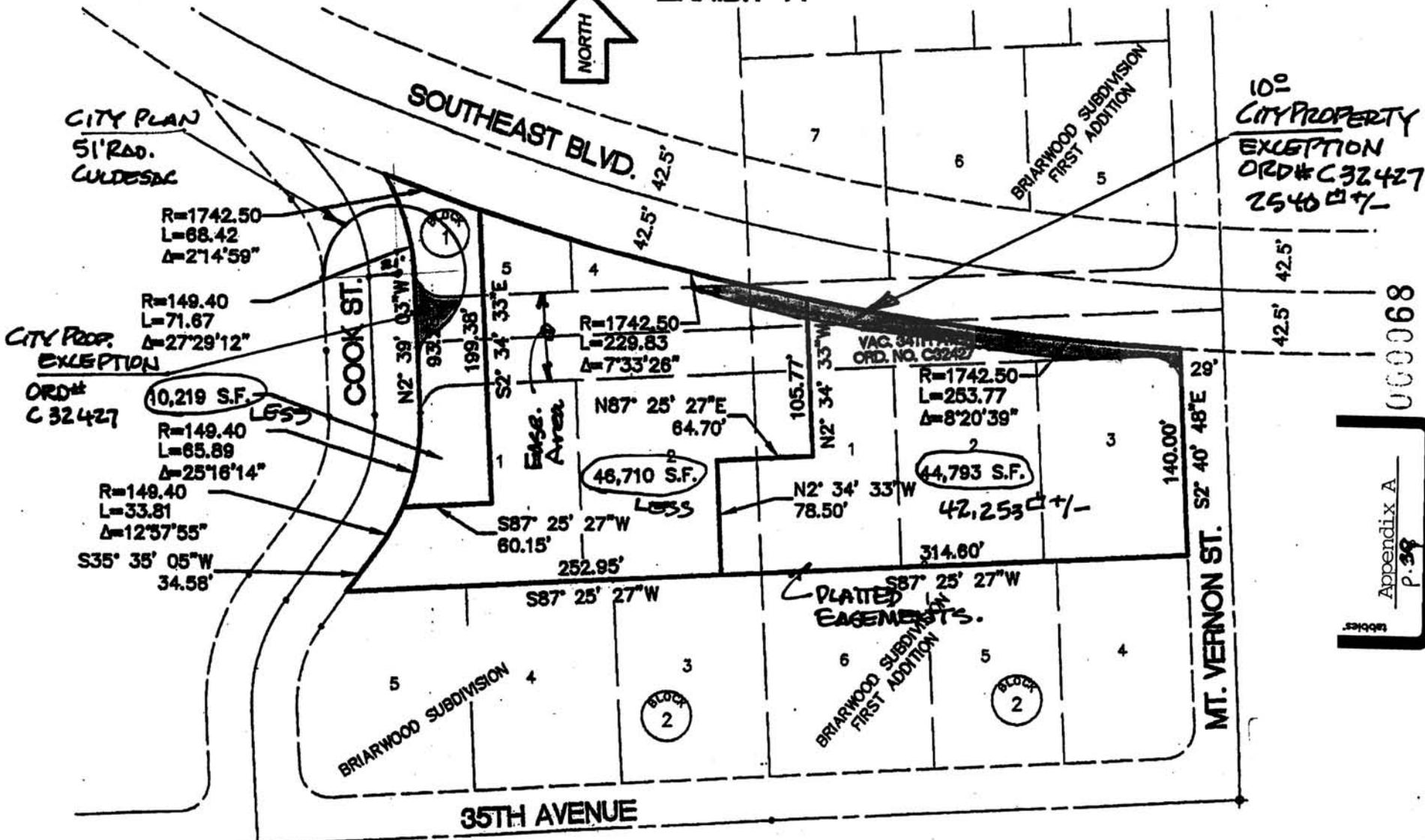
DATED this 7th day of December, 2010.

MURPHY, BANTZ & BURY, P.S.

  
John F. Bury, WSBA No. 4949

Attorney for Appellants

EXHIBIT 'A'



CITY PLAN  
51' RAD.  
CULDESAC

R=1742.50  
L=68.42  
Δ=2°14'59"

R=149.40  
L=71.67  
Δ=27°29'12"

CITY PROP.  
EXEMPTION

ORD#  
C 32427

10,219 S.F.

R=149.40  
L=65.89  
Δ=25°16'14"

R=149.40  
L=33.81  
Δ=12°57'55"

S35° 35' 05"W  
34.58'

R=1742.50  
L=229.83  
Δ=7°33'26"

VAC. 3411  
ORD. NO. C32427

R=1742.50  
L=253.77  
Δ=8°20'39"

44,793 S.F.

42,253 ±

46,710 S.F.

PLATTED  
EASEMENTS

100  
CITY PROPERTY  
EXEMPTION  
ORD# C32427  
2540 ±

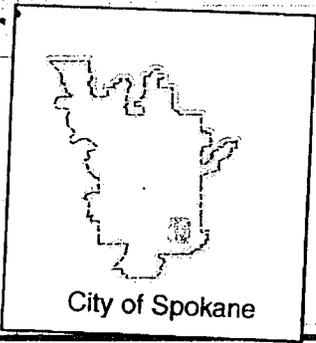
000068

Appendix A  
P. 39

Books

35TH AVENUE

SCALE 1"=100'±



South  
east

29th

Mt  
Vernon

Fiske

Crestline  
Stone

Mt  
Vernon

30th

30th

Fiske

30th

31st

31st

Regal

32nd

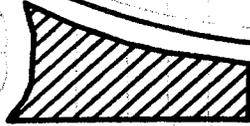
32nd

32nd

33rd

34th

34th



35th

35th

36th

36th

Lee

37th

Crestline

Stone

38th

Cook

Mt  
Vernon

39th

Lee

tabbles

Appendix B  
p. 40

000099

40th

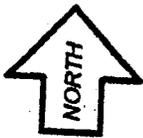
Legend  
Parcels [dashed line] Notification district  
[hatched box] Application property

APPLICANT: Konstantin Vasilenko  
PROPOSAL: 24-unit cotage housing on 3 parcels

Prepared by: WTC  
Date prepared: 03/13/09  
QC'd by: *PHC*  
Date QC'd: 3-13-09

NE 1/4 99-25-43

EXHIBIT 'A'



SOUTHEAST BLVD.

BRIARWOOD SUBDIVISION  
FIRST ADDITION

tabbles'  
Appendix C  
P. 41

R=1742.50  
L=68.42  
Δ=271°59"

R=149.40  
L=71.67  
Δ=27°29'12"

10,219 S.F.  
R=149.40  
L=65.89  
Δ=25°16'14"

R=149.40  
L=33.81  
Δ=12°57'55"

S35° 35' 05"W  
34.58'

COOK ST.

N2° 39' 03"W

BLOCK 1

93.28'  
199.38'

S2° 34' 33"E

R=1742.50  
L=229.83  
Δ=7°33'26"

N87° 25' 27"E  
64.70'

46,710 S.F.

S87° 25' 27"W  
60.15'

252.95'

S87° 25' 27"W

105.77'

N2° 34' 33"W

VAC. 84TH AVE.  
ORD. NO. C32427

R=1742.50  
L=253.77  
Δ=8°20'39"

44,793 S.F.

N2° 34' 33"W  
78.50'

314.60'

S87° 25' 27"W

140.00'

MT. VERNON ST.  
S2° 40' 48"E 28'

35TH AVENUE

BRIARWOOD SUBDIVISION

BRIARWOOD SUBDIVISION  
FIRST ADDITION

BLOCK 2

BLOCK 2

000132

ORIGINAL

CASE NO. 29204-5-III

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

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WILLIAM DAVIS, et al.,

Appellants,

v.

CITY OF SPOKANE, and KONSTANTIN  
VASILENKO,

Respondents.

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**CERTIFICATE OF SERVICE**

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John F. Bury  
Murphy, Bantz & Bury, P.S.  
818 W. Riverside, Suite 631  
Spokane, WA 99201  
Attorneys for Appellants  
James Benthin and William Davis

I, Mary L. Myers, Legal Assistant with the firm of Murphy, Bantz & Bury, P.S., hereby declare under penalty of perjury under the laws of the State of Washington and the United States that:

1. I am a citizen of the United States of America; over the age of eighteen years; and competent to be a witness.

2. I arranged for messenger service to deliver a true and correct copy of the **Appellants' Opening Brief**, on the 7<sup>th</sup> day of December, 2010, to the person(s) listed below:

Steve Jolley, Esq., 12340 E. Valley Way, Spokane Valley,  
Washington 99216

Salvatore J. Faggiano, Esq., 808 W. Spokane Falls Blvd.,  
5<sup>th</sup> Fl., Spokane, Washington 99201-3326

SIGNED at Spokane, Washington, this 7<sup>th</sup> day of  
December, 2010.

  
MARY L. MYERS