

FILED

SEP 09 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29970-8-III

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

CHERRYANN COBALLES,

Appellant,

v.

SPOKANE COUNTY; SPOKANE COUNTY BOARD OF COUNTY
COMMISSIONERS; SPOKANE COUNTY HEARING EXAMINER;
SPOKANE COUNTY REGIONAL ANIMAL SERVICES,

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

This matter presents a motion for statutory writ of review pursuant to RCW 7.16.040 and constitutional writ of review, regarding the decision of the Spokane County Board of County Commissioners to affirm the declaration of Gunnar, a three year old Rottweiler/Malamute dog, as a dangerous dog. The dog's owner challenges several findings of fact and conclusions of law in support of the declaration of dangerous dog, the jurisdiction of Spokane County to adopt ordinances controlling dangerous dogs within Spokane County, and raises constitutional challenges to Spokane County's dangerous dog ordinance, all under the writs of review.

The declaration of dangerous dog was issued by Spokane County Regional Animal Protection Services (SCRAPS) based upon an attack by the dog on a 3-year old child, Emmalin Champion, while the child was an invited guest in dog's owner's home.

The findings of fact are well supported in the evidence in the record below and the conclusions of law are well reasoned and based upon logic and the Spokane County Code on point. Likewise, the law regarding the scope of review under the respective writs of review and on the constitutional issues raised by the dog's owner is well established against the dog's owner.

The hearing below before the Hearing Examiner lasted almost 8 hours, at which the dog's owner was represented by counsel, allowed to confront and examine witnesses called by SCRAPS and to present her own witnesses, allowed to review and object to the evidence presented by SCRAPS and to present her own evidence, and finally was informed and took advantage of her right to appeal the recommendation of the Hearing Examiner and the decision of the Board of County Commissioners to Court.

Spokane County urges the Court to affirm the County Commissioner's decision in this case.

II. ASSIGNMENTS OF ERROR

The dog's owner alleges the following assignments of error below:

1. Spokane County Board of County Commissioners erred in declaring the dog a dangerous dog pursuant to Spokane County Code Section 5.04.032.
2. Superior Court erred in limiting issues on review to those subject to a statutory writ of review or in the alternative a constitutional writ of review.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

Six issues are pivotal to review of this matter before the Court:

1. Whether Spokane County has legal authority to regulate the ownership of dangerous dogs within Spokane County?

2. Whether the Spokane County Commissioners followed the established procedure for declaration of dangerous dog?
3. Whether the decision by the Spokane County Commissioners to declare the dog a dangerous dog violates dog owner's rights?
4. Whether the facts relied upon by Spokane County Board of County Commissioners in affirming the declaration of dangerous dog were supported by any competent proof in the record?
5. Whether the Spokane County Commissioners interpreted and applied the Spokane County Code correctly in affirming the declaration of dangerous dog pursuant to Spokane County Code Section 5.04.032?
6. Whether the reviewing court has jurisdiction under either the Constitutional Writ of Certiorari or the statutory Writ of Review (RCW 7.16.120) to consider the constitutionality of Spokane County Code Section 5.04.032 regarding the Declaration of Dangerous Dog?

IV. STATEMENT OF THE CASE

The dog's owner, Cherryann Coballes, Petitioner, is a single mother of two young boys, Anthony age 14, and Conner age 10, living in Spokane County. VROP¹ p. 93, lines 3–11; p. 158, line 25– p. 159, line 6. Petitioner owns two (2) pet Rottweiler mixed breed dogs, six (6) year old "Saddie" and three (3) year old "Gunnar." VROP p. 93, lines 3–9; p. 159, lines 16–25; p. 108, lines 21-24. Gunnar is aggressive and jumps on visitors to the Petitioner's home, thus it is policy to keep Gunnar either outside of the house or locked in

¹ In the body of the Respondent's Brief, the Verbatim Report of Proceedings of the hearing before the Spokane County Hearing Examiner will be referred to as "VROP".

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Anthony's bedroom while visitors are in the home. VROP p. 94, lines 7-11; p. 97, lines 13-22. There is a dog run in the back yard where the dogs can be kept secure. VROP p. 95, lines 17-19; p. 122, lines 13-24.

Josh Smith, Emmalin Champion's father, and Emmalin Champion had been periodic guests in the Petitioner's home during the year prior to Gunnar's attack on Emmalin. VROP p. 147, lines 21-25; p. 158, lines 1-9. The dog's owner had been emphatic in warning Mr. Smith and Emmalin stay out of Anthony's bedroom, where the dog is kept. VROP p. 164, lines 8-18; p. 94, lines 7-17; p. 96, lines 1-11. When in the house Gunnar was always taken on a leash to and from Anthony's room while Mr. Smith and Emmalin were asked to sit on the sofa away from Gunnar's path. VROP p. 96, lines 1-11. Contrary to the repeated warnings to stay out of the room where the dog is kept, Emmalin was allowed into Anthony's room with Anthony or Conner, in the dog's absence, from time to time to look for games in Anthony's room. VROP p. 143, lines 10-20; p. 146, lines 1-6. Gunnar was intentionally never socialized with Mr. Smith or Emmalin in any way. VROP p. 119, lines 11-25; p. 120, lines 1-6; p. 154, lines 8-19.

At the time of the attack on Emmalin, she and her father were guests in the dog's owner's home having spent the night there. VROP p. 150, lines 12-16; p. 165, line 10-p. 166, line 14. Earlier that

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morning Anthony had led Gunnar from the bedroom to the back yard and back to the bedroom. VROP 97, line 9–p. 99, line 4. At approximately 8:30 a.m., with both dogs in the room Anthony entered his bedroom to get dressed for church. VROP p. 97, line 9–p. 99, line 4; VROP p. 100, line 24–p. 101, line 25. Immediately prior to entering his room to dress for church, Anthony had noticed Emmalin in Connor’s room, across the hall, though he was not aware of what Emmalin was doing. VROP p. 114, line 10–p. 115, line 25. There was no warning to Emmalin that the dogs were in Anthony’s room even though both Gunnar and Sadie were in Anthony’s bedroom at the time.

While Anthony was standing at the clothes closet in his room to put on a shirt Anthony noticed that the door to his room was opening. Anthony turned his back to the door and finished putting on his shirt. VROP p. 103, line 2–p. 104, line 4. While Anthony could not see the door, Emmalin or Gunnar, he heard Gunner give a “soft growl” and then he heard Emmalin yell out. VROP p. 103, line 2–p. 104, line 4; 117, line 13–p. 118 line 9. When he turned to see what was happening, Anthony saw Gunnar biting Emmalin on the top of her head. He attempted unsuccessfully to pull Gunnar from Emmalin, by placing his arms around Gunnar’s waist from behind Gunnar and pulling him away. VROP p. 103, line 2–p. 104, line 4; 117, line 13–p.

118 line 9. Following the attack, Emmalin's father and the dog's owner arrived at Anthony's room. While Gunnar's owner held him away Mr. Smith picked up Emmalin and took her down the hall to the master bedroom to inspect Emmalin's injuries. VROP p. 137, lines 2-5; p. 105, lines 12-17; p. 152, lines 5-22. Emmalin was then rushed to Sacred Heart Medical Center for treatment of Emmalin's injuries. VROP p. 168, line 22-p. 170, line 23.

Gunnar's attack on Emmalin caused several lacerations to her scalp and puncture wounds to her skull. VROP p. 168, line 22-p. 170, line 23; AR² 26-49; AR 534 - 540.

The day after the attack, September 20, 2010, SCRAPS received an Animal Bite Report from the Spokane Regional Health District reporting the attack by Gunnar on Emmalin. VROP p. 28, line 18-p. 29, line 4; AR 526-527. Animal Protection Officer Chad Scheres was directed to deliver a Declaration of Dangerous Dog to the dog's owner and to impound Gunnar pursuant to SCC 5.04.032 (1)(f). VROP p. 28 line 18-p. 29, line 4; p. 36, lines 6-21. Upon lawful service of the Declaration of Dangerous Dog, the dog's owner and Anthony brought Gunnar to Officer Scheres's SCRAPS truck. Fearing

² "AR" refers to the Administrative Record before the Spokane County Hearing Examiner and the Spokane County Board of County Commissioners.

Gunnar's dislike of strangers the dog's owner and Anthony loaded Gunnar into the truck. VROP p. 28 line 18– p. 29, line 4; p. 36, lines 6–21; p. 41, line 19–p. 43, line 4. On September 21, 2010, the dog's owner submitted her timely request for a hearing to appeal the Declaration of Dangerous Dog. VROP p. 173, line 23–p. 174, line 3.

The Spokane County Hearing Examiner convened a hearing on the appeal of the Declaration of Dangerous Dog on October 6, 2010. VROP p. 5, lines 1-14. The hearing was conducted pursuant to SCC 5.04.032 with SCRAPS presenting its witnesses and evidence followed by the dog's owner's defense presented through her attorney. VROP p. 5, line 15–p. 6, line 25. The dog's owners' attorney cross examined witness offered by SCRAPS and called witnesses in her defense including an animal expert from the west side of Washington State and other written evidence.

Following the hearing the Hearing Examiner provided Revised Findings of Fact to the parties and Commissioners with the recommendation to the County Commissioners that the Declaration of Dangerous Dog be affirmed. AR 317–340, 344–368.

After review of the record produced before the Hearing Examiner and hearing answers from the Hearing Examiner to questions about the record and/or evidence from the County

Commissioners, the County Commissioners voted 2 to 1 to affirm the Declaration of Dangerous Dog. AR 310-316. The dog's owner's motion for writ of review followed.

V. ARGUMENT

A. REVIEW UNDER A CONSTITUTIONAL WRIT OR STATUTORY WRIT OF REVIEW IS OF A LIMITED SCOPE AND PURPOSE.

The scope of review by the Court under a Constitutional Writ of Certiorari is limited to determining whether the Board of County Commissioners, acted arbitrarily and capriciously in making their decision to affirm the declaration of dangerous dog, or whether the Board acted illegally – lacked legal authority to make the decision. *Bridle Trails v. Bellevue*, 45 Wn. App. 248, 253, 724 P.2d 1110 (1986); *Williams v. Seattle School District #1*, 97 Wn.2d 215, 221, 643 P.2d 426 (1982).

That same scope of review is also included in the scope of review identified in RCW 7.16.120, which governs the statutory Writ of Review³. *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 636, 689 P.2d 1084 (1984).

³ “The questions involving the merits to be determined by the court upon the hearing are:
(1) Whether the body or officer had jurisdiction of the subject matter

The focus of the scope of review by the Court under the statutory writ is the County Commissioner's decision to affirm the declaration of dangerous dog. Did the Board have jurisdiction to decide the issue before it? Did the Board follow the procedure established for making its decision? Does the County Commissioners' decision violate dog owner's rights? Was there sufficient evidence to support the Board's findings in making its decision? And, did the Board correctly interpret the Spokane County Code governing its decision?

A writ of review "may not be used to obtain judicial review of purely legislative, executive or ministerial acts of the agency". *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 634, 689 P.2d 1084 (1984), citing *Washington State Federation of State Employees v. State Personnel Board*, 23 Wn. App. 142, 145, 594

of the determination under review.

- (2) Whether the authority, conferred upon the body or officer in relation to that subject matter, has been pursued in the mode required by law, in order to authorize it or to make the determination.
- (3) Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator.
- (4) Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination.
- (5) Whether the factual determinations were supported by substantial evidence."

RCW 7.16.120.

P.2d 1375 (1979). Spokane County Code section 5.04.032 is a purely legislative matter and is thus not a proper subject of review under the writs under which the dog's owner comes before this Court. *Id.*

The dog owner's constitutional challenge of Spokane County Code (SCC) section 5.04.032 generally is an attempt to obtain judicial review of the legislative enactment of the ordinance, which is outside of the scope of review under a writ of review. *Chaussee v. Snohomish County Council*, supra.

Likewise SCRAPS enforcement of the ordinance, a ministerial act, is outside of the scope of review. *Id.* The issuance of the declaration of dangerous dog by SCRAPS under SCC 5.04.032(1)⁴ is ministerial, SCRAPS has no discretion in the matter. Impounding the dog pursuant to SCC 5.04.032 is a ministerial act by SCRAPS and is not reviewable under a writ of review⁵. *Chaussee v. Snohomish County Council*, supra.

⁴ "When the Director, or his/her designee, has sufficient information to determine that a dog is dangerous as defined in section 5.04.020(8), the director, or his/her designee **shall declare the dog a dangerous dog and shall notify the owner or keeper of the dog in writing, ...**

SCC 5.04.032(1) (Emphasis Added)

⁵ "Any dog declared dangerous under this section or any comparable section by a duly authorized government animal control authority **shall**

Similarly, SCRAPS' issuance of the declaration of dangerous dog and the subsequent impounding of the dog is not reviewable under the constitutional writ of review. The standard of review under the constitutional writ is whether the County Commissioners' **decision** is arbitrary and capricious or is contrary to law – meaning without jurisdiction or legal authority. *Bridle Trails v. City of Bellevue*, 45 Wn. App. 248, 252 – 253, 724 P.2d 1110 (1986). The constitutional writ of certiorari does not allow review of SCRAPS' performance of a ministerial duty. *Chaussee v. Snohomish County Council*, supra.

Properly, the review of SCRAPS' performance of its duty is done by the Board of County Commissioners as a quasi-judicial proceeding. SCC 5.04.032. The County Commissioners' decision is then in turn subject to judicial review under the statutory and/or constitutional writs.

The County Commissioners' decision was not the cause or the authority for the dog's impound. The ordinance requires impound upon the issuance by SCRAPS of the declaration of dangerous dog both of which acts are ministerial. SCC 5.04.032.

be immediately impounded until the owner registers the dog as dangerous in accordance with Section 5.04.035. ...

SCC 5.04.032(f) (Emphasis Added)

The County Commissioners' decision was a review of the declaration of dangerous dog. The duration of the dog's impound was solely up to the dog's owner and her choice to comply with the requirements of ownership of a dangerous dog within Spokane County.

The scope of review by the Court is clearly stated and is limited to that identified in RCW 7.16.120, to review of the County Commissioners' decision to determine whether the County Commissioners' decision is arbitrary and capricious or was made without jurisdiction or authority to do so.

- The Court has no jurisdiction to consider the constitutionality of the ordinance regarding the impound of the dog under SCC 5.04.032(1)(f). The dog's owner's briefing to the Superior Court indicates her understanding that she could have challenged the constitutionality of the ordinance by other legal means outside of the writ process, thus that issue is not properly before the Court under the writs sought in this action. CP 531 - 540. *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 636, 689 P.2d 1084 (1984).

B. SPOKANE COUNTY IS AUTHORIZED TO
REGULATE OWNERSHIP OF DANGEROUS
DOGS WITHIN SPOKANE COUNTY.

It is well-established that dogs are subject to police power and may be destroyed or regulated to protect citizens. *American Dog Owners Association v. City of Yakima*, 113 Wn.2d 213, 217, 777 P.2d 1046 (1998). An ordinance regulating the ownership of dogs is presumed constitutional. *Id.*, at 215.

The case of *Rabon v. City of Seattle*, 135 Wn.2d 278, 290 & 291 – 293, 957 P.2d 621 (1998), could not be more clear or on point on this issue. On the subject of preemption or conflict with the state law by regulation of dangerous dogs by a city (and the County in this case), the *Rabon* court says, at p. 291 – 293, that the legislative history of RCW 16.08 does not indicate any intent to preempt regulation of dangerous dogs by cities and counties and thus, such regulation is not preempted. *Rabon* is still good law.

• A comparison of SCC 5.04.032 and RCW 16.08.080 indicates that the two laws are similar in limitations and process. The local ordinance and the state statute need not be exactly the same to be reconcilable. *Rabon v. City of Seattle*, *supra* at 292.

• There is no preemption or conflict.

C. THE ESTABLISHED PROCEDURE FOR DECLARATION OF DANGEROUS DOG WAS PROPERLY FOLLOWED.

RCW 16.08.080(1) specifically states that cities and counties that have a notification and appeal procedure in place with regard to determining a dog within its jurisdiction to be dangerous may continue to utilize or amend that procedure. The procedure adopted by Spokane County for declaring dogs within Spokane County as dangerous dogs is found at SCC 5.04.032. In summary the procedure establishes criteria for an initial determination by SCRAPS that a declaration of dangerous dog is to be issued followed by the right of the dog's owner to appeal the declaration of dangerous dog issued by SCRAPS. SCC 5.04.032(1). The appeal process is initiated by a request from the dog's owner and a hearing before the Spokane County Hearing Examiner is convened. *Id.* The Hearing Examiner conducts a hearing under the rules set forth in SCC 5.04.032(2) & (3). At the conclusion of the hearing before the Hearing Examiner the matter is set before the Board of County Commissioners for final decision from the county regarding the declaration. SCC 5.04.032(2) – (4). The decision of the County Commissioners is appealable to the superior court under the general laws of the state of Washington. SCC 5.04.032(5).

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The dog's owner does not challenge that Spokane County properly complied with the established procedure for the declaration of dangerous dog in this matter. That issue is undisputed.

D. THE COUNTY COMMISSIONER'S DECISION TO DECLARE THE DOG DANGEROUS DOES NOT VIOLATE THE DOG'S OWNER'S RIGHTS.

The dog's owner does not allege that the decision of the County Commissioners in this case violates her rights. She challenges the constitutionality of the county ordinance governing the declaration of a dog as dangerous and impound of the dog upon declaration of dangerous dog, not the decision of the County Commissioners as violating her rights. Thus, absent a challenge that issue is waived by the dog's owner.

E. THE HEARING EXAMINER AND COUNTY COMMISSIONERS' FINDING OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE.

The findings of fact of the County Commissioners are reviewed by the Court to determine whether they are supported by substantial evidence in the record. *Washington State Department of Corrections v. City of Kennewick*, 86 Wn. App. 521, 937 P.2d 1119 (1997); *Bjarnson v. Kitsap County*, 78 Wn. App. 840, 899 P.2d 1290 (1995); *Carleton v. Board of Police Pension Fund Commissioners of*

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Seattle, 115 Wn. 572, 197 P. 925 (1921). Substantial evidence is the quantum of evidence sufficient to persuade a rational, fair minded person the premise is true. *Wenatchee Sportsman Association v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). In considering the sufficiency of evidence, an appellate court need only consider evidence favorable to the prevailing party. *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963). Credibility determinations are solely for the trier of fact, in evaluating the persuasiveness of the evidence and the credibility of the witnesses, the court must defer to the trier of fact. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994); *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). Unchallenged findings of fact are taken as verities on appeal. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).

The dog's owner challenges Finding of Fact numbers 16, 21, 31, 32, 79, 98, 99, 100, 102, 104, and 105. All remaining findings of fact are considered verities in this review by the Court. *Id.*

Challenges to Finding of Fact numbers 21, 31, 32, 79, and 98 are frivolous in that the evidence cited by the dog's owner clearly support the findings of fact.

Finding of Fact No. 16.

Without leave of the court or any justification in the law or evidence in the record, the dog's owner represents **AR Exhibit 4 (emphasized)** and **AR Exhibit 11 (emphasized)** to be exhibits that are part of the record presented to the Hearing Examiner and that were before the County Commissioners during their deliberation of their decision. (Emphasis original in Appellant's Brief.) Appellant's Brief, pp. 9 – 10. In fact what the dog's owner refers to as **AR Exhibit 4 (emphasized)** and **AR Exhibit 11 (emphasized)** are copies of the original exhibits with elements added by the dog's owner or her attorney and which were proposed as supplemental evidence and rejected by the Superior Court in its review of the County Commissioner's decision below. CP 516 – 519; CP 455: CP 388. The additional elements in the exhibits appear to represent what the dog's owner had hoped to present to the Hearing Examiner, but they are not true copies of the actual exhibits.

Finding of Fact No. 16 is clearly supported by the only testimony and Exhibits in the record on the subject. See Exhibits 4, 6, 9, and 11 presented to the Hearing Examiner, AR 427, 429, 432, and 447; VROP p. 161, line 23–p. 162, line 17. See also *Carleton v. Board of Police Pension Fund Commissioners of Seattle*, 115 Wn. 572, 197 P.

925 (1921), limiting the Court’s review to the “original evidence” before the Hearing Examiner and County Commissioners.

Substantial evidence in the record supports the Hearing Examiner’s finding.

Finding of Fact No. 21.

Finding of Fact number 21 is almost a verbatim quote of Anthony Coballes’s testimony. *See*, VROP p. 103, line 20 p. 104, line 4. At VROP p.105, lines 8–11. The dog’s owner’s attorney suggests a corrected version of Anthony’s testimony and Anthony agrees with the attorney. The trier of fact is the sole judge of the credibility of the witnesses and their testimony. *Morse v. Antonellis*, *supra* at 574. The Hearing Examiner and County Commissioners’ judgment that Anthony’s original statement, rather than the correction made for Anthony by his attorney, was correct and should not be disturbed on judicial review. *Id.* Finding of Fact No. 21 is supported by substantial evidence in the record.

Finding of Fact No. 31 and Finding of Fact No. 32.

Finding of fact number 31 states that an “animal bite incident report” was completed and then indicates the source of the information that was identified in the report. Finding of Fact No. 32 merely quotes from the report. The dog’s owner clearly disagrees with the contents

of the report, nonetheless the report says what it says and a finding to that effect is not error. Her challenge to the finding of fact is unfounded. Finding of fact numbers 31 and 32 are completely accurate. See AR 526–527.

Finding of Fact No. 79.

Finding of fact number 79 is a verbatim recitation of language from the Spokane County Code as identified by the Hearing Examiner. The code speaks for its self the reader should to refer to the code section cited in the finding to see the entire definition cited. The included quotation from the code is accurate and is not error.

Finding of Fact No. 98.

The dog’s owner’s challenge to finding of fact number 98 is without substance. Spokane County does not dispute that Emmalin was repeatedly instructed in one form or another by the dog’s owner and Emmalin’s father not to go into or enter the room where the dog was kept while in the house. Whether the “actual” instruction was not to open the dog’s door, not to open a door to a room where the dog has been placed, not to open the door to the dog’s room, or any other variation of the instructions, the fact remains that the 3 year old child was warned to stay clear of the dog. The finding is not error.

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Finding of Fact No. 99.

Finding of fact number 99 is supported by substantial evidence in the record before the Hearing Examiner and the County Commissioners. At VROP p. 115, line 20–p. 116, line 2, the testimony states that at the time that Anthony brought the dog to his room shortly prior to the dog biting Emmalin, Anthony could see that Conner and Emmalin were in Conner’s room though he did not know what they were doing. From that information a logical inference can be made that Emmalin did not know that the dog was in Anthony’s room behind the closed but unlocked door.

Testimony in the record establishes that Emmalin has been allowed to go into Anthony’s room from time to time to find a game to play. VROP p. 143, lines 10–20, and p. 146, lines 1–6. Testimony also indicates that in the moments just prior to Emmalin entering Anthony’s room, Conner and Emmalin were in Conner’s room to find and play a game. VROP p. 135, line 21–p. 136, line 16. Almost immediately after Conner turned to his closet to find a game, Emmalin had crossed the hallway and entered Anthony’s room where she was attacked by the dog. VROP p. 135, line 21–p. 136, line 16. It is completely reasonable, as the Hearing Examiner and County Commissioners found, that Emmalin was not thinking about disobeying the instruction

to stay out of the dog's room but instead was thinking about finding a game to play in a place that she had been shown before that games were kept.

In determining the sufficiency of evidence, a reviewing court need only consider evidence favorable to the prevailing party. *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963). Finding of Fact No. 99 is supported by substantial evidence in the record.

Finding of Fact No. 100.

It appears that the challenge to finding of fact number 100 is merely the dog's owner's opinion rather than a challenge to the finding at all. See Appellant's Brief, p. 14 - 15. Based upon all of the facts in evidence, the Hearing Examiner and the County Commissioners "found as fact" that Gunnar was overly protective and aggressive (consistent with dog's owner's testimony that the dog would jump on people if not restrained, VROP p. 160, lines 9-13), that part of the finding is not challenged by the dog's owner and is thus considered a verity on appeal. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). The finding is also supported by substantial evidence in the record; the purpose for putting the dog in the room when any guests came to the home was to prevent the dog from jumping on the guests, VROP p. 120, lines 7-24. Additionally the dog has shown an extreme

reaction to the presence of unfamiliar persons in the dog's owner's household. VROP p. 178, line 20–p. 183, line 11.

Testimony establishes that Anthony is 14 years of age. VROP p. 91, lines 1–5. Emmalin is 3 years of age. AR 527.

As a matter of fact the Hearing Examiner inferred that when the three year old child was in the dog's owner's household it was advisable that the dog be secured outside rather than in the house under the care of Anthony, not long ago a child himself. The finding is supported by the evidence in the record.

Finding of Fact No. 102.

Support in the record of finding of fact number 102 rests upon the Hearing Examiner and County Commissioners' view of the credibility of witnesses and their testimony. *Morse v. Antonellis*, supra at 574.

Anthony testified that when he noticed that the door to his room was opening he had been picking out a shirt to wear to church, he noticed the door opening so he turned his back to the door, finished putting on his shirt during which time he heard the dog growl and then Emmalin cry out, then he turned around to see what was going on. VROP p. 102, line 1–p. 103, line 25; p. 117, line 13–p. 118, line 9. Anthony admitted that he did not see the door hit the dog, neither did

he hear the dog bark or complain that it had been hit by the door. VROP p. 117, line 25–p. 118, line 5. At VROP p. 117, Anthony testifies that he was aware that the door was opening but he did not see the attack on the child by the dog. He testifies also (at VROP p. 103) that when the door to the room was opened by the child the door was opened all the way thus precipitating the attack. That testimony indicates two important facts, one that Anthony did not see exactly where the dog was when the door was opened, and two that the door could not have hit the dog laying on the floor in front of the door or else the door would not have opened all of the way.

Prior to the hearing before the Hearing Examiner, the dog's owner advised her children that if the dog was declared dangerous the dog could be put down. VROP 146, lines 13–19. It is reasonable that the Hearing Examiner and County Commissioners found parts if not all of the testimony from the dog's owner and her two sons to be practiced and unbelievable in many respects.

- Finding of Fact No. 102 is supported by substantial evidence in the record.

Finding of Fact No. 104.

- Finding of Fact No. 104 is clearly supported by substantial evidence in the record. *See*, VROP p. 130, lines 20–25; p. 162, lines

18–21; p. 159, line 25; p. 119, line 11–120, line 1; p. 95, line 17–p. 96, line 11. Both of the dog’s owner’s dogs were in the room with Anthony when Emmalin entered the room and the attack took place. VROP 98 – 103; VROP 108. Sadie, the other dog of the same breed did not react at all to Emmalin’s presence in the room. VROP 108; VROP 122 - 126. It is logical to infer that Gunnar’s violent reaction was excessive and unreasonable under the facts in the record and the other dog’s lack of aggressive reaction in exactly the same situation.

Finding of Fact No. 105.

The dog’s owner does not challenge the verity of finding number 105 but instead challenges whether it is a finding. Appellant’s Brief, p. 17. The unchallenged finding is that there are no facts in the record that support a conclusion that Emmalin was either negligent or reckless. By making no argument in challenge to finding of fact number 105 the asserted challenge thereto is waived. *American Legion Post #32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991).

F. THE DOG’S OWNER’S ASSERTION OF ERRONEOUSLY OMITTED FINDINGS OF FACT IS WITHOUT MERRIT.

The standard of review in this matter relative to findings of fact is to determine whether there is any competent proof of all of the facts necessary to be proved to support the making of the determination.

RCW 7.16.120(4). The reviewing court is only required to consider evidence in the record that is favorable to the prevailing party. *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963). None of the allegedly omitted findings are necessary to support the recommendation of the Hearing Examiner and the decision of the County Commissioners to affirm the declaration of dangerous dog. See SCC 5.04.032, SCC 5.04.020(8).

The case of *Car Wash Enterprises, Inc. v. Kampanos*, 74 Wn. App. 537, 874 P.2d 868 (1994), does not require that the fact finder enter findings of fact and is otherwise inapposite to this matter.

G. THE COUNTY COMMISSIONERS CORRECTLY
INTERPRETED AND APPLIED THE COUNTY CODE.

The dog's owner's reliance upon the rule of lenity for construction of the allegedly ambiguous terms fails on several points. The terms are not ambiguous. If the terms are ambiguous, deference is given to the body having the responsibility of interpreting the terms.

1. Ambiguity and the Rule of Lenity.

A court's objective in construing a statute is to determine the legislature's intent. *State v. Veliz*, 160 Wn. App. 396, 404, 247 P.3d 833 (2011). To determine the intent the court looks to the plain language of the statute, to the context of the language and the statutory

scheme as a whole. *Id.* Terms used in SCC 5.04 are considered ambiguous only if the term is susceptible to more than one reasonable interpretation, at which time the court may resort to statutory construction, legislative history, and relevant case law for assistance in discerning the legislative intent. *Id.*

If after employing all of the other rules of statutory construction the language of the ordinance remains ambiguous, then the court may employ the rule of lenity and interpret ambiguities in favor of the criminal defendant. *Id.*; *State v. Christman*, 160 Wn. App. 741, 754, 249 P.3d 680 (2011). The rule of lenity may be applied to language in a non-criminal statute only if the civil statute has a criminal application based upon the same terms as impose civil liability. *United States v. Thompson/Center Arms Company*, 504 U.S. 505, 517 – 518, 112 S.Ct. 2102, 119 L.Ed.2d 308, 69 A.F.T.R.2d 92-1493, 60 USLW 4480 (1992). The application of the rule of lenity in a civil context however is narrowly limited to the case when a statute describes an act or restriction that the commission or violation of which will impose a civil liability **and** a criminal sanction for the commission of the same act or violation of the same restriction. *Id.*

In the *Thompson/Center Arms* case, *supra*, the act of “making” a specific firearm created a tax liability (a civil requirement to pay a

tax) and without any further action or condition the “making” of exactly the same firearm constituted a crime. The rule of lenity is not applicable in this matter because the fact that a dog is dangerous under the definition of dangerous dog in SCC 5.04.020(8) or the act of owning a dangerous dog in and of its self does not, without additional requirements, subject the dog’s owner to criminal prosecution. See *Thompson/Center Arms*, at 517.

2. The Term Severe Injury Is Not Ambiguous and is Properly Applied.

The dog’s owner cites no legal authority for her allegation that Emmalin’s injury from Gunnar’s attack was not severe. Instead she asserts requirements to prove severe injury that do not appear in the clear and unambiguous definition of “severe injury⁶” found in the Spokane County Code. The plain language of the definition is easily ascertainable.

The facts clearly supported in the evidence indicate that the dog bite to Emmalin’s head caused several punctures of the child’s skull and that the lacerations to the child’s scalp caused by the dog bite were sutured closed. AR 534-540, AR 27-49. The dog’s owner admits

⁶ SCC 5.04.020 (25) “Severe injury” means any physical injury which results in a broken bone, disfigurement, laceration requiring suture(s) or surgery, or multiple bites requiring medical treatment

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that the dog bites on Emmalin’s head caused puncture wounds to the child’s skull and that the injuries required surgery. VROP p. 183, line 23–p. 184, line 2; p. 169, line 13–p. 171, line 13.

It is reasonable to conclude that punctures of the skull are broken bones regardless of how much the dog’s owner hopes to minimize them. Likewise the definition in the Spokane County Code is stated in the disjunctive. It is not required that there be broken bones that require sutures, disfigurement, and lacerations or surgery. SCC 5.04.020 (25). A broken bone, or disfigurement, or lacerations requiring sutures or surgery, etc. each individually are sufficient to meet the definition. In this case there are both broken bones and lacerations requiring sutures. The code was correctly applied.

3. The Term Provocation is Readily Ascertainable from the Context and by Deference to the County Commissioners’ Interpretation.

The term “provocation” as that term is used in the definition of dangerous dog, SCC 5.04.020(8) should only be seen as ambiguous and needing interpretation if it is susceptible to more than one reasonable interpretation. *State v. Veliz*, supra.

Under the dog owner’s interpretation if the dog believes that it is being provoked, then provocation has occurred. The proof of the fact of provocation is that the dog reacted in the only way it can, it bit

someone. If that is a reasonable interpretation of provocation then there would never be an unprovoked dog bite.

Giving deference to the interpretation of the ordinance by the County Commissioners, as the court must (see *City of Olympia v. Thurston County Board of Commissioners*, 131 Wn. App. 85, 94, 125 P.3d 997 (2005)), the only reasonable interpretation is that provocation be determined from an objective point of view; did the dog act in a manner that could be expected of a “reasonable dog” under the same circumstances? The term is unambiguous.

- Dr. Ha, the dog’s owner’s expert who testified before the Hearing Examiner, agreed that the reasonableness of the dog’s reaction should be a factor in determining whether a dog is dangerous. VROP p. 217, line 6–p. 218, line 20. Dr. Ha also agreed that a dog could learn to be aggressive and thus dangerous by the innocent and unintentional actions of its owner or from other events that heighten the dog’s sensitivity to strangers or specific events. VROP p. 218, line 22–p. 220, line 17. Keeping the dog isolated when visitors come to the home, the home invasions that severely disturbed the dog, and lack of socialization between the dog and Emmalin all contributed to the dog’s violent reaction by Emmalin merely opening the door and entering the room. VROP p. 218, line 22–p. 220, line 17. It is logical to conclude

that the dog may have been conditioned to such a violent reaction upon an encounter with strangers.

Those facts along with the fact that other dog in the room, also a Rottweiler breed, did not react at all to the child entering the room or even to Gunnar's attack on the child, indicates that Gunnar over reacted to the situation when compared to a "reasonable dog" standard. The child did not torment, abuse, assault, or otherwise provoke the dog. Cf. SCC 5.04.020(8). The dog over reacted to the situation and bit the child without provocation.

4. Willful Trespass is Correctly Interpreted and Applied by the County Commissioners.

The fallacy in the dog's owner's definition of the term "willful trespass" is that she ignores the word "willful" and focuses merely on the term "trespass". The assertion being that the child's intention to enter Anthony's room while the dog was in it equates to her alleged trespass as being willful.

The context of the term "willful trespass" indicates that there must be first a trespass, in the accepted legal sense of the word, and that there must also be a wrongful intent to trespass. That is consistent with the language of the definition of dangerous dog, SCC 5.04.020(8), which specifically prohibits a declaration of dangerous dog as a result

of a wrongdoer's actions. That is how the County Commissioners interpreted and applied the term "willful" and deference to their interpretation should be given by the Court. *City of Olympia v. Thurston County Board of Commissioners*, supra.

The undisputed facts in the testimony are that: Emmalin was with Conner in Conner's room immediately prior to Emmalin crossing the hall and entering Anthony's room. VROP p. 114, line 10–p. 115, line 25, p. 136, lines 1–19, p. 143, lines 10–20, p. 146, lines 1-6. Conner was looking in his room for a game for Emmalin to play with. VROP p. 136, lines 1-19. Almost immediately when Conner began looking for a game, Emmalin walked across the hall to Anthony's room, where Conner and Emmalin had found games to play on prior occasions. VROP p. 136, lines 1-19. It is not clear from the testimony whether Conner and Emmalin had gone into Anthony's room the day before looking for a game. Anthony was at his closet picking out a shirt just prior to Emmalin entering the room. VROP p. 102, lines 1–4, p. 103, line 12–p. 104, line 4. When Anthony noticed the door opening, he did not react with a start or indicate any fear. He turned his back to the door and finished putting on his shirt. VROP p. 103, line 12–p. 104, line 4, p. 117, line 3–118, line 9. While Anthony was putting his shirt on, with his back to the attack, he heard a soft growl.

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VROP p. 118, lines 6-8. When Anthony turned around to see what was going on he saw that the dog had bitten Emmalin on the head and he tried to pull the dog away from Emmalin. VROP p. 103, line 20–p. 104, line 4. Those facts do not indicate that Emmalin formed any intent to willfully trespass. They show that she was interested in a game and was going to a place where she and Conner had found games before.

5. No Evidence in the Record Supports a Claim of Promissory Estoppel.

There is no evidence in the record to support an allegation that Emmalin has committed the tort of estoppel.

Promissory estoppel, in its proper context is akin to a contract. It requires that there be a promise made by the child with the intent that the dog's owner rely upon that promise and the child's belief that the dog's owner would rely upon that promise. The dog's owner then must justifiably rely upon the child's promise and change her behavior based upon that promise. Next the child must act contrary to the promise made. Finally, the dog's owner must suffer damage as a result of her reliance and the child's actions contrary to the original promise to such an extent that not to enforce the promise would work an

injustice on the dog's owner. *Uznay v. Bevis*, 139 Wn. App. 359, 369, 161 P.3d 1040 (2007).

Evidence in the record indicates that the child was repeatedly told to stay out of the dog's room or otherwise stay away from the dog. VROP 164. There is no evidence however that the dog's owner changed her behavior or her course of conduct in reliance upon the alleged promise from the child. The record indicates that the dog's owner always kept the dog from the child and while the child visited the dog was always kept in Anthony's room or outside. VROP 122. The dog's owner points to no evidence that she reasonably relied upon what she characterizes as the assurance of a three year old child. There is no evidence in the record that Emmalin acted contrary to her alleged promise. Finally, the dog's owner has suffered no damages or loss as a result of the alleged promise and breach of promise by the child.

The alleged existence of the tort of estoppel is not supported in the facts of this case or the law defining promissory estoppel.

H. OTHER ISSUES RAISED IN DOG'S OWNER'S BRIEF.

1. Preponderance of the Evidence is the Standard of Proof Designated in SCC 5.04.032(1)(e).

The dog's owner's challenge to the standard of proof established in SCC 5.04.032(1)(e) is an improper challenge to the

ordinance which is a legislative act and not subject to review by the writ of review sought by her in this action.

Notwithstanding this issue not being properly before the Court, an issue before the Court is whether the County Commissioners followed the established procedure under SCC 5.04.032. SCC 5.04.032(1)(e) states in pertinent part: "... and that the burden shall be on the director, or his/her designee, to establish by a preponderance of the evidence that the dog is a dangerous dog". The standard of proof established in the ordinance is preponderance of the evidence, thus the County Commissioners did follow the established procedure in applying the standard of proof. There is no error in the application of the standard of proof to the County Commissioners' review of the declaration of dangerous dog.

Although a person's interest in the pets they own is a property interest it is an imperfect and qualified interest. *American Dog Owner's Association v. City of Yakima*, supra at 217, citing, *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 17 S. Ct. 693, 41 L.Ed. 1169 (1897). It is generally accepted in the State of Washington that the burden of proof required for a determination that a dog is dangerous is by a preponderance of evidence. *Mansour v. King County*, 131 Wn. App. 255, 265 – 267, 128 P.3d 1241 (2006). In *Mansour* the Court

reasons that the determination of dangerous dog does not sever the relationship between the dog and its owner, it merely places restrictions on the ownership and/or keeping of the animal. The Court then goes on to point out that even in a dependency action where a parent risks losing custody of their child, the burden of proof is only by a preponderance of the evidence. *Id.* Dog's owner's assertion that a higher burden of proof should apply is without basis.

Argument that the standard of proof is inadequate under constitutional principles is beyond the scope of review under a constitutional writ of certiorari or a statutory writ of review. *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 634, 689 P.2d 1084 (1984).

2. There has been No Ultravires Exportation of Restraints by Spokane County.

There being no evidence in the record that Spokane County has in any way attempted to enforce the dangerous dog restrictions in SCC 5.04.035 outside of the boundaries of Spokane County, the dog's owner's allegations of that happening are without any basis.

Even if the mere statement in the Hearing Examiner's recommendation to the County Commissioners, which was then adopted by the Commissioners, is technically an attempt to exercise

jurisdiction outside of Spokane County, it is harmless error in that there is no evidence of such attempts to enforce the requirement outside of Spokane County. If such an attempt were made, it could be challenged at the time it happens.

3. Spokane County Code 5.04.032 is a Proper Exercise of Police Power by Spokane County and Complies with Due Process Requirements for Declaring Dogs as Dangerous and Impounding Dangerous Dogs.

Although review of the constitutional challenge to the Spokane County Code section 5.04.032 is outside of the scope of review under the writ of review sought by the dog's owner in this case, in the event that the Court does consider the issues raised in that regard Spokane County offers the following. In making the argument stated below, Spokane County does not waive its assertion that the issues are outside of the scope of review in this matter.

a. SCC 5.04.032 is a proper exercise of police power.

It is well-established that dogs are subject to police power and may be destroyed or regulated to protect citizens. *American Dog Owners Association v. City of Yakima*, 113 Wn.2d 213, 217, 777 P.2d 1046 (1998). An ordinance regulating the ownership of dogs is presumed constitutional. *Id.*, at 215.

b. SCC 5.04.032 meets the requirements of substantive due process.

An ordinance meets the requirements of substantive due process if, 1) there is a public problem or evil, 2) the regulation tends to solve this problem, and 3) the regulation does not be unduly burdensome upon the person regulated. *Rhoades v. City of Battleground*, 115 Wn. App. 752, 763, 63 P.3d 142 (2003), citing, *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330-31, 787 P.2d 907 (1990).

The public problem addressed by SCC 5.04.032 is the potential for and actual injury to the citizens of Spokane County caused by dangerous dogs, as that term is defined in SCC 5.04.070. Protection of citizens and other persons within Spokane County from injury by dangerous dogs is a legitimate state purpose. *Id.* The fact that dangerous dogs are known to be kept as pets by persons living within Spokane County is sufficient evidence to illustrate the need for protection from them. *Id.* at 764. The dog's owner does not challenge this legitimate state purpose.

The regulation of ownership of dangerous dogs and imposing conditions under which the dogs must be kept such as safe enclosures, muzzles when not in a safe enclosure, and an established limit on

liability insurance to ensure recovery in the event a person is injured by a dangerous dog, is a reasonable means of attempting to provide the intended protection. *Id.* The dog's owner does not challenge this reasonable means of attempting to resolve the problem.

The substantive due process challenge asserted in this case focuses upon the allegedly burdensome nature of the requirements placed upon the owner of a dangerous dog. More specifically the requirement that the dog be muzzled when not inside a secure enclosure and that the dog otherwise be kept within a secure enclosure, alleging that this is literally incarceration of the animal. The dog's owner also objects to the requirement of liability insurance as overly burdensome. The fallacy in her argument is that the objection is based solely upon her assertion that her dog is not a dangerous dog. The dog's owner provides no suggestion regarding what requirements for the keeping of a dangerous dog would be less burdensome and still offer a reasonable means of protection to the innocent victims of a dangerous dog.

The dog's owner's challenge to SCC 5.04.032 fails to meet any of the necessary elements under substantive due process and should properly be denied.

c. SCC 5.04.032 meets all the requirements of procedural due process.

Procedural due process constrains governmental decision making that deprives individuals of liberty or property interests within the meaning of the Due Process Clause. *Rhoades v. City of Battleground*, supra, at 765, citing, *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Due process is a flexible concept; the exact contours are determined by the particular situation. *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). An essential principle of due process is the right to notice and meaningful opportunity to be heard. *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). Before an individual is finally deprived of a property interest, they must be given an opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, supra at 333.

Although it is recognized that ownership of a dog is greater than a mere economic interest, ordinances governing pet ownership do not reach a substantial amount of constitutionally protected conduct. *Rhoades v. City of Battleground*, supra at 768, citing, *American Dog Owner's Association v. City of Yakima*, supra. The property interest in a dog is of an imperfect or qualified nature. *American Dog Owner's*

Association v. City of Yakima, supra at 217. Thus, the procedural due process required in the context of an ordinance governing the ownership of a dog, and in this case a dangerous dog, may be something less than in a matter in which the property or liberty interest is more significant or permanent in nature. *Rabon v. City of Seattle*, 107 Wn. App. 734, 748, 34 P.3d 821 (2001).

Whether the dog's owner was given an opportunity to be heard at a meaningful time and in a meaningful manner is determined upon the specific facts of this case and the process afforded under the ordinance. *Mathews v. Eldridge, supra*. The purpose of the ordinance is the protection of persons from injury from dangerous dogs. SCC 5.04.010. The protection of the public from injury by the dog while waiting for an appeal hearing and decision by the Board of County Commissioners is accomplished by impounding the dog that has been declared dangerous by SCRAPs, pending the hearing. SCC 5.04.032(1)(f). Immediately prior to impounding the dog, the dog's owner is served with notice of the impound and detailed information regarding the owner's right to appeal the declaration of dangerous dog and the requirements for registration if the dog is to be kept within Spokane County. SCC 5.04.032(1). The dog's owner is free to retrieve

the dog from impound by meeting the requirements for keeping a dangerous dog within Spokane County. SCC 5.04.032(1)(f).

Here the dog's owner timely requested the appeal of the dangerous dog declaration and shortly thereafter retrieved the dog from impound. A hearing was held by the Spokane County Hearing Examiner where the dog's owner was allowed to confront and cross examine witnesses presented by SCRAPS, present witnesses in her own behalf, present evidence in support of her asserted defenses, all of which was done before an impartial quasi-judicial tribunal. SCC 5.04.032. The hearing requested by dog's owner was held within 15 days of her request for the hearing, the request having been made only one (1) day after the Declaration of Dangerous Dog was issued and the dog was impounded. VROP p. 173, line 23–p. 174, line 3. The impound of the dog was both under the authority of the SCC 5.04.032(1)(f) regarding the impound of dangerous dogs and for the purpose of quarantine of the animal relative to rabies infection following a bite by the dog on a human being pursuant to SCC 5.04.160. Certainly the dog's owner was given an opportunity to be heard in a meaningful manner. The opportunity to be heard was offered and then exercised in a timely manner. *Rabon v. City of Seattle*, 107 Wn. App. 734, 748, 34 P.3d 821 (2001).

4. Impounding the Dangerous Dog for the Purpose of Protecting the Public From Injury by the Dog and as Quarantine Following a Bite of a Human is Not an Unlawful Seizure.

As early as 1897 courts have ruled that a warrantless impound of a dog is allowable under the exercise of the police power afforded the State and its subdivisions such as counties. *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 705-706 (1897); *Garcia v. Village of Tijeras*, 108 N.M. 116, 122–123, 767 P.2d 355, 57 USLW 2507 (1988) (citing, *Sentell v. New Orleans & C.R. Co.*, supra); *Rabon v. City of Seattle*, supra at 748. The well recognized exception to the requirement of notice and hearing prior to impounding a dangerous dog requires that the impound be done 1) directly related to an important governmental or general public interest; 2) in response to a special need for prompt action; 3) under strict control by the government over its monopoly of legitimate power; 4) under the standards of a narrowly drawn statute, by a government officer responsible for determining that the impound was necessary and justified in the particular instance. *Fuentes v. Shevin*, 407 U.S. 67, 90–92, 92 S. Ct 1983, 32 L. Ed. 2d 556, 10 UCC Rep. Serv. 913 (1983). The U.S. Supreme Court has upheld warrantless seizures under this exception for such things as collecting a debt owed to the IRS, to protect against economic disaster of bank failure, and to protect the public from misbranded drugs and contaminated food. *Id.* at 92. The

Washington State Supreme Court has stated the exception as applying in “extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. Further the ‘opportunity’ for a hearing must be granted ‘at a meaningful time and in a meaningful manner.’” *City of Everett v. Slade*, 83 Wn.2d 80, 83–85, 515 P.2d 1295 (1973). In *Rabon v. City of Seattle*, supra at 748, the Court applied the exception to the impounding of dangerous dogs and found that the pre-hearing impound of the dogs was “justified by the strong public interest in prompt action to prevent more attacks.” (citing, *Everett v. Slade*, supra, and *Fuentes v. Shevin*, supra.). Washington State’s application of the exception to warrantless impound of dangerous dogs with post-impound opportunity for hearing is further supported in adoption by the Washington courts of the finding that even considering the emotional attachment that persons develop toward their dogs, dogs are nonetheless still property (*Mansour v. King County*, supra at 267) and dog ownership regulation does not reach a substantial amount of constitutionally protected conduct (*Rhoades v. City of Battleground*, 115 Wn. App. 752, 768–769 (2003)).

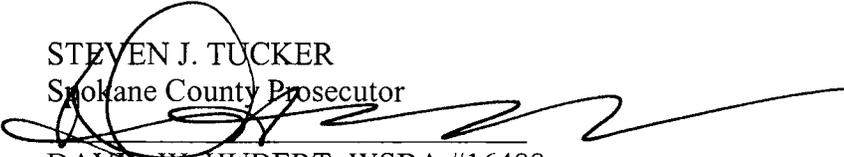
VI. CONCLUSION

The controlling law regarding this matter is well established against dog's owner, the Spokane County Code clearly does not support the interpretation that dog's owner wants to put it to, the Findings of Fact that dog's owner objects to are well supported in the evidence, many of them supported by the testimony of dog's owner herself or witnesses called on her behalf, and the facts that are not challenged along with the facts that have substantial support in the record all point to the conclusion that the Hearing Examiner's recommendation and the decision of the Board of County Commissioners was correct and should not be disturbed on review by this Court.

• Spokane County respectfully requests that dog's owner's writ be denied without costs or fees from Spokane County. If the Court deems it lawful, Spokane County requests to be reimbursed for costs and fees expended in defending this matter in an amount to be supported by Declaration upon request from the Court.

Respectfully submitted this 7th day of September, 2011.

STEVEN J. TUCKER
Spokane County Prosecutor


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Deputy Prosecuting Attorney
Attorneys for Spokane County

PROOF OF SERVICE

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

On the 9th day of September, 2011, I caused to be served a true and correct copy of the Respondents' Brief by the method indicated below, and addressed to the following:

Adam S. Karp
114 W. Magnolia St., Ste 425
Bellingham, WA 98225

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

DATED this 9th day of September, 2011 in Spokane, Washington.


LORI ZAAGMAN-BACON