

FILED

AUG 15 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 302415-III

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

PROSSER HILL COALITION, LISA WATTS-MCKEE, DANIEL
SPISAK, JACQUELYN OLSON, JACK WILCOX, TOM
WHITFIELD, JANICE WHITFIELD, ROBERT HEINEMANN,
MELAINÉ ZIMMERMAN, ROY WILSON, STEVE BAIRD,
RANDY SUNDERLAND, RICK OLSON, and CINDY PHILLIPS,

Respondents/Cross Appellants,

v.

COUNTY OF SPOKANE, SILVERBIRD LLC, and DENNIS P.
REED, DENNIS E. and DAWNA REED, husband and wife,

Appellants/Cross Respondents.

**APPELLANTS' REPLY BRIEF ON THE MERITS AND
RESPONSE TO CROSS APPEAL**

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I. INTRODUCTION

Petitioners Silverbird LLC, Dennis P. Reed and Spokane County (hereinafter collectively referred to as “Petitioners”) respectfully submit the following reply to the Response Brief filed by Respondents and response to the Cross-Appeal.

II. ARGUMENT IN REPLY

- A. RESPONDENTS MISCHARACTERIZE THE FAILURE TO PROPERLY NAME AND SERVE A NECESSARY PARTY AS MERELY AN ERROR IN THE CAPTION OF THE LAND USE PETITION.

The issue before the Court is what requirements must be satisfied in order for a person to become a “party” under LUPA.

It is undisputed that Dennis E. and Dawna Reed, as the property owners, are necessary and required parties to this LUPA action. It is undisputed that Petitioners did not name Dennis E. Reed and Dawna Reed in the caption of the land use petition/complaint. It is undisputed that Dennis E. Reed and Dawna Reed are not identified as a defendant/respondent in the body of the land use petition/complaint. It is undisputed that Petitioners did not serve a Summons on Dennis E. Reed and Dawna Reed, nor any of the other necessary parties.

Petitioners assert that in order to achieve party status under LUPA, the person must be named and identified in the body of the

petition as a party pursuant to RCW 36.70C.070(5) and also be served with a summons pursuant to Civil Rules 3 and 4. Respondents argue that the mere mention of the property owners in a factual context in its LUPA petition make Dennis E. and Dawna parties to this action. Adopting such a standard would nullify the Civil Rules, procedural due process and the express statutory requirements under LUPA.

To justify their failure to name a necessary party in its LUPA petition, Respondents claim an excusable mistake in the caption of their Land Use Petition. Respondents do not dispute that the owners of the property were not named as parties to the Land Use Petition either in the caption *or in the body of the Petition*.

RCW 36.70C.070(5) sets forth the required elements of a Land Use Petition, including “identification of each person to be made a party under RCW 36.70C.040(2) (b) through (d).” Respondents failed to identify Dennis E. Reed and Dawna Reed as a party, as required under RCW 36.70C.070(5); therefore, they are not a “party.”

Respondents mistakenly assert that RCW 36.70C.040(2) *automatically* makes the property owners a party to the action regardless of whether the persons are named as parties in the petition or not. Respondents’ Response/Opening Cross-Appeal Brief, p. 13 at footnote 5. RCW 36.70C.040(2) does not automatically make unnamed persons a

party to the Land Use Petition: it states who is a necessary party. Based upon their fatal assumption, Respondents compound their error by asserting that RCW 36.70C.040 only requires that the Land Use Petition be timely filed with the Court and served upon the persons identified in LUPA. Respondents ignore the clear language of the statute.

Respondents ask the Court to read and apply only the portion of RCW 36.70C.040(2) that ends with the words “timely filed with the court and timely served” to invoke appellate jurisdiction of the superior court. Respondents then ask this Court to interpret the remainder of RCW 36.70A.040(2) as merely a procedural rule that does not effect the jurisdiction of the superior court. This argument is contrary to the well established rule that “[i]n order to invoke the superior court’s appellate jurisdiction under LUPA, the petitioner must satisfy the statutory procedural requirements of RCW 36.70C.040”. *Quality Rock Products, Inc v. Thurston County*, 126 Wn. App. 250, 267, 108 P.3d 805 (2005).

Respondents assert that *Suquamish Indian Tribe v. Kitsap County* holds that only timely filing and service is necessary to invoke the superior court’s appellate jurisdiction, ignoring the Court’s clear statement that “*Here, in contrast, the NKCC was a party that would not have legal notice of the Tribe’s petition if not named and served.*” *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 825, 965

P.2d 636 (1998) (Emphasis added). The case clearly requires that the parties identified in RCW 36.70C.040(2) must be named as parties in the Land Use Petition under RCW 36.70C.070. *Id.*

Respondents' reliance upon the case of *Conom v. Snohomish County* is also misplaced. The issue in that case was whether RCW 36.70C.080(1) was jurisdictional. *Conom v. Snohomish County*, 155 Wn.2d 154, 157-158, 118 P.3d 344 (2005). The case goes on to acknowledge that RCW 36.70C.040(2) must be strictly complied with to invoke the superior court's appellate jurisdiction. *Id.* at 161 – 162.

Similarly, the case of *Keep Watson Cutoff Rural v. Kittitas County* interprets the requirements of RCW 36.70C.070 while concurring that strict compliance with RCW 36.70C.040 is jurisdictional. *Keep Watson Cutoff Rural v. Kittitas County*, 145 Wn. App. 31, 39, 184 P.3d 344 (2008).

The case of *San Juan Fidalgo Holding Company v. Skagit County* clearly requires strict compliance with RCW 36.70C.040 even on the pains of a seemingly harsh result. *San Juan Fidalgo Holding Company v. Skagit County*, 87 Wn. App. 703, 713, 943, P.2d 341 (1997). That case warns that accepting the doctrine of substantial compliance would undermine the strict jurisdictional requirement of RCW 36.70C.040. *Id.*; *Keep Watson Cutoff Rural*, 145 Wn. App. at 37.

Finally, the case of *Quality Rock Products, Inc. v. Thurston County* does not excuse the failure to name a necessary party as a party in the body of the Land Use Petition and in the caption as well. *Quality Rock*, 126 Wn. App. at 271. In *Quality Rock*, the petitioner clearly identified Black Hills as a necessary party, as required by RCW 36.70C.040(2), which was a determinative fact when the court allowed the caption to be amended. *Id.* at 271.

Respondents' assertion that timely filing with the court and service upon individuals and entities, regardless of whether the persons or entities are named as parties in the Land Use Petition, is completely unsupported in the law. All of the cited cases support the rule that all necessary parties to the Land Use Petition must be named as parties in the Land Use Petition.

Respondents failure to strictly comply with RCW 36.70C.040(2) and RCW 36.70C.070(5) deprived the superior court of appellate jurisdiction under LUPA. Thus, the superior court lacked jurisdiction to consider the Land Use Petition in any aspect and the petition should have been dismissed.

B. A SUMMONS IS REQUIRED IN MATTERS UNDER LUPA.

Respondents argue that requiring a summons to initiate review under LUPA would add a requirement that does not exist in LUPA. Their

reliance upon the case of *Quality Rock Products, Inc. v. Thurston County*, supra, is in error.

LUPA is a civil action. As a civil action, a Land Use Petition is governed by the Civil Rules for Superior Court (CR). CR 3. LUPA specifically refers to the Rules for Superior Court in RCW 36.70C.040(5) with regard to commencement of the action by service upon the local jurisdiction as well as in RCW 36.70C.030(2), expressly stating that the civil rules govern procedural matters. Nothing in LUPA exempts an action from the Civil Rules for Superior Court. Furthermore, the courts have affirmed that the Civil Rules are incorporated into the Land Use Petition Act under RCW 36.70C.040(5). *Suquamish Indian Tribe*, 92 Wash. App. at 823.

In the case of *Quality Rock Products, Inc. v. Thurston County*, supra, the Court held that a summons is in fact required even in a matter initiated under LUPA. “Quality Rock initially argues that RCW 36.70C.040(5) does not require a party to submit a summons because the statute consistently emphasizes the timely filing and service of the land use petition and omits any reference to a summons. But given RCW 36.70C.040(5)’s incorporation of the civil rules for service of process, coupled with CR 4’s purpose, *this argument is unpersuasive.*” Quality

Rock, 26 Wn. App. at 264 (Emphasis added). Respondent's reliance on that case to refute this requirement is unsupported.

There is no conflict between RCW 36.70C and the Civil Rules in requiring that a summons be served upon the parties to the action. Respondents' assertion that a summons is not required is unsupported.

C. PUBLIC NOTICE OF THE HEARING WAS PROPERLY POSTED AND COMPLIED WITH THE NOTICE REQUIREMENTS OF THE SPOKANE COUNTY CODE.

1. Respondents' Claims Regarding the Posted Notice of Hearing are Barred by the Spokane County Hearing Examiner Rules of Procedure.

Respondents' objection to the location of the sign posted for the Notice of Hearing is barred by the Spokane County Hearing Examiner Rules of Procedure adopted by the Spokane Board of County Commissioners by Resolution 1996-0294. (A copy of the Rules of Procedure is attached as Appendix A for the Court's convenience.)

Hearing Examiner Rule 9 C. reads:

"A person is deemed to have received notice if the person appears at the hearing or submits written information regarding the merits of the application, *even if notice was not properly mailed or posted.*" Appendix A. (Emphasis added).

Each of the Respondents appeared at the hearing; participated in the hearing through oral and/or written testimony; presented written and/or oral expert testimony through hired experts; or was represented by

counsel during all three hearing sessions spanning more than two weeks. CP 318 – 326; 425 – 429. Under the Hearing Examiner Rules, each Respondent is deemed to have received notice; therefore, there is no basis or standing for Respondents' claim of inadequate or improper notice.

2. The Posted Notice was Correctly Located Pursuant to the Spokane County Code.

Respondents' objections to the posted sign can be summarized as:

1) the sign should have been posted along a road having no physical connection to the subject property but having higher traffic volumes; and
2) the information on the posted sign unfairly prevented them from effectively participating in the hearing. Neither allegation is supported by the facts or law regarding this matter.

Respondents' objection to the location of the posted sign giving notice of the hearing is based solely upon their own interpretation of the Spokane County Code. Respondents rely upon isolated portions of the Spokane County Code taken out of context or misquoted to reach an interpretation that they ask this Court to adopt.

Spokane County Code 13.700.106(2)(b) requires that a sign giving notice of the hearing be "posted by the applicant on the site along the most heavily traveled street *lying adjacent to the site*" (Emphasis added). The sign is one of the forms of notice required by SCC

13.700.106(2). The Spokane County Code also requires that notice of hearing be mailed to all parties requesting notice, and other persons who may be affected by the action and all properties within 400 feet of the site, and be published in a newspaper of general circulation within the county at least 15 days prior to the hearing. SCC 13.700.106(2). In this case, notice of the hearing was mailed and published as required by the Spokane County Code and has not been challenged. HR 204 – 205; 206.

The only challenge relates to the location of the posted sign: there is no dispute that the sign was timely posted fifteen days prior to the public hearing. For this proposal, the applicant posted the required sign at Jensen Road, within the easement leading from Jensen Road to the proposed private airstrip. HR 203.

Although the Hearing Examiner found that the subject property was not adjacent to any road, he correctly concluded that posting the sign at Jensen Road, a public road, on the driveway leading to the proposed airstrip, was appropriate under SCC 13.700.106(2)(b). CP 85, 116. The Hearing Examiner specifically found¹:

“On October 11, 2010, the applicant timely posted a notice of hearing sign along the south side of Jensen Road; at the entrance to the long driveway that extends southerly from Jensen Road to

¹ It is important to note that the Hearing Examiner conducted two site visits to the subject property (one visit before to the public hearing and one visit after the close of the public hearing and prior to issuing his written decision); therefore, he could personally view the physical location of the posted sign. CP 79.

the northwest corner of the site, through land owned by the current site owners (Dennis and Dawna Reed) and their son, Denny Reed. The posting of the sign along Jensen Road was reasonable and proper under the circumstances.” CP 85.

The Hearing Examiner’s decision is entitled to deference in the interpretation of the Spokane County Code and the Spokane County Hearing Examiner Rules of Procedure. *State Department of Ecology v. Tiger Oil*, 166 Wn. App. 720, 754, 271 P.3d 331 (2012); *Pinecrest Homeowners Ass’n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004).

Petitioners argue that the sign should have been posted along Cheney-Spokane Road; however, the subject property is not visible from Cheney-Spokane Road, is not adjacent to Cheney-Spokane Road, and is not accessible from Cheney-Spokane Road. HR 610; HR 1244. In fact, the placement of the sign along Cheney-Spokane Road, as suggested by the Respondents, would not comply with the Spokane County Code. Spokane County Code Section 13.700.106(2)(b) requires that a sign giving notice of the hearing be “posted by the applicant on the site along the most heavily traveled street *lying adjacent to the site*” (Emphasis added). Cheney-Spokane Road is not “on the site” nor is it “adjacent to the site.” Furthermore, a sign along Cheney-Spokane Road would have required the applicant to trespass on County right-of-way or private

property into order to post the sign, because the subject property is not “adjacent to” Cheney-Spokane Road.

After hearing the arguments from Respondents and testimony from County Staff regarding the sign location and Code requirements, the Hearing Examiner found that the most logical place to post the notice “on the site” is at Jensen Road and the access driveway to the site. CP 85. As noted previously, Respondents are deemed to have received notice under the Hearing Examiner Rules of Procedure because they were present at the hearing.

Respondents’ reliance on the case of *Port of Seattle v. Pollution Control Bd.*, 151 Wn.2d 568 (2004) against granting the Hearing Examiner deference in interpretation of Spokane County ordinances is misplaced. The *Port of Seattle* case involved the Pollution Control Board applying and interpreting the federal Clean Water Act, as distinguished from the case of *Pinecrest Homeowners’ Ass’n v. Glen A. Cloninger & Assocs.*, supra, which was a matter of the Spokane City Council applying and interpreting the Spokane City Zoning Code. In the case before this Court, the Spokane County Hearing Examiner interpreted and applied the Spokane County Zoning Code.

Respondents’ challenge to the content of the posted notice with SCC 13.700.104 is misplaced. The requirements for signs are governed

by SCC 13.700.106(2)(b)(4). The posted sign does not require a description of the location of the site (presumably because it is posted “on the site”); therefore, the arguments regarding an improper description do not apply as the sign had no location description. The Code section cited by Respondents, SCC 13.700.104, refers to the written notice of hearing that is to be circulated by mail and published in the local newspaper. Respondents have not raised, nor briefed, any objection to the mailed and published notice of hearing; therefore, no allegation regarding SCC 13.700.104 is before this Court in this action. RAP 10.3(g). Furthermore, the Hearing Examiner made a specific finding that:

“The mailed and posted notices of hearing included a copy of the site plan of record, which shows the location of the site. All notices of hearing correctly listed the tax parcel numbers for the site, file number and contact information for the applicant and the County Building and Planning Department.” CP 85.

This finding is unchallenged and is a verity on appeal. RAP 10.3(g).

3. Respondents Were Not Confused or Misled by the Posted Notice of Hearing.

Respondents’ reliance upon *Barrie v. Kitsap County*, 84 Wn.2d 579, 527 P.2d 1377 (1975), in support of their allegation that the Notice of Hearing was insufficient is error. The local jurisdiction’s action in the *Barrie* case was a rezone decision that would allow the development of a

planned unit development (PUD) on the rezoned property or in the alternative any number of other proposals not disclosed by the notice of the hearing. *Barrie*, 84 Wn.2d, at 583 – 586. The hearing notice in the *Barrie* case led the hearing participants to believe that a desirable and well planned PUD development would be approved as part of the rezone action. *Id.* Thus, the notice was found to be deficient because the public could have been led to believe that a development that they supported was going to be approved or required as a result of the hearing, when in reality a totally different development could have been approved after the rezone decision.

In this case, there was no confusion regarding the proposed private airstrip that would be considered by the Hearing Examiner. Respondents never alleged that they did not understand that a private airstrip was being proposed, nor did they ever complain that they did not understand the location of the proposed private airstrip. The evidence demonstrates that the Respondents clearly knew the location of the proposed private airstrip and they strenuously objected to it. CP 429; HR 604; HR 439 – 574, 578 – 1236; CP 436 – 488, 633 – 681, 740 – 785. The Hearing Examiner adopted a specific finding that:

“[t]here is no evidence in the record that the description errors in the notice of hearing confused neighboring property owners, or other persons who received or reviewed the notice of hearing;

regardless of the location of the site. The description errors are not substantial enough to invalidate the notice provided for the hearing.” CP 85.

This finding is unchallenged and is a verity on appeal. RAP 10.3(g).

The Respondents argue that they were deprived of an opportunity to prepare for the hearing and that a continuance should have been granted; however, the Respondents were aware of the proposed private airstrip for almost 1 year before to the hearing on the conditional use permit. The Hearing Examiner adopted a specific finding of fact that:

“[n]eighboring property owners had the opportunity to examine the application filed at the County Building and Planning Department during normal business hours, from the time the notice of application was issued on December 17, 2009 until the public hearing commenced on October 27, 2010; and also during the hearing process. The hearing on the application extended over a period of two (2) weeks; which provided project opponents with additional time to review and comment on the application.” CP 84 - 85.

This finding is unchallenged and is a verity on appeal. RAP 10.3(g). The Record corroborates this finding and reflects that project opponents met with the County Planning Department staff to review the file and submit written objections ten months before the public hearing. HR 377. The Respondents complaints that they did not have adequate

notice of enough time to prepare for the hearing are refuted by their own written submissions to the County.

All that is owed to the Respondents under state law and the County Code is fifteen days notice of the public hearing. It is unchallenged that notice was timely given fifteen days before the hearing. The Respondents simply wanted a special exception from applicable state and local requirements and delay the proceedings.

Notice of the hearing complied with the requirements of SCC 13.700.106. HR 203; CP 116; CP 472 – 473. Throughout the proceedings, Respondents were represented by legal counsel, provided numerous hours of testimony and voluminous amounts of written evidence at the hearing, and in their own words, “substantial expert testimony.” CP 429; HR 604; HR 439 – 574, 578 – 1236; CP 436 – 488, 633 – 681, 740 – 785. The Respondents suffered no prejudice, nor were they denied an opportunity to provide extensive written and oral testimony during the three days of public hearings.

D. RESPONDENTS’ OBJECTION TO THE APPROVAL OF THE CONDITIONAL USE PERMIT LACKS ANY SUBSTANTIVE SUPPORT IN THE LAW OR THE RECORD BEFORE THE HEARING EXAMINER.

Respondents’ briefing regarding the Hearing Examiner’s decision, relative to the merits of the conditional use permit, is based completely

upon Respondents' anecdotal testimony, Respondents' own interpretation of the Spokane County Code, misapplication and mischaracterization of regulations regarding commercial public airports, and information or factors that are not relevant to the proposed private airstrip. Respondents cite no legal authority for their arguments with the exception of *Henderson v. Kittitas County*, 124 Wn. App. 747, 100 P.3d 842 (2004) and *Phillips v. City of Brier*, 24 Wn. App. 615, 604 P.2d 495 (1979) which they misinterpret and misapply as discussed later in this brief. Respondents failed to meet their burden and have not demonstrated that the Hearing Examiner made an erroneous interpretation of law, that his decision is not supported by substantial evidence in the Record or provided any other grounds for reversal under LUPA.

E. THE HEARING EXAMINER FULLY CONSIDERED ALL OF THE ALLEGED IMPACTS OF THE PROPOSED PRIVATE AIRSTRIP.

The Respondents do not dispute that the private airstrip meets the technical requirements set forth in the Spokane County Code. Rather, they argue subjective and vague standards such as whether the Hearing Examiner gave "full consideration" to adjacent land uses and whether the private airstrip is "compatible" with other permitted uses in the area.

Respondents' argue that the Hearing Examiner and County staff failed to use "common sense." Response/Opening Cross-Appeal Brief, p.

32. They claim that common sense dictates that when giving “full consideration” to impacts, the Hearing Examiner should have (1) required a noise impact analysis; (2) assessed the risk of accidents and crash potential; and (3) required Federal Aviation Association (FAA) approval forms in advance of approving the private airstrip.

The arguments made by Respondents are simply their own opinions and criticisms of the County’s process and the Hearing Examiner. Their bald allegations are not supported by case law, statute or the Record. They fail to provide any evidence or cite any governing regulations or case law to provide this Court with any basis to reverse the Hearing Examiner under LUPA’s standards.

The Record before the Hearing Examiner and the detailed decision of the Hearing Examiner illustrate that the Hearing Examiner carefully considered each of the arguments raised by the Respondents and imposed conditions upon the conditional use permit to address each of their concerns.

1. The Hearing Examiner Considered and Imposed Conditions upon the Conditional Use Permit Relative to the Alleged Noise Impacts.

Respondents first allege a requirement for a “standard noise impact analysis.” Respondents’ Response/Opening Cross-Appeal Brief, p. 34. However, Respondents’ brief is silent as to any parameters for

such a study and lacks any citation to legal authority, statute, code, regulation, or ordinance indicating that such an analysis is required for a private airstrip. The requirement does not exist.

Respondents fail to provide any evidence of what noise impact the private airstrip, as designed, will have upon the surrounding properties. They fail to provide any indication of how possible noise impacts would be incompatible with the uses of the surrounding properties. The allegations of impacts are generic and speculative at best.

The Hearing Examiner considered testimony regarding expected noise levels from the type of request aircraft and made the following finding of fact:

“The noise levels generated by the small aircraft referenced above, during takeoffs and landings, range from 51-72 dBA; and for the most part appear to be at or somewhat below the maximum permissible noise levels established by WAC 173-60-40, for the generation of noise by non-exempt commercial or industrial uses at the property line of a residential use (57 or 60 dBA); subject to the 5, 10, and 15 dBA reduction allowances being applied, for noises respectively generated over a total of 1.5, 5 and 15 minutes within a 1-hour period, between the hours of 10:00 pm and 7:00 am. See WAC 173-60-40.” CP 103.

This finding is unchallenged and is a verity on appeal. RAP 10.3.

The Hearing Examiner heard substantial testimony regarding noise concerns and found that expected noise levels from the type of aircraft that would be allowed would not exceed maximum levels.

Nonetheless, in response to the noise concerns raised by Respondents, the Hearing Examiner placed conditions upon the proposed private airstrip to include: (1) prohibit twin engine or multi-engine aircraft; (2) limit the number of allowed aircraft to fifteen; (3) limit landings and take-offs to civil daylight and twilight hours; (4) prohibit touch and go landings; (5) prohibit simultaneous departures and/or arrivals; (6) takeoffs and landings must avoid the over flight of houses; (7) prohibit commercial operations; and (8) require a displacement threshold and slip maneuver during landings to mitigate noise impacts. CP 118 - 125.

The Record is clear that the Hearing Examiner fully considered all alleged noise impacts relative to the proposed private airstrip and imposed appropriate limitations and conditions upon the permit to mitigate perceived impacts. The conditions of approval placed upon the permit by the Hearing Examiner justify his finding that: “The proposed private airstrip, *as conditioned*, is located and designed with full consideration to its proximity to, and effect on, adjacent land use.” CP 117. (Emphasis added.).

2. Notwithstanding the Inapplicability of the “Accident Potential Zones” Designated for General Aviation Airports, The Hearing Examiner Considered and Imposed Conditions upon the Conditional Use Permit Relative to the Alleged Impacts.

Respondents’ refer to and rely upon Spokane County Zoning Code Section 14.702 extensively in their briefing to support their arguments related to accident potential zones. The airspace and accident potential zones referred to in SCZC 14.702 are part of the Airport Overlay Zone adopted by Spokane County for the three general aviation airports in Spokane County. The Hearing Examiner properly found these regulations do not apply (“The AO Zone by its terms does not apply to private or personal airstrips”). CP 97. This unchallenged finding is a verity on appeal. RAP 10.3(g).

The Record demonstrates that the Hearing Examiner considered and weighed expert testimony regarding safety concerns. The following Findings of Fact were adopted by the Hearing Examiner:

Clyde Poser² testified that he had recently flown the proposed approach and take off paths at the proposed runway area; did not find that the rising terrain west of the site would create a hazard in making a curving 45 degree right turn at the departure end of the runway, as proposed; and the terrain to the west would not become a problem until a 140 degree turn had to be made at the end the runway end. CP 102.

² Clyde Poser is an aviation consultant who worked as a pilot for Hawaii Airlines for 38 years and currently serves as an Designated Airworthiness Representative for the FAA. HR 1287-1288.

Clyde Poser recommended that a displacement threshold of approximately 500 feet be established at each end of the 2,500 foot long runway for the proposed airstrip, and painted on the surface of the runway; in order to allow aircraft to stay higher on approach, land safely and minimum noise impacts. CP 102.

These findings are unchallenged and are verities on appeal. RAP 10.3(g).

Notwithstanding the irrelevance of the Airport Overlay Zone (SCZC 14.702) to the proposed private airstrip, the Hearing Examiner placed conditions upon the permit to address safety concerns. These include (1) during landing and takeoff, all aircraft are to land and take off as far from surrounding residences as possible and reach or maintain maximum possible altitude when nearing residential development; (2) landings and take-offs are limited to civil daylight and twilight hours; (3) touch and go landings are prohibited; (4) simultaneous departures and/or arrivals are prohibited; (5) takeoffs and landings must avoid the over flight of houses; (6) commercial operations are prohibited; and (7) a displacement threshold and slip maneuver shall be used during landings to mitigate noise impacts. CP 118 - 125.

In addition to the other conditions imposed, the Hearing Examiner required the applicant obtain a review of the proposed private airstrip for safety and compatibility by filling FAA Form 7480-1 with the Federal Aviation Association. CP 121-122. The Hearing Examiner not only

“fully considered” the alleged impacts, but he also imposed conditions related to the safety concerns raised by the Respondents. Respondents’ allegations against the Hearing Examiner’s decision are completely unsupported.

3. The Hearing Examiner Properly Conditioned the Conditional Use Permit Upon the Filing of FAA Form 7480-1.

At the hearing before the Hearing Examiner, Respondents argued strenuously that the conditional use permit should be denied on the basis that the applicant had not yet filed FAA Form 7480-1 for the proposed private airstrip. Respondents asserted that the purpose of the Form 7480-1 is to obtain a review by the FAA of the proposed private airstrip relative to the design of the airstrip for compliance with federal regulations etc., and for compatibility with the land uses in the vicinity of the proposed airstrip. CP 721. They argued that having failed to obtain the Form 7480-1 was a fatal flaw in the process of proposing the private airstrip in violation of federal law. CP 721.

Now, Respondents take issue with the Hearing Examiner’s decision to impose a condition for FAA approval, but cite no legal authority in support of their allegation of error. Respondents argue that the Hearing Examiner is not allowed to rely upon the approval from any agency other than the Hearing Examiner himself. Respondents’ assertion

is an absurd result that should be avoided because that would prevent the Hearing Examiner from requiring an applicant to obtain necessary building permits or approvals from fire districts, the engineering department, the FAA, etc. *City of Tacoma v. City of Bonnie Lake*, 173 Wn.2d 584, 593, 269 P.3d 1017 (2012).

The Hearing Examiner properly conditioned the permit to require the applicant to obtain approval by the FAA.:

“The proposed airstrip shall not be developed or operated unless the applicant submits a completed FAA Form 7480-1 for the personal airstrip to the FAA at the same time as, or prior to the submission of the completed FAA form 7480-1 for the proposed airstrip....

and shall not be developed if the FAA issues an objectionable determination for the proposed airstrip, based on safety concerns, that becomes a final determination.”

CP 125; See also CP 121.

If the FAA finds a defect or identifies a safety concern, the conditional use permit is void. The Hearing Examiner did not shirk his responsibilities with respect to safety and FAA compliance. He specifically conditioned the permit to require such approval. Timing of approval by the FAA has no significance, as long as it is obtained before the airstrip goes into operation. It should be emphasized that FAA Form 7480-1 is not a requirement of the Spokane County Code or state law. With respect to this matter, it is simply another example of Respondents

arguing their own opinions and criticism of the County's review process. The County did not commit error or disregard a requirement contained in its Code. The Respondents simply want it done "their way."

As mandated by the Hearing Examiner's conditions of approval, the applicant submitted Form 7480-1 to the FAA in December of 2011 and received a determination by the FAA in January of 2012 that the proposed airstrip will not adversely affect navigable airspace. See Motion to Supplement, Attachment "A." In making such determination, the FAA considered the effect the proposal would have on the safety of persons and property on the ground. *Id.*

F. THE HEARING EXAMINER CORRECTLY CONCLUDED THAT THE PROPOSED PRIVATE AIRSTRIP, AS CONDITIONED, IS COMPATIBLE WITH PERMITTED LAND USES.

The Respondents argue that the Hearing Examiner erroneously concluded that the private airstrip is "compatible" with other permitted uses in the area. However, the Respondents do not assign error to any of the 229 Findings of Fact adopted by the Hearing Examiner; therefore, they are verities on appeal. RAP 10.3(g). The Hearing Examiner relies upon such Findings of Fact to conclude that the use, as conditioned and restricted, is compatible. CP 121.

The Respondents misinterpret the Spokane County Code and erroneously assert that the use must be compatible with existing uses in the area. What the Code requires is that *adequate conditions and restrictions be placed upon the permit* to ensure it is compatible with permitted uses, whether existing or not.

SCZC 14.404.100(1)(b) reads:

- “1. The Hearing Examiner may approve an application for conditional use permit if all 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, and will not be materially detrimental to the public health, safety or general welfare.***”

(Emphasis added.)

Respondents’ narrow focus on existing residential uses in the area is misplaced and a misapplication of the applicable Zoning Code provisions. The Code requires the Hearing Examiner to make a determination that the proposal is compatible with permitted uses, not existing uses. The permitted uses in the area of the proposed private airstrip are rural land uses identified in the Spokane County Comprehensive Plan and the Spokane County Zoning Code. The Hearing Examiner adopted specific findings of fact describing the types of permitted land uses in the area, such as: commercial recreation areas,

contractors yard, gun and archery range, kennels, RV sales, agricultural, crop production, commercial greenhouses, dairy, wineries and schools. CP 86. These findings are unchallenged and are verities on appeal. RAP 10.3(g). It is clear from the Comprehensive Plan that the rural uses to be protected in the rural areas are non-residential uses that are traditionally relegated to the rural areas. Spokane County Comprehensive Plan, p. RL-1. The rural lifestyle that is to be preserved is that of business, industry, open spaces, agriculture, and recreation, not residential development. *Id.* Thus, the surrounding permitted uses that the proposed private airstrip must be compatible with is business, open space, agriculture, forestry, recreational activities, and last of all sparse residential use. *Id.* A private airstrip is a rural use that has traditionally been, if not always, located in the rural area because an urban environment would simply not contain the requisite land area to accommodate a landing strip. If anything, it is one of the rural uses that should be given priority if possible. *Id.*

Respondents do not point to any factual evidence in the Record or legal authority to refute that the criteria of SCZC 14.404.100(1) have been met.

1. Respondents Ask This Court to Second Guess the Well Reasoned Decision of the Hearing Examiner Based Upon Respondents' Personal Opinion and Without Evidence or Support in the Law.

In their challenge of the Hearing Examiner's decision, the Respondents claim that noise impacts make the airstrip incompatible, citing the case of *Phillips v. City of Brier*, 24 Wn. App. 615, 604 P.2d 495 (1979). The *Phillips* case works against the Respondents in this matter.

The rule stated in *Phillips* is that “[w]hile the courts may disagree with the decision of the municipal bodies in granting or not granting conditional use permits, such a disagreement standing alone does not provide the basis for judicial interference in such municipal decisions.” *Id.* at 621. Even a casual reading of the Respondents voluminous brief reveals that rather than looking to the LUPA standards of review applicable in this case, they rely upon their own testimony and their personal interpretation of the Spokane County Code in asking this Court to step into their shoes and agree that the Hearing Examiner's decision is error. That is exactly what the *Phillips* case warns against.

Respondents cite *Phillips* for the rule that noise is an appropriate basis for the denial of a conditional use permit. In fact, the case was decided upon the Supreme Court's determination that it was within the City of Brier's purview and that the City had not acted arbitrarily or

capriciously when it determined that the City could not find any conditions that could be imposed upon the proposed conditional use that would successfully control the increased traffic and increased noise that would be generated by the proposed use. *Id.* at 617 - 619. The proposed conditional use was the sale of beer at a café in a predominantly residential area of the city, and in a city where this was the only commercial activity other than the next door grocery store. *Id.* at 617.

In this case, the Hearing Examiner found that the neighboring properties generally consist of scattered single family homes, agricultural uses and/or undeveloped land; on acreage parcels ranging from five (5) acres to acreage parcels larger than the site (151 acres). CP 86, 90. The Hearing Examiner also found that permitted land uses in the area, such as: commercial recreation areas, contractors yard, gun and archery range, kennels, RV sales, agricultural, crop production, commercial greenhouses, dairy, wineries and schools. CP 86. Based upon these facts, and others, the Hearing Examiner concluded the use would be compatible with other permitted land uses.

There is simply no correlation between the *Phillips* case, involving a proposed use in a densely populated urban area, and this case involving a traditionally rural use, in a sparsely populated rural area. The Hearing Examiner's decision is not based upon unlawful procedure, an

erroneous interpretation of the law, or an erroneous application of the law to the facts. It is supported by substantial evidence in the Record when reviewed as a whole. RCW 36.70C.130(1).

2. Respondents Focus on the Alleged Impacts to Individuals Rather Than Upon the Public Health, Safety and General Welfare.

Respondents' case concerning accident potential is to isolated individuals, completely ignoring the criteria in the Spokane County Code that demands a focus on the *public health, safety and general welfare*. SCZC 14.404.100(1)(b).

Focusing on individuals, Respondents try to create an image of discomfort and loss. If the focus is properly put upon the public health, safety and general welfare, the claimed impacts can be seen in the proper context and seen as similar, if not less than, impacts from other permitted uses in the area, such as agricultural direct marketing activities; agricultural processing plant (similar to the sugar beet plants near Moses Lake or the Tacoma paper mills); warehouse; airstrip or heliport for crop dusting and spraying; personal airstrip; animal raising and/or keeping (similar to the corrals near Ellensburg); bee keeping; dairy farming; feed lot; feed mill; fertilizer application facility; commercial greenhouses; landscape materials sales lot; sewage sludge land application; contractor's yard; kennels; RV sales. SCZC 14.404.100(1)(b); SCZC

14.618.220. When placed in the proper perspective, the proposed private airstrip does not present any more serious impacts than other uses that are outright permitted in the area, such as kennel, gun range, dairy farm, feed mill, and fertilizer application facility. SCZC 14.618.220. The above activities are allowed in rural areas because they are traditionally rural activities that would not be well tolerated in areas designated and developed as urban residential areas. They are compatible with the public health, safety and general welfare because in the rural areas residential development is limited to large lots to avoid impacts of other rural activities with the public generally. Spokane County Comprehensive Plan, p. RL-1 – RL-4.

The Respondents assertions that the Hearing Examiner failed to acknowledge risks associated with airstrips are refuted by the Record and the findings of fact adopted by the Hearing Examiner. The Record demonstrates that safety concerns were considered and addressed through conditions of approval and restrictions on the use. The Hearing Examiner's decision is consistent with the Spokane County Code which requires that conditions and restrictions be placed upon the use to ensure it is compatible with other permitted uses.

3. Respondents Erroneously Refer to Factors that Are Not Criteria for Determination of Granting a Conditional Use Permit.

As discussed previously, Respondents refer to the Airport Overlay Zone applicable to general aviation/commercial airports and attempt to apply those regulations to private airstrips; however, those regulations are not applicable or relevant to the issues before the Court.

Respondents also argue that they will suffer a loss of property value and suggest that property values is a criteria for granting or denying the conditional use permit. Nothing in the Spokane County Code suggests that property values must be considered when granting a conditional use permit.

Respondents' reliance on the case of *Henderson v. Kittitas County*, 124 Wn. App. 747, 100 P.3d 842 (2004) is misplaced. The *Henderson* case is a review of a decision to change zoning of rural property from forest and range land to agricultural land which would reduce the minimum lots size of the property from 20 acres to 3 acres. The Court of Appeals upheld the County's decision to change the zoning on the grounds that, the increase in the number of possible lots and thus an increase in overall value of the property would lead to an increase in property taxes that in turn would lead to more property taxes and increased funding for public services. *Henderson*, 124 Wn. App at 756 –

757. The Court of Appeals decision in *Henderson* was based upon the increase in property tax as being beneficial to the public health, safety and welfare, not the property values directly. *Id.* In the *Henderson* case, the fact that the large parcel was unmarketable due to the small lot sizes surrounding it was found to be a deciding factor also. *Id.*, at 755. In this case, the alleged impact on Respondents' property values is speculative at best and not supported by evidence found to be credible by the Hearing Examiner. CP 113.

Reliance upon factors that are either irrelevant to or not criteria for granting a conditional use permit is a fatal error in Respondents case.

4. The Hearing Examiner Imposed Conditions upon the Conditional User Permit Sufficient to Address All of the Respondents' Concerns.

Respondents' objections to conditions placed upon the approval of the conditional use permit are nothing more than the Respondents refusal to acknowledge and accept the evidence provided by the applicant refuting the Respondents' evidence. Credibility of the witnesses and resolution of conflicting evidence are solely within the discretion of the trier of fact and will not be reviewed by an appellate court. *State v. Thomas*, 150 Wn.2d 821, 874 – 875, 83 P.3d 970 (2004). Respondents' claims of lack of sufficiency of the mitigations and conditions upon the conditional use permit are unpersuasive.

III. RESPONSE TO CROSS-APPEAL

A. RESPONDENTS ARE NOT THE PREVAILING PARTY IN THIS ACTION FOR THE PURPOSE OF AWARDING ATTORNEY'S FEES AND COSTS.

Respondents did not ask the superior court to simply remand the matter to the Hearing Examiner for a rehearing; they asked the superior court to find the Hearing Examiner's decision to be clearly erroneous, and/or not supported by substantial evidence in the record and that the decision be reversed by the superior court. CP 21.

Absent specific statutory authority, contractual provision, or recognized grounds in equity, attorney's fees and litigation expenses are not recoverable. *Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996). All of the authority cited by Respondents provides for an award of attorney's fees and costs only to the *prevailing party*. RCW 4.84.030; RCW 36.70C.110(4). Respondents do not meet the well established definition of "prevailing party" such as to be entitled to attorney's fees and costs.

Because the superior court only issued a remand to the Hearing Examiner was for a new hearing based upon an alleged failure of proper notice, a determination of the prevailing party under RCW 4.84.030 cannot be made. There can be no "prevailing party" as anticipated by RCW 4.84.030 until there is a decision on the merits of the conditional

use permit issued by the Hearing Examiner. *Ennis v. Ring*, 56 Wn.2d 465, 472 – 473, 341 P.2d 885 (1959); *Mortizky v. Heberlin*, 40 Wn. App. 181, 183, 697n P.2d 1023 (1985). See also *Leach v. Erickson*, 161 Wn. 473, 478, 297 P. 738(1931); *Dowler v. Clover Park School District*, 172 Wash.2d 471, 485, 258 P.3d 676 (2011); *City of Lake Forest Park v. State of Washington Shorelines Hearings Board*, 76 Wn. App. 212, 222, 884 P.2d 614 (1994)); *Allison v. Housing Authority*, 118 Wn.2d 79, 98, 821 P.2d 34 (1992); *Boeing Company v. Heidy*, 147 Wn.2d 78, 90, 51 P.3d 793 (2002) .

The remand of this matter to the Hearing Examiner by the Superior Court was narrowly based upon a determination that the sign giving notice of hearing was improperly placed. CP 1047 – 1051. There has been no decision on the merits of the matter. The prevailing party on the central issues of the case is yet to be determined. *Dowler v. Clover Park School District*, *supra*.

IV. REQUEST FOR ATTORNEYS FEES

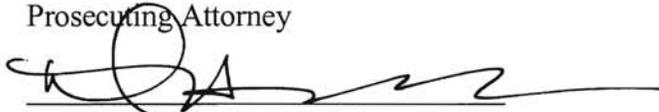
Upon a favorable decision by this Court, Petitioners request an award of its attorneys' fees and costs pursuant to RCW Chapter 4.84 and RCW Chapter 36.70C.

V. CONCLUSION

The Hearing Examiner's decision clearly demonstrates how the CUP application complied with the requirements of the decision criteria set forth in Spokane County Zoning Code. The Hearing Examiner's decision adopts unchallenged affirmative findings of fact relative to each criteria. Under LUPA, the Respondents may not simply show there is opposition to the Private Airstrip but that the decision is not supported by substantial evidence when viewed in light of the whole record. Petitioners have failed in their burden and the Hearing Examiner should be affirmed.

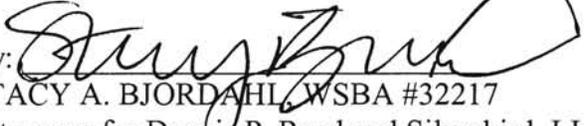
DATED this 15th day of August, 2012.

STEVEN J. TUCKER
Prosecuting Attorney



DAVID W. HUBERT, WSBA #16488
Civil Deputy Prosecuting Attorney
Attorneys for Spokane County

PARSONS/BURNETT/BJORDAHL/HUME, LLP

By: 
STACY A. BJORDAHL, WSBA #32217
Attorneys for Dennis P. Reed and Silverbird, LLC

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 15th day of August, 2012, I caused to be served a true and correct copy of the Appellants' Reply Brief by the method indicated below, and addressed to the following:

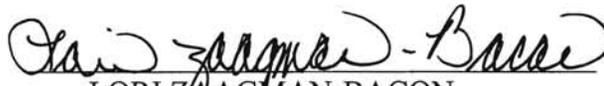
Rick Eichstaedt
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Personal Service
 U.S. Mail
 Hand-Delivered
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Michael D. Whipple
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Personal Service
 U.S. Mail
 Hand-Delivered
 Overnight Mail
 Facsimile

DATED this 15th day of August, 2012 in Spokane, Washington.


LORI ZAAGMAN-BACON

APPENDIX A

BEFORE THE BOARD OF COUNTY COMMISSIONERS
OF SPOKANE COUNTY, WASHINGTON

IN THE MATTER OF ADOPTING RULES)
OF PROCEDURE FOR THE OFFICE OF) R E S O L U T I O N
THE HEARING EXAMINER)

WHEREAS, pursuant to the provisions of the Revised Code of Washington, Section 36.32.120(6), the Board of County Commissioners of Spokane County has the care of County property and the management of County funds and business; and

WHEREAS, pursuant to the provisions of Resolution No. 96-0171 passed and adopted on the 13th day of February, 1996, the Board of County Commissioners adopted a Hearing Examiner Ordinance which established the Office of the Hearing Examiner, effective March 29, 1996; and

WHEREAS, pursuant to the provisions of RCW Section 36.70.970 the Board of County Commissioners shall prescribe procedures to be followed by the hearing examiner; and

WHEREAS, pursuant Section 6 of the Hearing Examiner Ordinance, the Board of County Commissioners may adopt interim procedures to be followed by the hearing examiner; and

WHEREAS, the Division of Building and Planning and the Hearing Examiner recommend the Board of County Commissioners adopt the attached Rules of Procedure;

NOW, THEREFORE, BE IT RESOLVED by the Board of County Commissioners that the Chairman of the Board or the majority hereby adopts the attached Rules of Procedure to be followed by the Hearing Examiner.

PASSED AND ADOPTED this 26 day of March, 1996.

BOARD OF COUNTY COMMISSIONERS
OF SPOKANE COUNTY, WASHINGTON

ATTEST:

WILLIAM E. DONAHUE,
Clerk of the Board

By: Doranne Montoye
Deputy Clerk

[Signature]
Phillip D. Harris, Chair
[Signature]
John Roskelley
[Signature]
Steve Hasson

SPOKANE COUNTY HEARING EXAMINER

RULES OF PROCEDURE

Sections:

1	Authority for Rules of Procedure
2	Definitions
3	Ex Parte Communications
4	Disqualification
5	Hearing Examiner-Authority
6	Scheduling of Hearings
7	Timeliness of Hearings
8	Hearing Backlog
9	Notice of Hearing-Effect of Notice
10	Staff Reports on Applications
11	Site Inspections
12	Presentation of Evidence
13	Reopening or Continuing Hearings
14	Dismissal of Applications
15	Record of Hearing
16	Decision of the Hearing Examiner
17	Reconsideration
18	Compliance with Law

1. Authority for Rules of Procedure.

These rules are adopted pursuant to section 6 of the Spokane County Hearing Examiner Ordinance, which ordinance was adopted as an attachment to County Resolution No. 96-0078. These rules set forth uniform procedures applicable to all matters coming before the hearing examiner.

2. Definitions.

For the purposes of these rules:

A. "Application" shall mean the application for a permit or approval, or any appeal, within the jurisdiction of the hearing examiner.

B. "Division of building and planning" or "division" means the Division of Building and Planning, Spokane County Public Works Department.

C. "Examiner", "chief hearing examiner", "deputy hearing examiner" and "examiner pro tempore" shall have the meanings assigned to such terms in the Hearing Examiner Ordinance.

D. "Ex parte communication" means any oral or written communication made by any person, including a county employee or official, pertaining to a matter that is or will be within

the jurisdiction of the hearing examiner and that is made outside of a public hearing and is not included in the public record.

E. "Party" means any person who has appeared at a public hearing conducted by the examiner.

3. Ex Parte Communications.

A. No person may communicate ex parte, directly or indirectly, with the hearing examiner. The hearing examiner may not communicate ex parte with opponents or proponents of any application unless the hearing examiner makes the substance of such communication part of the public record and provides the opportunity for any party to rebut the substance of such communication as provided by law. The hearing examiner may reopen the hearing or record prior to a final decision to address such matter.

B. This section does not prohibit ex parte communication regarding procedural matters, communication by the hearing examiner with his\her staff or the county prosecuting attorney's office, communication by the examiner for the sole purpose of conveying information regarding the specifics of an application, or communication by the examiner with county departments for the purpose of obtaining information or clarification, so long as the information or clarification received by the examiner is made part of the record.

4. Disqualification.

A. The hearing examiner may enter an order disqualifying the examiner from consideration of an application in the event of a conflict of interest.

B. Prior to the taking of evidence, the hearing examiner shall disclose publicly and on the record any conflict of interest the hearing examiner may have regarding the application.

C. Anyone seeking to rely on the appearance of fairness doctrine or conflict of interest to disqualify the hearing examiner from participating in a decision must raise the challenge as soon as the basis for disqualification is known.

D. The hearing examiner shall rule on the issue of disqualification in each instance when it is raised.

5. Hearing Examiner-Authority.

A. The hearing examiner shall have the general duties and powers set forth in the Hearing Examiner Ordinance and applicable law. Public hearings shall be conducted by the duly appointed chief examiner, deputy examiner or examiner pro tempore.

B. The hearing examiner shall have such powers as are necessary to carry out the intent of the Hearing Examiner Ordinance, including the authority to:

- (1) conduct pre-hearing conferences;
- (2) require the submittal of information;
- (3) schedule and continue hearings;
- (4) rule on all evidentiary and procedural matters, including motions and objections appropriate to the proceedings;
- (5) receive evidence and cause preparation of a record;
- (6) regulate the course of hearings and the conduct of the parties and their agents;
- (7) maintain order;
- (8) render decisions and enter written findings and conclusions;
- (9) include in a decision the conditions of approval necessary to ensure that the application complies with the applicable criteria for its approval; and
- (10) revoke any approval for failure to comply with the conditions imposed by the hearing examiner.

6. Scheduling of Hearings.

A. The division of building and planning shall coordinate the scheduling of public hearings with the chief examiner. The chief examiner shall prepare a weekly agenda indicating the dates and times that matters will be heard during the week, which shall be the official agenda for hearings conducted during the week.

B. To provide a convenience to the public, when practical, minor applications such as variances or conditional use permit applications shall be scheduled at the beginning of the day's agenda, followed by more complex matters such as rezone and preliminary plat applications. The hearing examiner shall reasonably limit the number of complex matters that will be scheduled for hearing on a single day.

C. When practical and not in violation of ordinance or prejudicial to the rights of any party, the hearing examiner may consolidate for hearing applications under the jurisdiction of the hearing examiner involving the same or related properties.

D. The chief examiner shall notify the division in advance of his\her intent to take authorized leave, to facilitate scheduling and to arrange for a deputy examiner or examiner pro tempore if necessary to conduct hearings during the chief examiner's absence.

7. Timeliness of Hearings.

A. To ensure compliance with RCW 36.70B.090, the division of building and planning shall, at the time an application is ready to be scheduled for hearing, advise the chief examiner in writing of the number of days that have elapsed since the applicant was notified by the division that the respective project permit application was complete. Such advisement shall state the period(s) of time, if any, that were excluded in determining the number of elapsed days and the reason for any excluded period(s).

B. The chief examiner shall, if possible, schedule a hearing on the project permit application within a sufficient period of time to assure compliance with the 120 day period specified in RCW 36.70B.110. If the 120 day time period is not complied with, the hearing examiner shall provide written notice to the project applicant stating the reasons for noncompliance and the estimated date for issuance of the notice of final decision.

C. This section shall apply only to project permit applications within the examiner's jurisdiction and filed on or after April 1, 1996.

8. Hearing Backlog.

The division of building and planning shall notify the chief examiner when it appears that the hearing of any application will be delayed for more than six weeks or cannot be scheduled to meet the time limit provided for in RCW 36.70B.110, due to the number of hearings already scheduled before the examiner. The chief examiner shall call for additional hearings, or arrange for a deputy examiner or examiner pro tempore, if necessary to address such concerns.

9. Notice of Hearing-Effect of Notice.

A. Each public notice required for the hearing of an application shall conform to applicable statutory and ordinance requirements. The notice should contain a statement that the hearing will be held pursuant to the rules of procedure adopted by the hearing examiner.

B. Failure of a person entitled to notice to receive notice does not affect the jurisdiction of the hearing examiner to hear the application when scheduled and render a decision, if the notice was properly mailed and posted.

C. A person is deemed to have received notice if the person appears at the hearing or submits written information regarding the merits of the application, even if notice was not properly mailed or posted.

D. If required notice is not given and actual notice is not received, the hearing examiner may reschedule the hearing or keep the record open on the matter to receive additional evidence.

10. Staff Reports on Applications.

A. The division of building and planning shall coordinate and assemble the comments and recommendations of other county departments and commenting agencies, and shall make a written staff report to the hearing examiner on all applications.

B. At least seven calendar days prior to the date of the scheduled public hearing, the staff report shall be filed with the office of hearing examiner and mailed by first class mail or provided to the applicant. At such time, the division shall also make the report available for public inspection. Upon request, the division shall provide or mail a copy of the report to any requesting person for the cost of reproduction indicated in chapter 1.42 of the Spokane County Code plus the cost of mailing if applicable.

C. If the staff report is not timely filed or furnished, the hearing examiner may at his\her discretion continue the hearing, considering the prejudice to any party and the circumstances of the case.

D. The staff report shall succinctly include the following information, as relevant to the application:

- (1) a description of the application;
- (2) the names and current addresses of the applicant, the owners of the subject property and any technical advisor or agent representing the applicant;
- (3) the name and office of the staff person preparing the report;
- (4) the location and general physical characteristics of the site, including size, dimensions, topography and existing uses;
- (5) the comprehensive plan designation and current zoning, and a brief history of past zoning and land use actions involving the site;

- (6) a technical data summary of the minimum lot sizes, allowable density, permitted site coverage and comparison of allowable uses under the existing and proposed zoning of the site;
- (7) the general character, land use and zoning of the surrounding area; including a brief summary of recent land use actions or development trends in the surrounding area;
- (8) the application's compatibility and impact on the zoning and character of the surrounding area;
- (9) a summary of the relevant and material provisions of the comprehensive plan, and the consistency of the application with such provisions, the county zoning code and applicable development regulations;
- (10) the proposed conditions for approval of the application under applicable land use codes and controls;
- (11) a summary of the type and service capacities of existing facilities and infrastructure, and the impact of the application thereon;
- (12) a summary or transmittal of the reports and recommendations of other agencies or departments commenting or consulted;
- (13) pertinent information regarding the State Environmental Policy Act and chapter 11.10 of the Spokane County Code;
- (14) analysis of the benefits offered by the application to the community;
- (15) if a rezone, a summary of the changed circumstances if any that support approval of the application;
- (16) the current population density in the general vicinity;
- (17) the division's conclusions and recommendations regarding approval of the application and SEPA; and
- (18) a zoning map and comprehensive plan map for the site and vicinity; and a copy of the proposed site plan, if any, for the application.

E. The chief examiner may make recommendations to the division on the format and content of staff reports submitted to the hearing examiner.

11. Site Inspections.

A. The hearing examiner may make site inspections, which may occur at any time after the staff report on an application has been filed with the hearing examiner and before the examiner renders a final decision. The hearing examiner need not give notice of the intention to make an inspection.

B. The inspection and the information obtained from it shall not be construed as new evidence or evidence outside the

record. If an inspection reveals new and unanticipated information, the hearing examiner may upon notice to all parties of record request written response to such information or reopen the hearing to consider the information.

12. Presentation of Evidence.

A. The format of the public hearing shall be organized so that the testimony and written evidence can be presented quickly and efficiently. The format will generally be as follows:

- (1) a brief introduction of the matter by the hearing examiner;
- (2) a report by division staff including introduction of the official file on the application and its procedural history, an explanation of the application, including the use of visual aids, and the recommendation of the division on the application;
- (3) the submittal of testimony and documents by the party with the burden of proof at the hearing, typically the applicant on an initial application or the appellant in the case of an appeal; followed by persons in support of such party's position;
- (4) the submittal of testimony and documents by opposing parties;
- (5) rebuttal;
- (6) questions and clarifications;
- (7) closure of the hearing;
- (8) closure of the record and continuation of the matter for final decision.

B. All reasonably probative evidence is admissible by the hearing examiner. The hearing examiner may exclude all evidence that is irrelevant, immaterial or unduly repetitious. The judicial rules of evidence are not strictly applied, but may be used by the examiner for guidance. The hearing examiner shall accord such weight to the evidence as he/she deems appropriate.

C. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference, at the hearing examiner's discretion. The examiner may require that the original of a document be produced. A party submitting documentary material at the hearing should make copies available at the hearing for review by the opposing party.

D. The hearing examiner may take official notice of judicially cognizable facts; federal, state and local laws, ordinances or regulations; the county's comprehensive plan and other adopted plans or policies of the county; and general, technical and scientific facts within the examiner's

specialized knowledge; so long as any noticed facts are included in the record and referenced or are apparent in the examiner's final decision.

E. The hearing examiner may require that testimony be given under oath or affirmation. All testimony taken by the hearing examiner in an appeal under section 11.10.170 of the Spokane County Code shall be under oath.

F. The hearing examiner may allow the cross-examination of witnesses. The hearing examiner is authorized to call witnesses and request written evidence in order to obtain the information necessary to make a decision. The hearing examiner may also request written information from or the appearance of a representative from any county department having an interest in or impacting an application.

G. The hearing examiner may impose reasonable limitations on the number of witnesses to be heard and the nature and length of their testimony to avoid repetitious testimony, expedite the hearing or avoid continuation of the hearing.

H. The hearing examiner may cause the removal of any person who is being disruptive to the proceedings, or continue the proceedings if order cannot be maintained. The examiner shall first issue a warning if practicable.

I. No testimony or oral statement regarding the substance or merits of an application is allowable after the close of the public hearing. No documentary material submitted after the close of hearing will be considered by the hearing examiner unless the examiner has left the record open for the submittal of such material and all parties are given an additional time to review and rebut such material.

13. Reopening or Continuing Hearings.

A. The hearing examiner may reopen or continue a hearing to take additional testimony or evidence, or other compelling cause, provided a final decision has not been entered.

B. If the hearing examiner announces the time and place of the continued hearing on the record before the hearing is closed, no further notice is required. If the hearing is reopened after the close of the hearing, all parties must be given at least five days notice of the date, time, place and nature of the reopened hearing.

C. Motions by a party for continuance or to reopen a hearing must state the reasons therefore and be made as soon as reasonably possible. The motion must be submitted in writing

unless made at the hearing. The hearing examiner may continue or reopen a hearing on his\her own motion, citing the reasons therefore.

14. Dismissal of Application.

A. The hearing examiner shall conduct the public hearing based on the completed application. If the hearing examiner deems that the application has been substantially changed since it was deemed complete, the examiner shall dismiss the application without prejudice and direct that a new application be submitted by the applicant and appropriate fees paid therefore. If the hearing examiner determines that the proposal has been changed but not substantially, the examiner shall not take action on the application until all reviewing agencies have been given an opportunity to review the changes made and make recommendations deemed to be necessary under applicable rules and regulations.

B. The hearing examiner may dismiss an application pursuant to a request by the applicant to withdraw an application, or for failure of the applicant to attend required hearings or provide requested information. If the applicant notifies the division of building and planning in writing of the desire to withdraw an application prior to notice of hearing being mailed to the persons entitled thereto, the dismissal shall be allowed without prejudice, and noted in the application file. If the request for withdrawal of an application is received after such notice being mailed and before a final decision is rendered, the application shall be dismissed with prejudice with the same effect as a denial of the application on the merits, in that the same or similar application cannot be considered by the hearing examiner for a one year period commencing with the date the initial application was deemed complete.

15. Record of Hearing.

A. The hearing examiner shall establish and maintain a record of all proceedings and hearings conducted by the examiner, including an electronic recording capable of being accurately transcribed and reproduced. Copies of the recording and any written portions of the record shall be made available to the public on request for the cost of reproduction or transcription, as determined by the chief examiner.

B. The record of hearing shall include, but is not limited to:

- (1) the application;
- (2) department staff reports;

- (3) all evidence received or considered by the hearing examiner;
- (4) the final written decision of the hearing examiner;
- (5) affidavits of notice for the hearing;
- (6) the environmental determination regarding the application;
- (7) the electronic recordings of the hearings and proceedings by the hearing examiner; and
- (8) the departmental file for the application, if incorporated into the record by the examiner.

C. For purposes of appeal to court or to the board of county commissioners, the electronic recording shall be transcribed at the cost of the appellant. The transcript shall be a verbatim transcript, unless the hearing examiner, the appellant and the applicant, if different from the appellant, agree that only certain portions of the hearing and other proceedings need be transcribed. The hearing examiner shall in all cases certify the official record and transcript for the purpose of appeal.

D. The hearing examiner may authorize a party to have the proceedings reported by a court reporter and have a stenographic transcription made at the party's expense. The hearing examiner may also cause the proceedings to be reported by a court reporter and transcribed.

E. The hearing examiner shall have custody of the hearing record and shall maintain such record until the period for appeal of the examiner's final decision has expired or the record is transmitted to court or the board of county commissioners pursuant to an appeal of the examiner's final decision.

16. Decision of the Hearing Examiner.

A. The decision of the hearing examiner shall include at least the following:

- (1) a description of the application;
- (2) the location of the property;
- (3) a statement regarding the status of SEPA review for the application;
- (4) the date and location of the hearing;
- (5) a list of the persons who testified at the hearing or a summary thereof;
- (6) a list of exhibits, or summary of such list;
- (7) a statement identifying the ordinance or criteria governing approval of the application; and
- (8) written findings of fact, conclusions, and a final decision based on such findings and conclusions, granting, denying or granting the application with such

conditions, modifications and restrictions as the examiner deems appropriate.

B. The final decision of the hearing examiner shall be rendered within ten (10) working days after the record is closed by the hearing examiner on an application, or such longer period of time as the applicant and the examiner agree in writing. The hearing examiner shall provide a copy of the final decision to the division of buildings as soon as possible.

C. No later than three (3) working days following the rendering of the final decision, copies of the final decision shall be mailed by certified mail to the applicant and by first class mail to other parties of record in the case.

D. Appeals from the hearing examiner's final decision must be taken in the manner and within the time frames established by the Hearing Examiner Ordinance.

17. Reconsideration.

The hearing examiner shall have limited authority to reconsider or clarify a final decision, which shall be confined to addressing exceptional circumstances such as correcting clerical errors, fraud or obvious ambiguity.

18. Compliance with Law.

The hearing examiner may modify these rules on a case by case basis to comply with applicable law.