

NO. 304175

FEB 06 2012

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

FAMILIES OF MANITO, ANN BEREGMAN, TODD STECHER and
SADIE LAKE,

Respondents/ Cross-Appellants,

vs.

ST. MARK'S LUTHERAN CHURCH,

Appellant/ Cross- Respondent.

and

CITY OF SPOKANE, a first class city of the State of Washington,

Respondent/ Cross- Respondent.

OPENING BRIEF OF ST. MARK'S LUTHERAN CHURCH

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A. INTRODUCTION

The City of Spokane administratively approved Appellant St. Mark's Lutheran Church's ("St. Mark's") application for an addition to an existing off-street parking lot. That approval was appealed by Families of Manito and three neighbors, Ann Bergeman, Todd Stecher and Sadie Lake (collectively referred to as "Families of Manito"), to the City of Spokane Hearing Examiner. The Hearing Examiner, after a full public hearing upheld the decision approving the addition and added required specific modifications and conditions. The Families of Manito appealed this decision to the Superior Court pursuant to chapter 36.70C RCW. The Superior Court found that the Hearing Examiner erred in two instances: 1) In imposing, as a condition, a modified development configuration that had been presented and discussed at the hearing before the Hearing Examiner; and 2) finding that the increased number of parking spaces allowed by the Hearing Examiner was contrary to the City of Spokane's Municipal Code ("SMC"), concluding in that St. Mark's fellowship hall was not included within the definition of "main assembly area". The Superior Court then remanded the matter to the Hearing Examiner for further consideration consistent with the Superior Court decision. This appeal followed.

B. ASSIGNMENTS OF ERROR

The Superior Court erred in not affirming the decision of the Hearing Examiner and further in finding:

1. That the Hearing Examiner’s condition requiring additional configuration for the parking lot constituted a new application not properly reviewed by the City; and
2. That the fellowship hall was not included within the definition of “Main Assembly Area” for the purpose of calculating the number of permissible parking spaces.

C. STATEMENT OF ISSUES

1. The Families of Manito have failed to meet it’s burden pursuant to RCW 36.70(130); and
2. The Hearing Examiner properly modified the decision being appealed, not the underlying application which had already been approved by the Planning Director.
3. The Court should defer to the Hearing Examiner’s and Planning Director’s interpretations of the SMC term ‘main assembly area’;
 - a) The fellowship hall should be included in this definition;
 - b) Substantial evidence supports the Hearing Examiner’s conclusions.

D. STATEMENT OF THE CASE

St. Mark’s submitted an application to expand its parking lot on land adjoining the Church’s existing parking area.

Currently, vehicle access to St. Mark's existing parking area is via 24th Avenue, which is a local access street. Record¹, p. 182. As part of its application, St. Mark's proposes to provide access to its parking area onto 25th Avenue, which is an arterial street that provides much safer access to St. Mark's. Record, pp. 152-153 & 182.

Prior to submitting the application, St. Mark's obtained approval of a boundary line adjustment combining the sanctuary, existing parking area, and the proposed parking addition into a single larger parcel or site. Record, pp. 1259 & 1268-1302. There was no appeal from approval of the BLA.

Ultimately, after finding that the application satisfied applicable decision/approval criteria (Record pp. 179-185), the City of Spokane Planning Director approved the parking addition, but limited the total number of parking spaces to 91, an increase of only three parking spaces over the number of parking spaces already existing on the site. Record, p. 185. Both the Families of Manito and St. Mark's appealed the approval (the "Administrative Appeal"). Record, pp. 1,148-1,175 & 1,191-1,198.

During the course of the Administrative Appeal, the City of Spokane (the "City") stipulated that the choir seating area in St. Mark's sanctuary should have been included in determining the size of the main

¹ The Original Certified Appeal Board Record.

assembly area and the number of permissible parking spaces. Record, p. 1258. Based on this stipulation, the City agreed that St. Mark's was entitled to a total of 102 parking spaces, an addition of approximately 15 spaces to St. Mark's current total. *Id.*

In arriving at this stipulation, the City was guided by SMC Table 17C.230-2 (See Appendix A) which provides a maximum parking ratio for religious institutions of 1 parking space per 60 square feet of main assembly area. The City's development regulations do not define "main assembly area", but the Department interpreted the term to include St. Mark's sanctuary and fellowship hall only. Record, p. 181. Thus, although St. Mark's building includes rooms totaling approximately 13,500 sq. ft., St. Mark's was only given credit for the (a) sanctuary – 3,306 sq. ft.; (b) choir seating area – 627 sq. ft.; and (c) fellowship hall – 2,162 sq. ft., for a total of 6,095 sq. ft., in determining the main assembly area and resulting number of parking spaces. Record, pp. 1,163 & 1,258.

Based on testimony regarding the use of both the sanctuary and fellowship hall and finding that the sanctuary and fellowship hall are used simultaneously to accommodate high attendance events at St. Mark's, the Hearing Examiner agreed with the Planning Director's interpretation of the term "main assembly area" – *i.e.*, that it included the sanctuary and fellowship hall. Record, pp. 30-31, 151, 152, 154.

During the hearing before the Hearing Examiner, and in response to hearing testimony and requests submitted by Families of Manito and their lawyer, St. Mark's submitted an optional plan for the parking addition that minimized the impact on the adjacent neighborhood. Record, p. 160. The modified parking plan essentially flip-flopped the original plan in order to move parking spaces away from neighboring houses, preserve trees, and promote traffic calming in the parking area. Record, pp. 160-161. Pursuant to the express authority granted by SMC 17G.050.320(B) (See Appendix A), the Hearing Examiner modified the approval and, in addition to other conditions, required St. Mark's to comply with this modified plan.

E. AUTHORITY AND ARGUMENT

1. The Families of Manito have failed to meet its burden pursuant to RCW 36.70C.130.

When reviewing a Superior Court's decision under the Land Use Petition Act (LUPA), the Court of Appeals stands in the shoes of the Superior Court, reviewing the ruling below on the administrative record. *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App.

17, 252 P.3d 382, corrected (2011); *Kelly v. County of Chelan*, 157 Wn. App. 417, 237 P.3d 346 (2010)².

The Court may grant relief from a land use decision only if the party seeking relief has carried the burden of establishing that one of the following standards is met:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

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

(c) The land use decision is not supported by evidence that is substantial³ when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous⁴ application of the law to the facts;

² St. Mark's argues herein errors St. Mark's asserted were made by the Superior Court. (See Assignments of Error at page 2, See also RAP 10.3(a)(4)). Families of Manito may assert other alleged defects in the Hearing Examiner's decision in it's cross appeal. St. Mark's will respond to any issues that are raised by Families of Manito in it's reply brief.

³ Under LUPA, "substantial evidence" is evidence that would persuade a fair-minded person of the truth of the statement asserted. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 129 P.3d 300 (2006).

⁴ Under Lupa, the "clearly erroneous application" test allows the Court to reverse a land use decision only if left with a definite and firm conviction that the examiner's decision is erroneous. *Friends of Cedar Park Neighborhood v. City of Seattle*, 156 Wn. App. 633, 234 P.3d 214 (2010).

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1) (emphasis supplied); *Peste v. Mason County*, 133 Wn. App. 456, 136 P.3d 140 (2006). Families of Manito failed to satisfy any of the foregoing standards of relief, requiring reversal of the Superior Court's decision and reinstatement of the Hearing Examiner's decision approving the proposed parking addition.

It is also important to note that under LUPA, the City's interpretation of its development regulations is a question of law subject to de novo review, giving deference to the City's expertise. RCW 36.70C.130(1)(b) (court must give deference to City's interpretation of its land use regulations); *Phoenix Development, Inc. v City of Woodinville*, 171 Wn.2nd 820 256 P.3rd 1150 (2011). (the court views facts and inferences in a light most favorable to the party that prevailed in the highest forum exercising fact-finding authority) *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn. App. 118, 186 P.3d 357 (2008); *Pinecrest Homeowners Ass'n v. Glen A. Coninger & Associates*, 151 Wn.2d 279, 87 P.3d 1176 (2004) (judicial review of City's interpretation of city ordinance must accord deference to City's expertise); *Habitat Watch v. Skagit*

County, 155 Wn.2d 397, 120 P.3d 56 (2005) (local jurisdiction with expertise in land use decisions are afforded an appropriate level of deference in interpretations of law under LUPA); *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App. 461, 24 P.3d 1079 (2001) (City council’s interpretation of “usable signal” was entitled to deference on review under LUPA). See also, *Manke Lumber Co., Inc. v. Diehl*, 91 Wn. App. 793, 959 P.2d 1173 (1998) (substantial weight is given to an agency’s interpretation of the statutes it administers).⁵

As is discussed in detail below, the Hearing Examiner followed all applicable and required procedures; there was no erroneous interpretation of the law, evidence supporting the Hearing Examiner decision is substantial and there is no basis for the Court to have a definite and firm conclusion that the decision was erroneous.

2. The Hearing Examiner Properly Modified the Decision Being Appealed, Not the Underlying Application Which Had Already Been Approved by the Planning Director.

St. Mark’s seek review of the Superior Court’s ruling that the Hearing Examiner erred in modifying the decision approving the expanded parking lot requested by St. Mark’s. The Hearing Examiner’s

⁵ See also SMC 17A.010.070(A)(3) and SMC 17G.060.020(A)(3) (See Appendix A) in which the Spokane City Council has delegated responsibility for administration, application and interpretation of the City’s land use regulations to the Planning Director.

modification of the Planning Director's decision was fully consistent with the authority the Spokane City Council has delegated to the Hearing Examiner. SMC 17G.050.320B. (See Appendix A).

The Superior Court ignored the distinction between an application and the decision approving an application. The underlying application was not modified. The Hearing Examiner did impose conditions upon his approval, as he is authorized to do; one condition was that St. Mark's was required to alter the design of the parking lot to provide additional protection to the adjacent homeowners.

As the Hearing Examiner's decision clearly states, rather than modifying the application, "[t]he decision of the Planning Director is modified as set forth herein." Record, p. 25. (Emphasis supplied).

[I]t is the decision of the Hearing Examiner to modify the decision of the Planning Department approving the expansion of the parking lot for St. Mark's Lutheran Church. . . . All other conditions imposed by the Decisionmaker will also remain in effect. (Emphasis supplied.)

Record, p. 32. Indeed, the Planning Director approved the application and it was the Planning Director's decision that Families of Manito appealed, not St. Mark's application.

Second, the Hearing Examiner does not design projects or prepare project drawings. Instead, the Hearing Examiner relies on those with the necessary resources and required expertise. In this case, in an effort to respond to the Families of Manito's concerns, St. Mark's submitted a "revised plan, which is very similar to the [one approved by the Planning Director] except it more or less reverses the main part of the parking and reverses the drainage. Record, p. 160; *see also* Record, p. 1181, revised drawing. The Hearing Examiner agreed that the revised site plan "minimize[s] impacts on the surrounding properties to the greatest extent possible." Record, p. 31. Because of this, as authorized by SMC 17G.050.320B, the Hearing Examiner modified the decision of the Planning Director to require the church to develop the parking lot in accordance with the revised site plan. Record, p. 32.

"The hearing examiner may affirm, modify, remand or reverse the decision being appealed." SMC 17G.050.320B. In choosing between these options, the Hearing Examiner considered the testimony and evidence presented at the hearing. Based on the testimony and evidence presented to him, the Hearing Examiner agreed that the revised site plan "minimize[s] impacts on the surrounding properties to the greatest extent

possible,” and modified the decision of the Planning Director to require St. Mark’s to comply with the revised site plan. Record, p. 31.

The Hearing Examiner’s modification of the Planning Director’s decision was fully consistent with the authority vested in the Hearing Examiner by the Spokane City Council. SMC 17G.050.320B.

3. The Court should defer to the Hearing Examiner’s Planning Director’s interpretation of the SMC term ‘main assembly area’
 - a) The fellowship hall should be included in this definition.

The Hearing Examiner did not err in concluding that the term “main assembly area” included St. Mark’s fellowship hall. On the contrary, the decisions of the City staff and Hearing Examiner were based upon the record that was also before the Superior Court.

Based on the evidence in the record, two separate individuals charged with the expertise to interpret and apply provisions of the City’s Land Use Code determined that St. Mark’s fellowship hall fell within the definition of “main assembly area”:

[T]he Appellant presented testimony that a former church member who testified that the Fellowship Hall and the sanctuary were not used at the same time. The Church, however, presented testimony from its pastor stating that the two spaces were used at the same time on different occasions. He testified that the youth

choir uses the Fellowship Hall during Sunday services and that certain events, because they attract a large number of attendees cannot be accommodated totally in the sanctuary and that the Fellowship Hall is used for spillover at those large events.

While the Hearing Examiner understands this to be a close question, *the presumption in favor of the Decisionmaker's interpretation*, and testimony that revealed that sometimes the two spaces are used simultaneously, convinces the Hearing Examiner that the main assembly area should not be limited to the sanctuary and choir area but should include the Fellowship Hall. (Emphasis supplied.)

Record, p. 31; RCW 36.70C.130(1)(b) (requiring Court to give deference to local jurisdiction's interpretation of its own land use regulations). The evidence clearly establishes that the number of persons attending an event at the church varies with each specific event. Funerals, holidays and special programs all result in different numbers of patrons in attendance. At times both the fellowship hall and the sanctuary are used.

Because of growth over the years [the sanctuary and fellowship hall] have become used at the same time. . . . For high peace days and very large attendance event into the fellowship hall people can gather using monitors to worship. And you do have some line of sight from that room. The rooms were made in such a way with folding doors and double doors which are fire walls, which are necessary to put in, the but intent was to make that as much one room for things like large funerals. . . . [T]here are times

when it's a very important part of our main assembly area.

Record, p. 151

[T]he fellowship hall was very necessary for one large worship area.

Record, p. 152

[The fellowship hall has] windows into the sanctuary so you can see in there. But most of the worship that's done in the fellowship hall, the fellowship hall for very large events use the TV monitors.

Record, p. 154.

Reasonable parking is necessary for such times and the Code clearly contemplates providing that parking.

In re Marriage of Blickenstaff, 71 Wn. App. 489, 494 (1993), supports St. Mark's contention. The court states:

On this issue, two principles are particularly useful. The first is that the Legislature's intent may be discerned from administrative interpretations of the statute. (Emphasis added.)

Id. at 347 (Citing *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991)). As mentioned above, in this case, the term "main

assembly area” has already been interpreted by the local jurisdiction with expertise. *See* RCW 36.70C.130(1)(b). The Court should not substitute its opinion for that of those entitled to deference in interpreting code provisions.

- b) Substantial evidence supports the Hearing Examiner’s conclusions.

Under LUPA, courts do not reweigh or evaluate the persuasiveness of the evidence presented to a hearing examiner. Courts review to determine only whether there is evidence to support the hearing examiner’s findings. *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). Substantial evidence is evidence that could support the truth of the fact asserted. *Id.* Under this standard, the Court is required to consider all of the evidence in the light most favorable to St. Mark’s, the prevailing party before the Hearing Examiner. *Id.*

“Under the substantial evidence standard, we will not substitute our judgment for that of the [hearing examiner].” *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 99 Wn. App. 127, 133, 990 P.2d 429 (1999), *aff’d on other grounds*, 146 Wn.2d 740, 49 P.3d 867 (2002). Instead, the Court must accept the Hearing Examiner’s assessments of weight and credibility. *J.L. Storedahl & Sons, Inc. v. Cowlitz County*, 125

Wn. App. 1, 11, 103 P.3d 802 (2004); *Isla Verde Int'l Holdings*, 99 Wn. App. at 133-34. Consequently, “[a]n order supported by substantial evidence can be upheld even if the record contains contrary evidence.” *Yakima Police Patrolmen’s Ass’n v. City of Yakima*, 153 Wn. App. 541, 561, 222 P.3d 1217 (2009).

In this case, as outlined herein above, the Hearing Examiner found that St. Mark’s main assembly area included its fellowship hall. Record, p. 31. Although the record may contain evidence to the contrary, under LUPA, the Court does not reweigh evidence. Instead, the Court must defer to the Hearing Examiner’s findings because substantial evidence supports it.

F. CONCLUSION

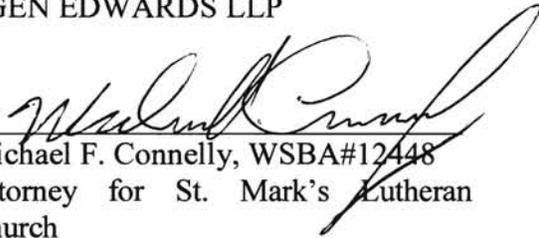
For the foregoing reasons, St. Mark’s respectfully asks the Court to reverse the decision of the Superior Court and affirm the decision of the Hearing Examiner, reinstating the Planning Director’s approval of the proposed parking addition.

G. Appendix A

RESPECTFULLY SUBMITTED this 6th day of February, 2012.

KOEGEN EDWARDS LLP

By:



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Appendix A

Title 17A Administration**Chapter 17A.010 General Administration****Section 17A.010.070 Delegation of Administration**

Except to the extent that state law requires municipal code enforcement personnel to be specifically qualified, every function, authority and responsibility vested by this title in a particular officer is delegable.

- A. Responsibility for the administration, application, and interpretation of these procedures pursuant to this title is as is set forth below.
1. The director of building services or his/her designee administers [chapter 17E.050 SMC](#), [Title 17F SMC](#), [chapter 17G.010 SMC](#), [Title 17I SMC](#), and the development codes.
 2. The director of engineering services or his/her designee administers [chapter 17D.020 SMC](#), [chapter 17D.080 SMC](#), [chapter 17E.010 SMC](#), [chapter 17E.050 SMC](#), [chapter 17G.080 SMC](#), [Title 17H SMC](#), and the development codes.
 3. The director of planning services or his/her designee administers [Title 17B SMC](#), [Title 17C SMC](#), and [chapter 17D.010 SMC](#), [chapter 17D.080 SMC](#), [chapter 17E.020 SMC](#), [chapter 17E.030 SMC](#), [chapter 17E.040 SMC](#), [chapter 17E.050 SMC](#), [chapter 17E.060 SMC](#), [chapter 17E.070 SMC](#), [chapter 17G.020 SMC](#), [chapter 17G.030 SMC](#), [chapter 17G.040 SMC](#), [chapter 17G.060 SMC](#), [chapter 17G.070 SMC](#), and [chapter 17G.080 SMC](#).
 4. The historic preservation officer or his/her designee administers [chapter 17D.040 SMC](#) and [chapter 17E.050 SMC](#).
 5. The director of wastewater management administers [chapter 17D.060 SMC](#) and [chapter 17D.090 SMC](#).

Date Passed: Monday, March 8, 2010

ORD C34566 Section 1

Title 17G Administration and Procedures**Chapter 17G.050 Hearing Examiner**

Article III. Appeal

Section 17G.050.320 Action on Appeal to Hearing Examiner

- A. Upon receiving an administrative appeal, the hearing examiner's office shall schedule a hearing on the appeal with the appropriate parties within thirty days of the date of the appeal unless the parties agree to extend the appeal date past thirty days.
- B. The hearing examiner may affirm, modify, remand or reverse the decision being appealed. In considering the appeal the examiner must act in a manner that is consistent with the criteria for the appropriate category of action being appealed.
- C. The original decision being appealed is presumptively correct. The burden of persuasion is upon the appellant to show that the original decision was in error and the relief sought in the appeal should be granted.
- D. If the findings of fact upon which the original decision was based are supported by substantial evidence, the hearing examiner must accept those findings. If not, the examiner may modify one or more of the findings as warranted by the evidence, or substitute its own findings, citing the evidence found supporting the substitute findings. In land use cases, if the decision is supported by the findings, but the city council is not satisfied with the results in the particular case, the city council may direct appropriate amendments to the underlying policy or regulatory documents to apply to future applications, but may not modify, remand, or reverse a decision based on such future amendments.
- E. If there is not substantial evidence to support the findings upon which the original decision is based, the decision is reversed. The hearing examiner must substitute its own findings which are supported by substantial evidence.
- F. If the original decision is not fully supported by the findings, the hearing examiner may:
 1. examine the evidence to determine whether additional findings could be supported, make those additional findings and then review the original decision;
 2. examine the evidence to determine whether additional findings could be supported, and if so, remand the matter for further findings and a new decision; or
 3. make such decision as is supported by the findings.
- G. If, in the judgment of the hearing examiner, a party can provide new evidence not available at the time of the original decision which would more likely than not change the decision, the examiner remands the matter back for reconsideration.
- H. If a substantial procedural error has taken place which has adversely affected the rights of an appellant, the hearing examiner may remand the matter for further proceedings.

Date Passed: Monday, February 21, 2005

ORD C33578 Section 3

Spokane Municipal Code

Wednesday, June 1, 2011 - 9:44 AM

[Print](#) | [Close Window](#)Font Size: [Increase](#) | [Decrease](#)**Title 17G Administration and Procedures****Chapter 17G.060 Land Use Application Procedures****Section 17G.060.020 Administration**

- A. Responsibility for the administration, application and interpretation of these procedures pursuant to this ordinance is as is set forth below:
1. The director of building services or his designee is responsible for [chapter 17E.050 SMC](#), Division F; [chapter 17G.010 SMC](#), Division I; and the development codes.
 2. The director of engineering services or his designee is responsible for [chapter 17D.020 SMC](#), [chapter 17D.070 SMC](#), [chapter 17E.010 SMC](#), [chapter 17E.050 SMC](#), [chapter 17G.080 SMC](#), Division H and the development codes.
 3. The director of planning services or his designee is responsible for SMC Division B, Division C, and [chapter 11.15 SMC](#), [chapter 11.17 SMC](#), [chapter 11.19 SMC](#), [chapter 17D.010 SMC](#), [chapter 17D.060 SMC](#), [chapter 17D.080 SMC](#), [chapter 17D.090 SMC](#), [chapter 17E.020 SMC](#), [chapter 17E.030 SMC](#), [chapter 17E.040 SMC](#), [chapter 17E.050 SMC](#), [chapter 17E.060 SMC](#), [chapter 17E.070 SMC](#), [chapter 17G.020 SMC](#), [chapter 17G.030 SMC](#), [chapter 17G.040 SMC](#), [chapter 17G.060 SMC](#), [chapter 17G.070 SMC](#) and [chapter 17G.080 SMC](#).
- B. The procedures for requesting interpretations of the land use codes and development codes shall be made by the department and may be contained under the specific codes.

Date Passed: Monday, November 26, 2007

ORD C34135 Section 25

NO. 304175

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

FAMILIES OF MANITO, ANN
BERGEMAN, TODD STECHER, and
SADIE LAKE,

Respondents/
Cross-
Appellants,

vs.

ST. MARK'S LUTHERAN CHURCH,

Appellant/
Cross-
Respondent,

and

City of Spokane, a first class city of the
State of Washington,

Respondent/ Cross Respondent.

COA: 304175

CERTIFICATE OF SERVICE
OF APPELLANT ST.
MARK'S LUTHERAN
CHURCH

CERTIFICATE OF SERVICE

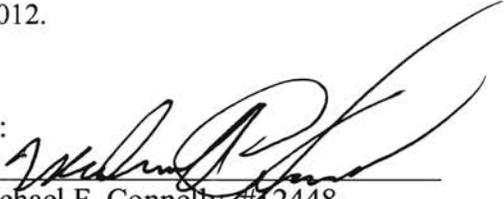
Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 6th day of February, 2012, the Opening Brief of Appellant St. Mark's Lutheran Church, in the above captioned matter and filed with the Court of Appeals, Division III, was served on the following persons via hand delivery:

RICK EICHSTAEDT
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