

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

MARY HAZEL UPTON,)
)
 Plaintiff,)
)
 v.) No. 4:16-cv-229
)
TOWN OF CLARKSVILLE,)
INDIANA,)
)
 Defendant.)

Complaint for Declaratory and Injunctive Relief

Introduction

1. On a number of occasions employees of the Town of Clarksville have entered Mary Hazel Upton’s property in Clarksville, without permission or warrant, to make inspections pursuant to the Town’s ordinances that the Town interprets as allowing such inspections. Ms. Upton is subject to similar searches in the future. Such searches, without consent or warrant, are unconstitutional and to the extent that the Town is interpreting its ordinances as allowing such searches the ordinances are unconstitutional. Appropriate injunctive and declaratory relief must enter.

Jurisdiction, venue, cause of action

2. This Court has jurisdiction of this case pursuant to 28 U.S.C. § 1331.
3. Venue is proper in this district pursuant to 28 U.S.C. § 1391.
4. Declaratory relief is authorized by Federal Rule of Civil Procedure 57 and 28 U.S.C. § 2201 and § 2202.
5. Plaintiff’s claim is brought pursuant to 42 U.S.C. § 1983 to redress the deprivation, under color of state law, of rights secured by the Constitution of the United States.

Parties

6. Mary Hazel Upton is an adult resident of Clarksville, Indiana.
7. Clarksville, Indiana is a town located in Clark County, Indiana.

Facts

8. Chapter 97 of the Town of Clarksville, Indiana Code of Ordinances (“Ordinances”) is entitled “Weeds.” The Chapter is attached as Exhibit 1.
9. Section 97.02 of the Ordinances makes it unlawful for the owner of property within the town to allow the property to become “overgrown with weeds, grass, or rank vegetation beyond the height of one foot, or to such extent that the growth is detrimental to the public health and constitutes a nuisance.”
10. Section 97.03 of the Ordinances provides that “[i]t shall be the duty of the Office of the Building Commissioner of the town to make a careful inspection of any lots, grounds and/or tracts of land situated within the corporate limits of the town for the purpose of determining whether there is a violation of this chapter.”
11. Violation of the provisions of Chapter 97 are declared to be public nuisances and may lead to a fine not to exceed \$2,500 a day, Sections 97.07, 97.99.
12. A separate Clarksville ordinance, Ordinance No. 20115-G-05, gives the Building Commissioner the authority “at any reasonable time to go in, upon, around or about the premises where any Building or Structure subject to provision of this Building Ordinance or the rules of the Fire Prevention and Building Safety Commission is located for the purposes of inspection and investigation of such building or structure.” This ordinance is attached as Exhibit 2.
13. Mary Hazel Upton has lived at the same property in Clarksville since 2006 and has owned it since 2011.

14. Her property is located on a corner with a fenced backyard.
15. On a number of occasions employees of the Town of Clarksville have entered upon her property, ostensibly to inspect for weeds and also stray cats.
16. The Town of Clarksville personnel have walked into her backyard, presumably through a gate that is in the fence around the yard.
17. At no time did the Town of Clarksville personnel have permission to enter upon her property and, on information and belief, they did not have a warrant.
18. Following visits in October of 2012, September of 2015, July of 2016, and September of 2016, Ms. Upton received a “Notice of Violation” from the Clarksville Planning, Zoning & Building Code Enforcement.
19. The last Notice of Violation states that Ms. Upton’s property had been found in violation of various ordinances concerning tall weeds, trash and junk, exterior maintenance, vegetation and yard maintenance.
20. All the notices that Ms. Upton received stated that she had 7 days to comply with the ordinance in violation or she would be issued a citation, which would require a court appearance and possible fines.
21. Following each notice of violation Ms. Upton attempted to remedy the perceived deficiencies with her property.
22. Following the last notice Ms. Upton wrote to the Town of Clarksville inquiring, among other things, as to its right to enter her property without permission.
23. On September 30, 2016 she was sent a letter, by certified mail, from the Building Commissioner of the Town of Clarksville that, among other things, provided her with

“ordinances that provide[] us with right of access.” The letter, with a number of attachments, is attached to this complaint as Exhibit 3.

24. It appears from the attachment to the letter that the City is relying upon Section 97.03 of the Ordinances as well as Ordinance No. 20115-G-05 as the source of its asserted right to enter Ms. Upton’s property without permission from Ms. Upton or a warrant.

25. Also attached to this letter were a number of photographs of Ms. Upton’s property, including some that were clearly taken from inside her fenced backyard.

26. Ms. Upton continues to have a large number of plants and vines in her backyard, including morning glory and honeysuckle vines that she intends to let grow.

27. The City has repeatedly inspected her property in the past and there is a realistic possibility that she will be subjected to warrantless entry into her property without permission in the future.

28. Mary Hazel Upton is being threatened with irreparable harm for which there is no adequate remedy at law.

29. At all times defendant has acted and has failed to act under color of state law.

Claim for relief

34. The actions of employees of the Town of Clarksville in entering plaintiff’s property without permission or without a warrant violates the Fourth Amendment to the United States Constitution and the ordinances of the Town of Clarksville that purport to allow such entry violate the Fourth Amendment.

Request for relief

WHEREFORE, plaintiff requests that this Court:

- a. Accept jurisdiction of this case and set the matter for hearing at its earliest convenience.

- b. Declare that the actions of the employees of the Town of Clarksville in entering plaintiff's property without permission or without a warrant violates the Fourth Amendment to the United States Constitution and, further, that the ordinances of the Town of Clarksville that purport to allow such entry without warrant or permission violate the Fourth Amendment.
- c. Enter a preliminary injunction, later to be made permanent, enjoining the Town of Clarksville, its employees, officials, agents, or other similar persons, from entering upon plaintiff's property without her permission or warrant and enjoining any and all ordinances of the Town of Clarksville that purport to allow such entry without warrant or permission.
- d. Award plaintiff her costs and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988.
- e. Award all other proper relief.

s/ Kenneth J. Falk

Kenneth J. Falk

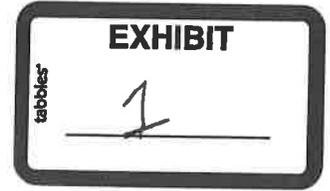
s/ Jan P. Mensz

Jan P. Mensz
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1031 E. Washington St.
Indianapolis, IN 46202
317-635-4059
Fax: 317-635-4105
kfalk@aclu-in.org
jmensz@aclu-in.org

Attorneys for Plaintiff

Print

Clarksville Code of Ordinances



CHAPTER 97: WEEDS

Section

- 97.01 Definition
- 97.02 Excessive growth prohibited
- 97.03 Inspections
- 97.04 Removal notice
- 97.05 Failure to remove; remedies
- 97.06 Cost of removal by the town
- 97.07 Public nuisance declared

- 97.99 Penalty

§ 97.01 DEFINITION.

For the purpose of this chapter, the following definition shall apply unless the context clearly indicates or requires a different meaning.

WEED. Any undesirable, uncultivated plant. As used in this chapter, **WEEDS, GRASS AND RANK VEGETATION** do not include agricultural crops such as hay and pasture.

(Ord. 94-G-03, passed 8-8-94)

§ 97.02 EXCESSIVE GROWTH PROHIBITED.

It is unlawful for the owner of any lot or tract of ground within the town to allow it to be overgrown with weeds, grass, or rank vegetation beyond the height of one foot, or to such extent that the growth is detrimental to the public health and constitutes a nuisance.

(Ord. 94-G-03, passed 8-8-94) Penalty, see § 97.99

§ 97.03 INSPECTIONS.

It shall be the duty of the Office of the Building Commissioner of the town to make a careful inspection of any lots, grounds and/or tracts of land situated within the corporate limits of the town for the purpose of determining whether there is a violation of this chapter.

(Ord. 94-G-03, passed 8-8-94; Am. Ord. 2010-G-02, passed 7-19-10)

§ 97.04 REMOVAL NOTICE.

(A) Whenever the Building Commissioner finds grass, weeds, or rank vegetation on property within the town which is in such a condition as to violate this chapter, the Building Commissioner shall issue a written notice to the landowner to remove the grass, weeds or rank vegetation within five days of the date of receipt of the notice. The notice shall state that, if the landowner is found to again be in violation of this chapter, during that season, the property owner will receive notice at the property at the time of mowing instead of being sent a certified letter. The initial notice shall be served by certified mail upon the landowner, to the landowner's last known address, with a first class letter sent on the same date.

(B) A landowner who has been issued a notice of violation under this chapter may appeal the notice of violation to the Town Council within 5 days of receiving the notice. Such appeal must be in writing and filed with the Clerk-Treasurer during regular business hours for that office. Upon receipt of an appeal of the notice, the Town Council will hear the matter at the next regularly scheduled Town Council meeting, or a Town Council meeting within 30 days of the filing of the appeal. The applicant and the Building Commissioner will be notified of the time and date of the hearing by first class mail. The landowner filing an appeal must appear before the Town Council at the designated time to present information and/or evidence as to why he/she believes that he/she should not have been issued a notice of violation.

(Ord. 94-G-03, passed 8-8-94; Am. Ord. 2003-G-04, passed 4-29-03; Am. Ord. 2012-G-09, passed 7-2-12)

§ 97.05 FAILURE TO REMOVE; REMEDIES.

(A) The Building Commissioner shall inspect the property within the ten days following the date of the notice to determine whether the violation has been cured. If the landowner has failed to remove the grass, weeds or rank vegetation, the Building Commissioner, his or her deputy or designee may issue to the landowner a citation for an ordinance violation which states the relevant offense(s) of this chapter, and the matter shall be prosecuted in the appropriate court by the Town Attorney.

(B) In addition, if the landowner upon reinspection has failed to remove the grass, weeds or rank vegetation, the town through its Building Commissioner may enter the property and remove the grass, weeds or rank vegetation. The town may also pursue any other appropriate legal remedies.

(C) If a landowner is found to again be in violation of this chapter during that season, the Building Commissioner shall post notice of a continuous abatement at the property at the time of abatement. A continuous abatement notice serves as notice to the real property owner that each subsequent violation during the same year for which the initial notice of the violation was provided may be abated by the municipality or county, or its contractors.

(Ord. 94-G-03, passed 8-8-94; Am. Ord. 2012-G-09, passed 7-2-12)

§ 97.06 COST OF REMOVAL BY THE TOWN.

(A) (1) If the landowner fails to remove the grass, weeds or rank vegetation and it is subsequently removed by the town, the Building Commissioner shall make a certified statement of the actual costs incurred by the town for the removal together with an administrative fee of \$25 plus the cost of sending the notice required herein. The statement shall be sent by certified mail, return receipt requested, or an equivalent service permitted under IC 1-1-7-1 to:

(a) The owner of record of real property with a single owner; or

(b) At least one of the owners of real property with multiple owners; at the last address of the owner for the property as indicated in the records of the county auditor on the date of the notice.

(2) The landowner shall pay the amount of the statement to the Building Commissioner within ten days of the receipt of the statement.

(B) If the landowner fails to pay within the specified ten-day period, a certified copy of the statement of cost with the administrative fee shall be filed in the Office of the Clark County Auditor. The Auditor shall place the amount claimed on the tax duplicate of the property affected by the removal by the town. The amount shall be collected as taxes are collected, and dispersed to the general fund of the town.

(Ord. 94-G-03, passed 8-8-94; Am. Ord. 2010-G-02, passed 7-19-10) Penalty, see § 97.99

§ 97.07 PUBLIC NUISANCE DECLARED.

Violations of the provisions of this chapter are declared a public nuisance.

(Ord. 94-G-03, passed 8-8-94) Penalty, see § 97.99

§ 97.99 PENALTY.

Any person, firm or corporation who violates any provision of this chapter shall be subject to a fine not to exceed \$2,500.00 for each violation. Each day that a violation continues shall be considered a separate violation.

(Ord. 94-G-03, passed 8-8-94)

ORDINANCE NO. 20115-G-05

ARTICLE III. INVESTIGATIONS AND INSPECTIONS OF CONSTRUCTION OR INSTALLATION ACTIVITIES

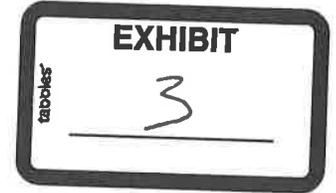
SECTION 15. GENERAL AUTHORITY TO MAKE INSPECTIONS AND INVESTIGATION

1. All Construction shall be subject to periodic inspections by the Building Commissioner irrespective of whether a building permit has been or is required to be obtained.
2. The Building Commissioner may at any reasonable time go in, upon, around or about the premises where any Building or Structure subject to provisions of this Building Ordinance or the rules of the Fire Prevention and Building Safety Commission is located for the purposes of inspection and investigation of such building or structure. Such inspection and investigation may be made before, during, and/or after construction on the project is completed for the purposes of determining whether the structure meets building standards and procedures, and ascertaining whether the construction and procedures have been accomplished in a manner consistent with this Building Ordinance and the rules of the Fire Prevention and Building Safety Commission.



TOWN OF CLARKSVILLE

2000 Broadway, Suite 234
Clarksville, Indiana 47129
(812) 283-1510



9/30/2016

CERTIFIED MAIL 7015 0640 0002 2125 5992
REQUEST RETURN RECEIPT

Ms. Mary Upton
1025 N. Taggart Ave.
Clarksville, IN 47129

Reference: Responses to your letter dated September 18, 2016
and
NOTICE OF VIOLATION
Town Ordinance § 97.02 EXCESSIVE VEGETATIVE GROWTH PROHIBITED
Property Located at 1025 N. Taggart Ave.

Dear Ms. Upton ,

We are in receipt of your letter dated September 18, 2016. Your letter was received in our office on September 22, 2016.

The purpose of our response is to (1) notify you that we are in receipt of your letter, (2) clarify our Notice of violation related to your property, (3) provide you with ordinances pertaining to the notice of violation and other ordinances that provides us right of access and (4) to notify you that you have seven (7) days upon receipt of this letter to comply.

The notice of violation pertains to excessive growth vegetation that is haphazardly growing along the fence line and your side and back yard. Please refer to the attached photos dated 09/14/2016. Flowers, vines and other plant life is by definition vegetation, but uncontrolled growth, volunteer growth of evasive plants with little to no horticulture is in violation of Town Ordinance § 97.02 "EXCESSIVE VEGETATIVE GROWTH PROHIBITED".

There are two immediate concerns. The first is the uncontrolled growth along your fence line that bisects the corner of Taggart & Adams. The growth obscures vision of vehicular traffic at the intersection and requires immediate remedial action to remedy the situation. The second concern is along your southeast property line. The evasive growth is so excess, it is entwined with the adjacent property owner's utility lines and in poses a safety hazard and requires immediate remedial action to remedy the situation as well.

You had indicated in your letter that you could not locate or did not believe that ordinances regarding excessive growth existed or that we had right of entry. Our ordinances are published and available on our website and we are always more than happy to provide you with a hard

copy of any and all of our Code if you wish. I have however, taken the liberty to enclose a copy of the ordinances that pertain to the topic of discussion.

I reiterate, you have seven (7) days upon receipt of this letter to comply. Please understand the penalties for such non-compliance or violation of this Ordinance is set forth in § 97.99 "PENALTY" and states any person or entity that violates any provision of this chapter shall be subject to a fine not to exceed Two Thousand Five Hundred (\$2,500.00) for each violation, and each day that a violation continues shall be considered a separate violation.

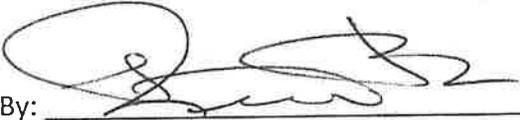
Furthermore, should you fail to remove the excessive vegetative growth on the Property, and it is subsequently removed by the Town or its contractor, the Building Commissioner shall record a certified statement of the actual costs incurred by the Town for such removal, together with an administrative fee of \$25.00 and the actual cost of sending you required notice of the statement by certified mail, return receipt requested, or an equivalent service permitted under IC 1-1-7-1.

You will be required to pay the amount of the statement to the Building Commissioner within ten (10) days following the receipt of the statement. If you then fail to make such payment, a certified copy of the statement of cost with the administrative fees shall be filed in the office of the Clark County Auditor and recorded in the office of the Clark County Recorder. The statement shall thereafter attach as a lien against the Property. The Auditor shall place the amount claimed on the tax duplicate of the Property, and the amount shall be collected in the same manner as taxes, and subsequently dispersed to the Town.

Please know that the Town of Clarksville honors and respects the rights of all of its citizens and property owners. However, the Town is obligated to enforce and uphold its ordinances, including with respect to the violation described above.

If there are circumstances that you believe should require the Town to reconsider this Notice of Violation and demand for remedial action, I would be glad to discuss with you during regular business hours. Otherwise, I thank you in advance for your consideration and response in remediating the conditions cited in this Notice.

TOWN OF CLARKSVILLE, INDIANA

By: 

Rick Barr, Building Commissioner

CHAPTER 97: WEEDS

§ 97.01 DEFINITION.

For the purpose of this chapter, the following definition shall apply unless the context clearly indicates or requires a different meaning.

WEED. Any undesirable, uncultivated plant. As used in this chapter, **WEEDS, GRASS AND RANK VEGETATION** do not include agricultural crops such as hay and pasture.

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(B) A landowner who has been issued a notice of violation under this chapter may appeal the notice of violation to the Town Council within 5 days of receiving the notice. Such appeal must be in writing and filed with the Clerk-Treasurer during regular business hours for that office. Upon receipt of an appeal of the notice, the Town Council will hear the matter at the next regularly scheduled Town Council meeting, or a Town Council meeting within 30 days of the filing of the appeal. The applicant and the Building Commissioner will be notified of the time and date of the hearing by first class mail. The landowner filing an appeal must appear before the Town Council at the designated time to present information and/or evidence as to why he/she believes that he/she should not have been issued a notice of violation.

(Ord. 94-G-03, passed 8-8-94; Am. Ord. 2003-G-04, passed 4-29-03; Am. Ord. 2012-G-09, passed 7-2-12)

§ 97.05 FAILURE TO REMOVE; REMEDIES.

(A) The Building Commissioner shall inspect the property within the ten days following the date of the notice to determine whether the violation has been cured. If the landowner has failed to remove the grass, weeds or rank vegetation, the Building Commissioner, his or her deputy or designee may issue to the landowner a citation for an ordinance violation which states the relevant offense(s) of this chapter, and the matter shall be prosecuted in the appropriate court by the Town Attorney.

(B) In addition, if the landowner upon re-inspection has failed to remove the grass, weeds or rank vegetation, the town through its Building Commissioner may enter the property and remove the grass, weeds or rank vegetation. The town may also pursue any other appropriate legal remedies.

(C) If a landowner is found to again be in violation of this chapter during that season, the Building Commissioner shall post notice of a continuous abatement at the property at the time of abatement. A continuous abatement notice serves as notice to the real property owner that each subsequent violation during the same year for which the initial notice of the violation was provided may be abated by the municipality or county, or its contractors.

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(a) The owner of record of real property with a single owner; or

(b) At least one of the owners of real property with multiple owners; at the last address of the owner for the property as indicated in the records of the county auditor on the date of the notice.

(2) The landowner shall pay the amount of the statement to the Building Commissioner within ten days of the receipt of the statement.

(B) If the landowner fails to pay within the specified ten-day period, a certified copy of the statement of cost with the administrative fee shall be filed in the Office of the Clark County Auditor. The Auditor shall place the amount claimed on the tax duplicate of the property affected by the removal by the town. The amount shall be collected as taxes are collected, and dispersed to the general fund of the town.

(Ord. 94-G-03, passed 8-8-94; Am. Ord. 2010-G-02, passed 7-19-10) Penalty, see § 97.99

§ 97.07 PUBLIC NUISANCE DECLARED.

Violations of the provisions of this chapter are declared a public nuisance.

(Ord. 94-G-03, passed 8-8-94)

ORDINANCE NO. 20115-G-05

ARTICLE III. INVESTIGATIONS AND INSPECTIONS OF CONSTRUCTION OR INSTALLATION ACTIVITIES

SECTION 15. GENERAL AUTHORITY TO MAKE INSPECTIONS AND INVESTIGATION

1. All Construction shall be subject to periodic inspections by the Building Commissioner irrespective of whether a building permit has been or is required to be obtained.
2. The Building Commissioner may at any reasonable time go in, upon, around or about the premises where any Building or Structure subject to provisions of this Building Ordinance or the rules of the Fire Prevention and Building Safety Commission is located for the purposes of inspection and investigation of such building or structure. Such inspection and investigation may be made before, during, and/or after construction on the project is completed for the purposes of determining whether the structure meets building standards and procedures, and ascertaining whether the construction and procedures have been accomplished in a manner consistent with this Building Ordinance and the rules of the Fire Prevention and Building Safety Commission.

JS 44 (Rev 09/10)

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA**

CIVIL COVER SHEET

This automated JS-44 conforms generally to the manual JS-44 approved by the Judicial Conference of the United States in September 1974. The data is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. The information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law.

Plaintiff(s):

First Listed Plaintiff:

Mary Hazel Upton ;

County of Residence: Clark County

Defendant(s):

First Listed Defendant:

Town of Clarksville, Indiana ;

County of Residence: Clark County

County Where Claim For Relief Arose: Clark County

Plaintiff's Attorney(s):

Kenneth Falk (Mary Upton)

ACLU of Indiana

1031 E Washington St

Indianapolis, Indiana 46202

Phone: 3176354059

Fax: 3176354105

Email: kfalk@aclu-in.org

Defendant's Attorney(s):

Jan Mensz

ACLU of Indiana

1031 E Washington St

Indianapolis, Indiana 46202

Phone: 3176354059

Fax: 3176354105

Email: jmensz@aclu-in.org

Basis of Jurisdiction: 3. Federal Question (U.S. not a party)

Citizenship of Principal Parties (Diversity Cases Only)

Plaintiff: N/A

Defendant: N/A

Origin: 1. Original Proceeding

Nature of Suit: 440 All Other Civil Rights

Cause of Action: 42 USC s. 1983. Defendant is violating the Fourth Amendment by entering to inspect plaintiff's property without a warrant or permission and the Town ordinances that purport to allow for such an inspection are unconstitutional.

Requested in Complaint

Class Action: Not filed as a Class Action

Monetary Demand (in Thousands):

Jury Demand: No

Related Cases: Is NOT a refiling of a previously dismissed action

Signature: /s/ Kenneth J. Falk

Date: Dec. 12, 2016

If any of this information is incorrect, please close this window and go back to the Civil Cover Sheet Input form to make the correction and generate the updated JS44. Once corrected, print this form, sign and date it, and submit it with your new civil action.

United States District Court
for the
Southern District of Indiana

MARY HAZEL UPTON,)	
)	
<i>Plaintiff,</i>)	
)	
vs.)	Cause No: 4:16-cv-229
)	
TOWN OF CLARKSVILLE, INDIANA,)	
)	
<i>Defendant.</i>)	

SUMMONS IN A CIVIL ACTION

TO:
Town of Clarksville, Indiana
Clarksville Administration Building
2000 Broadway
Clarksville, IN 47129

A lawsuit has been filed against you. Within 21 days after service of this summons on you (not counting the day you received it) or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Kenneth J. Falk / Jan P. Mensz
ACLU of Indiana
1031 E. Washington St.
Indianapolis, IN 46202

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action Number: 4:16-cv-229

PROOF OF SERVICE

(this section should not be filed with the court unless required by Fed. R. Civ. P. 4(l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)*_____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's Signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.