ORIGINAL

42917-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES BYRON HOLCOMB, individually
And as Personal Representative
Of the Estate of Karen R. Holcomb (1)

Appellants,

-vs-

ASSIGNED JUDGE FOR THE KITSAP COUNTY DISTRICT COURT IN NO. 1002203333; et. al.

Respondents.

REPLY BRIEF OF APPELLANT

J. Byron Holcomb, Pro Se
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Tel: (206) 842-8429
Fax: Same

(1) Karen Holcomb died January 18, 2011, and was alive during most of the events described herein.

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INTRODUCTION:

Appellant ("Holcomb") relies on his statement in his "Introduction" in his Opening Brief, as the correct, straight-forward, and factually supported statement.

ASSIGNMENTS OF ERROR:

Appellant ("Holcomb") relies on his statement in his "Assignment of Errors" in his Opening Brief.

The reason for inclusion in his Assignment of Errors of this court's Mandamus jurisdiction is that this court has the power (and duty) to require the judge of the court below to decide the Constitutional issue as presented to that judge in both Count III of the Petition (and this issue was argued in Holcomb's Opening Brief) and, if there was confusion (and there shouldn't have been), at least the Motion For Reconsideration specifically addressed the issue of the Constitutionality of the regulation at issue forcing the contract. The court below should have decided this issue under either presentation and did not. If this court, for whatever reason,

would have wanted that the Court below to have decided the issue first, and does want that now, Mandamus is available for this purpose. That Mandamus power is vested in R.C.W. 2.06.030.

As stated in his Opening Brief, Holcomb drew this court's attention to the decision of the court below, that it is not only wrong in terms of what was presented to her, but not applied in any recognized or appropriate fashion for this court to review. In applying Mandamus, this court should require the court below to serve her decision (or her replacement now that she is retired) on the Constitutional issue on this court before this court makes its final decision. Holcomb can find no reported authority on such a requirement, but it seems plain enough from the above said statute in the use of the word "determinations" for this Court to order Mandamus. This Court would then have before it a decision from below for adequate review.

This Court should also be reminded that the Constitutional issue presented herein is an issue of first impression before the Courts of this State (See, "Argument" below).

STATEMENT OF THE CASE:

The Respondents alleged "Restatement of the Case" is a testament to semantics, misstatement, false statement, matters unsupported by the record, and hope.

What should be emphasized to this Court is the regulation requiring (and forcing) the contract at issue is and was formulated by the Health District, sets forth who is authorized to be a contractor from and by an "approved" list prepared by the Health District, requires the property owner to enter into a contract with a contractor where such contract did not exist prior to Health District action or would have to be renewed ab initio, and reviews the contract for reasonableness of the fee, and generally reviews the contract's provisions as and for meeting the regulation. None of this was addressed by

the Health District in its "Opening" (meaning "Responding") brief, except to make it appear falsely that the Health District played no role in the contract formation or its terms or its review.

Moreover, that "Responding" Brief bandies about the words "inspect" and "inspection" carelessly without proper explanation. What would otherwise constitute an O&M "inspection", even by their alleged definition, would, according to its Brief, not be considered an "inspection" if no O&M contract and approved by them had been "entered into".

Where this misrepresentation becomes critical to Holcomb's argument is at CP 47. When Brown came to Holcomb's property, he reviewed the system, found it to be an approved system, found it to be in working order, did not find any problem needing to be "repaired", approved it for purposes of new construction as was done in 2001, and required two additional items for new construction purposes only. If this is not an "inspection", either under its regulation or realistically

for a working system, then he shouldn't have been there. Holcomb's unassailable point, and cannot be gainsaid, is that here is a qualified and trained representative of the Health District who came to Holcomb's property armed with the general and working knowledge of the system, or systems, of the Glendon Biofilter, as an on-site alternative septic tank system; while on scene, conducted a complete inspection by any reasonable, or technical, definition of that word; and, then, approved it without change or "repair", all within the Health District's own rules and regulations, indeed, the same as was done initially under court order. By this evidence, and once again to emphasize the point, it is unassailable that the Health District plainly has its own trained personnel and the capability of conducting an on-site inspection, which completely eliminates the need for the regulation and the contract at issue. This Court must understand this and not be misled by the fluff, and definitional miasma, of the Health District's alleged argument. The Brief does not deny this generally, or cannot do

so, specifically, by reason of Brown's inspection as contained in CP47.

ARGUMENT:

The Brief of the Health District, in opposing Holcomb's Opening Brief, allegedly relies on two claims: one is that Holcomb has not shown by his authority that the regulations at issue are unconstitutional; and, two, that, in any case, their Brief relies on the "presumption" that a regulation is Constitutional.

It is extremely important for this Court to notice that the Health District Brief does not cite to any authority upholding a forced contract, whether under a regulation or otherwise. NONE. What is more important is that the Health District should have determined the Constitutionality of the regulation at issue before adopting the same, which is just plain common sense, as well as an accepted practice by agencies in order to avoid in advance, and to be able to counter, an issue, such as the issue herein. The Health District did not. Good faith, an

element applied in review of any governmental action, is lacking as a companion issue, and then tack on plain arrogance of the worst sort from a governmental agency aimed at a court system to defy the same. For the Health District to rely on an alleged presumption of Constitutionality is unconscionable under these circumstances when the agency was remiss in its duties, and other reasons expressed, beforehand. These matters are critical to this Court's review of this case.

On top of this, the said Brief does not refer at all to the two major cases cited by Holcomb in his Opening Brief as squarely in opposition to a regulation requiring a forced contract as unconstitutional. No where does Respondent's Brief challenge *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), which clearly upholds the freedom to contract under 14th Amendment Due Process principles. The contract at issue herein is not a free decision of either the property owner or the contractor. No where does the Brief address *National Federation v. Sibelius,* 648 F.3d 1235 (11th

Cir. 2011), *rvrsd. on other grounds,* 567 U.S. _____ (2012), which clearly holds in principle that a forced contract by a governmental agency is unconstitutional.

In cavalier fashion, the Brief waives off without discussion the following cases cited to by Holcomb on the Due Process issues of forced contracts: *Eastern Enterprises v. Apfel,* 524 U.S. 498 (1998), where Mr. Justice Kennedy discusses at length his decision on both retroactive and prospective contracts, as necessary to his holding, as both come within and are subject to the Due Process clause; *Allied v. Spannus,* 438 U.S. 234 (1978), same discussion on a different substantive issue; and *Trustees v. Woodward,* 17 U.S. 304 (1819), same discussion on a different substantive issue. Aside from the false logic of the distinction between retroactive or prospective contracts as these notions apply to the Health District regulation at issue, all O&M contracts under the regulation are prospective when required to be renewed annually, as the Responding Brief agrees. The judicial Due

Process policies discussed in the above cases as to prospective contracts should lead this court to the logical conclusion, that the Health District forced contracts are unconstitutional.

What Holcomb can agree with the Brief is in the partial sentence contained on p. 16-17 as follows: "Thus, even though the district court lacks jurisdiction to determine constitutional issues, that issue, if properly raised and preserved (it was both in the district and superior courts)", but disagrees with the following continuation of the sentence: "...[it] can be addressed on an 'appeal' to the superior court." The latter phrase of the sentence ignores entirely that both the district court and superior court did not address the Constitutional issue herein and do not support this latter quote. Neither court openly or sub-silentio supports this latter phrase.

Holcomb attaches hereto, as Ex. "B", his Motion for Reconsideration before the district court and refers this court to his citing specially his raising the constitutionality of the regulation at issue before the judge and then after this to her not

deciding it. Ex. "C" her denial of "Reconsideration. Holcomb also referred that district court judge to the decision awaiting this court as being the final decision, and the district judge did not address this issue either. The district court decision is not final.

It is plain in any case that the district court did not have jurisdiction to decide the constitutional issue, and whether that remains for appeal or now under Mandamus and Prohibition is of no moment, since the matter is ripe for review now by this court under Mandamus and Prohibition in light of the decisions of both courts below.

Holcomb pleads with this court not to exempt, practically and by informal judicial policy, any challenge to the Health District. Any concern over the Health District regulation at issue can be cured by the Health District with and by its own personnel, certainly without putting the public at risk in any way. In practical terms, the courts, unfortunately, tend to send a figurative "wink-wink" in the direction of the Health District

as an assurance that the Health District is a power unto itself, and the courts will not interfere. This is the reality. That method must stop and stop now. The Health District does not deserve any special, non-recognized, exemption from court review, and has by the history shown by document and declaration herein that it is an arrogant agency out-of-control, knows that it has done no research beforehand and has no authority under the Constitution for what it does as to the regulation at issue (and other matters, insofar as that is concerned), has a repeated history of criminal activity, and has shown under the facts of this case that notwithstanding three expert opinions who stated that there was no need for "repair" of Holcomb's septic tank system in 2001, the superior court below ignored all of this and ordered "repair" any way. The citizens of this county stand unprotected from the excesses, illegalities, inaction, negligence, and unconstitutional actions of the Health District.

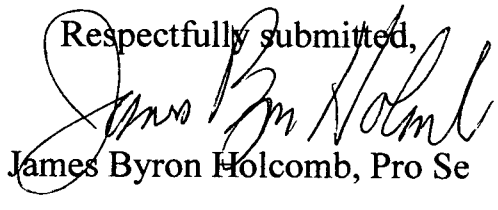
Holcomb pleads with this Court to act now before it gets any worse and, most emphatically, that the Health District will no longer enjoy any special exemption free from judicial review and scrutiny now and in the future. It is long past time to do this and, indeed, to express this by published opinion.

Holcomb otherwise renews his arguments made in his Opening Brief.

CONCLUSION:

Holcomb relies on his Conclusion as stated in his Opening Brief and requests that relief again.

Respectfully submitted,



James Byron Holcomb, Pro Se

EXHIBIT B

MOTION FOR RECONSIDERATION FILED 7/31/12
Kitsap County Health District v. Holcomb, NO. 100203333

JUDGE CINDY SMITH
NOTE FOR NEXT HEARING
SCHEDULED

FOR THE COUNTY OF KITASAP, STATE OF WASHINGTON
AT PORT ORCHARD

PLAINTIFF NOT DESIGNATED ON EX "A") **But presumably the Kitsap County**) **Health District,**)) **Plaintiff,**) **vs.**)) **JAMES BYRON HOLCOMB,**)) **Only Defendant named**) **And not wife nor**) **Community with regard**) **To ownership and**) **Possession of property**) **In question**) _____)	**CASE NO. 10020333** **MOTION TO RECONSIDER** **LETTER DECISION DTD 7/24/12**

COMES NOW J. BYRON HOLCOMB, as attorney for the only Defendant named in the above captioned matter, and moves this Court for an Order to Reconsider Judge Smith's letter ruling dated July 24, 2012.

This Motion is based on the subjoined Declaration of the named Defendant and on the files and records contained herein.

DATED: July 31, 2011

_____
J. Byron Holcomb

DECLARATION OF J. BYRON HOLCOMB:

Comes now J. Byron Holcomb in accordance with the laws of the State of Washington and declares as follows:

1. I am the only Defendant named above. The Kitsap County Health District ("Health District") through its representative has signed the Infraction complaint in the within matter, and is the, in fact, plaintiff.

2. I received the letter decision of Judge Smith on Saturday, July 28, 2012.

3. This letter decision is in error and reconsideration must be granted.

4. If the Court remembers, that on the return date of the hearing, the Health District was in default for failure to file a response to my Motions. Despite my vigorous objections, the Court refused to dismiss the case. Yet, the Court herein applies the same non-response logic as a basis of deciding this matter. This is plain error.

5. The Court instead of dismissing set down a briefing schedule as requested by the Prosecutor. Despite this verbal Order, no such schedule was ever initiated by the Health District. This is error.

6. When it became apparent that the Infraction rules and procedure was inadequate to the issues and facts, Holcomb applied for Writs. While the Superior Court remanded the decision without relief, Holcomb appealed that remand, and said appeal is still pending. No final Order should issue yet and to do so is error.

7. When the Appeals Court refused to stay this action, the action came on again for orders. Holcomb anticipated that a briefing schedule, which was never set for no fault of his, would be set, at which time and upon Order of this Court he would provide the authority for all of his defenses. Instead, the Court demanded that the hearing go forward. Despite Holcomb's vigorous objection to that hearing on this ground, It is unfair and inequitable to Holcomb and an abuse of discretion to hold that no authority was presented, since that authority would have been presented if the Court had set a briefing schedule. For the Court to issue its Order on this basis is plain error demanding reconsideration.

8. Holcomb was unprepared for the hearing as he anticipated that a briefing schedule would be set. Among other things, the evidence of the Health District was never provided to him prior to the hearing. Most important, the witnesses he would have requested, and did before the hearing was closed, were denied to him. Witness Brown, a Health District employee and inspector, was crucial in that he did an inspection of the septic system, showing that the Health District had the capability of doing this inspection without the need for the alleged contract at issue. The word "inspection" was never defined in any of the documentation provided at the hearing. By anything that is of common understanding, Brown did indeed inspect the Glendon Biofilter System. He would have had to do this to see if it is working properly. If it was not working properly, he would have noted that it in his report, and he did not. He cited other grounds necessary, but not that the system was in operative or had to be

"repaired", again an esoteric word known only but to the Health District. The Court should have heard from Brown and would have been satisfied that the "inspection" logic and rules were unnecessary, burdensome, and objected to for the reason of Brown's inspection.

7. A fair hearing was denied and demands reconsideration. In so doing, a briefing schedule should be set as was first ordered by the Court and never presented.

I so Declare under the laws of the State of Washington as is set forth above and signed at Bainbridge Island in Kitsap County on this 31 day of July 2012.

J. Byron Holcomb

EXHIBIT C

MOTION FOR RECONSIDERATION DENIED 8/17/12
Kitsap County Health District v. Holcomb, NO. 100203333

KITSAP COUNTY DISTRICT COURT

JAMES M. RIEHL, JUDGE
DEPARTMENT NO. 1

JEFFREY J. JAHNS, JUDGE
DEPARTMENT NO. 2

614 Division Street, MS-25
Port Orchard, WA 98366
Phone (360) 337-7109
Fax 337-4865

MARILYN G. PAJA, JUDGE
DEPARTMENT NO. 3

STEPHEN J. HOLMAN, JUDGE
DEPARTMENT NO. 4

MAURICE H. BAKER
COURT ADMINISTRATOR

August 17, 2012
Neil Wachter
Kitsap County Prosecuting Attorney's Office
614 Division Street, MS-25
Port Orchard, WA 98366

J. Bryon Holcomb
P.O. Box 10069
Bainbridge Island, WA 98110

Re: *Kitsap County Health District v. J. Bryon Holcomb,* Cause No I00203333
Gentlemen:
The Court has received the defendant's Motion for Reconsideration. The defendant's Motion for Reconsideration is denied.

Sincerely,

Judge Cindy K Smith
Judge Pro Tem, Kitsap County District Court