

# 36750-5  
Transfer

No. Supreme Court No. 79453-7

SUPREME COURT  
OF THE STATE OF WASHINGTON

THURSTON COUNTY,  
Respondent

APPELLANT'S BRIEF

vs.

MERRELL C. SAGER, Appellant

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STATE OF WASHINGTON  
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STATE OF WASHINGTON

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A. SUMMARY OF ASSIGNMENTS OF ERROR

1. Assignment of Error #1. The Thurston County superior court erred in shortening the number of criteria for granting a motion for reconsideration. There were nine grounds for granting the motion for reconsideration

a. ISSUE: MAY A LOCAL RULE LCR 59 ELIMINATE SEVEN OUT OF NINE GROUNDS IN CR 59 for granting a motion for reconsideration, and not violate general rule 83 which requires that local rules not conflict with the standard court rules? No.

2. Assignment of Error #2: The trial court erred denying defendant's July 13, 2006 motion for reconsideration of an order granting a warrant of abatement.

a. ISSUE: MANIFEST ERROR – MISREADING APPELLATE DECISIONS

Superior court failed to address the invalid 1971 code issue, wrongly believing that the issue had been decided by the appellate court.

1) May the superior court discard an issue remanded to it from the appellate court? No.

b. ISSUE: NEW INFORMATION

In 2005, after the appellate court remanded the case back to the Thurston County Superior Court, the Washington supreme court stated that Washington law does not permit the issuance of warrants in non-criminal actions related to building codes. (Bosteder).

1) May a superior court grant a warrant of abatement after the Washington supreme court ruled that there was no legal authority in Washington for granting administrative warrants? No.

c. ISSUE: IRREGULARITY IN THE PROCEEDINGS.

1) SUB-ISSUE: THERE IS NO CHARGING DOCUMENT RELATED TO THE HOUSE OR SEPTIC system which had already been built more than a decade before any citation was issued, but only a violation citation related to the carport.

a) May a county prosecutor charge a landowner with failing to get a building permit for a house, septic system, and a carport when the landowner was cited only for a failure to get a permit for the carport?

2) SUB-ISSUE: PROSECUTOR, ALLEN MILLER INTRODUCED FALSE EVIDENCE.

On October 14, 2005, The Thurston County Prosecutor, Allen Miller misled the court when he submitted actually false evidence of a public notice for the underlying 1971 codes. **[Docket 147: Plaintiff's Response to Defendant's Motion for Stay of Proceedings and In Support of Plaintiff's Motion for Contempt. Exhibits A and B.]**

a) May a prosecutor offer a typed draft of a public notice to prove that the notice was actually published in the appropriate newspaper?

3) SUB-ISSUE: PROSECUTOR IMPROPERLY CHANGED the motion for the warrant of abatement.

d. ISSUE: EXCESSIVE DAMAGES, OR ERROR IN THE AMOUNT OF RECOVERY, OR UNREASONABLENESS (ELEMENTS IN CR 59)

A warrant of abatement, open-ended enough to allow the removal of Mr. Sager's house and carport, is excessive when the only offense is a class I civil infraction failure to get a building permit 11 years earlier (for the house and septic system), Since a carport is not a building to house residents, its potential to be dangerous is remote.

1) May a superior court grant an abatement to remove (destroy) a house as an option open to the county by virtue of the warrant when the offense was a class I civil infraction: the failure to get a building permit?

e. ISSUE: UNJUSTIFIABLE VERDICT,

1) SUB-ISSUE: LIMITATION OF ACTIONS DEADLINE RAN OUT

The superior court granted a warrant of abatement for construction without a building permit when the building was built 11 years before legal action was ever taken by the county.

- a) Does a superior court have jurisdiction when the violation of a building code law occurred 11 years before the land owner was cited at a time way beyond the running of the statute of limitations on TCC 14.20.011 and TCC 14.20.012? No.

f. ISSUE: FAILURE TO ACCOMPLISH SUBSTANTIAL JUSTICE

Ruling against Mr. Sager on these issues does not accomplish final justice, because any Thurston County citizen – not a party to this case – who undertakes construction or remodeling can file this same cause of action, because the underlying codes were still not adopted according to RCW 36.32.120 (7) and therefore are still invalid.

- 1) Will the penalizing of a landowner for violations of codes not properly adopted accomplish substantial justice when any other landowner in the county challenge those same codes based on inadequate code adoption processes? No.

3. ASSIGNMENT OF ERROR 3, PROSECUTOR USED INCORRECT LAW

- a. Issue: Prosecutor Used incorrect law in motion for warrant of abatement.

RCW 7.48.020 and 030 are the basis for the prosecutor's claimed abatement authority, but those apply only to nuisance or dangerous buildings, something that was never shown by any court, and the lack of a building permit is not on the actionable list.

The code listed on the October 6, 2006 abatement (DANGER) sign posted on Mr. Sager's house referenced TCC 14.22 which is the dangerous building ordinance. [include exhibit of sign for this exhibit in argument] That ordinance has nothing to do with this case since there has never been showing of any nuisance or damage related to Mr. Sager's buildings or property.

- 1) May a court find against a defendant when the charges or claims are based on incorrect laws? No.

B. Statement of the Case

[Write a statement of the procedure below and the facts relevant to the issues presented for review. The statement should not be argumentative. Every factual statement should be supported by a reference to the record. See rule 10.4(f) for proper abbreviations for the record.]

In 1971, Thurston County wanted to adopt building and health codes. The county commissioners voted to pass Thurston County Codes (TCC) 14.20.011, 14.20.012, among others. The county commissioners did not provide public notice of the intent to pass these codes. In 1989, defendant/appellant Sager built his house and a septic system with double the required drain fields, but did not get a building permit for the construction. Ten years later, in 1999, Mr. Sager built a carport onto his house, but did not get a building permit for the construction.. In 2000, Thurston filed suit against Mr. Sager to compel him to get a building permit for the (1) carport, (2) the house, and (3) the septic system. and also (4) alleged nuisance. The Thurston County superior court ruled against Mr. Sager and in favor of the county. After a timely appeal, the appellate court ruled in an initial opinion and then a in a subsequent opinion on re-consideration, that (1) Mr. Sager had provided evidence that the county had improperly adopted the relevant ordinances, (2) the county could not exercise a broadly reaching authority to enter Sager's land without an administrative warrant, and (3) the county could not support the nuisance claim. However, the court did rule that (a) Mr. Sager was in violation of the building and sanitary codes, and (b) the case should be remanded to the Thurston County superior court. The Thurston County prosecutor continued to sue Mr. Sager to force him to get a building permit and moved for a warrant of abatement. On Oct 12, 2006, the superior court granted the warrant of abatement which was a final ruling. Mr. Sager lost

a motion for reconsideration of the grant of the warrant of abatement appealed this final ruling (the denial of a motion for reconsideration) and appealed that final ruling to the Washington supreme court.

C. SUMMARY OF ARGUMENT

[This is optional.]

#### D. ARGUMENT

1. Assignment of Error #1. The Thurston County superior court erred in shortening the number of criteria for granting a motion for reconsideration. There were nine grounds for granting the motion for reconsideration.

- a. ISSUE: MAY A LOCAL RULE I.CR 59 ELIMINATE SEVEN OUT OF NINE GROUNDS IN CR 59 FOR GRANTING A MOTION FOR RECONSIDERATION, AND NOT VIOLATE GENERAL RULE 83 WHICH REQUIRES THAT LOCAL RULES NOT CONFLICT WITH THE STANDARD COURT RULES? <sup>1</sup>/ NO.

Standard of review: Does the local rule conflict with the general rule?

The local rules for Thurston County list only two criteria for granting a motion for reconsideration: manifest error or new facts/authority.

However, CR 59 lists nine criteria. (1) procedural irregularity, (2) misconduct, (3) accident, (4) new evidence, (5) excessive damages, (6) error in the recovery amount, (7) unjustifiable verdict, (8) error in law, or (9) a failure to accomplish substantial justice.

CR 83(a) allows the superior court to adopt local rules “not inconsistent” with the superior court civil rules. King County v. Williamson, 66 Wn. App. 10, 12, 830 P.2d 392 (1992), *review denied*, 122 Wn.2d 1023 (1993). The fact that I.CR 59 removes seven out of the nine grounds in CR 59 for a motion for reconsideration would have to make the local rule inconsistent with the general rule.

This brief will include the two categories for granting a motion for reconsideration given in Thurston County’s local rule 59, but will also apply the categories found in CR 59.

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<sup>1</sup> GENERAL CIVIL RULE 83, LOCAL RULES OF COURT. “(a) Adoption. Each court by action of a majority of the judges may from time to time make and amend local rules governing its practice **not inconsistent with these rules.**”

E. ASSIGNMENT OF ERROR #2: THE TRIAL COURT ERRED DENYING DEFENDANT'S JULY 13, 2006 MOTION FOR RECONSIDERATION OF AN ORDER GRANTING A WARRANT OF ABATEMENT.

a. ISSUE: MANIFEST ERROR – MISREADING APPELLATE DECISIONS

Superior court failed to address the invalid 1971 code issue, wrongly believing that the issue had been decided by the appellate court.

- 1) May the superior court discard an issue remanded to it from the appellate court? No.

Standard of review. Look for conclusive ruling by the appellate court that would discard the code invalidity issue. None found.

This issue is spawned from a confusingly written appellate ruling at an earlier point in this same case. In Thurston County v. Sager, Washington Court of Appeals, Division II, No. 30614-0-II (unpublished), the appellate court ended up writing two stages of its opinion. The first step was the initial opinion. The second step was a ruling on reconsideration, and it modified the first step. (Exhibit \*\*: These are both found in the Appendix.). It is critical to see the original copies, because the finalized version has consolidated the edits from the order on reconsideration and the edited version no longer shows the critical wording referred to above.)

The appellant/defendant, Sager, had challenged the validity of the codes being used to prosecute him. Sager confirmed the failing of the code drafts to be filed in the auditor's office with a letter from the auditor, Kim Wyman. **[Clerk's Record: Kim Wyman's letter of June 8, 2005 saying that .011 and .012 were not recorded or on file prior to their adoption on the 5<sup>th</sup> page. This letter is found in the Notice of Evidence. Notice of Merrell Sager's Disability and Health Issues, dated June 22,**

**2005, 17-49]** Mr. Sager found that, surprisingly, in addition to the failure to file these code drafts, there was also a failure to publish. He also argued that, because, back in 1971, the codes had not been properly filed with the county auditor 10 days before adoption as required by RCW 36.32.120 (7) “to be effective,” then the codes were not effective and therefore could not provide jurisdiction for the court to enforce them. Mr. Sager then confirmed this with a letter from the county commissioners.

**[Commissioner’s statement saying that the 1971 code adoption was not filed with the auditor. This is found – as Exhibit C – in Motion for Stay of Proceedings Affidavit, Mrrell C. Sager in Response to Contempt Order, October 7, 2005. Documents Attached Herein, pages 143-153]** There was no question of timing, or laches, or any other bar to Mr. Sager’s claim; he was arguing that the codes simply did not have any legal existence, according to RCW 36.32.120 (7).

Regarding the claim of code invalidity, the initial appellate ruling rejected Mr. Sager’s claim in footnote 2.

“(Mr. Sager) further argues that TCBC 14.20.011 and .012 were improperly adopted. A person challenging the validity of the enactment has the burden to show the action was improper. (cite) TCBC 14.20.011 and .012 reference UBC 103, 106.1, and 106.2 by reference. RCW w6.32.120(7) requires that when a city adopts codes by reference, a copy of those codes be kept on file in the county auditor’s office 10 prior to their adoption. Sager fails to cite to any evidence in the record that the County failed to satisfy this requirement, and thus this claim fails.”  
Appellate court ruling of July 20, 2004.

The appellate court “affirmed the trial court’s grant of summary judgment on the building and sanitary code violations claims, ....” Id., at page 1.

However, as conclusive as that all looks, the appellate court undid that in its

August 17, 2004 order on reconsideration.

In its August 17 order on reconsideration, the appellate court said on page 2, “We amend the opinion as follows ....” It then directly deleted footnote 2 from the first opinion, the footnote quoted just above which included the analysis of what is required to show code invalidity and why Mr. Sager failed. The appellate court never mentions the code invalidity issue after its deletion of its own earlier analysis of its rejection of the invalidity issue.

It is important to look again at the wording that was deleted in footnote 2 (quoted above). “Sager fails to cite to any evidence in the record that the County failed to satisfy this (filing) requirement, and thus this claim fails.” This is cause and effect. If A doesn’t do X, Y will not happen. But, if A does do X, then Y will happen.

Merrell Sager did do X. So the claim did NOT fail.

The superior court had difficulty interpreting the appellate court’s decision. In the July 8, 2005 transcript, Judge Richard Strophy admitted this in a hearing on remand. On pages 47 and 48. He said the following on page 47 in a discussion with the prosecutor about clarifying the appellate court’s ruling, starting with the sanitary code.

Mr. Peters: “Actually, you’re partially right, Your Honor, .... The Court of Appeals did find a violation of the sanitary code.

Court: “Please show me where that is.”

Mr. Peters: “I’m looking at page 5.”

Court: “And before you comment further, let me tell you what’s difficult for me, is Judge Berschauer’s order simply grants summary judgment. It doesn’t say in what way it grants summary judgment, in light of the multiple requests for relief in the County’s initial complaint. But I can only assume, ..., that the effect of that summary judgment was to declare the defendant in violation of the Uniform Building Code ... (including) 14.20.011, 14.20.012, and the sanitary code ... although the order doesn’t say that.”

“Again, I assume that the grant of summary judgment has, implicit in it, the requirement of the defendant to abate the code violations,

and apparently grants permanent injunctive relief .... But the order is not specific, at least that I saw.”

**“So what exactly was affirmed and what was reversed is a little bit of a moving target ....” (emphasis added)**

The prosecutor goes on to interpret the appellate court’s first decision, but never reached the appellate court’s order on reconsideration (second step of its rulings).

However, Judge Strophy finally interpreted the appellate ruling as rejecting the code invalidity challenge by Mr. Sager and refused to hear discussion of it thereafter. <sup>2/</sup>

The court stated at one point

“So every time you bring it (code invalidity) up, Mr. Sager, it is going to be denied. You have to move on. If the Court is wrong in doing that and the Supreme Court happens to accept your notice of appeal as a writ for discretionary review and reverses me, then I’ll listen. But until then, I have concluded, and I don’t know how many times I need to say it, the law of the case that you have lost your opportunity to challenge the validity of the ordinances.” **[Record: Transcript (Verbatim Report of Proceedings) November 17, 2006, page 13, line 14.]**

After the trial court has clearly, and at length summarized its interpretation of the appellate court’s ruling saying that Mr. Sager’s “challenge to the validity of that code requirement has been denied (by both) Judge Berschauer (and) the Court of Appeals.” Mr. Sager responds immediately: “Your Honor, I don’t believe that the Court of Appeals denied that ....” (at page 61)

This was error by Judge Strophy.

The superior court judge ruled as if the critical footnote two had been left in place, which it had not been. It is contradictory to rule as if the appellate court had kept its rejection of the code invalidity claim when, in fact, the appellate court had deleted its

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<sup>2</sup> See the repeated references to the court’s interpretation of the appellate rulings on pages 56-58, 60-62, 68, 69.

rejection of the code invalidity claim. Judge Strophy failed to address the significance of the appellate court's reconsideration order deletion of its statement that Mr. Sager's code validity claim had failed because of a lack of evidence that the filing had not occurred.

The precise wording of the later deleted footnote 2 made a direct cause-and-effect connection between the (asserted) failure of a showing of evidence supporting Mr. Sager's claim and the subsequent resulting ruling that the Mr. Sager's code invalidity claim thus failed. The same cause-and-effect functions in the converse.

The subsequent retraction of that cause-and-effect ruling put Mr. Sager's code invalidity claim back on the table, and the appellate court then remanded the case

The significance of this failure of the appellate court to retain its rejection of the code invalidity claim was that this claim survived back into the case as it was remanded back down to the superior court which refused to consider the claim.

A further result of the code invalidity claim surviving into the remanded case is that the issue was still alive, and could be embellished. And Mr. Sager did properly embellish the code invalidity claim by further pointing out that, not only had the 1971 codes not been properly filed with the county auditor, but there had never been any public notice, a second requirement of RCW 36.32.120 (7) for a code "to be effective."

Thus, Thurston County had failed in two ways to properly adopt the codes that came to underlie the claims against Mr. Sager. Mr. Sager's continuing arguments against the validity of the 1971 codes was even stronger in remand with his showing – by producing photocopies of the newspaper pages which would have had to have carried the required public notice, but didn't – that the 1971 codes, for this second reason, had never gained legal existence.

Among other things, Mr. Sager had repeatedly asked the Thurston County prosecutor to show where it had published the required notice, but the prosecutor never could show this.

The prosecutor did offer false evidence to attempt to show the public notice, but this will be dealt with later under irregularity in the proceedings.

**IT IS IMPORTANT TO NOTE:** Mr. Sager does not have to prove that the appellate court accepted his code invalidity argument (though reading the precise cause-and-effect wording that was deleted by the court certainly implies such acceptance), but it is enough to show that the code invalidity argument was not rejected and, **at a minimum,** remained alive on remand. Once it is clear that the code invalidity issue was alive on remand, this then points to the error of the superior court's refusal to deal with the invalidity issue on remand.

b. **ISSUE: NEW INFORMATION**

In 2005, after the appellate court remanded the case back to the Thurston County Superior Court, the Washington supreme court stated that Washington law does not permit the issuance of warrants in non-criminal actions related to building codes. (Bosteder).

- 1) May a superior court grant a warrant of abatement after the Washington supreme court ruled that there was no legal authority in Washington for granting administrative warrants? No.

Standard of Review: Determine if the building code matter is a criminal action.

This issue is has already been resolved by the Washington supreme court.

At the time of the issuance of this warrant, Washington law did not permit the issuance of administrative warrants in an non-criminal building code violation matter. This was clearly stated in a series of cases under the heading of McCready (City of Seattle v. McCready, 123 Wn.2d 260, 272-76, 868 P.2d 134 (1994) (McCready I) and City of Seattle v. McCready, 124 Wn.2d 300, 309, 877 P.2d 686 (1994) (McCready II) as well as City of Seattle v. McCready, 131 Wn.2d 266, 931 P.2d 156 (1997) (McCready III). This was followed up on another case called Bosteder v. Renton, – P.3d (2005), WL (West Law) 1773775 (Washington, July 28, 2005), (Case No. 74934), Appealed from 86 P.3d at 155.

In Bolsteder, the opening statement of the Washington supreme court, Judge Fairhurst summarized at length.

“In a series of three decisions in 1994 and 1997, we determined that noncriminal administrative search warrants are invalid under the state constitution absent a court rule or statute that authorizes the issuance of such warrants. In those cases, we found no such authorizing statute or court rule and declared the warrants and searches purportedly conducted pursuant to those warrants void.”

Later in the case, the judge elaborates.

“The first two McCready decisions were grounded only in state constitutional law. Because article I, section 7 of the Washington Constitution requires 'adequate 'authority of law' for a governmental intrusion, we held in McCready I that warrants issued in the absence of statute or court rule authorization 'cannot serve as the authority of law for a governmental disturbance of an individual's private affairs.' McCready I, 123 Wn.2d at 271-72.”

And she continues.

“We did, however, conjure up broad statements that are not necessarily limited to a discussion of article I, section 7 throughout the McCready decisions. For example, we noted that '{t}here is . . . no general common law right to issue search warrants,' and 'the authority for search warrants

has always been derived from specific legislative authorizations or court rules.' *McCready I*, 123 Wn.2d at 274. 'We reiterated the above holdings for a third time in *City of Seattle v. McCready*, 131 Wn.2d 266, 931 P.2d 156 (1997) (*McCready III*).'

Judge Fairhurst kindly wrote a brief "hornbook" on this issue, even giving examples of how to do it right and how to do it wrong. Under the "wrong way" category, she gave an example of the Seattle Municipal Code

"In the codes relied upon by the city, the right of entry provision simply provides that 'if entry is refused, the building official shall have recourse to the remedies provided by law to secure entry.' Code for Dangerous Buildings sec. 201.3; Housing Code sec. 201.2. In *McCready I*, we held that this provision necessarily referred to one or more other provisions specifically granting those remedies, and in the case of the codes at issue, no such remedies could be found." *Bosteder, supra* at 6 (emphasis added)

This rejected open-ended wording in the Seattle code resembles Thurston County's analogous provision, TCBC 14.20.012, one of the codes being used to sue Mr. Sager.

"Notwithstanding the existence or use of any other remedy, the Building Official may seek legal or equitable relief to enjoin any acts or practices and abate any conditions which constitute or will constitute a violation of this chapter or other regulations herein adopted."

That open-ended wording was part of the motion for the warrant of abatement which Mr. Sager is challenged in his motion for reconsideration, and the denial of which he is appealing.

The "right way" category was exemplified by a horticultural inspection law.

"An example of a code which does authorize such a warrant is RCW 15.09.070, which governs inspections for horticultural pests and diseases, grants horticultural officials a right of entry onto private premises on less than probable cause, including for the purpose of general inspection. The statute allows those officials to enforce their right of entry by seeking search warrants and specifically allows: '{a} court may upon such application issue the search warrant for the purpose requested'. . . . The

Legislature has crafted a number of statutory schemes similar to RCW 15.09.070, whereby courts are explicitly authorized to issue administrative search warrants in support of the enforcement of specific laws. See RCW 15.17.190 (horticultural grading laws); RCW 16.57.180 (livestock identification laws); RCW 17.24.021 (insects, pests, and plant diseases); RCW 19.94.260 (weights and measures laws); RCW 69.50.502 (pharmaceutical premises).”

2. 14.20.012 Section (R)113 amended--Violations, civil infractions and penalties.  
Section (R)113.2 Notice of violation. ....  
... The violation of International Construction Code (R) 105.1 (**building without a permit**); ... **shall be designated as a class 1 civil infraction** pursuant to Chapter 7.80 RCW and Chapter 14.21 Thurston County Code. Any violation of International Construction Code R 110.1 shall be designated as a class 2 civil infraction pursuant to Chapter 7.80 RCW, ....

These cases were submitted to the Thurston County superior court in the motion for reconsideration that was denied. The point of the above is completely rein in Thurston County’s nostalgic desire to ride the “warrant horse” hither and thither around the county.

c. ISSUE: IRREGULARITY IN THE PROCEEDINGS.

1) SUB-ISSUE: LACK OF CLARITY IN CHARGING DOCUMENT

The initial charging document referred to the construction of a carport. While the note on the back of the citation did mention the house, it was written for the carport. There was absolutely no mention of the septic system. However, none of that was a barrier to the charges expanding to cover two structures (house and septic system) built 11 years earlier.

- a) May a county prosecutor charge a landowner with failing to get a building permit for a house, septic system, and a carport when the

landowner was cited only for a failure to get a permit for the carport?

No.

The above exemplified the tone of this entire matter. The county could make up its rules as it went. Mr. Sager was sued simply on the basis of supposition.

2) SUB-ISSUE: PROSECUTOR, ALLEN MILLER INTRODUCED FALSE EVIDENCE.

On October 14, 2005, The Thurston County Prosecutor, Allen Miller misled the court when he submitted actually false evidence of a public notice for the underlying 1971 codes. [Record: Verbatim Report of Proceedings, October 14, 2005, page 25, line 16 ff. This action re-introduced the code validity issue.

- a) May a prosecutor offer a typed draft of a public notice to prove that the notice was actually published in the appropriate newspaper? No.
- b) Standard of Review. Fraud, CR 11.

Fraud: Black's Law Dictionary, Seventh Edition, West Group, St. Paul, Minn, 1999, page 670 explains fraud. On page 671, it discusses fraud on the court. "A lawyer's ... misconduct in a judicial proceeding so serious that it **is intended to undermine** the integrity of the proceedings. Examples (include) ... introduction of fabricated evidence." (emphasis added.) It would be interesting to hear any explanation that would justify Mr. Miller's introduction of pages that did not prove what he alleged that they proved.

CR 11. The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information,

and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

While this is blatant submission of false evidence just to put a smoke screen over the proceedings, it has a twist. Clearly, office copies of the text of an intended public notice are not proof that the notice was ever published. However, because the judge was ruling that the public notice element was moot given the judge's interpretation of the appellate court's ruling to the effect that the 1971 code invalidity issue had been dismissed, one could say that the false evidence related only to a dead issue and so was harmless. No harm, no foul.

However, now that Mr. Sager is showing that the appellate court did not dismiss the code validity argument, the deliberate actions of Mr. Miller are very relevant fraud.

Sub-Issue: May 27, 2006 prosecutor changed underlying code.

Mr. Peters submitted a Motion to Amend a Clerical Mistake that contained a typographical error (wrong date of a passed hearing). Mr. Peters got leave to correct the typographical error (with the concurrence of Mr. Sager), **[Record: Transcript (Verbatim Report of Proceedings) November 17, 2006, page 8, line 18 to page 9, line 2.]**

However, in addition to correcting the typo, the prosecutor actually changed his pleading to remove an inapplicable statute as a basis for his argument at the then-upcoming hearing. He removed, RCW 7.48, because it was a nuisance-related statute and nuisance had been discarded. [**Clerk's Record: Declaration of Donald R. Peters, Jr. in Support of Motion to Amend Order to Correct Clerical Mistake, June 29, 2006, pages 211-212.**]. The appellate court [**See Appendix A, #1: Appellate Decision, April 20, 2004, Thurston County v. Clifford Sager, Unpublished Opinion, pages 1-2, 7 ff.**] and the trial court [**Record: Transcript (Verbatim Report of Proceedings) November 17, 2005 (now corrected to "2006"), page 19, line 22, and also Transcript (Verbatim Report of Proceedings) October 14, 2005, page 32, line 23.**] both rejected the claim that nuisance had any place in this case.

Mr. Peter's altering of the motion before the court, which adjustment was supposed to only change a typographical error, was improper. Nor did Mr. Peter's serve this altered pleading to Mr. Sager before the hearing. In fact, Mr. Sager did not see a copy of the altered pleading until the order against him was already signed by the court.

The result of all this was that Mr. Sager was unprepared for the argument Mr. Peters actually presented. Mr. Sager objected, but to no avail. The rules on service were not followed, the prosecutor improperly modified the legal content of the motion, the prosecutor merely dismissed the fact that he'd changed the pleadings with a denial, the court allowed this, and the prosecutor won the hearing.

These incidents exemplify a large pattern of misconduct which pattern also raises official misconduct claims. These misconduct events dragged out this case way beyond the time this case should have ended. While speaking ill of judicial officials is frowned

upon, it is both questionable and frustrating to a pro se to see two judges and a prosecutor miss the significance of code invalidity, and then to see the appellate court also overlook the issue (even after realizing that it needed to delete an analysis of it in footnote 2.)

d. ISSUE: EXCESSIVE DAMAGES, OR ERROR IN THE AMOUNT OF RECOVERY, OR UNREASONABLENESS (ELEMENTS IN CR 59)

A warrant of abatement, open-ended enough to allow the removal of Mr. Sager's house and carport, is excessive when the only offense is a failure to get a building permit (class 1 civil infraction) 11 years earlier (for the house and septic system). Since a carport is not a building to house residents, its potential to be dangerous is remote. This raises a question as to why Thurston County is so dedicated to pursuing this case.

- 1) May a superior court grant an abatement to remove (destroy) a house as an option open to the county by virtue of the warrant when the offense was a class I civil infraction: the failure to get a building permit?
- 2) Standard of review: abuse of discretion.

The Thurston County superior court denied a motion for reconsideration of the issuing of a warrant of abatement in a class I civil infraction matter. **[Clerk's Record: Order Denying July 13, 2006 Motion for Reconsideration, page 3]** However, the warrant was open-ended as to the actual abatement options, but included "removal" of Mr. Sager's house.

The April 2nd, 2006 Declaration of John Moore, Thurston County illustrates that Thurston County was talking about removing Mr. Sager's house and carport. This declaration is attached to May 16, 2006 Motion for Warrant of Abatement with Memorandum, pages **[Clerk's Record: Motion for Warrant for Abatement with**

**Memorandum, dated May 16, 2006; Pages 176-181] Note: This motion states that Moore's declaration is attached. However, the version in the clerk's papers does NOT have the declaration, and the page numbers are inadequate to include the declaration.]** The core of John Moore's statement is quoted below.

"On April 20, 2006, I made a site visit and confirmed the house and carport have not been removed." (emphasis added) Id. at page 2, line 4-5.

To authorize an abatement action that could be all out of proportion to the lack severity of the violation is an abuse of discretion.

'A trial court abuses its discretion when it bases its decision on untenable grounds or untenable reasons.' Weems v. N. Franklin Sch. Dist., 109 Wn. App. 767, 777, 37 P.3d 354 (2002). (citing State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Thurston County's own building codes (TCBC) insist on reasonableness.

14.16.100 Justifiable cause.

"**Justifiable cause**, as used in Thurston County building code, is a substantial reason put forth **in good faith that is not unreasonable, arbitrary or irrational and that is sufficient to create an excuse for an act under the law**. The permit applicant or designated agent must demonstrate justifiable cause in writing. In case of disagreement, the building official or designated representative shall make final *determination whether or not an applicant has demonstrated justifiable cause*. Lack of funds is not a justifiable cause." (emphasis added)

Reasonableness is even required in the Thurston County code which does authorize the demolition of DANGEROUS structures.

The Thurston County code says:

14.22.201 General.

A. Administration. The building official is authorized to enforce the provisions of this code. .... Such interpretations, rules and regulations shall be in conformity with the intent and purpose of this code.

Even in relation to clearly dangerous buildings, the purpose and scope still requires “a just, equitable and practicable method ....”

14.22.102 Purpose and scope.

A. “Purpose. It is the purpose of this code to provide a just, equitable and practicable method ... (for dealing with dangerous structures) ... which from any cause endanger the life, limb, health, morals, property, safety or welfare of the general public or their occupants may be required to be repaired, vacated or demolished.”

The Washington State Attorney General’s Office

The Washington State Attorney General’s Office recently addressed this same general issue of reasonableness. In December of 2006, the attorney general’s office posted an advisory memorandum which included what is called “Substantive Due Process.”

“Substantive Due Process. Washington courts have applied principles of substantive due process as an alternate inquiry where government action has an appreciable impact on property. A land use regulation that does not have the effect of taking private property may nonetheless be unconstitutional if it violates principles of substantive due process. **Substantive due process is the constitutional doctrine that legislation must be fair and reasonable in content and designed so that it furthers a legitimate governmental objective.** The doctrine of substantive due process is based on the recognition that the social compact upon which our government is founded provides protections beyond those that are expressly stated in the United States Constitution against the flagrant abuse of government power. *Calder v. Bull*, 3 U.S. 386 (1798).”

**“Courts have determined that substantive due process is violated when a government action lacks any reasonable justification or fails to advance a legitimate governmental objective. To withstand a claim that principles of substantive due process have been violated, a government action must (1) serve a legitimate governmental objective; (2) use means that are reasonably necessary to achieve that objective; and (3) not be unduly oppressive.** Violation of substantive due process requires invalidation of the violating government action rather than the payment of just compensation.”

(emphasis added) Office of the Washington State Attorney General,  
Advisory Memorandum December 2006, page 5 (or 7).

U.S. Supreme Court

This improper warrant of abatement crosses the reasonableness boundary as discussed in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 73 L. Ed. 210, 49 S. Ct. 50, 86 A. L. R. 654 (reversing this court's decision, 144 Wash. 74).

As Mr. Sager argued at the time of the motion for reconsideration a warrant for abatement that included removing his house for a class I civil infraction violation where there was not showing of nuisance or danger is unreasonable. He brought in *Hauser et al. v. Arness et al.*, 44 Wn.2d 358 (1954) for an extended discussion of reasonableness in land use issues. (*Hauser* analyzed reasonableness in zoning.) The case quoted extensively from the U.S. Supreme Court's own reasonableness analysis in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 73 L. Ed. 210, 49 S. Ct. 50, 86 A. L. R. 654 (reversing Washington state court's decision at 144 Wash. 74)

In *Hauser et al. v. Arness et al.*, 44 Wn.2d 358 (1954), the Washington Supreme Court discussed reasonableness in zoning matters.

As was said by the United States supreme court in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U. S. 116, 73 L. Ed. 210, 49 S. Ct. 50, 86 A. L. R. 654 (reversing this court's decision, 144 Wash. 74), concerning zoning ordinances:

"Zoning measures must find their justification in the police power exerted in the interest of the public. *Euclid v. Ambler Realty Co.*, supra, 387 [272 U.S. 365]. **The governmental power to interfere** by zoning regulations with the general rights of the land owner by restricting the character of his use, **is not unlimited** and, other questions aside, **such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or**

**general welfare.'** *Nectow v. Cambridge*, supra, p. 188 [277 U.S. 183]. Legislatures **may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable** upon the use of private property or the pursuit of useful activities."

As seated (sic) [Read "stated."] in *People ex rel. Kirby v. City of Rockford*, 363 Ill. 531, 2 N.E. 2d 842, **where there is no material relation of the restrictive ordinance to the public good, such ordinance cannot** under the guise of a zoning regulation, either confiscate the property or **inflict a substantial financial injury upon the owner thereof.**

"Mr. Justice Fulton, in the *Pioneer Savings Bank* case, stated the substance of the rule in the following language [408 Ill. 458, 97 N.E. 2d 305]: 'One of the controlling questions for us to determine is whether or not the invasion of the property rights under the purported police power is unreasonable and confiscatory, and, in so determining, we must consider the extent to which property values are diminished by the provisions of the zoning ordinance, and we must give due consideration to testimony in that regard. . .

**If the gain to the public by the ordinance is small when compared with the hardship imposed upon the individual property owner by the restrictions of the zoning ordinance, no valid basis for the exercise of police power exists.'** (emphasis added)

While Hauser relates to the reasonableness for the zoning codes, it is inconsistent to hold the position that reasonableness applies to zoning, but not to building codes.

Mr. Sager is not challenging zoning and building regulations in general; he is simply saying that the county is being very unreasonable **in the enforcement** of regulations in this case.

e. ISSUE: UNJUSTIFIABLE VERDICT.

- 1) SUB-ISSUE: THIS ISSUANCE OF A WARRANT OF ABATEMENT) IS UNJUSTIFIABLE, BECAUSE THE LIMITATION OF ACTIONS DEADLINE RAN OUT

The superior court granted a warrant of abatement for construction without a building permit when the building was built 11 years before legal action was ever taken by the county.

a) Does a superior court have jurisdiction when the violation of a building code law occurred 11 years before the land owner was cited at a time way beyond the running of the statute of limitations on TCC 14.20.011 and TCC 14.20.012? No.

b) Standard of review. Statutes of Limitation of Actions.

Mr. Sager built his house and his septic system in July of 1989. . **[Record: Transcript (Verbatim Report of Proceedings) October 14, 2005, page 7, line 17]** The charging document, the citation, was issued in 2000. That creates an approximately 11-year gap between the unpermitted construction and the legal action by the county. Mr. Sager pointed that out directly and argued that too much time had passed for the county to mount an action on the building permit issue. **[Record: Transcript (Verbatim Report of Proceedings) October 14, 2005, page 17]**

To build without a license is to violate Thurston County Building Codes (TCBC) 14.20.011 and .012. (TCBC).

The deadline for acting on a class I civil infraction is two years if one uses the catch-all statute, RCW 4.16.30.

Thus, the statute of limitation period for the house and septic system ran out in either 1991 or 1993, so the 2000 citation cannot apply to anything but the carport.

f. ISSUE: FAILURE TO ACCOMPLISH SUBSTANTIAL JUSTICE

Ruling against Mr. Sager on these issues does not accomplish final justice, because the basic issue will still be alive. Any Thurston County citizen who is not a party to this case and who undertakes construction or remodeling can file this same cause of action, because the underlying codes were still not adopted according to RCW 36.32.120 (7) and therefore are still invalid.

F. ASSIGNMENT OF ERROR 3, PROSECUTOR USED INCORRECT LAW

a. ISSUE: INCORRECT LAW USED.

RCW 7.48.020 and 030 are the basis for the prosecutor's claimed abatement authority, on page 1 ff. of his Motion for Warrant for Abatement with Memorandum, dated May 16, 2006. [**Clerk's Record: Motion for Warrant for Abatement with Memorandum, dated May 16, 2006; Pages 176-181**] but those apply only to nuisance or dangerous buildings, something that was never shown by any court, and the lack of a building permit is not on the actionable list. Read motion for warrant to confirm this.

The code listed on the October 6, 2006 abatement (DANGER) sign posted on Mr. Sagers house referenced TCC 14.22 which is the dangerous building ordinance. [**See February 20, 2007 letter to Deputy Clerk of the Supreme Court, Ronald Carpenter with, Exhibit 6, – a notice posted on Mr. Sager's house and on back porch for this exhibit in argument**] That ordinance has nothing to do with this case since there has never been showing of any nuisance or damage related to Mr. Sager's buildings or neighbors property.

1. The appellate court [**See Appendix A, #1: Appellate Decision, April 20, 2004, Thurston County v. Clifford Sager, Unpublished Opinion, pages 1-2, 7 ff.**]

and the trial court [**Record: Transcript (Verbatim Report of Proceedings) November 17, 2005 (now corrected to "2006"), page 19, line 22, and also Transcript (Verbatim Report of Proceedings) October 14, 2005, page 32, line 23.**] both rejected the claim that nuisance had any place in this case. This is yet another reason why the motion for reconsideration should have been granted and the warrant not authorized.

#### G. CONCLUSION

This is a case based the rule of law. Do the requirements of RCW 36.32.120 needed for a county code "to become effective" control code formation, or not?

This case also asks that official conduct follow legal, ethical, and statutory requirements.

To rule against Mr. Sager will require taking the following positions:

- The appellate court's deletion of footnote 2 in its order on reconsideration was completely irrelevant. [**See Appendix A, #2: Appellate Decision, Order On Reconsideration And to Amend Opinion, , August 17, 2004, Thurston County v. Clifford Sager, , page 2, item 1.**]

#### H. RELIEF

1. Appellant/Defendant Merrell C. Sager asked the supreme court to fully decide this case, because the frequent and numerous irregularities allowed by the Thurston County superior court raise questions as to the superior court's objectivity. At a minimum, Mr. Sager asks that any remanded issues be heard by a different judge.

2. Mr. Sager requests that all of the laws underlying this case be declared null and void, and all directly and indirectly related claims, charges, fees, fines and all other punitive or enforcement or persuasive measures be dismissed as void.
3. Mr. Sager requests that the court declare all the codes in Thurston County not passed according to 36.32.120(7) to be null and void until passed properly and require Thurston County to review all of its codes passed within the last forty years to confirm that the adoption process followed the requirements of RCW 36.32.120 (7)..
4. Request for fees and expenses.
  - a. Mr. Sager requests costs and fees for all the time and effort he expended in this matter. RAP 18.1(b)
  - b. Mr. Sager requests compensation of some sort for the misconduct and bad faith by Thurston County.
  - c. Mr. Sager requests the introduction of the private attorney general process into Washington law for non-frivolous suits.
  - d. Failing that, this case begs for some sort of analogous compensation for citizens who battle to change a law benefiting the public as much as or more than himself.
  - e. Failing that, he asks for some sort of Common Law compensation mechanism analogous to quantum meruit which is available in contract law. This has taken seven years of his life.

June 26, 2006

**Merrell C. Sager**  
9845 Littlerock Road

Page 32

Olympia, WA 98512  
(360) 754-0487

June 26, 2006

Respectfully submitted,

A handwritten signature in cursive script, reading "Merrell Clifford Sager", written over a horizontal line.

Merrell Clifford Sager, Appellant, Pro Se

## APPENDIX

### Appendix A

1. Appellate Decision, April 20, 2004  
Unpublished Opinion  
Thurston County v. Clifford Sager
2. Appellate Decision, August 17, 2004  
Order On Reconsideration  
And to Amend Opinion  
Thurston County v. Clifford Sager

These two documents were submitted in part (cover page only) with other pleadings. The first opinion of the appellate court is found in the Addendum to Brief Showing Cause Why Stay of Warrant of Abatement Should be Permanently Stayed. **[Clerk's Record, pages 250-258]**

The second appellate ruling, the Order On Reconsideration And to Amend Opinion was partially submitted in connection with an October 18, 2006 submission. **[Clerk's Record: Declaration of Merrell C. Sager with Brief Showing Cause Why Stay of Warrant of Abatement Should be Permanently Stayed, pages 238-249]**

Because it is critical to show the wording change, and because the court might end up using the edited and consolidated version of that 2004 decision and reconsideration order which eliminates the earlier – but critical – wording, these copies of the original texts are included here in the Appendix. These original texts show the wording of then footnot

1. Mr. Sager requests that all of the laws underlying this case be declared null and void, and all directly and indirectly related claims, charges, fees, fines and all other punitive or enforcement or persuasive measures be dismissed as void.
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  - e. Failing that, he asks for some sort of Common Law compensation mechanism analogous to quantum meruit which is available in contract law. This has taken seven years of his life.

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STATE OF WASHINGTON

BY \_\_\_\_\_



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THURSTON COUNTY,

Respondent,

v.

MERRELL CLIFFORD SAGER,

Appellant.

No. 30614-0-II

UNPUBLISHED OPINION

VAN DEREN, J. — Landowner Merrell Sager appeals the trial court's grant of summary judgment to Thurston County for violations of county building and sanitary codes, which the County claimed created a public nuisance. Sager argues that the trial court erred by (1) finding a public nuisance even though his unpermitted structures were not statutorily enumerated public nuisances and that the County offered no evidence of interference with others' use of their property; (2) authorizing the County to abate the so-called nuisance; (3) issuing an impermissibly broad search warrant; and (4) denying his discovery motions.

We affirm the trial court's grant of summary judgment on the building and sanitary code violation claims, and the abatement order for the building code violation, but we remand to the trial court to determine the appropriate remedy for the sanitary code violations. We vacate the trial court's order authorizing the County to search Sager's property without first obtaining an administrative search warrant. We reverse the grant of summary judgment on the public

nuisance claim and remand the issue for trial. Finally, we affirm the trial court's denial of Sager's motion to compel.

## FACTS

### I. VIOLATIONS

Sager did not file a report of proceedings in this case, and the facts surrounding the underlying violations are sparse.

Jeff Raley, a building inspector and code compliance officer with the Thurston County Development Services Department, went to Sager's property as a result of complaints of building and zoning code violations received by his department and verified that Sager was building a garage on the property without a permit. Raley notified Sager that he was violating Uniform Building Code (UBC) § 106, adopted by reference in Thurston County Building Code (TCBC) 14.20.011, for building without a permit. Two months later, the Thurston County code compliance coordinator issued Sager a civil infraction for this violation. The Thurston County District Court found that Sager had committed this infraction.

According to Raley, Sager had also constructed an on-site sewer system on his property "without permits, inspections or approval by Thurston County" in violation of the Thurston County Sanitary Code (TCSC). Clerk's Papers (CP) at 43. Sager has never allowed the County access to this property for inspection.

## II. PROCEDURAL HISTORY

In May 2002, the County filed a complaint alleging (1) violations of the building and sanitary codes; and (2) public nuisance. Sager filed an answer and alleged counterclaims.<sup>1</sup> Sager filed his first motion to compel discovery on October 8, 2002. The trial court apparently denied this motion without argument, but there is no order in the record.

The County moved for summary judgment in April 2003, and the court heard the motion on May 9, 2003. In the meantime, Sager filed a second motion to compel on May 2, 2003, arguing that the County had failed to respond to his second set of interrogatories and requests for production. He stated that he had contacted the County's attorney but was unable to "secure his agreement to answer this discovery." CP at 45.

On May 16, 2003, the court granted the County's motion for summary judgment ruling that: (1) Sager violated TCBC 14.20.011 and .012 by failing to obtain the necessary permits; (2) Sager violated several sections of the Thurston County Sanitary Code, Article IV by constructing the on-site sewage system without obtaining the proper permits; (3) these violations constituted a public nuisance; (4) Sager must either remove the unpermitted structures or obtain the necessary permits within 60 days of the order; (5) the County is authorized to enter the property with 24-hours notice to inspect for violations; (6) if Sager failed to comply with the order, the County

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<sup>1</sup> Sager alleged (1) violations of 42 U.S.C. §§ 1983, 1985, and 1988; (2) unlawful taking; and (3) civil conspiracy.

could enter Sager's property to abate the nuisance, bringing the Thurston County sheriff if necessary; and (7) the County could recover all abatement costs.

The County then moved for summary judgment on Sager's counterclaims and Sager moved for reconsideration. The court granted the County's summary judgment motion and denied Sager's May 2, 2002 motion to compel, his motion for CR 55 findings, and his motion for reconsideration. Sager appeals.

## ANALYSIS

### I. STANDARD OF REVIEW

When reviewing an order of summary judgment, we engage in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is proper only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). We must consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Wilson*, 98 Wn.2d at 437. The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits considered at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

After the moving party has submitted adequate affidavits, the burden shifts to the nonmoving party to set forth specific facts sufficiently rebutting the moving party's contentions and disclosing the existence of a material issue of fact. *Seven Gables*, 106 Wn.2d at 13. The

court should grant the motion only if, from all the evidence, reasonable persons could reach but one conclusion. *Wilson*, 98 Wn.2d at 437.

## II. REMEDIES FOR CODE VIOLATIONS

Sager does not dispute that he is in violation of the building and sanitary codes.<sup>2</sup> Thus, we affirm the trial court's grant of summary judgment on these claims. We now must determine whether abatement was the appropriate remedy under each code.

TCBC 14.20.012 specifically provides that abatement is an available remedy for failing to obtain a building permit.<sup>3</sup> On the other hand, abatement of the septic system is not a remedy set out in TCSC § 25, which permits the health officer to "initiate enforcement or disciplinary actions, or any other legal proceeding authorized by law," including "orders" directed to the owner of the on-site sewage system constructed in violation of TCSC Article IV. TCSC § 25.2. Authorized orders are limited to: (1) "[o]rders requiring corrective measures necessary to effect

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<sup>2</sup> Sager argues that he is exempt from the permit requirements under the contractor registration and plumbing provisions of Title 18 RCW for the first time on appeal, thus we need not reach this issue. RAP 2.5(a); *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 290, 840 P.2d 860 (1992).

He further argues that TCBC 14.20.011 and .012 were improperly adopted. A person challenging the validity of the enactment has the burden to show the action was improper. *Henry v. Town of Oakville*, 30 Wn. App. 240, 247, 633 P.2d 892 (1981). TCC 14.20.011 and .012 reference UBC §§ 103, 106.1, and 106.2 by reference. RCW 36.32.120(7) requires that when a city adopts codes by reference, a copy of those codes be kept on file in the county auditor's office 10 days prior to their adoption. Sager fails to cite to any evidence in the record that the County failed to satisfy this requirement, and thus this claim fails.

<sup>3</sup> TCBC 14.20.012 states: "Notwithstanding the existence or use of any other remedy, the Building Official may seek legal or equitable relief to enjoin any acts or practices and abate any conditions which constitute or will constitute a violation of this chapter or other regulations herein adopted."

compliance with this article”; and (2) “[o]rders to stop work and/or refrain from using any [on-site sewage system] . . . until all permits, certifications, and approvals required by this article are obtained.” TCSC §§ 25.3.1, 25.3.2. Thus, to the extent the trial court’s order may be read to allow abatement of the septic system, we reverse and remand for further consideration of the appropriate remedy under the sanitary code.

### III. SEARCH

Sager objects to the trial court’s broad grant of authorization to the County to enter and inspect his property. We agree and vacate the trial court’s order.

The Fourth Amendment’s warrant requirements apply to administrative searches. *Camara v. Municipal Court*, 387 U.S. 523, 534, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967); *City of Seattle v. Leach*, 29 Wn. App. 81, 84, 627 P.2d 159 (1981). Generally, warrants are required for administrative searches of both private and commercial premises. *Camara*, 387 U.S. at 532-33. Traditional exceptions to the warrant requirement apply, and Sager’s consent to the County’s search would obviate the need for an administrative warrant. *See generally, Michigan v. Clifford*, 464 U.S. 287, 297-98, 104 S. Ct. 641, 78 L. Ed. 2d 477 (1984). But Sager refuses to give consent, thus, the County must obtain a valid administrative search warrant based on adequate probable cause to search his property for violations.

“[A] lesser degree of probable cause is necessary to satisfy issuing an inspection warrant than is required in a criminal case.” *Leach*, 29 Wn. App. at 84 (citing *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978)). An administrative warrant may be based

either on specific evidence of an existing violation or on a general inspection program based on reasonable legislative or administrative standards that are derived from neutral sources.

*Marshall*, 436 U.S. at 320; *Leach*, 29 Wn. App. at 84.

At the time of the summary judgment argument in 2003, there was specific evidence that Sager was violating both the building code and the sanitary code. First, Thurston County Development Services Department received complaints about building and zoning code violations on Sager's property. Jeff Raley confirmed that Sager was building a garage on the property without a permit. The County issued Sager a civil infraction, and the district court found that Sager had committed this infraction.

There was also specific evidence of an existing violation of the sanitary code in 2004. During oral argument, Sager admitted that he had constructed an on-site septic system on his property in 1989 and had never obtained any permits for the system.

But whether there is evidence to satisfy the administrative warrant requirements should be decided upon each application for a warrant to enter Sager's property.

#### IV. PUBLIC NUISANCE

Sager argues that the County has failed to establish its public nuisance claim. We agree.

As the County acknowledges in its complaint, RCW 7.48.120 defines nuisance as:

Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or unlawfully interferes with, obstructs or tends to obstruct, or render dangerous for passage, any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or

highway; or in any way renders other persons insecure in life, or in the use of property.

RCW 7.48.130 defines a public nuisance as "one which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal." The statute further lists public nuisances,<sup>4</sup> and any nuisance not listed in RCW 7.48.140 is deemed a private

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<sup>4</sup> RCW 7.48.140 provides:

It is a public nuisance:

- (1) To cause or suffer the carcass of any animal or any offal, filth, or noisome substance to be collected, deposited, or to remain in any place to the prejudice of others;
- (2) To throw or deposit any offal or other offensive matter, or the carcass of any dead animal, in any watercourse, stream, lake, pond, spring, well, or common sewer, street, or public highway, or in any manner to corrupt or render unwholesome or impure the water of any such spring, stream, pond, lake, or well, to the injury or prejudice of others;
- (3) To obstruct or impede, without legal authority, the passage of any river, harbor, or collection of water;
- (4) To obstruct or encroach upon public highway, private ways, streets, alleys, commons, landing places, and ways to burying places or to unlawfully obstruct or impede the flow of municipal transit vehicles as defined in RCW 46.04.355 or passenger traffic, access to municipal transit vehicles or stations as defined in [RCW 9.91.025(2)(a), or otherwise interfere with the provision or use of public transportation services, or obstruct or impede a municipal transit driver, operator, or supervisor in the performance of that individual's duties;
- (5) To carry on the business of manufacturing gun powder, nitroglycerine, or other highly explosive substance, or mixing or grinding the materials therefor, in any building within fifty rods of any valuable building erected at the time such business may be commenced;
- (6) To establish powder magazines near incorporated cities or towns, at a point different from that appointed by the corporate authorities of such city or town; or within fifty rods of any occupied dwelling house;
- (7) To erect, continue, or use any building, or other place, for the exercise of any trade, employment, or manufacture, which, by occasioning obnoxious exhalations, offensive smells, or otherwise is offensive or dangerous to the health of individuals or of the public;

nuisance. RCW 7.48.150.

The County merely asserts in its complaint that Sager “has caused a nuisance on his property as defined by RCW 7.48.120 and a public nuisance as defined by RCW 7.48.130,” without specifying which of the enumerated public nuisances it is claiming exist on Sager’s property and without alleging any resultant damage. CP at 8. Sager counters that (1) none of his actions fall under the statutory definitions of public nuisance; and (2) the County has failed to show any damage or injury to surrounding property as RCW 7.48.120 requires. Viewing the facts in the light most favorable to Sager as the nonmoving party, there is a genuine issue of material fact as to whether Sager’s unpermitted structures qualify as a nuisance under the statutes. Accordingly, we reverse the trial court’s grant of summary judgment on the public nuisance claim.<sup>5</sup>

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(8) To suffer or maintain on one’s own premises, or upon the premises of another, or to permit to be maintained on one’s own premises, any place where wines, spirituous, fermented, malt, or other intoxicating liquors are kept for sale or disposal to the public in contravention of law;

(9) For an owner or occupier of land, knowing of the existence of a well, septic tank, cesspool, or other hole or excavation ten inches or more in width at the top and four feet or more in depth, to fail to cover, fence or fill the same, or provide other proper and adequate safeguards: PROVIDED, That this section shall not apply to a hole one hundred square feet or more in area or one that is open, apparent, and obvious.

<sup>5</sup> Both parties raised the issue of nuisance per se in their briefs but did not do so at the trial court, so, as we stated in note 3, *supra*, this issue is not properly before this court for consideration. RAP 2.5(a).

V. MOTIONS TO COMPEL

Sager's claim that the trial court erred by denying his requests for discovery and denying his motions to compel discovery is unpersuasive. Decisions on discovery requests are within the trial court's discretion and we will not disturb them on appeal unless they are manifestly unreasonable or based on untenable grounds. *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 777, 819 P.2d 370 (1991). The court noted in its order denying the motion that it considered the May 2, 2003 motion and motion for reconsideration filed May 16, 2003. The order states simply "there is not sufficient evidence to support a motion to compel." CP at 120. Sager does not provide any of the report of proceedings, so the court's oral ruling on the matter is not part of the appellate record.

The County argued that Sager failed to comply with CR 26(i), which provides:

The court will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. . . . Any motion seeking an order to compel discovery or obtain protection shall include counsel's certification that the conference requirements of this rule have been met.

(Emphasis added.)

In his May 2, 2002 motion, Sager stated that he "contacted plaintiff's counsel on May 1 concerning this matter and was not able to secure his agreement to answer this discovery." CP at 45. We must determine whether this is sufficient to satisfy CR 26(i).

In *Rudolph v. Empirical Research Sys., Inc.*, 107 Wn. App. 861, 867, 28 P.3d 813 (2001), we determined that under CR 26(i), written correspondence regarding a motion to compel is

insufficient to satisfy the requirement that the conference be “in person or by telephone” and that although the parties exchanged correspondence, the moving party’s counsel failed to provide a certification that the conference requirements were met.

We acknowledged in *Case v. Dundom*, 115 Wn. App. 199, 203, 58 P.3d 919 (2002), that *Rudolph* did not address “the precise language needed to satisfy the [certification] requirement,” but that that decision “emphasized that literal compliance with CR 26(i) was necessary.” *Case*, 115 Wn. App. at 203. We went on to say that *Rudolph* demonstrated “the strict interpretive approach to the rule.” *Case*, 115 Wn. App. at 204. We further noted that “*Case* submitted nothing else that [the court] can construe as a certification,” thereby indicating that a party moving to compel discovery could satisfy CR 26(i) by submitting something less than a formal certification that it had met the conference requirements. *Case*, 115 Wn. App. at 204.

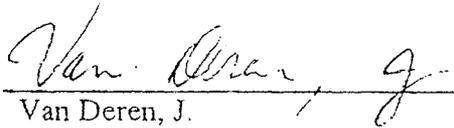
Sager filed a letter with the court on May 23, 2002, one week after the court granted the summary judgment motion, reflecting that he and the County’s attorney had conducted a discovery conference as CR 26(i) required. This letter satisfied the rule’s certification requirement. *See Case*, 115 Wn. App. at 204 (court looked to the period between time motion was filed and ruling on the motion to see if party submitted sufficient certification).

Despite Sager’s compliance with CR 26(i), he still cannot show that the trial court abused its discretion by denying his motion to compel. He argues only that “the Court entered an order denying [his] requests for discovery without even a cursory examination to determine if they were relevant.” Br. of Appellant at 17. This is contrary to the court’s ruling on the motion,

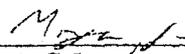
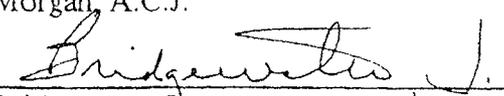
which states that it “considered the arguments of the parties, declarations and pleadings filed in this action.” CP at 120. Sager fails to demonstrate that the trial court exercised its discretion in a manifestly unreasonable manner or on untenable grounds. *Puget Sound Blood Ctr.*, 117 Wn.2d at 778 (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). Thus the court did not abuse its discretion in denying the motion.

Affirmed in part, reversed and vacated in part, and remanded.

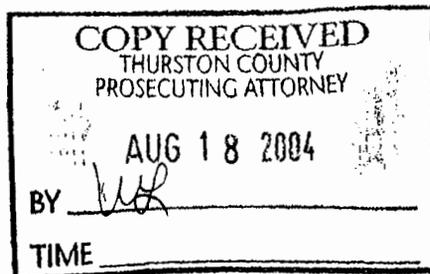
A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

  
\_\_\_\_\_  
Van Deren, J.

We concur:

  
\_\_\_\_\_  
Morgan, A.C.J.  
  
\_\_\_\_\_  
Bridgewater, J.





CLERK OF SUPERIOR COURT  
COUNTY OF THURSTON  
AUG 17 2004  
BY: 

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

THURSTON COUNTY,  
Respondent,  
v.  
MERRELL CLIFFORD SAGER,  
Appellant.

No. 30614-0-II

ORDER ON RECONSIDERATION AND TO  
AMEND OPINION

We issued an unpublished opinion in this case on July 20, 2004. Merrell Sager filed a timely motion to reconsider on July 26. Sager argues that: (1) he did raise the issue of statutory exemptions at the trial court; (2) he provided evidence that the county failed to satisfy the requirement that ordinances be on file in the county auditor's office 10 days before being adopted; (3) the opinion erroneously failed to declare him the substantially prevailing party; and (4) the opinion should be published to give guidance to public officials on code enforcement.

We dispose of the motion for reconsideration as follows:

1. We grant the motion for reconsideration on statutory contractor permit exemptions.
2. We deny the motion for reconsideration in all other respects.

We amend the opinion as follows (including the renumbering of footnotes):

1. (a) Delete footnote 2; (b) the last full sentence of the opinion beginning with “Affirmed in part . . .”; and (c) the last full paragraph of the opinion beginning with “A majority of the panel . . .”

2. We revise the opinion to insert the following language at the end of section V:

#### VI. OWNER PERMIT REQUIREMENTS

##### A. Contractor Registration Provisions

Sager asserts that the exemption in RCW 18.27.090(6) that states that the contractor registration provisions do not apply to “[a]ny construction, alteration, improvement or repair of *personal property* performed by the registered legal owner” relieve him of any obligation to obtain a building permit. Br. of Appellant at 18-19 (emphasis added). This statute does not relieve Sager of his obligation to obtain a building permit under Thurston County Code (TCC) 14.20.011; it merely states that he does not have to register as a contractor to work on personal property on his land. Sager was not working on personal property; he had constructed a house and a garage, which are both considered real, not personal, property.<sup>1</sup> The County alleged that Sager violated TCC by failing to obtain a building permit for construction on his property in violation of TCC 14.20.011 and .012. TCC 14.20.011 provides that “no building or structure regulated by this code shall be erected, constructed, enlarged, altered, repaired, moved, improved, removed, converted or demolished unless a separate permit for each building or

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<sup>1</sup> “Personal property” is defined as: “Any movable or intangible thing that is subject to ownership *and not classified as real property.*” BLACK’S LAW DICTIONARY at 1233 (7th ed. 1999) (emphasis added). “Real property” is defined as: “Land and anything growing on, attached to, *or erected on it,* excluding anything that may be severed without injury to the land. Real property can be either corporeal (soil and buildings) or incorporeal (easements).” BLACK’S at 1234 (emphasis added).

structure has first been obtained from the building official.” This applies to real property, and is thus not inconsistent with RCW 18.27.090(6). Sager does not deny that he built his home and garage on his property in violation of the permit requirement, and thus did not raise any issue of material fact on these claims. Accordingly, summary judgment on the County’s first cause of action was proper and we affirm.<sup>2</sup>

#### B. Plumbing Laws

Sager then argues that RCW 18.106.150 supersedes any local requirement that he obtain permits for plumbing done on his own property. RCW 18.106.150 exempts landowners from *obtaining a license or hiring a certified plumber* to do work on their own property. This statute does not address permit requirements. The County alleged that Sager violated the County’s Sanitary Code by failing to secure the required permits for constructing an on-site sewage system. The County code is not inconsistent with or superseded by RCW 18.106.150. Sager does not deny that he violated the Sanitary Code by failing to obtain the proper permits and again fails to raise a genuine issue of material fact, which would preclude summary judgment and, thus, we affirm summary judgment on this issue.

Affirmed in part, reversed and vacated in part, and remanded.

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<sup>2</sup> Sager also argues that RCW 18.27.090(12) exempts him from the permitting requirement because he was working on his property. He does not argue this in his brief on appeal. Moreover, this subsection of the statute does not exempt Sager from obtaining building permits - it merely exempts him from the requirement to register as a contractor.

He mischaracterizes the language in RCW 18.27.110. The statute prohibits the County from issuing a building permit to any “*contractor required to be registered under this chapter without verification that such contractor is currently registered as required by law.*” RCW 18.27.110(1) (emphasis added). As Sager acknowledges, he is not required to register as a contractor, so RCW 18.27.110(1) does not preclude the County from issuing him a building permit.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

IT IS SO ORDERED.

DATED this 17/11/2014 at Seattle, WA.

  
Van Deren, J.

  
Morgan, A.C.J.

  
Bridgman, J.