

Superior Court No. 09-2-03290-9
Court of Appeals No. 295486-III

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

DAN HENDERSON; NEIL MEMBREY; LARRY KUNZ; and KASI
HARVEY-JARVIS,

Appellants,

v.

JOHN PEDERSON, Director of Planning, Spokane County,

Respondent.

**BRIEF OF APPELLANTS, DAN HENDERSON, LARRY KUNZ,
NEIL MEMBREY, KASI HARVEY-JARVIS, and
NEIGHBORHOOD ALLIANCE OF SPOKANE**

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I. INTRODUCTION

This case is a review of a decision of the Spokane County Superior Court denying the issuance of a writ of mandamus to compel Spokane County's Planning Director, John Pederson, to enforce Spokane County's Critical Areas Ordinance¹ ("CAO"). Appellants allege that Respondent John Pederson failed to exercise his legal duty to enforce an ordinance created to protect an aquifer, which is a significant source of drinking water to many, in areas where the aquifer is vulnerable to contamination from large discharges of wastewater.

As discussed below, the Superior Court incorrectly denied the issuance of the writ of mandamus because: (1) it determined that the Respondent has a discretionary duty in enforcing the CAO; (2) that Appellants have other plain, speedy and adequate remedies; and (3) that Appellants are not beneficially interested in enforcement of the CAO. For the reasons set forth below, Appellants, Dan Henderson, Larry Kunz, Neil Membrey, and Kasi Harvey-Jarvis request that this Court reverse the decision of the Superior Court and issue the writ of mandamus.

¹ Relevant sections of the County's Code, including the Critical Areas Ordinance are included in the record at CP 103-223

II. ASSIGNMENT OF ERROR AND ISSUES PRESENTED

Assignment of Error

1. The trial court erred by finding that Appellants failed to satisfy the elements for a writ of mandamus, failing to issue the writ and dismissing Appellants' action. CP 417-20.

Issues Presented

1. Whether Respondent John Pederson has a clear duty to act under Spokane County's Critical Areas Ordinance?
2. Whether Petitioners have no other plain, speedy or adequate remedy exists to enforce the Critical Areas Ordinance
3. Whether Petitioners have a beneficial interest in the Respondent's exercise of his nondiscretionary duties?

III. STATEMENT OF THE CASE

The issues in this matter are not under dispute. CP 419. This case involves a dispute over the failure of Spokane County's ("County") Planning Director to enforce the County's CAO against a restaurant, known as McGlades, for its failure to comply with regulations governing septic discharge into areas designated as Critical Aquifer Recharge Areas ("CARA"). CP 90-92. Petitioners live in the vicinity of McGlades and, in some cases, obtain their drinking water near the restaurant's septic system. CP 9-20. Respondent Pederson is employed by the County Department of Building and Planning as the Director of Planning. CP 91, 244. He is

charged with the responsibility of enforcing the CAO, which includes the CARA regulations. CP 91, 250.

The County's CAO was created "to protect the public health, safety and welfare by preserving, protecting, restoring and managing through the regulation of development and other activities within . . . critical aquifer recharge areas." CP 90, 246, Spokane County Code §11.20.010(C)(3). Critical aquifer recharge areas are "areas where there is an aquifer that is a source of drinking water that is vulnerable to contamination that would affect the potability of the water." CP 90, 247, Spokane County Code §11.20.020.

Spokane County Code §11.20.075(L-3)(2)(a) requires non-residential uses outside the urban growth area that produce more than ninety gallons per acre per day in moderate to highly susceptible recharge areas to require enhanced septic systems such as sealed lagoons or holding tanks. CP 90-91, 248-49.

McGlades Restaurant is located in Colbert, Washington, an area located outside of Spokane County's urban growth area and within the County's designated CARA. CP 65, 291. The area of the lot at McGlades is 4.2 acres, based upon County records. CP 71, 230, 260. CAO requirements provide that the septic system can discharge no more than

378 gallons of sewage based on 4.2 acres and 90 gallons per day of sewage. CP 367.

Water meter readings indicate that McGlades is using significantly more than 90 gallons of wastewater per day per acre. CP 91-92, 367-68, 389-94. Water meter readings during the non-irrigation season are a common and accurate way to measure wastewater discharge. CP 92, 304, 360, 367. Water meter readings are an accurate and predicable way to determine the amount of water that finds its way to a wastewater system. *Id.* Further, water records indicating well over 90 gallons of wastewater per acre per day are indicative of a violation of the CAO requirements. *Id.* The water data indicates that McGlades is exceeding 450 gallons of water per day in the non-irrigation season. CP 91-92, 367-68, 389-94. McGlades business is not utilizing an enhanced wastewater disposal system as required by Spokane County Code §11.20.075(c)(L-3). CP 365, 368.

Petitioners sent multiple complaint letters to the County seeking enforcement of the CAO against McGlades. CP 10, 13, 16, 19, 92, 328-58. No enforcement action was taken as a result of the complaints and there is no active investigation. Respondent cannot remember the last time he visited the location. CP 260. Bruce Rawls from County Utilities has not

been asked to look at the issue “for several years.” CP 299. The Spokane Health District is not doing any investigation of the property. CP 234.

As a result, Petitioners filed a petition on July 23, 2009, with the Spokane County Superior Court seeking issuance of a peremptory writ of mandamus to compel Respondent Pederson to enforce the CAO against McGlades Restaurant. CP 1-8. Both parties filed for summary judgment. On November 10, 2010, after extensive briefing and oral argument, the Spokane County Superior Court granted Respondent’s summary judgment motion and denied Petitioners’ request for a writ of mandamus finding that the Petitioners “failed to establish any of the three elements required for a Writ of Mandamus to issue.” CP 420. Petitioners filed a timely appeal of that decision on December 6, 2010. CP 421-28.

IV. ARGUMENT

A. STANDARD OF REVIEW:

When reviewing a summary judgment order, the Court of Appeals will engage in the same inquiry as that of the trial court. *Sherman v. State*, 128 Wn.2d 164, 184, 905 P.2d 355 (1995). Therefore, a summary judgment order is reviewed *de novo*. *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 854, 827 P.2d 1000 (1992); see also *Retired Public Employees Council of Washington v. Charles*, 148 Wn.2d 602, 62 P.3d 470 (2003) (reviewing *de novo* a writ of mandamus denied on summary

judgment). The standard of review is *de novo* when the appeal is from denial of a mandamus action. *Land Title of Walla Walla, Inc. v. Martin*, 117 Wn.App. 286, 289, 70 P.3d 978 (2003).

B. ISSUING A WRIT OF MANDAMUS IS AN APPROPRIATE REMEDY BECAUSE THE DIRECTOR OF PLANNING HAS FAILED HIS LEGAL DUTY TO ACT, THERE IS NO OTHER PLAIN, SPEEDY OR ADEQUATE REMEDY AVAILABLE TO APPELLANTS, AND APPELLANTS ARE BENEFICIALLY INTERESTED.

A writ of mandamus is the appropriate remedy when a public official, such as Respondent in this matter, fails to exercise a non-discretionary duty. Here, the lower Court incorrectly held that a writ of mandamus was not the appropriate remedy to seek enforcement of the CAO. However, a mandamus action should lie when there is an “arbitrary refusal to perform a plain duty.” *State ex rel. Clark v. City of Seattle*, 137 Wash. 455, 459, 242 P. 966 (1926).

While a writ of mandamus is an extraordinary act, it is an appropriate remedy to compel a public official “to comply with law when the claim is clear and there is a duty to act.” *Paxton v. City of Bellingham*, 129 Wn. App. 439, 444, 119 P.3d 373 (2005); see RCW 7.16.160. The applicant for a writ of mandamus is required to satisfy three elements before the writ will be issued: (1) the party subject to the writ is under a clear duty to act; (2) the applicant has “no plain, speedy and adequate remedy in the ordinary course of law;” and (3) the applicant is

“beneficially interested.” *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003); RCW 7.16.160; RCW 7.16.170. Appellants have met all three of these criteria.

1. Spokane County's Critical Areas Ordinance Gives the Director of Planning an Exclusive, Non-Discretionary Duty to Enforce its Requirements.

Spokane County's CAO vests with the County's Planning Director an exclusive and mandatory duty to enforce the CAO. When there is a violation of the CAO, “It shall be the duty of the planning director . . . to interpret and enforce the provisions of this chapter” Spokane County Code §11.20.030(J)(2)(a). The CAO assigns a mandatory duty of enforcement to the Respondent when it unambiguously states that it *shall be the duty* of the Planning Director to enforce the CARA regulations. *Id.* The duty described in the ordinance does not require nor allow for judgment or expertise in order for the CAO to be enforced. *Id.* In addition, consistent enforcement is a fundamental and important purpose for the regulation's existence. Spokane County Code §11.20.010(4).

A writ of mandamus may be issued to compel a duty which is clear, ministerial, and not a discretionary act. *Burg v. Seattle*, 32 Wn. App. 286, 290, 647 P.2d 517 (1982). A ministerial duty is defined as a “duty imposed expressly by law” which is “mandatory and imperative.” *City of Hoquiam v. Grays Harbor County*, 24 Wn.2d 533, 540, 166 P.2d

461 (1946). A discretionary duty requires “the exercise of a basic policy evaluation, judgment, and expertise on the part of the officer or agency....” *Moloney v. Tribune Pub'g Co.*, 26 Wn. App. 357, 360, 613 P.2d 1179 (1980), *overruled on other grounds by*, *Bender v. Seattle*, 99 Wn.2d 582, 664 P.2d 492 (1983). A writ of mandamus can direct an officer to exercise a mandatory discretionary duty, but not the manner of exercising that discretion. *Eugster*, 118 Wn. App. at 405. Here, the CAO leaves no judgment, but requires enforcement of the CAO provisions by stating that the Planning Director “shall” enforce the CAO.

It is a basic rule of statutory construction that the statutory term “shall” is presumptively imperative and operates to create a duty. *Erection Co. v. Department of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993). This presumption thus imposes a mandatory requirement unless a contrary legislative intent is apparent. *Id.* Furthermore, this presumption is strengthened where other sections of the same statute contain the word “may.” *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 713, 911 P.2d 389 (1996).

The CAO unambiguously states that “[i]t *shall* be the duty of the [planning] director” to enforce the CARA regulations. Spokane County Code § 11.20.030(J)(2)(a) (emphasis added). The use of the term “shall” means the Respondent has an imperative and mandatory duty to enforce

the statute. *See Erection Co.*, 121 Wn.2d at 513, 852 P.2d 288. Moreover, the word “may” does not appear even once within the enforcement section of the CAO. *See Spokane County Code* §11.20.030(J)(2)(a)-(c). As a result, Respondent does not have discretion as to whether or not he may choose to enforce the CAO.

In contrast, the term “may” appears in other sections of the statute and other named officials in the CAO are given discretion with regard to enforcement. For example, the prosecutor’s office is given wide discretion as to whether or not they enforce the CAO via criminal charges. Spokane County Code § 11.20.030(J)(10) (the prosecuting attorney, on behalf of the County, *may* seek enforcement of the CAO). Because the CAO uses the terms “shall” and “may” when discussing the enforcement duties of various officials, this creates a strong presumption that the ordinary meanings of the word are to be used with “shall” being mandatory and “may” being permissive. *See Philadelphia II*, 128 Wn.2d at 713, 911 P.2d 389.

There is no legislative intent indicating that “shall” is to be used in a permissive sense and the intent of the CAO supports the statutory language in creating a mandatory duty. As indicated above, consistent enforcement is a fundamental and important purpose in protecting

CARAs. Spokane County Code § 11.20.075(4). By eliminating discretion in whether to enforce the CAO, this purpose is achieved.

Finally, the duty described in the CAO does not require nor allow for judgment or expertise in determining whether to enforce the CAO. Spokane County Code §11.20.030(J)(2)(c). However, the Respondent is given discretion in how to perform this duty. Spokane County Code § 11.20.030(J)(2)(c). The fact that the Respondent is given discretion in how to exercise this mandatory duty does not limit the appropriateness of a writ of mandamus. *See Eugster*, 118 Wn. App. at 405 (“Mandamus can direct an officer to exercise a mandatory discretionary duty, but not the manner of exercising that discretion.”); *Mower v. King County*, 130 Wash.App. 707, 719, 125 P.3d 148 (2005).

Since the duty of enforcement assigned to the Respondent is in an unambiguous and direct manner that does not require judgment or experience to be affected, Respondent has a nondiscretionary duty to enforce the CAO.

2. *Appellants Have No Plain, Speedy or Adequate Remedy in the Ordinary Course of Law to Enforce the Critical Areas Ordinance.*

Without the Court to compel Respondent to enforce the CAO, Appellants have no plain, speedy and adequate remedy in the ordinary course of law to compel enforcement.

A writ of mandamus should only be issued when there is no plain, speedy, and adequate remedy in the ordinary course of law. *City of Kirkland v. Ellis*, 82 Wn. App. 819, 827, 920 P.2d 206 (1996).

Specifically, Courts have stated:

There must be something in the nature of the action or proceeding that makes it apparent to this Court that it will not be able to protect the rights of the litigants or afford them adequate redress, otherwise than through the exercise of this extraordinary jurisdiction.

State ex rel. O'Brien v. Police Court of Seattle, 14 Wash.2d 340, 347-48, 128 P.2d 332 (1942) (citations omitted) (*quoting State ex rel. Miller v. Superior Court*, 40 Wash. 555, 559, 82 P. 877 (1905)).

The remedy issue turns on whether the duty the petitioner seeks to enforce “cannot be directly enforced” by any means other than mandamus. *Eugster*, 118 Wn. App. at 414. Whether there is a plain, speedy and adequate remedy depends on the facts of a particular case. *Butts v. Heller*, 69 Wn. App. 263, 267, 848 P.2d 213 (1993).

Appellants have no other adequate remedy because Pederson’s mandatory duty cannot be directly enforced by any means other than mandamus. The only public official tasked with the duty to enforce the CAO is the Director of Planning. Spokane County Code §11.20.030(J)(2)(a). Moreover, the Spokane County Code provides no mechanism to compel the Planning Director to exercise his non-

discretionary duties nor for citizen enforcement of CAO requirements. No other provision of the County Code or any other law allows citizen action to require proper septic system operation on a private facility for the purpose of protecting the local aquifer.

Recognizing this, Appellants provided Pederson with a number of complaints detailing the CAO violations at the McGlades Restaurant and urged him to carry out his responsibilities. CP 328-58. However, no enforcement action was taken and it is not apparent that any enforcement action will ever be taken. Pederson is the only public official capable of enforcing the CAO and has refused to take action. Therefore, Appellants have no other remedies to ensure compliance with the CAO.

3. *Appellants are Beneficially Interested in the Enforcement of the Critical Areas Ordinance.*

Appellants seek enforcement of the CAO, in part, due to the proximity of Appellants' private wells to the McGlades property. In order for a writ of mandamus to be issued, the petitioning party must be beneficially interested. *Eugster*, 118 Wn. App. 383 at 402; RCW 7.16.170. An individual has standing to bring an action for mandamus, and is therefore considered to be beneficially interested, if he has an interest in the action beyond that shared in common with other citizens. *Retired Public Employees Council of Washington*, 148 Wn.2d at 616.

Here, Appellants live directly adjacent to the McGlades restaurant. CP 9-20. Two of the Appellants have private wells that draw water 200 or fewer feet from the McGlades Restaurant's septic drain field and contamination of the aquifer could harm their private wells. CP 10, 16. All Petitioners have a beneficial interest in Respondent exercising his non-discretionary duty to enforce the CARA because when the drain field septic system is overloaded, there is a risk of contaminating the aquifer, which the CAO is designed to avoid. Spokane County Code § 11.20.010(C)(1)&(9) (purposes of the CAO include protecting the aquifer).

In addition, Appellants are beneficially interested because the use and enjoyment of their property is dependant on being able to safely utilize the limited water delivery services that are available in rural Spokane County. CP 10, 13, 16, 19. Therefore, Appellants are beneficially interested in compelling Pederson to carry out his mandatory duty.

C. THE WRIT OF MANDAMUS SHOULD BE ISSUED BECAUSE THE RECORD INDICATES THAT McGLADES IS DISCHARGING MORE THAN 90 GALLONS OF WASTEWATER PER ACRE PER DAY, IN VIOLATION OF THE CRITICAL AREAS ORDINANCE, AND RESPONDENT HAS FAILED HIS NON-DISCRETIONARY DUTY TO ENFORCE THE CRITICAL AREAS ORDINANCE.

The record before to the Superior Court indicated that the septic system on the McGlades property is not in compliance with CAO regulations. The requirements of the CAO regulation are clear: non-residential uses outside the urban growth area that produce more than 90 gallons per acre per day in moderate to highly susceptible recharge areas require enhanced septic systems such as sealed lagoons or holding tanks. Spokane County Code §11.20.075(L-3)(2)(a).

The undisputed facts demonstrate that: McGlades Restaurant is a non-residential use outside of the urban growth area; produces more than 90 gallons per acre per day in a highly susceptible recharge area; and does not have an enhanced septic system. Therefore the CAO regulations must be enforced against McGlades to protect the public health and water supply of this critical recharge area.

When evaluating whether a violation has occurred, Respondent is charged in statute to “utilize[e] the best available science to support policies and regulations to protect the functions and values of critical areas.” Spokane County Code §11.20.010(C)(3). Respondent admits that

he lacks technical expertise in modern wastewater design stating, "I'm not an expert in that area...I'm not a registered sanitation or a sewer design engineer or a sanitation engineer." CP 249. Respondent's charge is thus to rely on experts within the County to determine whether there is a violation of the CAO provisions.

To evaluate whether McGlades discharges in excess of 90 gallons of water per day, Bruce Rawls, the County's Director of Utilities, stated that water meter data for the non-irrigation season is the most accurate measure. CP 300-01. Rawls stated that it is common to use water meter readings to evaluate wastewater discharge during the non-irrigation season during times that "match up with periods when the restaurant seemed to be in business." CP 300. Rawls stated that water data is the most reliable way to measure wastewater discharge because, "85-90 percent of water that goes through a water meter eventually finds its way to a wastewater system." CP 301. After looking at the water data, Rawls stated that "[the] days I looked at turned out on 330 gallons per acre per day, and that is substantially more than 90, and in my opinion it indicates that they are not compliant with CARA." CP 304-05. This was confirmed by the County's former aquifer expert, who reviewed more than three years of water data to conclude that McGlades exceeded its legal limit. CP 367-68, 389-94.

Further, McGlades does not have an enhanced septic system as required for a non-residential use discharging above 90 gallons of water per day in a CARA. The County's CAO requires a septic system that protects the aquifer equal or greater to one of the following:

- i. Treatment utilizing sealed lagoons;
- ii. Treatment utilizing holding tanks with transport and disposal at a site licensed for disposal of the particular effluent;
- iii. Treatment in compliance with a valid surface water discharge permit obtained from the state department of ecology; or
- iv. Treatment in a mechanical wastewater treatment plant that produces less than three thousand five hundred gallons per day of effluent which meets the state drinking water standards prior to disposal into the ground using an infiltration system or subsurface disposal system; or
- v. Treatment in a mechanical wastewater treatment plant that produces more than three thousand five hundred gallons per day of effluent in compliance with a valid state waste discharge permit obtained from the state department of ecology and meeting the ground water standards, Chapter 173-200 WAC, or as amended.

Spokane County Code § 11.20.075(L-3)(2).

McGlades is using a wastewater system designed to handle up to 450 gallons of wastewater per day. CP 231. Water data indicates McGlades is exceeding 450 gallons of wastewater per day. CP 367-68, 389-94.

When asked whether the septic system complies with the CAO, Respondent Pederson replied, "I have no way to inspect the septic system since, and it is not within my charge to do so because it is a below ground facility. I don't have the technical expertise to inspect the [disposal] facility." CP 260. As McGlades is not using any of the enhanced systems listed in the Spokane County Code at § 11.20.075(L-3)(2)(i)-(v) and the water data shows that more water is going through the wastewater system than it was designed to handle, it cannot be said that the wastewater system at McGlades is protecting the aquifer "equal or greater to" an enhanced system.

As the undisputed facts demonstrate that McGlades is a non-residential use outside of the urban growth area; producing more than 90 gallons per acre per day in a highly susceptible recharge area; and does not have an enhanced septic system, there is clear violation of the CAO. With the clear undisputed facts before him, Respondent had the non-discretionary duty to enforce the CAO regulations and did not. Therefore, a writ of mandamus compelling the Respondent to enforce the requirements of the CAO is necessary to protect the public health and water supply of this critical recharge area.

V. CONCLUSION

The lower court incorrectly determined that Appellants had failed to establish the elements necessary for a writ of mandamus. Respondent has a non-discretionary duty to enforce the CAO, as evidenced by the use of the word “shall.” Appellants have no other plain, speedy or adequate remedy because there is no citizen suit provision or other way to compel Pederson to enforce the CAO. Lastly, Appellants are beneficially interested in the mandamus action because they live nearby to the offending property and draw drinking water in the vicinity of the offending septic system. For these reasons, Petitioners respectfully request that this Court overturn the lower Court’s decision and issue the petition for writ of mandamus.

Respectfully submitted this 25th day of February, 2011.



Rick Eichstaedt, WSBA #36487
Center for Justice
Attorney for Appellants

PROOF OF SERVICE

I, Danette Lanet, hereby certify that I caused a copy of the **Brief of Appellants** to be served, via USPS, postage prepaid, on all parties or their counsel of record on the date below:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25 day of February, 2011.



DANETTE LANET