

No. 29548-6-III

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

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

Appellants,

v.

JOHN PEDERSON, Director of Planning, Spokane County,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

This action by Appellants represents yet another attempt by Appellants to close McGlades restaurant. Earlier litigation regarding alleged violations of the CARA regulations was taken by Appellants before the Eastern Washington Growth Management Hearings Board arguing that Spokane County was in violation of applicable environmental laws including the CARA regulations and that as a result of such violations the public health and safety would suffer from the wastewater discharged from McGlades. CP – 454 - 460.

The fallacy in Appellants' argument in this case is that their conclusion that there is a possibility that McGlades might be contaminating the aquifer and therefore Spokane County is duty bound to shut down the fully permitted and legally operating business. During the 4 years that McGlades was open for business, Appellants have not yet presented any evidence of the dangers that they so adamantly warn against. Rather than bring an action against McGlades directly to stop the activity that Appellants assert so relentlessly is allegedly dangerous to the aquifer, Appellants choose to attempt to force Spokane County to generically enforce Spokane County regulations. It is well established that a writ of mandamus does not lie to require the enforcement of the law. *Tabor v. Moore*, 6 Wn. App. 759, 760, 496 P.2d 361 (1972).

Applying the law governing a Petition for the Writ of Mandamus to the relevant and undisputed facts it is clear that the writ should not issue as a matter of law.

II. ASSIGNMENTS OF ERROR

Appellants assign error to the Superior Court's decision granting the Respondent's Motion for Summary Judgment, denying Appellants' Motion for Summary Judgment and denying Appellants' Petition for Writ of Mandamus.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

The issues raised in this action by Petitioner can be summarized as follows:

1. Whether the Spokane County Planning Director has a clear and specific duty to "enforce the Spokane County Critical Aquifer Recharge Area regulations"?

2. Whether Appellants have any other plain, speedy or adequate remedy by which to stop allegedly possible contamination of the aquifer?

3. Whether Appellants' interest in preventing what they allege as a possible contamination of the aquifer is distinguishable from that of other citizens who are dependent on the aquifer for drinking water?

IV. STATEMENT OF THE CASE

The material facts relevant to the Motions for Summary Judgment brought by the parties hereto below are uncontested.

Beginning in November 2006, McGlade's Bistro and Wine Bar (hereinafter "McGlade's") was lawfully operating as a restaurant located at 4301 East Day-Mt. Spokane Road, Colbert, Washington. CP – 005; CP – 071; CP – 439. McGlade's is served by a septic system for the disposal of wastewater and is within the jurisdiction of the Spokane County Critical Area Ordinance, Spokane County Code Chapter 11.20. CP – 005; CP – 071; CP - 439. Appellants, Dan Henderson, Neil Membrey, Larry Kunz, and Kasi Harvey-Jarvis, each own and/or reside on property that is near or adjacent to the McGlade's property. CP – 004; CP – 009 - 020.

V. ARGUMENT

A. THE STANDARD OF REVIEW BY THIS COURT IS A REVIEW DE-NOVO.

When reviewing a summary judgment of the Superior Court, this Court engages in the same inquiry as that of the Superior Court, thus this Court's review is de-novo. *Jones v. Allstate Insurance Company*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Granting or denying a writ of mandamus is a matter within the discretion of the Court. *State ex rel. O'Brien v. Police Court of Seattle*, 14 Wn.2d 340, 347, 128 P.2d 332 (1942).

A Motion for Summary Judgment is appropriate when: (1) the pleadings, depositions, and other records on file, together with any affidavits submitted with the Motion, show there is no genuine issue of material fact, and (2) that the moving party is entitled to judgment as a matter of law. CR 56(c); *Jacobson v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977). Once the moving party makes a showing that it is entitled to judgment, the opposing party must come forward with specific facts to establish the existence of a genuine issue of fact. *Bankhead v. City of Tacoma*, 23 Wn. App. 631, 597 P.2d 920 (1970).

There is no dispute regarding the material facts of this case. As a matter of law Appellants can not meet any of the requirements necessary to support their Petition below for a Writ of Mandamus.

To sustain their petition for writ of mandamus Appellants must meet all three of the following elements:

1) That the Spokane County Planning Director is under a clear and specific duty to perform a ministerial, non-discretionary act;

2) That the Appellants have no plain, speedy and adequate remedy in the ordinary course of the law; and

3) That Appellants have a direct beneficial interest in the performance of the ministerial act that is distinct from the interest of the public. *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003); *Retired Public Employees Council v. Charles*, 148 Wn.2d 602, 616, 62 P.3d 470 (2003); RCW 7.16.160; RCW 7.16.170.

**B. PETITIONERS' RELIANCE ON
IRRELEVANT FACTS IS MISPLACED.**

Appellants assert and rely almost solely on facts that are not material to the issues relative to the issuance of a writ of mandamus. Appellants' allegations of possible pollution of the aquifer are immaterial, directly in dispute and are completely unsupported by any evidence in the record. CP – 438 – 440.

A material fact is one upon which the outcome of the litigation depends and thus must be relevant to the issues for decision by the court. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974); ER 401. Relevance requires (1) that the evidence be logically relevant to prove an essential element of the matter for decision by the court, and (2) legally relevant – having probative value that substantially outweighs its prejudicial value. *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008) (citing, *State v. Salterelli*, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982)).

Evidence placed in the record by Appellants focuses on Appellants' allegation that McGlades might be contaminating the aquifer. CP – 006 – 007; CP – 009 - 020. Without any citation to legal authority, they then propose that: Because McGlades is possibly contaminating the aquifer, Spokane County has a ministerial, non-discretionary duty to “enforce the CARA regulations against McGlades”. The Declaration of Stan Miller states Appellants' issue: “*The crux of the McGlades issue is whether or not this facility complies with the County's regulatory requirements with its existing utility infrastructure.*” (Emphasis Added) CP – 361.

Appellants misunderstand the issues before the Court, which are: (1) whether there is a clear/specific ministerial duty to act, (2) whether

there is a lack of a plain, speedy and adequate remedy, and (3) whether Appellants have a direct and specific beneficial interest in the performance of the ministerial duty that is distinguishable from the interest of others who draw from the aquifer. *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003); *State v. Wilson*, supra. Whether or not McGlades is violating the CARA regulations is not relevant to the issuance of a Writ of Mandamus.

Additionally, Appellants have failed to join all of the necessary parties for adjudication of that issue. CR 19(a). For the Court to determine that McGlades is in violation of the CARA regulations without McGlades and other necessary parties before the Court would work an extreme prejudice against McGlades and other necessary parties.

C. APPELLANTS FAIL TO DISTINGUISH THEIR INTEREST FROM THE PUBLIC'S INTEREST IN PROTECTING THE AQUIFER.

Standing to request a writ of mandamus requires proof that the Appellants have a beneficial interest in the performance of the requested act that is more than that interest shared in common with other citizens. *Eugster v. City of Spokane*, supra, at 402; *Retired Public Employees Council of Washington v. Charles*, 148 Wn.2d at 616, citing *State ex rel. Lay v. Simpson*, 173 Wn. 512, 513, 23 P.2d 886 (1933).

Appellants' sole basis for standing to petition for a writ of mandamus is that they are entitled to the protection of their health and use and enjoyment of their property. CP – 007; CP – 079. Appellants acknowledge that the beneficial interest that they claim gives them standing is no different than the interest held by every other citizen of Spokane County. CP – 079. Appellants assert no direct beneficial interest that is any different from the general beneficial interest that is bestowed upon all other citizens. Appellants allege no facts that give them standing to pursue a writ of mandamus and therefore their petition must be dismissed.

D. THE SPOKANE COUNTY PLANNING DIRECTOR IS UNDER NO CLEAR AND SPECIFIC DUTY TO ENFORCE THE CRITICAL AQUIFER RECHARGE AREA REGULATIONS AS PROPOSED BY APPELLANTS.

1. SCC 11.20.030 J. 2. a. Creates No Clear and Specific Duty.

It is well established that mandamus will not lie to compel enforcement of law or regulation. *Walker v. Munro*, 124 Wn.2d 402, 408, 879 P. 2d 920 (1994). A petition for writ of mandamus to force the Secretary of State and government officials to uphold and adhere to the Constitution of the State of Washington was properly denied. *Walker v. Munro*, supra, at 407. See also *Tabor v. Moore*, 6 Wn. App.759, 496

P.2d 361 (1972); *State ex rel. Beardslee v. Landes*, 149 Wn. 570, 271 P. 829 (1928).

Appellants rely solely upon SCC 11.20.030 J. 2. a. to support their allegation that the Spokane County Planning Director is under a clear and specific duty to enforce the Spokane County Critical Area Ordinance (CAO). Their reliance on this regulation is unfounded. In determining the meaning of the language of the Spokane County ordinance, the Court is to ascertain and give effect to Spokane County's intent in adopting the ordinance. *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 856, 827 P.2d 1000 (1992). Substantial deference is granted to Spokane County in interpreting its ordinances. *Overlake Hosp. Ass'n v. Department of Health of State of Washington*, 170 Wash.2d 43, 49 – 50, 239 P.3d 1095, (2010).

In pertinent part SCC 11.20.030 J. reads as follows:

J. Enforcement/Violation Penalty

1. Intent. It is the intent of this section *to provide authority for*, and procedures to be used in, enforcing the provisions of this chapter to the end of furthering the purposes and objectives thereof.
2. Enforcement.
 - a. It shall be the duty of the director, except as otherwise provided herein, to interpret and enforce the provisions of this chapter and conditions of approval imposed by actions of the board, hearing examiner and/or building and planning department.
 - b. It shall be the duty of other public works divisions to enforce the provisions of this chapter and conditions of

approval imposed by actions of the board, hearing examiner or division as they pertain to the licenses or permits issued or required by their division.

c. *The procedures set forth in this section are not exclusive. These procedures shall not in any manner limit or restrict the county from remedying violations or abating violations in any manner authorized by law.*

(Emphasis added) CP – 130.

Subsection J above, describes the authority of the various divisions of the Spokane County Public Department for enforcement of the CAO generally, clearly there is no affirmative ministerial duty for enforcement of the CAO. Subsection J merely indicates that it is the planning director alone who has authority for the interpretation and enforcement of the CAO, except with regard to provisions “of this chapter and conditions of approval imposed by actions of the board, hearing examiner or division as they pertain to the licenses or permits issued or required by” other divisions of the public works department. The Planning Director has no authority to interpret or enforce matters under the jurisdiction of the Engineering Division and the Engineering Division has no authority to interpret or enforce matter pertaining to the Planning Division.

It is well established that, in the context of enforcement, seemingly mandatory language is not mandatory at all. *Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748, 760 – 761, 125 S.Ct 2796

(2005). The intent of SCC 11.20.030 is clearly stated in subsection J. 1, to identify what County Official has authority to interpret and enforce Chapter 11.20. CP – 130. Further proof that subsection J. 2. does not create a mandatory or ministerial duty is the language in subsection J. 2. c.; “The procedures set forth in this section are not exclusive. These procedures shall not in any manner limit or restrict the county from remedying violations or abating violations in any manner authorized by law”. CP – 130. SCC 11.20.030 J. 2. c. indicates that the planning director has authority to interpret and enforce his/her respective matters under the code, and is also granted discretion to choose whatever procedure authorized by law that he/she believes in the exercise of the director’s discretion will abate an alleged violation. *Burg v. City of Seattle*, 32 Wn. App. 286, 290 – 291, 647 P.2d 517 (1982) citing *State ex rel. Clark v. Seattle*, 137 Wn. 455, 461, 242 P. 966 (1926).

Appellants take the language of SCC 11.20.030 J. 2. a. out of context, without reference to the modifying language of the subsections surrounding it, thus they misinterpret the meaning of the regulation. The isolated subsection does not support the necessary requirement that there be a clear/specific duty to act. Denial of the petition for writ of mandamus is correct on that ground alone.

2. Any Duty Under SCC 11.20.030 J. 2. a. Is Discretionary For Which Mandamus Does Not Lie.

It is clear that a writ of mandamus will only be granted to direct the performance of a specific act that is clearly required by law. *Eugster v. City of Spokane*, 118 Wn. App. 383, 404, 76 P.3d 741 (2003), quoting *State ex rel. Taylor v. Lawler*, 2 Wn.2d 488, 490, 98 P.2d 658 (1940); See also *Paxton v. City of Bellingham*, 129, Wn. App. 439, 444, 119 P.3d 373 (2005). Mandamus may not be used to compel public officers or administrative bodies to perform acts or duties which require the exercise of discretion or judgment. *Seiu Healthcare v. Gregoire*, 168 Wn.2d 593, 599, 229 P.3d 774 (2010); *Burg v. City of Seattle*, 32 Wn. App. 286, 290, 647 P.2d 517 (1982). An act is ministerial if it is prescribed by law and is defined with such precision and certainty as to leave nothing to the exercise of discretion or judgment. *Id.* If the prescribed act involves the exercise of discretion or judgment then it is not ministerial but is discretionary for which mandamus will not lie. *Seiu Healthcare v. Gregoire*, supra; *Burg v. City of Seattle*, supra, at 291. A mandatory duty is not a ministerial duty merely because it is mandatory. *Seiu Healthcare v. Gregoire*, supra, at 599 footnote 6.

As described above, the language of SCC 11.20.030 J. 2. a. does not create a duty for any specific performance. What appears to be

mandatory language in the County Code clearly does not create a ministerial duty as defined in the cases cited above. *Seiu Healthcare v. Gregoire*, supra; *Burg v. City of Seattle*, supra. When read in context SCC 11.20.030 describes a process available to Spokane County for the enforcement of its CAO. The process is discretionary and/or requires judgment in almost every aspect.

Under SCC 11.20.030 the Planning Director has charged with the interpretation of the ordinance, which is a discretionary act in its self. SCC 11.20.030 J. 2. a. He is then given discretion to follow the procedures described in that section or to remedy violations or abate violations in any manner authorized by law. SCC 11.20.030 J. 2. c. If the Director receives a complaint alleging a violation of the CAO, the Director has discretion to choose to refer the matter to the prosecuting attorney's office for criminal charges under SCC 11.20.030 J. 3., or he/she may initiate an investigation under SCC 11.20.030 J. 4. Pursuant to SCC 11.20.030 J. 4. c. if the Director believes that a violation has been confirmed by the investigation, then he/she has discretion to initiate a formal process of notice and negotiation with the alleged offender for resolution of the alleged violations. Each step of the process involves the exercise of discretion or judgment by the Planning Director. The repeated exercise of discretion and/or judgment clearly indicates that the

enforcement of the CAO by the Planning Director is discretionary and not a ministerial act. *Seiu Healthcare v. Gregoire*, supra; *Burg v. City of Seattle*, supra. The Petition for Writ of Mandamus it will not lie to provide the relief requested.

E. WASHINGTON AND OTHER COURTS HAVE REFUSED TO ISSUE WRITS OF MANDAMUS TO ORDER OFFICERS TO ENFORCE ORDINANCES OR COMPLY WITH CONSTITUTIONAL PROVISIONS.

Washington courts consistently refuse to issue writs of mandamus ordering officers to enforce criminal ordinances or constitutional provisions. *See Tabor v. Moore*, 6 Wn.App. 759 (1972); *State ex rel Beardslee v. Landes*, 149 Wash. 570 (1928); *State ex rel Hawes v. Brewer*, 39 Wash. 65 (1905). In *State ex rel Beardslee v. Landes*, 149 Wash. 570 (1928), the court refused to issue a writ of mandamus ordering the Seattle city mayor and the police chief to enforce a vehicle parking ordinance by arresting and prosecuting violators. The court stated that “it seems clear to us that mandamus is not an available remedy as against this alleged failure of duty on the part of [the mayor and police chief],” *Id.* at 571, because it would be impractical for the courts to oversee the performance of the duty. *Id.* at 572. *See State ex rel. Hawes v. Brewer*, 39 Wash. 65 (1905) (affirming superior court’s denial of writ to order Sherriff to prosecute

violators of city's Sabbath ordinances) (holding "mandamus will not lie to compel a general course of conduct, as it is impossible for the court to oversee the performance of those duties."). *Id.* at 67-68.

In *Tabor v. Moore*, 6 Wn.App. 759 (1972) the court held that Washington courts do not have the power to issue a writ of mandamus to city law enforcement officials to order them to take arrested persons before the magistrate without unreasonable or unnecessary delay. *Tabor*, 6 Wn.App. 759, 760. The court based its refusal to order the officers to adhere to constitutional provisions on the "fundamental reason that the judiciary does not have the power to directly supervise law enforcement officers," *Id.* at 760.

Other jurisdictions have held that a writ of mandamus cannot be used to order enforcement. In *Vretenar v. Hebron*, 144 Wis.2d 655 (1988), the Wisconsin Supreme Court refused to issue a writ of mandamus to town officials to command them to prosecute a citizen for violations of the city's dumping and rubbish storing ordinance. The court held that the "prosecution and enforcement of municipal ordinance violations are discretionary duties such that their performance cannot be compelled through mandamus," and there is no obligation on the part of municipal officers to prosecute all cases in which an individual commits a violation of the municipal code. *Id.* at

663,665. “The authority to prosecute has not been held to constitute a ministerial duty that would bring it within the purview of actions compelled by mandamus.” *Id.* In discussing the similarities between a prosecuting attorney and the town board member in this case, the court went on to state that “[w]hile the former involves criminal laws and the latter involves civil forfeiture ordinances, the prosecutorial duties are similar in that each is responsible for pursuing with discretion violations of laws under the office’s jurisdiction.” *Id.* at 664.

Similarly, in *People ex re. Jansen v. City of Park Ridge*, 7 Ill.App.2d 331 (1955), the Illinois court of appeals refused to issue a writ of mandamus to order a city mayor and police chief to enforce future violations of the city’s motor vehicle parking ordinance. The court held that “[m]andamus will not lie where to issue the writ would put into the hands of the court the control and regulation of the general course of official conduct or enforcement or enforce the performance of official duties generally.” *Id.* at 333.

F. OTHER MORE SPEEDY AND SPECIFIC REMEDIES
ARE AVAILABLE TO PETITIONERS TO OBTAIN THE
RELIEF THAT THEY SEEK.

In addition to the other two requirements for a writ of mandamus, Petitioners must prove that they have no plain, speedy and adequate remedy in the ordinary course of law available to them to obtain the

relief that they seek. *Eugster v. City of Spokane*, supra, at 402. A remedy is not inadequate merely because it is attended with delay, expense, annoyance, or even some hardship. *City of Kirkland v. Ellis*, 82 Wn. App. 819, 827, 920 P.2d 206 (1996). Before a writ will issue, there must be something in the nature of the action that makes it apparent that the rights of the litigants will not be protected or full redress will not be afforded without the writ. *Id.* The determination of whether there exists a plain, speedy and adequate remedy in the ordinary course of law is based on the facts of the case and rests within the discretion of the Superior Court. *Id.* at 828, footnote 6, citing *Butts v. Heller*, 69 Wn.App. 263, 266, 848 P.2d 213 (1993).

Appellants ask this Court to order Spokane County Planning Director to force McGlades to cease the alleged violation of the CAO, claiming (though unsupported in the record) that to do so will stop the inevitable pollution of the aquifer. CP – 006 -007; CP – 009 – 020; CP - 079. The remedies available to Spokane County under SCC 11.20.030 are either a possible fine and/or jail sentence, if criminal charges are sustained, or some form of voluntary compliance or the imposition of fines against McGlade’s if civil remedies are sought.

Either course of action available to Spokane County would be time consuming, expensive for Spokane County and would bring no

guarantee that McGlade's would discontinue the alleged violations. Appellants can not show that their rights would not be protected or full redress had against McGlade's without the requested writ of mandamus, thus the writ should not issue. *City of Kirkland v. Ellis*, supra.

In contrast, if Appellants are able to support their allegations of risk of contamination to the aquifer and Appellants' wells, Appellants could immediately bring an action for a temporary and permanent injunction against McGlade's. RCW 7.40.020. The result of an action by Appellants directly against McGlade's could include a claim for damages, if any, incurred by Appellants as a result of the alleged violations and/or contamination and would more specifically provide the relief that Appellants seek.

There being other remedies available to Appellants that are plain, speedy and adequate, in the sense that the other remedies would achieve at least and possibly better and more complete relief than the relief sought by the petition for a writ of mandamus, Appellants can not meet that requirement for obtaining a writ. The petition was properly denied by the Superior Court.

VI. CONCLUSION

Appellants have failed to establish their standing to seek a writ of mandamus by alleging only a general beneficial interest in enforcement of the code that is not at all different from that interest shared by the public in general.

There is no duty created or described in the Spokane County Code section upon which Appellants base their request for a writ. Even if we assume *arguendo* that the Code creates a duty in the Planning Director to act in any manner, the alleged duty would be a general duty similar to a duty to abide by or “enforce” the law. The code relied upon by Appellants allows the Planning Director to exercise discretion and judgment at every step of any action of enforcement of the code.

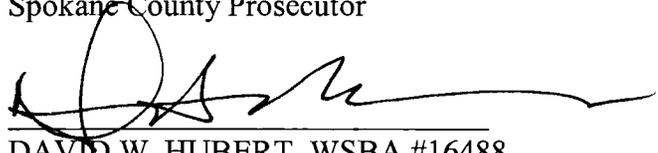
Finally, remedies that are plain and speedy and that would provide more and more specifically the relief that Appellants are seeking in the petition for a writ of mandamus are available to the Appellants through a temporary restraining order and/or injunction.

There being none of the three required elements for the issuance of a writ of mandamus present or proven in this case, the writ was properly denied. Respondent, John Pederson, Spokane County

Planning Director, respectfully requests that the Court affirm the decision of the Superior Court in this matter.

Respectfully submitted this 25th day of March, 2011.

STEVEN J. TUCKER
Spokane County Prosecutor

A handwritten signature in black ink, appearing to read 'D. Hubert', is written over a horizontal line. The signature is fluid and cursive.

DAVID W. HUBERT, WSBA #16488
Deputy Prosecuting Attorney
Attorneys for Spokane County

PROOF OF SERVICE

I hereby declare under the penalty of perjury and the laws of the State of Washington that the following statements are true.

On the ~~25th~~ day of March, 2011, I caused to be served a true and correct copy of the Respondent's Brief by the method indicated below, and addressed to the following:

Rick Eichstaedt
Center For Justice
35 West Main, Ste 300
Spokane, WA 99201

<input type="checkbox"/>	Personal Service
<input checked="" type="checkbox"/>	U.S. Mail
<input type="checkbox"/>	Hand-Delivered
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Facsimile

DATED this ~~25th~~ day of March, 2011 in Spokane, Washington.


LORI ZAAGMAN-BACON