

FILED

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NO. 296083
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

BERT HOOK, a single man,

Appellant,

v.

LINCOLN COUNTY NOXIOUS WEED CONTROL BOARD, a
Washington subagency; LINCOLN COUNTY, a Washington municipal
corporation,

Respondents.

APPELLANT'S CONSOLIDATED REPLY BRIEF

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COURT OF APPEALS, DIVISION III OF THE STATE OF
WASHINGTON

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I. Appellant's Arguments in Reply to Respondents' Briefing

Appellant Hook replies to Respondents' briefs on Appeal with this Consolidated Reply Brief.

The main points of Respondents' briefs assert: (1) that the statutory notice provisions of RCW 36.32.120(7) do not apply to "activation" of a county Weed Board and that the notice provided was "adequate"; (2) that Appellant Hook's claim is time-barred; (3) that "activation" of Lincoln County's Noxious Weed Control Board by Resolution No. 117286 is not the making and enforcement of police and sanitary regulations as contemplated by RCW 36.32.120(7), and (4) that Appellant Hook's motion for reconsideration and to amend complaint was properly denied because of the absence of a proposed amendment being attached to the motion. *See, Brief of Respondent Lincoln County @ 3, 9;*

Hook addresses these responses as follows:

A. RCW 36.32.120(7) applies.

To avoid the plain, statutory prohibition against imposing police and sanitary regulations on Lincoln County citizens without 10-days minimum published notice, Respondents argue that "activating" a county weed board pursuant to RCW 17.10 *et seq* is not adoption by reference, or otherwise, of that law, or for that matter, the making and enforcement of police and

sanitary regulations. *Brief of Respondent Lincoln County @ 2; Brief of Respondent Weed Board @ 8.* Respondents assert that the county resolution which passed (in violation of RCW 36.32.120(7)), creating Lincoln County's Noxious Weed Control Board and setting into motion the regulatory provisions of RCW 17.10 *et seq.* was a mere "legislative finding of fact". *Brief of Lincoln County @ 3.*

RCW 36.32.120(7) requires the legislative authorities of every county to make and enforce by appropriate resolutions "all such police and sanitary regulations as are not in conflict with state law...". *RCW 36.32.120(7)* (underlining added). The statute makes no distinction between a so-called "legislative finding of fact" made by resolution and any other kind of resolution making and enforcing police and sanitary regulations. Hook contends that such a distinction is *non sequitor*. How, he asks, does the law (or respondents) distinguish between the making and enforcement by appropriate resolution of all police and sanitary regulations and a resolution simply being a "legislative finding of fact" but which "precipitates the application of an existing law"? *Brief of Lincoln County @ 3.*

No legal or logical distinction can exist between "precipitating the application of existing law" and the adoption by Resolution 117286 of the

statute making and enforcing the regulations. These arguments are semantic.

Similarly, there can be no legal distinction between “activation” of Lincoln County’s Noxious Weed Control Board and the adoption by reference of the state statute (and recognized code) which set in motion its enforcement provisions. Activation is adoption. Lincoln County is authorized by RCW 36.32.120(7) to “adopt by reference Washington State statutes and recognized codes and/or compilations.” *RCW 36.32.120(7)*. This is what Lincoln County did.

On these semantic arguments, Respondents seek to nullify the following, black-letter, statutory language:

“PROVIDED FURTHER, that no such regulation, code, compilation, and/or statute shall be effective unless before its adoption a public hearing has been held thereon by the county legislative authority of which at least ten days notice has been given. *Id.*”

There is no dispute in this case that this notice was not provided.

CP-22, 11.10 (admitting). There is no ambiguity in the statute. Semantics will not avoid its strictures.

If, for example, legislative action which “precipitates the application” of state police and sanitary regulations over county citizens could be taken on some kind of notice unilaterally deemed “adequate” (*Brief*

of Lincoln County @3), multiple and/or separate classes of police and sanitary regulations would necessarily appear – those imposed by county legislative action under the rubric of merely making a “legislative finding of fact”, before which only arbitrary notice may be provided (and which may be deemed “adequate”) - and police and sanitary regulations which require compliance with the statute. But that’s not what the statute says. The statute says “all” police and sanitary regulations must comply with its notice provisions. It does not say except for this one or that one depending on how the legislative action is characterized. It does not say five days notice is adequate under some circumstances or in some situations, and it does not allow county legislative authorities the discretion to make it five days or one day or five minute’s notice. If such exceptions were to be recognized the statute’s plain language would lose its meaning altogether.

Statutes must be interpreted and construed so that all the language used is given effect and no portion rendered meaningless. *Homeowners Assn. v. Ltd. Ptship.*, 156 Wn.2d 696, 699, ___ P.3d ___ (2006). Plain words do not require construction. *State v. McCraw*, 127 Wn.2d 281, 288, 898 P.2d 838 (1995). The legislature means exactly what it says. *Id.* Because the language of the statute is unambiguous, the court’s inquiry is at

an end. *Dependency of M.S., 156 Wash. App. 907, 913, _____ P.3d _____*
(2010).

The trial court erred in reading these plain words out of the statute.

If Resolution 117286 operated locally to adopt by reference state police and sanitary regulations, as it did, and if a statute requires 10-days minimum published notice of such, as it does, and if, absent such notice, no such statute or regulation “shall be effective”, as the statute expressly declares, then the trial court erred and respondent’s argument must fail.

RCW 36.32.120(7) applies. The resolution is a void legislative act.

B. Appellant’s claim is not time barred.

Respondent Lincoln County next argues that Hook’s claim is time barred. *Brief of Respondent Lincoln County @ 9*. For authority, Respondent County relies on the general appeal provisions of RCW 36.32.330. *Id.* The County’s reliance upon this statutory sub-section presupposes generally that RCW 36.32.120 does apply, as Hook contends, but, in any event, it’s appeal provisions do not apply to the legislative acts of a county legislative authority. A long line of Washington cases have so held, including this court.

Beginning in 1895, our Supreme Court held that this “general appeal act refers only to the usual proceedings of the board and not to special proceedings under a special statute for a special purpose.” *Lawry v. County Commissioners*, 12 Wash. 446, 448, (1895). And 25 years later, our Supreme Court made it perfectly clear the general appeal provision did not apply except where the board of county commissioners exercise judicial power. *Adams County v. Scott*, 117 Wash. 85, 200 Pac. 1112 (1921). The *Adams County Court* said:

“...appeals from the board of County Commissioners to the Superior Court must be limited to such cases as require the exercise of purely judicial powers, and therefore when the board of County Commissioners exercise political power, or legislative power, or administrative power, or discretionary power or purely ministerial power, no appeal involving a trial de novo will lie.” *Id*; see also, *Sterling v. County of Spokane*, 31 Wn.App. 467, 469, 642 P.2d 1255 (Div. III, 1982) (where a board is acting distinct from ordinary duties general appeal provision “does not apply”) (underlining added) Citing *Adams County, supra*.

Finally, this court, among others, has repeatedly and correctly held that there is no time limitation for attacking a void legislative act, as here. *Swartout v. Spokane*, 21 Wn.App. 65, 664, 586 P.2d 135, (Div. III 1978), citing *Puget Sound Alumni of Kappa Sigma Inc. v. Seattle*, 70 Wn.2d 222, 422 P.2d 799 (1967) (recognizing plaintiffs successfully challenged the

validity of a legislative act 30 years after being taken); Spokane v. Harris, 25 Wn.App. 345, 348, 606 P.2d 291 (Div. III 1980).

Hook's action is not time-barred.

C. Reconsideration and amendment were improperly denied.

Next, respondent Lincoln County asserts the trial court properly denied Hook's motion for reconsideration and amendment of his complaint. *Brief of Lincoln County @ 11-12.* Hook contends reconsideration was improperly denied because interpretation of statute is a question of law. *Homeowners, supra @ 698.* The trial court found that Resolution 117286 "did not adopt...the provisions of Title 17.10 "RCW, by reference or otherwise". *CP-199.* This is how it avoided interpretation and construction of RCW 36.32.120(7). This was error, Hook submits, as a matter of law.

The county argues the absence of a proposed amended complaint accompanying a motion extinguished Hook's right to amend. This is not the test and, the respondents cite to no decisional law in support.

Hook's reserved right and motion to amend should have been granted.

First, CR 15(a) specifically provides that leave to amend “shall be freely given when justice so requires.” *CR 15(a)*. The rule serves to facilitate proper decisions on the merits, among other things. *Caruso v. Local Union No. 690, 100 Wn.2d 343, 349, 67 P3d 240 (1983)*. The touchstone for denial of a motion to amend is the prejudice an amendment would cause to the non-moving party. *Id @ 350*.

The respondents here can show no prejudice and justice requires this case to get to the merits of all claims and causes.

In September 2008, Hook expressly reserved his right to amend his complaint “at any time” to add any other allegations constituting grounds for relief and/or for immediate release of the Claim of Lien encumbering his property. *CP-08*. In October 2009, Hook again reserved his claims for any “further relief” in his pleadings on motion for summary judgment. *CP-40*. The basis for Hook’s amendments were disclosed in the declarations filed therewith. *CP-43 (disclosing ultra vires actions by the board); CP-45-47 (exposition of weed board ultra vires acts and saying that “weed board cannot show that any of the business it has conducted, or the exercise of its authority since inception, was made pursuant to statutory requirements.”)* These and other allegations were made in response to voluminous discovery materials supplied by defendants.

In September 2010, Hook again made clear the substance of his proposed amendment when he filed his own Proposed Final Order and Judgment and requested amendment “to add other allegations constituting grounds for relief.”

Again, in October 2010, the factual allegations supporting amendment of the complaint were set out in plaintiff’s motion for reconsideration, in detail, and, again, Hook made clear his request to amend the complaint. *CP-174*. And, again, in open court, on the record, Hook asked the court for leave to amend and specifically set forth a “snapshot” of what the other defects in the legal constitution and subsequent conduct of the weed board were, i.e., defects in its subsequent alleged reorganization, the propriety of electing themselves to the board, and etc. *VRP2 @ 3, 12*.

The respondents have not claimed any prejudice and, clearly, justice requires accountability on the part of the weed board in this case – being a non-representative body of non-elected officials exercising police powers without demonstrable standards, guidelines, or safeguards. Besides, although Washington has not expressly considered the question, denying a party plaintiff a request to amend a complaint where no copy of a proposed amended complaint was attached or submitted is just such a harsh rule as other courts have rejected and which defeats the purpose of resolving

actions on the merits. *Zaidi v. Ehrlich*, 732 F.2d 1218 (1984). In *Zaidi* the court said a plaintiff's failure to attach a proposed complaint "should not have been permitted to defeat her right to amend. She made clear the substance of her proposed amendment...and it was sufficient to alert both the court and the defendants to the nature of her proposed amendment." *Id.* @ 1220. That is the case here, and it's perfectly consistent with the long-settled Washington rule disapproving of the disposition of actions for "vagrant procedural technicalities". *First Federal Sav. v. Ekanger*, 22 Wn. App. 938, 943, 593 P.2d 170 (Div. III, 1979), affirmed, 93 Wn.2d 777, 613 P.2d 129 (1950). Rules and statutes governing civil procedure must be interpreted to promote justice and to facilitate determination on the merits with the substance of an issue prevailing over matters of form. *Id.*

Reconsideration and amendments were improperly denied.

Moreover, the standard on review of summary judgment dispositions favors Hook's amendment. Appellate courts review summary judgment rulings *de novo*; all facts and reasonable inferences are construed most favorably to a non-moving party. *Bamuelos v. TSA Wash. Inc.*, 134 Wn. App. 603, 611, _____ P.3d _____, (Div. III, 206). Surely, the evidence presented to the court, making clear the substance of Hook's proposed amendment (and viewed in a light most favorable to him) give rise to

reasonable inferences that Lincoln County's Weed Board conducts its business and affairs without compliance with statutory requirements or any standards, guidelines or safeguards to control arbitrary action and abuse of discretionary power. *See, Appellant's Opening Brief @ 21-26, citing Larson v. Monorail Auth., 156, Wn.2d, 752 ____ P.3d ____ (2006).* Respondents have not contradicted Hook's allegations.

II. Conclusion

Lincoln County's Noxious Weed Control Board made and now locally enforces regulations for the control of noxious weeds under RCW 17.10. It did so by passing Resolution 117286. By law, it was prohibited, and its action could not be effective, without 10-days minimum published notice of this legislative act imposing police and sanitary regulations. The respondents are not exempted from state law and cannot unilaterally create exceptions to it. The action was a void legislative act and can be challenged at any time.

Moreover, the respondents here can show no prejudice from Hook's request to take a closer look at the conduct and activities of Lincoln County's Noxious Weed Control Board. If, in fact, as Hook contends, adequate standards, guidelines and safeguards do not exist to control its

alleged arbitrary or abusive actions (or they've been ignored), Hook should be commended for his determination in pursuing his action and permitted to drill down into this unresolved genuine issue of fact, if, as a matter of law, the court holds Respondent's actions can avoid the plain letter of the notice statute making its action ineffective altogether.

RESPECTFULLY SUBMITTED this 16 day of August, 2011.

BOSWELL LAW FIRM, P.S.



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I certify that on the 16th day of August, 2011, I caused a true and correct copy of Appellant's Consolidated Reply Brief to be served on the following in a matter indicated below:

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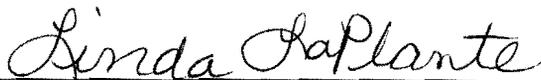
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.


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