

COURT OF APPEALS  
DIVISION II  
09 JUL -6 AM 10:06  
STATE OF WASHINGTON  
BY: [Signature]

**NO. 38394-2-II**  
**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**  
**DIVISION II**

**LUIS FLORES,**

**Appellant,**

**vs.**

**BRADLEY C. HOGGATT, et ux.,**

**Respondent,**

**APPEAL FROM THE SUPERIOR COURT**

**HONORABLE JAMES WARME**

**APPELLANT'S REPLY BRIEF**

**BEN SHAFTON**  
**Attorney for Defendant/Appellant**  
**Caron, Colven, Robison & Shafton**  
**900 Washington Street, Suite 1000**  
**Vancouver, WA 98660**  
**(360) 699-3001**

pm 7-1-07

**Table of Contents**

INTRODUCTION ..... 1

ARGUMENT..... 1

    I.    The Hoggatts Cannot Rely on RCW 58.17.210 and CCC 18.34.180  
    for the Clear Legal and Equitable Right Needed to Support Their Claim  
    for Relief. .... 1

    II.   The Hoggatts Have Misconstrued CCC 18.34.060(A). .... 8

    III.  The Trial Court’s Order Is Not in Conformity with Mr. Flores’  
    “Original Intent.” ..... 11

    IV.   Mr. Flores Is Entitled to an Award of Attorney’s Fees. .... 12

CONCLUSION..... 14

APPENDIX..... 15

    Civil Enforcement Code 2.06 ..... 16

## Table of Authorities

### Cases

<i>Burbo v. Harley C. Douglass, Inc.</i> , 125 Wn.App. 684, 692, 106 P.3d 258 (2005).....	11
<i>Busch v. Nervik</i> , 38 Wn.App. 541, 687 P.2d 872 (1984).....	7, 13
<i>City of Kennewick v. Board for Volunteer Firefighters</i> , 85 Wn.App 366, 369, 933 P.2d 423 (1997).....	2
<i>City of Spokane v. Spokane County</i> , 158 Wn.2d 661, 673, 146 P.3d 893 (2006).....	2
<i>City Spokane v. Fischer</i> , 110 Wn.2d 541, 542, 754 P.2d 1241 (1988).....	2
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 813-14, 828 P.2d 549 (1992).....	10
<i>Davenport v. Washington Education Association</i> , 147 Wn.App. 704, 197 P.3d 686 (2008).....	6
<i>Detention of Williams</i> , 147 Wn.2d 476, 491, 55 P.3d 597 (2002).....	5
<i>Esparza v. Skyrech Equipment, Inc.</i> , 103 Wn.App. 916, 938, 15 P.3d 188 (2000).....	2
<i>Ino Ino, Inc. v. City of Bellevue</i> , 132 Wn.2d 103, 143, 937 P.2d 154 (1997).....	14
<i>Internet Community &amp; Entertainment Corp. v State</i> , 148 Wn.App. 795, 803, 201 P.3d 1045 (2009).....	2
<i>Lemond v. Department of Licensing</i> , 143 Wn.App. 797, 806-7, 180 P.3d 829 (2008).....	11
<i>Lewis v. City of Mercer Island</i> , 63 Wn.App. 29, 32, 817 P.2d 408 (1991) 11	
<i>Nor-Pac Enterprises, Inc., v. Department of Licensing</i> , 129 Wn.App. 556, 564, 119 P.3d 889 (2005).....	10

<i>Quinn Construction Co., LLC v. King County Fire Protection District #26</i> , 111 Wn.App. 19, 44 P.3d 865 (2002).....	12, 13, 14
<i>Tingey v. Haisch</i> , 159 Wn.2d 652, 657, 152 P.3d 1020 (2007).....	2
<i>Tyler Pipe Industries, Inc., v. Department of Revenue</i> , 96 Wn.2d 785, 792, 638 P.2d 1213 (1982).....	1
<i>World Wide Video, Inc. v. City of Tukwila</i> , 117 Wn.2d 382, 392, 816 P.2d 18 (1991).....	2

**Statutes**

RCW 58.17 .....	3, 4
RCW 58.17.030 .....	3
RCW 58.17.210 .....	1, 2, 3, 4, 6, 7, 8
RCW 58.17.300 .....	3, 4

**Other Authorities**

CCC 18.34.020.....	4
CCC 18.34.060.....	9
CCC 18.34.060 (7).....	9
CCC 18.34.060(A).....	8, 9
CCC 18.34.180.....	1, 3, 7, 8
CCC 18.34.220.....	8
CCC 2.06.030(B).....	8
CCC 2.06.040(B).....	8

## INTRODUCTION

This brief will address the points raised by Mr. and Mrs. Hoggatt in the Brief of Respondent. It will avoid rearguing matters stated in the Brief of Appellant. The failure to address any particular point should be taken as an indication that Mr. Flores believes it was amply covered in the Brief of Appellate.

## ARGUMENT

I. The Hoggatts Cannot Rely on RCW 58.17.210 and CCC 18.34.180 for the Clear Legal and Equitable Right Needed to Support Their Claim for Relief.

The Hoggatts concede that they must demonstrate a clear legal or equitable right to obtain the relief that they seek. Brief of Respondent, p. 4; *Tyler Pipe Industries, Inc., v. Department of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982). They provided no authority as to the source of that clear legal or equitable right at the trial court or in connection with the Motion for Discretionary Review. They now seek to rely on RCW 58.17.210 and CCC 18.34.180. Neither the statute nor the ordinance grant them any rights that they can enforce.

The issue requires the construction or interpretation of a statute and a municipal ordinance. The rules of construction for municipal ordinances

are the same as those for state statutes. *City Spokane v. Fischer*, 110 Wn.2d 541, 542, 754 P.2d 1241 (1988); *World Wide Video, Inc. v. City of Tukwila*, 117 Wn.2d 382, 392, 816 P.2d 18 (1991). All statutes must be construed in accordance with the intent of the legislature. This is normally determined through the plain language of the statute. That plain meaning is found through an analysis of the entire statute itself and related statutes within the same act. *City of Spokane v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006); *Internet Community & Entertainment Corp. v. State*, 148 Wn.App. 795, 803, 201 P.3d 1045 (2009) Common sense informs the analysis, and an absurd or strained result must be avoided. *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007); *City of Kennewick v. Board for Volunteer Firefighters*, 85 Wn.App 366, 369, 933 P.2d 423 (1997); *Esparza v. Skyrech Equipment, Inc.*, 103 Wn.App. 916, 938, 15 P.3d 188 (2000).

The analysis begins with the language of the statute and the provision in the ordinance. The statute, RCW 58.17.210, reads as follows:

No building permit, septic tank permit, or other development permit, shall be issued for any lot, tract, or parcel of land divided in violation of this chapter or local regulations adopted pursuant thereto unless the authority authorized to issue such permit finds that the public interest will not be adversely affected thereby. The prohibition contained in this section shall not apply to an innocent purchaser for value without actual notice. All purchasers' or transferees' property shall comply with provisions of this

chapter and each purchaser or transferee may recover his damages from any person, firm, corporation, or agent selling or transferring land in violation of this chapter or local regulations adopted pursuant thereto, including any amount reasonably spent as a result of inability to obtain any development permit and spent to conform to the requirements of this chapter as well as cost of investigation, suit, and reasonable attorneys' fees occasioned thereby. Such purchaser or transferee may as an alternative to conforming his property to these requirements, rescind the sale or transfer and recover costs of investigation, suit, and reasonable attorneys' fees.

(Emphasis added) The ordinance, CCC 18.34.180, is virtually identical to RCW 58.17.210 and states:

- A. Except as provided in CCC 18.34.170, all purchasers or transferees of property divided in violation of this chapter shall comply with the provisions of this chapter. Each purchaser and transferee may recover his damages from any individual, firm, corporation, or agent selling or transferring land in violation of this chapter. This may include any amount reasonably spent as a result of inability to obtain any development permit and spent to conform to the requirements of this chapter as well as the cost of investigations, suit, and reasonable attorneys' fees occasioned thereby.
- B. Such purchaser or transferee may, as an alternative to conforming to these requirements, rescind the sale or transfer and recover the costs of investigation, suit, and reasonable attorneys' fees occasioned thereby.

As noted above, the statute must be construed in context and after reviewing other parts of RCW 58.17. Specifically, RCW 58.17.030 and RCW 58.17.300 must be considered. The first, RCW 58.17.030, provides in pertinent part:

...Every short subdivision as defined in this chapter shall comply with the provisions of any local regulation adopted pursuant to RCW 58.17.060.

The second, RCW 58.17.300, reads as follows:

Any person, firm, corporation, or association or any agent of any person, firm, corporation or association who violates any provision of this chapter or any local regulations adopted pursuant thereto relating to the sale, offer for sale, lease, or transfer of any lot, tract, or parcel of land shall be guilty of a gross misdemeanor and each sale, offer for sale, lease or transfer of each separate lot, tract, or parcel of land in violation of any provision of this chapter or any local regulation adopted pursuant thereto, shall be deemed a separate and distinct offense.

The Cowlitz County short subdivision ordinance makes it clear that it should be construed consistently with RCW 58.17. As CCC 18.34.020, provides:

The Board of County Commissioners deems it necessary to establish standards and procedures set forth in this chapter for the following purposes...

E. To comply with the State Subdivision Law.

The review of the statutes makes it clear that the legislature intended that all short subdivisions of land be done in accordance with local regulations. Furthermore, any person who sells a subdivided lot with first going through the required subdivision procedures is subject to criminal sanctions. In RCW 58.17.210, the legislature provided a remedy in favor of a purchaser of property that has been unlawfully subdivided.

The purchaser can attempt to obtain a lawful division of the property together with all development permits that are needed.<sup>1</sup> If successful, such a purchaser can obtain damages from the person who sold him or her the property to include but not be limited to costs expended to obtain development permits and a lawful plat. Alternatively, the purchaser can elect to rescind the conveyance of the lot.

By contrast, there is nothing in either the statute or regulation that provides for any sort of remedy in favor of a party occupying the Hoggatts' position—having sold a portion of a larger parcel in violation of a local subdivision ordinance. If the legislature had wanted to afford such a remedy to guilty sellers, it would have included such a provision in the statute. By limiting the grant of a remedy to an aggrieved purchaser, however, it excluded any remedy to the guilty seller. This conclusion follows from the canon of statutory construction known as *expressio unius est exclusio alterius*, or the expression of one thing in a statute implies the exclusion of another. *Detention of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002); *Davenport v. Washington Education Association*, 147

---

<sup>1</sup> There are other difficulties with the relief allowed by RCW 58.17.210. If a purchaser buys an unlawfully divided lot with an area less than minimum lot size as dictated by the local zoning ordinance, he or she cannot conform his property to local land use requirements. If the purchaser's seller has absconded or has no assets to pay restitution, the remedy of rescission is impractical. The purchaser is left with property that cannot be sold or otherwise used in conformity with local zoning and subdivision laws. This scenario has occurred in the experience of Mr. Flores' counsel. Unfortunately, RCW 58.17.210 makes no effective provision for the purchaser in such a situation.

Wn.App. 704, 197 P.3d 686 (2008), review granted, June 3, 2009. This rule applies to remedies. In *Davenport v. Washington Education Association, supra*, the Court held that an initiative precluding use of WEA “agency shop fees” for political purposes did not provide individual WEA members with a cause of action for relief.

Construing RCW 58.17.210 to allow a remedy to the guilty seller would also lead to an absurd result at odds with the intent of the legislature. When the legislature has criminalized the conduct of a person who sells property in violation of the local short subdivision ordinance and has authorized civil remedies against such a person for damages or rescission, the conclusion that the legislature also allowed any remedy to such a person must be considered absurd and cannot be adopted.

In cases such as this, when the guilty seller retains a portion of the property, the more sensible construction of RCW 58.17.210 would allow the purchaser the right to compel division of the property in accordance with his or her wishes rather than the reverse, as the trial court ordered. This conclusion follows from the language in RCW 58.17.210 allowing damages to the aggrieved purchaser that include money expended to conform his property to local subdivision requirements.

Such a conclusion is warranted by the facts of this case. Mr. Flores had been residing on the property for three years before he

discovered that he had been sold an unlawful lot. He was willing to correct the problem if the Hoggatts would provide a survey and agree that the property would not be re-divided for twenty-five years, both reasonable requests. The Hoggatts would not agree. The provisions of RCW 58.17.210 allow Mr. Flores to rescind. The trial court's order requires him to accept what the Hoggatts propose as a short subdivision or seek rescission of the transaction. It is unlikely that the legislature intended that rescission be his sole remedy and that he be required to let the Hoggatts divide the property in such a way as to serve their own interests.

If, in fact, rescission is Mr. Flores' sole remedy, the final order in a rescission action will require him to deed the property to the Hoggatts when they have paid the required amount of restitution. *Busch v. Nervik*, 38 Wn.App. 541, 687 P.2d 872 (1984). When that transaction has closed, the Hoggatts will own the entire property. They can then subdivide as they choose. Since they would then be the sole owners, they alone would be required to sign the short subdivision application. In other words, the Hoggatts should not be able to subdivide until rescission is complete.

One final question remains — who enforces the requirement in RCW 58.17.210 and CCC 18.34.180 that the property of the transferee conform to local subdivision requirements? The Cowlitz County

ordinance addresses that question in CCC 18.34.220. It provides as follows:

It is a civil infraction for any person to violate this chapter or assist in the violation of this chapter. Violations are subject to the provisions of Chapter 2.06 CCC. Any violation is a public nuisance. Each day a violation exists is a separate violation. Payment of any penalty imposed for a violation does not relieve a person from the duty to comply with this chapter.

Chapter 2.06 of the Cowlitz County Code is entitled “Civil Enforcement Code.” It envisions a notice of infraction issued by a law enforcement officer or a head of a county department or his or her designee. CCC 2.06.030(B); CCC 2.06.040(B). A copy of that chapter of the Cowlitz County Code is set out in the appendix. This regulatory scheme thus makes it clear that Cowlitz County will enforce its short subdivision ordinance and the duty of a transferee to conform property to the requirements of that ordinance.

At very least, however, and as discussed above, it is clear that the Hoggatts cannot find any clear legal or equitable right in RCW 58.17.210 or CCC 18.34.180.

II. The Hoggatts Have Misconstrued CCC 18.34.060(A).

The Hoggatts argue that Mr. Flores’ signature on the short subdivision application is unnecessary because CCC 18.34.060(A) does

not require by its terms that all owners sign the application. That argument ignores the facts of this case and the law.

The Hoggatts attempted to apply for a short subdivision in early 2008. Cowlitz County would not accept the application because all owners had not signed the application. (CP 12, 14) The Hoggatts then commenced this action against Mr. Flores. They alleged in paragraph 4.9 of their complaint that CCC 18.34.060 “requires that all owners of the land to be divided sign the application for short subdivision.” (CP 5)

The ordinance in question, CCC 18.34.060(A), provides as follows in pertinent part:

The preliminary application shall be in a form provided by the administrator and shall contain the following information:

7. The signature of owner(s) and developer(s)

The Hoggatts now contend that the absence of the word “all” from CCC 18.34.060 (7) means that Mr. Flores’ signature on the application was not necessary.

First of all, the language of the ordinance does not support the Hoggatts’ argument. The “(s)” placed at the end of the words “owner” and “developer” clearly indicates that if there is more than one owner or developer, each must sign the application.

Obviously, Cowlitz County is interpreting its ordinance to require all owners to sign. If there is any ambiguity in the ordinance, the interpretation of the agency charged with the interpretation of the ordinance must be given great weight. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813-14, 828 P.2d 549 (1992); *Nor-Pac Enterprises, Inc., v. Department of Licensing*, 129 Wn.App. 556, 564, 119 P.3d 889 (2005). Cowlitz County's interpretation of its own regulation must be given great weight.

Common sense tells us that the Hoggatts' proposed construction of the ordinance is absurd and that Cowlitz County's interpretation is sensible. Assume that two brothers own a fifty-acre parcel. One wants to subdivide but the other does not. The construction of the ordinance that the Hoggatts propose would allow one of the brothers to seek subdivision over the objections of the other. Cowlitz County obviously wants to avoid such a scenario. It does not want to have to commit its staff to the approval process if the owners of property disagree about what course should be taken. It also wants to avoid being party to a suit commenced by the owner who opposes the subdivision to restrain the process.

Finally, this argument undercuts the entire reason for the Hoggatts' suing Mr. Flores. If Cowlitz County was not correctly interpreting its own

ordinance, the Hoggatts should have sued Cowlitz County to require it to accept the short subdivision application without Mr. Flores' signature.

III. The Trial Court's Order Is Not in Conformity with Mr. Flores' "Original Intent."

The Hoggatts make an argument they claim is based on Mr. Flores' intention at the time of the initial sale in 2004. They refer to no evidence of what his intention might have been at that time.

Factual allegations not supported by the record are not considered by the Court of Appeals. *Lewis v. City of Mercer Island*, 63 Wn.App. 29, 32, 817 P.2d 408 (1991); *Burbo v. Harley C. Douglass, Inc.*, 125 Wn.App. 684, 692, 106 P.3d 258 (2005); *Lemond v. Department of Licensing*, 143 Wn.App. 797, 806-7, 180 P.3d 829 (2008). These issues cannot be considered for that reason.

It is worth noting, however, that if the Hoggatts had divided the property prior to the sale—as they should have done—Mr. Flores would have had the opportunity to choose to buy the property or not based upon the configuration of the short division at that time. The trial court's order, however, deprives him of that choice.

The record does indicate, however, that Mr. Flores once would have agreed to participate in the subdivision of the property if there were an appropriate survey; if the parties entered into a covenant to prevent

further division for a period of twenty-five (25) years; and if Mr. Flores agreed to pay all of his expenses and attorney's fees. (CP 46-47) The Hoggatts, however, chose to ignore Mr. Flores' requests and seek a subdivision in accordance with their own wishes.

IV. Mr. Flores Is Entitled to an Award of Attorney's Fees.

The Hoggatts claim that Mr. Flores is not entitled to an award of attorney's fees for dissolving the trial court's order because injunctive relief is the only relief they have. Their argument is not in accord with the authority they cite.

The Hoggatts rely on *Quinn Construction Co., LLC v. King County Fire Protection District #26*, 111 Wn.App. 19, 44 P.3d 865 (2002). That matter arose from a dispute over bidding for a public works contract. The King County Fire Protection District chose to accept the bid of Korsmo Construction even though it was filed between five and ten seconds after the bid deadline. Quinn Construction sought and obtained an order restraining the execution of the contract between Korsmo and the Fire Protection District pending suit. The trial court ultimately dissolved the injunction and allowed the District to contract with Korsmo. It refused, however, to award attorney's fees to the District for dissolving the injunction. Quinn appealed. The District cross-appealed and assigned error to the trial court's failure to award attorney's fees.

The Court of Appeals affirmed the denial of attorney's fees. It based its decision on the fact that plaintiff would not be entitled to any relief if it did not enjoin the District from entering into the contract.<sup>2</sup> The Court reasoned that an award of attorney's fees would not be appropriate under these circumstances because plaintiff was required to obtain the restraining order to have a right to any relief at all.

Our case bears no resemblance to *Quinn Construction Co., LLC v. King County Fire Protection District #26, supra*. In our case, the Hoggatts sought a preliminary injunction. They were not required to do so in order to preserve any right to relief. To the contrary, if Mr. Flores ultimately seeks and obtains rescission — as the Hoggatts claim he will — they will own all the property once they pay restitution as required by *Busch v. Nervik, supra*. They will then have the right to divide the property as they choose.

The rule allowing attorney's fees incurred to dissolve a wrongfully issued injunction is to deter plaintiffs from seeking relief prior to a trial on

///

---

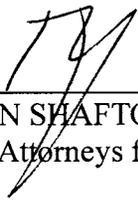
<sup>2</sup> The Court's decision was based on *Dick Enterprises, Inc. v. Metropolitan King County*, 83 Wn.App. 566, 922 P.2d 184 (1996). In that case, the Court held that an unsuccessful bidder would be required to object to the execution of the contract. If it did not do so, it would not be able to obtain any relief.

the merits. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 143, 937 P.2d 154 (1997). The holding in *Quinn Construction Co., LLC v. King County Fire Protection District #26*, *supra*, carves out an exception to this rule when injunctive relief is necessary to preserve any rights that the party seeking the injunction may have. As indicated, that is not the case here. Therefore, Mr. Flores is entitled to an award of attorney's fees.

#### CONCLUSION

The Court should reverse the order on plaintiffs' motion for summary judgment and award Mr. Flores his attorney's fees on appeal. It should also remand the matter with direction to dismiss plaintiffs' claims in this matter.

RESPECTFULLY SUBMITTED this 1 day of July,  
2009.

  
\_\_\_\_\_  
BEN SHAFTON, WSB #6280  
Of Attorneys for Flores

APPENDIX

Civil Enforcement Code 2.06

missioners. [Res. 6211, 6-6-79; Ord. 828, § VIII, 2-21-66.]

**2.04.110 Night sessions.**

The Justice Court and any Municipal Court is authorized to hold court at night sessions. [Res. 6211, 6-6-79.]

**2.04.900 Short title.**

This chapter may be referred to as the "Cowlitz County Justice Court Districting Plan." [Res. 6211, 6-6-79; Ord. 828, § XII, 2-21-66.]

**2.04.910 Severability.**

If any section, subsection, or other portion of this chapter is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such section or portion shall be deemed a separate provision of this chapter and such holding shall not affect the validity of the remaining portion of this chapter. [Res. 6211, 6-6-79; Ord. 828, § X, 2-21-66.]

**Chapter 2.06**

**CIVIL ENFORCEMENT CODE**

Sections:

2.06.010	Title.
2.06.020	Purpose.
2.06.030	Definitions.
2.06.040	Violations declared to be civil infractions.
2.06.050	Notice of infraction – Content.
2.06.060	Notice of infraction – Procedures for response.
2.06.070	Notice of infraction – Hearing procedures and rules.
2.06.080	Civil penalties assessed.
2.06.090	Failure to respond to or sign a notice of infraction a misdemeanor.
2.06.100	Collection of penalties.
2.06.110	Civil penalties – Director's authority.
2.06.120	Abatement.
2.06.130	Remedies cumulative.

**2.06.010 Title.**

This chapter shall be known as the Cowlitz County Civil Enforcement Code and shall be codified as Chapter 2.06 CCC. [Ord. 01-022, § 1, 2-12-01.]

**2.06.020 Purpose.**

The purpose of this chapter is to provide uniform procedures for the enforcement of specific county chapters with infraction authority. [Ord. 01-022, § 1, 2-12-01.]

**2.06.030 Definitions.**

For the purposes of this chapter, the following definitions shall apply:

A. "County" means Cowlitz County, Washington.

B. "Director" means county department head or elected official that administers any land use ordinance with infraction authority.

C. "Land use ordinance" means any of the following ordinances or resolutions of Cowlitz County, as they now exist or as they may hereafter be amended, and as codified in the Cowlitz County Code: No Shooting Areas, Chapter 10.20 CCC; Outdoor Public Shooting Range Development Standards, Chapter 10.22 CCC; Junk Vehicles, Chapter 10.27 CCC; Regulation of Sexually Oriented Businesses, Chapter 10.44 CCC; Private Roadways, Chapter 11.36 CCC; Solid Waste, Chapter 15.30 CCC; Manufactured Home/Mobile

Home Placement Code, Chapter 16.08 CCC; Gas and Oil Pipelines, Chapter 16.10 CCC; Development in Drainage Courses, Chapter 16.20 CCC; Floodplain Management, Chapter 16.25 CCC; Surface Mines, Chapter 16.35 CCC\*; Land Use Ordinance, Chapter 18.10 CCC; Wrecking Yard Ordinance, Chapter 18.16 CCC; Planned Unit Development, Chapter 18.30 CCC; Urban Subdivision, Chapter 18.32 CCC; Short Subdivision, Chapter 18.34 CCC; Large Lot Subdivision, Chapter 18.38 CCC; Mobile Home Parks, Chapter 18.42 CCC; Temporary Dwelling Permit Code, Chapter 18.44 CCC; Rural Subdivision, Chapter 18.50 CCC; Campground and Recreation Facilities, Chapter 18.56 CCC; Commercial and Industrial Binding Site Plan Code (BSP), Chapter 18.64 CCC; Critical Areas, Chapter 19.15 CCC. The term "land use ordinance" also includes future county ordinances that adopt the provisions of this chapter.

D. "Person" means any human being, organization, corporation, partnership, or governmental unit, and includes any of their agents or representatives. [Ord. 01-022, § 1, 2-12-01.]

\*Chapter 16.35 was repealed by Ord. 95-166. Provisions for surface mines are found within Chapter 18.10 CCC, the Land Use Ordinance.

#### **2.06.040 Violations declared to be civil infractions.**

A. Any violation of a land use ordinance as defined in CCC 2.06.030(C) is a civil infraction and a public nuisance, unless otherwise stated, and is subject to enforcement action under this chapter as well as any other means provided by the law. Neither an adjudication that a person has committed an infraction, nor payment of any penalty, shall relieve the violator from compliance with the provisions of the land use ordinance violated.

B. A civil infraction proceeding is initiated by the issuance of a notice of infraction. A notice of infraction can be issued by a director, a designee of a director, or a law enforcement officer. The issuance of a notice of infraction represents a determination that an infraction has been committed. The determination will be final unless contested as hereafter provided.

C. A notice of infraction may be served either personally or by mail. Personal service may be made by any person authorized to serve process in civil cases. Service by mail may be made by any person authorized to issue a notice of infraction, or by the Cowlitz County District Court. Service by mail shall be made by mailing the notice by certi-

fied mail, return receipt requested. The notice of infraction shall be filed with the Cowlitz County District Court promptly after it is issued. [Ord. 01-022, § 1, 2-12-01.]

#### **2.06.050 Notice of infraction – Content.**

A notice of infraction shall include the following:

A. A statement that the notice represents a determination that an infraction has been committed by the persons named in the notice and that the determination shall be final unless contested as provided in this chapter;

B. A statement that an infraction is a noncriminal offense for which imprisonment may not be imposed as a sanction;

C. A statement of the specific infraction for which the notice was issued;

D. A statement of the monetary penalty established for the particular infraction;

E. A statement of the options provided in this chapter for responding to the notice and the procedures necessary to exercise these options;

F. A statement that at any hearing to contest the determination the county has the burden of proving, by a preponderance of the evidence, that the infraction was committed, and that the person may subpoena witnesses including the person who issued the notice of infraction;

G. A statement that at any hearing requested for the purpose of explaining mitigating circumstances surrounding the commission of the infraction, the person will be deemed to have committed the infraction and may not subpoena witnesses;

H. A statement that the person must respond to the notice as provided in this chapter within 15 days;

I. A statement, which the person shall sign, that the person promises to respond to the notice of infraction in one of the ways provided in this chapter;

J. A statement that it is a misdemeanor punishable by a fine and/or imprisonment for a person to fail to sign a notice of infraction or to fail to respond to a notice of infraction as required. [Ord. 01-022, § 1, 2-12-01.]

#### **2.06.060 Notice of infraction – Procedures for response.**

A. Any person who receives a notice of infraction shall respond to such notice as provided in this section within 15 days of the date of the notice.

B. If the person determined to have committed the infraction does not contest the determination,

the person shall respond by completing the appropriate portion of the notice of infraction and submit it, either by mail or in person, to the Cowlitz County District Court. A check or money order in the amount of the penalty prescribed for the infraction must be submitted with the response. When a response which does not contest the determination is received an appropriate order shall be entered in the Court records.

C. If a person determined to have committed the infraction wishes to contest the determination, the person shall respond by completing the portion of the notice of infraction requesting a hearing and submitting it, either by mail or in person, to the Cowlitz County District Court. The Court shall notify the person in writing of the time, place, and date of the hearing, and that date shall not be sooner than seven days from the date of notice, except by agreement.

D. If a person determined to have committed the infraction does not contest the determination, but wishes to explain mitigating circumstances surrounding the infraction, the person shall respond by completing the portion of the notice of infraction requesting a hearing for that purpose and submit it, either by mail or in person, to the Cowlitz County District Court. The Court shall notify the person in writing of the time, place, and date of the hearing.

E. If any person that is issued a notice of infraction: (1) fails to respond to the notice of infraction within 15 days as required by this section; or (2) fails to appear at a hearing requested pursuant to subsection C or D of this section, the Court shall enter an order assessing the monetary penalty prescribed for the infraction. [Ord. 01-022, § 1, 2-12-01.]

#### **2.06.070 Notice of infraction – Hearing procedures and rules.**

Infractions under this chapter shall be heard and determined by the Cowlitz County District Court. Procedures for infractions under this chapter shall conform generally to the Infraction Rules for Courts of Limited Jurisdiction.

A. Any person receiving a notice of infraction may be represented by counsel. Each party to an infraction case is responsible for costs incurred by that party. No costs or attorney fees may be awarded to either party in an infraction case.

B. An attorney representing the county may, but is not required to, appear at any infraction proceeding under this chapter.

C. A hearing held for the purpose of contesting the determination that an infraction has been committed shall be without a jury.

D. The Court may consider the notice of infraction and any other written report made under oath submitted by the person who issued the notice in lieu of that person's appearance at the hearing. The person named in the notice may subpoena witnesses, including the person who issued the notice of infraction, and has the right to present evidence and examine witnesses present in court.

E. The burden of proof is upon the county to establish the commission of the infraction by a preponderance of the evidence.

F. After consideration of the evidence and argument, the Court shall determine whether the infraction was committed. Where it has not been established that the infraction was committed, an order dismissing the notice shall be entered in the Court's records. Where it has been established that the infraction was committed, an appropriate order shall be entered in the Court's records.

G. A hearing held for the purpose of allowing a person to explain mitigating circumstances surrounding the commission of an infraction shall be an informal proceeding. The person may not subpoena witnesses. The determination that an infraction has been committed may not be contested at a hearing held for the purpose of explaining mitigating circumstances. After the Court has heard the explanation of the circumstances surrounding the commission of the infraction an appropriate order shall be entered in the Court's records. There may be no appeal from the Court's determination or order. [Ord. 01-022, § 1, 2-12-01.]

#### **2.06.080 Civil penalties assessed.**

A. A person found to have committed an infraction shall be assessed a monetary penalty of \$1,000 for each violation. Any monetary penalty imposed by the Court is payable immediately, except that: (1) the Court may suspend all or a portion of the penalty on the condition that the person correct the violation within 30 days; and (2) if the person is unable to pay the penalty immediately, the Court may grant an extension to a specified date. Any willful failure to pay the penalty by the time required is a misdemeanor.

B. The monetary penalty for a second violation of the same land use ordinance within three years shall be double the penalty set forth above. The monetary penalty for a third violation of the same land use ordinance within three years shall be triple the penalty set forth above.

C. There shall be an additional penalty of \$100.00 for failure to respond to a notice of infraction. [Ord. 01-022, § 1, 2-12-01.]

**2.06.090 Failure to respond to or sign a notice of infraction a misdemeanor.**

Any person willfully violating a written and signed promise to appear in court or to respond to a notice of infraction pursuant to this chapter shall be guilty of a misdemeanor regardless of the disposition of the notice of infraction; provided, a written promise to appear in court or to respond to a notice of infraction may be complied with by an appearance by counsel. Failure to sign a notice of infraction is a misdemeanor. [Ord. 01-022, § 1, 2-12-01.]

**2.06.100 Collection of penalties.**

Civil penalties under this chapter may be collected in the same manner as other penalties, fines, or assessments imposed by the Cowlitz County District Court. [Ord. 01-022, § 1, 2-12-01.]

**2.06.110 Civil penalties – Director’s authority.**

After a notice of infraction is issued but before any court hearing, a director may suspend all or a portion of a civil penalty, on the condition that the defendant agree in writing to correct the violation by a specified date. If the defendant complies with the agreement, the director shall so notify the Court, and the Court shall dismiss the notice of infraction. [Ord. 01-022, § 1, 2-12-01.]

**2.06.120 Abatement.**

Whenever the county deems it necessary, it may take all appropriate measures to abate any violation of a land use ordinance. The costs of such measures shall be a joint and several obligation of all persons responsible for the violation. The county may recover its abatement costs through an appropriate legal action against any and all such persons. [Ord. 01-022, § 1, 2-12-01.]

**2.06.130 Remedies cumulative.**

Notwithstanding the existence or use of any other remedy, a director may seek legal or equitable relief to enjoin any acts or practices or abate any conditions which constitute a violation of any land use ordinance. All remedies specified herein are cumulative and nonexclusive and a director may seek any other remedy available at law or equity in responding to a violation of any land use ordinance. [Ord. 01-022, § 1, 2-12-01.]

**Chapter 2.08**

**DEPARTMENT OF CORRECTIONS**

**Sections:**

- 2.08.010 Findings – Action.
- 2.08.020 Control and supervision.
- 2.08.030 Accounts – Establishment.

**2.08.010 Findings – Action.**

The Cowlitz County Jail is currently under the jurisdiction of the Sheriff, Offender Services is currently under the jurisdiction of the Superior Court Judges and the Board of County Commissioners, and Probation is currently under the jurisdiction of the District Court Judges; and

The number of Cowlitz County offenders has been growing at a rapid rate in the last few years and the Jail has been exceeding capacity for many months; and

This increase in incarcerated people has had a tremendous impact on the Jail, Offender Services and Probation Departments; and

The impact on these departments will be even greater in the future due to the law and justice legislative appropriation which provides funding for more law enforcement personnel; and

It is evident the affected departments need to be combined into one unit for better coordination in reducing duplication of effort and to develop programmatic efficiencies.

Therefore, the Board of Cowlitz County Commissioners of Cowlitz County, Washington, reconfirms this Board’s action of October 22, 1990, to combine the Jail, Offender Services and Probation Departments into a Department of Corrections effective January 1, 1991. [Res. 90-204, 12-3-90.]

**2.08.020 Control and supervision.**

The Department of Corrections shall be under the immediate control and supervision of a director to be appointed by and serve at the pleasure of the Board of County Commissioners. [Res. 90-204, 12-3-90.]

**2.08.030 Accounts – Establishment.**

The Cowlitz County Budget Director shall work with the Treasurer and the Auditor to establish the accounts for the Department of Corrections in the manner required by law. [Res. 90-204, 12-3-90.]



