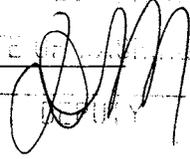


COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

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

DANIEL O. GLENN and CARLEEN
L. GLENN, husband and wife,

Appellants,

vs.

NO. 39272-1-II

**APPELLANTS'
CORRECTED BRIEF**

THURSTON COUNTY BOARD OF
HEALTH, and DIANE OBERQUELL,
KATHY WOLFE, and ROBERT
McCLOUD, in their
representative capacities
as members of the BOARD OF
HEALTH,

Defendants.

APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR THURSTON COUNTY

CORRECTED BRIEF OF APPELLANTS

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P.M. 10-26-2009

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I

ASSIGNMENT OF ERROR

The issuance of an order by the Honorable Scott A. Collier dismissing the Land Use Petition Act filed by the Appellants as the result of a conclusion that the Thurston County Board of Health was not the proper party was erroneous.

ISSUES RELATED TO ASSIGNMENT OF ERROR

A. The Trial Court's holding that the Board of Health had no independent authority to pursue or defend legal actions and thus was not the proper party to the LUPA action failed to recognize the content and impact of the provisions of law relating to the Board, including RCW 43.20.035(5) and RCW 70.05.060(1), such as the following:

- (1) the separate enforcement authority granted to the Board,
- (2) the responsibilities or imposed upon the Board and its administrative officer, and
- (3) the sanctions to which the individual members of the Board are subject in the event of a failure to enforce the matters within their jurisdiction.

B. In its interpretation of RCW 36.70C.40(2)(a), the Trial Court's conclusion that the Board of Health was not a "corporate entity" for purposes of the act failed to recognize the independent nature of the Board of Health.

II

STATEMENT OF CASE

A. Introductory Comment: This matter was dismissed upon jurisdictional grounds prior to entry of an order being issued by the Superior Court requiring a filing of a transcript of the hearing before the Board of Health. Thus, the normal approach of citing the fundamental factual background at the administrative level is not feasible, except through the written record of its decision.

B. Factual Summary: The Appellants are owners of a residential property located upon a site adjacent to Henderson Inlet. (CP 6) As the result of testing carried out by the staff of the Public Health & Social Services Department, an

agency under the supervision of the Thurston County Board of Health, a Notice of Violation indicating the onsite septic system (the OSS) violated newly issued standards was issued. (CP 11, FF #s 4-6) The failure was based upon the combined presence at one site within close proximity to the Appellants' property line of a dye inserted into the Appellants' system and a level of coliform higher than permitted. (CP 11, FF #3) As the process was set up, an appeal was taken of that decision to the supervisor of the individual issuing the decision, the County's Environmental Health Director. He affirmed the decision of his staff member. (CP 11, FF #s 8 & 9)

Thereafter, an appeal was timely taken to the County Board of Health, which is composed of the three County Commissioners. (CP 11, FF #10) A series of hearings were held, during one of which the Board directed the Department to take similar tests of the adjoining residential property. (CP 26-28, CP 13, FF #s 20 & 21) Those tests confirmed

the adjoining property deposited a level of dye at the sole site which was the basis for the finding of a failure of the Appellants' OSS and the non-compliant level of fecal coliform. (CP 13, FF #22) A notice of violation was issued to the owners of the neighboring property from which no appeal was taken. However, the Board took no notice of the test results and affirmed the decision of its employee, the Director of Environmental Health. In support of its decision which ignored the information gathered from the additional testing, in its findings of fact, it misstated the testimony of Mr. Richard Yunker by indicating the testing indicated "the link between the contamination and the septic system on Mr. Glenn's property is conclusive." (CP 13, FF #13) The conclusion of law issued by the Board stated only that the test "showed that sewage with a fecal coliform concentration of 1,300/100ml was discharged to the beach at a site that was hydraulically linked to the on-site sewage system." (CP 14, Conclusion

#1) In short, no effort was made to distinguish fecal coliform originating from the adjacent property and that, if any, from the subject property. In response to that misstatement, a declaration of Mr. Richard Yunker, the expert who had testified upon behalf of the Glenns, was submitted to the Board making clear that to which he had testified and pointing out the error, as well as the importance of the information gained through the additional testing. (CP 29-31) However, it was stated in an email message from the Board's staff to the Appellants that there was no provision in its rules to allow a reconsideration of a decision once filed.

The Appellants thereafter filed a Land Use Petition Act proceeding in Superior Court naming the Board of Health. (CP 5-9) Additionally, they sought an order staying the proceedings pending the hearing on the appeal. (CP 21-24) At the initial hearing, Counsel for the Board moved to dismiss upon the basis that the Board was not the proper

party, but rather Thurston County was the necessary party. (CP 19-20) The Trial Court granted the motion in its memorandum decision holding, in effect, that RCW 36.32.120(6) mandates that only the County government can be the proper party. (CP 61-65) The decision unintentionally cites the statute RCW 32.32.120(6) (CP 64) Thereafter, it denied a motion to reconsider in which it added, as dicta, that it would have denied the motion to stay. (CP 68-69) No final judgment was entered by the County. This appeal was filed without such an entry to insure no doubt would be present as to its timeliness. (CP 70-71)

III

ARGUMENT

The Board of Health was the appropriate party respondent in this matter.

It was the Trial Court's decision the Board of Health of Thurston County was not the proper party defendant. The Court's basic position was the statutory authority did not grant the Board of

Health authority to take action, whether to commence or defend legal action. That position did not give adequate consideration to the very unusual nature of the statutory authority under which a board of health is authorized. Further, it ignored a specific grant of authority in relation to such matters.

The County's Board of Health is created by specific statutory authority, specifically Chapter 70.05. RCW 70.05.030 reads as follows:

In counties without a home rule charter, the board of county commissioners shall constitute the local board of health, unless the county is part of a health district pursuant to chapter 70.46 RCW. The jurisdiction of the local board of health shall be coextensive with the boundaries of said county. The board of county commissioners may, at its discretion, adopt an ordinance expanding the size and composition of the board of health to include elected officials from cities and towns and persons other than elected officials as members so long as persons other than elected officials do not constitute a majority. An ordinance adopted under this section shall include provisions for the appointment, term, and compensation, or reimbursement of expenses.

The statute recognizes the possibility of several permutations of the Board of Health (BOH). This section specifically recognizes the Board of County Commissioners, acting as such, may adopt an ordinance broadening the membership of the BOH to include representatives of cities, towns, and even private parties. It also recognizes the possibility of multi-county health districts under RCW 70.46.

The reference to RCW 70.46, as tied to the Board's argument and the Court's decision, is very important. In years past, Thurston County exercised the right to have such a multi-county health district, but later opted to operate under RCW 70.05. RCW 70.46.060 sets out the powers and duties of a multi-county health district. It reads as follows:

The district board of health shall constitute the local board of health for all the territory included in the health district, and shall supersede and exercise all the powers and perform all the duties by law vested in the county board of health of any county included in the health district.

It is recognized that review of the entire chapter finds no specific reference to the authority to commence enforcement actions or to defend against claims, whether LUPA based or otherwise, arising from its actions. However, it is granted all the powers "vested in the county board of health" of a county included within the multi-county district. Further, if one were to desire to challenge an action of such a multi-county district, if that grant of powers did not include the authority to commence and defend against litigation, what party would be the proper party respondent? Under the theory that the Board of Health is not the proper party, a plaintiff/petitioner apparently would have to name all of the counties involved the district to insure that all necessary parties were named.

In at least two appellate decisions, the County Board of Health has been recognized as the proper party. The first was decided by the Supreme Court in 2004. The second was initially decided by

this Court in 2007 and this Court's decision was affirmed by the Supreme Court in November, 2008.

In procedural respects, the Supreme Court in the consolidated case of *Parkland Light & Water Company, et al v. Tacoma-Pierce County Board of Health, et al.*, 151 Wn2d 428, 90 P3d 37 (2004) implicitly dealt with the very issue presented in this matter. There, Parkland, the Lakewood Water District, and the City of Bonney Lake challenged an enactment of the Pierce County Board of Health mandating the fluoridation of the water provided to their customers. The Supreme Court ruled the action was beyond the authority of the Pierce County BOH, an agency created under the same authority as the Respondent in this matter. While the issue was not addressed directly, there was no question the Pierce County BOH was properly before the Court as the governmental entity which took the action which was challenged.

The second case was also a LUPA action in which a Board of Health was the respondent. In a

bit of irony, the case involved a matter heard by this Court involving the Thurston County Board of Health. In *Griffin v. The Thurston County Board of Health*, 137 Wn App 609, 154 P3d 296 (2007), the Petitioner filed a LUPA action appealing the Board of Health's denial of his request for a sewage system on his property. The trial court granted his appeal and reversed the BOH decision. However, Division II of the Court of Appeals reversed and reinstated the Board's decision. It then went on to the Supreme Court which, in a decision cited as *Griffin v. The Thurston County Board of Health*, 165 Wn.2d 50; 196 P3d 141 (2008), affirmed the decision of this Court. At the Court of Appeals level, the Board was represented by the counsel from the same office currently representing the Board. At the Supreme Court level, the Board was represented by the same counsel representing the Board in this matter. At neither level was the matter that the Board was not the proper party raised even though, under the theory put forth by the Board in this

case, if it were a valid issue, it would have been a jurisdictional issue. It was clear in the decision the parties accepted the fundamental fact that the Board of Health, as a separately constituted entity and as the entity which made the decision from which the appeal was taken, was the appropriate party.

Even more clearly, the decision of the Trial Court failed to give weight to specific statutory authority granted to and imposed upon the Board of Health in RCW 70.05.060. This statute sets out the powers and duties of a board organized under the chapter directly relevant to this case. The pertinent statutory text in that section reads as follows:

"Each local board of health shall have supervision over all matters pertaining to the preservation of the life and health of the people within its jurisdiction and shall:

(1) Enforce through the local health officer or the administrative officer appointed under RCW 70.05.040, if any, the public health statutes of the state and rules promulgated by the state board of health and the secretary of health;

(2) Supervise the maintenance of all health and sanitary measures for the protection of the public health within its jurisdiction;

(3) Enact such local rules and regulations as are necessary in order to preserve, promote and improve the public health and provide for the enforcement thereof . . .

(5) Provide for the prevention, control and abatement of nuisances detrimental to the public health; . . ."

Subsection (1) specifically gives the Board the authority to and imposes upon it the duty to "enforce" the public health statutes and rules promulgated by the State. Subsection (3) gives the Board both the authority to enact such rules as were found to be violated by the administrative staff of the Department and to "provide for the enforcement thereof." The Board's enforcement authority could not be more clear. There is no indication this is authority and responsibility which is imposed upon and granted to the County government in general, but rather specifically to and upon the Board.

The delegation of the joint authority to make rules and to enforce them was found to be a valid delegation of authority by Division I of the Court of Appeals in *Ford v. Bellingham-Whatcom County District Board of Health*, 16 Wn. App. 709; 558 P2d 821 (1977). The word "enforce" is not a subtle word or term in the law. It has a plain meaning, to require compliance with a law, rule, or regulation through direct action. It is clear the cited sections of the statute granted the Board of Health and its subordinate staff the explicit authority and responsibility to directly take enforcement action in these areas of activity.

Further, if this Court were to accept the position that the Board of Health has neither the authority or responsibility to take action, it would have to ignore the provisions of RCW 43.20.035(5), a citation unintentionally left out of the original filing of this Brief. That section, which is in the chapter establishing the State Board of Health, states as follows:

(5) All local boards of health, health authorities and officials, officers of state institutions, police officers, sheriffs, constables, and all other officers and employees of the state, or any county, city, or township thereof, shall enforce all rules adopted by the state board of health. In the event of failure or refusal on the part of any member of such boards or any other official or person mentioned in this section to so act, he or she shall be subject to a fine of not less than fifty dollars, upon first conviction, and not less than one hundred dollars upon second conviction.

It makes clear that, not only does the Board and its members have the duty and authority to enforce rules adopted by the State Board, it imposes a personal liability upon the member who fails to do so. If the Board did not have the authority to take enforcement action on its own, the statute would impose criminal liability upon the Board members for failing to take action which, under the rationale of the Trial Court's decision, they did not have the authority to take.

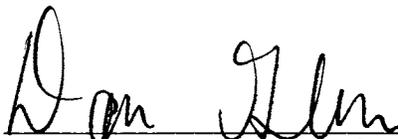
IV.

CONCLUSION

The Thurston County Board of Health, as the agency granted the specific authority and duty to not only enact, but also to enforce, the rules and regulations here at issue was the proper party in the LUPA filed. Thus, the decision of the Trial Court should be reversed and the matter remanded for further proceedings under the Petition.

DATED this 26th day of October, 2009.

GLENN & ASSOCIATES, P.S.

By 
DANIEL O. GLENN, of
Attorneys for Petitioner
WSBA #4800

COURT OF APPEALS
DIVISION II

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McCLOUD, in their]
representative capacities]
as members of the BOARD OF]
HEALTH,]
Defendants.]

NO. 39272-1-II
DECLARATION OF SERVICE

La RAE ERICKSON, certifies and declares as follows:

That I am a citizen of the United States of America and
over the age of eighteen (18) years. That on this day, the 26TH
of October, 2009, I deposited in the United States mail, a
properly addressed and stamped envelope, first class mail,
directed to:

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Elizabeth Petrich
Thurston County Prosecutor's Office
Central Office
Thurston County Courthouse
2000 Lakeridge Drive SW
Olympia, WA 98502

and containing a copy of Appellants' Corrected Brief attached hereto.

I CERTIFY UNDER PENALTY OF PERJURY, UNDER THE LAWS OF THE STATE OF WASHINGTON, PURSUANT TO RCW 9A.72, THAT THE FOREGOING IS TRUE AND CORRECT.

10/26/09 Olympia La Rae Erickson
DATE & PLACE La RAE ERICKSON