

40108-8  
NO. 38910-0-11

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

THOMAS & CASSANDRA BROTHERTON  
Appellant,

Vs.

JEFFERSON COUNTY  
Respondent

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF WASHINGTON  
FOR JEFFERSON COUNTY  
Cause Number: 08-1-00206-9  
The Honorable Judge Theodore Spearman

**BRIEF OF APPELLANT**

Thomas Brotherton  
Appellant  
255 Cascara Dr.  
Quilcene, WA 98376  
(360) 765-0901  
Date: April 15, 2010

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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**I. Assignments of Error**

- 1) The trial court erred by ignoring stipulated facts consistent with the complaint that would entitle Appellant to relief.
- 2) The trial court erred by accepting Respondent's arguments which were non-responsive and inconsistent with Appellant's complaint.
- 3) The trial court erred by not granting Appellant's motion for summary judgment when stipulated facts consistent with the complaint showed Appellant was entitled to relief.

**II. Issues Pertaining to Assignments of Error**

- 1) Should the trial court have granted Respondent's motion for summary judgment when the stipulated facts showed he was not entitled to relief? Errors number 1 and 2.
- 2) Should the trial court have granted Appellant's motion for summary judgment when the stipulated facts showed he was entitled to judgment as a matter of law? Errors number 2 and 3.

**III. Statement of Facts**

Under RCW 70.05.070, the local health officer is given the statutory authority to grant a waiver from state board of health septic requirements under certain conditions. RCW 70.05.070 specifically states that:

The local health officer may grant a waiver from specific requirements adopted by the state board of health for on-site sewage systems if:

- (1) The on-site sewage system for which a waiver is requested is for sewage flows under three thousand five hundred gallons per day;
- (2) The waiver request is evaluated by the local health officer on an individual, site-by-site basis;
- (3) The local health officer determines that the waiver is consistent with the standards in, and the intent of, the state board of health rules; and
- (4) The local health officer submits quarterly reports to the department

regarding any waivers approved or denied.

Chapter 246-272A-0420 WAC – Waiver of State Regulations states, in pertinent part:

- (1) The local health officer may grant a waiver from specific requirements of this chapter if:
  - (a) The waiver request is evaluated by the local health officer on an individual, site-by-site basis;
  - (b) The local health officer determines that the waiver is consistent with the standards in, and the intent of, these rules;...
- (2) The department shall develop guidance to assist local health officers in the application of waivers.

In June 2006, the Jefferson County Board of Health (hereinafter “Board” published a notice of public hearing that stated “The revisions proposed are being made to reflect recent revisions to the State On-Site Septic Code, now recodified at WAC 246-272-A.” CP VOL 1: 40. The changes to the Jefferson County Health code included a new section, JCC 8.15.165, which was not in the state health code. CP Vol 1: 40.

Following the public hearing, the Board enacted Ordinance 06-0719-07 on 19 July 2007 (CP VOL 1: 164-167), which replaced the old county code section 8.15 and added section JCC 8.15.165, Waiver of state or local regulations, which states, in pertinent part,:

- (1) Applicability. Any person who owns or operates an OSS may apply to the health officer for a waiver from any paragraph of these regulations.
- (2) Granting Requirements.
  - a. The health officer may grant such a waiver if it finds that:
    - i. Special circumstances exist that are not of the applicant's making;
    - ii. An unnecessary hardship will occur without the waiver;
    - iii. The health officer has determined that the waiver is consistent with the standards in, and the intent of, the public health protection purpose and objectives of these rules;

Ordinance 6-0719-07 does not state any findings of fact or recitations of studies or analyses to show Jefferson County has special circumstances that require more stringent regulations than contained in the state health code. CP VOL 1: 164.

Appellants requested a waiver of WAC 246-272A-240, per WAC 246-272A-420, to permit them to use a holding tank On-Site Septic System (OSS) for their guest cabin located in Jefferson County on October 7, 2008. CP VOL 1: 22. Jefferson County Public Health ( hereinafter "JCPH") denied that request. CP VOL 1: 33.

Appellants exhausted all administrative appeals and brought suit in Jefferson County Superior Court contesting the validity of a county ordinance,

JCC 8.15.165, which prohibits the local health officer from granting any waivers to the health code unless there is an unnecessary hardship not of the applicant's making. CP VOL 1: 1.

Defendant and Plaintiffs agreed there were no material facts in contention and both parties moved for summary judgment.

Defendant's Memorandum in support of his summary judgment motion raises two legal arguments: Plaintiff's complaint was time-barred and neither state or local regulations allow the requested waiver unless there is a special hardship. CP Vol 2: 220 – 247.

Plaintiff's summary judgment motion argues that JCC 8.15.165 was improperly enacted, it is void due to state preemption, and the waiver denial constituted unconstitutional discrimination. CP Vol 2: 242 – 257.

The trial court heard argument on Plaintiff's and Defendant's motion for summary judgment on December 4, 2009.

Mr. Alvarez, Chief Civil deputy Prosecutor for Jefferson County opened his argument by stating, "So, this is a case about a waiver, a waiver from the requirements on the on-site septic system code." RP 3.

Mr. Alvarez tells the court, "- Mr. Brotherton has asserted that that section [JCC 8.15.165] is unlawful because it's not in the state code, but I will get to why that is not of legal significance." RP 7.

Respondent argues that

...State preemption, because the County code is prohibiting what the State code would allow (sic). First of all, that's wrong on many, many levels. The first way that its wrong (sic) is that there is no state system for granting waivers. The second system that's wrong (sic) is that he would not qualify even if there was a state system for granting waivers because he still couldn't prove that it was in the public interest to have this occur. The third system – the third way that it fails is that I pointed out in my final briefing, on the briefing date October 23<sup>rd</sup>, that there are – that both the applicable WAC and the applicable RCW indicate that it's okay for the County code to be more stringent than the local and State code.

RP 8.

The trial court granted Respondent's motion for summary judgment and this appeal timely followed.

#### **IV. Argument**

On appeal from summary judgment, the Court of Appeals engages in the same inquiry as the trial court. RAP 9.12. After considering all evidence and reasonable inferences in the light most favorable to the nonmoving party, summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

Both parties here agree there are no material facts in contention and a summary judgment is appropriate.

**Issue 1: Should the trial court have granted Respondent's motion for summary judgment when the stipulated facts showed he was not entitled to relief?**

Note that the issue at bar in this case is whether Jefferson County's ordinance JCC 8.15.165 is barred by state preemption because it unlawfully conflicts with Washington State regulation WAC 246-272A-0420.

Respondent, in his Memorandum of Authorities In Support of Defendant's Motion for Summary Judgment (CP Vol 2: 220-247), argues two points of law:

- a. Plaintiff's Procedural and Substantive Attacks on the County's On-Site Septic System Code are Time-Barred, and
- b. No Discrimination Occurred Because Both The State and the Local Regulations do not allow for the waiver requested when no special hardship could be shown by these plaintiffs.

Respondent's Memorandum of Authorities, used 14 pages to recite JCPH's rationale for not following the state law. Respondent improperly confused the issue before the court by arguing the reasonableness of denying the waiver was the issue, rather than whether State law preempted JCC 8.15.165. Respondents used 2 ½ pages for their first legal argument and 5 pages for their second legal argument.

Respondent continued to confuse the issue during the summary judgment hearing. His first statement to the court asserted, "this is a case about a waiver, a waiver from the requirements on the on-site septic system code." RP 3. He continues in this same vein when he argues,

The first way that its wrong (sic) is that there is no state system for granting waivers. The second system that's wrong (sic) is that he would not qualify even if there was a state system for granting waivers...

RP 8.

## **A. The Complaint was not Time-Barred.**

Respondent argued that the action was one for declaratory relief and RCW 7.24 applied. He then argued the since RCW 7.24 has no statute of limitations, the court should follow some land use cases in determining what time limit should be allowed.

### **1. Constitutional Issue**

However, this logic is spurious. Appellants raised a constitutional issue to the court below. Article XI, section 11 of the Washington State Constitution prohibits a local regulation from conflicting with a general law of the state. If JCC 8.15.165 conflicts with WAC 246-272A-420, that is a constitutional violation.

RCW 4.16 – Limitation of Actions does not specify any limits on constitutional actions.

Neither the federal or Washington State Constitutions provide any limits on time for violations.

Since there is no valid statute of limitations on constitutional violations, Respondent's argument was spurious and their motion for summary judgment should not have been granted.

### **2. Doctrine of Equitable Tolling**

In addition, the Doctrine of Equitable Tolling tolls a statute of limitations when the defendant engages in deceptive behavior. In June 2006, Jefferson County Public Health (JCPH) published a notice of public hearing that stated "The revisions proposed are being made to reflect recent revisions to the State

On-Site Septic Code, now recodified at WAC 246-272-A.” CP VOL 1: 40. This was not true. The State code did not contain what the Board incorporated as JCC 8.15.165. This deceived the public into a belief that JCPH was merely updating their code to match the State code.

Equitable tolling is a legal doctrine that allows a claim to proceed when justice requires it, even though it would normally be barred by a statute of limitations. *Millay v. Cam*, 135 Wn.2d 193, 205, 955 P.2d 791 (1998).

When justice requires, a trial court may toll the statute of limitations; but courts should permit equitable tolling only sparingly. *State v. Duvall*, 86 Wn.App. 871, 875, 940 P.2d 671 (1997), review denied, 134 Wn.2d 1012, 954 P.2d 276 (1998); *Finkelstein v. Sec. Prop., Inc.*, 76 Wn.App. 733, 739, 888 P.2d 161, review denied, 127 Wn.2d 1002, 898 P.2d 307 (1995). “The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff.” *Millay*, 135 Wn.2d at 206, 955 P.2d 791.

Because the Defendant cloaked this ordinance in the guise of an update to match the state code and did not disclose its true effect, it was inherently deceptive. Equitable tolling should apply here because of deception by the Board and diligent pursuit by the Plaintiff.

Plaintiff’s action was not time-barred and the trial court’s granting of summary judgment to Defendant should be reversed.

**B. State regulations do not require a special hardship as a waiver condition.**

Respondent argued to the trial court that the State code also had a condition that a special hardship exist in order to permit a waiver. This is not true. WAC 246-272A-0420 only requires the local health officer to find that the waiver request meets state standards. Respondent materially misled the trial court.

The Respondent continued to confuse the issue by arguing the validity of Appellant's waiver request. This is not the issue at bar. The only issue is whether JCC 8.15.165 contradicts WAC 246-272A-0420.

Respondent made no argument on the issue at bar and thus has not shown he is entitled to summary judgment as a matter of law. The trial court's grant of summary judgment to Respondent was unjustified and should be reversed.

**Issue 2: Should the trial court have granted Appellant's motion for summary judgment when the stipulated facts showed he was entitled to judgment as a matter of law?**

Interpreting a statute presents a question of law subject to de novo review. *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994). When interpreting a statute, our fundamental duty is to ascertain and fulfill legislative intent. However, if a statute is clear, it is not subject to judicial construction and its meaning is to be derived from the statute itself.

*Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health*, 151 Wn.2d 428, 90 P.3d 37 (2004).

Under RCW 70.05.070, the local health officer is given the statutory authority to grant a waiver from state board of health septic requirements under certain conditions. RCW 70.05.070 specifically states that:

The local health officer may grant a waiver from specific requirements adopted by the state board of health for on-site sewage systems if:

- (1) The on-site sewage system for which a waiver is requested is for sewage flows under three thousand five hundred gallons per day;
- (2) The waiver request is evaluated by the local health officer on an individual, site-by-site basis;
- (3) The local health officer determines that the waiver is consistent with the standards in, and the intent of, the state board of health rules; and
- (4) The local health officer submits quarterly reports to the department regarding any waivers approved or denied.

Based on review of the quarterly reports, if the department finds that the waivers previously granted have not been consistent with the standards in, and intent of, the state board of health rules, the department shall provide technical assistance to the local health officer to correct the inconsistency, and may notify the local and state boards of health of the department's concerns.

If upon further review of the quarterly reports, the department finds that the inconsistency between the waivers granted and the state board of health standards has not been corrected, the department may suspend the authority of the local health officer to grant waivers under this section until such inconsistencies have been corrected.

This section expressly provides that local health officers have the authority to grant waivers that meet the specified conditions.

JCC 8.15.165 adds additional conditions limiting the local health officer's authority to grant waivers to the septic code. JCC 8.15.165 states:

(3) Granting Requirements.

- a. The health officer may grant such a waiver if it finds that:
  - i. Special circumstances exist that are not of the applicant's making;
  - ii. An unnecessary hardship will occur without the waiver;
  - iii. The health officer has determined that the waiver is consistent with the standards in, and the intent of, the public health protection purpose and objectives of these rules;

Thus, a waiver request may meet the state requirements and, under JCC 8.15.165, the local health officer is prohibited from granting it unless there are also “special circumstances” and “an unnecessary hardship” without it. “Special circumstances” is unconscionably broad and ambiguous.

**A. State Preemption**

The issue at bar, then, is whether JCC 8.15.165 conflicts with the State statute granting the local health officers’ specifically delegated discretionary authority by also requiring a special hardship exist.

Local boards of health supervise all matters pertaining to the preservation of the life and health of the people within its jurisdiction. RCW 70.05.060. A Board's statutory authority gives it the power to “[e]nact such local rules and regulations as are necessary in order to preserve, promote and improve the public health and provide for the enforcement thereof.” RCW 70.05.060(3).

These broad powers do not authorize the Board to act in areas where the legislature has made a more specific delegation of authority to another agency. For instance, where the Board's action usurps specifically delegated statutory

authority, a conflict can arise between the actions of one agency that negates the more specific statutory authority of another. If that occurs, the more specific statutory delegation of authority controls. *Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health*, 151 Wn.2d 428, 433, 90 P.3d 37 (2004).

This court considered whether a local regulation was invalid on grounds of conflict in *HJS Development, Inc. v. Pierce County*, 148 Wn.2d 451, 61 P.3d 1141 (2003). In *HJS*, the court recognized and applied analytical framework for determining when a conflict occurs. The court concluded that a local regulation conflicts with a statute when it permits what is forbidden by state law or prohibits what state law permits. *HJS*, 148 Wn.2d at 482, 61 P.3d 1141 (citing *Rabon v. City of Seattle*, 135 Wn.2d 278, 292, 957 P.2d 621 (1998)). In other words, when two provisions are contradictory they cannot coexist. No conflict will be found, however, if the provisions can be harmonized. *HJS*, 148 Wn.2d at 482, 61 P.3d 1141 (citing *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 29 P.3d 709 (2001)).

In this case, the Board's ordinance irreconcilably conflicts with the authority granted to local health officers under RCW 70.05.070, and the two cannot be harmonized. Essentially, the Board's ordinance is a local regulation that prohibits what state law permits: the ability of the local health officer to regulate the septic system waivers expressly granted to them by statute. The ordinance prohibiting the local health officer from granting waivers that meet state standards removes any decision-making power from local health officers with respect to the granting of waivers, and the express statutory authority granted to local health officers pursuant to RCW 70.05.070 would be rendered

meaningless. The purpose of the statute is to give local health officers, not the Board, authority over waivers.

This argument is further supported by the fact that article XI, section 11 of the Washington State Constitution prohibits a local regulation from conflicting with a general law of the state. This means that when a local regulation conflicts with a state statute, the court will invalidate the regulation. *Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health* at 434. Because an irreconcilable conflict exists, the Board's ordinance fails in its entirety and cannot be enforced against any party to the present suit.

**B. The Board did not find JCC 8.15.165 was necessary to the public health.**

Respondent argued in his Memorandum supporting Defendant's motion for summary judgment that JCC 8.15.165 was merely a more stringent regulation that state law permits the local Board of Health to make. CP Vol 2: 274 – 276.

RCW 70.118.050 Adoption of more restrictive standards states:

If the legislative authority of a county or city finds that more restrictive standards than those contained in \*section 2 of this act or those adopted by the state board of health for systems allowed under \*section 2 of this act or limitations on expansion of a residence are necessary to ensure protection of the public health, attainment of state water quality standards, and the protection of shellfish and other public resources, the legislative authority may adopt ordinances or resolutions setting standards as they may find necessary for implementing their findings.

However, in this case the Board made no findings of any sort in enacting ordinance 06-0719-07. CP VOL 1: 164.

A Board's statutory authority gives it the power to “[e]nact such local rules and regulations as are necessary in order to preserve, promote and improve the public health and provide for the enforcement thereof.” RCW 70.05.060(3).

An agency's interpretation of law may be entitled to deference “to the extent that it falls within the agency's expertise in a special area of the law,” which generally means that the statute pertains to the agency's authority and how it bases its policy decisions on that statute. *Plum Creek Timber Co. v. Washington State Forest Practices Appeals Bd.*, 99 Wn.App. 579, 588, 993 P.2d 287, 292 (2000); see also *Renton Education Ass'n v. Public Employment Relations Comm'n*, 101 Wn.2d 435, 443, 680 P.2d 40 (1984).

The Board's local conditions of “special circumstances” and “unnecessary hardship” do not fall within its statutory authority of “preserve, promote and improve the public health.”

Additionally, simply denying the local health officer his statutory authority over waivers far exceeds the scope of the “more restrictive standards” allowed by the legislature.

The Board exceeded its authority and Appellant's motion for summary judgment should be granted.

### **C. Manifest Error Affecting Constitutional Due Process Rights**

Should JCC 8.15.165 be voided for vagueness? “[S]pecial circumstances” and “unnecessary hardship” are arbitrary standards subject to wide interpretation.

This issue was not raised at trial, so Appellant requests the court to consider it under RAP 2.5(a)(3).

Under RAP 2.5(a)(3), a defendant must show how an alleged constitutional error actually affected his rights at trial. ” *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). It is this showing of actual prejudice that makes the error “manifest.” *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251. A “manifest” error is “unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed.” *State v. Lynn*, 67 Wn.App. 322, 339, 345, 835 P.2d 251 (1992). “An appellant who claims manifest constitutional error must show that the outcome likely would have been different, but for the error.” *State v. Jones*, 117 Wn.App. 221, 232, 70 P.3d 171 (2003).

An appellant who claims a manifest constitutional error that may be raised for the first time on appeal must show that the outcome likely would have been different, but for the error; it is this showing of actual prejudice that makes the error “manifest.” *State v. We*, 138 Wn.App. 716, 158 P.3d 1238 (2007).

While appellate courts may accept review of constitutional issues not raised in trial court, defendant must raise issue on appeal in accordance with rules of appellate procedure; issues not so raised, even constitutional issues, are not properly before Supreme Court. *State v. Johnson*, 119 Wn.2d 167, 829 P.2d 1082 (1992).

A statute meets due process requirements if it provides explicit standards to prevent arbitrary and discriminatory enforcement. *Bellevue v. Miller*, 85 Wn.2d 539, 536 P.2d 603 (1975). A statute which fails to provide those standards is

unconstitutionally vague. *State v. Zuanich*, 92 Wn.2d 61, 593 P.2d 1314 (1979); *Bellevue v. Miller*, supra; *Seattle v. Pullman*, 82 Wn.2d 794, 514 P.2d 1059 (1973).

Here, “special circumstances” and “unnecessary hardship” do not inform the public what circumstances would have to be present to qualify or what necessary hardships would disqualify a waiver. Since “special circumstances” and “unnecessary hardship” are entirely relative terms, they do not “prevent arbitrary and discriminatory enforcement” and JCC 8.15.165 should be held void for vagueness.

Had this issue been raised at the court below, the outcome would have been different because the terms in JCC 8.15.165 are very clearly subject to personal interpretation and do not provide sufficient guidance for consistent enforcement.

Appellant’s summary judgment motion should be granted.

**V. Conclusion**

Appellants respectfully request that this Court reverse the trial court's grant of summary judgment to the Respondent, grant Appellant's motion for summary judgment, and order Respondent to pay costs pursuant to RAP 14.3 and 18.1; and RCW 64.40.020.

Respectfully submitted this 15th day of April, 2010



By: Thomas A. Brotherton , WSBA # 37624  
Appellant

1 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

2 DIVISION II

3  
4 THOMAS BROTHERTON and  
5 CASSANDRA BROTHERTON, AND  
6 THEIR MARITAL COMMUNITY,  
7 Appellant,

8 -vs-

9 JEFFERSON COUNTY, a political  
10 subdivision of the State of Washington,  
11 Defendant.

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Court of Appeals No.: 38910-0-II

AFFIDAVIT OF SERVICE

12 STATE OF WASHINGTON )

13 County of JEFFERSON )

14 Michael Whittaker, being first duly sworn on oath, does depose and state:

15 I am a resident of Jefferson County, am over the age of 18 years and not a party to the  
16 above-entitled action, and competent to be a witness.

17 On April 15, 2010, I hand delivered a copy of the BRIEF OF APPELLANT to the  
18 Jefferson County Prosecutor's Office, 1820 Jefferson Street, Port Townsend, WA 98368.

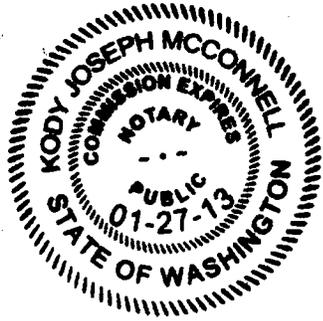
19 Dated this 15<sup>th</sup> day of April, 2010

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23 Michael Whittaker

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28 AFFIDAVIT OF SERVICE



1 SUBSCRIBED AND SWORN to before me this 15<sup>th</sup> day of April, 2010



*Kody McConnell*

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Kody McConnell  
NOTARY PUBLIC in and for  
The State of Washington  
My commission expires 1/27/13

1 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

2 DIVISION II

3  
4 THOMAS BROTHERTON and  
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6 THEIR MARITAL COMMUNITY,  
7 Appellant,

8 -vs-

9 JEFFERSON COUNTY, a political  
10 subdivision of the State of Washington,  
11 Defendant.

Court of Appeals No.: 38910-0-II

DECLARATION OF MAILING

12 STATE OF WASHINGTON )

13 County of JEFFERSON )

14 Michael Whittaker, being first duly sworn on oath, does depose and state:

15 I am a resident of Jefferson County, am over the age of 18 years and not a party to the  
16 above-entitled action, and competent to be a witness.

17 On April 15, 2010, I sent an original, postage prepaid, of the BRIEF OF APPELLANT,  
18 and a copy, postage prepaid, of the BRIEF OF APPELLANT, to the Washington State Court of  
19 Appeals, Division Two, 950 Broadway, Suite 300, Tacoma, WA 98402.

20  
21 Dated this 15<sup>th</sup> day of April, 2010

22  
23   
24 Michael Whittaker

25  
26  
27  
28 DECLARATION OF MAILING

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