

ORIGINAL

NO. 40108-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THOMAS & CASSANDRA BROTHERTON
Appellant,

Vs.

JEFFERSON COUNTY
Respondent

FILED
COURT OF APPEALS
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STATE OF WASHINGTON
BY [Signature]

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

REPLY OF APPELLANT

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Appellant
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Date: April 15, 2010

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I. Introduction

Respondent would like this to be a land use issue, but clearly it is not. The issue brought before the lower court and now this court is the legality of a county ordinance. CP 1-4. The challenged ordinance prohibits the local health officer from performing duties prescribed by the state health code and Appellant asks the court to void this usurpation of the State's authority.

Whether this ordinance is found valid or invalid, the land use will not change. The only impact is to restrict the Appellant's choice of on-site septic systems, all of which must, and do, meet the state sewage code.

This ordinance came to the attention of Appellant when he sought a county permit to install a holding tank on-site sewage system to serve an existing, structure completely compliant with county zoning code and comprehensive plan. Under the challenged county ordinance the local health officer is prohibited from even considering this waiver request. Respondent has presented no authority to support his claim that this challenge to the legality of a county ordinance specifying the duties of a county officer is a land use issue. Appellant's request was properly denied under the county ordinance. The issue here is the validity of the Jefferson County ordinance that circumscribes the local health officer's state statutory authority.

Appellant requests this court to reject the Respondent's attempts to shift the argument away from the main issue: the validity of the county ordinance.

II. This is not a land use issue.

Respondent asserts that this is about a decision on OSS permitting and cites *Harrington v. Spokane County*, 128 Wn.App.202, 114 P.3d 1233 (2005) as authority that decisions about OSS permitting are subject to LUPA. However, this is incorrect. In *Harrington*, Spokane County denied Appellant a building permit because his lot did not meet the county's Shoreline Management Plan ten foot vertical separation requirement for a septic system. The court held for Respondent because the Appellant did not exhaust his administrative remedies under the Shoreline Management Act. Nowhere in *Harrington* does the court imply that OSS decisions fall under LUPA.

In addition, the issue raised here is the validity of a county ordinance that abrogates a duty assigned to the local health officer by the state. It is not about a permitting decision.

Respondent cites RCW 36.70C.030(1) as showing OSS permitting decisions are LUPA decisions. However, this issue is not the validity of a permit decision. Appellant acknowledges that the permit decision made by the county was valid under the existing county ordinance. The issue at bar is the validity of that ordinance.

Respondent also cites *Holder v. City of Vancouver*, 136 Wn.App. 104, 147 P.3d 641 (2006), for the proposition that LUPA is the exclusive means of judicial review for land use decisions. However, again, Appellant is not challenging a land use decision. The main issue here is the validity of a county ordinance that restricts the state given authority of the local health officer.

The trial court clearly erred and its summary judgment ruling should be reversed.

III. Appellant has not abandoned any claims

Respondent asserts that all claims Appellant made to the lower court are abandoned because Appellant did not raise them to this court. He cites *Seattle-First Nat. Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 588 P.2d 1308 (1978), for the proposition that the appellate court “will not consider issues abandoned at trial and clearly abandoned in this court.” However, that case is distinguishable. In *Seattle-First* the defendant’s trial memorandum on summary judgment made a solitary reference to an “indemnity” claim, did not argue it at trial and did not argue it at the Supreme Court.

Here, all of the claims were made by Appellant to the trial court which granted Respondent summary judgment with no findings on any claim. Either the trial judge rejected them all without comment, or simply ignored them. Since the trial court made no record of its findings, we cannot now tell. However, it is significant to understanding the basis for the lower court’s ruling that Respondent focused on the permit decision in the lower court and largely ignored the issue that Appellant raised both here and there, the validity of the county ordinance. *cf.* CP V2-240

Appellant requests that this court reverse the summary judgment decision by the lower court and remand it for trial consistent with that decision. This court

is not asked to review the claims made before the lower court at this time. No claims raised before the lower court are intended to be abandoned. Appellant desires all of them to be heard by the lower court. See *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998).

The trial court clearly erred and its summary judgment ruling should be reversed.

IV. The local health officer had no discretion to abuse.

Respondent argues that “the crux of this matter is whether the LHO acted within his lawful discretion.” Respondent’s Brief 21. Once again, the issue at bar is not how this particular LHO ruled, it is whether the county ordinance that removed his discretion to approve this waiver, if he wanted to, is valid.

Under state law, the local health officer has discretion to approve waivers. WAC 246-272A-420. However, the challenged county ordinance removes the local health officer’s discretion and prohibits him from approving a waiver that meets the state sewage code. Appellant argues that the ordinance should be voided because it prohibits what state law permits. *Parkland Light and Water Co. v. Tacoma-Pierce County Bd. Of Health*, 155 Wn.2d 428, 433, 90 P.3d 37 (2004).

The trial court clearly erred and its summary judgment ruling should be reversed.

V. State law preempts the county ordinance.

Respondent argues that the county did not violate state law because it was authorized to “adopt a more stringent OSS code [than the state code] if it memorializes its reasons for doing so.” Respondent’s brief at 24. Actually, RCW 70.118.050 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. The legislative authority may identify the geographic areas where it is necessary to implement the more restrictive standards. In addition, the legislative authority may adopt standards for the design, construction, maintenance, and monitoring of sewage disposal systems.

The courts have voided county decisions which were “accompanied by no reasoning, explanation or findings of fact, however informal.” *Sisley v. San Juan County*, 89 Wn.2d 78, 85-86, 569 P.2d 712 (1977).

Clearly, the legislature intended for the local authority to be specific, to find facts that require different regulations than the more general ones adopted by the state, facts “that affect the design, construction, maintenance, and monitoring of sewage disposal systems.” However, here, the county’s findings for the ordinance that enacted the challenged ordinance were vague and nonspecific. 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.

In addition, the legislature granted a local health board the authority to deviate from state-wide standards when local conditions require it to ensure “protection of the public health, attainment of state water quality standards, and the protection of shellfish and other public resources.” They did not give the local legislative body the authority to stop or curtail programs of the State Department of Health (DOH). But that is exactly what the challenged ordinance does. DOH gave the LHO authority to permit waivers to the state sewage code if the waiver met state standards. WAC 246-272A-420. DOH then published *An Application Guide for Granting Waivers from State On-Site Sewage System Regulations, Chapter 246-272* (CP V1-54), which gives the LHO guidance on state standards. DOH has implemented a process which a LHO is authorized to use to evaluate waiver proposals. The challenged ordinance destroys that state process and should not be considered a “more stringent standard.”

The trial court clearly erred and its summary judgment ruling should be reversed.

VI. The action is not time-barred.

Respondent argues that this action is time-barred and cites two land use cases as authority, *City of Federal Way v. King Cty.*, 62 Wn.App. 530, 815 P.2d

790 (1991), and *Bellewood I & Sammamish Woods v. LOMA and City of Issaquah*, 124 Wn.App. 45, (2004), to show that land use decisions have short appeal times. Once again, Respondent is trying to convince the court that this is a land use case when it clearly is not. These cases are not dispositive since the main issue here is the validity of an ordinance that only affects the authority of the local health officer. RCW 7.24, the Uniform Declarative Judgments Act, which this action was brought under, has no time limit.

The trial court clearly erred and its summary judgment ruling should be reversed.

VII. Equitable Tolling applies.

Respondent argues that the doctrine of Equitable Tolling does not apply since there was no deception. He bases this on the fact that the ordinance itself states the limitations on the local health officer's authority. However, he misses the point. The deception arose when the county public hearing notice stated the proposed ordinance only enacted current state law. Clearly this was deceptive since the limitation on the local health officer's authority has never been in the state septic code and is quite different than the language in WAC 246-272A-420.

The deception was practiced on the public when the county made an untrue statement as to the purpose of the proposed ordinance and downplayed the extent of their creativity.

VIII. The county ordinance cannot be harmonized with state law.

Respondent completely misstates the issue once again. He argues that “the Brotherton’s are mistaken when they assert their indisputable right to a waiver.” This is the same single-minded insistence on a false concept that undoubtedly caused the errors in the court below. Again, the issue here is the validity of the local ordinance.

If the local code and the state statute can be harmonized, then there is no conflict and the local code will be deemed lawful, *Lawson v. City of Pasco*, 2010 WL 1492807, ___ P.3d ___, (WA Supreme Ct., #81636-1, 4/15/2010). Respondent asserts that the appellants in *Lawson* and this case are similarly situated,, however this is incorrect. In *Lawson* the appellants were challenging a county manufactured home ordinance that specified where they could be located and claimed it was in conflict with a state law on manufactured housing that regulated tenancies once they existed. The court found no conflict. *Lawson* is distinguishable because here both the county ordinance and the state law conflict on the authority of the local health officer.

The trial court clearly erred and its summary judgment ruling should be reversed.

IX. Equal Protection is not an issue before this court.

Respondent argues that Appellant’s equal protection claim is invalid. Appellant did not raise this issue to this court. The only issue raised is the correctness of the lower court’s summary judgment decision based on the issue

raised there of the county ordinance validity. Appellant requests the court to reverse the lower court's summary judgment and remand for proceedings in accordance with that decision. If this court finds the ordinance is invalid and reverses the summary judgment decision, then the equal protection argument will be valid and pursued in the lower court.

X. Jefferson County is not entitled to attorney's fees and costs.

Respondent admits that the lower court's decision "affirmed the LHO's denial of the Appellant's waiver request." Respondent's Brief at 36. Appellant's complaint did not raise the issue of the validity of the waiver denial. Appellant's complaint raised the issue of the validity of the county ordinance that required the local health officer to deny the waiver.

Under RCW 4.84.370(1)(b)(2) the county must have prevailed at the superior court and on appeal. However, the superior court did not reach a decision on the issue at bar, but, rather, at the strong urging of Respondent, erroneously considered only the issue of the validity of the waiver denial.

XI. 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 22nd day of June, 2010.

A handwritten signature in cursive script, reading "Thomas A. Brotherton".

By: Thomas A. Brotherton , WSBA # 37624
Appellant

