

Court of Appeals No. 40134-7-II

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

BARBARA K. FORD,

Appellant,

v.

MASON COUNTY,

Respondent.

APPELLANT'S REPLY BRIEF

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Jean Jorgensen, WSBA #34964
Attorneys for Appellant
Singleton & Jorgensen, Inc., PS
337 Park Avenue North
Renton, WA 98057
Telephone: (425) 235-4800

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***I. STANDARD OF REVIEW BASED UPON
ADMINISTRATIVE RECORD***

In Appellant Ford’s opening brief, Appellant Ford cited the correct standard of review. “When reviewing a superior court’s decision on a land use petition, the appellate court stands in the shoes of the superior court. An appellate court reviews administrative decisions on the record of the administrative tribunal, not of the superior court.” *HJS Development, Inc. v. Pierce County ex rel. Dept. of Planning and Land Services*, 148 Wn.2d 451, 61 P.3d 1141 (2003) quoting *Citizens to Preserve Pioneer Park v. City of Mercer Island*, 106 Wn. App. 461, 470, 24 P.3d 1079 (2001) (internal quotation marks omitted).

Despite Respondent Mason County’s assertion to the contrary, Appellant Ford is not asserting that the Administrative Procedures Act (“APA”) applies to this case; however, the standard of review, as previously cited and briefed, is identical to that of the APA.

Respondent Mason County does not dispute that the review is based on the administrative record without regard to the superior court decision. See Respondent’s Brief at 12.

II. THE HEARING EXAMINER DECISION LACKS SUBJECT MATTER JURISDICTION AND SHOULD BE VACATED

A. Subject Matter Jurisdiction May Be Raised on Appeal

Despite Respondent Mason County's assertion to the contrary, Appellant Ford has always contended that the proper jurisdiction for issuance of the notice of violation, which solely sought a monetary penalty, is RCW 7.80. AR 93, 96-97, 107, 121. During the hearing, counsel for the Appellant Ford argued, "And it is a civil infraction. Section of Mason County Municipal Code 15.13.020 specifically states that all such similar infractions under this regulation shall be governed by the standards and procedures set forth in Revised Code of Washington 7.8[0]." AR 121. However, even if that were not the case, Appellant Ford may raise the issue of subject-matter jurisdiction at any time.

Jurisdiction over the subject matter of an action is an elementary prerequisite to the exercise of judicial power. A judgment is void if entered without subject matter jurisdiction. The rules allow a party to raise lack of subject matter jurisdiction at any time: before there is a final judgment, CR 12(h)(3) and RAP 2.5(a)(1), and after a final judgment has been entered, CR 60(b)(5).

Bour v. Johnson, 80 Wn. App. 643, 646-47, 910 P.2d 548 (1996) (internal quotations and citations omitted).

**B. Mason County Cannot Undermine its Judicial System
and the Express Provisions in its Code**

In this case, Mason County cannot issue a Notice of Violation to compel Ms. Ford before a hearing examiner, pursuant to LUPA, as opposed to filing a civil infraction in district court, pursuant to the civil infraction statute, RCW 7.80, and applicable court rules, IRLJ. Mason County argues that it “has its own complete system of civil violations” pursuant to RCW 7.80.010(5). See Respondent’s Brief at 11. Notably, Mason County does maintain a district court to hear civil infractions, such as the infraction issued to Appellant Ford in 2007 based upon the identical set of facts (posting no longer appearing on cabin exterior). AR 035. Now, Mason County asserts that it can develop a second, alternative, system to hear certain civil infractions, which system provides its citizens with considerably less due process and subjects them to considerably greater financial penalties, pursuant to the authority of RCW 7.80.010(5). However, the Washington State Supreme Court specifically held otherwise:

The authority of local jurisdictions to issue civil infraction notices and impose and enforce related penalties is governed by chapter 7.80 RCW. This statute provides local jurisdictions two options for issuing and enforcing civil infractions. Under the default/judicial track, the entire civil infraction system is administered and supervised by the courts, from issuance of the notice to the collection of penalties. Infraction jurisdiction resides exclusively in the

district and municipal courts, *i.e.* courts of limited jurisdiction. RCW 7.80.010(1)-(4), .050(5) (“A notice of infraction shall be filed with a court having jurisdiction....”). The statute does provide that a local jurisdiction may enforce civil infractions “pursuant to its own system established by ordinance.” RCW 7.80.010(5). But, **to the extent cities do not establish a system for hearing and determining infractions, the judicial track is by default the system authorized by law.**

Post v. City of Tacoma, 167 Wn.2d 300, 311-12, 217 P.3d 1179 (2009)
(emphasis added).

Mason County disregards the express provision in its code that violations are civil infractions. Mason County Code 6.73 governs “Contaminated Properties”.¹ Significantly, MCC 6.73.100(2) provides:

The violation of any provision of this chapter is designated as Class 1 civil infraction pursuant to Chapter 7.80 RCW. Civil infractions shall be heard and determined according to Chapter 7.80 RCW, as amended, and any applicable court rules. The penalty for such violation shall be two hundred and fifty dollars per violation.

There is no basis for Mason County to disregard that express provision in its code, in order to compel Appellant Ford to proceed before the hearing examiner under a different set of rules, burdens, and penalties.

MCC 15.13 does not properly govern the civil infraction issued to Appellant Ford. The hearing examiner never had jurisdiction over this matter. The hearing examiner’s decision imposing thousands of dollars of

¹ A copy of this chapter of the Mason County Code is attached as an appendix to the Appellant’s Opening Brief.

finer and costs against Appellant Ford lacks subject matter jurisdiction and should be vacated on that basis alone.

Consequently, Appellant Ford is further entitled to relief under LUPA, pursuant to RCW 36.70C.130(1)(a) and (e):

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision;

III. APPELLANT'S CONSTITUTIONAL RIGHTS WERE REPEATEDLY VIOLATED AND THE EVIDENCE RESULTING FROM UNCONSTITUTIONAL SEARCHES SHOULD HAVE BEEN SUPPRESSED

Despite the fact that Mason County's June 5, 2001 "unfit for use" order explicitly stated that a search warrant had been obtained by the Mason County Sheriff's Department, no search warrant has ever been sought nor issued. AR 11. Appellant Ford never provided consent to anyone from Mason County to perform an administrative search of her property.

Respondent Mason County argues that because Appellant never denied entry, Respondent Mason County's conduct was legal. Notably, Mason County failed to follow its own ordinance, MCC 15.13.010, which provides:

If such premises or building be unoccupied, the director shall first make reasonable effort to locate the owner or other person having charge or control of the premises or building and request entry. If entry is refused, the director shall have recourse to remedies provided by law to secure entry.

Respondent Mason County does not even attempt to argue its entry onto Appellant Ford's private property was with her consent, subject to a search warrant, or that it falls within exigent circumstances.

Instead, Mason County argues that photographs of the interior and exterior of the cabin are viewable from a public area. Mason County performed unauthorized administrative searches on numerous occasions. AR 111-112. Mason County submitted photographs marked June 5, 2001 (AR 46), September 10, 2004 (AR 44), October 18, 2004 (AR 43), January 21, 2005 (AR 42), May 30, 2007 (AR 39-40), August 9, 2007 (AR 38), July 2, 2008 (AR 8-10), and July 15, 2008 (AR 36).² Christine Clark, the public officer who issued the July 2008 Notice of Violation, admitted that the cabin itself is not even visible from the public road, much less can one see inside the cabin's windows from the public area. AR 125.

Mason County's only rebuttal is that an officer may encroach on a driveway as that area is impliedly open to the public. See Respondent's Brief at 22. This Court explicitly rejected the argument that approaching a

² Mason County has always ignored the fact that Appellant's gutting of the interior of the cabin occurred prior to any posting. AR 62. The only thing that Appellant ever did was place an extra refrigerator inside the cabin.

house by the impliedly open access area does not constitute a search within the meaning of Const. art. 1 § 7. *State v. Johnson*, 75 Wn. App. 692, 704, 879 P.2d 984 (1994).

Before turning further to the *Johnson* case, it is important to address the critical differences between the federal and state law, as set forth by the Washington Supreme Court:

Although they protect similar interests, the protections guaranteed by article I, section 7 of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution. The Fourth Amendment protects only against “unreasonable searches” by the State, leaving individuals subject to any manner of warrantless, but reasonable searches. U.S. Const. amend. IV (“The right of the people to be secure in their ... houses ... against unreasonable searches ... shall not be violated...”); *Illinois v. Rodriguez*, 497 U.S. 177, 187, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) (“[W]hat is at issue ... is not whether the right to be free of searches has been *waived*, but whether the right to be free of *unreasonable* searches has been *violated*.”).

By contrast article I, section 7 is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not. Const. art. I, § 7 (“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”). This is because unlike in the Fourth Amendment, the word ‘reasonable’ does not appear in any form in the text of article I, section 7 of the Washington Constitution. Understanding this significant difference between the Fourth Amendment and article I, section 7 is vital to properly analyze the legality of any search in Washington.

Article I, section 7's blanket prohibition against warrantless searches is subject to a few well guarded exceptions.

Absent an exception to the warrant requirement, a warrantless search is impermissible under ...article I, section 7 of the Washington Constitution. This constitutional protection is at its apex where invasion of a person's home is involved. Exceptions to the warrant requirement are narrowly drawn, and the State bears a heavy burden in showing that the search falls within one of the exceptions.

State v. Elsfeldt, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008) (internal citations and quotations omitted).

The *purpose* of the officers' entry onto public property is dispositive of the issue of whether or not an unlawful trespass and search has occurred. *Johnson* at 704-05. The DEA officers in *Johnson* approached the private property under cover of darkness, opened an unlocked gate, and proceeded down a dirt road onto the Johnson's property, approaching a barn and never approaching the residence. After obtaining readings from a thermal imaging device used to detect a potential grow operation, the DEA agents left and returned later with a search warrant. The *Johnson* court rejected the argument that the property owner had no expectation of privacy in the accessway to his property, holding that a warrantless "search" had occurred. Just as in *Johnson*, our case involves a public health officer that was not using the driveway merely as a way to gain access to the Ford's cabin. Rather, she was using the driveway as the most convenient route on which to trespass on the

Ford property. The record demonstrates that Christine Clark entered the Ford property on July 2, 2008 for the explicit purpose of “perform[ing] a follow up inspection”. AR 005. Defendant Clark was not attempting to approach the cabin in order to contact its occupants; in fact, she knew that the cabin was unoccupied. Defendant Clark had no other purpose for approaching the cabin other than to perform yet another warrantless “inspection” which has not been denied. The record reveals her intent to “revisit the site and determine if fewer samples could be taken.” AR 005; VRP 25. Like the officers in *Johnson*, her only purpose was to conduct an official search of the property without having obtained a warrant. When an officer’s primary motivation is to investigate a possible methamphetamine lab, that “purpose does not create an exception to the search warrant requirement.” *State v. Link*, 136 Wn. App. 685, 696, 150 P.3d 610 (2007). The County cannot justify the search with the “open view” or “plain view” exception, as the “exception to the warrant requirement only applies when the law enforcement officer is lawfully standing in the place when the officer sees something* that he immediately knew was incriminating evidence.” *Id.*

Just as in *Johnson* and *Link*, this Court should reject the notion that entry of the Ford property “curtilage that are impliedly open to the public” is not a blatant violation of the protections provided by Const. art. 1 § 7

and that the open view exception does not apply to justify an unreasonable search. Notably, Mason County took photographs from all sides of the cabin, front, and back, from the upstairs outdoor deck in the back of the cabin, inside the cabin, and even of *contents* of garbage bags stored under the back deck. Notably, the specific reason the public health officers were entering the property was to perform “follow-up inspections”. AR 111-112. Just as in *Johnson*, this Court should hold that the public officer’s unreasonable intrusion requires suppression of all evidence obtained as a result. *Johnson* at 709.

The hearing examiner disregarded Appellant Ford’s constitutional rights (citing a lack of “authority to enforce, interpret, or rule on constitutional challenges) and considered all of the photographic evidence in making a decision that Appellant Ford committed the three alleged violations.³ Absent evidence obtained during the unlawful searches and seizures of Appellant Ford’s property, and given the testimony that Appellant Ford was not even observed on July 2, 2008, the date of the issuance of the citation, Appellant Ford is entitled to relief under LUPA, pursuant to RCW 36.70C.130(1)(c) and (f):

³ The photographs should never had been admissible, but even if they were, they did not prove, by a preponderance of evidence, that Appellant entered or authorized someone to enter the cabin, that she removed any postings, nor that she failed to comply with the original unfit for use order. Appellant was never barred from utilizing the outside of the cabin.

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(f) The land use decision violates the constitutional rights of the party seeking relief.

IV. ORIGINAL INSPECTION MAY NOT BE VISIBLE, BUT MUST ESTABLISH CONTAMINATION TO COMPORT WITH DUE PROCESS

Respondent Mason County asserts that its public health officer need only do a cursory, visual inspection of real property in order to ascertain whether or not it has been *contaminated* within the definition set forth in RCW 64.44.010 (“polluted by hazardous chemicals”). Such a narrow reading completely undermines the spirit and purpose of the statutory requirement to determine, based on science, not speculation, that property has been *contaminated*. See WAC 246-205-531 for types of permissible sampling procedures, which “ensure accuracy and the ability to produce similar results with repeated sampling” and which samples must be maintained with an “unbroken chain-of-custody”. Respondent Mason County completely disregards its legal obligations, in direct violation of the due process concepts afforded Appellant Ford.

Permitting a court to authorize attachment [of real property] merely because the plaintiff believes the defendant is liable, or because the plaintiff can make out a facially valid complaint, would permit the deprivation of the defendant's property when the claim would fail to convince a jury,

when it rested on factual allegations that were sufficient to state a cause of action but which the defendant would dispute, or, in the case of a mere good faith standard, even when the complaint failed to state a claim upon which relief could be granted. The potential for unwarranted attachment in these situations is self-evident, and too great to satisfy the requirements of due process absent any countervailing consideration.

Connecticut v. Doebr, 501 U.S. 1, 14, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991) (rejecting statute authorizing a judge to allow prejudgment writ of attachment of real estate without prior notice or hearing).

Mason County presented no evidence of testing of the Ford property before its posting of the initial Unfit for Use notice.⁴ Instead, it feebly argues that it has no obligation to perform testing to comply with statutory requirements as long as it “inspects” the property. Absent any testing to determine contamination, the property was never “Unfit for Use,” was never contaminated, and should never have been seized by Mason County. Consequently, since the initial seizure of the property is unconstitutional, all subsequent alleged violations should be quashed as “fruit of the poisonous tree” as they originate from exploitation of the original illegality. *See State v. Weller*, 76 Wn. App. 165, 168, 884 P.2d 610 (1994). “Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and

⁴ Nor, even after seven years later has Mason County obtained any evidence of contamination. AR 132-133.

circumstances. *It is "compounded of history, reason, the past course of decisions."* *Cafeteria Workers v. McElroy*, 367 U. S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961) (internal quotation and citation omitted). The lack of any evidence of contamination presented by Respondent Mason County and the lack of any justification for issuance of the very first order that it now accuses Appellant Ford of violating must be considered. Otherwise, instead of rectifying constitutional violations, the legal process would be turned on its head and would effectively ensure Respondent Mason County's ability to continue its due process violations. Appellant Ford is entitled to relief under LUPA, pursuant to RCW 36.70C.130(1)(c) and (f):

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(f) The land use decision violates the constitutional rights of the party seeking relief.

V. APPELLANT DOES NOT BEAR THE BURDEN OF PROVING SHE DID NOT COMMIT INFRACTION

Mason County asserts that Appellant Ford had to overcome a "rebuttable presumption" that she removed the posted notice because of her property ownership status, and it faults her for not presenting evidence of other persons removing the notice from the cabin. However, the facts are clear that Mason County seized the property in 2001 and has

prohibited Appellant Ford from enjoying her family cabin ever since. The only entity that has “dominion and control” over the cabin is Mason County.⁵ Furthermore, *State v. Summers*, cited by Respondent, is inapplicable to this case because the notice was not an “item[] in the premises”, but was merely attached to the *outside* of the property, effectively providing the whole world access to the piece of paper, not to mention Mother Nature. 107 Wn. App. 373, 389, 28 P.3d 780 (2001). Appellant Ford cannot prove that a person unknown to her, at a time unknown to her, for a reason unknown to her, removed the notice.

Mason County’s reliance on *State v. Durning*, 71 Wn.2d 675 (1967) is also misplaced. There are a statutes that permit a rebuttable presumption of criminal intent, such as RCW 9.41.030 (when a defendant is found armed with a pistol, with no license to carry, it is prima facie evidence of an intention to commit a crime of violence), or RCW 19.48.110 (permitting jury to find intent to defraud innkeeper when guest leaves without payment for hotel accommodations). Notably, the requirement to find the accused guilty of the underlying criminal act is disposed of altogether as the Respondent Mason County asserts. “[T]he constitutionality of the legislation depends upon the rationality of the

⁵ Mason County prohibited Appellant Ford from staying in her cabin.

connection between the facts proved and the ultimate fact presumed.”
State v. Higgins, 67 Wn.2d 147, 151-52, 406 P.2d 784 (1965). In this case, Mason County elected to jump past its obligation to prove any facts at all relating to whether Appellant Ford was armed without a license to carry, to use the first example, or whether Appellant Ford left the hotel without paying, to use the second example, before coming to the ultimate fact presumed, that she had criminal intent in removing the notice, to use the actual facts in this case.

RCW 7.80.100(3) provides that the burden of prove is on the government to establish that a civil infraction was committed. Even MCC 15.13.045 provides that has the burden of proof. The hearing examiner disregarded the appropriate standard of proof in making his decision.

Appellant Ford is entitled to relief under LUPA, pursuant to RCW 36.70C.130(1)(a) and (b):

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
- (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

VI. NO SUBSTANTIAL EVIDENCE SUPPORTS ANY FINDING THAT APPELLANT COMMITTED A VIOLATION

Mason County failed to satisfy its burden of showing that Appellant Ford did anything on July 2, 2008. She was not present and nobody observed her doing anything. All of the “evidence” presented to the hearing examiner should be suppressed as the fruit of the poisonous tree because Mason County never obtained a search warrant or requested consent to enter the property to repeatedly perform its “inspections”. Consequently, Appellant Ford cannot be found to have committed any violation on July 2, 2008, or at any time before or after that date. Mason County bears the burden of proof. Appellant Ford did not have the burden of rebutting anything, nor the burden of presenting evidence to show she did not commit any infraction. “A person accused of a crime has more than the right to present evidence in his defense. He has the constitutional right to sit on his hands.” *State v. Higgins*, 67 Wn.2d 147, 151, 406 P.2d 784 (1965) quoting *Barrett v. United States*, 322 F.2d 292 (5th Cir. (Ga.), 1963). Appellant Ford is entitled to relief under LUPA, pursuant to RCW 36.70C.130(1) (c):

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

VII. APPELLANT CITED VALID BASES FOR ATTORNEYS FEES ON APPEAL

RCW 7.80.140 authorizes an award of attorneys' fees to either party in a civil infraction case. The citation issued in this matter was, in fact, a civil infraction (although one that Mason County failed to process properly in a court of limited jurisdiction). Nevertheless, the statute authorizes an award of fees to Appellant Ford should she prevail.

VI. CONCLUSION

Respondent Mason County's conduct violated the constitutional rights of Appellant Ford, egregiously and on numerous levels. But the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI. *See also* Const. art. 1 § 2.

"The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter- all his force dares not cross the threshold of the ruined tenement!" *State v. Williams*, 142 Wn.2d 17, 32, 11 P.3d 714 (2000) quoting *Miller v. United States*, 357 U.S. 301, 307, 78 S.Ct. 1190, 1194, 2 L.Ed.2d 1332 (1958) (quoting remarks attributed to William Pitt, Earl of Chatham, on the occasion of debate in Parliament in March 1763).

The hearing examiner's decision should be vacated as it lacked subject matter jurisdiction. Appellant Ford's constitutional rights were repeatedly violated. The hearing examiner committed errors of law that greatly prejudiced Appellant Ford, such as requiring her to prove she did not commit a violation. Additionally, Appellant Ford was not present on the date the violations were issued, but was cited because of her status as the property owner. Under the authority of the U.S. and Washington State Constitutions, and under the authority of RCW 36.70C, LUPA, Appellant has demonstrated she is entitled to relief and that the hearing examiner's decision should be vacated.

Dated this 25th day of June, 2010.

Respectfully submitted,

SINGLETON & JORGENSEN, INC., PS

By



Jean Jorgensen
WSBA No. 34964
Attorneys for Appellant Ford

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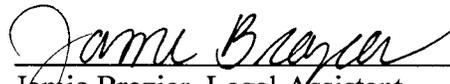
STATE OF WASHINGTON
BY _____
CITY

I declare that on this date I have caused to be faxed, emailed and delivered via messenger service, one true copy of APPELLANT'S REPLY BRIEF, to the following counsel:

John E. Justice
Law, Lyman Daniel Kamerrer & Bogdanovich, P.S.
PO Box 11880
Olympia, WA 98508-1880
Fax (360) 357-3511
jjustice@lldkb.com

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

Dated this 25TH day of June, 2010.



Jamie Brazier, Legal Assistant