

**NO. 40134-7-II**

**COURT OF APPEALS FOR THE STATE OF WASHINGTON**

**DIVISION II**

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**BARBARA K. FORD,**

**Appellant,**

**v.**

**MASON COUNTY,**

**Respondent.**

FILED  
COURT OF APPEALS  
10 MAY 27 PM 1:53  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
JENNY

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**On Appeal from Thurston County Superior Court  
Cause No. 08-2-02769-1**

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**RESPONDENT'S BRIEF**

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**May 26, 2010**

**ORIGINAL**

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**I. IDENTITY OF RESPONDENT**

Mason County is the Respondent herein.

**II. COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

- A. Does substantial evidence in the record support the hearing examiner's decision that the appellant committed three violations of the Mason County Code (MCC) and was therefore subject to payment of fines and costs authorized by MCC? (Appellant's Assignments of Error 6 and 8)
- B. Did the Hearing Examiner err in concluding that Mason County could issue civil violations under its code provisions rather than the judicial civil infraction provisions of ch. 7.80 RCW? (Appellant's Assignments of Error 1, 2, 3 and 7)
- C. Did the Hearing Examiner err in admitting evidence gathered by Mason County in support of the violations when there was no violation of MCC or the U.S. and State Constitutions in the gathering of the evidence? (Appellant's Assignments of Error 4 and 5)

### III. COUNTER-STATEMENT OF THE CASE

#### A. Factual History.

On June 2, 2001 the Mason County Sheriff's Department confiscated an alleged illegal methamphetamine drug lab at a cabin owned by the appellant, Barbara Ford. AR 002. RCW 64.44.020 provides in pertinent part:

Whenever a law enforcement agency becomes aware that property has been contaminated by hazardous chemicals, that agency shall report the contamination to the local health officer. The local health officer shall cause a posting of a written warning on the premises within one working day of notification of the contamination and shall **inspect** the property within fourteen days after receiving the notice of contamination. (emphasis added)

Mason County Public Health received notice of the confiscated lab on June 4, 2001. AR 002. The statute requires "inspection" of the property, not testing. Likewise, WAC 246-205-530 did not require Mason County to have the cabin tested before posting it "Unfit for Use." Appendix A. Pursuant to RCW 64.44.020, the cabin was inspected and designated and posted as "Unfit for Use" on June 4, 2001. AR 011-014; AR 062. Thus the inspection occurred *within fourteen days* of the notification by law enforcement. Later sampling by a certified contractor confirmed

contamination above acceptable levels. AR 114.

The cabin was re-posted on July 5, 2001 because the June 4<sup>th</sup> posting had been torn down. AR 62. Notice of the re-posting was sent to the appellant by regular and certified mail. AR 003. It was received at her residence and signed for on June 7, 2001. AR 024. The appellant had ten days to request a hearing before the local Health Officer. AR 014; RCW 64.44.030. The Order was never contested. AR 026. It therefore became res judicata and the Hearing Examiner correctly decided not to reconsider its validity seven years later. *See, e.g., Marley v. Dep't of Labor and Indus.*, 125 Wn.2d 533, 886 P.2d 189 (1994).

The appellant claims that Mason County “shifted” the responsibility to the appellant to develop a “work plan” prepared by a certified decontamination contract and approved by the County. Appellant’s Brief at 13.

However, pursuant to RCW 64.44.050:

An owner of contaminated property who desires to have the property decontaminated, demolished, or disposed of shall use the services of an authorized contractor unless otherwise authorized by the local health officer. *The contractor and property owner shall prepare and submit a written work plan for decontamination, demolition, or disposal to the local*

*health officer . . . If the work plan is approved and the decontamination, demolition, or disposal is completed and the property is retested according to the plan and properly documented, then the health officer shall allow reuse of the property. . . . The property owner is responsible for: (a) The costs of any property testing which may be required to demonstrate the presence or absence of hazardous chemicals; and (b) the costs of the property's decontamination, demolition, and disposal expenses, as well as costs incurred by the local health officer resulting from the enforcement of this chapter. (emphasis added)*

No work plan was proposed under this statute until June 26, 2008, when Mason County was contacted by a meth lab clean up contractor (“the contractor”) who represented the appellant and wanted to discuss a “sampling plan” for the cabin. AR 004. The appellant admitted in a letter to the contractor that she had gutted the interior of the cabin and placed a refrigerator inside the cabin “after” the property was posted. AR 033-34.

The contractor contacted Mason County again on July 1, 2008 to discuss reducing the number of samples required. AR 005. Christine Clark, from Mason County, visited the property on July 2, 2008. *Id.* She observed that the cabin had been entered and that items that were previously in the cabin, counters, drawers, insulation and flooring, **were now outside the house.** *Id.* There

was a container of toys inside the house not present during an earlier inspection. *Id.* Finally, the notice of “Unfit for Use” had been removed again. AR 006.

On July 15, 2008 a Notice of Civil Violation was issued to the appellant notifying her of three violations of Mason County Sanitary Code. First of section 6.73.090(2) for entering or authorizing the entry of the cabin after it was posted “Unfit for Use” without approval of the county health officer. This violation was based on the observations made by Christine Clark On July 2, 2008 and the admission in the letter from Barbara Ford to her contractor. AR 050. Second, of section 6.73.090(7) for removing the notice of “Unfit for Use”. *Id.* Finally, the appellant was notified of a violation of section 6.73.090(7) for authorizing or completing work inside the cabin without a County Health Department approved plan. *Id.* A hearing was scheduled for August 11, 2008. AR 051. The County recommended a fine of \$1,000 per violation, together with staff and hearing costs. AR 007.

The hearing on the violations was held on September 23, 2008. HEX 2008-00031, CP 58-67. The hearing examiner found:

1. That the appellant, or someone she authorized, entered

the cabin after it was posted “Unfit for Use”. CP 59-60.

2. That the appellant removed or authorized removal of the Notice of “Unfit for Use”. CP 60.

3. That the appellant conducted work on the cabin, or authorized work to be done on the cabin, without an approved work plan. CP 60.

The Examiner declined to specifically rule on the appellant’s various constitutional objections, but did note that “there is no evidence health officers purposely conducted secret inspections or entered the property beyond areas open to presumed invitees.” CP 62. And finally, [appellant] never denied health officers permission to enter her property before the Notice of Civil Violations was issued. *Id.* As a result, the Hearing Examiner concluded “that there were no violations of County ordinance when photographic evidence was gathered.” *Id.*

Based on the findings of fact, the Hearing Examiner concluded that the violations of Mason County Code 6.73.090(a)(2); (a)(5); and (a)(7) were committed. CP 63-64. The Examiner issued fines of \$1,000 for each violation for a total of

\$3,000, with \$2,375 suspended if the decontamination work was completed by December 31, 2008. \$625 of the fine was due within thirty days and hearing examiner costs of \$350 and Mason County's enforcement costs were due within thirty days as well. CP 64-65. The Hearing Examiner's decision was issued October 23, 2008. CP 65.

**B. Procedural History.**

Following the Hearing Examiner's decision, the appellant filed a complaint in Thurston County Superior Court seeking review under LUPA and included claims for damages as well. CP 4-32; 33-67. The trial court conducted a LUPA hearing and issued a decision affirming the Hearing Examiner's decision in all respects. CP 123-131. This appeal of the trial court's LUPA decision followed. CP 132-141. The damages claims were not part of the LUPA decision, nor are they part of this appeal. Appendix B.

**IV. LAW AND ARGUMENT**

**A. Standard of Review.**

The appellant challenged the hearing examiner's decision in the trial court pursuant to LUPA. CP 35. Thus, LUPA's standards of

review, set forth below, should apply in this Court.

**1. The appellant cannot assert that LUPA does not apply for the first time on appeal.**

The appellant argues for the first time on appeal that LUPA does not apply to her appeal of the Hearing Examiner's decision to this Court. *Appellant's Brief*, at 16. She asserted that LUPA did apply in the trial court. CP 35. Her argument to the contrary cannot be asserted for the first time on appeal. *Sourakli v. Kyriakos, Inc.*, 144 Wn.App. 501, 509, 182 P.3d 985 (2008), *rev. denied*, 165 Wn.2d 1017 (2009) ("An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal.")

The appellant also argues for the first time on appeal that the Administrative Procedures Act (APA) applies to this appeal. Notwithstanding the failure to raise this argument below, the APA definition of "agency" is limited to a "state board, commission, department, institution of higher education, or officer" and an "agency action" is the "licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or

withholding of benefits" by such an "agency." RCW 34.05.010(2),(3). Mason County is not a state agency to which the APA applies. *See, e.g., Entm't Indus. Coalition v. Health Department*, 153 Wn.2d 657, 667 (2005) ("The health board is not an agency under the APA, and therefore its actions were not "agency actions" under the APA.")

In sum, LUPA, not the APA, applies to the appeal of the Hearing Examiner's decision.

**2. LUPA also applies to this appeal because Mason County has its "own system" of civil violations.**

In *Post v. City of Tacoma*, 167 Wn.2d 300, 308-312 (2009), the Court examined whether LUPA applied to "notices of violations and assessments of penalties" issued by Tacoma to a landowner for code violations. The definition of a "land use decision" to which LUPA applies includes:

The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

RCW 36.70C.020(1)(c).

The Court in *Post* explained that authority for local governments to issue civil infraction notices and enforcement of related penalties derives from ch. 7.80 RCW. *Id.* at 311. 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.” *Id.* (emphasis added).

Alternatively, “a local jurisdiction may enforce civil infractions ‘pursuant to its own system established by ordinance.’” *Id.* at 311-312, *citing* RCW 7.80.010(5). Under Tacoma’s code, a person could only appeal the “first notice of violation and first civil penalty . . . Tacoma provides no process for hearing and determining subsequent infractions.” *Id.* at 312. The Court held that such a *partial* system of appeal did not satisfy RCW 7.80.010(5)’s requirements and thus Tacoma did not have “its own system established by ordinance.” *Id.* Tacoma was therefore “required by chapter 7.80 RCW to follow the legislature’s default system and enforce its infractions in courts of limited jurisdiction.”

*Id.* at 312. Because “LUPA does not apply when a location jurisdiction is required by law to enforce” its ordinances in a court of limited jurisdiction, LUPA’s time limits did not bar the challenge in *Post. Id.*

In contrast, Mason County has its own complete system of civil violations, which does not limit appeals of subsequent notices and penalties as was the case in *Post.* Chapter 15.13 MCC. Appendix C. The holding in *Post* is therefore not applicable. Thus, even if appellant were permitted to raise this argument for the first time on appeal, it fails because Mason County has its own system of civil violations to which LUPA does apply.

### **3. LUPA’s standard of review.**

This case does involve a land use decision, namely the enforcement of a the appellant’s compliance with the County’s Sanitary Code, Title 6.73 MCC. RCW 36.70C.020(2)(c) (“The enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, *maintenance*, or use of real property.” (emphasis added)) Thus judicial review is governed by LUPA. RCW 36.70C.030. *See, e.g., Isla Verde Intern. Holdings, Inc. v. City of Camas*, 146 Wash.2d 740, 49 P.3d 867 (2002).

Under LUPA, the court of appeals stands in the same position as the superior court and reviews the decision of the "local jurisdiction's body or officer with the highest level of authority to make the determination" RCW 36.70C.020(1); *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn.App. 461, 474, 24 P.3d 1079 (2001). Review is based on the administrative record. *Paulina v. City of Vancouver*, 122 Wn.App. 520, 525, 94 P.3d 366 (2004).

LUPA allows the Court to "grant relief only if the party seeking relief has carried the burden of establishing that one of the standards in RCW 36.70C.130(1)(a)-(f) ] has been met." RCW 36.70C.130(1). Issues of law are reviewed de novo under subsection (b), the "error of law" standard. *See Isla Verde*, 146 Wash.2d at 751. The Court reviews factual findings for substantial evidence under subsection (c). Substantial evidence is evidence sufficient to convince a rational, unprejudiced person that a finding is true. *Id.* at 751-52. "Judicial review of factual issues and the conclusions drawn from the factual issues shall be confined to the record created by the quasi-judicial body or officer." RCW 36.70C.120(1). This standard of review is no different than the standard asserted by appellant

under the APA. *Appellant's Brief*, at 16.

The appellant sought relief in the trial court under three sections of RCW 36.70C.130(1): (b), (c) and (f):

- (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;
- (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.

CP 89.

**B. The Hearing Examiner did not Erroneously Interpret the Law Regarding the Issuance of the Notice of Civil Violation.**

The County issued the appellant a Notice of Civil Violation pursuant to Mason County Code 15.13.040. AR 049-051. That code provision states in pertinent part:

(a) Authority. A notice of civil violation may be issued and served upon a person if any activity by or at the direction of that person is, has been, or may be taken in violation of the applicable codes under Section 15.03.005. A landowner, tenant, or contractor may each be held separately and joint and severally responsible for violations of the applicable codes and regulations.

(b) Notice. A notice of civil violation shall be deemed served and shall be effective when posted at the location of the violation and/or delivered to any person at the location and/or mailed first class to the owner or other person having responsibility for the location and not returned.

The appellant argues that the County “civil violations” are invalid because they are in excess of the dollar amounts set forth in ch. 7.80 RCW. The hearing examiner did not err in rejecting this argument. The appellant also argues that the official who issued the civil violations had to personally witness the violation or file a written statement with the issuing court under RCW 7.80.050. This argument was also properly rejected.

- 1. Mason County is permitted to have its own system of civil violations and was not required to proceed under RCW 7.80.050 or apply its limitations.**

RCW 7.80.010(5) provides, “Nothing in this chapter [ch.

7.80 RCW] prevents any city, town, or county from hearing and determining civil infractions pursuant to its own system established by ordinance.” Mason County has its own system established by ordinance. Chapter 15.13 MCC. Appendix C.

Because it has its own system of civil violations, the County did not issue the appellant a Notice of *Civil Infraction* under RCW 7.80.050 and Mason County Code 15.13.020(d). VRP 16. A civil infraction is appealable to the courts of limited jurisdiction, not a hearing examiner. RCW 7.80.040. A Notice of Civil Violation is a different enforcement mechanism. *See, e.g., Post v. City of Tacoma, Dept. of Public Works, Bldg. & Land Use, supra*, 167 Wn.2d at 311.. *Post* specifically noted that local government’s are not required to utilize the default judicial system of enforcement if they have their own system pursuant to County ordinance. *Id.* Thus, the Hearing Examiner correctly concluded that the provisions of RCW 7.80.050 did not apply to the Notice of Civil Violation issued by Mason County. The Notice of Civil Violation is not invalid because it was not issued as a Civil Infraction pursuant to RCW 7.80.050.

**2. The Hearing Examiner did not err in upholding the amount of the penalty.**

Mason County Code § 15.13.050 provides in pertinent part:

(a) Authority. A person who violates any provision of the development code, or who fails to obtain any necessary permit, who fails to comply with the conditions of a permit, or who fails to comply with a notice of civil violation shall be subject to a civil fine.

(b) Amount. The civil fine assessed **shall not exceed one thousand dollars for each violation**, except where the hearings examiner is authorized under this chapter to double the fine. Each separate day, event, action or occurrence shall constitute a separate violation. (emphasis added)

Pursuant to Mason Count Code § 15.13.045(d)(3)(B), the Hearing Examiner applied the following factors to determine that the maximum amount per violation was warranted:

- (i) Whether the person responded to staff attempts to contact the person and cooperated with efforts to correct the violation;
- (ii) Whether the person failed to appear at the hearing;
- (iii) Whether the violation was a repeat violation or if the person has previously violated the applicable codes, regulations, and ordinances;
- (iv) Whether the person showed due diligence and/or substantial progress in correcting the violation;
- (v) Whether a genuine code interpretation issue

exists; and  
(vi) Any other relevant factors.

CP 64.

The appellant does not challenge the Hearing Examiner's finding that the above factors justified the maximum penalty and thus it is a verity. Instead, she claims that RCW 7.80.120 applies and limits the amount of the fine. However, RCW 7.80.120 applies to *civil infractions*, not to a civil violation. The appellant has cited no authority holding that a local government which chooses to enact its own system of enforcement pursuant to RCW 7.80.010(5) cannot pursue violations of its code through the civil violation process in front of a hearing examiner rather than through a civil infraction process in the courts. CP 61.

The appellant instead argues that MCC § 15.13.050 is invalid under Article XI, § 11 of the State Constitution because it allegedly conflicts with RCW 7.80.120. No such conflict exists. In *State v. Kirwin*, 165 Wash.2d 818,825-26 (2009), the court explained:

We presume an ordinance is valid unless the challenger can prove the ordinance is unconstitutional. (citation omitted) An ordinance may be deemed invalid in two ways: (1) the ordinance directly conflicts with a state statute or (2) the

legislature has manifested its intent to preempt the field. (citation omitted). Article XI, section 11 of our state constitution allows local governments to create “such local police, sanitary and other regulations as are not in conflict with general law.” A local regulation conflicts with state law where it permits what state law forbids or forbids what state law permits. (citation omitted). . . The focus of this inquiry, therefore, is on the substantive conduct proscribed by the two laws. A conflict arises when the two provisions are contradictory and cannot coexist. (citation omitted).

In this case, the appellant does not specify whether she is claiming a direct conflict, or an intent to “preempt the field.”

Obviously, RCW 7.80.010(5) precludes an argument that the State intended to preempt the field. Thus, the appellant must establish a direct conflict. As the Court explained in a similar situation in

*Kirwin*:

The ordinance and the statute at issue here prohibit the same behavior-littering. Kirwin correctly observes the ordinance designates littering as an offense subject to arrest while the state statute does not. This difference, however, does not create an impermissible direct conflict; the focus of the article XI, section 11 inquiry is on the conduct proscribed by the two laws (a question of substance), *not their attendant punishments* (a question of magnitude). The two laws coexist because, *although the degree of punishment differs*, their substance is nearly identical and therefore an irreconcilable conflict does not arise. Because there is no direct conflict, unless the state littering statute expresses intent to preempt local entities from either proscribing littering or setting

their own degrees of punishment for littering, then the ordinance will survive scrutiny under article XI, section 11.

*Id.*, 165 Wn.2d at 826-27 (emphasis added).

As in *Kirwin*, Mason County's ordinance does not permit *conduct* prohibited by state law, or prohibit *conduct* expressly permitted by state law. The fact that it provides for a higher penalty does not, therefore, create an irreconcilable direct conflict.

The Hearing Examiner did not err in determining that the appropriate penalty under MCC § 15.13.050 and § 15.13.045(d)(3)(B) could exceed the amounts set forth in RCW 7.80.120.

**3. The Hearing Examiner Did Not Erroneously Interpret the Law When Determining Costs.**

MCC § 15.13.055 provides:

(a) Authority. Notwithstanding any other code provision, a person who violates any provision of any code or regulation under MCC Section 15.03.005, or who fails to obtain any necessary permit, or who fails to comply with a notice of civil violation shall be subject to enforcement, hearings examiner, and abatement costs. Costs in year 2002 shall be fifty-two dollars and thirty cents per hour for any employee of Mason County, except that department heads and managers, elected officials, and deputy prosecutor

time shall be seventy-five dollars per hour. For every year after 2002, the rate may be adjusted according to the Consumer Price Index.

(b) Amount. The review authority shall keep an itemized account of the time spent by employees of the county in the enforcement or abatement of any code or any regulation under Section 15.03.005. The review authority may request costs be ordered by the hearings examiner. The hearing examiner may order costs.

(c) Notice. Upon completion of the work for which cost recovery is proposed, the review authority shall provide notice by certified mail return receipt requested to the property owner or other person on whose behalf the costs were incurred.

In this case the Hearing Examiner awarded the County \$350 in costs for the cost of the Hearing Examiner. CP 64. There is no challenge to that amount. The Examiner also awarded the costs of enforcement to be determined by the County. CP 65. The County provided an itemized account of time to the appellant establishing costs in the amount of \$1615.96. AR 053-54. The appellant does not argue that MCC § 15.13.055 was not complied with by the County.

The only argument against the award of costs is another reference to the civil infraction statute and a claim that RCW 7.80.140 conflicts with MCC § 15.13.055. As explained above, there

is no irreconcilable conflict simply because it permits a larger category of costs to be awarded. MCC § 15.13.055 does not permit conduct prohibited by state law and does not prohibit conduct expressly permitted by state law.

The Hearing Examiner did not err in awarding costs to the County in the amount of \$1965.96.

**C. The evidence submitted by the County in support of the civil violations was not gathered in violation of Mason County Code or the U.S. and State Constitutions.**

The appellant argues that the evidence presented in support of the civil violations was gathered in violation of Mason County Code and the U.S. and State Constitutions because there was no search warrant obtained by Mason County when it posted the property, took pictures of the exterior of the cabin and made observations of the area around the exterior of the cabin. The Hearing Examiner concluded that there were no violations of county ordinance when the objected to evidence was gathered. He did not consider the constitutional arguments. CP 62.

The appellant suggests that there was a violation of MCC 6.73.050. Appellant's Brief at 27. That section of the Mason

County Code states that if entry to property to conduct an inspection or enforce the County's Code "is refused, the health officer, building official, fire marshall or their designee shall have recourse to the remedies provided by law to obtain entry." As the Hearing Examiner noted, the appellant "never denied health officers permission to enter her property before the Notice of Civil Violation was issued." CP 62. This fact is unchallenged and is thus a verity on appeal. The appellant has therefore failed to establish a violation of MCC 6.73.050.

She also claims that the County's evidence was gathered in violation of the U.S. and State constitutions. The Fourth Amendment to the United States Constitution and article I, section 7, of the Washington State Constitution protect citizens from unreasonable searches and seizures. *State v. Davis*, 86 Wash.App. 414, 420, 937 P.2d 1110 (1997). Whether an officer's presence on an individual's property is unconstitutional depends on the totality of the circumstances surrounding the officer's entry. *State v. Seagull*, 95 Wash.2d 898, 902, 632 P.2d 44 (1981). Officers may encroach on areas of the curtilage that are impliedly open to the public, such as access routes, or a walkway leading to a residence and "are free to

keep their eyes open” while doing so. *Seagull*, 95 Wash.2d at 902, 632 P.2d 44. An officer may intrude to the same extent as a reasonably respectful citizen. *Seagull*, 95 Wash.2d at 902, 632 P.2d 44. *See, also, State v. Myers*, 117 Wash.2d 332, 344, 815 P.2d 761 (1991) (state Supreme Court reiterated the rule that a police officer who approaches a residence in connection with an investigation, from a common access route, does not violate the resident's reasonable expectation of privacy and that a front porch is not a constitutionally protected area.)

In this case, the evidence presented in support of all three violations was as follows:

1. Mason County observed and photographed various items *outside the cabin* that appeared to have originated inside the cabin. CP 59. This finding is not challenged as unsupported by substantial evidence and is therefore a verity on appeal. *First Pioneer Trading Co., Inc. v. Pierce County*, 146 Wash.App. 606, 617, n. 5 (2008).

2. The testimony from Christine Clark was that she never entered the cabin. AR 124. This finding is not challenged.

There is no evidence that any evidence gathered by Mason

County and found by the Hearing Examiner to support the violations was obtained from an area outside areas of the curtilage that are impliedly open to the public. The appellant claims that the “cabin is not viewable from any public area” citing AR 124-25.

However, that portion of the record states as follows:

Q. Can you see the cabin from the public road?

A. If you’re standing in the driveway. Yes.

AR 125.

This factual assertion is uncontested in the record. Thus, no search warrant was required to gather the evidence admitted in support of the violations and no constitutional violation occurred. In addition, even if the evidence appellant complains about were not considered, the appellant *admitted* to the clean up contractor that she had the cabin gutted and installed a fridge, which supports Counts I and III even without the County’s observations and photographs. AR 033-34.

**D. The Hearing Examiner Did not Erroneously Interpret the Law When Determining a Rebuttable Presumption that the Appellant Removed the Notice.**

The Hearing Examiner found that a Notice of “Unfit for Use” was posted on appellant’s cabin on August 9, 2007 and was not

present on July 2, 2008. CP 60. Those findings are not challenged and are thus verities on appeal. The appellant offered no evidence that other persons or forces removed the Notice or had control of the cabin during this time period. When a person has dominion and control over a premises, it creates a rebuttable presumption that the person has dominion and control over items in the premises. *State v. Summers*, 107 Wash.App. 373, 389, 28 P.3d 780 (2001), *review granted and cause remanded on other grounds*, 145 Wash.2d 1015, 37 P.3d 289 (2002). The appellant has cited no authority for the proposition that a “rebuttable presumption” was legally erroneous in this case. The County still had the burden of proving the violation by a preponderance of the evidence, despite the rebuttable presumption that the appellant removed or authorized removal of the notice created by the appellant’s dominion and control of the cabin. *See, e.g., State v. Durning*, 71 Wash.2d 675, 677 (1967) (statute creating rebuttable presumption for crime of unlawful entry did not improperly shift burden of proof to defendant “of proving himself free from guilt.”) It did so by evidence that the appellant owned and controlled the cabin during the relevant time period; that cabin was posted in August, 2007;

and that the Notice was not present on July 2, 2008. The appellant was in fact found guilty of the same offense regarding an earlier posting. AR 004.

**E. The Hearing Examiner Properly Concluded that Substantial Evidence Supported a Violation in Count I.**

The Court reviews factual findings for substantial evidence under subsection (c). Substantial evidence is evidence sufficient to convince a rational, unprejudiced person of the truth of a finding. *Isla Verde Intern. Holdings, Inc., supra*, 146 Wash.2d at 751-52.

Count I was a violation of MCC § 6.73.090(a)(2), which provides:

- (a) It is unlawful and a violation of this chapter to:
  - (1) Occupy or permit or authorize the occupation of any structure, premises or property posted as unfit for use or ordered vacated pursuant to this chapter or Chapter 64.44 RCW;
  - (2) Enter or authorize or allow another person, company, corporation, trust or other business entity to *enter* any property declared unfit for use or otherwise ordered vacated pursuant to this chapter or Chapter 64.44 RCW without approval of the health officer. (emphasis added).

The Hearing Examiner found that the property was posted and that Mason County had not authorized the appellant or anyone

working for the appellant to enter the cabin. CP 59-60. The Examiner further found that the appellant admitted to having the cabin gutted and placing a fridge inside. *Id.*, AR 033-34. These findings are not challenged. There was additional evidence presented consisting of personal observations by Mason County personnel of items outside the cabin that “appeared to have originated from inside” the cabin. CP 59. These findings were not challenged beyond the assertion that the observations and photographs were obtained without a warrant. As explained *supra*, no warrant was required because the observations were made from a location impliedly open to the public.

Taken together this is certainly enough evidence to convince a rational, unprejudiced person that the appellant entered, or authorized another person to enter, the cabin. Even without the observations, the appellant’s admission to this fact is sufficient to sustain the violation. The count I violation was supported by substantial evidence.

**F. The Hearing Examiner Properly Concluded that Substantial Evidence Supported a Violation in Count II.**

Count II was a violation of MCC § 6.73.090(a)(5), which

provides:

(a) It is unlawful and a violation of this chapter to:

(5) Remove, deface, obscure or otherwise tamper with any notice posted pursuant to this chapter or Chapter 64.44 RCW;

The Hearing Examiner found that there was photographic evidence showing a Notice posted on August 9, 2007 and an absence of that Notice in a photograph on July 2, 2008. CP 60. This finding is not challenged. The Examiner correctly noted that the appellant's control over the property created a rebuttable presumption that she removed Notice. The appellant presented no evidence to the Examiner tending to rebut that presumption. Her only argument is that she was not actually seen removing the Notice. However, the effect of the rebuttable presumption is to avoid the need for eyewitness testimony that she removed the Notice herself, while still permitting her to rebut the presumption with evidence of another explanation, but she failed to submit *any* evidence on the subject.

**G. The Hearing Examiner Properly Concluded that Substantial Evidence Supported a Violation in Count III.**

Count III was a violation of MCC § 6.73.090(a)(7), which

provides:

(a) It is unlawful and a violation of this chapter to:

(7) Fail or refuse to comply with any order or decision of the health officer, hearing officer or appeals commission pursuant to this chapter.

The Hearing Examiner found that Mason County issued an Order in 2001 prohibiting clean up work inside the cabin without an approved written work plan for decontamination by an authorized contractor. AR 013. There was no approved written work plan for the cabin. CP 64. The evidence in the record consisting of personal observations and photographs, including the appellant's own admission that she gutted the cabin, was sufficient to convince a rational, unprejudiced person that the appellant refused to comply with the County's 2001 Order when unauthorized work was done at the cabin.

The appellant argues that Count I and Count III constitute identical violations. However, Count I has to do with entering, or authorizing entry, of a posted property. It does not require any clean up work be done. Count III relates to clean up work by a non-authorized contractor without an approved plan in violation of the County's Order. The two counts are distinct.

The appellant cites *State v. Freeman*, 153 Wn.2d 765, 771 (2005). However, the issue in *Freeman* was whether the legislature “intended to punish separately both a robbery elevated to first degree by an assault, and the assault itself.” As the Court noted, “[i]f the legislature authorized cumulative punishments for both crimes, then double jeopardy is not offended.” *Id.* In this case, the two ordinance provisions were violated by separate conduct (Count I: entry and Count II: clean up work) and there is no evidence that the Mason County Commissioners did not intend for each provision to constitute a separate violation even if the same conduct overlapped both violations. *Garrett v. United States*, 471 U.S. 773, 779, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985) (legislature has the power to criminalize every step leading to a greater crime, and the crime itself).

The Count III violation should be affirmed because it was supported by substantial evidence in the record.

**H. The Appellant is not entitled to attorneys fees on appeal.**

In Washington, attorney fees may be awarded only when there is a contractual, statutory, or recognized equitable basis. *Miotke v. City of Spokane*, 101 Wash.2d 307, 338 (1984). The

appellant cites two statutory bases for attorneys fees on appeal. The first is RCW 7.80.140. That statute applies to “civil infraction” cases. It is undisputed that Mason County did not issue the appellant a civil infraction. CP 61. Because this is not a “civil infraction case” RCW 7.80.140 does not apply.

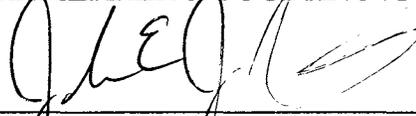
The other statute cited by appellant is RCW 4.84.350. This is known as the Equal Access to Justice Act. The EAJA defines “agency” as “any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings....” RCW 4.84.340(1) (emphasis added). In other words, that statute only applies to state agencies. *See, e.g., Entm’t Indus. Coalition v. Health Department, supra*, 153 Wn.2d at 667 (“[t]he statute awards attorney fees only to qualified parties who prevail in a judicial review of actions against ‘state’ agencies. The Tacoma-Pierce County Board of Health is not a state agency.”) Moreover, the EAJA only applies to judicial review of “agency action” as defined by chapter 34.05 RCW, the Administrative Procedure Act (APA). RCW 4.84.340(2). As noted in *Entm’t Indus. Coalition*, the APA “applies only to actions of state agencies clearly involved in statewide programs.” *Id.* at 153.

Mason County is not a state agency under the APA and thus its actions are not “agency actions” under the EAJA. Attorneys fees are not authorized by that statute in this case.

#### **V. CONCLUSION**

For the foregoing reasons, the hearing examiner’s decision and the trial court’s decision should be affirmed in their entirety.

LAW, LYMAN, DANIEL,  
KAMERRER & BOGDANOVICH, P.S.



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John E. Justice, WSBA No 23042  
Attorneys for Respondents

# APPENDIX

246-205-520 << 246-205-530 >> 246-205-531

**WAC 246-205-530**  
**Inspecting property.**

No agency filings affecting this section since 2003

Within fourteen days after a law enforcement agency or property owner notifies the local health officer of potential property contamination, the local health officer shall inspect the property.

(1) To enable the local health officer to determine contamination, the property inspection shall include, but not be limited to, an acquisition of data such as evidence of:

- (a) Hazardous chemical use or storage on site;
- (b) Chemical stains;
- (c) Release or spillage of hazardous chemicals on the property; or
- (d) Glassware or other paraphernalia associated with the manufacture of illegal drugs on site.

(2) As part of the property's inspection, the local health officer may request copies of any law enforcement reports, forensic chemist reports, and any department of ecology hazardous material transportation manifests needed to evaluate:

- (a) The length of time the property was used as an illegal drug manufacturing or storage site;
- (b) The size of the site actually used for the manufacture or storage of illegal drugs;
- (c) What chemical process was involved in the manufacture of illegal drugs;
- (d) What chemicals were removed from the scene; and
- (e) The location of the illegal drug manufacturing or storage site in relation to the habitable areas of the property.

(3) The local health officer may coordinate the property's inspection with other appropriate agencies. At the request of the local health officer, the Washington state department of ecology may conduct an environmental assessment and may sample the property's ground water, surface water, septic tank water, soil, and other media as necessary to enable the local health officer to evaluate the long-term public health threats.

[Statutory Authority: RCW 64.44.070. 03-02-022, § 246-205-530, filed 12/23/02, effective 1/23/03. Statutory Authority: RCW 64.40.070 [64.44.070] and chapter 64.44 RCW. 92-10-027 (Order 268B), § 246-205-530, filed 4/29/92, effective 5/30/92.]

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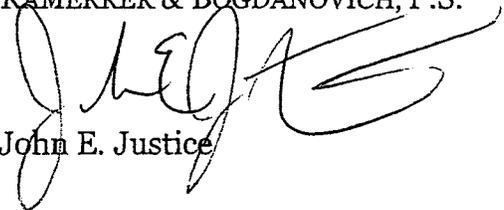
**Re: *Ford v. Mason County, et al.*  
Court of Appeals No. 40134-7-II  
Thurston County Superior Court Cause No: 08-2-02769-1**

Dear Kim:

I am counsel for the defendant/respondent Mason County, in the above referenced appeal. I wanted to alert the Court that case is a LUPA appeal that was combined with claims for damages. *See Attached Complaint.* The Order being appealed only dealt with the LUPA appeal. The damage claims have not been dismissed and there is no final judgment below or other order determining the entire action. Therefore, it does not appear that this review is properly brought under RAP 2.2, review as a matter of right. If maintained, it should be re-cast as seeking discretionary review under RAP 2.3.

Sincerely,

LAW, LYMAN, DANIEL,  
KAMERRER & BOGDANOVICH, P.S.

  
John E. Justice

JEJ:ta

Enc.

cc: Jean Jorgensen  
Monty Cobb  
Christine Clark  
Dawn Twiddy  
Candy Drews

**APPENDIX B**

the burden of proving the decision was wrong;

- (4) The desired outcome or changes to the decision;
- (5) The appeals fee as provided for in the applicable ordinance.

(c) Procedure. An appeal before the hearing examiner shall be by procedures established by the hearing examiner consistent with RCW 36.70B.

(Ord. 80-03, Attach. B (part), 2003; Ord. 179-02, Attach. B (part), 2002; Ord. 142-02, Attach. B (part), 2002; Ord. 88-02, Attach. B (part), 2002; Ord. 116-01, Attach. A (part), 2001; Ord. 129-00, Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).

#### **15.11.030 Appeal to state review boards.**

The appeal of the final decision of the hearing examiner may be filed to the appropriate state review board and is subject to the appeal processes of the review board (notification, review, hearing, and decision). The State Environmental Hearings Office processes appeals of shoreline permits, conditional uses, and variances; the State Department of Health processes appeals of public health and air-water quality issues.

(Ord. 80-03, Attach. B (part), 2003; Ord. 179-02, Attach. B (part), 2002; Ord. 142-02, Attach. B (part), 2002; Ord. 88-02, Attach. B (part), 2002; Ord. 116-01, Attach. A (part), 2001; Ord. 129-00, Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).

#### **15.11.040 Judicial appeal.**

(a) Appeals from the final decision of the hearing examiner involving those codes and ordinances to which this title applies, and for which all other appeals specifically authorized have been timely exhausted, shall be made to Mason County superior court within twenty-one days of the date the decision or action became final, unless preempted by state law.

(b) Notice of the appeal and any other pleadings required to be filed with the court shall be served on the clerk of the board of county commissioners and prosecuting attorney within the applicable time period. This requirement is jurisdictional.

(c) The cost of transcribing and preparing all records ordered certified by the court or desired by the appellant for such appeal shall be borne by the appellant.

(Ord. 80-03, Attach. B (part), 2003; Ord. 179-02, Attach. B (part), 2002; Ord. 142-02, Attach. B (part), 2002; Ord. 88-02, Attach. B (part), 2002; Ord. 116-01, Attach. A (part), 2001; Ord. 129-00, Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).

### **Chapter 15.13 ENFORCEMENT**

Sections:

15.13.005 Severability.

15.13.010 Enforcing official– Authority.

15.13.020 Penalty.

15.13.030 Application.

15.13.035 Warning notice.

15.13.040 Notice of civil violation.

15.13.045 Hearing before the hearings examiner.

15.13.050 Civil fines.

15.13.055 Cost recovery.

15.13.060 Abatement.

15.13.070 Review of approved permits.

15.13.075 Revocation or modification of permits and approvals.

**15.13.005 Severability.**

This title shall be governed by the laws of the state of Washington. In the event that any portion or section of this title be declared invalid or unconstitutional by a court of competent jurisdiction, the remainder of the title shall not be affected and shall remain in full force and effect.

(Ord. 179-02 Attach. B (part), 2002; Ord. 142-02 Attach. B (part), 2002; Ord. 88-02 Attach. B (part), 2002; Ord. 116-01 Attach. A (part), 2001; Ord. 129-00 Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).

**15.13.010 Enforcing official– Authority.**

(a) The review authority shall be responsible for enforcing those codes and ordinances to which this title applies, and may adopt administrative rules to meet that responsibility. The review authority may delegate enforcement responsibility, as appropriate. An employee of one review authority department may commence an enforcement action of violations of codes and regulations of other departments.

(b) Inspections. The purpose of these inspection procedures are to ensure that a property owner's rights are not violated.

When it is necessary to make an inspection to enforce the provisions of this chapter, or when the director has reasonable cause to believe that a violation has been or is being committed, the director or his duly authorized inspector may enter the premises, or building at reasonable times to inspect or to perform any duties imposed by this chapter, provided that if such premises or building be occupied that credentials be presented to the occupant and entry requested. 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.

(Ord. 32-04 Attach. B (part), 2004; Ord. 179-02 Attach. B (part), 2002; Ord. 142-02 Attach. B (part), 2002; Ord. 88-02 Attach. B (part), 2002; Ord. 116-01 Attach. A (part), 2001; Ord. 129-00 Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).

### **15.13.020 Penalty.**

(a) Nonconforming structures and other non-conforming land modifications shall be a continuing violation. Every day of violation shall be a separate violation. It shall be a violation to own, use, control, maintain, or possess a portion of any premises which has been constructed, equipped, maintained, controlled, or used in violation of any of the applicable provisions, MCC Section 15.03.005, in this title. Structures or activities which were made or conducted without a permit, when a permit was required at the time of first action, do not vest and require current permits. Any person, firm, or corporation who violates or who solicits, aids, or attempts a violation are accountable under this chapter and are subject to the penalty provision as well as the hearing examiner process.

(b) Compliance with the requirements of those codes and regulations listed under MCC Section 15.03.005 shall be mandatory, and violations of those codes are within the purview of this chapter.

(c) Any private party who intentionally, recklessly, or negligently violates any of the applicable codes, regulations and ordinances is guilty of a misdemeanor. This includes, but is not limited to, a violation of notice and order, a violation of notice of civil violation, a violation of a warning notice, a violation of a stop work order, violation of a do not occupy order, and failure to comply with orders of the hearings examiner. Any person convicted of a misdemeanor under this section shall be punished by a fine of not more than five hundred dollars, or by imprisonment not to exceed ninety days, or by both, unless otherwise required by state laws. Each such person is guilty of a separate offense for each and every day during any portion of which any violation of any of the applicable provisions is committed, continued, permitted, or aided by any such person.

(d) Notwithstanding the provisions of any other code, the review authority is authorized to issue civil infractions for violations of any provision of any code or regulation listed under Section 15.03.005. The enforcement officer may issue a civil infraction ticket of up to two hundred fifty dollars for the first violation and up to five hundred dollars for the second and subsequent violations. Second and subsequent violations refer to any violation of any provision of Section 15.03.005 within two years of the first violation. A violator is: (1) one who owns the property and knows the violation is occurring, and fails to take action to abate it; (2) one who causes the violation to occur or solicits, commissions, requests, or aids the violation; (3) one who has a virtual exclusive right to possess the land, as in a tenant, equitable title owner, or trust beneficiary, and who aids, abets, commissions, solicits, requests, or knowingly allows a violation to occur on the land; or (4) to the maximum extent allowed under Washington law, any company whose employee or employees violates any provision of Title 15. Proof in district court shall be by a preponderance of the evidence. To the extent that there is no conflict with this regulation, all such civil infractions under this regulation shall be governed by the standards and procedures set forth in Revised Code of Washington 7.80 (Civil Infractions). Each day of the violation shall be considered a separate offense.

(Ord. 179-02 Attach. B (part), 2002; Ord. 142-02 Attach. B (part), 2002; Ord. 88-02 Attach. B (part), 2002; Ord. 116-01 Attach. A (part), 2001; Ord. 129-00 Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).

### **15.13.030 Application.**

(a) Actions under this chapter may be taken in any order deemed necessary or desirable by the review

authority to achieve the purpose of this chapter or of the development code.

(b) Proof of a violation of a development permit shall constitute prima facie evidence that the violation is that of the applicant and/or owner of the property upon which the violation exists. An enforcement action under this chapter against the owner and/or applicant shall not relieve or prevent enforcement under this chapter or other ordinance against any other responsible person, which, to the extent allowed by state law, includes an officer or agent of a business or nonprofit organization who, while violating the applicable provisions, is acting on behalf of, or in representation of, the organization.

(c) Where property has been subjected to an activity in violation of this chapter, the county may bring an action against the owner of such land or the operator who performed the violation. In addition, in the event of intentional or knowing violation of this chapter, the hearing examiner may, upon the county's request, deny authorization of any permit or development approval on said property for a period up to ten years from the date of unauthorized clearing or grading. While a case is pending before the hearing examiner, the county shall not authorize or grant any permit or approval of development on the property.

(d) Nothing in this chapter shall be construed to prevent the application of other procedures, penalties or remedies as provided in the applicable code or ordinance.

(Ord. 32-04 Attach. B (part), 2004; Ord. 179-02 Attach. B (part), 2002; Ord. 142-02 Attach. B (part), 2002; Ord. 88-02 Attach. B (part), 2002; Ord. 116-01 Attach. A (part), 2001; Ord. 129-00 Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).

#### **15.13.035 Warning notice.**

Prior to other enforcement action, and at the option of the review authority, a warning notice may be issued. This notification is to inform parties of practices which constitute or will constitute a violation of the development code or other development regulation as incorporated by reference and may specify corrective action. This warning notice may be sent by certified/registered mail, posted on site or delivered by other means. The parties shall respond to the county within twenty days of the postmark, posting on site, or delivery of the notice.

(Ord. 179-02 Attach. B (part), 2002; Ord. 142-02 Attach. B (part), 2002; Ord. 88-02 Attach. B (part), 2002; Ord. 116-01 Attach. A (part), 2001; Ord. 129-00 Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).

#### **15.13.040 Notice of civil violation.**

(a) Authority. A notice of civil violation may be issued and served upon a person if any activity by or at the direction of that person is, has been, or may be taken in violation of the applicable codes under Section 15.03.005. A landowner, tenant, or contractor may each be held separately and joint and severally responsible for violations of the applicable codes and regulations.

(b) Notice. A notice of civil violation shall be deemed served and shall be effective when posted at the location of the violation and/or delivered to any person at the location and/or mailed first class to the owner or other person having responsibility for the location and not returned.

(c) Content. A notice of civil violation shall set forth:

(1) The name and address of the person to whom it is directed;

- (2) The location and specific description of the violation;
- (3) A notice that the order is effective immediately upon posting at the site and/or receipt by the person to whom it is directed;
- (4) An order that the violation immediately cease, or that the potential violation be avoided;
- (5) An order that the person stop work until correction and/or remediation of the violation as specified in the order;
- (6) A specific description of the actions required to correct, remedy, or avoid the violation, including a time limit to complete such actions;
- (7) A notice that failure to comply with the regulatory order may result in further enforcement actions, including civil fines and criminal penalties;
- (8) A notice of the date, time and place of appearance before the hearing examiner as provided in Section 15.13.045.

(d) Remedial Action. The review authority may require any action reasonably calculated to correct or abate the violation, including but not limited to replacement, repair, supplementation, revegetation, or restoration.

(Ord. 179-02 Attach. B (part), 2002; Ord. 142-02 Attach. B (part), 2002; Ord. 88-02 Attach. B (part), 2002; Ord. 116-01 Attach. A (part), 2001; Ord. 129-00 Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).

#### **15.13.045 Hearing before the hearings examiner.**

- (a) A person to whom a notice of a civil violation is issued will be scheduled to appear before the hearings examiner after the notice of civil violation is issued. Extensions may be granted at the discretion of the appropriate review authority.
- (b) Correction of Violation. The hearing will be canceled if the applicable review authority determines that the required corrective action has been completed or is on schedule for completion as set by the review authority at least forty-eight hours prior to the scheduled hearing.
- (c) Procedure. The hearings examiner shall conduct a hearing on the civil violation pursuant to the rules of procedure of the hearings examiner. The applicable review authority and the person to whom the notice of civil violation was directed may participate as parties in the hearing and each party may call witnesses. The county shall have the burden of proof to demonstrate by a preponderance of evidence that a violation has occurred or imminently may occur and that the required corrective action will correct the violation. A hearing examiner's order may prohibit future action, and violations of that order may lead to penalties under this title. The determination of the applicable review authority shall be accorded substantial weight by the hearings examiner in determining the reasonableness of the required corrective action.
- (d) Decisions of the Hearings Examiner.
  - (1) The hearings examiner shall determine whether the county has established by a preponderance of the

evidence that a violation has occurred and that the required correction will correct the violations and shall affirm, vacate, or modify the county's decisions regarding the alleged violation and/or the required corrective action, with or without written conditions.

(2) The hearing examiner shall issue an order to the person responsible for the violation which contains the following information:

(A) The decision regarding the alleged violation including findings of fact and conclusions based thereon in support of the decision;

(B) The required corrective action;

(C) The date and time by which the correction must be completed;

(D) The civil fines assessed based on the criteria in subsection (d)(3) of this section;

(E) The date and time by which the correction must be completed.

(3) Civil fines assessed by the hearing examiner shall be in accordance with the civil fine in Section 15.13.050.

(A) The hearing examiner shall have the following options in assessing civil fines:

(i) Assess was issued and thereafter; or

(ii) Assess civil fines beginning on the correction date set by the applicable review authority or alternate correction date set by the hearings examiner and thereafter; or

(iii) Assess less than the established civil fine set forth in Section 15.13.050 based on the criteria of subsection (d)(3)(B) of this section; or

(iv) Assess no civil fines.

(B) In determining the civil fine assessment, the hearing examiner shall consider the following factors:

(i) Whether the person responded to staff attempts to contact the person and cooperated with efforts to correct the violation;

(ii) Whether the person failed to appear at the hearing;

(iii) Whether the violation was a repeat violation or if the person has previously violated the applicable codes, regulations, and ordinances;

(iv) Whether the person showed due diligence and/or substantial progress in correcting the violation;

(v) Whether a genuine code interpretation issue exists; and

(vi) Any other relevant factors.

(C) The hearing examiner may double the civil fine schedule if the violation was a repeat violation or

the person has previous violations of the applicable codes, regulations, or ordinances. In determining the amount of the civil fine for repeat violations the hearing examiner shall consider the factors set forth in subsection (d)(3)(B) of this section.

(4) Notice of Decision. Upon receipt of the hearing examiner's decision, the review authority shall send by first class mail and by certified mail return receipt requested a copy of the decision to the person to whom the notice of a civil violation was issued. The decision of the hearing examiner shall be rendered within ten working days of the hearing.

(e) Failure to Appear. If the person to whom the notice of civil violation was issued fails to appear at the scheduled hearing, the hearing examiner will enter a default order with findings pursuant to subsection (d)(2) of this section and assess the appropriate civil fine pursuant to subsection (d)(3) of this section. The county will enforce the hearing examiner's order and any civil fine from that person.

(f) Appeal to Superior Court. See Section 15.11.040 Judicial Appeal.

(Ord. 179-02 Attach. B (part), 2002; Ord. 142-02 Attach. B (part), 2002; Ord. 88-02 Attach. B (part), 2002; Ord. 116-01 Attach. A (part), 2001; Ord. 129-00 Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).

#### **15.13.050 Civil fines.**

(a) Authority. A person who violates any provision of the development code, or who fails to obtain any necessary permit, who fails to comply with the conditions of a permit, or who fails to comply with a notice of civil violation shall be subject to a civil fine.

(b) Amount. The civil fine assessed shall not exceed one thousand dollars for each violation, except where the hearings examiner is authorized under this chapter to double the fine. Each separate day, event, action or occurrence shall constitute a separate violation.

(c) Notice. A civil fine shall be imposed by an order of the hearings examiner, and shall be effective when served or posted as set forth in Section 15.13.040(b).

(d) Collection.

(1) Civil fines shall be immediately due and payable upon issuance and receipt of order of the hearings examiner. The review authority may issue a stop work order until such fine is paid.

(2) If remission or appeal of the fine is sought, the fine shall be due and payable upon issuance of a final decision.

(3) If a fine remains unpaid thirty days after it becomes due and payable, the review authority may take actions necessary to recover the fine. Civil fines shall be paid into the county's general fund unless otherwise provided by ordinance. The review authority, in its discretion, may determine that assessments in amounts of five hundred dollars or more shall be payable in not to exceed three equal annual installments. The payments shall bear interest equal to that charged on delinquent taxes under RCW 84.56.020. Such an account in good standing shall not be considered as delinquent unpaid fines as provided in subsection (d)(4) of this section.

(4) Unpaid fines shall be assessed against the property and be recorded on the assessment roll, and

thereafter said assessment shall constitute a special assessment against and a lien upon the property, provided that fines in excess of the assessed value shall be a personal obligation of the property owner, and fines assessed against persons who are not the property owner shall be personal obligations of those persons.

(e) Immediately upon its being placed on the assessment roll, the assessment shall be deemed to be complete, the several amounts assessed shall be payable, and the assessments shall be liens against the lots or parcels of land assessed, respectively. The lien shall be subordinate to all existing special assessment liens previously imposed upon the same property and shall be paramount to all other liens except for state, county and property taxes with which it shall be upon a parity. The lien shall continue until the assessment and all interest due and payable thereon are paid.

(f) All such assessments remaining unpaid after thirty days from the date of recording on the assessment roll shall become delinquent and shall bear interest at such rates and in such manner as provided for in RCW 84.56.020, as now or hereafter amended, for delinquent taxes.

(g) If the county assessor and the county treasurer assess property and collect taxes for this jurisdiction, a certified copy of the assessment shall be filed with the county treasurer. The descriptions of the parcels reported shall be those used for the same parcels on the county assessor's map books for the current year.

(h) The amount of the assessment lien shall be billed annually by the treasurer's office on the date of the assessment lien until paid and shall be subject to the same penalties and procedure and sale in case of delinquency as provided for ordinary property taxes. All laws applicable to the levy, collection and enforcement of property taxes shall be applicable to such assessment. Notwithstanding the previous provisions, the foreclosure process and sale process may be commenced within a year of the creation of a lien when the review authority or the hearing examiner make a written request to the treasurer's office to commence the process.

(Ord. 80-03 Attach. B (part), 2003; Ord. 179-02 Attach. B (part), 2002; Ord. 142-02 Attach. B (part), 2002; Ord. 88-02 Attach. B (part), 2002; Ord. 116-01 Attach. A (part), 2001; Ord. 129-00 Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).

**15.13.055 Cost recovery.**

(a) Authority. Notwithstanding any other code provision, a person who violates any provision of any code or regulation under MCC Section 15.03.005, or who fails to obtain any necessary permit, or who fails to comply with a notice of civil violation shall be subject to enforcement, hearings examiner, and abatement costs. Costs in year 2002 shall be fifty-two dollars and thirty cents per hour for any employee of Mason County, except that department heads and managers, elected officials, and deputy prosecutor time shall be seventy-five dollars per hour. For every year after 2002, the rate may be adjusted according to the Consumer Price Index.

(b) Amount. The review authority shall keep an itemized account of the time spent by employees of the county in the enforcement or abatement of any code or any regulation under Section 15.03.005. The review authority may request costs be ordered by the hearings examiner. The hearing examiner may order costs.

(c) Notice. Upon completion of the work for which cost recovery is proposed, the review authority shall provide notice by certified mail return receipt requested to the property owner or other person on whose behalf the costs were incurred.

(d) Collection. Costs may be collected as provided in MCC Section 15.13.050(d) through (h) inclusive.

(e) Civil fines and funds collected shall be deposited as provided in the respective county regulation or, if no other provision is made, shall be deposited in the general fund of the county. However, departmental directors may, in their discretion, direct that costs be placed in a special abatement fund. If the director decides to close the fund, the remaining fund balance shall revert back to the general fund.

(Ord. 179-02 Attach. B (part), 2002; Ord. 142-02 Attach. B (part), 2002; Ord. 88-02 Attach. B (part), 2002; Ord. 116-01 Attach. A (part), 2001; Ord. 129-00 Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).

**15.13.060 Abatement.**

(a) The review authority may abate the violation if corrective work is not commenced or completed within the time specified in a notice of civil violation.

(b) If any required work is not commenced or completed within the time specified, the review authority may proceed to abate the violation and cause the work to be done and charge the costs thereof as a lien against the property and any other property owned by the person in violation and as a personal obligation of any person in violation.

(Ord. 32-04 Attach. B (part), 2004; Ord. 179-02 Attach. B (part), 2002; Ord. 142-02 Attach. B (part), 2002; Ord. 88-02 Attach. B (part), 2002; Ord. 116-01 Attach. A (part), 2001; Ord. 129-00 Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).

**15.13.070 Review of approved permits.**

(a) Review. Any approval or permit issued under the authority of the development code may be reviewed for compliance with the requirements of the development code, or to determine if the action is creating a nuisance or hazard, has been abandoned, or the approval or permit was obtained by fraud or deception.

(b) Review Authority Investigation. Upon receipt of information indicating the need for, or upon receiving a request for review of permit or approval, the review authority shall investigate the matter and take one or more of the following actions:

- (1) Notify the property owner or permit holder of the investigation;
- (2) Issue a notice of civil violation and/or civil fine and/or recommend revocation or modification of the permit or approval;
- (3) Refer the matter to the county prosecutor;
- (4) Revoke or modify the permit or approval, if so authorized in the applicable code or ordinance; and/or
- (5) Refer the matter to the hearing examiner with a recommendation for action.

(Ord. 32-04 Attach. B (part), 2004; Ord. 179-02 Attach. B (part), 2002; Ord. 142-02 Attach. B (part), 2002; Ord. 88-02 Attach. B (part), 2002; Ord. 116-01 Attach. A (part), 2001; Ord. 129-00 Attach. A § 2 (part), 2000; Res. 79-78 (part), 1998; Res. 136-96 (part), 1996).

### **15.13.075 Revocation or modification of permits and approvals.**

[[Handled by appropriate departments]]

(a) Upon receiving a review authority's recommendation for revocation or modification of a permit or approval, the hearing examiner shall review the matter at a public hearing, subject to the notice of public hearing requirements (Section 15.07.030). Upon a finding that the activity does not comply with the conditions of approval or the provisions of the development code, or creates a nuisance or hazard, the hearing examiner may delete, modify or impose such conditions on the permit or approval it deems sufficient to remedy the deficiencies. If the hearing examiner find no reasonable conditions which would remedy the deficiencies, the permit or approval shall be revoked and the activity allowed by the permit or approval shall cease.

(b) Building Permits. The building official, not the hearing examiner has the authority to revoke or modify building permits.

(c) If a permit is not acted on within three years of authorization, the permit is automatically revoked.

(d) Reapplication. If a permit or approval is revoked for fraud or deception, no similar application shall be accepted for a period of one year from the date of final action and appeal, if any. If a permit or approval is revoked for any other reason, another application may be submitted subject to all of the requirements of the development code.

(Ord. 32-04 Attach. B (part), 2004).

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II  
TACOMA**

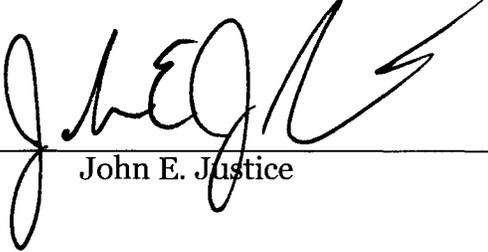
BARBARA FORD,  
  
Appellant,  
  
vs.  
  
MASON COUNTY,  
  
Respondent.

**COURT OF APPEALS  
NO. 40134-7-II  
  
THURSTON COUNTY  
SUPERIOR COURT  
NO. 08-2-02769-1  
  
DECLARATION OF  
SERVICE**

I declare that on Wednesday, May 26 2010, I served a copy of Respondent's Brief; and this Declaration of Service on respondent via U.S. Mail.

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

DATED this 26<sup>th</sup> day of May, 2010 at Tumwater, WA.

  
\_\_\_\_\_  
John E. Justice

BY \_\_\_\_\_  
DEPUTY

10 MAY 27 PM 1:53  
STATE OF WASHINGTON

FILED  
COURT OF APPEALS  
DIVISION II