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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Superior Court No. 09-2-03290-9
Court of Appeals No. 295486-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

DAN HENDERSON; NEIL MEMBREY; LARRY KUNZ and KASI
HARVEY-JARVIS,

Appellants,

v.

JOHN PEDERSON, Director of Planning, Spokane County,

Respondent.

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

At the heart of this case are two competing views of whether Spokane County's Director of Planning, John Pederson, is required to enforce the County's Critical Areas Ordinance ("CAO"). It is also undisputed that the record in this matter indicates that the facility in question, McGlades, exceeds the allowable discharge limit into its septic system. It is equally undisputed that Mr. Pederson has not taken action to enforce the CAO to address the violation. As demonstrated in our opening brief, these facts confirm that Mr. Pederson's actions in failing to enforce the CAO warrant the issuance of a writ of mandamus.

To resist Appellants' claims, Respondent dismisses this case as an attempt to close down a restaurant. That is not what this case is about – it is about protecting our aquifer and enforcing the law, as required by the County's CAO. Respondents also argue that (1) Appellants' rely on facts they deem irrelevant; (2) Appellants have no specific interest in protecting the aquifer, (3) the Director has no clear and specific duty to enforce the CAO, (4) courts refuse to issue writs of mandamus to enforce ordinances like the CAO, and (5) other remedies are available to address Appellants' concerns. All five arguments are simply wrong.

II. ARGUMENT

A. THE FACTS CITED BY APPELLANTS ARE RELEVANT TO THIS PROCEEDING AND ARE NOT IN DISPUTE.

Despite Respondent's arguments to the contrary, the undisputed facts demonstrate that McGlades Restaurant: (1) is a non-residential use outside of the urban growth area; (2) produces more than 90 gallons per acre per day in a highly susceptible recharge area; and (3) does not have an enhanced septic system. Therefore the CAO regulations must be enforced against McGlades to protect the public health and water supply of this critical recharge area.

The CAO requirements provide that the McGlades septic system can legally discharge no more than 378 gallons of sewage based on 4.2 acres and 90 gallons per day of sewage. CP 367. Water meter readings indicate that McGlades is using significantly more than 90 gallons of wastewater per day per acre. CP 91-92, 367-68, 389-94. McGlades business is not utilizing an enhanced wastewater disposal system as required by Spokane County Code §11.20.075(c)(L-3). CP 365, 368. Petitioners sent multiple complaint letters to the County seeking enforcement of the CAO against McGlades. CP 10, 13, 16, 19, 92, 328-58. No enforcement action was taken as a result of the complaints and there is no active investigation.

In granting summary judgment, the Superior Court recognized that “there are no genuine issues as to any material fact relating to the parties’ motion.” CP 419.

This evidence is directly relevant to support Appellants’ claim that Respondent failed to perform his nondiscretionary duty to enforce the CAO. Under Evidence Rule 401, “relevant evidence” is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Evidence is relevant if it tends to make the existence of a material fact more or less probable. *City of Seattle v. Boulanger*, 37 Wn. App. 357, 359, 680 P.2d 67 (1984). Facts tending to establish a party’s theory of the case will generally be found to be relevant. *State v. Rice*, 48 Wn. App. 7, 12, 737 P.2d 726 (1987).

Before a writ will issue, Appellants’ must establish whether: (1) Respondent is under a clear duty to act; (2) Appellants have no plain, speedy and adequate remedy at law; and (3) the applicant is beneficially interested. *Eugster v. City of Spokane*, 118 Wn. App. 383, 402-403, 76 P.3d 741 (2003). Where a duty to act is established, “the question becomes whether the circumstances trigger the duty.” *Id.* at 404. A clear duty to act is established in the CAO as “it shall be the duty of the director . . . to . . . enforce the provisions of this chapter.” *See Spokane County*

Code § 11.20.030(J)(2)(a). Accordingly, whether Respondent's clear duty to act has been triggered in this case is based on evidence relevant to whether a violation of the CAO has occurred. Thus, whether or not McGlades is in violation of the CAO is relevant as to whether Respondent's duty to enforce the CAO has been "triggered." The undisputed facts show that McGlades is in violation of the CAO.

Contrary to Respondent's assertions, Appellants are not asking this Court to decide whether McGlades is in violation of the CAO. Experts currently and formerly within Respondent's own department have already found that McGlades is in repeated violation of these regulations as it greatly exceeds 90 gallons of wastewater per acre per day in a critical aquifer recharge area and has no enhanced septic system. *See* CR 304-05, 366-368, 390 394. The record contains ample undisputed evidence in the form of water records, the deposition of Bruce Rawls, a registered engineer and County Public Utilities Director, and the declaration of Stanley Miller, who served 21 years as Manager of the Spokane County Water Quality Management Program. *Id.*

Respondent has not disputed any of the material facts. Certainly, this evidence is material as to whether Mr. Pederson failed to exercise his duty to enforce the CAO.

**B. APPELLANTS HAVE A RECOGNIZABLE INTEREST
GREATER THAN THE PUBLIC BECAUSE APPELLANTS
OWN PROPERTY IN CLOSE PROXIMITY TO THE SITE.**

Respondent's challenge to Appellants' interest in this proceeding is without merit. In order for a writ of mandamus to be issued, the petitioning party must be beneficially interested. *Eugster*, 118 Wn. App. at 402. A person is beneficially interested "if he has an interest in the action beyond that shared in common with other citizens." *Retired Public Employees Council of Washington v. Charles*, 148 Wn.2d 602, 616, 62 P.3d 470, 478 (2003) (citing *State ex rel. Lay v. Simpson*, 173 Wn. 512, 513, 23 P.2d 886 (1933)).

Here, Appellants' property rights are directly impacted by this action – they live directly adjacent to the McGlades restaurant. CP 9-20. Two of the Appellants have private wells that draw water 200 or fewer feet from the McGlades Restaurant's septic drain field and contamination of the aquifer could harm their private wells. CP 10, 16. In addition, Appellants are beneficially interested because the use and enjoyment of their property is dependent on being able to safely utilize the limited water delivery services that are available in rural Spokane County. CP 10, 13, 16, 19.

**C. INTERPRETING “SHALL” AS MANDATORY IS NOT
CONTRARY TO THE APPARENT INTENT OF THE
CRITICAL AREAS ORDINANCE.**

Contrary to Respondent’s argument, “shall” is presumed mandatory unless a *contrary* legislative intent *is apparent*. *Erection Co. v. Department of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993). When there is a violation of the CAO, “It shall be the duty of the planning director . . . to interpret and enforce the provisions of this chapter” Spokane County Code §11.20.030(J)(2)(a). The CAO assigns a mandatory duty of enforcement to the Respondent when it unambiguously states that it *shall be the duty* of the Planning Director to enforce the CARA regulations. *Id.* The provision cited by Respondent “it is the intent of this section to provide authority for . . . enforcing the [CAO]” does not provide any apparent intent to give the director of planning a permissive duty, rather than a mandatory duty, to enforce the CAO.

The County’s CAO was created “to protect the public health, safety and welfare by preserving, protecting, restoring and managing through the regulation of development and other activities within . . . critical aquifer recharge areas.” CP 90, 246. As in this case, where the provisions of a statute affect the public interest they are held to be mandatory, rather than directory. *Spokane County ex rel. Sullivan v. Glover*, 2 Wn.2d 162, 170, 97 P.2d 628 (1940).

Here, the provisions of the CAO regarding Respondent's duties undoubtedly affect the public interest because enforcement of the CAO protecting groundwater quality and preventing environmental harm benefits the public. This is especially true in this case when Appellants' private wells draw upon groundwater located near McGlades. Therefore, Respondent's duty should be held to be mandatory.

Since the duty of enforcement assigned to the Respondent is in an unambiguous and direct manner that does not require judgment or experience to be affected, Respondent has a nondiscretionary duty to enforce the CAO.

D. DESPITE RESPONDENT'S DISCRETION IN HOW TO EXERCISE HIS MANDATORY DUTY, MANDAMUS IS STILL APPROPRIATE IN DIRECTING RESPONDENT TO EXERCISE THAT DISCRETION.

A mandatory duty may include discretion in how to exercise that mandatory duty. Mandamus can direct an officer to exercise a mandatory discretionary duty, but not the manner in exercising that discretion. *In re Dyer*, 143 Wn.2d 384, 398, 20 P.3d 907 (2001); *Mower v. King County*, 130 Wn. App. 707, 719, 125 P.3d 148 (2005). Respondent has no discretion in *whether* to exercise his duty to enforce the CAO, but has some discretion in *how* to exercise that duty. The CAO enumerates

specific procedures when Respondent takes investigatory action. Spokane

County Code § 11.20.030(J)(4) states that:

The following procedures shall apply to an investigation of a violation of this chapter.

- a. A physical inspection of the property and/or circumstances identified in the complaint or referral shall be conducted. The physical inspection must comply with legal right of entry requirements, as established by state and constitutional law; and
- b. The enforcement authority shall determine, based on information derived from sources such as field observations, the statements of witnesses, relevant documents and applicable county codes, whether a violation has occurred; and
- c. When a violation has been confirmed, a notice of investigation shall be mailed to the property owner of record and/or those person(s) who are creating or contributing to the violation. The notice shall contain those items specified in Section 11.20.030.J.5.

Even though the procedures in this section are not exhaustive, Respondent is not given unbridled discretion when taking action pursuant to his duties under Spokane County Code § 11.020.030(J)(2)(a). The fact that Respondent may take other actions than set above is not a limit in issuing a writ of mandamus. *See Eugster*, 118 Wn. App. at 405, (“Mandamus can direct an officer to exercise a mandatory discretionary duty, but not the manner of exercising that discretion.”); *See Mower*, 130 Wn.App. at 719; *See Dyer*, 143 Wn.2d. at 398.

A similar situation was considered by a Michigan court in *Township of Canton v. Wayne County Road Com'n*, 367 N.W.2d 385 (Mich. Ct. App. 1985). There the Road Commission had a “general duty to keep all county roads in reasonable repair so that they shall be reasonably safe and convenient for public travel.” *Id.* at 387. The Road Commission had discretion in the methods employed in maintaining the roads. *Id.* at 387-388. Despite this, the trial court ordered the Road Commission to maintain the gravel roads, but may not order how to maintain those roads. *Id.* at 388.

The fact that the Respondent is given discretion in how to exercise this mandatory duty does not limit the appropriateness of a writ of mandamus.

E. THE NOTION OF PROSECUTORIAL DISCRETION DOES NOT EXIST IN CIVIL ENFORCEMENT OF THE CRITICAL AREAS ORDINANCE.

Respondent argues that mandamus should not apply to criminal enforcement. Appellants’ do not dispute the notion that mandamus is not appropriate to require law enforcement officers to enforce criminal provisions of a statute or ordinance because of prosecutorial discretion. All the cases cited by Respondent involve criminal enforcement and prosecutorial discretion. *See* Response Brief at 14-15. This is not the case here.

Appellants seek an action to compel the Respondent to enforce the civil provisions of the CAO, which is different than criminal enforcement. The CAO reflects this notion of prosecutorial discretion when it states that “the prosecuting attorney ... *may* seek enforcement of any provisions of this code by filing an appropriate legal action.” Spokane County Code § 11.20.030(J)(10) (emphasis added). In contrast, the civil enforcement section does not contain the notion of prosecutorial discretion stating “[i]t *shall* be the duty of the [planning] director” to enforce the CARA regulations. Spokane County Code § 11.20.030(J)(2)(a) (emphasis added).

Mandamus is a procedure provided by statute for the enforcement of rights and the redress of wrongs. *Peterson v. Dep't of Ecology*, 92 Wash.2d 306, 311, 596 P.2d 285 (1979). In addressing the wrongs, the requirements of the CAO do not necessitate any criminal or civil enforcement measures. In fact, as explained above, the Director has discretion in how to enforce the CAO and could seek voluntary compliance measures. Even where more formal enforcement occurs, it does not call for civil or criminal enforcement:

Where violations of this ordinance occur, it shall be the duty of the property owner after notification from the Department to immediately provide any necessary temporary mitigation/stabilization of damaged critical areas to prevent further degradation of the critical area, pending completion of required permit processes, management or mitigation plans, or similar actions.

Spokane County Code § 11.20.030(J)(3)(a).

Appellants do not seek to compel the Respondent or the prosecuting attorney to take criminal enforcement. This mandamus action involves civil enforcement of the CAO, an area where there is not the tradition of prosecutorial discretion.

F. AN INJUNCTION AGAINST MCGLADES DOES NOT CONSTITUTE AN OTHER PLAIN, SPEEDY AND ADEQUATE REMEDY IN THE ORDINARY COURSE OF LAW.

Lastly, Respondent has not shown that Appellants have a plain, speedy, and adequate remedy in the ordinary course of law other than a writ of mandamus to compel Respondent to perform his duties. The CAO was not written with a citizen suit provision, but with the intent that enforcement of the CAO would be the duty of the Director of Planning. Spokane County Code § 11.20.030(J)(2)(a). No other remedy exists to enforce the CAO. Respondent alleges that compelling Respondent to enforce his duty would be time consuming and/or expensive. Not only is this an unsupported claim, but it is not a consideration when issuing a writ of mandamus. The focus is whether any *other* remedy is plain, speedy and adequate.

Respondent states that Appellants could bring an action for a temporary and permanent injunction against McGlades. However, seeking

an injunction against McGlades is not what this case is about. This case is about the failure of Respondent to enforce the County's CAO against a know violator, McGlades. Requiring Appellants to seek an injunction completely avoids the relief Appellants request, which is to compel Respondent to perform his statutorily mandated duty. An injunction against McGlades has nothing to do with Respondent's mandatory duty.

Moreover, the purpose of the CAO is to prevent harm to the environment. The CAO's purpose is "to protect the public health, safety and welfare by preserving, protecting, restoring and managing through the regulation of development and other activities within . . . critical aquifer recharge areas." Spokane County Code §11.20.010(C)(3). Respondent asserts that Appellants have an alternative remedy by seeking injunctive relief or a "claim for damages." Response at 18. However, such actions would be successful only after contamination has occurred or there is an imminent threat to Appellants' drinking water. This is directly contrary to the purpose of the CAO, which is designed to protect and preserve the health of the aquifer and associated drinking water.

Respondent seems to argue that it is Appellants' responsibility to do his job. It is not the responsibility of citizens to enforce the CAO, but the duty of the Director. Therefore a writ of mandamus is appropriate. There is simply no other plain, speedy, and adequate remedy at law to

compel the Respondent to enforce the CAO other than a writ of mandamus.

III. CONCLUSION

The Director of Planning must act to protect critical areas as directed by local law. His failure to do so in the face of clear evidence that a violation of the CAO is occurring is baffling and warrants the issuance of a writ of mandamus.

For the reasons, this court should reverse the lower court's dismissal of Appellants' writ of mandamus and grant the writ of mandamus.

Dated this 26th day of April, 2011.



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PROOF OF SERVICE

I hereby declare under the penalty of perjury and the laws of the State of Washington that the following statements are true.

On the 26 day of April, 2011, I caused to be served, via USPS, postage prepaid, a true and correct copy of the *Reply Brief of Appellants* to the following:

David Hubert
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Original and one copy filed with:

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DATED this 26 day of April, 2011.



Danette Lanet