

No. 95237-0

No. 49691-7

Court of Appeals
DIVISION II
STATE OF WASHINGTON

SOUTHWICK, INC., a Washington Corporation,

APPELLANT,

v.

WASHINGTON STATE, AND ITS DEPARTMENT OF LICENSING BUSINESS AND
PROFESSIONS DIVISION, WASHINGTON STATE FUNERAL AND CEMETERY BOARD,

RESPONDENT.

APPELLANT SOUTHWICK'S REPLY BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ANALYSIS 1

 A. Southwick did not violate RCW 68.50.140. 1

 1. Southwick had a legitimate need to relocate the Devotion Urn Garden..... 2

 2. Southwick had the authority under its rules to move the Devotion Urn Garden outside of the easement..... 3

 3. In finding Southwick had violated a statute that Southwick had not been charged with violating, and by acting without first giving Southwick notice and an opportunity to be heard, the Board violated Southwick's right to due process of law..... 5

 4. There was no substantial evidence presented to the Board that Southwick violated RCW 68.50.140. 10

 B. Southwick had no duty to notify next of kin before shifting the Devotion Urn Garden. 14

 1. Southwick had the authority, pursuant to its rules, and not conditioned on notice, to shift the location of the Devotion Urn Garden..... 14

 2. The Board did not sanction Southwick for violating RCW 68.50.200-.220, and Southwick did not violate that statute..... 15

 3. Southwick did not violate RCW 68.24.060. 18

 C. Applying the rule of lenity in this quasi-criminal proceeding, the Court should hold that Southwick did not violate any of these statutes. 21

 D. Assuming Southwick prevails, the Court should award Southwick fees and costs under the Equal Access to Justice Act. 23

III. CONCLUSION 23

TABLE OF AUTHORITIES

Cases

<i>Esmieu v. Schrag</i> , 88 Wn.2d 490, 497, 563 P.2d 203 (1977).....	8
<i>In re Remains of Faenov (Braun v. Selig)</i> , 194 Wn.App. 42, 376 P.3d 447 (2016).....	16, 18
<i>Mansour v. King County</i> , 131 Wn.App. 255, 264 ¶ 10, 128 P.3d 1241 (2006).....	7
<i>McDaniel v. Department of Soc. and Health Services</i> , 51 Wn.App. 893, 897, 756 P.2d 143 (1988).....	8, 9
<i>Sheldon v. Sheldon</i> , 47 Wn.2d 699, 702, 289 P.2d 335 (1955)	8
<i>State v. Jacobs</i> , 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005).....	21

Statutes

RCW 18.235.110	16
RCW 18.235.130(8).....	16
RCW 34.05.574(1)(b).....	14, 25
RCW 68.04.100	12
RCW 68.20.060-.067	3, 13
RCW 68.24.060	6, 14, 15, 16, 18, 19, 20, 22, 25
RCW 68.24.110	3, 13
RCW 68.40.140	9
RCW 68.50.140	1, 2, 7, 9, 10, 11, 13, 22, 23, 25
RCW 68.50.140(4).....	12, 13, 14, 24
RCW 68.50.200	6, 15, 16
RCW 68.50.200-.220	14, 15, 16, 17, 18, 19, 22
RCW 68.50.210	17
RCW 68.50.220	6, 17, 18

I. INTRODUCTION

Southwick, Inc. ("Southwick") submits this Reply Brief in support of its appeal from a decision of the Washington State Funeral and Cemetery Board ("the Board"). Because the Board plainly violated Southwick's right to due process, and because Southwick did not violate either of the statutes the Board found it had violated, the Court should reverse and remand with instructions that the trial court enter a declaratory judgment in Southwick's favor. And, the Court should award Southwick fees under the Equal Access to Justice Act.

II. ANALYSIS

Southwick did not violate RCW 68.50.140. And, Southwick had no duty to notify next of kin prior to shifting the location of the Devotion Urn Garden.

A. Southwick did not violate RCW 68.50.140.

Southwick did not violate RCW 68.50.140. Southwick had a legitimate need to relocate the Devotion Urn Garden. Southwick had the authority under its rules to move the Devotion Urn Garden outside of the City of Olympia's easement. In finding Southwick had violated a statute that Southwick had not been charged with violating, and by acting without first giving Southwick notice and an opportunity to be heard, the Board

violated Southwick's right to due process of law. Finally, there is no substantial evidence that Southwick violated RCW 68.50.140.

1. Southwick had a legitimate need to relocate the Devotion Urn Garden.

Southwick had a legitimate need to relocate the Devotion Urn Garden.

The prior owners of Forest Memorial Cemetery having abandoned it, Southwick took over the operation of this very old and historic, but derelict, cemetery in the late 1980s. AR 6 (Finding ¶3.7) (Southwick "took over management and care of an essentially abandoned cemetery, improving the condition of the cemetery grounds and honoring many unfunded burial contracts"). Southwick took over operation of this cemetery with the written approval of the Cemetery Board. AR 144. Southwick took over the operation of this historic cemetery in order to preserve it; it has made little to no profit operating the cemetery. AR 136 (Burgman Decl., ¶11). When taking over operation, Southwick was unaware that the City of Olympia possessed an easement running through the middle of the cemetery. AR 6 (Finding ¶3.7) ("[T]he necessity to remove the remains was no fault of" Southwick's).

In 2011, the City of Olympia notified Southwick that its main municipal waterline ran through the middle of the cemetery, that the City

possessed an easement for the waterline, and that the aging waterline might soon need emergency repair. AR 137 (Burgman Decl., ¶18); AR 179-82. The City of Olympia demanded that Southwick remove anything located in the easement that might constitute an impediment to the City of Olympia's access to the waterline for the purpose of its repair. *Id.* The City's survey showed that the Devotion Urn Garden lay within the easement. AR 183.

Southwick had both the legal obligation and the legitimate need to shift the location of the Devotion Urn Garden in response to the City's demand. There is nothing in the Final Order that suggests otherwise. The Prosecuting Authority's claim that Southwick acted irresponsibly or without cause in moving the Devotion Urn Garden is wholly without merit.

2. Southwick had the authority under its rules to move the Devotion Urn Garden outside of the easement.

Southwick had the authority under its rules to move the Devotion Urn Garden outside of the easement.

The Legislature has authorized cemetery authorities to establish rules governing the interment of remains in the cemetery. RCW 68.24.110. See also RCW 68.20.060-.067. Southwick sold each of the lots within the Devotion Urn Garden subject to rules adopted pursuant to

these statutes. AR 152-72. These rules specifically authorized Southwick, in the event that Southwick discovered it had made an error in interring remains, to correct that error by removing and reinterring the remains:

In the event the error shall involve the interment of the remains of any person in such property, the Corporation reserves and shall have the right to remove and reinter the remains in the property conveyed in lieu thereof.

AR 163 (¶10(j)). Nothing in these rules purported to condition Southwick's right to correct errors in the interment of human remains upon prior notice. *Id.*

In direct response to the City of Olympia's lawful demand, and acting pursuant to the authority of its rules, Southwick shifted the location of the entire Devotion Urn Garden the minimum distance necessary to relocate it outside the City of Olympia's waterline easement. AR 137-38 (Burgman Decl., ¶ 19, 24). After this occurred, each of the unopened, sealed urns remained in exactly the same lot, and in exactly the same relative location to one another, as before. AR 138 (Burgman Decl., ¶25). See also AR 6 (Finding ¶3.7) (Southwick "took care to move the [remains] as short a distance as possible, and to maintain the configuration of the plots").

The fact that Southwick had slightly shifted the location of the Devotion Urn Garden was immediately apparent to anyone visiting the

cemetery. AR 138 (Burgman Decl., ¶25). The Board received no evidence or testimony that the slight change in location confused anyone. Instead, Southwick's patrons uniformly complimented Southwick on the improved appearance of the cemetery after the move. AR 138 (Burgman Decl., ¶26); AR 193.

As Southwick made plain from the very outset of this matter (AR 56 (Palko Decl., ¶7)), Southwick acted pursuant to the authority of its rules. Under its rules—which the Legislature authorized Southwick to adopt, and pursuant to which Southwick sold every plot located in the Devotion Urn Garden—Southwick had the legal authority to correct the error it had unwittingly made in establishing the Devotion Urn Garden in the area that Southwick later discovered was subject to the City of Olympia's waterline easement.

3. In finding Southwick had violated a statute that Southwick had not been charged with violating, and by acting without first giving Southwick notice and an opportunity to be heard, the Board violated Southwick's right to due process of law.

In finding Southwick had violated a statute that Southwick had not been charged with violating, and by acting without first giving Southwick notice and an opportunity to be heard, the Board violated Southwick's right to due process of law.

To initiate this administrative proceeding, the Board filed a Statement of Charges. AR 15-17. The Statement of Charges alleged that Southwick had violated the law, not because it had moved the location of the Devotion Urn Garden outside of the City of Olympia's waterline easement, but because Southwick had failed to notify next of kin before doing so. AR 16 (Statement of Charges, ¶2.2) ("On July 21, 2014, Respondent's Principle stated to the board's investigators the next-of-kin had not been notified before the cremated remains were moved. *This conduct* constitutes a violation of RCW 68.24.060, 68.50.200 and 68.50.220.") (emphasis added).

The parties' cross-motions for summary judgment focused on the failure to notify, and the statutes identified in the Statement of Charges. AR 49-53; 122-39. The Board's Presiding Officer, in ruling on the cross-motions for summary judgment, held that these statutes, which each begin with the word "may," were "authorizing statutes." AR 281-82 (Conclusion ¶2-5). In effect, by merely describing what a person "may" do, the Presiding Officer recognized that they created a safe harbor. But because they are "authorizing statutes" only, only describing what Southwick "may" do, and not what it "shall," "must," or "may only" do, the Presiding Officer correctly concluded that Southwick had not violated these statutes. *Id.*

Casting around for some basis justifying the Department's decision to bring charges against Southwick, the Presiding Officer settled on a statute which had not been mentioned in the Statement of Charges. Without giving Southwick any prior notice or opportunity to be heard, the Presiding Officer held—out of the blue—that Southwick had violated RCW 68.50.140. AR 282 (Conclusion ¶6). The Board subsequently incorporated the Presiding Officer's summary judgment decision in its Final Order. AR 5 (Finding ¶3.2).

In finding Southwick had violated a statute Southwick had not been charged with violating, and by acting without first giving Southwick notice and an opportunity to be heard, the Presiding Officer, and the Board, violated Southwick's right to due process of law.

Due process requires notice, and the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mansour v. King County*, 131 Wn.App. 255, 264 ¶ 10, 128 P.3d 1241 (2006). The Board's Presiding Officer violated Southwick's right to due process of law because he gave Southwick no advance notice that he was considering RCW 68.50.140, and because he deprived Southwick of the opportunity to be heard at a meaningful time and in a meaningful manner, before he made his determination that Southwick violated this statute.

The Department argues, for the first time in its brief on appeal, that because Southwick filed a motion for revision/reconsideration, that somehow "cured" the flagrant violation of Southwick's due process right to notice and a meaningful opportunity to be heard. This argument turns the Constitution, and the right of due process, upon its head.

Any decision made without first providing notice and a meaningful opportunity to be heard is void. *McDaniel v. Department of Soc. and Health Services*, 51 Wn.App. 893, 897, 756 P.2d 143 (1988); *Esmieu v. Schrag*, 88 Wn.2d 490, 497, 563 P.2d 203 (1977); *Sheldon v. Sheldon*, 47 Wn.2d 699, 702, 289 P.2d 335 (1955). Therefore, the summary judgment order entered in violation of Southwick's due process rights was and is void. The Board's order, which expressly incorporates that summary judgment order, therefore also was and is void.

The Department argues that Southwick cannot show harm, because "Southwick had the opportunity to . . . prepare and present a defense against RCW 68.50.140 before the full Board." Respondent's Brief, p. 16. That simply is not true.

First, the entry of the summary judgment order effectively reversed the burden of proof. It imposed on Southwick the burden of showing why the Board should not adhere to the Presiding Officer's decision, rather than putting the burden on the Prosecuting Authority, where it belonged.

In addition, the Presiding Officer first raised RCW 68.40.140 only after the opportunity to present evidence into the record had closed. See AR 377 (Notice of Hearing, ¶1.5) (Board specifically advises Southwick that it would not be permitted to present evidence directed at the merits); AR 401 (*idem*); AR 415-16 (Board at Final Hearing permits submission of evidence only on issue of penalty). Further, Southwick was provided with no opportunity to conduct discovery into any issue connected with the Department's allegation that it violated RCW 68.50.140. See AR 363-372 (Southwick's discovery as to statutes identified in Statement of Charges). And, Southwick was denied the right to meaningfully cross-examine the Department's witnesses. Southwick was harmed, and its ability to prepare and present a defense impaired.

The Department cites *McDaniel v. Department of Soc. and Health Services*, 51 Wn.App. 893, 898, 756 P.2d 143 (1988) for the proposition that "where there is sufficient notice and an issue is fully litigated, an administrative decision will be upheld even if an allegation was not included in the pleadings." Respondent's Brief, p. 14-15.

In *McDaniel*, the Department of Social and Health Services failed to provide a welfare recipient notice in advance of an administrative hearing that the Department was required to prove that the welfare recipient intentionally violated certain welfare regulations. *Id.* at 897-8.

In *dicta*, the Court opined that because the welfare recipient's attorney raised the issue of intent in opening statement, presented evidence directed at the issue during the administrative hearing, and argued the issue, the failure to notify was harmless. *Id.*

Here, in contrast, Southwick did not raise the issue of RCW 68.50.140 at summary judgment. Instead, Southwick, without ever having been provided notice that it should conduct discovery, present evidence, or examine witnesses directed at the issues presented by this statute, learned only after the opportunity to conduct discovery was over, the evidentiary record had closed, and after the Board's Presiding Officer had already ruled, that this statute was at issue.

If this is not a violation of due process, what would be?

Southwick was denied the opportunity to be heard at a meaningful time and in a meaningful manner. The Presiding Officer's summary judgment order was therefore void. And the Board's Final Order, which incorporated the Presiding Officer's summary judgment decision, was also void. This Court should therefore reverse the Board's Final Order.

4. There was no substantial evidence presented to the Board that Southwick violated RCW 68.50.140.

In any event, there was no substantial evidence presented to the Board that Southwick violated RCW 68.50.140. Because the Board

mischaracterized and misapplied the law, and because it did not purport to find a violation of any specific subsection of this statute, the Board's Final Order, entered on summary judgment, must be reversed.

RCW 68.50.140 provides:

(1) Every person who shall remove human remains, or any part thereof, from a grave, vault, or other place where the same has been buried or deposited awaiting burial or cremation, without authority of law, with intent to sell the same, or for the purpose of securing a reward for its return, or for dissection, or from malice or wantonness, is guilty of a class C felony.

(2) Every person who shall purchase or receive, except for burial or cremation, human remains or any part thereof, knowing that the same has been removed contrary to the foregoing provisions, is guilty of a class C felony.

(3) Every person who shall open a grave or other place of interment, temporary or otherwise, or a building where human remains are placed, with intent to sell or remove the casket, urn, or any part thereof, or anything attached thereto, or any vestment, or other article interred, or intended to be interred with the human remains, is guilty of a class C felony.

(4) Every person who removes, disinters, or mutilates human remains from a place of interment, without authority of law, is guilty of a class C felony.

In its final order, the Board characterized RCW 68.50.140 as "a general prohibition against removal of interred human remains." This is a gross mischaracterization of the statute, which contains four separate subsections prohibiting four specifically defined sets of conduct.

Without there being the slightest basis in the actual language of the Final Order for it to do so, the Prosecuting Authority in its appellate brief claims that the Board found Southwick to have violated RCW 68.50.140(4). Respondent's Brief, p. 19. That subsection prohibits any person from removing or disinterring human remains "from a place of interment," "without authority of law." For either of two reasons, Southwick did not violate this statute.

First, Southwick did not remove human remains "from a place of interment." The Prosecuting Authority, in its brief, does not address this plainly applicable requirement.

RCW 68.04.100 defines "interment" as "the placement of human remains **in a cemetery**" (emphasis added). Under this definition, these cremated remains' "place of interment" is Forest Memorial Cemetery. It is not disputed that the remains at all times remained sealed within unopened urns within Forest Memorial Cemetery. Therefore, Southwick did not remove any remains "from a place of interment."

The Legislature did not impose the requirement that remains be removed "from a place of interment" by mistake. The Legislature enacted this statute, which has ancient roots, to prevent grave robbers and other miscreants from coming into a cemetery and removing or disturbing the remains buried there. The Legislature, by this statute, did not intend to

regulate the conduct of cemetery authorities themselves. Instead, the Legislature authorized cemetery authorities to adopt their own rules regulating their own conduct. RCW 68.24.110; RCW 68.20.060-.067.

In order to sustain a determination that Southwick violated RCW 68.50.140, the Board had to conclude that Southwick removed the remains from their place of interment—Forest Memorial Cemetery. The Board did not enter any such conclusion, because there is no substantial evidence supporting it.

In addition, RCW 68.50.140(4) applies only when human remains are removed from a place of interment "without lawful authority." Here, Southwick had "lawful authority" to shift the location of the Devotion Urn Garden in light of the rules pursuant to which it sold every one of the plots located in the Urn Garden. Again, the Board did not address this issue.

RCW 68.24.110, and the rules Southwick adopted pursuant to that statute, provided Southwick with the lawful authority to act exactly as it did. Southwick, in acting pursuant to its rules, acted with lawful authority.

In sum, the Board did not purport to conclude that Southwick had removed remains "from a place of interment," or that, in acting pursuant to its rules, Southwick had acted "without lawful authority"—both of which subjects the Board had to address in order to conclude that Southwick had

violated RCW 68.50.140(4). And there is no substantial evidence in the record to suggest that Southwick did either of these things.

For any or all of these reasons, the Court should reverse the Board's Final Order, and, as RCW 34.05.574(1)(b) specifically authorizes, remand to the trial court with instructions that the trial court enter a declaratory judgment determining that, in shifting the location of the Devotion Urn Garden in response to the City of Olympia's demand that Southwick remove all obstructions located within the City's waterline easement, Southwick did not violate RCW 68.50.140.

B. Southwick had no duty to notify next of kin before shifting the Devotion Urn Garden.

In addition, Southwick had no duty to notify next of kin before shifting the location of the Devotion Urn Garden. Southwick had the authority, pursuant to its rules, and not conditioned on notice, to shift the location of the Devotion Urn Garden. The Board did not sanction Southwick for violating RCW 68.50.200-.220, and Southwick did not violate that statute. Finally, Southwick did not violate RCW 68.24.060.

1. Southwick had the authority, pursuant to its rules, and not conditioned on notice, to shift the location of the Devotion Urn Garden.

The theory on which the Department based its Statement of Charges in this case was that Southwick had a duty to notify next of kin before shifting the location of the Devotion Urn Garden. See AR 45

(Amended Statement of Charges, ¶2.2, alleging Southwick's conduct in not notifying next of kin before the cremated remains were moved violated RCW 68.24.060 and RCW 68.50.200). This was the theory on which the Prosecuting Authority moved for summary judgment. AR 49-53. This is also reflected by the fact that the Board, in its Final Order, imposed notification requirements on Southwick. AR 9.

Southwick shifted the Devotion Urn Garden acting pursuant to the authority granted by its rules. AR 56. These rules authorized Southwick to correct errors in the interment of remains. AR 163 (Rule 10(j)). That is exactly what Southwick did.

These rules did not purport to condition Southwick's right to exercise this authority upon any kind of prior notice to next of kin. *Id.* Neither the Presiding Officer, in ruling on the cross-motions for summary judgment, nor the Board, in its Final Order, nor the Department, in its brief, address this issue or purport to explain why Southwick did not have the legal authority to act as it did pursuant to these rules.

2. The Board did not sanction Southwick for violating RCW 68.50.200-.220, and Southwick did not violate that statute.

Ignoring the source of authority on which Southwick has consistently stated it acted, the Prosecuting Authority in its appellate brief instead argues that the Board's Final Order should be upheld based on the

claimed inapplicability of other statutes, one of which is RCW 68.50.200-.220. The Court should reject this argument.

First, the Board itself did not find Southwick to have violated this statute. AR 7 (Conclusion ¶4.4, 4.5). And the Board did not impose sanctions upon Southwick based upon any determination that Southwick had violated this statute. The Board, in its Final Order, imposed sanctions upon Southwick based solely upon its conclusion that Southwick had violated RCW 18.50.140 [sic] and RCW 68.24.060:

By violating RCW 18.50.140 [sic] and without fitting into any applicable exception to the statute, and by violating RCW 68.24.060, the respondent has engaged in unprofessional conduct pursuant to RCW 18.235.130(8). Under RCW 18.235.110 the Board may impose discipline.

AR 8 (Conclusion ¶4.9).

Second, RCW 68.50.200-.220 is phrased permissively. It describes circumstances under which remains "may" be removed. See RCW 68.50.200 (Human remains **may** be removed . . .) (emphasis added). This statute does not state that remains "shall," "must," or "may only" be removed pursuant to its terms.

This statute addresses requests by individual or public authorities to move remains; it is not addressed to cemetery operators. *In re Remains of Faenov (Braun v. Selig)*, 194 Wn.App. 42, 376 P.3d 447 (2016) (RCW 68.50.200 sets forth the rule governing the disinterment of human remains

upon a private request; RCW 68.50.210 sets forth the rule for disinterment of human remains by public authority on application to Court; and RCW 68.50.220 sets forth the circumstances in which the prior two statutes do not apply).

This statute does not prohibit any conduct. Because it does not prohibit any conduct, it is impossible for any person, much less Southwick, to "violate" this statute.

In his summary judgment order, the Board's Presiding Officer recognized this. He characterized RCW 68.50.200-.220 as an "authorizing statute." AR 282 (Conclusion ¶5). He recognized that he could not properly find Southwick, which had not claimed to have acted under the authority of this statute, and had not invoked the safe harbor it might potentially provide, as having "violated" it. *Id.* The Board, in its Final Order, agreed with the Presiding Officer's characterization of RCW 68.50.200-.220. AR 7 (Conclusion ¶4.4, 4.5).

In its appellate brief, the Prosecuting Authority argues that Southwick violated RCW 68.50.220. Respondent's Brief, p. 22-23. Given that both the Board's Presiding Officer, and the Board itself, found no violation of RCW 68.50.220, the Prosecuting Authority is not entitled to ask an appellate court to affirm the Board's imposition of sanctions on this basis.

The Prosecuting Authority argues that Southwick violated the final clause of RCW 68.50.220. Aside from being an exception to a statute that is phrased permissively, and which is not directed to cemetery authorities, the language of this final clause does not apply to the facts presented here. Southwick did not move remains from "one plot to another." Southwick shifted the location of the entire Devotion Urn Garden to relocate it outside the City of Olympia's waterline easement. All the remains stayed in exactly the same plots, in exactly the same location relative to one another. AR 138 (Burgman Decl., ¶25). See also AR 6 (Finding ¶3.7) (Southwick "took care to move the [remains] as short a distance as possible, and to maintain the configuration of the plots.").

In sum, the Board did not find Southwick to have violated RCW 68.50.200-220, and Southwick did not violate this statute. The Final Order cannot be sustained on this basis.

3. Southwick did not violate RCW 68.24.060.

Finally, Southwick did not violate RCW 68.24.060.

RCW 68.24.060 is contained in a chapter setting forth the process for establishing cemeteries. Therefore, RCW 68.24.060 must be interpreted in light of the purpose of this chapter. See *Remains of Faenov*, 194 Wn.App. at 48, ¶ 15. This chapter, and therefore this statute, only addresses the issue of whether a cemetery may file a new plot map before interring any remains.

It does not address the circumstances in which a cemetery authority may relocate interred human remains.

RCW 68.24.060 provides:

Any part or subdivision of the property so mapped and plotted **may**, by order of the directors, be resurveyed and altered in shape and size and an amended map or plat filed, so long as such change does not disturb the interred remains of any deceased person.

(emphasis added).

Like RCW 68.50.200-.220, this statute is phrased permissively. It describes what cemetery directors "may" do. It does not describe what cemetery directors "shall" do, "must" do, or "may only" do. Because on its face this statute does not prohibit any conduct, it simply is not possible for Southwick (or anyone else) to violate it.

The Board's Presiding Officer recognized this. In his summary judgment order, he held that this statute only authorized conduct. He did not find that Southwick violated it. AR 281-282 (Order on Motion for Summary Judgment, Conclusion of Law ¶2).

In the Final Order, the Board, without receiving any briefing or additional evidence directed at this issue, changed position. The Board ruled:

Respondent also violated RCW 68.24.060 because it moved plot locations but failed to amend the plot map associated with that move. Respondent constructively amended the plot map by moving the plot locations and further violated RCW

68.24.060 when it moved human remains in the process of altering the plot locations.

AR 8 (Final Order, Conclusion of Law ¶4.7).

The Board's determination that Southwick violated this statute fails for several reasons.

First, the Board made no finding that Southwick was subject to the requirements of RCW 68.24.060. The Legislature originally enacted this statute as part of the 1943 "General Cemetery Act." See 1943 Wash. Laws Ch. 247, Ch. 65. There is nothing in that Act which states that it applies to cemeteries already established as of the date the Legislature passed that law. The Prosecuting Authority made no showing, and the Board made no finding, that the provisions of Chapter 68.24 RCW, including RCW 68.24.060, applied to Forest Memorial Cemetery, which had been established in 1857, 86 years before the Legislature passed this statute.

Moreover, RCW 68.24.060 addresses the circumstances under which a cemetery authority may revise **a plot map**. But the Prosecuting Authority offered no evidence showing that the original operators of Forest Memorial Cemetery had ever recorded such a map. In the absence of a showing that there was a plot map to be revised, this statute does not apply.

The Board was not entitled, on summary judgment, to conclude as a matter of law that Southwick had violated RCW 68.24.060. In fact, because

the statute does not prohibit any conduct, neither Southwick nor anyone else could violate it. For this, and the other reasons described herein, the Court should reverse the decision of the Board on this issue, and remand with instructions that the trial court enter a declaratory judgment that Southwick, in shifting the location of the Devotion Urn Garden pursuant to the authority of its rules in response to the City of Olympia's demand, did not violate this statute.

C. Applying the rule of lenity in this quasi-criminal proceeding, the Court should hold that Southwick did not violate any of these statutes.

Finally, applying the rule of lenity in this quasi-criminal proceeding, the Court should hold that Southwick did not violate any of the charged statutes.

The rule of lenity provides that to the extent that there is ambiguity in the application of a statute in a criminal or quasi-criminal proceeding, the statute must be construed in a manner strictly favoring the person charged with its violation. *State v. Jacobs*, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005).

Here, Southwick had both a legitimate need and the legal obligation to remove any obstructions located within the City of Olympia's waterline easement. Under the Legislatively-authorized rules pursuant to which Southwick had sold every lot in the Devotion Urn Garden, Southwick had

the right, not conditioned upon notice, to correct errors in the interment of remains, such as the error that had occurred when the Devotion Urn Garden had been unwittingly established within the City's easement.

Because RCW 68.50.140 on its face only applies to the removal of remains from a place of interment—i.e., to somewhere off of cemetery property—and because Southwick was acting pursuant to the lawful authority granted it under its rules, Southwick had no reason, at the time that it acted, to be aware that its actions violated RCW 68.50.140. And because RCW 68.24.060, and RCW 68.50.200-.220, on their face, only describe what persons "may" do, and do not prohibit any conduct, Southwick had no reason to conclude that it had violated these statutes, either.

It is one thing for the Board to interpret these ambiguous statutes in a prospective way, and to apply its interpretation to those persons who, when acting, have actual or constructive knowledge of the way the Board interprets them. But it is quite another thing for the Board to apply statutes, which on their face have no application to the conduct engaged in by Southwick, to retrospectively "interpret" them so as to find Southwick "violated" them, and to sanction Southwick on that basis.

Because the statutes which the Cemetery Board purported to interpret and apply to Southwick are, at the very least, ambiguous, the Court should apply the rule of lenity, and construe them, in this license revocation

proceeding, strictly in favor of Southwick. So construed, the penalties imposed on Southwick cannot be sustained. For this additional reason, the sanctions which the Board imposed on Southwick must be reversed.

D. Assuming Southwick prevails, the Court should award Southwick fees and costs under the Equal Access to Justice Act.

Finally, for the reasons described in Southwick's opening brief, assuming Southwick prevails, the Court should award Southwick fees and costs under the Equal Access to Justice Act.

III. CONCLUSION

The Court should reverse the Board's Final Order, entered on summary judgment, that Southwick violated RCW 68.50.140.

The Board's Presiding Officer's out-of-the-blue conclusion that Southwick violated this statute occurred in flagrant violation of Southwick's due process rights. Therefore, the Presiding Officer's decision is void. And the Board's Final Order, which was based on and incorporated the Presiding Officer's decision, is also void.

In any event, Southwick did not engage in conduct that violated RCW 68.50.140. Southwick had a legitimate need to move the location of the Devotion Urn Garden in response to the City of Olympia's demand that Southwick remove all obstructions from the City of Olympia's waterline easement. The Legislature has authorized cemetery authorities, like Southwick, to adopt rules governing the interment of remains. Without

conditioning Southwick's right in any way on prior notice, those rules gave Southwick the authority to correct errors in the interment of remains. Southwick thus had the authority to shift the location of the Devotion Urn Garden pursuant to those rules, and properly acted pursuant to that authority.

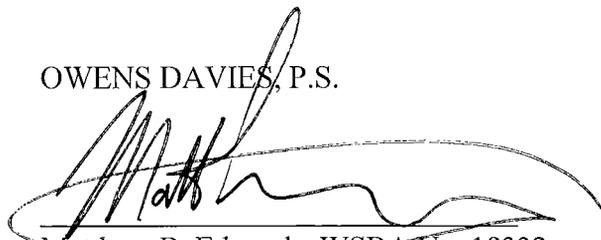
In addition, RCW 68.50.140(4) only prohibits the removal of remains from a "place of interment." The cemetery code defines these remains' "place of interment" as Forest Memorial Cemetery, reflecting the legislative intent that RCW 68.50.140(4) not apply to cemetery authorities. In shifting the location of the Devotion Urn Garden, Southwick did not remove any remains from Forest Memorial Cemetery, and did not violate RCW 68.50.140(4).

And, RCW 68.50.140(4) also required the Department to establish that Southwick acted "without lawful authority." Because the Legislature authorized cemetery authorities like Southwick to adopt rules governing the interment of remains in a cemetery, because Southwick adopted such rules, because those rules permitted Southwick to correct errors made in the interment of human remains (such as the error that occurred when the Devotion Urn Garden was unwittingly established within the City of Olympia's waterline easement) without conditioning such permission on notice, Southwick acted with "lawful authority."

Finally, Southwick did not violate RCW 68.24.060. That statute is permissive. It describes what cemetery directors "may" do. It does not prohibit any conduct. Therefore, Southwick could not violate it.

The Court should reverse the Final Order. Further, because Southwick plainly did not violate RCW 68.50.140 or RCW 68.24.060, as authorized by RCW 34.05.574(1)(b) the Court should remand with instructions that the trial court enter a declaratory judgment so declaring. And the Court should award Southwick attorney's fees under the Equal Access to Justice Act.

OWENS DAVIES, P.S.

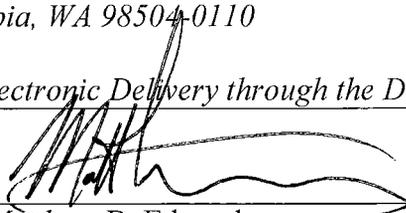
A handwritten signature in black ink, appearing to read "Matt Edwards", is written over a horizontal line. The signature is fluid and cursive.

Matthew B. Edwards, WSBA No. 18332
Attorney for Appellant Southwick, Inc.

I certify that on the 21st day of February, 2017, I caused a true and correct copy of this Reply Brief to be served on the following in the manner indicated below:

*R. July Simpson
Office of the Attorney General
Licensing & Administrative Law Division
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Olympia, WA 98504-0110*

via Electronic Delivery through the Division II File Upload site.

By: 
Matthew B. Edwards

OWENS DAVIES PS

February 21, 2017 - 3:13 PM

Transmittal Letter

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Court of Appeals Case Number: 49691-7

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