6-29-2010

Stafford v. Kootenai County Appellant's Brief Dckt. 37320

IN THE SUPREME COURT FOR THE STATE OF IDAHO

DOUGLAS and MICHELLE STAFFORD, husband and wife,

Plaintiffs/Appellants,

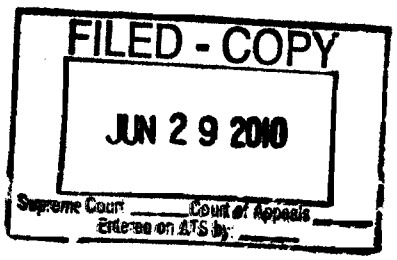
vs.

KOOTENAI COUNTY, a Political Subdivision of the State of Idaho, acting through the KOOTENAI BOARD OF COMMISSIONERS; and ELMER R. "RICK" CURRIE, RICH PIAZZA, and TODD TONDEE, COMMISSIONERS, in their official capacities,

Defendants/Respondents.

SUPREME COURT NO. 37320-2010

Kootenai County Case No. CV-09-2516



APPELLANTS' OPENING BRIEF

Honorable John T. Mitchell, District Court Judge, Presiding

Appeal from the District Court of the First Judicial District For Kootenai County

John F. Magnuson, ISB #4270
P.O. Box 2350
1250 Northwood Center Court, Suite A
Coeur d'Alene, ID 83816
Telephone: (208) 667-0100

Attorney for Appellants

Patrick M. Braden, Deputy Attorney, ISB #6020
Kootenai County Legal Services
P.O. Box 9000
451 Government Way
Coeur d'Alene, ID 83816
Telephone: (208) 446-1620

Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES **PAGE**

OTHER AUTHORITIES **PAGE**

I. STATEMENT OF THE CASE.

A. Nature of the Case.

This case represents an appeal under the Idaho Administrative Procedures Act and the Local Land Use Planning Act from a final Order of the Kootenai County Board of Commissioners finding that Douglas and Michelle Stafford violated Kootenai County Ordinance No. 374 (Kootenai County's current Site Disturbance Ordinance). The Staffords established that the actions alleged to constitute violations of Ordinance No. 374 were undertaken by the Staffords and known to the County prior to the effective date of said Ordinance. The Staffords contend that they have been improperly and retroactively cited under an Ordinance with an effective date that post-dates the actions for which they have been cited. The Board of Commissioners disagreed. The Staffords appealed to the District Court pursuant to the Local Land Use Planning Act, I.C. §§67-6521 and the Idaho Administrative Procedures Act, I.C. §§67-5270 through 67-5277. The District Court affirmed the Board's determination that the Staffords had violated Kootenai County Ordinance No. 374. This appeal followed.

B. Course of Proceedings.

On September 7, 2007, the Kootenai County Building and Planning Department caused to be issued to the Staffords, under the heading "Case No. CV-07-0092," a "Notice of Violation." See AR, Vol. I, p. 005.[1] The Notice of Violation alleged that the Staffords had violated Kootenai County Ordinance No. 374 by causing "site disturbance within twenty-five foot set-back." Id.

On March 19, 2008, the Kootenai County Building and Planning Department (hereafter "the

---

[1] Included in the record on appeal are seven (7) volumes of the "Agency Record." The "Agency Record" will be referred to herein by the acronym "AR." The "Clerk's Record" will be referred to by the acronym "R."

Department") provided the Staffords with a "Notice of Site Disturbance Ordinance Violation." See AR, Vol. I, p. 0136. That Notice again alleged that the Staffords had violated Kootenai County Ordinance No. 374. The Department advised the Staffords that they had forty-five (45) days within which to file an administrative appeal from the Department's determination that they had violated Ordinance No. 374.

On March 21, 2008, the Staffords timely appealed the Department's administrative determination that they had violated Kootenai County Ordinance No. 374. See AR, Vol. I, p. 0138. The Staffords' appeal came on before a Kootenai County Hearing Examiner. See AR, Vol. II, p. 0317 The Hearing Examiner rejected the Staffords' argument, finding that they had violated Kootenai County Ordinance No. 374. See AR, Vol. III, pp. 0468-0474.

The Staffords appealed the Hearing Examiner's Decision to the Kootenai County Board of Commissioners (hereafter "the Board"). Id. at pp. 0475-0476. On March 19, 2009, the Board entered its Order of Decision, rejecting the Staffords' argument. The Board found that the Staffords had violated Ordinance No. 374. See AR, Vol. III, pp. 0615-0624. That Decision was amended on April 16, 2009. See AR, Vol. III, pp. 0628-0636.

The Staffords timely filed an appeal from the Board's Order and Amended Order to the District Court. R., pp. 6 and 25. The Staffords' appeal was made pursuant to the Local Land Use Planning Act, I.C. §§67-6521, and the Idaho Administrative Procedures Act, I.C. §§67-5270 through 67-5277. The Staffords sought review, from the District Court in its appellate capacity, of that certain "Amended Findings of Fact, Applicable Legal Standards, Conclusions of Law, and Order of Decision" entered by the Board on April 16, 2009. R., pp. 45-53. Following briefing and argument, the District Court entered its "Memorandum Decision and Order on Appeal," affirming the Board's

Order and Amended Order finding a violation under Ordinance No. 374. This appeal followed.

C. Statement of Facts.

1. Ordinance No. 251.

Kootenai County's "Site Disturbance Ordinance No. 251" is contained in the record at AR, Vol. I, p. 0046-0066. Ordinance No. 251 took effect on January 1, 1997. Id. at p. 0062. Ordinance No. 251 provided, with respect to lots with frontage on Lake Coeur d'Alene, that "an undisturbed natural vegetation buffer shall be retained at the waterfront . . . . The buffer shall be a minimum of twenty-five feet in slope distance from the high water mark of the water body [elevation 2125.0 (N.G.V.D. 1929 Datum)]." Id. at pp. 0057-58.[2]

Ordinance No. 251 defines a "undisturbed natural vegetation buffer" as:

> An area where no development activity has occurred or will occur, including, but not limited to, logging, construction of utility trenches, roads, structures, or surface and storm water facilities. Buffer areas shall be left in their natural state.

See AR, Vol. I, p. 0049.

The purpose of Ordinance No. 251, as stated therein, is:

> The purpose of this ordinance shall be to protect property, surface water, and ground water against significant adverse effects from excavation, filling, clearing, unstable earth works, soil erosion, sedimentation, and storm water run-off and to provide maximum safety in the development and design of building sites, roads, and other surface amenities.

---

[2]Coeur d'Alene Lake elevation 2125.0 at N.G.V.D. datum equates to elevation 2128 using Washington Water Power (now Avista) datum. Elevation 2128 is the level artificially maintained during the summer months by the Avista dams on the Spokane River, the natural outlet to Lake Coeur d'Alene. See, generally, In re: Sanders Beach, 143 Idaho 443, 147 P.3d 75 (2006).

Id. at p. 0046.[3]

2. Ordinance No. 283.

Kootenai County "Site Disturbance Ordinance No. 283" became effective July 26, 1999. R., p. 64. The stated "purpose" of Ordinance No. 283 did not differ from that stated in Ordinance No. 251. The definition of "undisturbed natural vegetation buffer," as contained in Ordinance No. 283, did not differ from that contained in Ordinance No. 251. The prohibition against development activity within the twenty-five (25) foot set-back from elevation 2128 was also unchanged from that contained in Ordinance No. 251.

3. Ordinance No. 374.

Kootenai County's "Site Disturbance Ordinance No. 374" was adopted effective December 12, 2005. See AR, Vol. I, p. 0093. The stated "purpose" of the Ordinance did not change from the purpose declared in Ordinance Nos. 251 and 283. The definition of "undisturbed natural vegetation buffer" also went unchanged. Id. at p. 0081. So too did the prohibition against development activity within the twenty-five (25) foot set-back zone from elevation 2128. Id. at p. 0089.

Ordinance No. 374 contained the following specific language:

> The provisions of this Ordinance [374] shall supersede the provisions of Kootenai County Site Disturbance Ordinance No. 283.

See AR, Vol. I, p. 0093 (emphasis added). Ordinance No. 374 also specifically stated that it "shall take effect and be in full force" on December 12, 2005. Id.

---

[3]Ordinance No. 251 provides, at Section 13, that violations may be considered a criminal misdemeanor and punishable by a maximum fine of $300 or six (6) months in jail, or both. See AR, Vol. I, p. 0061.

4. The Stafford Property.

The Stafford property consists of a three-quarter acre lot on Lake Coeur d'Alene. See AR, Vol. I, p. 0028. The Staffords purchased the property in 1999. See Tr., Vol. I, p. 0057.[4]

Dr. Stafford offered unrebutted testimony, before the Board, that development activity had occurred within the twenty-five (25) foot set-back zone on the property prior to 1999.

> [W]hen we bought the property in 1999 - that area - the development that we're on was logged. Um, the area down by the Lake actually was used as a slash pile. When we bought the property, there was a slash pile that they - it appears that they attempted to bury it - dug about a three foot hole and they stuck and filled it up with about eight or nine foot slash - slash pile of stumps of logs and things. Um, the property was torn up. It uh - noxious weeds on there. Canadian thistle and knapweed.

See Tr., Vol. I, p. 20. Dr. Stafford also offered unrebutted testimony before the Board that the property had sand within the twenty-five (25) foot set-back zone at the time he purchased it. See Tr., Vol. I, p. 0058.

5. The Staffords' First Building Permit Application.

The Staffords submitted an application for a building permit on the property in July of 1999. See AR, Vol. I, p. 0028. The Staffords sought to build a single family residence. Id. The permit was issued in July of 1999 and construction began. Id. Construction of the Stafford home was completed in 2000. The Department signed off on the Staffords' initial "Certificate of Occupancy" on March 23, 2000. Id. at pp. 0039-0040.

---

[4] There is one volume of transcript included in the Appellate Record. It consists of the "Clerk's Transcript" from administrative proceedings held before Kootenai County. This transcript will be referred to herein by the acronym "Tr."

6. Subsequent Work Within the Twenty-Five Foot Set-Back Area.

In the summer of 2000, as confirmed by photographs offered by the Department, the Staffords had accomplished minimal clean-up efforts of the prior development activity that had occurred within the twenty-five (25) foot set-back zone. See AR, Vol. I, p. 0010. In 2001, Dr. Stafford desired to clean-up the prior development activity that had occurred within the twenty-five (25) foot set-back zone on his property. See Tr., Vol. I, p. 0057.

Prior to undertaking any action, Dr. Stafford went to the Department for advice:

> [W]e finished our house in 2000 and moved in. In the summer of . . . 2001, we decided that we would like to do something that would clean that up. It was a - it was a mess. At that time, we did hire a landscaper. Uh, talked to him - came up with some plans. I personally went down to Planning and Zoning and talked to the lady behind the counter. I don't know her name, but it was in 2001. And specifically asked her, and told her our situation, it had been torn up uh was there a problem with us planting grass and trees. And she told us that re-greening was never a problem. And okay, so if I plant grass and plants and trees down there, its not a problem. She repeated re-greening is not a problem. So we went ahead . . . .

See Tr., Vol. I, pp. 0057-0058. Stafford offered unrebutted testimony that the improvements were completed in 2001:

> I have since cleaned up the beach a little bit and moved some rocks around and things like that, but um, so in 2001, our project was completed down there and as the photographs and records show we were not trying to hide anything - it was there.

Id. at p. 0058. Photographs offered by the Department show that by July of 2002, the Stafford property had been cleaned up, including areas within the twenty-five (25) foot set-back zone. See AR, Vol. I, p. 0013. This included the addition of sand to the sand that previously existed (as confirmed by Dr. Stafford's unrebutted testimony), "re-greening" as verbally approved by the

Department (as also confirmed by Dr. Stafford's unrebutted testimony), and a portion of a barbeque pit that will be discussed more fully below. Illustrative photographs are included in the Agency Record at Vol. I, pp. 0011-0025.

At the time the improvements were completed (July of 2001), the operative Site Disturbance Ordinance in effect was Ordinance No. 283.

7. The Staffords Apply for a Second Building Permit for an Addition to Their Home.

In August of 2005, the Staffords applied for a new building permit to authorize construction of an addition to their home. See AR, Vol. I, p. 0067. The permit was approved by Kootenai County in October of 2005. Id.

As part of the submittals to Kootenai County, in support of their request for a building permit for the addition, the Staffords submitted a "Site Plan" prepared by a professional engineer. See AR, Vol. II, p. 0269. This plan is referred to herein as "the Site Plan." The Site Plan depicted the twenty-five (25) foot set-back "from vegetation line" (summer elevation of 2128 WWP (Avista datum)). Id. That set-back line is shown to run through the center of the barbeque pit that Dr. Stafford installed in the summer of 2001. Id. The Site Plan (as it will be referred to herein) was signed and approved by the Kootenai County Building and Planning Department on October 13, 2005. Id.

Representatives of the County came out to inspect the Stafford construction project, which, pursuant to the Site Disturbance permit issued by the County, included silt fences at or near the shoreline. See Tr., Vol. I, p. 0059. These individuals raised no objection or comment to the improvements that Dr. Stafford had made some four and a half years earlier. Id.

Effective December 12, 2005, Kootenai County Ordinance No. 374 was adopted, specifically

superseding Ordinance No. 283 (which was in effect when the Staffords completed their improvements within the twenty-five (25) foot set-back zone in July of 2001).

8. The Staffords are Cited for Violating Ordinance No. 374.

The Staffords made request for a Certificate of Occupancy on the addition to their home that was authorized by the 2005 building permit. This request came in August of 2007. As part of that final inspection, the Department issued a "Notice of Violation" (the Notice of Violation at issue in this proceeding), claiming that the Staffords had violated Site Disturbance Ordinance No. 374 (effective December 12, 2005) based upon the improvements that the Department acknowledges were completed in July of 2001 (when Ordinance No. 283 was in effect and had not yet been superseded). See AR, Vol. I, p. 0005.

9. The Department Refuses to Issue a Certificate of Occupancy Based Upon the Claim that the Staffords Had Violated Ordinance No. 374.

On November 21, 2007, the Staffords, through counsel, wrote the Department's Director. See AR, Vol. I, pp. 0106-0108. The Staffords attempted to resolve the matter, given the then pending holidays, and the County's position that the Staffords could not occupy the completed addition to their home based upon alleged site disturbance violations occurring six (6) years earlier (and prior to the adoption and effective date of the Ordinance (Ordinance No. 374) relied upon by the County. The County did not respond.

On December 5, 2007, the Staffords renewed their request to resolve the matter. See AR, Vol. I, p. 0105. The County did not respond.

On January 15, 2008, after the holidays had passed, and some two (2) months later, the County responded, refusing to consider the issuance of the Certificate of Occupancy. See AR, Vol.

I, pp. 0113-0114.

After subsequent efforts to resolve the matter failed, the Department gave the Staffords notice that the Department would be recording a "Notice of Violation," asserting a violation under Ordinance No. 374. See AR, Vol. I, pp. 0127-0130. The Staffords then filed their appeal which gives rise to this proceeding. Id. at p. 0138.

10. Proceedings Before the Board of County Commissioners.

The Staffords argued to the Board that they had been improperly cited under Ordinance No. 374. Ordinance No. 374, effective December 12, 2005, specifically "superseded" Ordinance no. 283. Ordinance No. 283 was in effect in the summer of 2001 when the subject improvements were completed. Ordinance No. 374 could not form the basis for a violation based upon action that preceded the effective date of the Ordinance.

The Board rejected the Staffords argument.[5] The Staffords argued at hearing to the Board in part as follows:

> It is important to note that the process that we are involved in . . . the charge against the Staffords is a violation of Ordinance 374. That is what they have been charged with. Now, if somebody makes a claim about a violation of 283 or 251, that's not the violation alleged here today and then there will be an argument in that context as well, but this is 374 only.

See Tr., Vol. I, p. 0087.

The Board noted that Ordinance No. 283 was in effect at the time the subject improvements were completed. Commissioner Tondee stated:

---

[5]The Board did find that the Staffords would not be required to move the barbeque pit that was depicted on the Site Plan specifically approved by the Department as part of the remodel application. See AR, Vol. II, p. 0269. See also, Tr., Vol. I, p. 0083.

> The new ordinance going forward would be 374. That does not negate that the time period that ordinance was in effect prior or the previous ordinance 283 was in effect prior to that . . . [T]he work was done there was an ordinance in effect that did not allow the work that was done in 2001. Uh, and the work that was done in 2001 was done without a permit . . . . We're saying the work was done without a permit and it's in violation of our ordinances to do work in that area so from my understanding . . . there needs to be a remediation plan and it needs to put it back.

See Tr., Vol. I, pp. 0091-0092.

Commissioner Piazza agreed. "I do believe that 283 was in effect at the time [the improvements were completed]." See Tr., Vol. I, p. 0095. To date, no charge has ever been made against the Staffords under Ordinance No. 283.

II. ISSUES PRESENTED ON APPEAL.

1. Whether the Board's order of decision denying the Staffords' appeal was erroneous as a matter of law?

2. Whether the Board's order of decision denying the Staffords' appeal was arbitrary, capricious, and/or an abuse of discretion or unsupported by substantial evidence?

3. Whether the County is estopped to claim a violation of Ordinance No. 374?

III. ARGUMENT.

A. Applicable Standards on Appeal.

The Staffords bring this appeal from the Board's Order of Decision and Amended Order of Decision pursuant to the Local Land Use Planning Act, I.C. §§67-6521 and the Idaho Administrative Procedures Act, I.C. §§67-5270 through 67-5277. Pursuant to Section 67-6521 of the LLUPA, an effected person aggrieved by a decision to deny a permit authorizing the development of real property may seek judicial review as provided in §67-5201, et seq. (IDAPA). Pursuant to I.C. § 67-

5279 of the IDAPA, the Board's Order of Decision is subject to reversal if this Court finds that the Board's "findings, inferences, conclusions, or decisions" are:

(1) In violation of Constitutional provisions;

(2) Made upon unlawful procedure;

(3) Not supported by substantial evidence on the record as a whole; or

(4) Arbitrary, capricious, or an abuse of discretion.

See I.C. § 67-5279(3)(a), (c), (d), and (e).

On appeal, this Court is to review the Board's decision under the LLUPA and IDAPA independently of the decision of the District Court. Fischer v. City of Ketchum, 141 Idaho 349, 352, 109 P.3d 1091 (2005) (citing Evans v. Board of Commissioners of Cassia County, 137 Idaho 428, 430, 50 P.3d 443 (2002)).

On appeal, "this Court defers to the agency's Findings of Fact unless they are clearly erroneous." Id. (citing Price v. Payette County Board of Commissioners, 131 Idaho 426, 429, 958 P.2d 583 (1998)). In addition:

> The Board's zoning decision may only be overturned where its findings: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedures; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion.... The party attacking the Board's decision must first show that the Board erred in a manner specified in Idaho Code §67-5279(3), and then it must show that it's substantial right has been prejudiced....

Fischer v. City of Ketchum, 141 Idaho at 352 (additional citations omitted).

B. The Board's Decision Sustaining the Violation Alleged Under Ordinance No. 374 Was Erroneous as a Matter of Law.

1. The Adoption of Ordinance No. 374 Post-Dated the Conduct Alleged to Constitute the Violation.

Ordinance No. 374 was adopted effective December 12, 2005. See AR, Vol. I, p. 0093. There is no dispute that the actions giving rise to the violation were performed in the summer of 2001. Dr. Stafford has so testified. See Tr., Vol. I, p. 0057. The Department's photographs confirm as much. See AR, Vol. I, pp. 0009-0019. Since the charging Ordinance (No. 374) was effective prospectively from December 12, 2005, and since the complaint of conduct is conceded by the County to have occurred in July of 2001, the charge under the ordinance relied upon by the County cannot stand. The Board's Decision to the contrary was in error as a matter of law.

2. Ordinance No. 283 is Irrelevant to this Proceeding.

The Commissioners, in deliberations reflected by the transcript, seemingly determined that there was "no harm - no foul" since Ordinance No. 283, in effect between July 26, 1999 and December 11, 2005 (which encompasses the period when the encroachments were placed in service) had language similar to Ordinance No. 374. This too was in error as a matter of law.

First, the Staffords were not charged under Ordinance No. 283. The charging document, which carries criminal penalties, was based solely upon Ordinance No. 374. See AR, Vol. I, p. 0005.

Second, Ordinance No. 283 no longer exists. Ordinance No. 374 specifically provided that it "superseded" Ordinance No. 283. See AR, Vol. I, p. 0093. "Supersede" in this context, is distinct from "amend." It is noteworthy that the word "amend" was not used.

"Supersede" is defined by Black's Law Dictionary as follows:

> "Obliterate, set aside, annul, replace, make void, inefficacious or

useless, repealed."

"Annul," one of the alternative definitions for "supersede," is defined by Black's Law Dictionary as:

"To make void or of no effect."

In contrast, "amend" is defined as "to change, correct, revise, improve." The difference between "supersede" and "amend," in the legal sense, is that "supersede" undoes all that went before it and starts anew. "Amend," on the other hand, keeps what was done before but simply changes it.

The use of the term "supersede" in Section 15 of Ordinance No. 374 "obliterated," "annulled," and "rendered of no force and effect" the prior Site Disturbance Ordinance (Ordinance No. 283). Ordinance No. 374, the very Ordinance upon which the subject violation is based, is effective only from December 12, 2005 forward. In other words, and without conceding the same, if there was an arguable violation of the prior Site Disturbance Ordinance, and if that violation was not pursued administratively to a conclusion prior to December 12, 2005, the violation is essentially "grandfathered" through the adoption of Ordinance No. 374.[6]

Third, Ordinance No. 283, like Ordinance No. 374, carries criminal penalties. A violation of the Ordinance is a criminal misdemeanor "and shall be punishable by a maximum fine of $300 or six (6) months in jail, or both." While Ordinance No. 283 provides that "[e]ach day a violation shall constitute a separate offense," the last day Ordinance No. 283 was in effect was on December

[6]The resolution of this issue is not essential to finding in the Staffords favor. It is enough for this Court to determine that the Staffords were charged under the incorrect Ordinance. It is noteworthy, however, that since the Staffords were charged with a criminal violation under Ordinance No. 374, and since that violation has proceeded to a final determination, the Staffords might well be subjected to double jeopardy in violation of the U.S. Constitution in the event the County hereafter attempts to cite them in subsequent proceedings under Ordinance No. 283 (notwithstanding the fact that Ordinance No. 283 has been "superseded," "annulled," and "made void or of no effect").

11, 2005. From December 12, 2005 forward, Ordinance No. 374 applied in that it had "superseded" Ordinance No. 283.

Accordingly, the last day that the Staffords could be claimed to have violated Ordinance No. 283 was December 11, 2005. Yet since that conduct is, in the language of the ordinance, a criminal misdemeanor, the period of limitations contained in I.C. §19-403 applies:

> A prosecution for any misdemeanor must be commenced by the filing of the complaint or the finding of an indictment within one (1) year after its commission.

To date, the Staffords have never been charged with a violation under Ordinance No. 283.[7]

3. If the Staffords Did Engage in Citable Conduct (a Point Not Conceded), Then the Chargeable Offense Was Under Ordinance No. 283.

The conduct giving rise to the charge occurred three and one-half years before Kootenai County Ordinance No. 374 became effective. Ordinance No. 374 cannot be applied retroactively to criminalize conduct that occurred prior to its adoption date. See, e.g., State v. Byers, 102 Idaho 159, 166, 627 P.2d 788 (1981).

> "The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' Hall, *General Principles of Criminal Law (2nd Ed. 1960), at 58-59*, must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures...."

State v. Byers, 102 Idaho at 166 (quoting Bouie v. City of Columbia, 378 U.S. 347, 354, 84 Sup. Ct. 1697, 1702-03 (1964)). There can be no question that Ordinance No. 374 is criminal in nature in

---

[7] The same result would hold true under the limitations applicable to any civil claim brought or sought to be brought by the County based upon an alleged violation under Ordinance No. 283. See, e.g., I.C. §5-224 ("An action for relief not herein before provided for must be commenced within four (4) years after the cause of action shall have accrued."). Any civil enforcement action that could have been brought based upon an alleged violation under Ordinance No. 283 should have been brought before December 11, 2009. No such action has ever been brought by the County seeking civil enforcement under Ordinance No. 283.

that it specifically provides that violations may constitute criminal misdemeanors and shall be punishable by a fine of $300 or six (6) months in jail or both.

The District Court disagreed with the analysis suggested by the Staffords. In so doing, the District Court erred. The Court concluded that Ordinance No. 374 was not penal in nature since the violation of the same "may" constitute a misdemeanor. The District Court determined, "the use of the word 'may' makes it discretionary." R., p. 141. Yet the ordinance further provides that a violation shall "be punishable by a maximum fine of $300 or six (6) months in jail, or both." In other words, the ordinance says that a violation may be considered a criminal misdemeanor or the violation may also result in civil action. However, the ordinance states that a violation shall be punishable as a misdemeanor. In other words, there is nothing discretionary about the statute. It specifically provides that a violation is criminal in nature. What Kootenai County has done is repeal Ordinance No. 283 and prospectively criminalized conduct that was previously described in that ordinance. Under the facts of this case, this results in an inequitable scenario creating prejudice on the part of the Staffords.

The situation here is not one in which the County was left without a remedy. At all points in time, the County could have brought a criminal charge or enforcement action against the Staffords under Ordinance No. 283. It did not. The County wiped the slate clean, did away with Ordinance No. 283 (while alleged violations existed on the Stafford property), and then charged the Staffords with a violation penal in nature under a statute of prospective application. This was of the County's doing, not the Staffords. Based upon the method and manner by which this action has proceeded, the County Board erred in finding that a violation under Ordinance No. 374 had been established, simply because one could have been established under No. 283, at some point in time, and the

Board's decision should be vacated accordingly.

4. Ordinance No. 337 Has No Effect On These Proceedings.

In proceedings before the District Court, Kootenai County cited §§1-2-3 of the Kootenai County Code, adopted via the enactment of Ordinance No. 337 on August 30, 2004. R., pp. 101-02. Section 1-2-3 of the Kootenai County Code provides:

> No new ordinance shall be construed or held to repeal a former ordinance whether such former ordinance is expressly repealed or not, as to any offense committed against such former ordinance or as to any act done, any penalty forfeiture or punishment so incurred, or any right accrued or claim arising under the former ordinance, or in any way whatever to affect any such offense or act so committed or so done, or any penalty, forfeiture or punishment so incurred or any right accrued or claimed arising before the new ordinance takes effect....

See K.C.C. §1-2-3 (R., pp. 101-02).

The cited language relied upon by Kootenai County, as contained in §1-2-3, actually supports the argument of the Staffords. The language relied upon by Kootenai County supports the proposition that if the Staffords were to be charged with any offense, it should have been under Ordinance No. 283 (in effect at the time of the alleged violations) rather than Ordinance No. 374 (the adoption of which post-dated the commission of the alleged violations). However, Kootenai County has never brought civil or criminal proceedings against the Staffords based upon Ordinance No. 283 and, for reasons previously advanced, the time for so doing is now passed.

5. The County May Not Use These Proceedings to Establish a Violation of an Act Not Charged Under Ordinance No. 283.

The County argues, consistent with the decision of the Commissioners, that this case presents, in essence, a case of "no harm-no foul" as the cited conduct is alleged to run afoul of both Ordinance No. 283 and Ordinance No. 374. To this end, as an implicit means to "end-run" the *ex*

post facto infirmities arising from the application of Ordinance No. 374, the County argues: "It is true that from that date forward [December 12, 2005], Ordinance No. 283 had no further force or effect. This does not change the fact that Ordinance No. 283 was in full force and effect until December 12, 2005, however." R., p. 90 (emphasis in original). A Defendant is entitled to notice of the charges against him. The charging authority must prove the offense charged and the Defendant is not subject to conviction for other offenses even if those offenses were proven at trial. See, e.g., State v. Washington, 20 Or. App. 350, 531 P.2d 743, affirmed, 273 Or. 829 (1975). The Staffords were never charged with violating Ordinance No. 283.

6. The Board's Determination Was Contrary to the Language of Ordinance No. 374 as Applied to These Facts.

The stated purpose of Ordinance No. 374 is "to protect property, surface water, and ground water against significant adverse effects from excavation, filling, clearing, unstable earthworks, soil erosion, sedimentation, and storm water run-off. . . ." See AR, Vol. I, p. 0078. There is no showing on these facts that the placement of a barbeque pit (specifically authorized and condoned by the Department), the replacement of previously-existing sand (an undisputed proposition based upon the facts of record), the placement of basalt rocks indigenous to the very property (another point not disputed by the record), and the placement of lawn upward from the Lake (but within the twenty-five (25) foot set-back) with the County's oral permission and knowledge, creates any "significant adverse effects."

Moreover, the County claims that Ordinance No. 374 was to promote an "undisturbed natural vegetation buffer." Yet an "undisturbed natural vegetation buffer" is defined as "an area where no development activity has occurred or will occur, including, but not limited to, logging . . . ." See

AR, Vol. I, p. 0081.

There is no dispute, based upon Dr. Stafford's testimony, which was unrebutted, that the subject property, prior to the Staffords' purchase of the same in 1999, was logged, developed, and used, all within the twenty-five (25) foot set-back zone, for what is defined by the Ordinance as "development activity." If the purpose of leaving an undisturbed natural vegetation buffer is to preclude development activity, then that purpose is irrelevant when development activity has already occurred before the effective date of the Ordinance. Does the County really suggest that the Staffords are to leave an undisturbed slash pile and noxious weeds on the property? There wasn't an "undisturbed natural vegetation buffer" in place when Ordinance No. 374 (or Ordinance No. 283 for that matter) became effective based on the unrebutted facts of this case. Hence, there was no "undisturbed natural vegetation buffer" to maintain.

C. The Board's Determination Was Arbitrary, Capricious, and Constituted an Abuse of Discretion.

The Board's Decision, based upon the factors and authorities set forth above, would primarily consist of the specific language of Ordinance No. 374 and well-accepted principles of statutory construction, suggests that the Board's application of the Ordinance to support a violation under the facts at bar was arbitrary, capricious, and to the extent necessary, constituted an abuse of discretion. At the very least, the application of Ordinance No. 374 to these facts, sufficient to find a violation, was unsupported by substantial evidence or, essentially, any evidence.

D. The County is Estopped to Claim a Violation Under Ordinance No. 374.

It is a general proposition that estoppel does not apply to governmental agencies. However, it has been held that the people in their collective and sovereign capacity ought to observe the same

rules of honesty and fair dealing that is expected of a private citizen, and should no more be allowed to lull a citizen to repose and confidence in what would otherwise be a false and erroneous position than should the private citizen. See Murtaugh Highway Dist. v. Twin Falls Highway Dist., 65 Idaho 260, 142 P.2d 579 (1943). Consider the facts at bar.

Dr. Stafford, upon moving into his house, goes to the Kootenai County Building and Planning Department and asks what he can do within the twenty-five (25) foot set-back zone. He asks if he can plant vegetation. He is specifically advised that "re-greening" is not a problem. He asks a second time. He is again told that "re-greening" is not a problem. See Tr., Vol. I, p. 0066.

Based on the foregoing, Dr. Stafford plants vegetation within the twenty-five (25) foot set-back zone. He also replaces or adds to previously-existing sand (a point established by the record) and places basalt boulders indigenous to the area within the twenty-five (25) foot set-back zone. He also completed the installation of a barbeque pit that is only partially within the twenty-five (25) foot set-back zone.

And what does the County do? The County sends someone out to take pictures of the Stafford property in 2001 and 2002. See AR, Vol. I, pp. 0009-0019. Armed with photographs of the very substance of what it now claims to constitute a violation, what does the County do? Nothing. Five years pass.

In the interim, the Staffords apply for a permit to build an addition to their home. This requires a second Site Disturbance permit. Silt fences are placed at or near the twenty-five (25) foot set-back zone. The County inspects the project. No one says anything. In fact, the County actually signs off on a Site Plan submitted by the Staffords that shows that the barbeque pit, placed in service five years earlier, partially lies within the twenty-five (25) foot set-back zone. See AR, Vol. II, p.

0269.

It is only when the Staffords request a Certificate of Occupancy, and the home addition is completed, that the County claims a violation of an Ordinance (374) that wasn't even in effect when the County took the pictures of the offending encroachments (in 2001 and 2002) but chose to do nothing.

This isn't a case where the Staffords have been charged with violating Ordinance No. 283. The inapplicability of Ordinance No. 374 has been raised and noticed to the County at all times through proceedings below, but the County has done nothing but press onward under an Ordinance that unquestionably post-dates the offense charged.

Under these unique facts, the County should be estopped to claim a violation under Ordinance No. 374. The Court should so hold.

IV. CONCLUSION.

Based upon the reasons and authorities set forth above, Appellants Douglas and Michelle Stafford respectfully requests that this Court reverse the Order of Decision of the Kootenai County Board of Commissioners, and find that, as a matter of law, there has been no violation of Ordinance No. 374 (the same Ordinance being inapplicable to the facts at bar). The Staffords further request entry of an order remanding the matter with instructions that the violation be dismissed and that recorded notice of the same be removed from the real property records of Kootenai County.

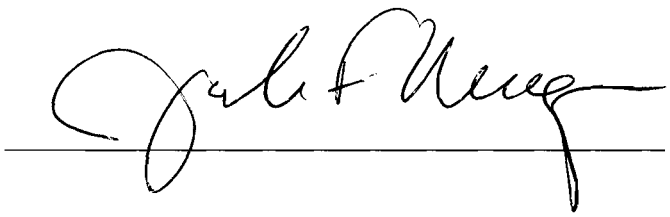
DATED this 28th day of June, 2010.

JOHN F. MAGNUSON
Attorney for Petitioners

CERTIFICATE OF SERVICE

I certify that two true and correct copies of the foregoing document was served upon the following via **hand delivery** on this 28th day of June, 2010:

Patrick M. Braden, Deputy Attorney
Kootenai County Legal Services
P.O. Box 9000
451 Government Way
Coeur d'Alene, ID 83816



STAFFORD.BRIEF-SUP CT.wpd