IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BARBARA K. FORD, Appellant, v. MASON COUNTY, a WASHINGTON MUNICIPAL CORPORATION, CHRISTINE CLARK, AND HER MARITAL COMMUNITY, AND JOHN DOES 1-10, Respondent.	No. 40134-7-II UNPUBLISHED OPINION

Worswick, A.C.J. — Barbara Ford appeals from Thurston County Superior Court's affirmation of a hearing examiner's determination under the Land Use Petition Act (LUPA), chapter 36.70C RCW, that she committed three violations of the Mason County Code (MCC) with regard to a methamphetamine lab discovered in a cabin she owned. She raises various issues relating to the hearing examiner's decision, including (1) lack of subject matter jurisdiction; (2) excessive fines; (3) misapplication of provisions within chapter 7.80 RCW; (4) constitutional

error; (5) improper burden shifting; and (6) lack of substantial evidence. We affirm the superior court's decision on two of the violations and reverse and remand on the remaining violation.

FACTS

On June 2, 2001, Mason County Sheriff's deputies were called to a disturbance at a cabin located on the east end of Lake Nahwatzel. Deputies were advised that they were responding to a landlord-tenant issue between Ford and her tenants. After the deputies arrived, however, they learned that the disturbance related to a methamphetamine lab on the premises.

The deputies then determined that there was likely to be significant chemical contamination at the residence. As a result, a deputy contacted the Washington State Department of Ecology, which responded the next day and removed the lab items and chemicals. One of the deputies also advised the Mason County Department of Health (Health Department) of the possible contamination.

On June 4, Health Department officials designated the cabin as "Unfit for Use" due to the likelihood that the cabin's contamination presented a potential immediate or long-term health hazard. Administrative Record (AR) at 2. This designation was to remain in effect until a Washington State certified clandestine lab cleanup contractor could assess the property and report its findings to the Health Department. The next day, Health Department officials visited the property to post the "Unfit for Use" and "Do Not Occupy" notices.[1] AR at 3. The Health Department sent a copy of the notice to Ford by certified mail.

[1] Health Department officials also took photos of the outside of the cabin, showing the notices had been posted.

Over the next several years, the Health Department periodically inspected the property, finding that the postings had been removed and unauthorized work had been conducted.[2] The Health Department took pictures of the cabin and the premises during visits on September 10, 2004, October 18, 2004, January 21, 2005, May 30, 2007, and August 9, 2007.[3]

On June 26, 2008, Joe Mazzuca, a certified clandestine lab cleanup contractor hired by Ford, contacted Christine Clark, a Health Department official, to discuss cleaning up Ford's cabin. They agreed to a sampling plan that Mazzuca was to submit for review before sampling began. A few days later, Mazzuca contacted Clark to express concerns that the number of samples required was high in light of the cabin's size. As a result, Clark agreed to revisit the cabin to determine if fewer samples would suffice.

At Mazzuca's invitation, Clark returned to the premises for a follow up inspection on July 2. She observed the following: (1) two open windows; (2) counters and drawers sitting outside the house that had been previously inside the house; (3) bags of insulation and flooring that had previously been inside the house now sitting outside of the house in bags; (4) insulation that had previously been on the interior walls of the house was now gone; (5) a container of toys now in the house that were not in the house on August 9, 2007; and (5) a refrigerator in the cabin that was not there before. Several pictures were taken that reflect these findings.

Based on Clark's findings, the Health Department issued a "Notice of Civil Violation"

[2] The Health Department posted the final notice at issue in this case on August 9, 2007.
[3] All of these visits coincided with a reposting of the "Unfit for Use" notice that was no longer present on the property on these dates.

under chapter 173-350 WAC to Ford on July 15, 2008, which directed her to appear at a hearing regarding the violations. AR at 88. The notice alleged three violations of the MCC. The three counts were described as follows:

> Count (1) That on or about July 2, 2008, [Ford], did enter or authorize or allow another person, company, corporation, trust or other business entity to enter any property declared unfit for use or otherwise ordered vacated pursuant to this chapter or [c]hapter 64.44 RCW without approval of the health officer at parcel #52004-50-00027 in Shelton, Mason County, Washington in violation of Mason County Title 6 Sanitary Code **6.73.090(2)**.
>
> . . . .
>
> Count (2) That on or about July 2, 2008, [Ford] did as owner remove, deface, obscure or otherwise tamper with any notice posted pursuant to this chapter or [c]hapter 64.44 RCW; at parcel # 52004-50-00027 in Shelton, Mason County, Washington in violation of Mason County Title 6 Sanitary Code **6.73.090(5**).
>
> On August 27, 2007, the charge against [Ford] for Notice Tampering was found committed in Mason County District Court. This building has been posted and reposted at least six times, possibly more, on the following dates: 6-4-01, 9-10-04, 10-18-04, 2-4-05, 4-5-07, 8-9-07, & needs to be reposted again.
>
> Count (3) That on or about July 2, 2008, [Ford] unlawfully failed to comply with the Unfit for Use Order & Letter issued on June 5, 2001, in violation of Mason County Code **6.73.090(7)** in Mason County Washington.
>
> . . . .

AR at 88-89.

The Mason County Hearing Examiner held a hearing on September 23, 2008. At the hearing, Health Department officials presented photographic and other evidence from their August 9, 2007 and July 2, 2008 visits to the premises. And in order to show unauthorized activities had been conducted on the property, the Health Department presented photographs from earlier visits to contrast the August 9, 2007 and July 2, 2008 photographs. The hearing examiner issued its decision on October 23, 2008, affirming all counts and imposing $3,000 in

fines, code enforcement costs to be verified by county staff, and hearing costs in the amount of $350. The hearing examiner also denied Ford's motion for costs and fees.

Ford sought judicial review of the hearing examiner's decision in Thurston County Superior Court. The superior court, in its appellate capacity, affirmed the hearing examiner's decision. Ford now appeals.

ANALYSIS

Ford raises several issues on appeal, including that (1) the hearing examiner lacked subject matter jurisdiction; (2) excessive fines and costs were imposed; (3) the civil infraction was invalidly issued; (4) evidence was seized in violation of her constitutional rights; (5) the hearing examiner impermissibly shifted the burden of proof to her; and (6) a lack of evidence supports the conclusions that she committed all three counts.

Standard of Review

When reviewing matters under LUPA, we stand in the shoes of the superior court and review the hearing examiner's land use decision de novo, based on the administrative record. *Girton v. City of Seattle*, 97 Wn. App. 360, 363, 983 P.2d 1135 (1999). We may grant relief from a land use decision here if Ford can carry her burden of establishing one of the six standards of relief. RCW 36.70C.130(1) provides the following standards for relief:

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

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

(d) The land use decision is a clearly erroneous application of the law to the facts;

> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
>
> (f) The land use decision violates the constitutional rights of the party seeking relief.

Ford bears the burden of proving that the hearing examiner erred. *N. Pac. Union Conf. Ass'n of the Seventh-Day Adventists v. Clark County*, 118 Wn. App. 22, 28, 74 P.3d 140 (2003). We review the hearing examiner's findings of fact for substantial evidence, that is, evidence sufficient to persuade a fair-minded person of the order's truth or correctness. *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 694, 49 P.3d 860 (2002). And we review questions of law de novo. *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004). When we review an asserted error under LUPA, we grant "such deference as is due the construction of a law by a local jurisdiction with expertise," so long as that interpretation is not contrary to the statute's plain language. RCW 36.70C.130(1)(b); *see Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 587, 90 P.3d 659 (2004).

Subject Matter Jurisdiction

Ford contends, for the first time in her reply brief, that the hearing examiner lacked subject matter jurisdiction to hear this matter. Subject matter jurisdiction relates to the court's authority to act and does not depend on procedural rules. *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 315, 76 P.3d 1183 (2003). A party may challenge subject matter jurisdiction at any time and a judgment entered by a court lacking jurisdiction is void. *Inland Foundry Co., Inc. v. Spokane Cnty. Air Pollution Control Auth.*, 98 Wn. App. 121, 123-24, 989 P.2d 102 (1999).

Ford argues that the Health Department cannot issue a Notice of Violation to compel her

to appear before a hearing examiner under LUPA and instead must file a civil infraction in district court under chapter 7.80 RCW. Mason County disagrees and contends that under RCW 7.80.010, it is free to establish its own scheme separate and apart from state law.[4]

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

RCW 36.70C.020(c) (emphasis added). MCC § 6.73 governs enforcement actions related to contaminated properties and provides as follows, in relevant part:

> Each violation of this chapter shall be a separate and distinct offense and in the case of a continuing violation, each day's continuance shall be a separate and distinct violation.
>
> (1) Every violation of this chapter is unlawful and a public nuisance.
>
> (2) The violation of any provision of this chapter is designated as Class 1 civil infraction pursuant to [c]hapter 7.80 RCW. Civil infractions shall be heard and determined according to [c]hapter 7.80 RCW, as amended, and any applicable court rules. The penalty for such violation shall be two hundred and fifty dollars per violation.
>
> (3) Any person, company, corporation, trust or other business entity intentionally, recklessly or negligently violating any provision of this chapter shall be, upon conviction, guilty of a misdemeanor and shall be subject to a fine of not more than five hundred dollars or to imprisonment in the county jail not to exceed ninety days or to both fine and imprisonment.
>
> (4) The prosecuting attorney is authorized to institute legal action to enforce compliance with the provisions of this chapter and may seek legal or equitable relief to enjoin any acts or practices or abate any conditions that constitute a violation of this chapter.
>
> (5) *The health officer and his or her designee are authorized to bring*

[4] RCW 7.80.010(5) provides: "Nothing in this chapter prevents any city, town, or county from hearing and determining civil infractions pursuant to its own system established by ordinance."

> *enforcement action as provided in Chapter 15.13 Mason County Development Code.*

MCC § 6.73.100 (emphasis added). And MCC § 15.13.040 provides the following:

> "Notice of Civil Violation":
> (a) Authority. A notice of civil violation may be issued and served upon a person if any activity by or at the direction of that person is, has been, or may be taken in violation of the applicable codes under Section 15.03.005. A landowner, tenant, or contractor may each be held separately and joint and severally responsible for violations of the applicable codes and regulations.
> (b) Notice. A notice of civil violation shall be deemed served and shall be effective when posted at the location of the violation and/or delivered to any person at the location and/or mailed first class to the owner or other person having responsibility for the location and not returned.
> (c) Content. A notice of civil violation shall set forth:
> (1) The name and address of the person to whom it is directed;
> (2) The location and specific description of the violation;
> (3) A notice that the order is effective immediately upon posting at the site and/or receipt by the person to whom it is directed;
> (4) An order that the violation immediately cease, or that the potential violation be avoided;
> (5) An order that the person stop work until correction and/or remediation of the violation as specified in the order.
> (6) A specific description of the actions required to correct, remedy, or avoid the violation, including a time limit to complete such actions;
> (7) A notice that failure to comply with the regulatory order may result in further enforcement actions, including civil fines and criminal penalties;
> (8) A notice of the date, time and place of appearance before the hearing examiner as provided in Section 15.13.045.
> (d) Remedial Action. The review authority may require any action reasonably calculated to correct or abate the violation, including but not limited to replacement, repair, supplementation, revegetation, or restoration.

Both parties reference *Post v. City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009), to support their respective positions that Mason County can or cannot enforce its sanitary code

provisions before a hearing examiner. In *Post*, the city of Tacoma's building code enforcement department found several of Post's properties to be in violation of various building codes. *Post*, 167 Wn.2d at 303. As a result, Tacoma imposed thousands of dollars in penalties. *Post*, 167 Wn.2d at 303. Post failed to bring his properties into compliance and ultimately appealed many of the fines, but Tacoma in most cases denied the hearing requests. *Post*, 167 Wn.2d at 303. Post sued under LUPA, arguing that his rights were violated. *Post*, 167 Wn.2d at 303-04. Our Supreme Court held that Tacoma's procedure violated due process and reversed the superior court. *Post*, 167 Wn.2d at 304.

Under Tacoma's code, a person could appeal the "first notice of violation and first civil penalty," but "Tacoma provid[ed] no process for hearing and determining subsequent infractions." *Post*, 167 Wn.2d at 312. As a result, the court held that RCW 7.80.010's authorization to cities allowing them to establish their own processes of enforcement required a complete system. *Post*, 167 Wn.2d at 312. Because Tacoma's system was "partial" in nature and did not provide a process for hearing and determining subsequent infractions, the default provisions of chapter 7.80 RCW applied instead. *Post*, 167 Wn.2d at 312. The court recognized that RCW 7.80.010 "provides local jurisdictions two options for issuing and enforcing civil infractions. Under the default/judicial track, the entire civil infraction system is administered and supervised by the courts, from issuance of the notice to the collection of penalties." *Post*, 167 Wn.2d at 311. But "a local jurisdiction may enforce civil infractions pursuant to its own system established by ordinance." *Post*, 167 Wn.2d at 311-12 (internal quotation marks omitted).

Mason County has clearly established a complete method of enforcement separate and apart from chapter 7.80 RCW. Thus, subject matter jurisdiction under LUPA exists in this case. Ford's argument fails.

Excessive Fines and Costs

Ford also contends that the hearing examiner erred in imposing a $1,000 penalty for each violation, which exceeded the amounts provided in RCW 7.80.120.[5] Despite this statutory limit, the MCC imposes a different penalty schedule, allowing Mason County to assess fines and costs that do not conform to the fee schedule listed in RCW 7.80.120. MCC § 15.13.045.

Ford argues that this presents a conflict between the MCC and RCW 7.80.120, and, in light of this conflict, the statutory limits govern. But there is no conflict here. The violations at issue here are not "civil infractions" under RCW 7.80.010(5), but are "civil violations" under MCC § 6.04.050. RCW 7.80.010 expressly provides that a county is free to establish its own civil enforcement mechanism separate and apart from chapter 7.80 RCW. But as *Post* states, any separate enforcement mechanism established by local ordinance must be complete to be valid. The presence of penalty provisions within the MCC further demonstrates its completeness. Ford has not shown that penalties established as part of the local enforcement mechanism must mirror those established in RCW 7.80.120. Based on this, Ford has not demonstrated an error of law that entitles her to relief under RCW 36.70C.130(1). Her argument fails.

[5] RCW 7.80.120 provides a fee schedule for civil infractions, ranging from $25 for a "class 4 civil infraction" to $250 for a "class 1 civil infraction."

Misinterpretation of Chapter 7.80 RCW

Ford also argues that the civil violations against her violate RCW 7.80.050[6] because the officer did not personally witness the offense or file a written statement with the issuing court. Ford further argues that the hearing examiner erred in concluding that procedural and substantive law governing "civil violations" differs from that governing "civil infractions" and in concluding that compliance with chapter 7.80 RCW is irrelevant and does not apply to the prosecution of civil violations.

As analyzed above, RCW 7.80.050 does not govern the present civil action. Instead, the relevant provisions of the MCC govern and provide the necessary direction to county officials and the hearing examiner in this case. In light of this, Ford has not demonstrated an error of law under RCW 36.70C.130(1)(b). Her argument fails.

---

[6] RCW 7.80.050 provides in relevant part:

> (1) A civil infraction proceeding is initiated by the issuance, service, and filing of a notice of civil infraction.
> (2) A notice of civil infraction may be issued by an enforcement officer when the civil infraction occurs in the officer's presence.
> (3) A court may issue a notice of civil infraction if an enforcement officer files with the court a written statement that the civil infraction was committed in the officer's presence or that the officer has reasonable cause to believe that a civil infraction was committed.
> (4) Service of a notice of civil infraction issued under subsection (2) or (3) of this section shall be as provided by court rule. Until such a rule is adopted, service shall be as provided in (alteration in original) JTIR 2.2(c)(1) and (3), as applicable.
> (5) A notice of infraction shall be filed with a court having jurisdiction within forty-eight hours of issuance, excluding Saturdays, Sundays, and holidays. A notice of infraction not filed within the time limits prescribed in this section may be dismissed without prejudice.

Evidence Unlawfully Obtained

Ford next contends that the photographic and other evidence submitted at the code enforcement proceeding was obtained in violation of her constitutional rights. We disagree.

The Fourth Amendment of the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Article I, section 7 of the Washington Constitution provides, "[N]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." The Fourth Amendment's warrant requirements apply to administrative searches. *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 534, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967); *City of Seattle v. Leach*, 29 Wn. App. 81, 84, 627 P.2d 159 (1981). Generally, warrants are required for administrative searches of both private and commercial premises. *Camara*, 387 U.S. at 532-33. An administrative warrant may be based either on specific evidence of an existing violation or on a general inspection program based on reasonable legislative or administrative standards that are derived from neutral sources. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978); *City of Seattle*, 29 Wn. App. at 84. Traditional exceptions to the warrant requirement apply, and Ford's consent to the County's search would obviate the need for an administrative warrant. *Michigan v. Clifford*, 464 U.S. 287, 297-98, 104 S. Ct. 641, 78 L. Ed. 2d 477 (1984). Mason County bears the burden to show that any consent was freely and voluntarily given. *Seymour v. Wash. State Dept. of Health*, 152 Wn. App. 156, 170, 216 P.3d 1039 (2009).

But under the "open view" doctrine, no search occurs "'when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used . . . .'" *State v. Bobic*, 140 Wn.2d 250, 259, 996 P.2d 610 (2000) (quoting *State v. Rose*, 128 Wn.2d 388, 392, 909 P.2d 280 (1996)). For example, the United States Supreme Court held that a health department inspector did not violate the Fourth Amendment when he entered the outdoor premises of the Western Alfalfa Corporation and observed smoke plumes from the plant's chimneys in an area in which the public was not excluded. *Air Pollution Variance Bd. of Colo. v. Western Alfalfa Corp.*, 416 U.S. 861, 862-65, 94 S. Ct. 2114, 40 L. Ed.2d 607 (1974).

In this case, with the exception of two photographs from August 9, 2007, all of the photographs taken on September 10, 2004, October 18, 2004, January 21, 2005, and May 30, 2007 were from the outside of the cabin looking toward the front entrance. AR at 38-44. As a result, these photographs fall under the "open view" exception to the warrant requirement. *See State*, 128 Wn.2d at 393 (front porch to a mobile home, which was at the end of a private driveway off a private road and not fenced was impliedly open to the public for purposes of the "open view doctrine"). And with regard to the photographs taken on July 2, 2008, the Health Department visited the property and conducted an inspection with the explicit consent of Ford's representative, the methamphetamine lab cleanup contractor, which was a necessary precursor to the cleanup work Ford hired the contractor to complete. Mason County has met its burden in demonstrating the lawfulness of the evidence retrieved that served as the basis for the hearing

examiner's ruling. Thus, Ford's argument fails.[7]

Substantial Evidence

Lastly, Ford contends that the evidence was insufficient to support the hearing examiner's conclusions that she committed the three counts charged.[8] Under RCW 36.70C.130(1)(c), a land use decision is improper when it is "not supported by evidence that is substantial when viewed in light of the whole record before the court." As to count II, we agree.

When reviewing a challenge to the sufficiency of the evidence under RCW 36.70C.130(1)(c), we look to whether there is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 694, 49 P.3d 860 (2002) (internal quotation marks omitted). We must "view all the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact finding authority. . . ." *Peste v. Mason County*, 133 Wn. App. 456, 477, 136 P.3d 140 (2006) (internal quotations marks omitted) (quoting *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-72, 859 P.3d 610 (1993)). We defer to the hearing examiner's assessment of the "credibility of witnesses and the weight to be given reasonable but competing inferences." *State ex rel. Lige & Wm. B. Dickson Co. v. County of*

[7] Ford also argues that the hearing examiner misinterpreted various provisions of the MCC that address entry onto land. But the relevant MCC provisions Ford references do not provide any greater protections than those already afforded by the Fourth Amendment. *See* MCC § 6.04.040; MCC § 6.73.050. Because we hold that there was no Fourth Amendment violation, her argument on this point necessarily fails.

[8] Ford has not explicitly assigned error to any specific finding of fact by the hearing examiner.

Pierce, 65 Wn. App. 614, 618, 829 P.2d 217 (1992).

Count I

With regard to count I, Ford was charged with violating MCC § 6.73.090(a)(2), which makes it unlawful to "[e]nter or authorize or allow another person, company, corporation, trust or other business entity to enter any property declared unfit for use or otherwise ordered vacated pursuant to this chapter or chapter 64.44 RCW without approval of the health officer[.]" Several pieces of evidence support this count, including the fact that (1) Health Department officials had posted the "Unfit for Use" notice; (2) that the cabin appeared to be gutted and had a new refrigerator inside; and (3) that several items obviously from the inside of the cabin were now outside of it. This is more than enough evidence to persuade a fair-minded person that someone entered the property. Thus, Ford's argument fails.

Count II

With regard to count II, Ford was charged with violating MCC § 6.73.090(a)(5), which makes it unlawful to "[r]emove, deface, obscure or otherwise tamper with any notice posted pursuant to this chapter or Chapter [sic] 64.44 RCW[.]" In support of this count, the hearing examiner relied on photographic evidence of the notice posted on August 9, 2007 and photographic evidence on July 2, 2008, showing that the notice had been removed.[9] The hearing examiner also relied on a rebuttable presumption that Ford, as the property owner, impermissibly

[9] The hearing examiner expressly stated that it gave "no consideration or weight to allegations that [Ford] removed any notice of contamination posted before August 9, 2007." Clerk's Papers at 63 n.3.

removed the posting.

The only evidence that supports the hearing examiner's conclusion here is the photographic evidence of the notice posted on August 9, 2007, and then absent nearly a year later. While sufficient to show the posting was no longer present, it is insufficient to specifically show that Ford removed or tampered with it. And the hearing examiner's findings of fact and conclusions of law fail to illuminate the specific authority for the rebuttable presumption. Thus, Ford is entitled to relief under RCW 36.70C.130(1)(c). We reverse on this count and remand with instructions to dismiss this count and any penalties imposed related thereto.[10]

Count III

Finally, with regard to count III, Ford was charged with violating MCC § 6.73.090(a)(7), which makes it unlawful to "[f]ail or refuse to comply with any order or decision of the health officer, hearing officer or appeals commission pursuant to this chapter." As to this count, the hearing examiner relied on evidence from 2001 that the Health Department issued an order prohibiting cleanup work inside the cabin without an approved work plan by an authorized methamphetamine lab cleanup worker. The record clearly demonstrates that no such plan existed and that Ford conducted cleanup and other work inside the cabin on her own. This evidence is substantial enough to support count III. In light of this, Ford's argument fails.

Beyond Ford's contention that the evidence is insufficient to support the findings for counts I, II and III, she also argues that counts I and III are identical. Ford makes a passing

[10] Because we reverse this count for insufficient evidence, we do not address Ford's argument that the hearing examiner improperly shifted the burden of proof to her.

citation to a criminal case, *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005), to support her proposition. But as Mason County points out, separate conduct supports counts I and II and there is no evidence that Mason County did not intend for each code provision to constitute a separate violation. Thus, Ford has not demonstrated an error of law entitling her to relief in this instance. Her argument fails.

ATTORNEY FEES

Ford requests attorney fees under RAP 18.1, RCW 7.80.140, and RCW 4.84.370.[11] Under RAP 18.1(a), attorney fees and expenses generally may be awarded "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court . . . ." RCW 7.80.140 states that "[e]ach party in a civil infraction case is responsible for costs incurred by that party, but the court may assess witness fees against a nonprevailing respondent. Attorney fees may be awarded to either party in a civil infraction case." And RCW 4.84.370 provides:

> (1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:
>
> (a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing party on

[11] Ford actually requested fees under RCW 4.84.350, "Judicial review of agency action—Award of fees and expenses." We presume that Ford actually meant to request fees under RCW 4.84.370, "Appeal of land use decisions—Fees and costs."

> appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and
>
> (b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.
>
> (2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

Ford is clearly not entitled to fees under RCW 7.80.140 because this is not a "civil infraction" case. And because Ford did not substantially prevail below, she is not entitled to fees under RCW 4.84.370 either.

We affirm the superior court's decision relating to counts I and III, reverse the hearing examiner's decision relating to count II, and remand for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Hunt, J.

Van Deren, J.