Judge Beth M. Andrus
Department 35

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

RICHARD BONESTEEL; EDWIN YASUKAWA; STEVEN DAVIES; SALLY OLJAR; KELI CARENDER; MARK ELSTER; GREG MOON; and SCOTT SHOCK, Plaintiffs, v. THE CITY OF SEATTLE, a Washington Municipal Corporation; SEATTLE PUBLIC UTILITIES; RAY HOFFMAN, Director, in his official capacity, Defendants.	No. 15-2-17107-1 SEA ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs, current and former residents of the City of Seattle, brought this lawsuit challenging the constitutionality of the enforcement provisions of City of Seattle Ordinance No. 124582, codified in Seattle Municipal Code (SMC) 21.36.083, and Seattle Public Utilities Director's Rule SW-402.1, under which trash collectors and SPU employees are required to inspect residents' garbage to determine compliance with composting and recycling requirements.

The Court has considered the pleadings and evidence identified in Appendix A and argument of counsel. Based on the foregoing, the Court GRANTS the Plaintiffs' motion for

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summary judgment on the privacy claim, declines to rule on the procedural due process claim, and DENIES the Defendants' motion for summary judgment. The Court's reasoning follows.

UNDISPUTED FACTUAL BACKGROUND

In 2013, the City of Seattle adopted a resolution prohibiting the disposal of food waste and compostable paper as garbage. The City converted this resolution into Ordinance No. 124582 on September 22, 2014. SMC 21.36.083, entitled "Residential Recycling Required," now provides in pertinent part:

> B. Required Recycling of Food Waste and Compostable Paper.
>
> 1. As of January 1, 2015, all residents living in single-family structures, multifamily structures and mixed-use buildings shall separate food waste and compostable paper for recycling, and **no food waste or compostable paper shall be deposited in a garbage container** or drop box or disposed as garbage at the City's transfer stations. The Director of Seattle Public Utilities is authorized to promulgate rules, in accordance with the provisions of the Administrative Code, SMC Chapter 3.02, for purposes of interpreting and clarifying the requirements of this subsection.
>
> 2. Enforcement.
>
> a. As of October 1, 2014, the Director of Seattle Public Utilities shall begin a program of educational outreach regarding the food waste and compostable paper recycling requirements.
>
> **b. As of January 1, 2015, the Director of Seattle Public Utilities shall establish a program of placing educational notices or tags on garbage containers with significant amounts of food waste and compostable paper.**
>
> **c. As of July 1, 2015, any violation of this section by residential curbside or backyard customers shall result in an additional collection fee of $1 per can collection.** Blevins Decl., at Ex. 1 (emphasis added).

SPU Director Ray Hoffman amended Director's Rule SW-402.1, entitled "Prohibition of Recyclables in Garbage," to establish the educational program required by SMC 21.36.083(B)(2) and to implement enforcement procedures. Paragraph 2(B) of SW-402.1 now provides:

> B. Residential – Can Customers
>
> 1) Significant amounts of recyclables in the garbage for residential cans

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> mean that any of the following, alone or in combination, make up more than 10 percent by volume of the contents of a garbage can, **as determined by visual inspection** by an SPU inspector or contractor: recyclable paper, recyclable cardboard, glass or plastic bottles and jars, aluminum or tin cans, yard waste, food waste and compostable paper.
>
> 2) SPU will place educational notices or tags on garbage containers with recyclables including food waste and compostable paper during the period January 1, 2015 through June 30, 2015.
>
> 3) As of July 1, 2015, residential garbage cans set out for curb/alley or for backyard collection that contain significant amounts of recyclables, including food waste and compostable paper, are subject to an additional collection fee of $1 per can per collection. Blevins Decl. at Ex. 3.

SPU services 150,000 household containers per week. The City contracts with two companies, Waste Management and Recology/CleanScapes, to provide trash collection. The City contracts with Republic/Rabanco for recycling processing services. It contracts with two companies, Lenz Enterprises and PacificClean of Washington, for the collection of compostables. Van Dusen Decl. at ¶4.

The City has a long history of limiting the materials residents may deposit into the garbage, such as human waste, dead animals over 15 pounds, Styrofoam peanuts, hypodermic needles, tires, and explosives. Van Dusen Decl. at ¶10-11. The City contends that garbage collectors have always visually "scanned" the contents of garbage cans to make sure there are no dangerous or prohibited materials inside, although there is no evidence that SPU instructed collectors to open tied garbage bags to search their contents for such materials. If, however, a collector happened to see prohibited materials in the garbage can, she left an "Oops" tag on the can. *Id.* at ¶12, Ex. D.

After the City passed Ordinance No. 124582, SPU began a program to educate residents about mandatory disposal of food waste and compostable paper in yard waste bins. The program included leaving City "Educational Notices" (similar to the "Oops" tags) on cans containing food waste:

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SPU has developed draft procedures for enforcing the food waste ban and imposing fines for violations. First, SPU instructs the collectors to "monitor" all garbage cans routinely during collection and to enter an "Exception Code 25" and "Rate Charge" into the onboard computer system any time the collectors observe more than 10% of combined recycling, food waste and compostable paper in a resident's garbage can. Second, SPU instructs the drivers to leave "adhesive SPU red tags" on all "non-compliant cans." Blevins Decl., Ex. 4. Collectors tagged approximately 500 cans per week in early 2015. SPU's rate of tagged cans dropped to under 40 per week by late 2015. Van Dusen Decl. at ¶19. Finally, SPU may ask field staff to investigate customers with a high frequency of charges to "identify opportunities to improve education for drivers or customers." Blevins Decl., Ex. 4. If a resident's can is tagged for a food waste violation, SPU plans to send a violation notice letter to the resident and to impose a $1 fine. Blevins Decl. at Ex. 4.

These same draft procedures indicate that if any resident is fined but calls the SPU Contact Center to contest the charge, SPU will automatically credit back the $1 charge. Blevins Decl., Ex. 4. At oral argument, counsel for the City conceded that the City probably could never prove a

violation, if a resident challenged it, because the evidence (*i.e.*, the garbage) would have already been disposed of by the collector issuing the notice of violation. SPU has amended the Director's Rule twice to extend the date for imposition of the collection fee. Van Dusen Decl. at ¶19. None of the Plaintiffs has been assessed a fine for putting food waste in garbage cans.

SPU has also trained trash collectors as to when to report violations to SPU and when to leave Educational Notices on residents' garbage cans. Blevins Decl. at Ex. 5. The SPU training materials provide that "10% or more of [food and yard waste] and Recyclables in garbage cards are considered contaminated and need to be noted and tagged." SPU's guidelines advise collectors to report a violation to SPU and tag a resident's garbage can when the collector sees 10% or more contamination "loose in the container" or "through clear plastic bags." In addition, the collector should report and tag, "if you find 10% after [the can] has been emptied in the hopper" or "if the bag is already open and it's [sic] contents are clearly visible." But collectors are told they cannot report a violation or tag a resident's can if:

- Bags are black or opaque
- If the garbage cart feels like it has food waste but you can't see it (heavy and bagged)
- If the garbage cart smells like food waste but you can't see it (nasty, leaky and bagged)
- If there is no [food yard waste] container out. *Id.*

The training materials advise collectors to measure the volume of the container, not the volume of any individual garbage bag when determining whether anyone was violating the 10% rule. SPU said "It doesn't take much to equal 10%, but use good judgement [sic]." Blevin Decl., Ex. 5.

One Plaintiff, Keli Carender, received two red Educational Notices in January or February 2015, indicating that she had violated food waste requirements—a contention she disputes. Ms. Carender testified that she placed her garbage into opaque bags and tied the bags' drawstrings before putting the bags into the can. Carender Decl. at ¶3. Plaintiffs contend the collectors could only have seen food waste inside her bags by opening the bag and searching their contents.

ANALYSIS

A. Summary Judgment Standard

The parties have filed cross motions for summary judgment with the Plaintiffs asking the Court to determine the constitutionality of Seattle's food waste collection scheme and the Defendants asking the Court to dismiss the constitutional challenge on procedural and substantive grounds. Summary judgment should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Young v. Key Pharmaceuticals Inc.*, 112 Wash.2d 216, 225-26, 770 P.2d 182 (1989).

A facial constitutional challenge does not require a showing of direct injury in order for the asserting party to have standing. *See Tacoma v. Luvene,* 118 Wn.2d 826, 845, 827 P.2d 1374 (1992); *State v. Sherman,* 98 Wn.2d 53, 56, 653 P.2d 612 (1982). Plaintiffs raise a facial challenge to the enforcement provisions of SMC 21.36.083 and Director's Rule SW-402.1 under the Washington constitution, Art. I, §7 and Art. I, §3. A facial challenge is an attack on a law itself, as opposed to a particular application of a law. *City of Los Angeles v. Patel*, __ U.S. __, 135 S.Ct. 2443, 2449, 192 L.Ed.2d 435 (2015). While facial challenges are the most difficult to mount successfully, courts allow such lawsuits to proceed, particularly in cases in which the law appears to permit warrantless searches. *Id.* at 2450. To prevail on a facial challenge, a plaintiff must establish that "no set of circumstances" exists under which the law at issue would be valid. *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

This "no set of circumstances" test, however, does not allow the City to rely on well-establish exceptions to the warrant requirement to justify an inspection regime. In *Patel*, the City of Los Angeles argued that an ordinance permitting the police to inspect hotel registry records was not unconstitutional "in all of its applications" because there could be an exception to the warrant requirement justifying a search. *Id.* at 2450-1. The U.S. Supreme Court rejected this argument,

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holding that when a court is assessing a law under the facial challenge standard, the court considers only "searches that the law authorizes, not those for which [the law] is irrelevant." *Id.* If exigency or some exception to the warrant requirement would justify a search under the Fourth Amendment, the subject of such a search would have to allow the search to occur regardless of the language of the applicable city ordinance. *Id.* The fact that the plain view or open view doctrines could make ***some*** garbage inspections lawful does not, under *Patel*, defeat the Plaintiffs' facial challenge as a matter of law.

B. Plaintiffs' Article I, §7 privacy challenge

Art. I, §7 of the Washington constitution provides "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." This language has been held to be qualitatively different from, and more protective than, the Fourth Amendment. *State v. Hinton*, 179 Wash.2d 862, 868, 319 P.3d 9 (2014). A court analyzing a privacy claim applies a two-part test. *State v. Surge*, 160 Wash.2d 65, 71, 156 P.3d 208 (2007). First, the court must determine whether the state action constitutes a disturbance of one's private affairs. Second, the court must determine whether the intrusion is authorized by law. *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wash.2d 297, 306, 178 P.3d 995 (2008).

1. Is a trash collector's search of garbage a disturbance of one's private affairs under *Boland*?

The test for whether there has been a disturbance of a person's private affairs under Article I, §7 is a purely objective one, looking to the actions of the government agent. *State v. Young*, 135 Wash.2d 498, 501, 957 P.2d 681, 682 (1998). The question here is whether a trash collector's search of a resident's garbage to detect food waste violations is a disturbance of that resident's private affairs.

In *California v. Greenwood*, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988), the U.S. Supreme Court held that under the Fourth Amendment, a defendant did not have a reasonable expectation of privacy in garbage placed in opaque bags outside his house for collection by a trash

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collector. The Washington Supreme Court diverged from *California v. Greenwood* when analyzing the issue under Art. I, §7. In *State v. Boland*, 115 Wash.2d 571, 800 P.2d 1112 (1990), the Supreme Court held that under our state constitution, a defendant's private affairs were unreasonably intruded on by law enforcement officers when they removed garbage from his trash can and transported it to a police station to be searched by state and federal narcotics agents. The Supreme Court held that any resident who places garbage in a can and puts it on the curb for collection reasonably believes the garbage will not be subjected to a warrantless governmental search. 115 Wash.2d at 578. "While a person must reasonably expect a licensed trash collector will remove the contents of his trash can, this expectation does not also infer an expectation of governmental intrusion." *Id.* at 581. In other words, we expect the collector to pick up our garbage and remove it for proper disposal; we do not expect that the government will search the contents of our garbage bags to identify evidence of wrong-doing.

This expectation of privacy was later recognized by the Washington Court of Appeals in *State v. Sweeney*, 125 Wash. App. 881, 887, 107 P.3d 110 (2005). In that case, the court of appeals rejected the notion that one's privacy interest in the contents of his garbage ceases to exist once in the hands of the garbage collector. 125 Wash. App. at 886-887. It held that a municipal garbage collector's action of placing a suspect's garbage into an empty hopper and driving the truck a few blocks away to permit a detective to search the contents of the bags violated Art. I, §7 and *Boland*.

Both *Boland* and *Sweeney* stand for the proposition that residents expect their garbage to be collected and disposed of by a trash collector but they do not expect that collector to give their garbage to law enforcement to be searched. This case presents a slightly different question: although residents expect trash collectors to open their garbage cans and dump their contents into a garbage truck, do residents have a reasonable expectation of privacy that the trash collector will not search the contents of garbage bags located in that can to verify compliance with disposal laws?

In its briefing to the Court, the City argued "[t]here is no reasonable expectation of privacy

as between SPU and its customers regarding the contents of SPU's garbage containers in the context of this service relationship." Def. Mtn for Summ Jdgmt at 20. At oral argument, however, the City conceded that residents ***do*** have such a privacy interest. When asked if the trash collectors could lawfully open tied garbage bags (whether opaque or translucent) to search their contents for food waste, the City admitted it would need a search warrant to do so. When asked if the trash collector could lawfully rummage through an untied paper sack to look for food waste not otherwise in plain view, the City again said he or she could not. The City now takes the position that trash collectors can lawfully enforce the food waste and compostable paper ban **only** if these items are in plain view.

Although not squarely addressed in *Boland* and *Sweeney*, it appears to be a logical extension of the reasoning of these cases: if a person has a privacy interest in their own garbage and a garbage collector cannot give the garbage to a police officer to perform a warrantless search, then the collector himself could not conduct such a search either. This Court found no reported case directly on point, but courts have questioned the proposition that trash collectors, acting on behalf of municipal utilities, can search the contents of residents' garbage when the garbage is not in plain view. *See State v. Hempele*, 576 A.2d 793, 805 (N.J. 1990); *State v. Granville*, 142 P.3d 933, 941 (N.M. 2006) (residents have a reasonable expectation of privacy in the contents of their garbage cans when that garbage is in a container that conceals the contents from plain view). "Allowing garbage collectors to search through someone's trash in an effort to find recycling violations is no less intrusive than is a warrantless search of that same garbage conducted by police in an effort to find incriminating evidence. Both involve the same invasion of personal privacy." Ann R. Johnson, *State v. Defusco: Warrantless Garbage Searches Under the Connecticut Constitution*, 14 QLR 143, 182 (1994).

Based on *Boland* and *Sweeney*, and the City's own concessions at oral argument, this Court concludes that a trash collector's search of the Plaintiffs' garbage is a disturbance of their private

affairs.

2. Is the trash collector's intrusion authorized by law?

If a privacy interest has been disturbed, the second step of the analysis asks whether authority of law justifies the intrusion. *York*, 163 Wash.2d at 306. The authority of law required by Article I, §7 is satisfied by a valid warrant, limited to a "few jealously guarded exceptions." *Id.* A warrantless search is per se unreasonable unless it fits within one of the exceptions, such as exigent circumstances, consent, a search incident to a valid arrest, an inventory search by law enforcement after an arrest, the plain view doctrine, or an investigative stop under *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). *York,* 163 Wash.2d at 310.

The City argues that the food waste ordinance and implementing rule is facially valid because trash collectors may screen garbage for impermissible items under the plain view doctrine. Under the traditional application of the plain view doctrine, if a law enforcement officer or other government agent intrudes into an area in which there is a reasonable expectation of privacy, the agent must have a prior justification for the intrusion, inadvertently discover the incriminating evidence, and immediately recognize the item as contraband. *State v. Myers*, 117 Wash.2d 332, 346, 815 P.2d 761 (1981).

In this case, trash collectors have a justification for opening the lid of residents' garbage cans and looking inside to determine if there is any trash to collect. Plaintiffs agree that there could be circumstances that justify a trash collector inspecting their garbage, such as when a collector inadvertently sees plainly visible contraband while dumping the garbage out of the can and into a truck's hopper. *Boland* acknowledged that "the usual exceptions to the warrant requirement, such as plain view and exigency, also apply to garbage cans." *Id.* at 578. If food waste or compostable paper is in plain view, trash collectors may observe it in the course of routine garbage collection, and take enforcement action based on their observations. *See State v. Graffius*, 74 Wash. App. 23, 27, 871 P.2d 1115 (1994) (police officer's observation of marijuana in partially open garbage can

was not unlawful search because contraband was in plain view).

But as the City conceded at oral argument, not all warrantless garbage inspections would fit the plain view exception. SMC 21.36.083(B)(2)(b) and (c) authorize SPU to tag garbage cans containing "significant amounts" of food waste and compostable paper. SPU Director's Rule SW-402.1(B)(1) defines "significant amounts" as more than 10 percent by volume of the contents of a garbage can, as determined by "visual inspection" by an SPU inspector or contracting trash collector. The City could not explain how inspectors can compute the 10 percent limit *without* searching through a resident's garbage bags. The enforcement provisions of the ordinance and implementing rule, on their face, allow trash collectors to open and search the contents of a resident's garbage bags, even when food waste or compostable paper is not in plain view. The City conceded that such a search would be constitutionally impermissible. Thus, the Court must conclude that the enforcement provisions, as currently written, are facially unconstitutional.

This Court does not find that the City's ban on the disposal of food waste and compostable paper in residential garbage cans is unlawful. The City persuasively argues that it has the police power to take steps to reduce the quantity of compostable material being disposed in landfills and that the ban is a reasonable regulation promoting public safety, health, and welfare. The Plaintiffs do not challenge these contentions. The only claim Plaintiffs raise is whether the City's chosen method of enforcement, codified in SMC 21.36.083(B)(2)(b) and (c), and SPU Director's Rule SW 402.1 (B) (1) - (3), violates residents' privacy rights by authorizing warrantless searches of their garbage. This ruling does not prohibit the City from banning food waste and compostable paper in SPU-provided garbage cans. It merely renders invalid the provisions of the ordinance and rule that authorize a warrantless search of residents' garbage cans when there is no applicable exception to the warrant requirement, such as the existence of prohibited items in plain view.

Given the Court's ruling invalidating the enforcement provisions of the city ordinance and implementing rule, the Court need not reach the Plaintiffs' due process challenge as those claims

are now moot.

ORDER

Based on the foregoing, Plaintiffs' motion for summary judgment is GRANTED and judgment is entered in favor of Plaintiffs on their privacy claim against Defendants City of Seattle, Seattle Public Utilities, and Director Ray Hoffman, in his official capacity. Seattle Municipal Code 21.36.083(B)(2)(b) and (c), and Seattle Public Utilities Director's Rule SW-402.1 (B) (1) - (3) are declared unconstitutional and void. An injunction is hereby entered against their enforcement.

Dated this 27th day of April, 2016.

Electronic signature attached

_____

Chief Civil Judge Beth M. Andrus
King County Superior Court

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APPENDIX A

Plaintiffs' Motion for Summary Judgment

Plaintiffs' Motion for Summary Judgment;
Declaration of Ethan W. Blevins in Support of Motion for Summary Judgment, with Exhibits 1-9;
Declaration of Richard Bonesteel;
Declaration of Edwin Yasukawa;
Declaration of Steve Davies;
Declaration of Sally Oljar;
Declaration of Mark Elster;
Declaration of Greg Moon;
Declaration of Scott Shock;
Declaration of Keli Carender, with Facsimile Affidavit by Ethan W. Blevins;
City of Seattle's Response to Plaintiffs' Motion for Summary Judgment;
Plaintiffs' Reply in Support of Plaintiffs' Motion for Summary Judgment.

City of Seattle's Motion for Summary Judgment

City of Seattle's Motion for Summary Judgment;
Declaration of Robert Tad Seder in Support of Defendant City of Seattle's Motion for Summary Judgment, with Exhibit 1;
Declaration of Hans Van Dusen, with Exhibits A-I;
Plaintiffs' Response to Defendants' Cross-Motion for Summary Judgment;
Reply Re Defendant's Motion for Summary Judgment.

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Signed by: Beth Andrus
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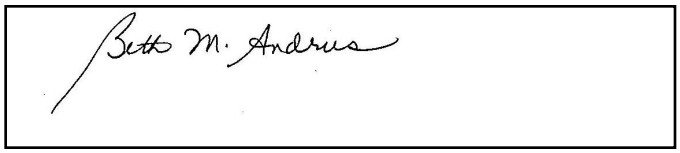

Judge/Commissioner: Beth Andrus

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