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Washington State Court of Appeals
Division II

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Docket No. 41055-9-II

Pierce Cy. Sup. Ct. Cause No. 10-2-07721-4

HEIDI I. DOWNEY, et al.,

Plaintiffs-Petitioners,

-against-

PIERCE COUNTY, et al.,

Defendants-Respondents.

APPELLANTS' BRIEF

ORIGINAL

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I. ASSIGNMENTS OF ERROR

1. Respecting Ms. Downey's appeal to superior court (Claims I-IV), the trial court erred affirming the Hearing Examiner's decision.
2. Respecting Ms. Downey's taxpayer derivative action seeking declaratory and injunctive relief (Claims V-VII), the trial court erred entering summary judgment dismissal favoring the County.

Issues Pertaining to Assignments of Error

1. Were each of the Examiner's findings of fact supported by substantial evidence (CP 215 ¶ 8)?
2. Were errors of law committed by the Auditor's designee and Examiner warranting reversal (CP 215-16 ¶ 9)?
3. Did the Auditor's designee and/or the Examiner act *ultra vires* (CP 216 ¶ 10)?
4. Did the Examiner demonstrate bias against Ms. Downey (CP 216 ¶ 11)?
5. Is Blizzard a dangerous dog (CP 216 ¶¶ 12, 14)?
6. Is requiring payment of a filing fee for the right to a contested hearing concerning a dangerous dog declaration unconstitutional?
7. Is imposing an improper burden and standard of proof in a contested hearing concerning a dangerous dog declaration

unconstitutional?

8. Is failure to permit subpoena powers to prepare for and participate in the first contested hearing concerning a dangerous dog declaration unconstitutional?
9. Does issuing a dangerous dog declaration constitute an unconstitutional seizure, when issued without a warrant (CP 216-17, ¶¶ 18-21)?

II. STATEMENT OF THE CASE¹

Plaintiff-Appellant Heidi Downey lives with her husband, kids, and dogs at the end of an easement road in unincorporated Pierce County. One such dog is Blizzard, a neutered male, white and orange Great Pyrenees, a long haired breed, who is the subject of this dispute. On Apr. 7, 2009, Blizzard allegedly grabbed Tina Steiner's Pomeranian named Kayla, and without provocation inflicted non-mortal wounds while off Ms. Downey's property, as defined by PCC 6.02.010(N). Over four months after the alleged incident, and despite Ms. Steiner's repeated failure to clearly identify Blizzard, not having witnessed how the matter commenced, and disregarding Ms. Downey's furnishing a solid alibi for

¹ The verbatim report of proceedings is referenced as "VRP" and the administrative record as "AR." While numerically marked in sequence, parenthetical text following each AR reference provides an alphanumeric identifier from the document itself.

Blizzard, Pierce County Animal Control nonetheless declared Blizzard dangerous on Aug. 13, 2009, thereby immediately imposing restraints on Blizzard and Ms. Downey's liberty without a determination of probable cause, warrant, or similar order by a neutral and detached magistrate. Lack of probable cause is evidenced by the following:

- On Jul. 2, 2009, Officer Jody Page cannot match any of Ms. Downey's dogs with the description given by Ms. Steiner (**AR 38 (A10)**), though the "closest is a chocolate and white aussie," not a white and orange Great Pyrenees. **AR 42 (A14)**.
- On Jul. 7, 2009, Mr. Steiner corrects the first statement to animal control by conceding that the neighbor boy Justin Kaelin did not see any part of the alleged incident, although Mrs. Steiner originally insinuated that he would be an independent, corroborating eyewitness who saw Ms. Downey's dog in her yard with Kayla (**AR 38 (A10), AR 47 (B3), and AR 51 (B7)**).
- On Jul. 15, 2009, despite animal control's request for additional clarity, Ms. Steiner still cannot describe Blizzard as the culprit (**AR 38 (A10)**).
- On Aug. 6, 2009, Ms. Steiner admits she failed to see the incident commence, and one interpretation is that Kayla was in the easement road and off-leash when "grabbed" ("She said she did not see the incident start, nor did she hear barking or growling."² She had her back to the road and front yard, putting her other dogs in their pen. She turned and saw the Downey dog, described as 'Blizzard' grabbing her dog as it was trying to run back towards the house. Blizzard grabbed Kayla in her mouth and dragged her

² During live testimony before the Hearing Examiner, Steiner said she saw nothing prior to turning around, after hearing Kayla bark or nip, and seeing a dog with Kayla in its mouth. **VRP 8:5-9**. Officer Page confirmed that Ms. Steiner stated she did not see or hear the incident start. **VRP 48:2-8**.

down the easement road towards the Downey residence.”) (AR 39 (A11)). This statement to animal control disabled Ms. Steiner from proving that Blizzard attacked without provocation by her own dog and that the incident occurred off Ms. Downey’s property.³

- In written statements, Ms. Steiner first says that the dog who attacked Kayla on Apr. 7, 2009 was “gold and white maybe a mixed lab of sorts; about 3 feet tall” (AR 47 (B3) and AR 51 (B7)), then changes the description to “white/cream colored with a tail that curls up taller and thinnest of the three” (AR 48 (B4)), and then switches dogs completely a third time by saying it was “another dog which is brown and white with a curled tail it is now that dog” (AR 48 (B4)). The repeated misidentification no doubt resulted from Ms. Steiner’s under-oath admissions that she “didn’t know what [Ms. Downey’s] dog was,” that “it happened fast,” and that she “was in shock.” VRP 17:19—18:4.

On Aug. 20, 2009, Ms. Downey timely sought review of the adverse dangerous dog declaration before the Pierce County Auditor’s designee Stephen Greer (“Greer”) (AR 54 (C1)), raising numerous defenses, as stated, and paying the mandatory \$250 fee of PCC 6.07.015(E)(1) (AR 55 (C2)).⁴

³ Ms. Steiner notes that she placed a cross near where she first saw Kayla in the dog’s mouth, yet she did not see where the incident commenced or where Kayla was situated when she heard her bark or yip prior to seeing her in the dog’s mouth. VRP 12:2-15. Further, Ms. Steiner admitted that sometimes Kayla would “mosey to the road” (i.e., off Ms. Steiner’s property and on the easement road) when she let her out to urinate, as she did the morning of Apr. 7, 2009. VRP 12:18-24. Ms. Steiner also admitted that Kayla, as a puppy, had entered the Downey’s yard. VRP 14:17-22. Officer Page testified that Ms. Steiner told her the cross was placed at, not near, the location of that part of the incident that Ms. Steiner first saw. VRP 48:5-8.

⁴ Though issued a dangerous animal designation, the Pierce County Auditor sent Ms. Downey a packet on Aug. 25, 2009 informing her of the procedure for appealing a “potentially dangerous animal” declaration, and indicating she had to pay \$125 as a mandatory fee to seek review for her “first appeal” to the Auditor’s Designated

On Sept. 30, 2009, Greer upheld a Potentially Dangerous Animal designation against Blizzard while purportedly following PCC 6.07.010(E)(1-3). This hearing was not taped or otherwise recorded, depriving Ms. Downey the ability to use Ms. Steiner's under-oath testimony in subsequent proceedings, and allowing the complainant a dress rehearsal without any risk of being successfully impeached through prior inconsistent testimony, a point that emerged clearly during the hearing before the Hearing Examiner, as noted below:

9 Q. (BY MS. DOWNEY) So did I not drive past you while you were
10 standing on your front porch during Saturday going up there
11 while your dog was all the way down our driveway?

12 MR. O'CONNOR: I'm going to object to this.

13 THE WITNESS: I don't know.

14 MR. O'CONNOR: Just -- just a moment, Tina. We need to
15 have a legal conversation about this line of questioning,
16 because what's relevant is what happened on April 7th.

17 HEARING EXAMINER: That's correct.

18 MS. DOWNEY: Then why is she allowed to say that her dog
19 had never done anything?

**20 HEARING EXAMINER: She didn't say that. Incidentally,
21 she didn't say that on this record. She may have said it on
22 some other one, not on this record.**

VRP 15:9-22 (emphasis added). Greer's "Administrative Review Decision" entered an order sustaining the potentially dangerous animal designation "as sufficient evidence exists by preponderance" that Blizzard

Administrative Official, and pay another \$250 as a mandatory fee to seek review for her "second appeal" to the Pierce County Hearing Examiner. **AR 57 (C4); AR 60 (C7).**

“[i]nfllicted a bite(s) on a human, domestic animal, or livestock either on public or private property,” one of the grounds to declare a dog potentially dangerous. **AR 62 (C9)**. At no time before appealing this decision did the County file a motion asking Greer to correct or amend his order.

On Oct. 8, 2009, expressing her frustration with Greer’s apparent failure to review the documentation submitted (finding Blizzard “potentially dangerous” yet Ms. Downey being ordered to pay \$250 for appeal of a “dangerous” designation), Ms. Downey completed and filed her “Appeal to Pierce County Hearing Examiner of DA/PDA Decision” with the proper entity and paid \$250 to the Pierce County Auditor in relation to challenging Greer’s adverse designation concerning her dog Blizzard as a Potentially Dangerous Animal, as provided by PCC 6.07.010(E)(3). **AR 64 (C11); AR 65 (C12)**. Thereafter, Pierce County Animal Control/Auditor agents contacted Ms. Downey and demanded that she pay another \$250 in order to appeal a Dangerous Animal declaration pertaining to Blizzard. Threatened with impound, euthanasia, and other administrative or criminal repercussions, on Oct. 14, 2009, Downey paid another \$250 to the Pierce County Auditor in relation to challenging the adverse designation concerning her dog Blizzard. **AR 65 (C12)**.

On Oct. 26, 2009, without conducting another hearing and without allowing Ms. Downey to submit new evidence or argument, Greer amended his administrative review decision to uphold the determination that Blizzard was not potentially dangerous, but dangerous, claiming the amendment was necessary to correct what amounted to merely a “scrivener’s error.” **AR 69 (C16)**. By rewriting history, Greer singlehandedly changed the determination and order to assert that “sufficient preponderance of evidence” supported a determination that Blizzard:

[i]nflicted severe injury on or kills an animal without provocation while the animal inflicting the injury is off the property where its owner resides, thus “sustain[ing]” animal control’s dangerous animal designation “as sufficient evidence exists by preponderance.” **AR 70 (C17)**.

Ms. Downey then timely sought review of Greer’s determinations before the Pierce County Hearing Examiner’s deputy examiner Terrence McCarthy (“McCarthy”), having paid the mandatory \$500 fee per PCC 6.07.015(E)(3). During the hearing, McCarthy committed harmful evidentiary errors, such as the following:

1. Considering and soliciting testimony about prior alleged incidents having no bearing on whether Blizzard injured Kayla on Apr. 7, 2009 and that were never reported (**VRP 20:17—21:18**), even though

Downey was prohibited from inquiring about Kayla's prior roaming behavior, which was assuredly relevant (**VRP 15:9-17**).⁵

2. Considering and soliciting testimony directly violating ER 408. At **VRP 30:20**, McCarthy asks why Downey believes that Ms. Steiner was falsely accusing Blizzard of attacking Kayla. Downey responds that she was sued by the Steiners following her refusal to succumb to their demand and desire that "all three of [her] dogs [would be] put down." **VRP 30:21-25**. Downey concludes that Steiner lied in order to obtain money in this economic downturn and, "in her words, to punish me." **VRP 31:6-8**. Then McCarthy asks the objectionable question, "Did you pay any money to them?" **VRP 31:9**. Downey, perhaps not realizing she has grounds to object, answers, "Yes, I did." **VRP 31:10**. He follows with, "How much did you pay to them?" **VRP 31:11**. Downey answers this wholly objectionable question, "1700." **VRP 31:12**. Continuing as though he were Mr. O'Connor's co-counsel, McCarthy concludes, "Then why would – why would she – if you've already paid her money, why would she be doing – testifying now like this?" **VRP 31:13-15**. Downey responds, "Because it wasn't the amount of money that they wanted. They wanted 2300." **VRP 31:16-17**. Again, this line of questioning, prompted by

⁵ Importantly, Ms. Steiner never alleged nor identified Blizzard as the dog who allegedly

McCarthy alone, whom Downey may not have felt at liberty to refuse to answer, clearly violates ER 408. It should be obvious that Steiner would be “testifying now like this” even though Downey “already paid her money” in order to save face, maintain consistency and not be accused of perjury, or to punish Downey for her refusal to euthanize all of her dogs. This was not mere innocent solicitation on McCarthy’s part, as he distinctly drew the improper conclusion that by paying \$1700, Downey was admitting fault. At **VRP 56:10-12**, McCarthy asks, “If your dogs were actually in the kennel, as you say, why did you settle, pay them so much money to settle the case?” Despite Downey reiterating that she was watching her dogs during the time frame when the attack was alleged to have occurred, he presses on with the question, “So that’s why you paid to settle the case?” **VRP 56:23-24**. The bias and harm are unmistakable.

3. Showing bias before Downey even calls her daughter as a witness, and then, not even acknowledging that he heard her testimony in the Jan. 26, 2010 order adds to the appearance of unfairness. Downey asks if she can have her daughter testify, to which McCarthy responds, “How old is your daughter?” Learning she is twelve, he does not bar her. **VRP 34:18-22**. But before she testifies, the hearing recesses. Upon

attacked one of her goats a year before the incident with Kayla. **AR 47 (B3)**.

reconvening, he invokes an unwritten custom against child testimony, stating:

And I will tell you now that you can put your daughter on to testify, but, generally speaking, it is frowned upon to put children on the stand in – in a hearing proceeding.

VRP 35:20-23. He adds, without authority, “It’s not considered in their best interest, generally speaking, so it’s your call as a mother.” **VRP 35:25—36:1.** When she finally takes the stand, he attempts to solicit an objection from Mr. O’Connor, asking:

And does the prosecutor have any questions about qualifications to testify? She’s age 12, so the – the law is neutral as to whether or not she can testify.

VRP 42:6-9. Mr. O’Connor waives any objection saying “competency is presumed at age 12.” **VRP 42:10-14.** This is not the law.⁶

4. Then Downey asks her daughter to relate what she heard the Animal Control Officer tell her mother. **VRP 45:13-14.** McCarthy denies her request because “if he’s not in attendance, no.” He adds:

If it’s an out-of-court – out-of-Hearing Examiner statement made and the person’s not here to say whether or not the conversation took place, then

⁶ ER 601 provides that every person is competent to testify except as provided by rule or statute. The presumption of incompetency was set at age ten (RCW 5.60.050), not twelve, and then only if the child appeared “incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly,” a statutory restriction that has since been rescinded. See *State v. Pham*, 75 Wash.App. 626 (1994) (age of child not determinative of capacity as witness); *State v. Standish*, 14 Wn.2d 39 (1942) (a “normal” girl of eleven may testify); *State v. Whitfield*, 129 Wash. 134 (1924) (proper to hear evidence of nine year old who is capable of receiving just impressions).

it's hearsay and it's not admissible.

VRP 45:19-22. Without inquiring as to what purpose Downey intended to offer the out-of-court statement (e.g., for the truth of the matter asserted or some other reason), and without realizing that anything stated by the party opponent (here, the County's speaking agents) is non-hearsay admission under ER 801(d)(2)(iii-iv)⁷, McCarthy made a plainly incorrect ruling.

Despite the clear bias and disregard of evidentiary rules, Ms. Downey, a pro se defendant, did her best to prove the points raised in her appeal.⁸ Following a hearing on Nov. 18, 2009, over two months later,⁹ on Jan. 26, 2010, McCarthy upheld Greer's decision, finding that Blizzard was a dangerous dog, purportedly relying on PCC 6.07.015(E)(3), PCC 1.22.090(G), and PCC 1.22.080(B)(2)(b). In his order, captioned "Appeal

⁷ Indeed, even if not an admission by party opponent, hearsay exceptions routinely apply where the declarant's availability is not required (ER 804).

⁸ This included the alibi and imposter defenses (**VRP 29:1-15** (identifying other dogs running loose around that time-frame); **25:11-24 and 38:22—40:9**), to pointing out repeated inconsistencies and changes of description by Ms. Steiner (**VRP 55:9-25 and 37:13-14** (noting that Great Pyrenees has long hair not Lab-like hair, as described by Ms. Steiner) and **VRP 29:1-15** (noting she does not own a white and brown dog, alleged to have been accompanying the attacking dog, which she also does not own (viz., a gold and white mixed Lab)) and the difference in timing (**VRP 17:9-12**)), to responding to the completely inadmissible allegations that Ms. Downey's other dogs were involved in injuring or killing animals (**VRP 36:8-25**) and to the question of where the incident took place (Ms. Downey providing exhibits from the Assessor's Office showing that the easement road crosses the Leach, not the Steiner, property – see also **AR 9, AR 19 (D2), AR 20 (D1), AR 21 (D5)**).

⁹ In violation of PCC 1.22.120(B)(requiring all decisions to be rendered "within ten working days following the conclusion of all testimony and hearings and closing of the

of a Decision of Pierce County Auditor's Administrative Official," McCarthy reiterated that he was reviewing Greer's decision "declaring 'Blizzard' a potentially dangerous dog" (AR 15), without justification omitted the testimony of Janelle Downey from the list of witnesses who testified (AR 15), and, without indicating that the hearing was conducted *de novo*, and without specifying the burden or standard of proof, rendered a "DECISION" stating, "The appeal of the administrative official's declaration is hereby denied." AR 16.

On Feb. 4, 2010, Downey timely filed a motion for reconsideration (AR 7-9). Nowhere does she ask that he reconsider the standard or burden of proof, but instead that he reassess the evidence and inconsistencies submitted for re-balancing. On Feb. 18, 2010, the County responded (AR 6), proposing Findings of Fact and Conclusions of Law to solicit the material alteration of McCarthy's Jan. 26, 2010 order and exceed the scope of Ms. Downey's motion under the guise of replying to her challenge to "certain facts, the credibility of witnesses, and statements made by administrative official Steven Greer at an earlier informal review." AR 4-6. Of course, in requesting this relief, the County was not merely responding to a request to reconsider, but initiating what amounted

record," unless a longer period is agreed (it was not)).

to its own motion for reconsideration or relief from judgment, to which Ms. Downey had no opportunity to respond. Ms. Downey's motion was denied on Mar. 11, 2010. McCarthy then signed the proposed Findings of Fact and Conclusions of Law, substantially revising and contradicting his Jan. 26, 2010 order by noting that the hearing conducted on Nov. 19, 2009 was "de novo," that Pierce County "established the following facts by a preponderance of the evidence," and upholding the DDA without any reference to Greer's decision. **AR 2-3.**

On Mar. 24, 2010, Ms. Downey timely filed suit in superior court, seeking appellate review under PCC 6.07.015(E)(4) and statutory and constitutional writs of review. She also petitioned the Washington State Attorney General to take action to correct the constitutional deficiencies raised in the *Complaint* by intervening and/or otherwise correcting, curing, or remedying the Pierce County Code's patent constitutional defects as alleged. **CP 143.**

On Mar. 29, 2010, Assistant Attorney General Kristen K. Mitchell declined Ms. Downey's petition on behalf of the Attorney General's Office. **CP 145.** Apr. 1, 2010, Downey amended the complaint and appeal, adding allegations related to the taxpayer derivative action. **CP 11-19.**

Following a joint appeal/summary judgment hearing on Jul. 23,

2010, Judge Hickman affirmed the Examiner's determination that Blizzard was dangerous and denied Downey's motion for summary judgment in her facial constitutional challenge. To improve upon the clarity of Judge Hickman's in-court order, the parties jointly moved to amend, the amended order being court signed on Jul. 30, 2010. **CP 214-18.**

III. ARGUMENT

There may be merit to the argument that a person's relationship with a dog deserves more protection than a person's relationship with, say, a car.

Rabon v. City of Seattle, 107 Wash.App. 734, 743-44 (I, 2001) (intimating that Fifth Amendment (and hence, Article I, § 3 of State Constitution) protection against *deprivations of liberty* may more appropriately address the nature of the right infringed when a companion animal has been killed or withheld by government after being declared dangerous). Due process rights attach to dog ownership. *Mansour v. King County*, 131 Wash.App. 255, 263-64 (I, 2006). In Washington:

[T]he private interest involved is the owners' interest in keeping their pets ... is greater than a mere economic interest, for pets are not fungible. So the private interest at stake is great."

Rhoades v. City of Battleground, 115 Wash.App. 752, 766 (II, 2003).

Here, the risk of erroneous deprivation is extraordinarily high given the lack of a determination of probable cause by a detached and neutral magistrate, the inability of the complainant to properly and

consistently identify the culprit, the *post hoc* “amendment” to Greer’s order upholding what he believed was a DPDA (not a DDA), Greer’s *ultra vires* deviation from the statutorily prescribed standard of review, McCarthy’s biased handling of the second-tier “appeal,” his *ultra vires* deviation from the statutorily prescribed standard of review, lack of substantial evidence in light of the rule of lenity, and his *post hoc* “amendment” to his prior order upholding Greer’s decision.

De minimis contests over a 10-mile-over-limit speeding ticket with modest fine still achieve due process compliance through the IRLJ, offering a contested hearing before an impartial magistrate, right to subpoena and cross-examine, and placement of the burden of proof on the government to prove the driver was speeding by evidentiary preponderance. Dogs, though property, have earned at least the same constitutional regard when the government attempts to destroy, remove, or label them. Here, the County not only deprived Downey of due process but seized her property without a warrant or legal exception thereto. An essential principle of due process is the right to notice and a meaningful opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). A meaningful opportunity to be heard means ““at a

meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

At such a hearing, the governmental decision must be tested against a defined standard that comports with due process. Here, because the County code prescribes a patently illegal standard, no adequate standard against which the County’s decisions may be tested exists. In *Mansour*, the Court of Appeals evaluated the sufficiency of a first, contested fact-finding hearing before the King County Board of Appeals following issuance of a Notice of Violation and Order to Remove Mr. Mansour’s dog from the jurisdiction. The Court concluded that lack of a clearly ascertainable, adequate standard and burden of proof in upholding a removal order (*Id.*, at 264 (“An adequate standard of proof is a mandatory safeguard.”)), not being permitted to subpoena documents and witnesses (*Id.*, at 270 (“Due process requires that a pet owner contesting a removal order be able to subpoena witnesses and records.”)), and not receiving sufficient notice as to the precise law he allegedly violated all violated procedural due process (*Id.*, at 272). The court reversed, adding that appellate review cannot cure a deficient standard and burden of proof. *Id.*, at 267-68.

In *Phillips v. San Luis Obispo County Dep't of Animal Regulations*, 183 Cal.App.3d 372, 376 (1986), a city ordinance providing for seizure and destruction of a dog who could not be properly controlled was found unconstitutional despite a post-seizure “courtesy” hearing, where the ordinance made no provision, express or implied, for any notice of hearing either before or after seizure. The California Court of Appeals agreed with the Phillipses that “the statute or ordinance itself must provide for notice and a hearing and that a gratuitous hearing does not cure a deficient law.” *Id.*, at 380 (citing *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424-425 (1915)). “A hearing granted as a matter of discretion is no substitute for due process.” *Id.* Further, “It is irrelevant that the question may have been fairly decided by a courtesy hearing or that the plaintiff lacks a defense on the merits.” *Id.* (citing *Coe*, at 424). This policy “ensures that the response of the administrative entity will be a settled and uniform procedure, rather than a haphazard one.” *Id.* Thus, even if the county and McCarthy provided Ms. Downey the *ad hoc* “courtesy” of a *Mansour*-compliant burden of proof, by deviating from the admittedly illegal statutory provisions of Ch. 6.07 PCC, such does not guarantee that any other citizen defending against a dangerous dog designation will also so benefit. Further, such gratuitous due process does

not cure a deficient law or guarantee equal treatment under the law, requiring reversal as done in *Phillips*. Due process is not subject to governmental whim.

Below Downey discusses the several grounds to vacate the DDA and declare portions of Title 6 PCC unconstitutional.

A. APPEAL FROM HEARING EXAMINER TO COURT

1. Warrantless seizure and lack of probable cause to issue DDA.

PCC 6.07.015(A) predicates issuance of a DDA on a mandatory determination of probable cause through four evidentiary predicates. Although Steiner submitted a written complaint and was purportedly willing to testify, as discussed above, the complaint failed to identify Blizzard despite its ever-changing finger-pointing. No other “substantial evidence” supported deeming Blizzard dangerous. Indeed, the investigating officer witnessed no such dangerous behavior and could not even identify the dog based on Steiner’s two written complaints.

At the time of issuing the DDA (not at the time of the hearing), was there probable cause to justify issuance? In light of the above, Officer Page failed to obtain substantial evidence by a wide margin. If there were probable cause, why did Officer Page wait four months to issue the declaration, and have to repeatedly solicit statements from Steiner (which

changed over time) because the inconsistent identifications failed to match any of Ms. Downey's' dogs? Did Officer Page interview any other witnesses or neighbors or canvas the immediate neighborhood and jobsites to see if look-alikes existed before she tainted the pretrial identification by presenting to Steiner a biased photo line-up of dogs that all pointed to Ms. Downey? *See State v. Cook, infra*. And in failing to procure the declaration from a neutral magistrate through a procedure akin to swearing out an affidavit in support of search warrant, the avoidable error, of constitutional magnitude, led to considerable expense and time wasted by all involved, because Ofc. Page failed to comply with her statutory duty.

Having nonetheless issued the DDA, Ofc. Page did so without a warrant. The Fourth Amendment applies to the States and provides that:

no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Wash. Const., Art. I § 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Art. I § 7 confers protections "qualitatively different from, and in some cases broader, than those provided by the Fourth Amendment." *City of Seattle v. McCready*, 123 Wn.2d 260, 267 (1994). While the Fourth Amendment protects a reasonable expectation of privacy, Washington's Art. I § 7 goes

further and keeps safe Defendants' private affairs from "governmental trespass absent a warrant." *State v. Young*, 123 Wn.2d 173, 181-82 (1997)(quoting *Myrick*, 102 Wn.2d at 511)).

Ms. Downey's ownership of Blizzard constitutes her private affairs in which she enjoys the right to be free from governmental trespass absent a warrant. Further, Blizzard is regarded as a personal effect, the seizure of whom violates the Fourth Amendment. The Fourth Amendment guarantees that:

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated....

U.S. Const. amend. IV. People's "effects" include their personal property. *U.S. v. Place*, 462 U.S. 696, 701 (1983)(luggage is "effect"). In every circuit that has considered the question, including the Ninth, domestic animals are "effects" under the Fourth Amendment.¹⁰

A seizure of property occurs whenever there is some meaningful interference with an individual's possessory interest in that property. *Soldal v. Cook Cy.*, 506 U.S. 56, 61 (1992). Failing to contest the DDA,

¹⁰ *Viilo v. Eyre*, 547 F.3d 707, 711 (7th Cir.(Wis.)2008)); *Altman v. City of High Point, N.C.*, 330 F.3d 194, 203 (4th Cir.(N.C.)2003); *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 210 (3rd Cir.(Pa.)2001); *Leshner v. Reed*, 12 F.3d 148, 150 (8th Cir.1994); *Fuller v. Vines*, 36 F.3d 65, 67-68 (9th Cir. 1994)("A dog is an 'effect' or 'property' which can be seized."), *overruled on o.g.*, *Robinson v. Solano Cy.*, 278 F.3d 1007, 1013 (9th Cir.2002).

Ms. Downey would be obligated to surrender Blizzard or pay \$500 for an annual permit, tattoo or microchip Blizzard at additional expense, and conform to the requirements for keeping a dangerous animal within Pierce County – including the highly prohibitive \$500,000 insurance/bond requirement. PCC 6.07.025(F). Failure to comply with the DDA registration requirements within ten days of issuance will result in mandatory impound and euthanasia within five days of seizure (i.e., a forfeiture unless she pays to “appeal”). PCC 6.07.025. Further, Ms. Downey could face prosecution for a gross misdemeanor if found in violation of any provision of Ch. 6.07 PCC. PCC 6.07.040. Even after being registered, failure to comply with the conditions of owning a dangerous dog results in seizure and possible euthanasia. PCC 6.07.045.

To appeal this designation, Ms. Downey had to pay \$250 for the first-level “appeal” and \$500 for the second-level “appeal.” Yet the declaration that Blizzard is dangerous subjected him to impoundment even if Ms. Downey timely appealed should he be outside a “proper enclosure” without leash, muzzle, and physical restraint of a responsible person, as “appeal” does not stay restraints. See **AR 29 (A1)**; PCC 6.07.015(E)(5)(noting that during appeal process, restraints are still

imposed on possession and use of personalty¹¹). Hence, the DDA – appealed or unappealed – constitutes a meaningful interference with Ms. Downey’s property and liberty interest in Blizzard, as well as her own liberty interests arising from criminal prosecution and incarceration.

Seizures exist even by placing a condition on the right of possession. In *Rossi v. Town of Pelham*, 35 F.Supp.2d 58, 70 (D.N.H. 1997), the court recognized that seizures may occur when the defendant retains possession, recognizing partial, minimally intrusive, and non-dispossessing seizures as well as complete, highly intrusive, and formally dispossessing seizures. In *Rossi*, the court found that meaningful interference with Rossi’s possessory interest in records even though the officer never attempted to dispossess her of custody or control of them, because he conditioned her right to possess on remaining at the town hall. *See also U.S. v. Allen*, 644 F.2d 749, 751 n.2 (9th Cir.1980)(finding that the agent’s statement of intent to seize the briefcase constituted a seizure even before the courier left the police station without it); *Presley v. City of Charlottesville*, 464 F.3d 480 (4th Cir.2006)(city publishing a map showing public trail over plaintiff’s property was a meaningful

¹¹ E.g., taking to off-leash dog parks, walking without a muzzle, requiring construction of confinement on premises as defined by PCC 6.02.010(BB).

interference, such that a “temporary” or “partial” seizure may be said to apply). In analyzing this question, the court must acknowledge that the DDA immediately invaded several sticks in the bundle of Ms. Downey’s private property rights in Blizzard, including rights to exclude, use, and alienate, and threatened her with forfeiture of the entire bundle failing compliance with costly restraints or “appeal.”¹²

Indeed, when government agents threaten to dispossess a citizen of property if the citizen engages in a certain activity, even if the citizen does not attempt to engage in that prohibited activity and the threat to dispossess is never carried out, a seizure of property has occurred. *See Place*, at 707.¹³ Furthermore, where the interference with possessory interests effectively limits the ability of the owner to engage in previously allowed activities (e.g., taking dog to off-leash park, playing ball with dog without muzzle on one’s own property), for the lifetime of the dog and not merely a brief 90-minute interval (as in *Place*), liberty interests are also

¹² *See Nollan v. Calif. Coastal Comm’n*, 483 U.S. 825, 831-32 (1987)(holding that government requirement that beachfront cottage owners cannot exclude others accessing water constituted a taking by mandated easement for which it must pay).

¹³ *See also U.S. v. Gray*, 484 F.2d 352 (6th Cir.(Ky.)1973)(state trooper’s removal of rifles from defendant’s closet, carrying them to lower floor of building, and then copying down serial numbers constitutes a seizure although trooper did not take rifles with him after conducting search).

impaired. In the end, the question whether the DDA constitutes a “meaningful interference” must be answered affirmatively.

Under the Fourth Amendment, absent specific exceptions, a seizure of personalty is:

per se unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause.

Id., at 701. A warrant requires a determination of probable cause by a neutral and detached magistrate. *State v. Hatchie*, 161 Wn.2d 390, 398 (2007). The definition of magistrate in RCW 2.20.020 does not include animal control officers. Additionally, the magistrate must possess neutrality, detachment and the capability to determine probable cause. *State v. Porter*, 88 Wn.2d 512, 515 (1977). A neutral and detached magistrate never made a determination of probable cause before issuing the DDA. Nothing indicates that Ofc. Page possessed the requisite neutrality, detachment or capability to determine probable cause, especially when she complimented Ms. Downey about her “granite countertops and how nice [her] house [was] and that most people can’t afford to do an appeal.” **VRP 32:2-5**.

Under Art. I, § 7, a warrant may not issue without an authorizing statute or court rule. *State v. McCready*, 123 Wn.2d 260 (1994).

Moreover, municipal warrants must allege the violation of a crime. *State v. McCready*, 124 Wn.2d 300, 310 (1994). Here, nothing in Ch. 6.07 PCC authorizes a warrant based upon probable cause in relation to a dangerous animal designation. Nor does the DDA (AR 29-30 (A1-A2)) actually issued by Ofc. Page make reference to violation of a crime. Thus, the DDA fails to meet the requirements for a warrant and disturbed Ms. Downey's private affairs under Art. I, § 7, as well as constituted an unreasonable seizure in violation of the Fourth Amendment.

2. Equitable estoppel by government.

Ms. Downey took action on the faith of the statements and representations of the County – viz., she called attention to the failure of Greer to decide the case under the appropriate law and nonetheless decided to appeal his conclusion that Blizzard was a PDA. At no time did she concede Blizzard was instead a DA. So when Greer *sua sponte* issued an order without a new hearing or opportunity to be heard, he (viz., the County) reneged on earlier representations (beginning with the paperwork transmitted by the County in preparation for the hearing and culminating in Greer's first decision). He also caused injury to Ms. Downey by forcing her to pay an additional \$250 for a "dangerous" dog hearing before McCarthy, losing the temporary gain she made in having Greer

downgrade Blizzard from a DA to a PDA. It is not Ms. Downey's obligation to ensure that her dog is consistently declared throughout the appeal process. As discussed above, though issued a DDA, the county announced the hearing before Greer as one to adjudicate Blizzard's status as a PDA. Greer's order declared Blizzard a PDA, not a DA. The County took no step to disturb this finding. Yet when Ms. Downey sought her second "appeal," she was threatened with immediate confiscation of Blizzard and other repercussions unless she paid another \$250 (which she did). While this *post hoc* rehearing without notice or an opportunity to be heard constitutes a separate basis to vacate and dismiss the DDA, it also presents a case of equitable estoppel by government that would justify – at a minimum – reducing the DDA to a PDA, which Ms. Downey would be free to challenge *de novo*. See *State v. Yates*, 161 Wn.2d 714, 737-738 (2007)(outlining elements of defense).

The County's letters announcing the PDA appeal before Greer (not DDA) and Greer's decision declaring Blizzard a PDA (not DA) constitute a series of binding, unambiguous statements inconsistent with Greer's (and the County's) later insistence that errors and omissions warranted a re-writing of history, all without the due process expected by *Mansour*. In *Finch v. Matthews*, 74 Wn.2d 161, 175 (1968), the Supreme Court

recognized that equitable estoppel against government should not be interpreted so restrictively as to allow government to get away with patent breaches that private citizens would otherwise be held to, or that the government itself could hold a private party to:

We have repeatedly held that in business relations with individuals the state must not expect more favorable treatment than is fair between men. The state in its dealings with individuals should be held to “resolute good faith.”

Id. (citations omitted). Further:

The modern trend in both legislative and judicial thinking is toward the concept that the citizen has a right to expect the same standard of honesty, justice and fair dealing in his contact with the state or other political entity, which he is legally accorded in his dealing with other individuals.

Id., at 176.

Of course, the relationship between the County and Ms. Downey is not merely commercial in nature. Its terms are far more precious – viz., liberty and property interests sanctified by the state and federal constitutions, resulting in a permanent classification of her dog as dangerous, exposing her to criminal prosecution, demanding that she make annual registration payments at a cost that is several times over the cost to adopt a new dog, and other limitations of her ability to share her life with a family member. In addition to being injured in the many ways indicated above, a primary injury is constitutional. Accordingly, rescission is the

only legitimate outcome, putting the parties where they were before any designation was issued (i.e., Blizzard is not dangerous).

More than resolute good faith in government contracts is required. Strict compliance is incumbent upon in dealings implicating guarantees established under our Bill of Rights. Applying estoppel in this instance will improve, rather than impair, governmental functions. In estopping the County, public revenues will actually be spared by saving the cost of the dangerous dog appeal and any further review if indicated. *See Kramarevcky v. DSHS*, 122 Wn.2d 738, 744 (1993) (courts should be most reluctant to equitably estop when public revenues are involved).

Ms. Downey's constitutional rights may be economically inefficient to honor. They may also cause municipalities to experience political embarrassment, administrative inconvenience, or even hostility from members of the public. Such is the nature of our political system and its inalienable rights. Depending on the tide of public opinion, many public defenders (and judges who grant their motions) are chastised for letting their clients off on technicalities. But those "technicalities" often spring from the federal and state constitutions. In being upheld, true, a few

guilty men may go free, but dozens more innocents will be protected.¹⁴

3. Destruction of Record and Unconstitutional Procedure at First Hearing.

The hearing before Greer was not recorded.¹⁵ Accordingly, Ms. Downey lost the ability to meaningfully seek review of Greer's decision and to impeach Steiner for changing her testimony, yet again, between the first and second hearings, depriving her of additional due process protection. See, e.g., RALJ 5.1(a)(mandating recording); and RALJ 5.4 (affording appellant new trial for loss or damage to record). Further, due process of law requires "a record of sufficient completeness" for review of the errors raised by a criminal defendant. *State v. Larson*, 62 Wn.2d 64, 67 (1963). Though not criminal, the dangerous dog hearing has criminal repercussions.

The county states, "The Auditor's designee conducts an informal hearing in a conference room next to the kitchen in the Auditor's office."

¹⁴ The County may ask the court to consider the risk to members of the community should Blizzard not be declared dangerous. Yet the test of equitable estoppel of government does not turn on purported injustice to third parties, who have no say in what agreements or statutory obligations are made between the County and Ms. Downey, just as victims of crime have no right to revoke or condition an agreement between a prosecuting attorney and a criminal defendant. *Kramarevcky v. DSHS*, 64 Wash.App. 14, 23 (1992). Nor should the court, in assessing whether invoking equitable estoppel here will impair government functions, consider the cumulative effect of applying equitable estoppel in all cases like this. The review judge in *Kramarevcky* did this, to the dismay of the Court of Appeals, which reversed. *Id.*, at 24-26.

¹⁵ This is based on the absence of any rule requiring same and that the public disclosure

CP 167. And this water-cooler justice, giving improper deference to animal control, and failing to record sworn testimony for later “appeal,” costs \$250? Recording is important especially if the Hearing Examiner must rely on the record below. Further, that the county treats the Examiner proceeding purely as a trial *de novo* disregards the plain language of Ch. 1.22 PCC, but also compounds the unconstitutionality of paying for justice - \$250 for a first contested hearing and \$500 for a do-over? That PCC 1.22.110 allows the hearing examiner to take testimony under oath does not negate the need to defer to the administrative official and find “substantial evidence” in the “record.” Thus, in not mandating recording of the hearing before Greer, the county systematically deprives dog owners meaningful second-tier review and is unjustifiably dismissive of due process.

Although Mr. O’Connor urged McCarthy to treat the second-tier appeal *de novo*, the code expressly does not permit it. PCC 6.07.015(E)(2) provides:

If the Auditor or the Auditor’s designee finds that there is insufficient evidence to support the declaration, it shall be rescinded, and the restrictions imposed thereby annulled.

Yet, PCC 6.07.015(E)(3) states:

request submitted by Mr. Karp to the County did not turn up any such tape or CD.

If the Auditor or the Auditor's designee finds sufficient evidence to support declaration, the owner may appeal such decision pursuant to the Pierce County Hearing Examiner Code, Chapter 1.22 PCC[.]

PCC 1.22.090(G), titled "Burden of Proof," states:

A decision of the Administrative Official shall be entitled to substantial weight. Parties appealing a decision of the Administrative Official shall have the burden of presenting the evidence necessary to prove to the Hearing Examiner that the Administrative Official's decision was clearly erroneous.

Appeals of Administrative Decisions (here, first-tier "appeals" of DDAs) to the Examiner are set forth in PCC 1.22.080(B)(2)(b).¹⁶ Accordingly, instead of a *de novo* hearing, the second-tier "appeal" to the Examiner amounts to appellate review based on the first-level record. **But where is that record?**

Adding insult to injury is that the hearing before Greer is codified in such a way as to completely disregard the on-point holding of *Mansour*. Instead of placing the burden on the government to prove its allegations by evidentiary preponderance, PCC 6.07.015(E)(2-3) effectively places the burden on the dog owner to disprove the allegations and do so by upending the county's "findings" by the highly deferential arbitrary and

¹⁶ Note that it says "Appeals of potentially dangerous dog declarations" only, not dangerous dog declarations.

capricious (or “sufficient evidence”) standard. In *State v. Salinas*, 119

Wn.2d 192, 201 (1992), the Supreme Court held:

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilty beyond a reasonable doubt.

An insufficiency claim “admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.*¹⁷

PCC 6.07.015(E)(2-3) does not ask the Auditor to weigh the evidence at all, but, rather, to decide if the evidence was “sufficient” to support issuance of the DDA at the outset. And the standard by which the DDA was initially issued? **Probable cause, not evidentiary preponderance.** PCC 6.07.015(A). Hence, the sufficiency test is even more flagrantly unconstitutional in that it asks whether the evidence viewed in the light most favorable to animal control would lead any rational factfinder to find probable cause to believe the dog was dangerous. As *Mansour* ruled in reversing the superior court, “Appellate review cannot cure an inadequate standard of proof.” *Id.*, at 267.

¹⁷ Five years later, the Supreme Court held in *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103 (1997), at 112-113:

Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true.

As discussed in *Mansour*, the substantial (or sufficient) evidence standard is the same as evaluating whether the factfinder acted arbitrarily and capriciously. *Mansour*, at 262-63.

Accordingly, procedural due process requires that a sufficiently protective **standard of proof**, not an **appellate scope of review** (such as “substantial evidence”), be provided to guard against erroneous deprivations of life, liberty, and property. By applying the substantial evidence scope of review, Greer deprived McCarthy, and McCarthy deprived the trial court, of a basis for meaningful review. *See Santosky v. Kramer*, 455 U.S. 745, 757 (1982).

4. Greer and McCarthy amending orders without a hearing, and applying a non-prescribed standard and burden of proof, thereby acting ultra vires.

“An ultra vires act is one performed without any authority to act on the subject.” *Haslund v. City of Seattle*, 86 Wn.2d 607, 622 (1976). Ultra vires actions are “wholly without legal authorization or in direct violation of existing statutes.” *Finch*, 74 Wn.2d at 172. “More commonly, an agency steps outside its authority by failure to comply with statutorily mandated procedures.” *Noel v. Cole*, 98 Wn.2d 375, 379 (1982), *superseded by statute as stated in Young v. Young*, 164 Wn.2d 477 (2008). Undisputedly, Greer directly violated PCC 6.07.015(E)(2-3) by applying an evidentiary preponderance standard of review, or so it seems. His conflation of the sufficient evidence standard with the evidentiary

preponderance standard of proof creates doubt for his order states, “The PDA issued by Pierce Animal Control is hereby sustained as sufficient evidence exists by preponderance.” **AR 67 (C14)**. Yet his determination states:

Based upon the record herein, evidence present, and a proper declaration pursuant to PCC 6.07.010, the above named animal(s), when unprovoked did one or more of the following by the preponderance of the evidence:

AR 67 (C14). Either way, Greer failed to comply with the appellate review standard of PCC 6.07.015(E)(2-3). Hence, his ruling is *ultra vires* and void. *Noel*, at 381 (ultra vires contracts are void and unenforceable). Whether Greer had the best of intentions in deviating from clear statutory guidelines is immaterial to whether he had statutory authority to do so.

Greer also acted *ultra vires* when he decided the new question of whether Blizzard was a DA without providing Ms. Downey the hearing she was entitled to upon paying \$250 pursuant to PCC 6.07.015(E)(1). In other words, she received a hearing on the question of whether Blizzard was a PDA, but not a DA. *See Mansour*, at 270-271 (mandating sufficient notice of the charges or claims against which one must defend as a “fundamental tenet of due process”). Further, he lost jurisdiction to amend when she filed her second-tier appeal to the Examiner.

In analyzing the terms “(in)sufficient evidence” under PCC 6.07.015(E)(2-3), it follows that sufficient means substantial. Hence, the first-tier “appeal” before Greer amounted to statutorily vesting appellate jurisdiction to review for sufficient evidence whether Ofc. Page had probable cause to issue the declaration. See *State v. Salinas*, supra, at 201. An insufficiency claim (as characterized by PCC 6.07.015(E)(2)) “admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.*¹⁸ This standard contravenes *Mansour*.

As with Greer, McCarthy rewrites history. Ms. Downey, not the County, moved for reconsideration (**AR 7-9**), a procedure described as an opportunity to implore the Examiner to correct a decision based on “errors of procedure or errors of misinterpretation of fact.” **AR 18**. Ms. Downey did not ask McCarthy to reconsider his decision based on applying the wrong standard or burden of proof, or that he conducted a *de novo* trial on the merits without statutory authority. Yet, without the County filing its own motion for reconsideration, and without inviting Ms. Downey to reply to Mr. O’Connor’s response (**AR 6**), the Examiner overhauled the decision by deviating substantially from the statutory procedure set forth

¹⁸ As further authority that “sufficient” and “substantial” are interchangeable appellate review standards, see *Steffen v. DOL*, 61 Wash.App. 839, 844 (1991), which states, “Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth

in PCC 6.07.015(E)(3) and PCC 1.22.090(G). PCC 1.22.090(G), titled “Burden of Proof,” prevails over any misreading of PCC 1.22.120(A), as the County urges upon this court. It cannot be stated more clearly (and erroneously, for that matter). Dangerous dog “appeals” are expressly subject to this burden of proof, per PCC 1.22.080(B)(2)(b). As with Greer, this *post hoc* change is *ultra vires* and deprived Ms. Downey of due process.¹⁹

As for McCarthy’s adopting new findings offered by the county in response to Ms. Downey’s motion for reconsideration, the proper method would have been for the county to file its own cross-motion for reconsideration under PCC 1.22.130 instead of seeking to amend the judgment through a *sub rosa* response to Ms. Downey’s motion. While the examiner could issue a revised decision in answer to a reconsideration motion, due process requires that the nonmovant have an opportunity to respond to such a dramatic set of changes. The county never told Ms. Downey she had a right to reply (or respond, as the case may be).²⁰

of the matter.”

¹⁹ Consider *Massey v. Charlotte Cy.*, 842 So.2d 142, 143 (Fla.App.2003)(finding due process violated when code enforcement board imposed lien on Masseys’ property without allowing them any predeprivation or postdeprivation process to test the validity of the additional factual findings required for the lien itself).

²⁰ See AR 10, 18 (noting that county may respond in 10 days to Ms. Downey’s timely

The county argues that it should be excused for defying the procedures set forth in county code. However, “courtesy” compliance with the constitution (though not required by the county code) mandates reversal even if the defendant lacks a prima facie defense. *See Phillips*.

5. *McCarthy’s applying unconstitutional standards outlined in Ch. 6.07 PCC.*

McCarthy initially followed PCC 6.07.015(E)(3) and PCC 1.22.090(G) as statutorily prescribed, by refusing to reverse Greer in the proceeding he described as the “Appeal of Administrative Official’s Decision.” **AR 15-16**. If this second-tier “appeal” were truly regarded as an appellate review hearing and not a trial, then it violates *Mansour* for the reason that McCarthy gave Greer’s decision “substantial weight,” and placed the burden on Ms. Downey to show that Greer’s decision was “clearly erroneous.” PCC 1.22.090(G). This might not have been objectionable had the county code required that Greer comply with *Mansour* at the first, contested fact-finding hearing on the question of whether Blizzard was a DA. As noted, however, an erroneous standard of proof cannot be cured by appellate review.

motion for reconsideration, but no subsequent notice that Ms. Downey may respond to the county’s untimely motion for reconsideration [the county’s own quasi-reconsideration request of Feb. 18, 2010 (**AR 6**) was filed more than seven business days after the Jan. 26, 2010 decision]].

In asserting that the hearing examiner's public proceeding is, in essence, a *de novo* trial, the county concedes that the Auditor's hearing is rendered a nullity, a rehearsal for the Examiner's opening night performance. If that is the case, then it is patently unconstitutional for Ch. 1.22 PCC to direct the examiner to apply appellate review standards to a trial over which it has original jurisdiction.

The County cannot have it both ways. If PCC 1.22.090(G) is a section of "general applicability," then where is the section specifically applicable to (potentially) dangerous animal hearings? If it does not exist (and it does not, as the County cannot cite it), then the County is conceding that an incorrect standard is mandated upon the Examiner by code, violating *Mansour* for the same reason that the King County Code and board rule's silence resulted in Division I reversal.

And if the County is saying that it was the prosecutor's recommendation in pre-trial briefing that preserved due process and carried the standard of review for that day and that dog, since when is due process determined by one of the parties, unilaterally proclaimed, and exclusively rendered at the whim of the state? Such ad hoc "courtesy" procedures violate the constitution for the same reason that they were found unconstitutional in *Phillips*.

6. McCarthy completely disregarding the testimony of Janelle Downey.

Without lawful authority or attempted explanation, and in the absence of any motion to strike, McCarthy refused to consider any of the testimony of Janelle Downey. **AR 15** (omitting Janelle Downey from list of witnesses). This constituted clear error and justifies reversal.

7. McCarthy acting unfairly and with clear bias in soliciting and considering inadmissible evidence and otherwise making incorrect rulings.

McCarthy, in exercising his quasi-judicial duties, was far from impartial. A litigant may be denied due process of law due to judicial bias. *Matter of Johnston*, 99 Wn.2d 466, 475 (1983). Under the appearance of fairness doctrine, quasi-judicial proceedings are valid “only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing.” *Id.*, at 478 (citing *Swift v. Island Cy.*, 87 Wn.2d 348, 361 (1976)); *State v. Post*, 118 Wn.2d 596, 618 (1992).

As discussed above, McCarthy took the role of the county prosecutor, asking objectionable questions that called for ER 408-inadmissible answers, misapplying the rule of hearsay, showing bias against Janelle Downey even before she took the stand based on her age (and then ratifying the bias by omitting her from the Jan. 26, 2010 order

completely), considering irrelevant evidence that prejudiced Ms. Downey and refusing to consider relevant evidence that would assist Ms. Downey's defense. *In toto*, these errors are harmful and reveal a judicial bias or appearance of unfairness that justifies reversal.

8. **Insufficient evidence to prove lack of provocation or that Blizzard was off Ms. Downey's "property."**

Addressing the merits of the case first requires that the court acknowledge the application of the rule of lenity.

If a statute is ambiguous, the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary.

State v. Jacobs, 154 Wn.2d 596, 600 (cit. om.). "A statute is ambiguous if it is subject to two or more reasonable interpretations." *State v. McGee*, 122 Wn.2d 783, 787. "Under the rule of lenity, the court must adopt the interpretation most favorable to the criminal defendant." *Id.* In construing the phrases "without provocation" and "off the owner's property," the rule of lenity serves an important tie-breaking function, favoring Downey.

While true that the lenity rule traditionally applies to criminal, not civil, proceedings, civil lenity applications have been endorsed by the United States Supreme Court²¹ and Washington Court of Appeals.²² Strict

²¹ In *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992), the United States Supreme Court applied the lenity canon to a civil statute that had criminal applications, interpreting the term "make" as used in the National Firearms Act, which provided for a \$200 tax on anyone "making" a "firearm." A "maker" of "firearms" failing to comply

construction and lenity canons apply in forfeiture, quasi-criminal, and criminal settings, reaching the same result – construing ambiguities against government.

Forfeiture proceedings are quasi-criminal in nature only with respect to the need to protect certain Fourth and Fifth Amendment rights.

Rozner v. City of Bellevue, 116 Wn.2d 342, 351 (1991); *Deeter v. Smith*, 106 Wn.2d 376 (1986)(Fourth Amendment exclusionary rule applies in civil forfeiture setting); *In re Disciplinary Proceeding Against Haley*, 156 Wn.2d 324, 349 (2006)(quasi-criminal proceedings subject to rule of strict construction); *Alby v. Banc One Financial*, 119 Wash.App. 513, 523 (III, 2003) (forfeitures highly disfavored and language of limitation that could lead to forfeiture strictly construed, here, in the realty conveyance context); *Ross v. State Farm Mut. Auto. Ins. Co.*, 132 Wn.2d 507, 515-16 (1997)(exclusionary insurance coverage provisions strictly construed

with any of the NFA’s other requirements could be subjected to a \$10,000 fine and/or ten years imprisonment. *See also Leocal v. Ashcroft*, 543 U.S. 1 (2004) (applying lenity to resolve whether a state DWI conviction was a “crime of violence” within meaning of relevant immigration statute that had both civil and criminal applications); *Clark v. Martinez*, 543 U.S. 371 (2005)(applying lenity rule in civil case when interpreting immigration statute and concluding that “lowest common denominator ... must govern”); *United States v. Plaza Health Laboratories*, 3 F.3d 643 (2nd Cir.1993)(applying lenity rule to Clean Water Act’s ambiguous statutory definition for “point source”).

²² *Internet Community & Entertainment Corp. v. State*, 148 Wash.App. 795, 809 (II, 2009), *rev’d o.g.*, 2010 WL 3432595 (Court of Appeals agreeing that nature of statute at issue determines whether rule of lenity applies, not civil posture of case in which statute is being considered).

against insurer); *Housing Authority of Everett v. Terry*, 114 Wn.2d 558, 563 (1990)(unlawful detainer statutes strictly construed in favor of tenant).²³

Traditionally, forfeiture actions have proceeded upon the fiction that inanimate objects themselves can be guilty of wrongdoing. ... Simply put, the theory has been that if the object is “guilty,” it should be held forfeit.”

U.S. v. U.S. Coin and Currency, 401 U.S. 715, 719 (1971). Dangerous dog codes operate under a similar fiction, in focusing on the canine’s fault, not the owner’s. While not a civil forfeiture proceeding conditioned on misuse of a dog to further criminal activity, because of the onerous restraints at play in contesting a dangerous dog’s status, much less keeping one so declared, the practical effect of Ch. 6.07 PCC is to civilly forfeit the dog and to irrevocably label the dog with a predicate status (i.e., “dangerous”) for subsequent criminal forfeiture. Lenity and strict construction secure a citizen’s Fifth Amendment due process rights by clarifying ambiguous definitions in a way that provides sufficient notice of proscribed conduct.

The county has accused Ms. Downey of violating PCC

²³ A similar rationale was employed by the Court of Appeals in Virginia in *Hoye v. Commonwealth*, 405 S.E.2d 628 (Va.App.1991), where a habitual offender (three offenses) faced civil proceedings to revoke his driver’s license. *Hoye* held that “[a]lthough this is a civil proceeding, its effect is to impose a forfeiture. Therefore the operative statute *must be strictly construed against the Commonwealth.*” *Id.*, at 629. *Hoye* has particular instructiveness because Ch. 6.07 PCC includes a forfeiture provision, PCC 6.07.045, in addition to criminal provisions.

6.02.010(N)(2) by allowing Blizzard to be maintained as a dangerous dog. Violating the terms of restraint for a dog declared “dangerous” is a crime under PCC 6.07.040. Triggering that crime is failing to confine, identify, license, and register a dangerous dog. PCC §§ 6.07.025, 6.07.030. If prosecuted for violating restrictions for maintaining a dangerous dog, the county would have to prove beyond a reasonable doubt not that Blizzard was, in fact, “dangerous” as defined by PCC 6.02.010(N), but that he was previously found “dangerous” either following the appeal of the designation or by consent (i.e., not appealing in the period provided). Thus, whether Blizzard was, in fact, “dangerous,” is an antecedent question to criminal liability (a predicate to the compound offense, if you will), one that, unless challenged now, might not be collaterally attackable in the later criminal proceeding.²⁴

Lenity and strict construction must be applied in order to ensure due process for Ms. Downey, since the word “dangerous,” as used in PCC 6.02.010(N), is a term of art summarizing a specific alleged act containing

²⁴ Arguably, therefore, Ms. Downey is entitled to hold the county to a much higher burden of proof in this proceeding, since if there is a restraint violation that occurs after a final adjudication of “dangerousness,” Ms. Downey will not be able to challenge an element of the offense. By preceding the word “dangerous” with “following a declaration of” and succeeding it with the phrase “and the exhaustion of the appeal therefrom,” the county has usurped the role of the jury to determine if, in fact, the dog met the definition of “dangerous.” Accordingly, due to the criminal application of the term “dangerous,” the rule of lenity or strict construction should favor the potential criminal defendant (viz.,

ambiguous terminology. Because the word “dangerous” also serves as an element of the crime under PCC 6.07.040:

Any person who violates a provision of Chapter 6.07 [viz., “owner of a dangerous animal shall obtain a permit for such animal” (PCC 6.07.025); “shall be unlawful for the person owning or harboring or having care of such dangerous ... animal” (PCC 6.07.030)] shall, upon conviction thereof, be found guilty of a gross misdemeanor,

the word “dangerous” (and its constituent elements) evidently has a criminal application. While PCC 6.07.025-.030 triggers criminal liability only after exhaustion of the appeal from the dangerous animal declaration, so that the jury hearing the gross misdemeanor charge is not deciding whether the dog actually engaged in “dangerous” behavior, the definition of “dangerous” furnishes the necessary predicate for the compound offense related to control of that so-declared dangerous animal. Thus, lenity canons apply to those terms with a hybrid civil-criminal application (the “without provocation,” and “off the property where its owner resides” elements of “dangerous”).

a. “Without Provocation”

The County must prove that Kayla was allegedly severely injured or killed “without provocation.” Ms. Downey need not disprove provocation as an affirmative defense. *See State v. Acosta*, 101 Wn.2d 612

the owner of the dog who was declared dangerous).

(1984)(State has the burden of proving the absence of self-defense in prosecutions for assault, citing both a statutory and constitutional basis for so holding). *Acosta* added that placing the burden of proof on the defendant in such cases would relieve the State of its burden of proving every element of the crime beyond a reasonable doubt. Indeed, failing to instruct the jury that the State had this burden was reversible error. *State v. Redwine*, 72 Wash.App. 625 (1994). *State v. Camara*, 113 Wn.2d 631, 638 (1989)(emphasis added), discusses when the absence of a defense is an ingredient of the offense in a two-part test, either of which warrants burdening the state. PCC 6.02.010(N) satisfies the first test in that it expressly includes the defense of provocation as an ingredient of the offense.

The Defendants' position would have merit if Ms. Steiner actually witnessed how the incident unfolded. Absent these data, the factfinder (and this court) are urged to rely on inadmissible speculation. Further, the county miscredits circumstantial evidence as expert testimony. There is no authority stating as a matter of law that a seven-pound dog cannot provoke a larger male dog. Should a larger dog just have to suffer "small dog syndrome" when the latter chases, assaults, or physically communicates aggression (as admitted by Ms. Steiner, who testified that she heard Kayla

bark prior to seeing her in a dog's mouth? (**VRP 8:9**))? The problem of provocation deepens when one attempts to compare humans to nonhumans, and canines specifically.²⁵

But keep in mind that it is not Ms. Downey's burden to prove provocation. Rather, it is the county's to disprove, constrained by the rule of lenity due to an undefined and vague term, which includes unintentional provocation. No admissible lay opinion or even expert opinion was offered by the county to support the conclusion of lack of provocation, and the county should be barred from relying on matters not contained within the record on appeal. Post-provocation acts cannot be used to bootstrap a finding of provocation that itself lacks any evidentiary basis, much as a criminal defendant's mere use of lethal force cannot be used to itself prove or justify the need for self-defense. In other words, the "after" cannot prove the "before."

As noted above, the county has no admissible evidence that Blizzard (if it were him, for the sake of argument²⁶) was not provoked by

²⁵ Consider *Kirkham v. Will*, 311 Ill.App.3d 787, 791-92 (2000), where the court held that provocation, in the context of civil liability for a dog bite to a person, turned on the reasonableness of the dog's response, rather than that of the provocateur.

²⁶ Ms. Downey directs the court to her opening appeal brief, recognizing that under the substantial/sufficient evidence standard of review, this may prove one of the more difficult parts of Ms. Downey's appeal. However, that Ms. Steiner's inconsistent testimony at the hearing before Greer was never recorded (and, thus, not usable in the

Kayla. This is because it can provide no evidence as to what happened before Kayla was allegedly seen in the mouth of Blizzard. Ms. Steiner's protestations to the contrary are purely speculative and lack foundation and are, therefore, inadmissible under ER 703. The county therefore loses for want of evidence.

The phrase "without provocation," in being undefined, is ambiguous. A reasonable person does not know what acts sustain a conclusion that a dog bit an animal without provocation, whether the term is objective or subjective (i.e., from the perspective of the animal), intentional or unintentional. How may one nonhuman animal be said provoke another? How can the court divine intentionality in a canine without expert testimony, that was never offered?

Further, no rational basis exists to discriminate between intentional and unintentional provocateurs or human and nonhuman provocateurs (i.e., not even considering nonhuman provocation as a basis for exclusion). Such an embrace of alternative bases for provocation is supported by case law evaluating the doctrine in the context of personal

second proceeding), that Ms. Steiner's testimony lacks consistency while Ms. Downey's remains unchanged, and that Ms. Steiner had difficulty positively and unwaveringly identifying Blizzard even in photographs that were "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" (*see State v. Cook*, 31 Wash.App. 165 (1982)) should come into play in determining whether McCarthy acted arbitrarily and capriciously.

injury.²⁷ Additionally, from an equitable standpoint and as a practical matter, dogs may be provoked without any intention by the injured party, but the context in which the incident occurs wholly explains and excuses the conduct.²⁸ The truth of the matter is that the county does not know what transpired in the moments before contact was made. This is as fatal to its case here as it would be if it relied upon the testimony of a witness who walked into a bar to see two patrons in a brawl, not knowing what started the fight. The witness could testify to the details of the fight itself but would have no knowledge as to how it began (e.g., whether one patron reacted in self-defense). What makes this case even less salvageable for the county than the bar brawl example is that at least the witness can offer lay observations rationally related to his perceptions, as interpreted through the eyes and ears of a member of the same species. Here, the county is relying upon cross-species identification and cross-species

²⁷ See *Toney v. Bouthillier*, 129 Ariz. 402, 405-6 (1981) (finding that act of three-year-old punching dog may constitute provocation, irrespective of whether the child intended to provoke the dog); see also *Nelson v. Lewis*, 36 Ill.App.3d 130 (1976) (finding provocation where 2.5 year old accidentally stepped on dog's tail and noting that unintentional acts may constitute provocation, as in "an act or process of provoking, stimulation or incitement."); *Nicholes v. Lorenz*, 396 Mich. 53 (1976) (recognizing that determination of whether six-year-old inadvertently stepping on dog's tail constituted provocation was jury question).

²⁸ For instance, a party may assume the risk of being bitten by approaching a dog without permission or introduction by the dog's handler, invading her personal space and threatening her (and from the dog's standpoint, her guardian). In this regard, see *Stehl v.*

behavioral interpretation by Ms. Steiner, at a distance, with no detail leading up to the altercation. To then conclude that there was no provocation is factually baseless and confounded by the additional anthropomorphic error and interpretive difficulties occasioned by trying to ascribe human motivations and mental states to nonhumans. Under the rule of lenity, no less a result obtains.

b. “Off the Property Where Its Owner Resides”

The county also had the burden of proving that the alleged killing took place “off the property where its owner resides.” “Property” is not defined by the code. Neither is “premises.” However, the term premises is often construed distinctly as real property under one ownership inside the inner line of a sidewalk or, a curb, ditch or shoulder marking the edge of the used public right-of-way. That the county chose not to define a dangerous dog as one who “inflicts severe injury on or kills an animal ... off the premises where its owner resides” is significant. The use of the term “premises” would mean that a dog is dangerous if he kills outside the perimeter of the realty under one ownership up to the sidewalk or other marking of the edge of the used “public right-of-way.”

It is undisputed that the shared access easement is not “under one ownership,” but jointly owned as property of the Downeys. While an “easement” would not constitute “premises,” it does fit within the broader definition of “property.” Further, the easement is not a “public right-of-way.” It is private property. Lastly, there is no evidence that the term “property” is limited to ownership thereof. PCC 6.02.010(N) refers to the dog owner’s “property,” not the dog owner’s “solely owned property.”

Being ambiguous, the rule of lenity applies. The Downeys live at the end of an easement road, the only route of ingress and egress. Hence, the easement serves as an umbilical cord, a *sine qua non* piece of property permitting them to “reside” at their present address. Technically, therefore, if the incident took place on the easement, then Blizzard was not “off the property where its owner resides.” An easement is a form of “property.”

An interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road).

“Easement,” *Black’s Law Dictionary*, at 527, 7th ed. “Like estates in land, [easements and profits] are property rights or interests.” 17 Wash.Prac. § 2.1 (Nature of easements and profits); *Bakke v. Columbia Valley Lumber Co.*, 49 Wn.2d 165 (1956). “Property” is defined as:

1. The right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel); the right of ownership 2. Any external thing over which the rights of possession, use, and enjoyment are exercised....

Black's Law Dictionary, at 1232 (7th ed.). Thus, property rights are not just restricted to ownership in fee simple but include licenses, permits, leases, and access agreements. The rule of lenity steps in to construe any ambiguity in the favor of the dog owner. In this regard, given that Ms. Steiner had her back turned prior to the moment when the alleged incident commenced, that when she turned around she saw her dog very near the easement road in the mouth of suspect canine, that she previously testified that Kayla had historically traveled off her property without leash or supervision, and that Ms. Downey testified to having nearly hit Kayla with her vehicle on Ms. Downey's property shortly before the alleged attack, there was insufficient evidence to support the finding that the incident occurred on Ms. Steiner's property based on a presumptively incorrect interpretation of the phrase "off the property where its owner resides."

B. FACIAL CONSTITUTIONAL CHALLENGE

1. Pay-to-Play.

PCC 6.07.015(E)(1, 3) unconstitutionally requires the dog owner to buy access to justice. The right of access to the courts is constitutionally protected, fundamental, and cannot be denied as a long-standing necessary

result of the Due Process Clause and the Equal Protection Clause. *Bounds v. Smith*, 430 U.S. 817 (1977). In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Supreme Court held that refusing to waive the filing fee for indigent female welfare recipients who wanted a divorce but were unable to pay was an unconstitutional condition precedent to accessing the courts.²⁹ In *Griffin v. Illinois*, 351 U.S. 12, 18-19 (1956), a plurality held unconstitutional a requirement that a criminal defendant pay for the transcript to appeal his conviction. As with *Griffin*, ability to pay costs bears no rational relationship to guilt or innocence and cannot be used as an excuse to deprive defendants of a fair trial, notwithstanding Officer Page's telling remark to Ms. Downey that most people simply cannot afford to appeal, after admiring her granite countertops and nice home.

Although due process does not require a State to provide appellate review, "when an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v. Normet*, 405 U.S. 56, 77-78 (1972). In *Lindsey*, the court held that the double-bond requirement unconstitutionally burdened the statutory right of an Oregon Forcible

²⁹ See also *In re Green*, 669 F.2d 779 (D.C.Cir.1981)(requiring indigents to prepay the full filing fee and a \$100 deposit against costs assessed was illegal); *MLB v. SLJ*, 519 U.S. 102 (1996)(cannot require indigent mother to pay record preparation fee to

Entry and Wrongful Detainer (“FED”) defendant to appeal, noting that the double-bond requirement “not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond.” *Id.*, at 78.

Of course, the case at bar presents a far less murky question than that presented in *Boddie* and progeny for two reasons. First, a citizen’s right to challenge the DDA and its seizure of property and liberty begins not as the misnomered “appeal,” but, as described in *Mansour*, a first, contested fact-finding hearing to defend against the government’s dispossession of property using powers of compulsion directly implicating well-grounded constitutional rights to due process, equal protection, and no seizure without a warrant. Second, the “appeal” of a DDA occurs in response to adverse action commenced by government in order to prevent a profound upset to the *status quo*, as opposed to a suit commenced by the dog owner. There is no precedent requiring a person charged with a crime, or, as here, issued a notice requiring payment of what amounts to an 10-day period within which to either forfeit the dog or pay a “dangerous dog registration” fine and strictly comply with several costly provisions (e.g., \$500,000 insurance/bond, construction of proper enclosure), to prepay for

challenge state’s decision to terminate her parental rights).

the privilege of being able to force the government to prove its case against her. Even for a measly parking ticket, the defendant has an absolute right under the IRLJ to demand a contested hearing at no cost to the ticketed. Indeed, even a civil defendant need not pay a filing fee to demur to the allegations and claims against him.

The \$250 first-level “appeal” fee and \$500 second-level “appeal” fee are not valid conditions precedent to judicial relief but an unconstitutional “purchase of justice” requirement that also impedes the First Amendment’s right to seek redress of grievances. The Petition Clause of the First Amendment forbids Congress from “abridging the ... right of the people ... to petition the Government for a redress of grievances.” U.S.Const.Amend. I. The right to petition extends to all departments of government, and access to the courts is but one aspect of this right. *In re Marriage of Meredith*, 148 Wash.App. 887, 899 (II, 2009) (quoting *California Motor Transport Co. v. Trucking Unlimited*, 92 S.Ct. 609, 404 U.S. 508, 510 (1972)).

Adequate, effective, and meaningful access to the courts is an aspect of and subsumed under the First Amendment right to petition government for redress of grievances. *Soranno’s Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir.1989)(citing *California Motor*, at 510). The

right of access is also protected by the Fourteenth Amendment's procedural and substantive due process clause. *Jackson v. Proconier*, 789 F.2d 307, 310 (5th Cir.1986). Imposing significant "appeal fees" impedes access to the courts, violating the First and Fourteenth Amendments.

As noted in *Putman v. Wenatchee Valley Medical Center, P.S.*, 166 Wn.2d 974 (2009), the Supreme Court struck down Ch. 7.70 RCW's certificate of merit requirement on access to court grounds, noting that it violated the patient's right to access the extensive discovery needed to effectively pursue her claims. *Id.*, at 979. As in *Putman*, a requirement that a party pay \$250 to \$750 to even gain an audience before whom she may pursue her defense, significantly interferes with constitutional rights ensuring access to an impartial, compliant, and fair tribunal. When those rights are impaired, judicial review to cure those errors is presumed.

Again, were the first hearing before the Auditor an "appeal," a filing fee for nonindigents might not offend the constitution, and had the second hearing before the Examiner not been treated as a *de novo* trial on the merits (rendering the Auditor's hearing completely superfluous), but instead as a true appeal, then a filing fee for nonindigents would be analyzed differently. Asking the citizen to pay for the right to defend himself would be tantamount to requiring a civil defendant to pay a filing

fee just to answer a complaint or face default – except here the dispute is not between private parties, but government and a citizen, where the former is using the police power and threat of criminal prosecution, as well as summary declaratory and injunctive action, against the latter.

Another reason to strike as unconstitutional PCC 6.07.015(E)(1,3) is Wash.Const. Art. I, § 10: “Justice in all cases shall be administered openly, and without unnecessary delay.” Known as the “open courts clause,” and though typically discussed by the appellate courts in the context of sealing records and permitting cameras in the courtroom, it also impacts impediments to judicial review that defy meaningful access to justice. This clause, and counterparts in the majority of other states, is derived from the Magna Carta of 1215 where the King promised that he would no longer sell right or justice, “Nulli vendemus ... rectum aut justiciam.” *Perce v. Hallett*, 13 R.I. 363, 365 (1881).

In 2007, the Supreme Court held that the open courts clause did not include a right to publicly funded counsel in a dissolution action. *In re King*, 162 Wn.2d 378 (2007). Ms. Downey, and other taxpayers whose dogs may be similarly declared, do not demand free defense counsel. Instead, they challenge the financial impediment to obtain a contested, evidentiary hearing. Closer to the question is *Bullock v. Roberts*, 84

Wn.2d 101 (1974), which confirmed that full access to courts in a divorce action is a fundamental right and held that the show cause requirement of indigency prior to obtaining default order was a constitutionally impermissible impediment to accessing the judicial system. *Id.*, at 104-105 (citing *Boddie v. Conn.*, 401 U.S. 371 (1971); *Ashley v. Superior Court*, 82 Wn.2d 188 (1973)). Undoubtedly, full access to courts in an action that challenges a seizure, seeks and attempts to secure a modicum of due process before the permanent impairing of property and liberty interests through a government-declared adverse classification, including the predicate condition for criminal prosecution, is equally fundamental. *See Hauser v. Arness*, 44 Wn.2d 358, 367-68 (1954) (every person has the privilege to use his property in his own way and for his own purposes, based on liberty and property rights).³⁰

Again, Ms. Downey does not object on “open courts” grounds to a reasonable fee to appeal a decision to the superior court from a constitutionally-sound contested hearing, whether before a municipal or district court, or a quasi-judicial forum like a hearing examiner. The Supreme Court in *Ortwein v. Schwab*, 410 U.S. 656 (1973), in rejecting

³⁰ *See also Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex.1977) (“protection of one’s right to own property is said to be one of the most important purposes of government. That right has been described as a fundamental, natural, inherent,

the plea of indigent welfare recipients to a waiver of filing fees to appeal the deprivation of benefits, noted that at least they received a predetermination evidentiary hearing **at no charge**, something not provided by Pierce County to Ms. Downey:

The Court has held that procedural due process requires that a welfare recipient be given a predetermination evidentiary hearing. **These appellants have had hearings**. The hearings provide a procedure, **not conditioned on the payment of any fee**, through which appellants have been able to seek redress.

Id., at 659 (footnotes and cit. om.; emphasis added). Other courts around the nation have similarly held that prepayment as a condition precedent to judicial review is unconstitutional.³¹ One of those cases pertains to dogs specifically and is highly judicious here, declaring unconstitutional the requirement that a dog owner prepay a bond for care of an impounded dog in order to get a contested hearing because it mandates forfeiture of the dog even if the indigent owner would have eventually prevailed had he the wherewithal to pay. *Louisville Kennel Club v. Louisville/Jefferson Cy.*

inalienable, not derived from the legislature and as preexisting even the constitutions.”).
³¹ See also *In re Estate of Dionne*, 128 N.H. 682 (1986)(statute requiring parties to pay fees to probate court judge for special contested hearing session was unconstitutional); *Texas Ass’n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 449-450 (Tex.1993)(declaring unconstitutional statutory provisions forfeiting right to judicial review of assessed penalties through contested hearing absent prepayment of assessed penalty); *Commonwealth Natural Resources and Environmental Protection Cabinet v. Kentec Coal Co., Inc.*, 177 S.W.3d 718, 725-26 (Ky.,2005)(prepayment of assessments as condition to obtain contested hearing violates equal protection and is unconstitutionally arbitrary and unreasonable).

Metro Gov't, 2009 WL 3210690 (W.D.Ky., Oct. 2, 2009), at *9-10 (citable under FRAP 32.1(a) and GR 14.1(b)).

Practically speaking, to be forced to pay many times over the cost to adopt a dog from the Tacoma-Pierce County Humane Society solely to contest the negative criminal and regulatory consequences that follow the unilateral declaration of a dog as dangerous – in what amounts to an involuntary, reactive proceeding, commenced by the County, rather than a voluntary, proactive proceeding such as a dissolution action, commenced by one or both spouses – is an unreasonable financial barrier that eclipses a litigant's constitutional right of redress, access to justice, and due process, and compels a default, government-induced seizure and takings for the dog owner who cannot afford to pay the cumbersome filing fee(s). Further, there are no alternatives to challenging the designation, as the contested hearing process, through the Auditor, hearing examiner, and superior court, is the exclusive method available to a dog owner to adjust her legal relationship with the government, not to mention the dog's relationship with same (e.g., if the dog is transferred to another person, the status and restrictions travel to the new caretaker).

PCC 6.07.015(E)(1,3)'s onerousness and illegality, particularly for indigents, is compounded by being:

(1) nonwaivable;

(2) demanded not by a court, but by the very prosecuting authority who issued the designation;

(3) quasi-criminal and regulatory in nature and the result of the government using powers of compulsion to deprive a citizen of fundamental constitutional rights;

(4) determined without a preliminary, pre-declaration finding of probable cause by a detached and neutral magistrate; and

(5) nonrefundable.

Further, it is undisputed that a criminal defendant has an absolute right to a jury trial at no charge, and even if indigent, the right to counsel. As stated above in the discussion on civil lenity doctrine, because declaring a dog dangerous provides the predicate for later criminal prosecution should the defendant violate dangerous dog restraints, the only opportunity for the dog owner to have her day in court – from a civil and criminal perspective – is at the outset when the government permanently and adversely changes the legal classification of her dog.

A perfect and current example is that of Reynaldo M. Ramirez, a Pierce County resident whose dog was declared potentially dangerous in 2009. Mr. Ramirez could not afford to pay the \$125 “appeal” fee, though he had the desire and grounds to contest it. Despite asking a sympathetic Tim Anderson, Animal Services Manager, for a waiver based on Mr.

Ramirez's indigent status, Mr. Anderson indicated he had no such ability and refused the request. On Dec. 14, 2009, Mr. Karp tried to intervene on Mr. Ramirez's behalf. Mr. Anderson responded that this nonwaiver policy was "set by the elected Auditor of Pierce County not myself." Though Mr. Anderson agreed to check with his legal advisor to review the current policy, the answer remained in the negative. **CP 152-53**. On Apr. 12, 2010, Mr. Ramirez was prosecuted for failure to comply with potentially dangerous dog restraints. *County v. Ramirez*, Pierce Cy. Dist. Co. No. XYC001520. On Sept. 20, 2010, the case against Mr. Ramirez was dismissed based on the pay-to-play clause violating his constitutional rights.³² The court can see precisely why the pay-to-play requirements of PCC 6.07.010 (potentially dangerous dogs) and PCC 6.07.015 (dangerous dogs) are illegal. The above nuances illustrate the concerns raised by the *Boddie* Court, in stating that "[A] cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard." *Boddie*, 401 U.S. at 380. Such "purchase of justice" requirement also violates the privileges and immunities clause of the Washington Constitution, Art. I, § 22, in that it grants a decided

³² Public defender Jane Spencer will obtain an order to this effect on Oct. 8, 2010 from Pierce County District Court.

advantage to, and unmerited privilege of access favoring, those who can afford to pay the onerous “appeal” fees.

2. Standard of Proof.

Perhaps the best argument why the county’s dangerous dog code must be stricken comes at the insistence of the prosecuting attorney’s office, which urged the Auditor’s designee and Hearing Examiner – in brief, at the beginning and at the end of the hearing – to ignore the code, and which continues to argue the vitality of *Mansour*. These *ad hoc* urges aside, the code remains, and as written, is unconstitutional for every reason stated in *Mansour* and herein.

3. Subpoena Powers.

While the Examiner does accept requests for issuance of subpoenae, no such mechanism applies at the Auditor-review stage (see PCC 6.07.015(E)(2-3)), thereby violating *Mansour*, at 268-70. Otherwise, the county is asking this court to accept the unconstitutional premise that subpoena powers may be acquired only by paying \$750 and going through the motions of a first hearing before the Auditor’s designee.

C. RAP 18.1 REQUEST FOR FEES.

Plaintiffs request attorney’s fees under RAP 18.1 on the equitable basis that they are conferring a substantial benefit to an ascertainable class

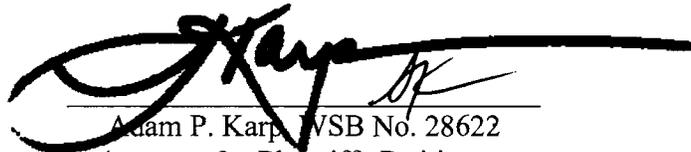
(taxpayers and dog owners), and protecting constitutional principles. *Dempere v. Nelson*, 76 Wash.App. 403, 407 (1994); *Weiss v. Bruno*, 83 Wn.2d 911 (1974)(constitutional protection variant of common fund).

IV. CONCLUSION

For the reasons stated herein, the assignments of error should be sustained, portions of the Pierce County code declared unconstitutional, and fees awarded for Ms. Downey's defense of the constitutions.

Dated this Oct. 11, 2010

ANIMAL LAW OFFICES



Adam P. Karp WSB No. 28622
Attorney for Plaintiffs-Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Oct. 11, 2010, I caused a true and correct copy of the foregoing APPELLANTS' BRIEF, to be served upon the following person(s) in the following manner:

[x] Email (by agreement)

Cort O'Connor
Pierce County Prosecutor's Office
955 Tacoma Ave. S., Ste. 301
Tacoma, WA 98402
(253) 798-6201
coconno@co.pierce.wa.us

A handwritten signature in black ink, appearing to read 'A. Karp', is written over a horizontal line. The signature is stylized and cursive.

Adam P. Karp, WSBA No. 28622
Attorney for Plaintiffs-Petitioners