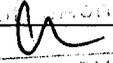


COURT OF APPEALS  
DIVISION II

NO. 41055-9-II

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STATE OF WASHINGTON  
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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

HEIDI I. DOWNEY,  
et al,

Plaintiffs-Petitioners

v.

PIERCE COUNTY,  
et al,

Defendants-Respondents

---

**PIERCE COUNTY'S RESPONSE BRIEF**

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**ORIGINAL**

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**A. ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR.**

1. Whether the Hearing Examiner's findings of fact were supported by substantial evidence (Plaintiffs' Issues on Appeal Nos. 1, 5).

2. Whether the administrative appeal violated Downey's right to due process (Plaintiffs' Issues on Appeal Nos. 2, 3, 4, 7).

3. Whether the elements of equitable estoppel have been proven by clear, cogent and convincing evidence (Plaintiffs' Issues on Appeal no. 2).

4. Whether Pierce County's dangerous animal regulations are unconstitutional (Plaintiffs' Issues on Appeal no. 6, 8, 9).

5. Whether attorney fees should be awarded to the prevailing party.

**B. STATEMENT OF THE CASE.**

**1. PROCEDURAL HISTORY**

On August 13, 2009, PCAC Officer Page issued a declaration of dangerous animal regarding "Blizzard", a male Pyrenees dog. AR 29. Blizzard's owner, Heidi Downey, filed a timely request for an administrative review on August 20, 2009. AR 54-55. The administrative review took place on September 9, 2009, before the Auditor's designee Steven Greer. AR 57, 61. Downey represented herself during the

administrative review. After hearing from appellant Heidi Downey and the complainant and after reviewing the case file and exhibits, Mr. Greer upheld the declaration, but erroneously referred to the declaration as a potentially dangerous animal declaration instead of a dangerous animal declaration. AR 61-63. The first decision dated September 30, 2009 also quoted the code section which pertained to potentially dangerous animals, not dangerous animals. AR 61-63. Mr. Greer issued an amended decision on October 26, 2009. AR 69-71. The amended decision upheld the dangerous animal declaration and cited the correct code definition for a dangerous animal. AR 69-71. However, by that time, Downey had already filed an appeal to the Pierce County Hearing Examiner.

Heidi Downey filed a timely appeal to the Pierce County Hearing Examiner on October 8, 2009, and paid the \$500 appeal fee. AR 64- 65. On November 19, 2009, a de novo hearing took place before Deputy Hearing Examiner Terrence McCarthy. AR 2-3, 98. Heidi Downey appeared pro se during this hearing. VRP 1. Following the hearing, the Hearing Examiner issued a decision on January 26, 2010, upholding the dangerous animal declaration for Blizzard. AR 15- 18.

Downey then filed a request for reconsideration to the Hearing Examiner on February 4, 2010. AR 7-9. The handwritten request challenged the testimony and credibility of witnesses. AR 7-9. On

February 10, 2010, Downey's request was forwarded by the Hearing Examiner's office to the parties of record for review and comment. AR 10. In response, PCAC requested that the Hearing Examiner adopt proposed findings AR 6. A copy of the proposed findings was sent to Heidi Downey on February 18, 2010. AR 6. No response was received from Downey. On March 11, 2010, the Hearing Examiner adopted the proposed findings. AR 2-3.

Downey filed a complaint in Pierce County Superior Court on March 24, 2010, on her own behalf and on behalf of all similarly situated taxpayers in Pierce County and the State of Washington. CP 1-8. An amended complaint was filed on April 1, 2010. CP 11-19. The amended complaint was divided into two main parts. The first part contained a writ of review that challenged the decisions of the auditor's designee and the Hearing Examiner and the administrative appeal process as applied to Downey. CP 11-19. The second part contained a challenge to the constitutionality of Pierce County's dangerous animal regulations and included a petition for declaratory and injunctive relief. CP 11-19. This second part included all similarly situated taxpayers. CP 11-19. Downey filed a motion for summary judgment on the entire complaint which was heard by Judge John Hickman on July 23, 2010. CP 201-202. An original order denying the motion was entered at the time of the hearing CP 201-

202. To improve the clarity of the court's order, the parties jointly moved to amend. CP 211-213. The amended order denying the plaintiffs' summary judgment motion was entered on July 30, 2010. CP 214-218. This appeal was timely filed on August 6, 2010. CP 219-227.

## **2. FACTS.**

### a. Facts of the Case.

Appellant Heidi Downey is the owner of a male Pyrenees dog named Blizzard. AR 29. On April 7, 2009, Blizzard was off his owner's property when he attacked and bit a Pomeranian named Kayla that belonged to neighbor Tina Steiner. VRP 7-9.<sup>1</sup> The bite inflicted upon Kayla was severe. According to treating veterinarian Virginia King, the bite wounds penetrated Kayla's abdominal wall which was ripped open in several places and her right kidney was lacerated and bleeding extensively. AR 52. Kayla had to be euthanized due to the extent of the injuries. VRP 9, AR 52. Following the incident, Pierce County Animal Control (PCAC) Officer Jody Page interviewed witnesses and took statements from appellant Heidi Downey and Tina Steiner. AR 36-53. Following her investigation, PCAC Officer Page issued a Declaration of Dangerous Animal on August 13, 2009. AR 29.

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<sup>1</sup> VRP denotes Verbatim Report of Proceedings. AR denotes administrative record.

b. Pierce County's Dangerous Animal Regulations

Under the Pierce County Code, a "dangerous animal" means any animal that when unprovoked:

1. inflicts severe injury on or kills a human being without provocation, or
2. inflicts severe injury on or kills an animal without provocation while the animal inflicting the injury is off the property where its owner resides, or
3. has been previously found to be potentially dangerous, the owner having received notice of such and the animal again aggressively bites, attacks, or endangers the safety of humans or other animals.

(PCC 6.02.010.N. and PCC 6.07.015 of the Pierce County Code are attached as Appendix A.)

PCC 6.07.015 sets forth a two step appeal procedure for appealing a dangerous animal declaration. The first level of appeal is an in house administrative review heard by the Auditor or Auditor's designee. The administrative review is an informal hearing that takes places in a conference room in the Auditor's office. This hearing is not tape recorded. Per PCC 6.07.015, the Auditor's designee is authorized to rescind the declaration if he finds there was insufficient evidence to support the declaration. The fee for the administrative review of a dangerous animal declaration is \$250.00 per animal. PCC 6.07.015.E.

The Pierce County Code allows an animal owner to appeal the Auditor's or designee's decision to the Pierce County Hearing Examiner. PCC 6.07.015.E.3. The fee for appealing a dangerous animal declaration is \$500 per animal. *Id.* Per PCC 1.22.110, the Hearing Examiner is required to hold a public hearing that is tape recorded. This hearing takes place in the Public Hearing Room at the Pierce County Annex.

While an appeal is pending, the animal owner must comply with the restrictions set forth in PCC 6.07.015.E.5 which prohibits an owner from allowing his/her animal to be unconfined on the premises of the owner, or to go beyond the owner's premises unless securely leashed, under the control of a competent adult, and humanely muzzled or otherwise securely restrained. PCC 6.07.015.E.5. If the declaration is upheld, then owner is required to obtain a dangerous animal permit and comply with the ownership requirements for dangerous animals. PCC 6.07.025. Among those ownership requirements is the obligation to provide proof to PCAC that the animal has received a rabies vaccination, has been spayed or neutered, and has been identified via microchip or tattoo. PCC 6.07.025. The owner must obtain liability insurance in an amount of at least \$500,000, which insures the owner for any injuries inflicted by the dangerous animal. PCC 6.07.025.

Unlike some other jurisdictions, Pierce County does not ban certain breeds or require the dog owners to remove their animals from the County. Animal owners in Pierce County are allowed to keep dangerous and potentially dangerous animals as long as they comply with the ownership requirements in the Pierce County Code.<sup>2</sup> Where an owner fails to comply with the ownership requirements, PCAC may impound the animal pursuant to PCC 6.07.025 and PCC 6.07.045

In the event that a dangerous or potentially dangerous animal is impounded, the owner is granted the right to appeal the impound to the Hearing Examiner. PCC 6.07.045. There is no fee to appeal the impoundment. PCC 6.07.045. During the appeal, the Hearing Examiner will determine whether the animal should be returned to the owner or forfeited to the County and humanely euthanized. PCC 6.07.045. An owner's failure to comply with ownership requirements may also result in criminal prosecution. PCC 6.07.040.

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<sup>2</sup> With the exception of dangerous animals that have killed a human being without provocation. In those circumstances, the animal is euthanized. PCC 6.07.015 F.

C. **ARGUMENT.**

1. **STANDARD OF REVIEW**

When an appellate court reviews a trial court's decision on a writ of review, the court reviews the decision of the body that makes the findings and conclusions relevant to the decision. *Mansour v. King County*, 131 Wn. App. 255, 262, 128 P.3d 1241 (2006). The court functions in an appellate capacity, considering questions of law de novo and evaluating factual determinations under a substantial evidence standard. Id.

Substantial evidence is evidence sufficient to persuade a reasonable person of the truth of the finding. Id. The substantial evidence standard is deferential and requires the court to view the evidence and reasonable inferences in the light most favorable to the party that prevailed in the forum that exercised fact-finding authority. Id.

Regarding the declaratory action, an appeals court reviews an order of summary judgment in a declaratory action de novo. *McNabb v. Dep't of Corrs.*, 163 Wn. 2d 393, 397, 180 P.3d 1257 (2008) The appellate court considers any relevant facts and reasonable inferences in the light most favorable to the nonmoving party and all questions of law are reviewed de novo. *Hollis v. Garwall, Inc.*, 137 Wn. 2d 683, 690, 974 P.2d 836 (1999).

**2. THE CHALLENGED FINDINGS OF FACT WERE NOT PROPERLY IDENTIFIED IN THE ASSIGNMENTS OF ERROR. ALTERNATIVELY, THE HEARING EXAMINER'S FINDINGS OF FACT WERE SUPPORTED BY SUBSTANTIAL EVIDENCE.**

- a. Challenged findings were not clearly identified.

The Hearing Examiner entered findings of fact in his original decision and as part of his decision on reconsideration. CP 2-3, 15-16. These findings were not identified with particularity in the plaintiffs' assignments of error, or the issues pertaining to assignments of error, as required by RAP 10.3. Unchallenged findings of fact are verities on appeal. *State v. Valdez*, 167 Wn. 2d 761, 767, 224 P.3d 751 (2009).

- b. There was substantial evidence to support the Hearing Examiner's finding that the attack was unprovoked.

The Hearing Examiner found that Blizzard's attack upon Kayla was unprovoked. AR 3, 16. The testimony of Tina Steiner coupled with the circumstances of the attack and the relative size of the animals is substantial evidence to support the Hearing Examiner's finding that the attack was unprovoked.

Kayla, a Pomeranian owned by Tina Steiner, weighed approximately 7 pounds. VRP 13. On the morning of April 7, 2009, Tina Steiner let Kayla out of her house to urinate. VRP 8. Tina Steiner turned

to put her other dog into a pen when she heard something that sounded like a bark or a yip. VRP 8-9. Tina turned around and saw one of Downey's dogs (later identified as Blizzard) running down the street with Kayla in his mouth. VRP 8. Tina Steiner chased after Blizzard yelling "Kayla" VRP 8. Halfway between her house and Downey's house, Blizzard dropped Kayla. VRP 8. Tina Steiner took Kayla to the vet, but her injuries were so severe that Kayla had to be euthanized. VRP 8, 9 AR 52. Tina Steiner testified that she did not see Kayla do anything to provoke the attack. VRP 13. Viewing the evidence in the light most favorable to the county, there was sufficient evidence to convince a reasonable person that the attack was unprovoked.

- c. There was substantial evidence to support the Hearing Examiner's finding identifying Blizzard as the attacker.

The Hearing Examiner made a finding that Blizzard was the attacking animal. AR 3,16. There is substantial evidence to support this finding.

Moments after hearing what sounded like a yelp or a bark, Tina Steiner observed one of Downey's dogs running down the street with Kayla still in his grasp. VRP 8. During the hearing before Hearing Examiner, Tina Steiner identified Blizzard in several photos as the attacking dog. VRP 22-25, AR 22-25. In one of her previous statements,

Tina Steiner described the attacking dog as having a tail that curls up and Blizzard has a tail that curls up. AR 48, AR 25. Although the description given by Tina Steiner varied somewhat in her written statements between "gold and white" and "white and cream", she consistently used the color white to describe "Blizzard" and Blizzard is primarily white in color. AR 47, 48, 51. VRP 22-25. Viewing the evidence in the light most favorable to the county, there was sufficient evidence to support the Hearing Examiner's finding that Blizzard was the dog that attacked Kayla.

- d. There is substantial evidence to support the Hearing Examiner's finding that Blizzard was off the property where his owner resides when he attacked Kayla.

The Hearing Examiner found that Blizzard was off the property where his owner resides when he attacked Kayla. AR 2,3. The Hearing Examiner also found the attack occurred on Tina Steiner's property. AR 16. There is substantial evidence to support these findings.

At the hearing before the Hearing Examiner, Tina Steiner testified that the initial attack occurred on her own property. VRP 11-12. Tina Steiner placed an "X" on Exhibit 1 showing that the attack occurred on her property. VRP 11-12, AR 19, 20. During the hearing, there was a dispute over whether a memorial cross within the easement road marked the location of the attack. According to Officer Page, Tina Steiner previously

stated that the cross marked where the incident happened. VRP 48.

During the hearing, Tina Steiner explained that the incident occurred closer to the carport on her own property. VRP 11-12. The dispute over where the initial attack occurred is a question of credibility. The Hearing Examiner found Tina Steiner's testimony to be credible. AR 3. Judgments regarding the weight of the evidence and credibility determinations are the exclusive function of the trier of fact. *Quinn v. Cherry Lane*, 153 Wn. App. 710, 225 P.3d 266 (2009). When viewed in the light most favorable to the County, there was sufficient evidence to support the finding that the attack occurred on Tina Steiner's property and that Blizzard was off the property where his owner resides.

- e. The issue of probable cause regarding identification was not raised before the Hearing Examiner and cannot be raised for the first time on appeal.

The appellant argues that PCAC Officer Jody Page lacked probable cause to identify "Blizzard" as the attacker prior to issuing the dangerous animal declaration. There is no finding from the Hearing Examiner regarding probable cause because probable cause was not an issue that Heidi Downey properly raised before the Hearing Examiner. Therefore, Downey failed to exhaust her administrative remedies by not raising this issue below and is precluded from raising it for the first time in

this appeal. *Washington Shell Fish, Inc. vs. Pierce County*, 132 Wn. App 239, 260, 131 P.3d 326 (2006) See also *Stevens County v. Futurewise*, 146 Wn. App. 493, 502, 192 P.3d 1 (2008).

Furthermore, this issue is moot because unlike criminal cases, where lack of probable cause may result in suppression of evidence at a subsequent trial, the remedy for an animal owner who objects to a dangerous animal designation is to request an administrative review where the burden is upon the government to prove the definitional elements by a preponderance of evidence. PCC 6.07.015. Suppression of evidence is not a remedy provided by PCC 6.07.015. Downey already obtained the remedy provided to any animal owner who objects to a dangerous animal declaration.

**3. THE ADMINISTRATIVE APPEAL PROCESS DID NOT VIOLATE DOWNEY'S RIGHT TO DUE PROCESS.**

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Post v. City of Tacoma*, 167 Wn.2d 300, 313, 217 P.3d 1179 (2009). *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L. Ed. 2d 18 (1976). Proceedings before quasi-judicial administrative bodies must satisfy minimum due process requirements but are not governed by strict rules of judicial procedure. *Van Sant v. City of Everett*, 69 Wn App. 641, 849 P.

2d 1276 (1993). The state legislature has also recognized that administrative hearings are not judicial proceedings and are designed to be "conducted with the greatest degree of informality consistent with fairness". RCW 34.12.010

a. No record was destroyed.

Downey complains that the administrative review hearing before the Auditor's designee is not recorded. According to the Downey, not recording an informal hearing is the same as "destroying" a record. Downey cites no authority that requires all proceedings before an administrative official to be recorded.

b. A de novo hearing before the hearing examiner is not prohibited by the Pierce County Code.

Downey also argues that the Hearing Examiner must restrict himself to reviewing the record made during the appeal to the Auditor's designee. Per PCC 1.22.110, an appeal of an administrative official's decision must involve a public hearing before the hearing examiner. The public hearings are tape recorded and the testimony is given under oath. PCC 1.22.120.C. The PCC does not require the Hearing Examiner to limit the scope of evidence to the record that was before the Auditor's designee.

PCC 1.22.110 is similar to Washington Administrative Procedures Act (WAPA) in that a person who is adversely affected by an

administrative decision is entitled to a formal hearing before a presiding officer where testimony is provided under oath and subject to cross examination. RCW 34.05.449, RCW 34.05.452. The WAPA does not limit the scope of review to facts and evidence that were originally presented to the agency or administrative official. ***Port of Seattle v. Pollution Control***, 151 Wn.2d 568, 595-600, 90 P.3d 659 (2004). The very fact that the WAPA requires that a new hearing be held before a presiding officer has been interpreted as requiring a de novo scope of review. *Id.* Neither the PCC nor the WAPA restrict the scope of review during quasi-judicial administrative hearings to the evidence submitted to an administrative official. Thus, the administrative appeals did not violate procedural due process

- c. The correct burden of proof was applied by the Administrative official and the Hearing Examiner.

Downey argues that an incorrect burden of proof was used during the hearing before the Administrative Official and before the Hearing Examiner. To support her argument, Downey cites PCC 1.22.090 of the Pierce County Hearing Examiner Code. PCC 1.22.090.G provides:

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 officials decision was clearly erroneous.

PCC 1.22.090.G.

The code section that Downey is citing is one of general applicability used in a variety of cases heard by the Pierce County Hearing Examiner including appeals of land use decisions, local licensing decisions, and a variety of other local governmental actions listed in PCC 1.22.080. This burden of proof contained in PCC 1.22.090.G. was never cited by the Administrative Official or the Hearing Examiner in this case. AR 14-17, 92-93. In fact, Mr. Greer, the administrative official, referred to the correct burden of proof in his original and amended decision. AR 61-62, 92-93.

The Hearing Examiner also adopted findings stating that the County had proven the necessary elements by a preponderance of evidence. AR 2-3. The Hearing Examiner was aware of the correct standard that governs animal control cases. In pre-trial briefing, the county wrote "Pursuant to *Mansour v. King County*, 131 Wn. App 255 (2006), the burden is on the government to prove that Blizzard is dangerous within the meaning of PCC 6.02.010.N by a preponderance of evidence." AR 97. At the beginning of the hearing the prosecutor stated, "[t]he burden on the County today is to prove by a preponderance of

evidence the following facts:..." VRP 4. At the end of the hearing, the prosecutor again added "what happened at the informal hearing before Stephen Greer has been discussed quite a bit in the hearing, but the bottom line is, in today's hearing, it was the County's burden to prove by a preponderance of the evidence, not beyond a reasonable doubt, but by a preponderance of evidence certain facts..." VRP 53. The Administrative official and the Hearing Examiner applied the correct burden of proof.

- d. Neither the Auditor's Designee nor the Hearing Examiner acted ultra vires.

Washington courts have drawn a distinction between governmental acts that are ultra vires and those acts that suffer from some procedural irregularity. "An act of an officer which is within his realm of power, albeit imprudent or violative of a statutory directive is not ultra vires." ***Bd. of Regents v. City of Seattle***, 108 Wn.2d 545, 552, 741 P.2d 11 (1987). 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, 547 P.2d 1221 (1976). Ultra vires acts are those performed with no legal authority and are characterized as void on the basis that no power to act existed. ***South Tacoma Way LLC vs. State***, 169 Wn.2d 118, 233 P.3d 871 (2010). Conversely, acts done without strict procedural or statutory compliance are subject to a different review. *Id.*

Per PCC 6.07.010 & PCC 6.07.015, both the Auditor's designee Steven Greer and the Hearing Examiner are authorized to hear appeals related to dangerous and potentially dangerous animals. Therefore, it cannot be said that Greer or the Hearing Examiner were acting beyond the scope of their authority even if procedural irregularities occurred.

Downey argues that the Hearing Examiner did not have the authority to impose the correct burden of proof set forth in *Mansour v. King County*, 131 Wn. App. 255, 128 P.3d 1241 (2006) which requires the county to prove the animal is dangerous by a preponderance of evidence. Downey argues that the Hearing Examiner was required to disregard *Mansour* and apply the clearly erroneous standard set forth in PCC 1.22.090.G . The code does not require quasi-judicial officers to disregard state law. PCC 1.22 is the Hearing Examiner Code which contains the regulations of general applicability for appeals for the various Pierce County Departments. The *Mansour* case imposed a higher burden of proof specific to dangerous animal cases. *Mansour* at 264-266. PCC 1.22.120A states that the Hearing Examiners' decisions shall be based, not only upon the applicable regulations, but on federal and state law and case law as well. The Hearing Examiner did not act ultra vires by imposing the correct burden of proof upon the County.

Downey argues that the Auditor's designee Steven Greer also acted ultra vires by applying the correct burden of proof set forth in *Mansour*. PCC 6.07.015.E.2. provides that if the Auditor or Auditor's designee finds that there is insufficient evidence to support the declaration, it shall be rescinded and the restrictions imposed thereby annulled. There is nothing in the PCC that prevents the Auditor's designee from applying the correct standard of proof under *Mansour*. If the designee is not convinced by a preponderance of evidence that the animal is dangerous as defined by Pierce County Code, then there was insufficient evidence to support the declaration and the designee is obligated to rescind it.

Downey also argues that Greer acted ultra vires and without due process by amending his decision. But any challenge to Greer's amended decision is moot. Downey had already filed an appeal to the Pierce County Hearing Examiner prior to the issuance of Greer's amended decision and the appeal to the Pierce County Hearing Examiner was de novo.

Downey argues that the Hearing Examiner acted ultra vires by issuing findings of fact in response to Downey's motion for reconsideration. Downey's request for reconsideration was a three page handwritten letter that repeatedly challenged the Hearing Examiner's interpretation of evidence. AR 11-13. The Hearing Examiner responded

by adopting additional findings of fact. AR 1-3. Downey fails to cite any authority which forbids the Hearing Examiner from responding to her motion for reconsideration with additional findings. Additionally the County's proposed findings of fact and conclusions of law were submitted to the Hearing Examiner on February 18, 2010 with a copy sent to Downey on the same day. AR 6. No response was ever received from Downey. No request for additional time was requested by Downey. Contrary to Downey's assertions, it is not the County's responsibility to inform her that she could or should respond to the proposed findings.

e. The Hearing Examiner acted fairly and without bias.

Per PCC 1.22.080.E, the Hearing Examiner may prescribe rules and regulations for the conduct of public hearings. The rules of procedure adopted by the Hearing Examiner regarding evidence allow the Hearing Examiner wide discretion in determining the admissibility of evidence during the public hearing. Regarding the admissibility of evidence, the Hearing Examiner's rules provide as follows:

A. Quasi-judicial public hearings are not subject to the evidentiary rules of the court system, but are guided by the concept of due process.

B. Evidence, including hearsay evidence, is admissible if in the judgment of the Examiner it is the kind of evidence upon reasonable prudent persons are accustomed to rely upon in the conduct of their affairs.

C. The Examiner may exclude evidence that is irrelevant, unreliable, immaterial, or unduly repetitious.

D. The Examiner may take official notice of properly enacted provisions of law, codes or standards adopted by recognized organizations, matters within his or her specialized expertise, and of notorious or commonly understood facts.

Office of the Hearing Examiner, Rules of Procedure for Hearings, Rule 1.08. (attached as Appendix B)

Downey accuses the Hearing Examiner of having a bias against her, but does not point to any personal comments made against her by the Hearing Examiner. Downey cites only to the Hearing Examiner's questions and rulings on evidence. There is nothing in the PCC that prohibits the Hearing Examiner from asking questions of witnesses. Furthermore, as stated above, the Hearing Examiner has wide discretion in determining the admissibility of evidence at the public hearing and is not bound by the rules of evidence. Downey represented herself and did not object to the Hearing Examiner's rulings during the hearing. Although Downey may disagree with some of the rulings, that does not demonstrate a bias against her.

- f. Omitting the name of a immaterial witness from the written decision does not justify reversal.

Downey also asserts that the Hearing Examiner refused to consider the testimony of her daughter Janelle Downey. During the hearing, Downey asked her 12 year old daughter a series of questions regarding hearsay statements made by others. VRP 42- 45. Janelle was not a witness to the attack and her testimony was immaterial to the elements that the County had to prove by a preponderance of evidence. VRP 42-45 The Hearing Examiner never stated that he was disregarding Janelle's testimony, and allowed her to testify, but her name was not included in the list of witnesses in the Hearing Examiner's original decision dated January 26, 2010. AR 15, 16. When the Hearing Examiner adopted findings of fact as part of his decision on the motion for reconsideration, he referred to all witnesses. AR 2.

Even in criminal cases, a defendant is entitled to a fair trial, but not one that is error free. *State v. Fisher*, 165 Wn.2d 727, 746-47, 202 P.2d 937 (2009). The omission of the Hearing Examiner of Janelle's name as a witness in his original ruling has not been shown to violate fundamental due process or justify reversal.

4. **EQUITABLE ESTOPPEL IS NOT PROPER WHERE THE PETITIONER FAILED TO ESTABLISH ALL OF THE ELEMENTS BY CLEAR, COGENT AND CONVINCING EVIDENCE.**

To establish equitable estoppel requires proof of (1) an admission, statement, or act inconsistent with a claim later asserted; (2) reasonable reliance on that admission, statement, or act by the other party; and (3) injury to the relying party if the court permits the first party to contradict or repudiate the admission, statement, or act. *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 599, 957 P.2d 1241 (1998). Application of equitable estoppel against the government is disfavored. *Id.* Therefore, when the doctrine is asserted against the government, equitable estoppel must be necessary to prevent a manifest injustice, and the exercise of government functions must not be impaired as a result of estoppel *Id.* The burden is on the moving party to prove all required elements by clear, cogent, and convincing evidence. *Id.*

The evidentiary record establishes that Downey did not rely on the mistake made by the Auditor's Designee Steven Greer when he incorrectly referred to Blizzard as a potentially dangerous animal in his original decision. In the appeal of Greer's decision, Downey wrote:

Due to the incompetent paperwork regarding this matter, I find it impossible that all documents were read, looked at or used to make an informed decision. I have documents for dangerous, potentially dangerous- fees for both, yet the determination is for potentially but you chased my appeal for dangerous and the formed [sic] I signed is for dangerous with this-how can this department claim to have read these documents?

AR 64. In her appeal application Downey marked the box labeled "[x] Copy of Dangerous Animal Decision and \$500 appeal fee attached."

AR 64. Downey spotted the error in Greer's decision and believed he was incompetent. She did not rely upon his mistake. In fact, she filed a timely appeal because of his mistake. AR 64. Therefore, there was no detrimental reliance on administrative official's error.

To the extent there was any reliance on the errors made by Mr. Greer, the reliance was not reasonable. When a party decides to appeal an administrative decision, that action precludes finality of the decision until the appeal is resolved. It is not reasonable to allow Downey to rely upon the errors that she has identified in her own appeal. Downey has failed to establish each element of equitable estoppel by clear, cogent, and convincing evidence.

**5. PLAINTIFFS HAVE NOT MEET THEIR BURDEN OF ESTABLISHING THAT PIERCE COUNTY'S DANGEROUS ANIMAL REGULATIONS ARE UNCONSTITUTIONAL.**

Where the appellant challenges the constitutionality of an ordinance, the burden is on her to prove the ordinance is unconstitutional. Regularly enacted ordinances are presumed constitutional. *Homes Unlimited, Inc. v. City of Seattle*, 90 Wn. 2d 154, 158, 579 P.2d 1331 (1978). The challenger bears the heavy burden of proving that the ordinance is unconstitutional beyond a reasonable doubt. *Erickson & Assoc., Inc. v. City of Seattle*, 123 Wn. 2d 864, 869, 872 P.2d 1090 (1994).

- a. A Dangerous Animal Declaration is not a seizure and does not require a warrant.

Chapter 6.07 of the Pierce County Code does not require an animal control officer to obtain a warrant prior to issuing a dangerous animal declaration. The appellant has not cited any case holding that a determination of a dangerous animal constitutes a "seizure" within the meaning of the United States or Washington State constitution or that a warrant is required prior to issuing a dangerous animal declaration. Therefore, Downey has failed to meet her burden of proving that Pierce County's Animal control ordinance, which gives PCAC the authority to

declare animal dangerous without a warrant, to be unconstitutional beyond a reasonable doubt.

To support her argument that the issuance of a dangerous animal declaration is a seizure, Downey cites criminal cases where evidence was seized without a warrant and inverse condemnation cases where there was a government taking of real property. These cases are not applicable. Contrary to Downey's argument, courts have routinely upheld animal control regulations as a lawful exercise of police power. "Dog ownership is subject to a legitimate exercise of police power and dogs may be regulated or destroyed in order to protect citizens." *Am. Dog Owners Ass'n v. City of Yakima*, 113 Wn. 2d 213, 217, 777 P.2d 1046 (1989). See also *Sentell v. New Orleans & C.R.R.*, 166 U.S. 698, 704, 17 S. Ct. 693 (1897). Property in dogs is of an imperfect or qualified nature and they may be subjected to peculiar and drastic police regulations by the state without depriving their owners of any federal right. *Niccha v. People of the State of New York*, 254 U.S. 228, 41 S.Ct 103 (1920). It is well settled that the licensing of dogs and the regulation or the manner in which they shall be kept and controlled are within the legitimate sphere of the police power, and that statutes and ordinances may provide for impounding dogs and for their destruction or other disposition. *Simpson v. City of Los Angeles*, 40 Cal. 2d 271, 279, 253 P.2d 464 (1953) citing *Sentell v. New*

*Orleans & C. Railroad Co.*, 166 U.S. 698, 17 S.Ct 693, 41 L. Ed 1169 (1897).

A federal court has held that animal control ordinances that authorize an animal control officer to issue orders without prior judicial review to be constitutional. In *Leibowitz v. City of Mineola*, 660 F. Supp 2d 775 (E.D. Tex. 2009), the plaintiff argued that the city's anti-tethering and anti-barking ordinances infringed upon his property interest to have a dog protect his property. The plaintiff argued that the ability of the animal control officers to issue either a "remedial requirements" order or a misdemeanor citation without any appeal provision deprived him of due process. *Id.* The court rejected the plaintiff's arguments and ruled that the city's ordinances did not violate either substantive or procedural due process. *Id.* at 784. The court found that substantive due process was not violated because there was a rational relationship between the animal control regulations and a legitimate government interest in the safety, welfare, and general enjoyment of both animal and citizens of the city. *Id.* at 784. The classification of animals as "dangerous" by local animal control agencies has not been held to be a seizure.

b. Local jurisdictions are not prohibited from charging administrative appeal fees.

Downey has not met her heavy burden of proving the administrative appeal fees listed in PCC 6.07.015 to be unconstitutional. This section of the plaintiffs' brief is very confusing. It is unclear what is being challenged. Are the plaintiffs challenging the ability of local jurisdictions to charge any administrative appeal fee? Are the plaintiffs challenging the amount of the fee? Are the plaintiffs seeking a waiver of fees for indigent pet owners? The plaintiffs have cited several different federal and state constitutional sections, but the applicable standards and constitutional analysis are missing. Passing treatment of an issue or lack of a reasoned argument is insufficient to merit judicial consideration. *State v. Johnson*, 119 Wn. 2d 167, 171, 829 P.2d 1082 (1992). Therefore Defendants ask this court to decline to consider this issue.

Downey may challenge the legality of requiring any administrative appeal fee. Downey states that PCC 6.07.015 "unconstitutionally requires the dog owner to buy access to justice." This is the "pay-to-play" argument. However, Washington courts have recognized that an individual does not have an absolute and unlimited constitutional right of access to the court system. *Yurtis v. Phipps*, 143 Wn. App. 680, 694, 181 P.3d 849 (2008). Rather, due process requires only that the individual be

afforded a reasonable right of access, or a meaningful opportunity to be heard. *Id.* Consequently, when access to the courts is not essential to advance a fundamental right, access may be regulated if the regulation rationally serves a legitimate end. *Id.* Ownership of a dog does not implicate any fundamental constitutional right. ***American Canine Foundation v. City of Aurora, Colorado***, 618 F. Supp 2d 1271, 1278 (2009). Therefore, the ordinance is constitutional if it bears a rational relationship to a legitimate legislative goal or purpose. *Id.* Among those legitimate goals is the collection of fees to offset operating costs. ***Ortwein v. Schwab***, 410 U.S. 656, 93 S. Ct 1172 (1973).

What Downey fails to explain in her briefing is that there is a significant difference between cases involving a fundamental constitutional interest such as the right to appeal a criminal conviction versus appeals from regulatory enforcement decisions that fall squarely within a local jurisdiction's police powers. No Washington court has held that animal ownership is fundamental constitutional right. What Downey is urging is unprecedented.

Downey cites to an unpublished opinion from a federal district court in Kentucky in support of her argument that administrative appeal fees are unconstitutional. ***Louisville Kennel Club v. Louisville/Jefferson Co. Metro Government***, 2009 WL 3210690 (W.D.Ky). In that case, the

court held the local jurisdiction's animal impound procedures violated due process. The subject ordinance required an animal owner to post a bond to cover the cost of boarding and veterinary care for the impounded animal when filing an appeal of the impound. *Id* Pierce County Code recognizes the difference between impounding an animal and issuing a decision declaring the animal to be dangerous. Per PCC 6.07.045, there is no fee to appeal the impoundment of a dangerous animal and there is no requirement that a bond be posted before an appeal is filed with the Hearing Examiner. Downey's dog has been declared dangerous, but has not been impounded. Therefore, the Kentucky Kennel case is not applicable.

Downey may also be raising a facial challenge to the amount of the fees, but this is unclear. Downey argues that the appeal fee is too high compared to the cost of adopting a dog at the local Humane Society, but it is unclear how the costs of adopting an animal has any relation to the costs of an administrative appeal. The party who raises a constitutional challenge to the reasonableness of a fee bears the burden of proof of showing that the ordinance is unconstitutional beyond a reasonable doubt. *Home Builders Association of Kitsap County et al, v. City of Bainbridge Island*, 137 Wn App. 338, 153 P.3d 231 (2007), *Thurston County Rental Owners Ass'n v. Thurston County*, 85 Wn. App. 171, 181, 931 P. 2d 208

(1997). A reviewing court may not strike down legislation as unreasonable unless it is shown to be clearly unreasonable or arbitrary and capricious. *Thurston County Rental Owners Ass'n*, supra. Downey has failed to meet her burden of proof in showing that the administrative appeal fees contained in PCC 6.07.015 are unconstitutional. There is no factual record regarding the reasonableness of the fee amounts because appeal fees were not raised as an issue during the administrative appeal to the Hearing Examiner. Downey has not demonstrated that the fees listed PCC 6.07.015 are, on their face, unconstitutional.

Downey might be challenging the constitutionality of PCC 6.07.015 due to the lack of an indigency provision that allows the waiver of the appeal fee. Heidi Downey never claimed indigency during the administrative appeal process. Instead, Downey cites to a Pierce County District Court case involving a different animal owner by the name of Reynaldo Ramirez and his dog. First, the facts of the Ramirez case are not part of the record in this appeal. Furthermore, the decision of a Pierce County District Court Judge is an unpublished opinion that Downey is prohibited from citing per GR 14.1(a).

Downey includes several cases where the court addressed fee requirements in cases involving fundamental rights. In those cases, the courts held that where statute affected a fundamental constitutional

interest, a statute that did not provide an indigency waiver of fees was unconstitutional as applied. In *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780 (1971), the U.S. Supreme Court found that the ability to dissolve a marriage was a fundamental right. A statute that required all petitioners to pay certain filing fees was unconstitutional as applied to indigent petitioners. *Id.* In *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct 585 (1956) the right to appeal a criminal conviction was recognized as a fundamental constitutional right. A statute that required all defendants to pay for transcript was held to be unconstitutional as applied to indigent defendants. *Id.* Where a fundamental right was impacted, the courts have held that that the States must provide access to the courts to indigent parties via a waiver of fees.

In contrast, where no fundamental right is implicated, the courts have upheld the constitutionality of laws that require the payment of fees. In *United States v. Kras*, 409 U.S. 434, 93 S. Ct 631 (1973) the U.S. Supreme Court ruled that the ability to file for bankruptcy was not a fundamental constitutional right. The statute that required all petitioners, including indigent petitioners, to pay filing fee was held to be constitutional. *Id.* Similarly in *Ortwein v. Schwab*, 410 U.S. 656, 93 S. Ct. 1172 (1973) the court held that the interest of litigants seeking increased welfare payments was not a fundamental constitutional interest.

The statute that required all appellants, including indigent appellants, to pay a filing fee was held to be constitutional. *Id.*

The *Boddie* and *Griffin* line of cases do not apply to this case because animal ownership has not been recognized by the courts as a fundamental constitutional right. Additionally, those cases deal with laws found to be unconstitutional as applied to indigent parties. There is no evidence that Downey is indigent.

Plaintiffs correctly point out that in *Kras* and *Ortwein*, the courts look at alternatives to a judicial remedy in the due process analysis. In *Kras*, the alternatives available to debtors included the possibility of negotiated payment agreements with creditors and waiting out the applicable statute of limitations period. *Kras*, supra, 409 U.S. at 445. Those types of nonjudicial remedies were not discussed in *Ortwein* because the U.S. Supreme Court had already "held that procedural due process requires that a welfare recipient be given a pre-termination evidentiary hearing." *Ortwein*, supra, 410 U.S. at 659-660. Welfare recipients do not pay a fee for these hearings *Id.* The plaintiffs argue that the hearings provided at no cost to welfare recipients should be expanded from welfare termination cases to animal control cases. This expansion of law is not supported by relevant precedent. The plaintiffs have not met

their heavy burden of showing that the appeal fees contained in Pierce County's dangerous animal regulations are unconstitutional.

c. Subpoena powers of an administrative official.

This issue was raised for the first time on appeal to the Pierce County Superior court. CP 140. After Downey requested an administrative review, she was provided with a copy the case file. AR 57. At no time during the administrative review or proceedings before the Hearing Examiner did Downey request additional records via subpoena or other means. Downey failed to exhaust her administrative remedies and is prohibited from raising this issue for the first time on appeal. *Washington Shell Fish Inc, vs. Pierce County*, 132 Wn. App 239, 260, 131 P.3d 326 (2006) See also *Stevens County v. Futurewise*, 146 Wn. App. 493, 502, 192 P.3d 1 (2008).

Furthermore, the balancing test discussed in *Mansour* to determine what process is due is missing from the plaintiff's brief. The plaintiff is assuming that the procedural due process rights that attach to the animal removal order in *Mansour* are applicable to dangerous animal declarations in Pierce County. In *Mansour* the court stated "requiring *Mansour* to move out of King County to keep "Maxine" alive is a severe enough sanction to warrant more formal procedural safeguards. Due process

requires that a pet owner contesting a removal order be able to subpoena witnesses and records." *Mansour* at 270. However, there are several differences between King County's animal control regulations and Pierce County's regulations. In Pierce County, if the decision of the Auditor's designee is appealed to the Hearing Examiner, the Hearing Examiner has the authority to issue subpoenas per PCC 1.22.080.C. Unlike King County, Pierce County does not require owners of dangerous animals to remove their pets from the county. Additionally, under Pierce County regulations where an animal is impounded because the owner failed to comply with the licensing requirements for keeping dangerous animals, the owner is provided with an opportunity to contest the impoundment to the Hearing Examiner at no cost. PCC 6.07.045. The plaintiff has not shown why the subpoena requirement that applies to appeals of King County's removal orders should also apply to the administrative review of Pierce County's dangerous animal declarations.

**6. ATTORNEY FEES SHOULD NOT BE AWARDED**

Plaintiff requests attorney fees on appeal under RAP 18.1 on the equitable basis that her argument protects constitutional principals affecting taxpayers and dog owners. Washington courts follow the American rule in not awarding attorney fees as costs unless authorized by

contract, statute or recognized equitable exception. *Mansour v. King County*, 131 Wn. App. 255, 128 P.3d 1241 (2006).

Attorney fees are not authorized by statute in this case. Chapter 6.07 of the Pierce County Code governs administrative appeals from dangerous animal declarations. That chapter does not authorize attorney fees to the prevailing party. PCC 6.07. When an appeal is filed in Superior Court via a statutory writ of review, RCW 7.61 is the governing statute. RCW 7.61 does not provide for attorney fees to the prevailing party. *Federal Way School Dist No. 210 v. Vinson*, 154 Wn. App. 220, 225 P.3d 379 (2010).

Attorney fees are not authorized by any recognized equitable principal that applies to this case. There is a narrowly construed equitable principal that applies to cases involving unconstitutional expenditures of public funds. *Mansour v. King Co*, supra, *Weiss v. Bruno*, 83 Wn. 2d 911, 523 P.2d 915 (1974). That specific challenge has not been briefed or proved in this case. Therefore the request for attorney fees should be denied.

**D. CONCLUSION.**

The Hearing Examiner's findings of fact were supported by substantial evidence and the administrative appeal process did not violate Heidi Downey's right to due process. Downey has not proved all the

elements of the doctrine of equitable estoppel by clear, cogent, and convincing evidence and therefore that doctrine should not be applied in this case. The plaintiffs have not met their heavy burden of proving that Pierce County's dangerous animal regulations to be unconstitutional beyond a reasonable doubt. Therefore, this appeal should be denied.

DATED: December 10, 2010.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



Cort O'Connor WSBA #23439  
Deputy Prosecuting Attorney  
Attorney for Defendants/Respondents

10/07/10 10:12:59  
STATE OF WASHINGTON  
DEPUTY  
COURT OF APPEALS  
TACOMA

Certificate of Service:

The undersigned certifies that on this day she delivered by electronic mail and ABC delivery to the attorney of record for the appellant and appellant c/o his attorney a true and correct of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/10/10      Jill A. Anderson  
Date                      Signature

# Appendix “A”

*Chapter 6.02*

***ANIMAL CONTROL – GENERAL PROVISIONS***

**Sections:**

- 6.02.010 Definitions.**
- 6.02.020 Authorized Agents May Perform Duties.**
- 6.02.025 Licenses Required.**
- 6.02.030 Authority to Pursue.**
- 6.02.040 Notice of Impounding Animal.**
- 6.02.050 Hindering an Officer.**
- 6.02.060 Interference With Impounding.**
- 6.02.070 Redemption of Dogs.**
- 6.02.075 Redemption of Livestock.**
- 6.02.080 Redemption of Animals Other Than Dogs and Livestock.**
- 6.02.085 Mandatory Spay/Neuter for Impounded Dogs and Cats – Deposit – Refund – Exceptions.**
- 6.02.088 Conditions of Release.**
- 6.02.090 Injured or Diseased Animals.**
- 6.02.100 Duties Upon Injury or Death to an Animal.**
- 6.02.110 Poisoning of Animals.**
- 6.02.120 Abatement of Nuisances.**
- 6.02.140 Severability.**

**6.02.010 Definitions.**

As used in this Title, the following terms shall have the following meanings:

- A. "Adult" means any animal seven months of age or over.
- B. "Adequate food and water" means food or feed appropriate to the species for which it is intended. Both food and water must be in sufficient quantity and quality to sustain the animal and should be in containers designed and situated to allow the animal easy access.
- C. "Adequate shelter" means a structure that keeps the animal clean, dry, and protected from the elements, allows the animal to turn around freely, sit, stand and lie without restriction, and by application does not cause injury, disfigurement, or physical impairment to the animal.
- D. "Altered" shall mean to permanently render incapable of reproduction (i.e., spayed or neutered).
- E. "Animal" means any nonhuman mammal, bird, reptile or amphibian including livestock and poultry as defined herein.
- F. "Animal Control Agency" means that animal control organization authorized by Pierce County to enforce its animal control provisions.
- G. "Animal Shelter" means that animal control facility authorized by Pierce County.
- H. "At large" means off the premises of the owner or keeper of the animal, and not under restraint by leash or chain or not otherwise controlled by a competent person.
- I. "Auditor" means Pierce County Auditor.
- J. "Cat" means and includes female, spayed female, male and neutered male cats.

- K. "Competent adult" means a person 18 years of age or older who is able to sufficiently care for, control, and restrain his/her animal, and who has the capacity to exercise sound judgement regarding the rights and safety of others.
- L. "County" means Pierce County.
- M. "Court" means District Court or the Superior Court, which courts shall have concurrent jurisdiction hereunder.
- N. "Dangerous Animal" means any animal that when unprovoked:
1. inflicts severe injury on or kills a human being without provocation, or
  2. inflicts severe injury on or kills an animal without provocation while the animal inflicting the injury is off the property where its owner resides, or
  3. has been previously found to be potentially dangerous, the owner having received notice of such and the animal again aggressively bites, attacks, or endangers the safety of humans or other animals.
- An animal shall not be declared dangerous if the threat, injury, or damage was sustained by a person who, at the time, was committing a willful trespass or other tort upon the property where the owner resides, or was tormenting, abusing, or assaulting the animal, or was committing or attempting to commit a crime.
- O. "Dog" means and includes female, spayed female, male and neutered male dogs.
- P. "Gross Misdemeanor" means a type of crime classification that, while not a felony, is ranked as a serious misdemeanor. The maximum penalty for a gross misdemeanor is 365 days in jail and/or a \$5,000.00 fine.
- Q. "Humane trap" means a live animal box enclosure trap designed to capture and hold an animal without injury.
- R. "Impound" means to receive into the custody of the Animal Control Authority, or into the custody of the Auditor or designee.
- S. "Juvenile" means any animal from weaning to seven months of age.
- T. "Livestock" means all cattle, sheep, goats, or animals of the bovidae family; all horses, mules, other hoof animals, or animals of the equidae family; all pigs, swine, or animals of the suidae family; llamas; and ostriches, rhea, and emu.
- U. "Misdemeanor" means a crime classification with a maximum penalty of 90 days in jail and/or a \$1,000.00 fine, pursuant to Section 1.12.010 of this Code.
- V. "Muzzle" means a muzzle made in a manner that will not cause injury to the animal or interfere with its vision or respiration but shall prevent it from biting any person or animal.
- W. "Owner" means any person, firm, or corporation owning, having an interest in, or having control or custody or possession of any animal.
- X. "Potentially Dangerous Animal" means any animal that when unprovoked: (a) inflicts bites on a human, domestic animal, or livestock either on public or private property, or (b) chases or approaches a person upon the streets, side-walks, or any public grounds or private property in a menacing fashion or apparent attitude of attack, or (c) any animal with a known propensity, tendency, or disposition to attack unprovoked or to cause injury or otherwise to threaten the safety of humans, domestic animal, or livestock on any public or private property.
- Y. "Poultry" means domestic fowl normally raised for eggs or meat, and includes chickens, turkeys, ducks and geese.

- Z. "Proper Enclosure" means, while on the owner's property, the animal shall be confined indoors or in a securely enclosed and locked pen or structure, suitable to prevent the entry of young children and designed to prevent the animal from escaping. Such pen or structure shall have a locking door with a padlock, secure sides, a concrete floor, and a secure top attached to the sides, and shall also provide protection from the elements for the animal. The structure must comply with all applicable provisions of local Building and Zoning Codes.
  - AA. "Severe injury" means any physical injury which results in broken bones or disfiguring lacerations requiring multiple sutures or cosmetic surgery.
  - BB. "Unconfined" means not securely confined indoors or in a securely enclosed and locked pen or structure upon the premises of the person owning, harboring or having the care of the animal.
  - CC. "Vicious" means chasing or approaching a person or animal in a menacing or apparent attitude of attack or the known propensity to do any act which might endanger the safety of any person, animal, or property of another.
  - DD. "Warning Sign" means a clearly visible and conspicuously displayed sign containing words and a symbol (to inform children or others incapable of reading) warning that there is a dangerous animal on the property.
- (Ord. 2008-14 § 1 (part), 2008; Ord. 2005-108 § 1 (part), 2005; Ord. 99-17 § 1 (part), 1999; Ord. 95-151S § 2 (part), 1996; Ord. 92-35 § 1 (part), 1992, Ord. 89-235 § 3, 1990; Ord. 87-40S § 1 (part), 1987)

#### **6.02.020 Authorized Agents May Perform Duties.**

Wherever a power is granted to or a duty imposed upon the Sheriff, the power may be exercised or the duty may be performed by a Deputy of the Sheriff or by an authorized agent of Pierce County, deputized by the Sheriff.

- A. The animal control authority shall be a division of the Pierce County Auditor. The duly elected auditor of Pierce County shall be the director of the animal control authority.
- B. The animal control authority is authorized to enforce the provisions of the Pierce County Code and the laws of the State of Washington as they pertain to animals.
- C. All animal control officers must be special deputies commissioned by the Pierce County Sheriff.

(Ord. 2008-14 § 1 (part), 2008; Ord. 87-40S § 1 (part), 1987)

#### **6.02.025 Licenses Required.**

Licenses required are for regulation and control. This entire Title shall be deemed an exercise of the power of the State of Washington and of the County of Pierce to license for regulation and/or control and all its provisions shall be liberally construed for the accomplishment of either or both such purposes. (Ord. 2005-108 § 1 (part), 2005)

#### **6.02.030 Authority to Pursue.**

Those employees or agents of the County charged with the duty of seizing animals running at large may pursue such animals onto County-owned property, vacant property, and unenclosed private property, and seize, remove, and impound the same. (Ord. 95-151S § 2 (part), 1996; Ord. 87-40S § 1 (part), 1987)

*Chapter 6.07*

***DANGEROUS AND POTENTIALLY DANGEROUS ANIMALS***

**Sections:**

- 6.07.010 Declaration of Animals as Potentially Dangerous – Procedure.**
- 6.07.015 Declaration of Animals as Dangerous – Procedure.**
- 6.07.020 Registration, Permits and Fees for Potentially Dangerous Animals.**
- 6.07.025 Registration, Permits and Fees for Dangerous Animals.**
- 6.07.030 Confinement and Identification of Dangerous or Potentially Dangerous Animals.**
- 6.07.035 Notification of Status of a Dangerous or Potentially Dangerous Animal.**
- 6.07.040 Penalty for Failure to Control or Comply with Restrictions.**
- 6.07.045 Impoundment of Dangerous or Potentially Dangerous Animals.**

**6.07.010 Declaration of Animals as Potentially Dangerous – Procedure.**

- A. The animal control authority shall have the ability to declare an animal as potentially dangerous if there is probable cause to believe the animals falls within the definitions set forth in Section 6.02.010 X. The finding must be based upon:
  - 1. The written complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it to fall within the definition of Section 6.02.010 X.; or
  - 2. Animal bite reports filed with the County or the County's designee; or
  - 3. Actions of the animal witnessed by any animal control officer or law enforcement officer; or
  - 4. Other substantial evidence.
- B. **Exclusions.** An animal shall not be declared potentially dangerous if the animal control authority determines, by a preponderance of the evidence, that the threat, injury, or bite alleged to have been committed by the animal was sustained by a person who was at the time committing a willful trespass or other tort upon the premises occupied by the owner of the animal, or who was tormenting, abusing, or assaulting the animal, or who has been in the past observed or reported to have tormented, abused, or assaulted the animal, or who was committing or attempting to commit a crime.
- C. The declaration of a potentially dangerous animal shall be in writing and shall be served on the owner in one of the following methods:
  - 1. Certified mail to the owner's last known address; or
  - 2. Personally; or
  - 3. If the owner cannot be located by one of the first two methods, by publication in a newspaper of general circulation.
- D. The declaration shall state at least:
  - 1. The description of the animal.
  - 2. The name and address of the owner of the animal, if known.
  - 3. The whereabouts of the animal if it is not in the custody of the owner.
  - 4. The facts upon which the declaration of potentially dangerous animal is based.
  - 5. The availability of a hearing in case the person objects to the declaration, if a request is made within ten calendar days.
  - 6. The restrictions placed on the animal as a result of the declaration of a potentially dangerous animal.

7. The penalties for violation of the restrictions, including the possibility of destruction of the animal, and imprisonment or fining of the owner.
- E. If the owner of the animal wishes to object to the declaration of a potentially dangerous animal:
1. The owner may request a hearing before the County, or the County's designee, by submitting a written request and payment of a \$125.00 administrative review fee to the Auditor or the Auditor's designee within ten calendar days of receipt of the declaration, or within ten calendar days of the publication of the declaration pursuant to Section 6.07.010 C.3.
  2. 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.
  3. If the Auditor or the Auditor's designee finds sufficient evidence to support declaration, the owner may appeal such decision pursuant to Pierce County Hearing Examiner Code Chapter 1.22 PCC; provided that the appeal and the payment of an appeal fee of \$250.00 must be submitted to the Auditor or the Auditor's designee within ten calendar days after the finding of sufficient evidence by the Auditor or the Auditor's designee.
  4. An appeal of the Hearing Examiner's decision must be filed in Superior Court within 15 calendar days of the date of the Hearing Examiner's written decision.
  5. During the entire appeal process, it shall be unlawful for the owner appealing the declaration of potentially dangerous animals to allow or permit such animal to:
    - a. Be unconfined on the premises of the owner; or
    - b. Go beyond the premises of the owner unless such animal is securely leashed, under the control of a competent adult, and humanely muzzled or otherwise securely restrained.

(Ord. 2008-14 § 1 (part), 2008; Ord. 2005-108 § 1 (part), 2005; Ord. 99-17 § 4 (part), 1999; Ord. 92-35 § 4, 1992; Ord. 89-235 § 2 (part), 1990; Ord. 89-192 § 1, 1989; Ord. 87-40S § 4 (part), 1987)

**6.07.015 Declaration of Animals as Dangerous – Procedure.**

- A. The animal control authority shall have the ability to declare an animal as dangerous if there is probable cause to believe the animal falls within the definitions set forth in Section 6.02.010 N. The finding must be based upon:
1. The written complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it to fall within the definition of Section 6.02.010 N; or
  2. Animal bite reports filed with the County or the County's designee; or
  3. Actions of the animal witnessed by any animal control officer or law enforcement officer; or
  4. Other substantial evidence.
- B. **Exclusions.** An animal shall not be declared dangerous if the animal control authority determines, by a preponderance of the evidence, that the threat, injury, or bite alleged to have been committed by the animal was sustained by a person who was at the time committing a willful trespass or other tort upon the premises occupied by the owner of the animal, or who was tormenting, abusing, or assaulting the animal, or who has been in the past observed or reported to have tormented, abused, or assaulted the animal, or who was committing or attempting to commit a crime.
- C. The declaration of a dangerous animal shall be in writing and shall be served on the owner in one of the following methods:

1. Certified mail to the owner's last known address; or
  2. Personally; or
  3. If the owner cannot be located by one of the first two methods, by publication in a newspaper of general circulation.
- D. The declaration shall state at least:
1. The description of the animal.
  2. The name and address of the owner of the animal, if known.
  3. The whereabouts of the animal if it is not in the custody of the owner.
  4. The facts upon which the declaration of dangerous animal is based.
  5. The availability of an appeal in case the person objects to the declaration, if a request is made within ten calendar days.
  6. The restrictions placed on the animal as a result of the declaration of a dangerous animal.
  7. The penalties for violation of the restrictions, including the possibility of destruction of the animal, and imprisonment or fining of the owner.
- E. If the owner of the animal wishes to object to the declaration of a dangerous animal:
1. The owner may request a hearing before the County or the County's designee by submitting a written request and payment of a \$250.00 administrative review fee to the Auditor or the Auditor's designee within ten calendar days of receipt of the declaration, or within ten calendar days of the publication of the declaration pursuant to Section 6.07.015 C.3.
  2. 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.
  3. 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; provided that the appeal and the payment of an appeal fee of \$500.00 must be submitted to the Auditor or the Auditor's designee within ten calendar days after the finding of sufficient evidence by the Auditor or the Auditor's designee.
  4. An appeal of the Hearing Examiner's decision must be filed in Superior Court within 15 calendar days of the date of the Hearing Examiner's written decision.
  5. During the entire appeal process, it shall be unlawful for the owner appealing the declaration of dangerous animals to allow or permit such animal to:
    - a. Be unconfined on the premises of the owner; or
    - b. Go beyond the premises of the owner unless such animal is securely leashed, under the control of a competent adult and humanely muzzled or otherwise securely restrained.
- F. In the case wherein an animal is found to be a dangerous animal pursuant to the procedures in 6.07.015 because the animal killed a human being without provocation, after the exhaustion of appeal therefrom, the dangerous animal shall be forfeited to the County and be humanely euthanized.
- (Ord. 2009-17 § 1, 2009; Ord. 2008-14 § 1 (part), 2008)

**6.07.020 Registration, Permits and Fees for Potentially Dangerous Animals.**

Following the declaration of a potentially dangerous animal and the exhaustion of the appeal therefrom, the owner of a potentially dangerous animal shall obtain a permit for such animal from the animal control agency, and shall be required to pay the fee for such permit in the amount of \$250.00 to the Auditor or the Auditor's designee. In addition, the owner of a

potentially dangerous animal shall pay an annual renewal fee for such permit in the amount of \$250.00 to the Auditor or the Auditor's designee.

Should the owner of a potentially dangerous animal fail to obtain a permit for such animal or to appeal the declaration of a potentially dangerous animal, the County or the County's designee is authorized to seize and impound such animal and, after notification to the owner, hold the animal for a period of no more than five days before destruction of such animal.

A registration and permit will be issued to the owner of a potentially dangerous animal upon payment of the permit and inspection fees if the owner is able to pass a site inspection within the prescribed timeframe by meeting the following inspection criteria:

- A. A proper enclosure of the animal with a posted warning sign as defined in Sections 6.02.010 Z. and DD.;
- B. Proof that either:
  1. The animal has been microchipped (and microchip number is provided), or
  2. The animal has an identifying tattoo, either inside the left ear or inside the left, rear, upper thigh of the animal and a color, digital photo of the tattoo (in electronic format) is provided for identification purposes;
- C. Two current, color, digital photographs (in electronic format) of the animal (minimum 3" x 5" in size), for identification purposes;
- D. Proof of current rabies vaccination;
- E. Proof the animal has been spayed or neutered.
- F. Proof of a policy of liability insurance (such as homeowner's insurance) issued by an insurer qualified under Title 48 RCW in the amount of at least \$250,000.00 (with Pierce County listed as the certificate holder), insuring the owner for any personal injuries inflicted by the potentially dangerous animal, or proof of a surety bond issued by a surety insurer qualified under Chapter 48.28 RCW in a form acceptable to the animal control authority in the sum of at least \$250,000.00 and payable to any person injured by the potentially dangerous animal.
- G. Animal must be humanely muzzled, as defined in Section 6.02.010 V., when outside of its primary residence.
- H. Animal must wear a brightly colored collar (not less than two inches in width) with current license tag at all times.

Muzzle and collar must be available at time of inspection.

An owner who fails to pass inspection will be subject to a \$50.00 re-inspection fee per occurrence. Re-inspection must occur during the prescribed ten calendar day period; it does not extend the allotted timeframe.

(Ord. 2008-14 § 1 (part), 2008; Ord. 2005-108 § 1 (part), 2005; Ord. 99-17 § 4 (part), 1999; Ord. 89-235 § 2 (part), 1990; Ord. 87-40S § 4 (part), 1987)

#### **6.07.025 Registration, Permits and Fees for Dangerous Animals.**

Following the declaration of a dangerous animal and the exhaustion of the appeal therefrom, the owner of a dangerous animal shall obtain a permit for such animal from the animal control agency, and shall be required to pay the fee for such permit in the amount of \$500.00 to the Auditor or the Auditor's designee. In addition, the owner of a dangerous animal shall pay an annual renewal fee for such permit in the amount of \$500.00 to the Auditor or the Auditor's designee.

Should the owner of a dangerous animal fail to obtain a permit for such animal or to appeal the declaration of a dangerous animal, the County or the County's designee is authorized to seize and impound such animal and, after notification to the owner, hold the animal for a period of no more than five days before destruction of such animal.

A registration and permit will be issued to the owner of a dangerous animal upon payment of the permit and inspection fees if the owner is able to pass a site inspection within the prescribed timeframe by meeting the following inspection criteria:

- A. A proper enclosure of the animal with a posted warning sign as defined in Sections 6.02.010 Z. and DD.;
- B. Proof that either:
  - 1. The animal has been microchipped (and microchip number is provided), or
  - 2. The animal has an identifying tattoo, either inside the left ear or inside the left, rear, upper thigh of the animal and a color, digital photo of the tattoo (in electronic format) is provided for identification purposes;
- C. Two current, color, digital photographs (in electronic format) of the animal (minimum 3" x 5" in size), for identification purposes;
- D. Proof of current rabies vaccination;
- E. Proof the animal has been spayed or neutered.
- F. Proof of a policy of liability insurance (such as homeowner's insurance) issued by an insurer qualified under Title 48 RCW in the amount of at least \$500,000.00 (with Pierce County listed as the certificate holder), insuring the owner for any personal injuries inflicted by the dangerous animal, or proof of a surety bond issued by a surety insurer qualified under chapter 48.28 RCW in a form acceptable to the animal control authority in the sum of at least \$500,000.00 and payable to any person injured by the dangerous animal.
- G. Animal must be humanely muzzled, as defined in 6.02.010 V., when outside of its primary residence.
- H. Animal must wear a brightly colored collar (not less than two inches in width) with current license tag at all times.

Muzzle and collar must be available at time of inspection.

An owner who fails to pass inspection will be subject to a \$50.00 re-inspection fee per occurrence. Re-inspection must occur during the prescribed ten calendar day period; it does not extend the allotted timeframe.

(Ord. 2008-14 § 1 (part), 2008)

**6.07.030 Confinement and Identification of Dangerous or Potentially Dangerous Animals.**

- A. Following a declaration of a dangerous or potentially dangerous animal and the exhaustion of the appeal therefrom, it shall be unlawful for the person owning or harboring or having care of such dangerous or potentially dangerous animal to allow and/or permit such animal to:
  - 1. Be unconfined on the premises of such person; or
  - 2. Go beyond the premises of such person unless such animal is securely leashed and humanely muzzled or otherwise securely restrained.
- B. Dangerous or potentially dangerous animals must be tattooed or have a microchip implanted for identification. Identification information must be on record with the Pierce County Auditor.
- C. Dangerous or potentially dangerous animals must be currently licensed and the registration permit to own the animals as defined under Section 6.07.020 must be kept current at all times.

(Ord. 2008-14 § 1 (part), 2008; Ord. 2005-108 § 1 (part), 2005; Ord. 97-111 § 5, 1997; Ord. 89-235 § 2 (part), 1990; Ord. 87-40S § 4 (part), 1987)

**6.07.035 Notification of Status of a Dangerous or Potentially Dangerous Animal.**

- A. The owner of an animal that has been classified as a dangerous or potentially dangerous animal shall immediately notify the Auditor and Sheriff when such animal:
  - 1. Is loose or unconfined; or
  - 2. Has bitten or otherwise injured a human being or attacked another animal or livestock.
- B. At least 48 hours prior to a dangerous or potentially dangerous animal being sold, given away, or moved to another location, the owner shall provide the name, address, and telephone number of the new owner to the Auditor or the Auditor's designee. The new owner shall comply with all of the requirements of this Chapter in addition to any state and/or local laws in existence in the new location.
- C. When an animal classified as dangerous or potentially dangerous dies, the owner of said animal shall submit proof (vet records, etc.) to the Auditor or the Auditor's designee within ten calendar days.

(Ord. 2008-14 § 1 (part), 2008; Ord. 2005-108 § 1 (part), 2005; Ord. 99-17 § 4 (part), 1999; Ord. 89-235 § 2 (part), 1990)

**6.07.040 Penalty for Failure to Control or Comply with Restrictions.**

Any person who violates a provision of Chapter 6.07 shall, upon conviction thereof, be found guilty of a gross misdemeanor. In addition, any person found guilty of violating this Chapter shall pay all expenses, including shelter, food and veterinary expenses, including identification or boarding and veterinary expenses necessitated by the seizure of any animal for the protection of the public, and such other expenses as may be required for the destruction of any such animal. The animals are subject to seizure and impoundment consistent with Section 6.07.045. Furthermore, any dangerous or potentially dangerous animal which attacks a human being or animal may be ordered destroyed when, in the court's judgment, such dangerous or potentially dangerous animal represents a continuing threat of serious harm to human beings or animals. (Ord. 2008-14 § 1 (part), 2008; Ord. 99-17 § 4 (part), 1999; Ord. 89-235 § 2 (part), 1990; Ord. 87-40S § 4 (part), 1987)

**6.07.045 Impoundment of Dangerous or Potentially Dangerous Animals.**

Should the owner of a dangerous or potentially dangerous animal violate the conditions or restrictions of owning and possessing a dangerous or potentially dangerous animal contained in Section 6.07.020 or 6.07.025 or imposed by the animal control authority, hearing examiner or district court, such animal may be seized and impounded. The owner may within two business days petition the Pierce County Hearing Examiner for the dog's return. The Hearing Examiner will determine whether the animal should be returned to the owner or forfeited to the County and humanely euthanized. Notice of the hearing shall be as provided in Section 6.07.010 C.

If a decision to forfeit the animal to the County is rendered by the Hearing Examiner, the owner may prevent the animal's destruction by, within seven calendar days:

- 1. Petitioning the district court for the animal's immediate return, subject to court-imposed conditions; and
- 2. Posting a bond or security in an amount sufficient to provide for the animal's care for a minimum of 30 calendar days from the seizure date.

If the animal control authority has custody of the animal when the bond or security expires, the animal shall be immediately forfeited to the animal control authority unless the court orders an alternative disposition. If a court order prevents the animal control authority from assuming ownership and it continues to care for the animal, the owner shall renew the bond or security, in advance, for all continuing costs for the animal's care. (Ord. 2008-14 § 1 (part), 2008)

# Appendix “B”

**PIERCE COUNTY**  
**OFFICE OF THE HEARING EXAMINER**

**RULES OF PROCEDURE  
FOR HEARINGS**

902 South 10th Street  
Tacoma, Washington 98405

Phone: (253)272-2206  
Fax: (253)272-6439

October, 1998

*current  
as of  
3-19-01*

## 1.08 EVIDENCE

- A. Quasi-judicial public hearings are not subject to the evidentiary rules of the court system, but are guided by the concept of due process.
- B. Evidence, including hearsay evidence, is admissible if in the judgment of the Examiner it is the kind of evidence upon which reasonably prudent persons are accustomed to rely upon in the conduct of their affairs.
- C. The Examiner may exclude evidence that is irrelevant, unreliable, immaterial, or unduly repetitious.
- D. The Examiner may take official notice of properly enacted provisions of law, codes or standards adopted by recognized organizations, matters within his or her specialized expertise, and of notorious or commonly understood facts.
- E. Exhibits
  - 1. Documents, photographs, drawings, and physical evidence may be offered as exhibits and each will be assigned an exhibit number. Exhibits offered will be retained until after a final decision is rendered and all appeal proceedings, if any, have been resolved.
  - 2. The staff report and all documents offered from the official County file will be admitted.
  - 3. Documentary evidence may be received in the form of copies of relevant excerpts from larger documents.
  - 4. Persons desiring to introduce letters or written documents should present the original to the Examiner and provide copies to County staff and the applicant/appellant.
  - 5. Applicants submitting written documents shall submit the original to the Examiner, a copy to County staff, and a copy to any appellants.

## 1.09 TESTIMONY

- A. All oral testimony shall be taken under oath or affirmation.
- B. The Examiner may impose reasonable limitations on the nature and length of testimony. In so doing, the Examiner shall give consideration to: