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COURT OF APPEALS DIVISION II  
OF THE STATE OF WASHINGTON

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KIMBERLYN DOTSON, Appellant

vs.

PIERCE COUNTY, Respondents

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OPENING BRIEF OF APPELLANT KIMBERLYN DOTSON

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APPELLANT’S STATEMENT OF ISSUES &  
ASIGNMENTS OF ERROR

A. Should this enforcement action be overturned because the County Staff violated express county code provisions? **YES.**

1. Did the County improperly rely on data expressly prohibited by PCC 18.140.040(B); without which this Enforcement action fails? **Yes.**

2. Did County staff pursue false complaint contrary to PCC 18.140.025? **Yes.**

B. Does the Enforcement Action Fail Because the County lacked actual delineation of fish & wildlife critical area? **Yes.**

1. Does the County’s failure to meet standards established in *Shear v. King County*, 167 Wn.App. 561, 273 P.3d 490 (Div. 1, 2012) create an insurmountable evidentiary problem for the County in this Enforcement Action? **Yes.**

2. Did County Meet the *Shear* Ruling standard that critical area must be established with precision prior to enforcement action? **No.**

3. Should this enforcement action be overturned where the County has not met its burden to ACTUALLY delineate the Subject Property as a F&W Area? **Yes.**

4. Should this enforcement action be overturned where the County admits it lacks evidence of actual critical area on this site? **Yes.**

6. Should this enforcement action be overturned where the County Used 2007 “Data” as Basis for 2016 Enforcement Action? **Yes.**

7. Should this enforcement action be overturned where County reliance on 2007 data is procedurally & constitutionally faulty? **Yes.**

C. Should this Enforcement Action be overturned where County lacks legally admissible evidence? **Yes.**

1. Should this Enforcement Action be overturned where County site visits upon which notice apparently is based were not constitutionally permissible? **Yes.**

2. Should this Enforcement Action be overturned where County

site visits failed to comply with the Washington Constitution's greater protections? **Yes.**

3. Should this Enforcement Action be overturned where the County failed to meet its burden to justify warrantless or an exception thereto? **Yes.**

4. Should this Enforcement Action be overturned where County had neither a Warrant nor a basis for exception in this administrative enforcement action? **Yes.**

5. Should this Enforcement Action be overturned where County lacked warrant and where the 'Open View Doctrine' does not apply? **Yes.**

6. Should this Enforcement Action be overturned where County lacked warrant and where the 'The Plain View Doctrine also does not apply? **Yes.**

7. Should this Enforcement Action be overturned where County lacked warrant and where County fails to present evidence of consent? **Yes.**

8. Should this Enforcement Action be overturned where County fails to establish info alleged in Ecology Complaint and its subsequent coordinated investigation with Pierce County Conservation District staff was illegally exercised? **Yes.**

9. Should Exclusionary Rule be applied as a remedy for warrantless searches? **Yes.**

10. Are Aerial Photos and or Magnified Imagery Are Inadmissible? **Yes.**

11. Is County use of enhanced or magnified photos or aerials impermissible? **Yes.**

12. Does lack of visibility to naked eye renders warrantless, visually enhanced observations invalid? **Yes.**

D. Did the County HE Err in applying "Contract Principles" to Uphold Flawed County Enforcement? **Yes.**

## I. INTRODUCTION

Surely more should be required of a governmental entity seeking to enforce alleged violations involving constitutionally protected property and private affairs. This is an appeal of Pierce County Planning and Land Services (PALS or County) staff decision to enforce critical area provisions against a subject parcel, identified as tax parcel number 0417066001 (Subject Property). PALS cites to Kimberlyn Dotson as the Appellant in the Staff Report. The County alleges that one horse is located within a “potential” Fish & Wildlife Habitat Conservation Area (F&W Area). The County repeatedly admits in its written materials that the actual F&W Area designation has not been established, yet proceeds with enforcement any way. Under Staff’s view, the County may bring enforcement actions based on a “potential” or a hunch, and the accused apparently is required to produce the evidence the County actually needs to convict. The law does not support this backwards process.

In addition, the County’s key enforcement of the alleged critical area violation relied on observations obtained by a warrantless, non-consensual search by the County’s sole witness. The County’s sole witness testified under oath that the only vantage point where she could observe the “evidence” of the alleged violation was after entering upon the Property Owner’s private property, without first obtaining consent or administrative

warrant.<sup>1</sup> Setting aside only momentarily constitutional issues, the County's enforcement action also was been flawed at its very start, by violating two express requirements adopted by the County Council for any land use enforcement action.

First, the Staff Report and related public records request regarding the Subject Property and this enforcement action conclusively establish that the County's enforcement action is founded on and directly contrary to the express prohibition against use of "Aerial photography, orthophotos, planimetrics, satellite data or any other aerial surveillance techniques" for PALS enforcement actions. See PCC 18.140.040(B).<sup>2</sup> The entire enforcement action is the fruit of this poisonous tree. Once the prohibited materials are eliminated, the County lacks any basis for enforcement.

Second, PCC 18.140.025, *Enforcement Following Complaint*, requires that County Staff undergo a detailed review for accuracy "to ensure against false allegations", and that, "No enforcement action will be

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<sup>1</sup> Transcript (TR) at 84:12-21: "Q: So as I read this correctly, from your vantage point on 296th, you do not observe a stream within the paddocked area -- or what you call a stream within the paddocked area; correct?"

A: Um, correct.

Q: And it's only on the north end of 55th, after traveling almost the full distance of Ms. Dotson's property on 55th Avenue East that you're able to see what you testified is a water course in the paddock?

A: Correct."

<sup>2</sup> **Additional Enforcement Powers**

5. Aerial photography, orthophotos, planimetrics, satellite data or any other aerial surveillance technique **shall not** be utilized as proactive enforcement tools to initiate enforcement actions by the Planning and Land Services or Public Works Departments in pursuit of compliance with the enforcement provisions of this Chapter.

pursued until such time staff confirms a violation has occurred”<sup>3</sup>. Here the evidence shows that:

- (1) Within a month of the receiving the Complaint, County concedes the allegations which initiated the enforcement action were false,<sup>4</sup> and
- (2) The County’s Staff report in numerous places also concedes that the presence or absence of an actual, regulated fish or wild life species had not yet been determined, as required by PCC 18E.40.030 Fish and Wildlife Habitat Conservation Area Review Procedures. Yet, the enforcement action proceeded.

Several additional defects support granting this appeal. Staff alleged the presence of a “stream” on the Subject Property, then bootstraps that allegation into the “stream” being a “natural water”, the presence of which is an “indicator” of a “Potential F&W Area”. Setting aside momentarily the centerpiece truth that enforcement of a critical area violation first requires establishing a critical area, which is then must be proven to be “altered”,<sup>5</sup> the County’s house of cards collapses completely due to the fragility of its base assumption, the presence of a “stream”. The County’s Staff Report and testimony at hearing admits that the “data” used to “establish” the “presence” of a stream was that of a neighboring property’s

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<sup>3</sup> **18.140.025 Enforcement Following Complaint.** Alleged violations will undergo a detailed review by staff for accuracy and content to ensure against false allegations. No enforcement action will be pursued until such time staff confirms a violation has occurred. (Ord. [2013-85](#) § 1 (part), 2013; Ord. [2013-30s2](#) § 4 (part), 2013).

<sup>4</sup> See AR 119-120, the initial complaint dated [October 15, 2015](#) and AR 48, dated [November 25, 2015](#), “the complaint about shoveling dirt into the creek does not appear to have occurred” at AR 48.

<sup>5</sup> *PCC 18E.10.110 Compliance.*

B. When a critical area or its required buffer has been altered in violation of this Title, the Department shall require the property owner to bring the site into compliance

critical area review from 2007. No site-specific typing of the Subject Property exists, neither in the staff report or in Appellant's related public records request<sup>6</sup>, because the County never undertook site specific water typing of Appellant's property. Further, any alleged stream typing by the County necessarily depended on use of "Aerial photography, orthophotos, planimetrics, satellite data or any other aerial surveillance techniques,"<sup>7</sup> which use is expressly prohibited. See PCC 18.140.040(B).<sup>8</sup> In addition, the County includes visually enhanced serial photos, which are also unlawful. Without the prohibited materials, none of the County's allegations could be lawfully established.

Additionally, the Pierce County Staff who gathered the purported evidence in this case testified that she intruded onto private property to

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<sup>6</sup> See AR 186 at footnote – The Petitioner also submitted a public records request for County records related to her property

<sup>7</sup> **TR 24:16-23**. "Q: Okay. Um, do you recognize this email? A: I do.

Q: Okay. And, um, what's the date of the email? A: It is November 16th, 2015.

Q: So it's about a month and a day after your visit? A: Correct

Q: Okay, do you agree that it includes an aerial with planimetrics showing the house and the outbuildings? A: It does." Referring to Petitioner's exhibit B, **AR 123-125**, emails by County Staffer.

**TR 27:4-15**, "Q...And your statement, "Hey, Rene" -- Pierce County Conservation District. "I want to make sure 5 what building is there, since I've only seen a portion of 6 the site from the road. Below is an aerial with planimetrics showing the outhouse and the three outbuildings. Attached are photos from the Assessor Treasurer's data. Only County people have access to this." And so you go on to say you're wanting to confirm -- her to confirm the location of various buildings on the site using the aerial; correct?

A: Um, the planimetrics as a -- as a graphic tool so she knows what I'm talking about; correct.", Petitioner's Exhibit C, **AR 123-125**, emails by County Staffer

<sup>8</sup> **Additional Enforcement Powers**

5. Aerial photography, orthophotos, planimetrics, satellite data or any other aerial surveillance technique **shall not** be utilized as proactive enforcement tools to initiate enforcement actions by the Planning and Land Services or Public Works Departments in pursuit of compliance with the enforcement provisions of this Chapter.

investigate this matter.<sup>9</sup> Staff failed to seek or obtain informed consent to intrude onto the subject private property. Staff emails show the County also relied on “evidence” obtained by the intrusion onto the Subject private Property by other government actors including Pierce County Conservation District and possibly the Department of Ecology.<sup>10</sup> Pierce County has not met its burden to demonstrate that it obtained its “evidence” consistent with the Constitution of the United States and the State of Washington.

This Court grant this appeal and either dismiss this land use enforcement action or remand with direction to exclude the County’s prohibited materials, reject its assumptions and potentials, require a confirmed determination by the County that a critical area exists before and not after commencing an enforcement action.

#### I. STANDING.

Appellant Dotson is the owner of the property subject of the Examiner’s decision. AR 48. Pursuant to RCW 36.70C.060, and other statutes, in this capacity, Appellant has standing as a “person aggrieved or adversely affected by the Land Use Decision.”<sup>11</sup>

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<sup>9</sup> TR 84:12-21, TR 102:14-18.

<sup>10</sup> AR 48, referencing meeting Ecology on site on October 15, 2015.

<sup>11</sup>Under RCW 36.70C.060(2)(b) and other statutes, the Appellant is a person whose asserted interests are among those the local jurisdiction is required to consider when it

## **II. BURDEN OF PROOF**

The scope of review in LUPA actions is governed by RCW 36.70C.130(1), under which this Court may grant relief if the party seeking relief can establish that one of the following standards is met:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
  - (b) The land use decision is an erroneous interpretation of the law, after allowing such deference as is due the construction of the law by a local jurisdiction with expertise;
  - (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
  - (d) The land use decision is a clearly erroneous application of the law to the facts;
  - (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
  - (f) The land use decision violates the constitutional right of the party seeking relief. RCW 36.70C.1301(a)-(f).
- Standards (a), (b), (e) and (f) present questions of law for which the

accepted standard of review is de novo.<sup>12</sup> Standard (c) is reviewed under the "substantial evidence" standard of review, which is defined as "a sufficient quantity of evidence to persuade a fair minded person of the

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makes a land use decision. Further, as property owner, Appellant has constitutionally protected rights to be free of arbitrary and illegal governmental decision-making and that its property not be damaged or taken by illegal actions or without just compensation. Appellant was prejudiced by the failure of the Pierce County Hearings Examiner to recognize her fundamental constitutionally protected rights. A judgment in favor of Appellant will substantially eliminate or redress the prejudice to her constitutionally protected rights.

<sup>12</sup> 7 Wash. State Bar Ass'n, *Real Property Deskbook* § 111.49, at 111-25.

truth or correctness of the order."<sup>13</sup> The clearly erroneous test for (d) is whether the court is "left with a definite and firm conviction that a mistake has been committed."<sup>14</sup> If Appellant shows that Pierce County's actions fall within any of the articulated standards, this Court is required to grant relief.

In addition, Chapter 1.22 of the Pierce County Code (PCC) sets forth the Pierce County Hearing Examiner Code. Section PCC 1.22.090(G)(2) sets forth the burden of proof in appeals of enforcement actions:

(a) When an appeal is submitted by the recipient of a final enforcement decision or order, the initial burden shall be on the County to prove, by a preponderance of evidence, that the use, activity, or development is not in conformance with the regulations contained in Pierce County Code or the terms of a permit or approval.

(b) When the appellant alleges that an exemption applies, the burden shall be upon the appellant to prove, by a preponderance of evidence, that the current use, activity, or development is exempt from the regulations contained in Pierce County Code.

Here, Ms Dotson did not allege any activity was "exempt", so she had no burden. The County had the burden to establish a violation occurred, which it failed to meet.

### **III. STATEMENT OF ERRORS COMMITTED.**

1. The Examiner's Decision is contrary to the evidence, fails to properly consider and/or interpret the law, is not supported by evidence that is

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<sup>13</sup> *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 959 P.2d 1091 (1998), (quoting *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510, rev. denied, 132 Wn.2d 1004, 939 P.2d 215 (1997)).

<sup>14</sup> *Anderson v. Pierce County*, 86 Wn. App. 290, 302, 936 P.2d 432 (1987).

- substantial when reviewed in light of the whole record and is a clearly erroneous application of the law to the facts. In addition, the Decision deprives Appellant of her constitutionally protected rights.
2. The Examiner's decision is based on constitutionally inadmissible evidence.
  3. The Land Use Decision is an erroneous interpretation of the law. In this regard, the Examiner's interpretation of local ordinances is not entitled to any deference, as those ordinances are clear and unambiguous. The Examiner's interpretation of the law is contrary to law, and no deference is warranted.
  4. The Land Use Decision violates the constitutional rights of the Appellant. The Examiner's Decision erroneously extinguishes an ongoing legal use of the property without compensation and in violation of the Appellant's constitutional rights. The Examiner erred to the extent that he failed to recognize and protect such rights, or alternatively, the Examiner erred to the extent that he purported to rule on constitutional issues without the authority to do so. *Yakima Clean Air v. Glascam Builders*, 85 Wn. 2d 255 (1975), and *Bare v. Gorton*, 84 Wn.2d 380 (1974).
  5. The Land Use Decision is an erroneous interpretation of the law, and or of the facts.
  6. The Hearing Examiner's Land Use Decision is clearly erroneous application of the law to the facts.
  7. The Hearing Examiner's Land Use Decision is not supported by substantial evidence in the record.
  8. Appellant specifically appeals the following:
    - o Findings of Fact 1, 3, 4, 5, 6, 7, 9, 10, 11, 12;
    - o Conclusion of Law 1, 2, 3, 4, 5, 6, 7, 8; and Decision.

## II. FACTS<sup>15</sup>

Around September 29, 2015, the Department of Ecology received a complaint<sup>16</sup> which stated that “they have built a fence and corral and feeder for animals” and “They shoveled dirt into the creek so it's not a

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<sup>15</sup> AR denotes reference to the Administrative Record, on file with the Court. TR denotes reference to the transcript of Examiner's hearing, also on file.

<sup>16</sup> AR 119-121 Appellant Ex A.

creek anymore”.<sup>17</sup> Ecology transferred the Complaint to the County. The County apparently undertook a number of warrantless non-consensual site visits to the Subject Property, and collaborated with Ecology and the Pierce County Conservation District (PCCD) staff about PCCD staff visits to the Subject Property. **TR 19:11-19 and AR 48-49**, which refers to a “site visit on October 15, 2015” and “a subsequent” site visit, and see *Rene Skaggs Email* dated November 13, 2015<sup>18</sup>.

Appellant’s Exhibits B-H<sup>19</sup> show a clear path of investigation coordinated between Renee Skaggs, PCCD staff, Mary Van Haren Pierce County Staff, and Ecology staff. The email exchanges show extensive reliance on “Aerial photography, orthophotos, planimetrics, satellite data or any other aerial surveillance techniques<sup>20</sup>,” which use is expressly prohibited by County Code. The emails show an active exchange of information beginning at least November 13, 2015 through November 24, 2016<sup>21</sup>. The very next day, November 25, 2015 County Staff issues its “Compliance Process Letter” to Appellant Kim Dotson, the subject Property owner.<sup>22</sup> In that same November 25, 2015 letter, the County concedes that Ecology’s Complaint proved to be completely false. “A

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<sup>17</sup> AR 119-122.

<sup>18</sup> AR 123-124.

<sup>19</sup> (AR 123-177)

<sup>20</sup> AR 123, 128, 134, 139, 149, 150, 152, 158, 159, 160-162,167,

<sup>21</sup> AR 123-177

<sup>22</sup> AR 48-49.

subsequent site visit showed the stream flowing naturally so the complaint of shoveling dirt into the creek does not appear to have occurred or impacted the flow.”<sup>23</sup> Emphasis added. It follows that nothing was built “over the “stream””. The remaining allegation of the Ecology Complaint states: “they have built a fence and coral and feeder for animals”. There is nothing inherently illegal about such structures.<sup>24</sup> However, Pierce County pressed on with its own enforcement action, now directed at one, lone horse on the 2.6 acre property.<sup>25</sup> For instance, by email dated November 13, 2015, Ms. Rene Skaggs of the Pierce County Conservation District described that Ms. Skaggs had called Ms. Dotson to “steer” Ms. Dotson toward donating Ms. Dotson’s pet horse to a private stable with whom Ms. Skaggs is familiar, so that the private stable could take the horse for use in its own program.<sup>26</sup>

On May 6, 2016, Pierce County sent Ms. Dotson an unsigned “Conservation Area Approval Fish and Wildlife Application Number 832074”.<sup>27</sup> This document states that: “Based on our research and site visit, a stream was identified within your parcel. This drainage course was typed as an F1 through application 553137 on the upstream parcel

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<sup>23</sup> AR 48-49. TR 21:16-25.

<sup>24</sup> AR 119-122.

<sup>25</sup> AR 78-80 and 94-97.

<sup>26</sup> **AR 124.**

<sup>27</sup> **AR 73-75.**

0417066004”<sup>28</sup>. However, the referenced parcel 0417066004 used to establish a F-1 “stream” is **not** the Subject Property.<sup>29</sup> Therefore, the County bases the purported existence of an F-1 “stream”, and resulting enforcement action here upon 2007 “data” for a *different* property, which is separated from the Subject Property by a road.

The 2007 file used by the County was not introduced into evidence by the County, or supplied to Appellant as part of her records request. However Staff described that the 2007 water typing included use of more “Aerial photography, orthophotos, planimetrics, satellite data or any other aerial surveillance techniques,” which is now prohibited in enforcement actions by PCC 18.140.040(B).<sup>30</sup>

The County staff also testified that, despite relying on the 2007 water typing mapping in this 2016 enforcement action, Staff was unaware that Department of Fish & Wildlife regulations require fish habitat water type maps be updated every five years. See WAC 222-16-030.<sup>31</sup> On

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<sup>28</sup> Commonly known as 29510 55<sup>th</sup> Avenue East, Graham, WA.

<sup>29</sup> **AR 74.** The Subject Property is Parcel No. 0417066001. Id.

<sup>30</sup> **AR 184 and TR 37:1-38:25, 39:4-10.**

<sup>31</sup> WAC 222-16-030- Water typing system. In relevant part provides:  
“Until the fish habitat water type maps described below are adopted by the board, the Interim Water Typing System established in WAC 222-16-031 will continue to be used. The department in cooperation with the departments of fish and wildlife, and ecology, and in consultation with affected Indian tribes will classify streams, lakes and ponds. The department will prepare water type maps showing the location of Type S, F, and N (Np and Ns) Waters within the forested areas of the state. The maps will be based on a multiparameter, field-verified geographic information system (GIS) logistic regression model. The multiparameter model will be designed to identify fish habitat by using

questioning, Staff was unable to confirm that the water type map it relied on from the 2007 data had been updated in the nine years since.<sup>32</sup> Instead, Staff testified that the “stream” indicators were “confirmed” by her on the ground, “field” observations. However, that same Department of Fish & Wildlife regulation WAC 222-16-030 provides that “Except for these periodic [five year] revisions of the maps, on-the-ground observations of fish or habitat characteristics will generally **not** be used to adjust mapped water types”. Further, Staff testified that she used the 2007 data, her “field observations” and AR 107, a GIS produced aerial map with planimetrics to type the F-1 stream indicator, in support of the enforcement action. Staff testified and confirmed that AR 107 consists of more, prohibited “Aerial photography, orthophotos, planimetrics”. TR 27:5-17 and TR

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geomorphic parameters such as basin size, gradient, elevation and other indicators. The modeling process shall be designed to achieve a level of statistical accuracy of 95% in separating fish habitat streams and nonfish habitat streams. Furthermore, the demarcation of fish and nonfish habitat waters shall be equally likely to over and under estimate the presence of fish habitat. These maps shall be referred to as "fish habitat water typing maps" and shall, when completed, be available for public inspection at region offices of the department.

Fish habitat water type maps will be updated every five years where necessary to better reflect observed, in-field conditions. Except for these periodic revisions of the maps, on-the-ground observations of fish or habitat characteristics will generally not be used to adjust mapped water types. However, if an on-site interdisciplinary team using nonlethal methods identifies fish, or finds that habitat is not accessible due to naturally occurring conditions and no fish reside above the blockage, then the water type will be immediately changed to reflect the findings of the interdisciplinary team. The finding will be documented on a water type update form provided by the department and the fish habitat water type map will be updated as soon as practicable. If a dispute arises concerning a water type the department shall make available informal conferences, as established in WAC 222-46-020 which shall include the departments of fish and wildlife, and ecology, and affected Indian tribes and those contesting the adopted water types....”

<sup>32</sup> TR 90: 3-24,

29:1-5.

As to her field observations, County Staff testified that her conclusions as to the existence of a “stream” were based on observations viewed from 55th Avenue East<sup>33</sup>, which is a clearly marked, **private** street,<sup>34</sup> located almost entirely on and traverses Ms. Dotson’s private property<sup>35</sup>. Ms. Van Haren, the County Staffer, testified that she has had no formal training on enforcement actions,<sup>36</sup> on government entry on private lands and on administrative warrants<sup>37</sup>. She testified she had never obtained an administrative warrant.<sup>38</sup> She testified that she had no hesitation about going onto private property for investigative purposes.<sup>39</sup> She testified that she did not seek consent before going down 55<sup>th</sup> Avenue, a private road, (“there had never been any indication that that [consent]is required”). TR 41:21-42:29.

Ms. Van Haren testified that she also observed “stream indicators” from 296<sup>th</sup>, a public roadway. But the view across the heavily wooded area observable from the public roadway makes it highly unlikely that any

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<sup>33</sup> TR 9:22-24

<sup>34</sup> TR 41:21-23, TR 44:3-5 and AR 179 and 180.

<sup>35</sup> See AR 179, 180, and 109, Appellants Exhibits J& K and County Ex 7.

<sup>36</sup> TR 15:11-25, TR 42: 3:16

<sup>37</sup> She testified that she has had “conversations” with deputy prosecuting attorneys about enforcement matters, the most recent being several years ago.

<sup>38</sup> TR 42:13-16.

<sup>39</sup> TR 42:8-9

detailed or accurate observations could be made.<sup>40</sup> Ms Van Haren drew a red line on AR 109, Appellant’s Exhibit L, to depict where she opined that she could view “stream indicators”. Her red line “observation” from the public road does not extend into the fenced area, where the violation is alleged. Id. Only her red line observations from private road 55<sup>th</sup> Street East extend into the fenced area where the violation is alleged. AR 109, and:

Q: So as I read this correctly, from your vantage point on 296th, you do not observe a stream within the paddocked area -- or what you call a stream within the paddocked area; correct? A: Um, correct.

Q: And it’s only on the north end of 55th, after traveling almost the full distance of Ms. Dotson’s property on 55th Avenue East that you’re able to see what you testified is a water course in the paddock?  
A: Correct.<sup>41</sup>

The lack of legal visibility of the alleged violation is borne out by the County Staffer’s emails and statements, “I’ve only seen a portion of the site from the roadway”,<sup>42</sup> and her need to use the prohibited aerials to make her calculations on where the alleged violation was located, “Here is what I get. On County View, I measured the distance from the hydro line to the toe of the slope...”<sup>43</sup> Staff’s observations about exactly what was observed are significant to the County’s burden to establish that a

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<sup>40</sup>See AR 179, 180, and 109, Appellants Exhibits J& K and County Ex 7.

<sup>41</sup> TR 84:12-21.

<sup>42</sup> AR 152

<sup>43</sup> AR 159.

violation actually exists. On the specifics of her “field observations” Ms Van Haren testified she viewed “indicators of drainage areas”<sup>44</sup> which consisted of “low areas”.<sup>45</sup> She described what she called “flow indicators” due to vegetation. She couldn’t recall if she could see “scour”<sup>46</sup>, which she said would indicate water flow and testified she doesn’t remember if the vegetation was bent over or not<sup>47</sup>, which would “indicate” water flow.

On May 18, the County was notified Ms Dotson was represented by legal counsel.<sup>48</sup> On July 8, a Notice to Correct (NTC) was issued<sup>49</sup>. Ms Dotson through legal counsel timely requested administrative review on July 22, 2016.<sup>50</sup>

On August 9, 2016 PALs declined to rescind the NTC.<sup>51</sup> PAL’s denial decision mischaracterizes the status of a County Compliance Process letter of November 25, 2015.<sup>52</sup> On August 23, 2016, Ms Dotson appealed PAL’s

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<sup>44</sup> **TR 11:5-6.**

<sup>45</sup> **TR 11:13-14.**

<sup>46</sup> **TR 11:16-17**

<sup>47</sup> **TR 11:18-20, and TR 43:11-15.**

<sup>48</sup> **AR 77.**

<sup>49</sup> **AR 78-80.**

<sup>50</sup> **AR 81-93.**

<sup>51</sup> **AR 94-97.**

<sup>52</sup> “After discussion with Kimberly Dotson about the nature of the violation, Title 18E requirements, the options for resolving the violation, a letter regarding the regulated activities occurring in the Fish and Wildlife or Wetland Buffer, dated November 25, 2015 was sent to Kymberly Dotson. This letter included information on the violation, including code citations and also included information on how to submit an appeal. No appeal was ever submitted.

denial decision,<sup>53</sup> resulting in the Hearing Examiner Hearing of September 26, 2016<sup>54</sup>.

### III. ANALYSIS

#### A. This Enforcement Action Fails Because It Violates Express County Code Provisions

The County's enforcement action was flawed at its very start, by violating two express requirements adopted by the County Council for any land use enforcement action.

##### 1. County Cannot Rely on Data Expressly Prohibited by PCC 18.140.040(B); without which this Enforcement action fails.

First and significantly, the Staff Report and Appellant's related public records request regarding the Subject Property<sup>55</sup> and hearing testimony establish that the County's enforcement action is founded on and directly contrary to the express prohibition against use of "Aerial photography, orthophotos, planimetrics, satellite data or any other aerial surveillance

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**AR 95.** These statements in PAL's denial decision include significant factual and legal errors. First, the letter was sent certified but is recorded as unclaimed in County records. **AR 182.** County's responsive record 0000030- D to Records Request. Second, the claim that the County Letter dated November 25, 2015 **AR 48-49** was "not appealed", is apparently attempting to elevate its allegations to some type of un-appealed verity. However, the Court's records again show this 11/25/16 letter was a "compliance Process Letter" letter describing a "minor violation" and not a "Notice to Correct" for which appeal procedures apply. See **AR 182** to Records Request, (where descriptor "NOTC" is not circled). Also see the 11/25/15 letter at page 2, **AR 49**, "**Compliance Process Letter**" where the reference to appeal processes clearly refer to the list of available County future actions, including the later July 8, 2016 actual NOTC, which was appealed.

<sup>53</sup> **AR 29-40**

<sup>54</sup> **AR 1-16.**

<sup>55</sup> **AR 186.**

techniques” for any Planning and Land Services (PALS) enforcement actions. See PCC 18.140.040(B).<sup>56</sup> The entire enforcement action is the fruit of this poisonous tree. Once the prohibited materials are eliminated, the County lacks any basis for enforcement.

Specifically, the following materials and Exhibits in the County Staff Report cannot be used, as they are contrary to See PCC 18.140.040(B):

- **All County PALs materials produced and actions taken after November 13, 2015**, the date of Email from Mary Van Haren, County PALs Staff to Renee Skaggs, Pierce County Conservation District, **AR 162**, which contains prohibited “aerial with the planimetrics” showing subject site and buildings as well as reference to 3 photos of on-site buildings. **AR 162 and 123-126**. This is the first (known) email to an extended string of emails in which PALS, PC Conservation District and Ecology employees confer and share “County only data”, (**AR 152, 169**) aerials and planimetrics in support of the enforcement action against the Subject Property. The last (known) emails in this string is dated 11/24/2015, **AR 167**, the day before the County sent its first enforcement letter on November 25, 2015 **AR 48-9**. The email exchange expressly describes that “attached are aerials and planimetrics”, **AR 123, 127** and refers to use of County assessor data and that “only County people have access to these” photos. Id. The email string includes the following:

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<sup>56</sup> **Additional Enforcement Powers**

5. Aerial photography, orthophotos, planimetrics, satellite data or any other aerial surveillance technique **shall not** be utilized as proactive enforcement tools to initiate enforcement actions by the Planning and Land Services or Public Works Departments in pursuit of compliance with the enforcement provisions of this Chapter.

- **AR 127**, Email dated 11/16/15 @ 11:44 PM, From Van Haren to Skaggs, referring to aerials “from photo 2 to tope of slope;”
- **AR 132** - Email dated 11/18/15 @ 11:52 PM, From Skaggs to Van Haren, (“I went back into County GIS” and “could you go into the County assessor data and measure”);
- **AR 143**, Email dated 11/19/15 @ 12:15 AM Van Haren to Skaggs, (“Here’s what I got. On County View I measured the distance from the hydro center”) with attached aerials and planimetrics
- **AR 149-** Email dated 11/19/15 @ 12:15 AM Van Haren to Ecology Staff (“Here ya go”)
- **AR 158**, Email dated 11/24/15 @ 4:30 Ecology Staff to Van Haren (referring to aerial, “so the area that is 107 feet away pictured in beige color?”)
- **AR 167**, Email dated 11/24/15 @ 5:15 AM Van Haren to Ecology Staff (“No I added a red line which shows the distance measured” and in which is embedded an aerials and planimetrics).
- **AR 48-49** --11/25/15 Court letter and reference to F1 Stream typing from review of adjacent parcel, which requires use of prohibited Aerial photography, orthophotos, planimetrics, satellite data or any other aerial surveillance technique- Also produced after and as a result of 11/13/15 and thereafter County use of prohibited materials for enforcement matter.
- **AR 56** – Copy of Aerial photography, orthophotos, planimetrics exchanged between County Staff and Ecology **at Ar 159**, also produced after and as a result of 11/13/15 and thereafter County use of prohibited materials for enforcement matter.
- **AR 74** – dated May 4, 2016 **Page 2 of F&W Area Notice** at page 2 of 4 refers to F1 Stream typing from review of adjacent parcel, which

requires use of prohibited Aerial photography, orthophotos, planimetrics, satellite data or any other aerial surveillance technique, and at **AR 76**, copy of Aerial photography, orthophotos, planimetrics exchanged between County Staff and Ecology at **AR 56**. Also produced after and as a result of 11/13/15 and thereafter County use of prohibited materials for enforcement matter.

- **AR 107 - County GIS View Orthophoto Map** printed 9/15/16 purportedly showing Wetland and F&W Areas. Also produced after and as a result of 11/13/15 and thereafter County use of prohibited materials for enforcement matter.
- **AR 78-80 – July 8, 2016 County Notice and Order to Correct.** (produced after and as a result of 11/16/15 and thereafter County use of prohibited materials for enforcement matter).
- **AR 94-97– August 9 2016 County Written Decision on Administrative Review-** (produced after and as a result of 11/14/15 and thereafter County use of prohibited materials for enforcement matter).
- **AR 25, Staff Report “Response to Appeal Allegations” Section at page 7 of 9:** The Presence of the hydro center line shown on the GIS County View data was confirmed during the site visits.
- **AR 25 - Staff Report “Response to Appeal Allegations” Section at page 7 of 9:** “data showing an F1 stream type lowing across a neighboring property was used during PALS review of application number 832074 during a stream type verification process”.

**2. County Pursued False Complaint Contrary to PCC 18.140.025**

Second, PCC 18.140.025, *Enforcement Following Complaint*, **AR 184**,

requires that County Staff undergo a detailed review for accuracy “to ensure against false allegations”, and that, “No enforcement action will be pursued until such time staff confirms a violation has occurred”<sup>57</sup>. Here the evidence shows that:

(1) Within a month of the receiving the Complaint, County concedes the allegations which initiated the enforcement action were false. **AR 48.** Yet, the enforcement action proceeded, and

(2) The County’s Staff report in numerous places also concedes that the presence or absence of regulated fish or wild life species has not been determined, as required by PCC 18E.40.030 Fish and Wildlife Habitat Conservation Area Review Procedures. Yet, the enforcement action proceeds.

The County failed to drop the Complaint once it was proven false, in direct contradiction to the County Code provision.

**B. Enforcement Action Fails: Lack of Delineation.**

The action here also should be dismissed pursuant to the rule announced in *Shear v. King County*.<sup>58</sup> *Shear* mandates that a municipality seeking to enforce a land use ordinance have established the existence of a specific type of critical area that the land use allegedly violates prior to the commencement of an enforcement action. The establishment of a critical

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<sup>57</sup> **PCC 18.140.025 Enforcement Following Complaint.** Alleged violations will undergo a detailed review by staff for accuracy and content to ensure against false allegations. No enforcement action will be pursued until such time staff confirms a violation has occurred. (Ord. [2013-85](#) § 1 (part), 2013; Ord. [2013-30s2](#) § 4 (part), 2013).

<sup>58</sup> *Shear v. King County*, 167 Wn.App. 561, 273 P.3d 490 (Div. 1, 2012).

area proceeds according to the municipality's enacted delineation process. In this case, in order to establish a critical area, the current Pierce County code requires compliance with the criteria set forth in PCC 18E.10.050 (H)<sup>59</sup>, and PCC 18E.40.030 (B)(2)<sup>60</sup>

The County failed to undertake those processes or put into evidence any information about streams particular to the Subject Property, and thereby runs afoul of the rule in *Shear* as to delineation of both streams and F&W Areas. Therefore, as a matter of law, this Court should find that

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<sup>59</sup> **AR 194** - PCC 18E.10.050 (H): The exact boundary of each critical area depicted on the Critical Areas Atlas Maps is approximate and is intended only to provide an indication of the presence of a critical area on a particular site. Additional critical areas that have not been mapped may be present on a site. The actual presence of a critical area or areas and the applicability of these regulations shall be determined based upon the classification or categorization criteria and review procedures established for each critical area.

<sup>60</sup> **AR 195**. PCC 18E.40.030(B)(2). All habitat assessments submitted under the requirements of this Chapter shall, at a minimum, include the following:

- a. The parcel number of the subject property.
- b. The site address of the subject property, if one has been assigned by the County.
- c. The date and time when the site evaluation for the habitat assessment was conducted and the date when the habitat assessment was prepared.
- d. The credentials of the fish or wildlife biologist who prepared the habitat assessment.
- e. The mailing address and phone number of the property owner and the fish or wildlife biologist that prepared the habitat assessment.
- f. A detailed description of the vegetation on and adjacent to the site.
- g. Identification and a detailed description of any critical fish or wildlife species or habitats, as set forth in PCC [18E.40.020](#), on or adjacent to the site and the distance of such habitats or species in relation to the site. Describe efforts to determine the status of any critical species in the project area, including information on survey methods, timing, and results of surveys for species or suitable habitat identification.
- h. Include any information received from biologists with special expertise on the species or habitat type, such as WDFW, Tribal, USFS, or other local, regional, federal, and university fish, wildlife and habitat biologists and plant ecologists. Include any such conversations in the habitat assessment and cite as personal communication.
- i. A map showing the location of the site, including written directions.
- j. The Department may also require that the applicant request a separate evaluation of the site by WDFW staff to confirm the findings of the habitat assessment.

the County failed to establish the centerpiece element of a Critical area violation: to wit: that a regulated critical area *actually exists* on the Subject Property. Accordingly, this Court should grant this appeal and dismiss this critical area land use enforcement action.

**1. *Shear v. King County*, 167 Wn.App. 561, 273 P.3d 490 (Div. 1, 2012) Creates an Insurmountable Evidentiary Problem for the County in its Enforcement Action.**

*Shear* involves three main issues: statutory interpretation of County land use code, allocation of the burden of delineating alleged critical area in the context of a land use enforcement action, and hearing examiner's jurisdiction<sup>61</sup>. The issues directly bear on this case, and supports dismissal of the enforcement action. *Young v. Pierce County*,<sup>62</sup> framed the issue in *Shear*:

The County may be complaining that unless it can force Young to obtain and pay for a wetlands delineation report, it will have no way to obtain the evidence it needs to enforce its wetlands ordinance against him. If it is, however, its complaint is not valid. It has every right to go onto Young's land despite his no-trespassing signs, and thus to obtain the evidence it needs to support its citation-provided that it first applies for and obtains an administrative search warrant. Correspondingly, Young has a right to assert and maintain his privacy-even if the County finds that inconvenient-unless and until the County obtains and serves an administrative search warrant.

120 Wn.App at 191-192. *Shear* expressly approves of the Appeals Court burden allocation and adds that a completed critical area delineation is the

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<sup>61</sup> 273 P.3d at 491.

<sup>62</sup> 120 Wn.App. 175, 84 P.3d 927 (Div. 2, 2004) (J. Morgan, dissenting).

threshold piece of *prima facie* evidence needed for critical area enforcement. The County fails to (1) establish a critical area, and (2) fails to introduce any evidence of critical area delineation because no such evidence exists. This Court should dismiss this case under *Shear*.

**2. *Shear* Ruling Clarifies that Critical Area Must be Established with Precision Prior to Enforcement Action.**

In *Shear*, the King County Examiner determined and the Court of Appeals agreed that the County had **not** met the **burden which applies in the enforcement context** to show that an actual flood area existed on the subject property sufficient to support a violation.

**For purposes of code enforcement**, however, the [Critical Areas Ordinance] flood hazard provisions are incomplete. **For enforcement purposes** one needs also a clear and intelligible standard. KCC 21A.24.230 tells us how DDES should go about formulating such a standard, but **until that process is actually undergone, no standard exists....**

The relevant code provision states that "a flood hazard area consists of the following components" and then lists five elements, including the floodplain, the floodway, the flood fringe and channel migration zones....

**Without such a formal regulatory designation, there is no easily ascertainable adopted county flood hazard area standard applicable to the Spencer property, and the portion of the county's notice and order that cites the Appellants for conducting materials processing operations and clearing, grading and filling within a flood hazard area becomes a gesture without legal effect.**<sup>63</sup>

The King County staff argued it met its burden by introducing the Federal

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<sup>63</sup> *Shear*, Wn.App. at 570-571.

Emergency Management Act (FEMA) maps into evidence, upon which the hearing examiner found Spencer's property was within the 100-year flood area designated on the FEMA maps. King County Staff thus argues the county council defined "flood hazard area" as the 100-year flood hazard designated on FEMA maps. The Examiner rejected that argument, ruling that "DDES is required to sift through and compare the multiple sources of flood hazard data and evaluate their accuracy in formulating a relevant standard . . . **Without such a formal regulatory designation, there is no easily ascertainable adopted county flood hazard area standard applicable to the Spencer property**". *Id.* at 571.

The Appeals Court also rejected King County Staff's argument and found that for **enforcement purposes, the flood hazard areas must be established with precision.**<sup>64</sup> The missing evidence in *Shear* is repeated in the present case.

### **3. Enforcement action fails because the County has not met its burden to ACTUALLY delineate the Subject Property as a F&W Area**

The Pierce County Code, like King County, includes a code provision

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<sup>64</sup> Thus, although the county council indicated in a definition section that flood hazard areas are those areas "subject to" the 100-year floods as set forth in FEMA maps, the council in the same legislation set forth an extremely detailed process by which DDES was to examine a wide variety of sources of information on flooding, **weigh the data, and after that, designate specific flood hazard areas....**Indeed, in the very same ordinance, the council made it clear that the Department was to undertake a **specific process in delineating flood hazard areas**". *Id.* at 572.

which sets forth the procedure for determining whether an area qualifies as an actual Fish and Wildlife Area (“F&W Area”). If the area is actually determined to be an F&W Area, then enhanced land use regulations will apply to the area(s) so established. See *King County*, 273 P.3d at 496, and PCC 18E.40.030(B).<sup>65</sup>

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<sup>65</sup> B. **Habitat Assessment.** A habitat assessment is a site investigation process to evaluate the potential presence or absence of a regulated fish or wildlife species or habitat affecting a subject property.

1. The applicant may select a wetland specialist or a fish or wildlife biologist, as allowed by this Section, or Department staff to conduct a habitat assessment to determine whether or not a regulated fish or wildlife habitat area, point location, and any associated buffer are located on the site for a proposed development as outlined below:
  - a. Applicants for single-family dwellings or agricultural activities may retain Department staff to complete the habitat assessment as follows:
    - (1) Requests for Department staff to conduct a habitat assessment shall be accompanied with a fish and wildlife habitat area application and associated fee(s).
    - (2) If Department staff conducts the habitat assessment and determines that no regulated fish or wildlife habitat areas, point locations, or associated buffers are present on the site, then fish and wildlife habitat area review will be considered complete.
    - (3) If Department staff conducts the habitat assessment and determines that regulated fish or wildlife habitat areas, point locations, or associated buffers are present on the site, then the Department will offer the applicant the option of either complying with standard requirements set forth in PCC [18E.40.040](#) or seeking approval of an alternate approach. For alternate approaches, applicant shall be required to submit a habitat assessment study or a habitat assessment report as outlined in subsection [18E.40.030](#) B.1.b.
  - b. If the regulated fish or wildlife habitat area is a point location or species-related habitat area, then a fish or wildlife biologist, as appropriate, shall conduct the habitat assessment. If the regulated fish or wildlife habitat area is solely related to the presence of a natural water, then either a fish or wildlife biologist or Wetland Specialist may conduct the habitat assessment. In either instance the following documentation shall be submitted to the Department.
    - (1) If the field investigation determines that a fish or wildlife habitat conservation area, point location or associated buffer is not located on the site, then a habitat assessment letter shall be submitted for County review. The habitat assessment letter shall meet the requirements contained in PCC [18E.40.070](#) – Appendix A. (See Figure 18E.40-3 in Chapter [18E.120](#) PCC.)
    - (2) If the field investigation determines a fish or wildlife habitat conservation area, point location, or associated buffer is located on the site and the proposed

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regulated activity complies with the standards set forth in PCC [18E.40.040](#) and the buffer requirements as set forth in PCC [18E.40.060](#), then a habitat assessment study shall be submitted for County review. The habitat assessment study shall meet the requirements contained in PCC [18E.40.070](#) – Appendix B. (See Figure 18E.40-3 in Chapter [18E.120](#) PCC.)

(3) If the field investigation determines a fish or wildlife habitat conservation area, point location, or associated buffer is located on the site but the proposed development activity does not or cannot comply with the standards set forth in PCC [18E.40.040](#) or the buffer requirements as set forth in PCC [18E.40.060](#), then a habitat assessment report shall be submitted for County review. The habitat assessment report shall meet the requirements contained in PCC [18E.40.070](#) – Appendix C. (See Figure 18E.40-3 in Chapter [18E.120](#) PCC.)

(4) Habitat assessments shall be submitted to the Department for review and approval together with a fish and wildlife habitat area application and associated fee(s).

(5) Habitat assessments shall be prepared, signed, and dated by a wetland specialist, fisheries or wildlife biologist, as applicable to the particular species or habitat type.

(6) Habitat assessment reports shall address the mitigation requirements set forth in PCC [18E.40.050](#).

2. All habitat assessments submitted under the requirements of this Chapter shall, at a minimum, include the following:

- a. The parcel number of the subject property.
- b. The site address of the subject property, if one has been assigned by the County.
- c. The date and time when the site evaluation for the habitat assessment was conducted and the date when the habitat assessment was prepared.
- d. The credentials of the fish or wildlife biologist who prepared the habitat assessment.
- e. The mailing address and phone number of the property owner and the fish or wildlife biologist that prepared the habitat assessment.
- f. A detailed description of the vegetation on and adjacent to the site.
- g. Identification and a detailed description of any critical fish or wildlife species or habitats, as set forth in PCC [18E.40.020](#), on or adjacent to the site and the distance of such habitats or species in relation to the site. Describe efforts to determine the status of any critical species in the project area, including information on survey methods, timing, and results of surveys for species or suitable habitat identification.
- h. Include any information received from biologists with special expertise on the species or habitat type, such as WDFW, Tribal, USFS, or other local, regional, federal, and university fish, wildlife and habitat biologists and plant ecologists. Include any such conversations in the habitat assessment and cite as personal communication.
- i. A map showing the location of the site, including written directions.
- j. The Department may also require that the applicant request a separate evaluation of the site by WDFW staff to confirm the findings of the habitat assessment.

3. The Department shall review the habitat assessment and either:

Like the King County Code, the Pierce County Code sections which address the requirements for establishing a F&W Area lists a variety of sources from which Planning and Land Use Services might identify “potential” Fish & Wildlife Habitat Conservations Areas. *Id.* An unrelated application is **not** one of the available sources. *See generally* PCC 18E.10.140- Appendix A (Mapping sources). And, notably, despite all the County testimony which surmises the presence of a F&W Area solely based on Department of Fish and Wildlife water type reference maps, PCC 18E.40.020 (E), *Potential Fish & Wildlife Conservation Areas*, which lists habitat mapping areas which are to be used to determine the presence of Fish & Wildlife Conservation Areas does not include the Water Type Reference Maps 18E.10.140- Appendix A (E) as an authorized mapping source (limits to mapping sources described in PCC 18E.40.020(A) and (G)). Further, even if a potential F&W Area is identified, that is only step one. The County Code explicitly concedes that county mapping is imprecise and more is required in order to establish a wildlife habitat area with certainty:

....the Pierce County Critical Areas Atlas-Critical Fish and Wildlife Habitat Area Maps **provide an indication** of where **potential** regulated fish and wildlife habitat areas are located within the County.

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- a. Accept the habitat assessment and approve the critical fish and wildlife application; or
  - b. Reject the habitat assessment and notify the applicant in writing of the reasons why the habitat assessment was rejected.

The presence or location of a potential regulated fish or wildlife species, habitat area, or point location that has not been mapped, but that may be present on or adjacent to a site, shall be determined using the procedures and criteria established in this Chapter.

PCC 18E.40.030A(1). Thus, like in King County, more is needed to establish a critical area with certainty beyond mere indication; the Pierce County Code requires a study / report per its Code to actually establish the Fish & Wildlife Habitat Conservation Area.<sup>66</sup> It is axiomatic that a determination of the actual existence of a wildlife habitat critical area is an essential element to enforcing a wildlife habitat area alleged violation.

PCC 18E. 10.110.<sup>67</sup> Like King County in *Shear*, Pierce County has **not** introduced evidence into the record of this enforcement proceeding that a habitat area actually exists on the Property in question. The County's lack of evidence and any definitive evidence of a critical area on this Property, under *Shear*, means that the enforcement action fails because the County has not met its burden under *Shear* to (1) establish the existence of a critical area and (2) establish a violation occurred in that critical area.

The *Shear* opinion expressly defines **what** is required to support a critical area violation **in an enforcement context**: An actual study or report which establishes the fact of and not mere allegation that a critical

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<sup>66</sup> See PCC 18E.40.030 A and B for the extensive determination process.

<sup>67</sup> *PCC 18E.10.110 Compliance.*

B. When a critical area or its required buffer has been altered in violation of this Title, the Department shall require the property owner to bring the site into compliance

area actually exists. The reports will of course vary by local rules, and Pierce County's required steps to establish a F&W Area are much more complex than that of King County in *Shear*, which was more of an academic map analysis exercise.

*Shear* also states **who** has the burden to present that evidence of the critical area: ***the jurisdiction which seeks to enforce***, and **not** the alleged violator has the burden to come forth with *prima facie* evidence regarding the alleged violation.<sup>68</sup> Here, the record clearly shows that Pierce County has **not** met its burden to establish that a Fish & Wildlife Habitat Conservation Area actually exists on the Property. Applying *Shear* to this case, the County's lack of evidence of an established critical area means that the County lacks any basis to declare the Property any sort of critical area and or to pursue the present enforcement action.

#### **4. County Admits it Lacks Evidence of Actual Critical Area on This Site**

The County admits it lacks evidence of an actual F&W Area in several places throughout its Staff Report:

- **Staff Report Introduction AR 20:** alleged violation “within 315 feet of wetland *indicators* and within 165 feet of a fish and wildlife ***indicator***”, “Staff observed hydophytic vegetation (a wetland

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<sup>68</sup> *Shear*, 273 P.3d at 495-496. *Shear*, 273 P.3d at 495-496; *Young*, 120 Wn.App. 175 at 191J. Bridgewater dissent instructs that once the suspicion of a wetland land use violation arises, then the County must obtain administrative search warrants in order to meet its enforcement burden to show that the critical area exists.

*indicator*) and a stream”; and “Exhibit 5B (AR 109) County View Map showing *potential* Wetland and Fish & Wildlife Habitat Conservation Areas”<sup>69</sup>

- **Staff Report “Violation” Section AR 24:** “Staff observed a .....within a *potential* fish and wildlife habitat area.”
- **AR 71-May 4 cover letter to proposed Water Type Verification “approval”.** “The critical areas and **buffers have not been professionally surveyed. Only professionally surveyed boundaries and a site plan prepared by a professional surveyor** will show the exact fish and wildlife conservation areas and buffer boundaries”.
- **AR 74-May 4 proposed Water Type Verification “approval”.** “**Only professionally surveyed boundaries and a site plan prepared by a professional surveyor will show the exact** fish and wildlife conservation areas and buffer boundaries”.
- **AR 78 -** alleged violation “within 315 feet of wetland *indicators* (County Wetland inventory and hydro centerline) and within 165 feet of a fish and wildlife *indicator* (hydro centerline)”, “Staff observed hydrophytic vegetation (a wetland *indicator*) and a stream”; and “**AR 107**, County View Map showing *potential* Wetland and Fish & Wildlife Habitat Conservation Areas
- **AR 94 -August 9 2016 Decision on Administrative Review: County Staffer Mary Van Haren** observed “...where a drainage course (fish and wild life *indicator*) was present.”

The County’s lack of evidence of an actual, established critical area means that the County cannot establish a violation for an un-established critical

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<sup>69</sup> The County is NOT charging wetland violations, so any reference to alleged wetlands are irrelevant. Further County Exhibit 5B is inadmissible as it is prohibited by PCC 18.140.040(B).

area. The present enforcement action fails.

**5. *Shear* expressly grants the Hearing Examiner authority to hear the dispositive defenses which support the Appellant’s requested relief of an unconditional dismissal.**

Another issue resolved by *Shear* involves whether the Hearing Examiner may address this type of defect. **Yes.** The Court of Appeals found the Examiner’s authority includes determining what “standard” or criteria is required to establish whether a violation exists, and ruling on whether the municipality presented evidence to meet that standard. 167 Wn.App at 574. Here, in keeping with *Shear*, the Examiner erred by not ruling rule that **in this enforcement context**, the County must first establish the fact and not mere allegation of a critical area on the Subject Property, and that the County lacked this required evidence. The Hearing Examiner had jurisdiction to dismiss the County’s enforcement action, and erred in not doing so under the principal articulated in Justice Morgan’s dissent in *Young v. Pierce County*, 120 Wn.App. 175, 190, 84 P.3d 927 (Div. 2, 2004), and expressly approved of by the *Shear* court.

**6. The County Cannot Use the 2007 Grazyna Sobezyk “Data” as Basis for 2016 Enforcement Action**

The primary information apparently relied on by the County as basis to allege the existence of a potential F&W Area for this enforcement action was a critical area notice recorded against another property nine years ago. Pierce County maintained at hearing that an F1 stream – the most

protected type – existed on the Subject Property based on a prior unrelated application [application 553137] on a nearby property, which is separated from the Subject Property by a road, and where that owner in 2007 had stipulated to that fact from 2007. AR 74:

Based on our research and a site visit, a stream was identified within your parcel. This drainage course was typed as a F1 through application 553137 on the upstream parcel 0417066004.

Much like the County does not allow applicants to submit ten year old inspection and delineation reports from neighboring properties to obtain building permits, the County cannot base its enforcement action on the same stale and irrelevant documents, like it does here.

There are additional defects in the County’s use of the purported existence of a 2007 F-1 “stream” delineation for a different property in this enforcement action here. The 2007 file containing the 2007 F-1 “stream” delineation used by the County was not introduced into evidence by the County, or provided to the accused property owner. Staff merely described the fact of 2007 water typing, including admitting that it was established using more “Aerial photography, orthophotos, planimetrics, satellite data or any other aerial surveillance techniques,” which are all now prohibited in land use enforcement actions. The County staff also testified that despite relying on the 2007 water typing mapping, Staff was unaware that Department of Fish & Wildlife regulations require fish habitat water type maps be updated every five years. See WAC 222-16-

030. Staff on cross exam was unable to confirm that the water type map it relied on from the 2007 data had been updated in the 11 years since. Instead, Staff testified that the “stream” indicators were “confirmed” by her on the ground field observations<sup>70</sup>. However, that same Department of Fish & Wildlife regulation WAC 222-16-030 provides that “Except for these periodic [five year] revisions of the maps, on-the-ground observations of fish or habitat characteristics will generally **not** be used to adjust mapped water types”. Staff testified that in addition to the 2007 data, and her “field observations,” she also used **AR 107** to “type” the Subject Property’s F-1 stream indicator, in support of the enforcement action. Yet, Staff conceded that **AR 107** consists of “Aerial photography, orthophotos, planimetrics”, which are expressly prohibited in enforcement actions. A 2007 stream typing on a *different* property is not a cognizable basis for determining what conditions exist now in 2016 on a different property. *See* PCC 18E.040. This Court should find that relying on what existed on other properties nearly 10 years ago through use of prohibited materials is not valid, pre-enforcement delineation, sufficient to support this action.

**7. County Reliance on 2007 Data is Procedurally & Constitutionally Faulty.**

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<sup>70</sup> These are the same “filed observations” where Staff admits she entered on to the property owner’s private property without consent to observe.

Pierce County Staffer's "extrapolation" about where critical areas might exist on the Subject Property violates the property owner's due process. There is no evidence that the County provided Appellant any opportunity to be heard during the 2007 water typing process of application/stipulation No. 553137. The County even failed to provide the property owner a copy of the 2007 water typing process of application/stipulation No. 553137, and failed to place it in evidence. Further, the Pierce County enforcement codes have been updated since 2007. AR 170. Pierce County cannot use results derived from the County's 2007 code against Ms. Dotson and the Property. Any current enforcement action must be based upon the code in effect at the time of the notice of violation.

"The fourteenth amendment to the federal constitution provides that no state shall 'deprive any person of life, liberty, or property, without due process of law.' Article 1, section 3 of the Washington State Constitution similarly provides that '[n]o person shall be deprived of life, liberty, or property, without due process of law.'"<sup>71</sup> Although 'the boundaries of the concept of due process are not capable of precise formulation,' at a minimum it requires "the opportunity to be heard," and 'notice reasonably

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<sup>71</sup> *Hasit LLC v. City of Edgewood*, 179 Wn.App. 917, 952-53, 320 P.3d 163 (Div. 2, 2014).

calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections, Thus, due process requires “notice and opportunity for hearing appropriate to the nature of the case” before a state deprives a person of “life, liberty or property.” Furthermore, the opportunity “must be granted at a meaningful time and in a meaningful manner”.<sup>72</sup>

Pierce County committed the precise error that Washington’s Supreme Court rejected in *Post v. City of Tacoma*, 167 Wash. 2d 300, 313, 217 P.3d 1179 (2009). *Post* explains:

Though the procedures may vary according to the interest at stake, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). To determine whether existing procedures are adequate to protect the interest at stake, a court must consider the following three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The private interest that Ms. Dotson seeks to vindicate is the right to ability to engage in mundane gardening activities and boarding her pet at home without erroneous penalties being assessed. The risk of having the Property deemed impaired land by the County is evident. Pierce County

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<sup>72</sup> *Hasit*, internal citations omitted.

did not establish that the Subject Property's owner had opportunity to be heard on the underlying "approximation" that her Property is somehow a critical area because her neighbor's was in 2007. Appellant's fundamental due process right to be heard at a meaningful time is violated. The effect of the County's error is that the County now seeks nine years later to enforce violations against the Appellant Property Owner, with penalties of thousands of dollars, and the potential for misdemeanor charges. **AR 49.**

Further, in the nine years since the County accepted the 2007 data of application/stipulation No. 553137, the County has amended its zoning code multiple times. *Brown v. Seattle*, 117 Wn.App. 781, 793, 72 P.3d 764 (Div. 1, 2003), prohibits the County from enforcing anything but the land use code **in effect at the time of the issuance of the violation.**<sup>73</sup>

In summary, the property owner had no notice of the 2007 proceedings, was not given any appeal of the underlying critical area determination of her neighbor's property, had no reasonable indication that such information would be used against her, yet that is the primary evidence upon which the County relies in this enforcement action. This flawed County process must be found to be reversible error under *Post*.

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<sup>73</sup>*Brown v. Seattle*, 117 Wn.App. 781, 793, 72 P.3d 764 (Div. 1, 2003): "The City also argues that if the court does not construe the exemption as it urges, this interpretation will vitiate the shoreline regulations and the SMA. But in fact, the City has already amended the code to prevent that by requiring use permits for moored vessels...The exemption [at the time of NOC issuance] contains no qualifications or exceptions and is not limited to vessels that are traveling over water. Brown's use of the Challenger for lodging is not a regulated **use under the code in effect at the time of the issuance of the NOV.**

**C. Enforcement Action Fails – Lack of Legally Admissible Evidence**

**1. County Site Visits Upon Which Notice Apparently Is Based Are Not Constitutionally Permissible.**

All of the various County Staff /agents’ “evidence” was gathered in violation of the Subject Property Owner’s constitutional rights.

Accordingly, all such evidence is inadmissible and should be disregarded.

Absent the improperly gathered “evidence” the County lacks any basis for the allegations, and the action should be dismissed.

The HE Report at AR 5 describes the County Staff testimony: “55th is a private road and she entered upon the private road. She did not feel it necessary to obtain consent to drive the private road. She did not apply for an administrative warrant.” And “She has had no formal training in enforcement procedures, but has had conversations with the County attorney about the process. These conversations happen sporadically and the last time it occurred was a couple of years ago, maybe in 2014.” **AR 4.** The County’s sole witness testified that her observations came from a site visit on October 15, 2015, took place in two locations (1) 296<sup>th</sup> street, a public road, and 55<sup>th</sup> Avenue , a private street located on Appellant’s private property. **AR 109.** She conceded under oath that the only vantage point where she could observe the “evidence” of the alleged violation was

after entering upon the Property Owner's private property<sup>74</sup>:

“Q: So as I read this correctly, from your vantage point on 296th, you do not observe a stream within the paddocked area -- or what you call a stream within the paddocked area; correct?

A: Um, correct.

Q: And it's only on the north end of 55th, after traveling almost the full distance of Ms. Dotson's property on 55th Avenue East that you're able to see what you testified is a water course in the paddock?

A: Correct.”

On re-direct, the County witness re-affirmed her inability to observe any “flow indicators” from outside the private property, on the 296<sup>th</sup> street public location.

Q.....So Ms. Van Haren, Ms. Lake had you draw on the map what you could see from 296th when you were out at the site on October 15th, 2015.

A: Yes.

Q: And I believe the lines that you were drawing showed that you could not see the hydro center line or stream actually going through the paddock area; is that correct?

A: From 296th, I would agree that I probably couldn't see it as far as the paddock fence.<sup>75</sup>

The County presented no evidence of Appellant's consent for County enforcement to undertake the October 15, 2016 entry onto her property or for any search. Appellant's legal counsel at the hearing outset objected to all inadmissible evidence, the County materials obtained during and as a result of the October 15, 2015 County search. **TR 5:13-16.** After

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<sup>74</sup> Transcript (TR) at 84:12-21.

<sup>75</sup> TR 102: 114-18. To the extent that the HE determined that the violation was observed without going on to the private road, the HE also errs, based on the above testimony, as no facts in the record support that finding. See also Transcript (TR) at 84:12-21.

Appellant's counsel objected early on in the hearing<sup>76</sup>, the HE ultimately the Examiner allowed the disputed material.<sup>77</sup> In his decision at hearing and in his written Decision, the HE erred in allowing/considering evidence gathered during the illegal search. The HE first posits that he has no authority to rule on constitutional issues, but then, goes on to rule to allow the tainted evidence, apparently because there was no gate to bar access to the private road and there was not a "No trespass sign":

Appellant raises numerous issues regarding both State and Federal constitutional violations that the Examiner has no authority to resolve. However, concerning the issue of illegally obtained evidence, 55th Avenue East is neither gated nor posted with "No Trespassing" signs, and Ms. Van Haren did not enter appellant's parcel. Furthermore, the Examiner has approved numerous, large subdivisions served exclusively by private roads. Pierce County will not allow security gates on public roads, to include cul-de-sac roads that serve single-family residential subdivisions. The Examiner considered all evidence presented at the hearing and hereby denies all of Ms. Lake's objections to the entry of said evidence into the record.<sup>78</sup>

In so ruling, the HE erred in applying the law to the facts, and relied on facts not supported by the evidence. Of course, neither omission of gate or sign cures an illegal, non- consensual search viewed from private property, as discussed below. The HE also erred as the HE's contention that "Ms. Van Haren did not enter appellant's parcel", is flatly contradicted by the

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<sup>76</sup> The Hearing Examiner (HE) noted he would consider Petitioner's counsel's objection as "continuing throughout her [the County Staffer's] testimony" TR 8:14-16,

<sup>77</sup> TR 63:6-10, "I have some problems with going on 55th. But I'm going to go ahead and admit the evidence for the purpose of this hearing, and I'm going to revisit the -- the evidence when I'm making the decision."

<sup>78</sup> HE Decision at Conclusion 32, AR 11-12.

record. See **AR 109**, which depicts the Subject private Property bounded by a yellow line. The private road of 55<sup>th</sup> Avenue is completely on Ms Dotson's subject property, as the HE himself noted at the hearing:

You know, I -- I have some concerns regarding on private -- going on private property. I mean, I look at the map here and -- and, um -- um, and the road is completely on Ms. Dotson's property.

To the extent that the HE determined that the violation was observed without going on to the private road, the HE also errs<sup>79</sup>. See **AR 8**, HE FF no.7, which claims: Ms Van Haren 'Noted a stream flowing south from the central portion of the parcel through a culvert under said road.' The record flatly does not support this finding. Ms Haren never testified seeing any water flow – she testified at most she saw “flow indicators” (which included such non-specific items such as “low areas” repeatedly.<sup>80</sup> See

**TR 103:5-7:**

Q...So my question is, from 296th, what indicators of potential fish and wildlife habitat were you able to see?

A: The -- the topographic low area, the culvert. These are all indications of flow -- or of a low area where water flows. Um, those

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<sup>79</sup> See FF No. 9, AR 8. “Ms. Van Haren testified that she never entered appellant's parcel and therefore did not personally observe the presence of a stream on the site or the presence of a stream within the horse paddock area. Instead, Ms. Van Haren relied upon her observations at the culverts beneath 296th Street and 55th Avenue as well as a view into the site from 55th Avenue. She observed water flowing from the site into the culvert beneath 296th Street, observed a low topographical drainage in the culvert area on 55th Avenue, and a continuation of the drainage to the south through the paddock.” This Finding is not supported by the record.

<sup>80</sup> TR 98:3-7, “ A: The hydro center line drawn on there. The aerial photo shows vegetation. The hydro center line shows the indicator from the DNR typing. So the aerial photo doesn't establish the hydro center line, per se. That's what the field observation does. The culvert, the swale area.”

were probably the key ones.

And also see AR 8:18-19 “potential”, 8:23 “ indicators”, 10:18 “indicators”, 11:6-7 “indicative”, 11:16-21 “influence of water”, 14:1-2, 54:1-2, 59:6-9, 50:8-10, 61:2-7, 68:3-9 “possibility,” 68:16-17 “indications”, 69:405 “ indicators”, 70:3-6 “indicative of a potential” 71:15-23 “potentially regulated”, 72:1-6, 87:13-20, 103:3-4, “indicators” to list a few. In allowing the ill-obtained material which flowed from the non- consensual, warrantless search, the HE ignored constitutional protections and erred.

## **2. Washington Constitution Affords Greater Protections than US**

Washington’s Constitution Art. 1, Sec. 7 is explicitly broader than the US Constitution’s 4th Amendment, and “clearly recognizes an individual’s right to privacy with no express limitations.” *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833, 838 (1999)(citations omitted). The prohibition against warrantless searches is subject to limited and narrowly drawn exceptions. *Id.* at 349.

## **3. Burden is On Government Agency To Justify Warrantless Searches Based on Narrow Exemptions.**

As a general rule, **warrantless searches and seizures are per se unreasonable.** *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). Further, *the burden is always on the state* to prove that one of the narrow exceptions exist. *Hendrickson*, 129 Wn.2d at 71. The County

failed to do so completely.

#### **4. Requirement for Warrant Or Exceptions Apply to Administrative Actions.**

The fact that a search is part of an administrative or regulatory program or has a purpose other than criminal prosecution also does not affect an individual's reasonable expectation of privacy in the premises being searched.<sup>81</sup> Under either a criminal or administrative search, as occurred here, a state agency is required to obtain a warrant prior to a search absent specific and “closely guarded” exceptions to the rule.<sup>82</sup> The protections of the U.S. Constitution Fourth Amendment As applied to the states via the 14<sup>th</sup> Amendment and article I, section 7 of the Washington Constitution extend to administrative and regulatory searches.<sup>83</sup>

#### **5. The ‘Open View Doctrine’ does not apply**

No “Open View Doctrine,” or “Plain View Doctrine,” warrant exceptions apply. The evidence obtained by the County was done so after County agents Van Haren and or PC Conservation District staff unlawfully entered onto and /or obtained illegally enhanced or aerial

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<sup>81</sup> See *Camara*, 387 U.S. at 528-29 (search of home for housing code violations); *See v. Seattle*, 387 U.S. 541, 545-46, 87 S. Ct. 1737, 1740-41, 18 L. Ed. 2d 943, 947-48 (1967) (search of commercial premises for fire code violations).

<sup>82</sup> *Michigan v. Clifford*, 464 U.S. 287, 294, 104 S.Ct. 641 (1984).

<sup>83</sup> See Justice Charles W. Johnson, Article, Survey of Washington Search and Seizure Law: 1998 Update, 22 Seattle U. L. Rev. 337, 529-533 (1998). *Camara v. Municipal Court*, 387 U.S. 523, 523-32, 87 S. Ct. 1727, 1727-33, 18 L. Ed. 2d 930, 930-38 (1967).

photos of the Subject Property. The open view doctrine applies to observations made “while lawfully present at the vantage point.”<sup>84</sup> “It is clear that police with legitimate business may enter areas of the curtilage which are impliedly open.”<sup>85</sup> Here, no photos originated from a lawful vantage point, because for one reason, the Subject Property (private) and alleged paddock (fenced) is not “impliedly open,” thus the exemption, if claimed, does not apply. The open-view doctrine further states that, “contraband that is viewed when an officer is standing in a lawful vantage point is not protected.”<sup>86</sup> This doctrine reasons that no ‘search’ has occurred where an officer is lawfully present at a vantage point and detects something by using one or more of his or her senses<sup>87</sup>. However, here the County’s offered photos and testimony establish that the County is relying on illegally obtained observations and illegal enhanced aerial photographs of the private property. In no case were County staff/agents/officers operating from a lawful vantage point.

In a case very similar to this, *State v. Johnson*, the Court of Appeals found that Drug Enforcement Agency (DEA) agents were not lawfully on the Defendant's property. DEA agents entered the curtilage of the

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<sup>84</sup> *State v. Rose*, 128 Wn.2d 388 (1996).

<sup>85</sup> *State v. Seagull*, 95 Wash.2d 898, 902, 632 P.2d 44 (1981).

<sup>86</sup> *State v. Neeley*, 113 Wash.App. 100, 109, 52 P.3d 539 (2002)(emphasis added).

<sup>87</sup> *Neeley*, 113 Wash.App. at 109, 52 P.3d 539 (quoting *State v. Cardenas*, 146 Wash.2d 400, 408, 47 P.3d 127, 57 P.3d 1156 (2002), cert. denied, 538 U.S. 912, 123 S.Ct. 1495, 155 L.Ed.2d 236 (2003)).

defendants' property via the access road without a warrant to investigate an alleged drug operation. There the court observed:

The DEA agents were not using the road merely as a way to gain access to the Johnsons' house. Rather they were using it as the most convenient route on which to trespass on the Johnsons' property. **The record demonstrates that the DEA agents never attempted to approach the house or contact the occupants. Indeed, it is obvious that they had no intention of doing so . . . their only purpose was to conduct a search and gain information by trespassing on private property.**<sup>88</sup>

In this case, the County staff/agents/officers viewed through

*enhanced* means areas of the property not visible from the public way in order to investigate alleged code violations and photograph the property. They were not “lawfully present,” and so the open view doctrine does not apply. *Id.*

#### **6. The Plain View Doctrine Also Does Not Apply.**

The elements to the plain view doctrine are, “(1) a prior justification for intrusion, (2) inadvertent discovery of incriminating evidence, and (3) immediate knowledge by the officer that he had evidence before him.”<sup>89</sup> Since the County’s sole justification for entry on to the property was for investigation, there can be no “a prior justification for intrusion,” or “inadvertent discovery of incriminating evidence”; thus this exception to the warrant requirement also cannot apply.

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<sup>88</sup> *State v. Johnson*, 75 Wn. App. 692, 704-05, 879 P.2d 984 (1994).

<sup>89</sup> *State v. Kull*, 155 Wn.2d 80, 85, 118 P.3d 307 (2005), citing *State v. Chrisman*, 94 Wash.2d 711, 715, 619 P.2d 971 (1980).

## 7. County Fails to Present Evidence of Consent.

The County didn't even try to argue that consent was granted for the entries, thus nullifying the need for a warrant. It didn't even attempt to argue that if they were not told leave, and or no objections were made to the improper search, consent was somehow given. The true standard for determining consent to a warrantless entry is that consent must be **affirmatively given**, it **cannot** be waived by inaction.<sup>90</sup> However, in his Findings of Fact No 11 (**AR 9-10**), the HE calls out that when Ms Dotson signed the "Master Application" it included a "grant" to "agencies to which this application is made or forwarded the right to enter the above location to inspect the proposed, in progress, or completed work..."*id.* Any reliance on this is wholly misplaced. Even if the "grant" could meet the test of a knowing informed consent, which it does not, the dates are wrong. The "grant" was signed on March 17, 2016. **AR 9-10**. The County's entry on to Ms Dotson's private occurred on October 15, 2015, months after the grant date. The HE also makes passing reference to a "subsequent site visit" possibly inferring that the "subsequent visit" occurred after the "grant" was signed, quoting from County Exhibit 3B, **AR 48-49**, when he makes reference to "a subsequent visit". Not so.

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<sup>90</sup> See *State v. Walker*, 136 Wash.2d 678, 682-86 (1998). In addition, the County has been on notice since at May 18, 2016 by written letter that they lacked consent to any entry onto the Subject Property. See **Staff Exhibit 3E, AR 77**.

Exhibit 3B (**AR 48-49**) is the County's Compliance Letter with date of November 25, 2015 – which also well before the “grant” by the Property Owner.<sup>91</sup> In any case, the County in no way met any of the three requirements for establishing a consensual warrantless search: “(1) the consent must be voluntary; (2) the person granting consent must have authority to consent; and (3) the search must not exceed the scope of the consent.”<sup>92</sup> “Consent” requires affirmative permission to enter the property, not mere acquiescence. Factors in determining consent include: (1) whether the consenting person was in custody; (2) whether officers' guns were drawn; **(3) whether the person was told he or she had the right to refuse a request to search**; (4) whether the person was told he or she was free to leave; (5) whether Miranda warnings were given; and (6) whether the person was told a search warrant could be obtained.<sup>93</sup> In the present case, not one of the six factors was met by County staff. The County cannot simply ignore the rule that mere acquiescence to lawful authority is insufficient to constitute consent.<sup>94</sup> The County did not meet this burden to show valid consent. Because the County testimony, observations and photos are the result of warrantless searches, and because

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<sup>91</sup> The HE completely leaves out reference to the Petitioner Property Owner's Notice of No Trespass letter sent to the County dated May 18, 2015 which completely revoked any “grant” **AR 77**, County Exhibit 3E.

<sup>92</sup> *Walker*, 136 Wash.2d at 682, 965 P.2d 1079.

<sup>93</sup> *United States v. Castillo*, 866 F.2d 1071, 1082 (1988) .

<sup>94</sup> *United States v. Spires*, 3 F.3d 1234, 1237 (9th Cir. 1993).

the County has not established its burden to show that an exception applies, the County observations of alleged “stream” and its photos and all evidence built upon aerial observations are inadmissible.

**8. County Fails to Establish Info Alleged in Ecology Complaint and Subsequent Coordinated Investigation with Pierce County Conservation District Staff Was Legally Obtained.**

Here, the County reports that it received a complaint from Ecology and then initiated this action. **AR 119-22**. The complaint does not specify Ecology’s vantage point on the private property. **AR 123-177** show coordinated investigation between County and PC CD Staff, including as the very basis of the enforcement, site photos and prohibited Aerial photography, orthophotos, planimetrics, satellite data and other aerial surveillance techniques.<sup>95</sup> Pierce County has not put anything into evidence explaining whether Ecology or PCCD obtained a search warrant, or, lack a warrant, any valid consent. Warrantless searches are per se unreasonable.<sup>96</sup>

**9. Exclusionary Rule Is Remedy for Warrantless Searches.**

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<sup>95</sup> Staff testified that she used the 2007 data, her “field observations” and AR 107, a GIS produced aerial map with planimetrics to type the F-1 stream indicator, in support of the enforcement action. Staff testified and confirmed that AR 107 consists of more, prohibited “Aerial photography, orthophotos, planimetrics”.

**All County PALs materials produced and actions were based on the November 13, 2015, Email from Mary Van Haren, County PALs Staff to Renee Skaggs, Pierce County Conservation District, AR 162, which contains “aerial with the planimetrics” showing subject site and buildings as well as reference to 3 photos of on-site buildings. AR 162 and 123-126.** And see TR 27:5-17 and TR 29:2-5.

<sup>96</sup> *State v. McKague*, 143 Wash. App. 531, 539, 178 P.3d 1035, 1038 (Div. 2, 2008).

WA Article I, section 7 provides greater protection of a person's right to privacy than the US Fourth Amendment.<sup>97</sup> The exclusionary rule has been extended to Washington's heightened protections against searches of homes under WA Art. 1 § 7.<sup>98</sup> The County's exhibits which are aerial photos, or which were created in reliance on aerial photos (Staff Ex(s) 3B, 3C, 3D, 5B, 6, and 7,) (AR 48-9, 50-70, 71-76, 107, 108 and 109,) or which are photos taken as a result of zoom enhancement (AR 105-6) are inadmissible, and HE erred in admitting.

**D. HE Erred in applying “Contract Principles” In Enforcement Context.**

In light of the County's fatally flawed enforcement, the HE sua sponte and bizarrely turned to “contract law” to find that the County's notice of violation was actually “in the nature of a specific performance action to compel appellant to perform her remaining obligation” under what the HE termed as a “settlement agreement.” AR 4-15.<sup>99</sup> The two, decades old

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<sup>97</sup> *State v. O'Neill*, 148 Wash.2d 564, 584, 62 P.3d 489 (2003); accord *State v. Ferrier*, 136 Wash.2d 103, 111, 960 P.2d 927 (1998).

<sup>98</sup> In the beginning, all evidence obtained by an unconstitutional search and seizure was inadmissible in a federal court regardless of its source *See Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), *overruled on other grounds, citing Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914). Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). *State v. Young*, 123 Wn.2d at 196.

<sup>99</sup> HE No. 8. “Although not argued by Pierce County, appellant and the agencies involved

cases cited by the HE generally guide on the issue of when a compromise, settlement, or release is a contract; and provide that a “settlement agreement” will be construed in light of its language and the circumstances surrounding its making. *Id.* Applying contract principle in this present enforcement context makes no sense. This is **not** a “private dispute, as was addressed in *Stottlemire v Reed*, 35 Wn. App. 169 (1983), and *In Re The Marriage of Ferree*, 71 Wn. App. 35 (1983), ““First, the law favors the private settlement of disputes and is inclined to view them with finality” *id.*, quoting *Snyder v. Tompkins, Supra* (citations omitted) at 173. Here, Appellant was threatened by a government agency, under penalty of civil and criminal prosecution (AR 48-9), which as a result, she

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in resolving the critical areas violation essentially entered into a binding settlement agreement. Said agreement was partially performed by appellant and fully performed by PALS, ECY, and PCD. Partial performance by appellant included submittal of a completed Resource Management Application Checklist and Master Application and payment for PALS staff to prepare a Habitat Assessment. Appellant also signed the Farm Resource Management Plan prepared by PCD. She signed an agreement authorizing ECY to approve a grant to cover the costs of corral relocation. However, appellant did not finally perform the settlement agreement as she refused to sign and record the Critical Area Approval. On the other side of the settlement agreement, PALS prepared the Habitat Assessment and the Critical Area Approval. PCD prepared the Farm Resource Management Plan for appellant's parcel. ECY arranged for a grant to cover the costs of corral relocation. The parties' performance also provided the consideration for the agreement.

**By refusing to sign and record the Critical Area Approval, appellant breached the settlement agreement** she entered with, PALS, PCD, and ECY to resolve the critical area violations on her parcel. **PALS issuance of the NOTC is in the nature of a specific performance action to compel appellant to perform her remaining obligation under the settlement agreement.** See *Stottlemire v Reed*, 35 Wn. App. 169 (1983), and *In Re The Marriage of Ferree*, 71 Wn. App. 35 (1983).

took initial steps which the Examiner described as “enforcement options” AR 9. Nor was any “settlement process” complete. AR 74, the County’s May 4, 2016 Notice, describes that Appellant was required to execute and record restrictions against her property, and that the recording of the restrictions was needed “ in order to finalize the review process”. Appellant refused, and instead chose the alternative– to appeal. Nor do these circumstances support that any “Settlement Agreement” was knowingly made. “The court considers several factors to determine whether the release was fairly and knowingly made.<sup>100</sup> Those factors are:(1) the peculiar dignity and protection to which the law cloaks the human person, as contrasted with articles of commerce; (2) **the inequality of the bargaining positions** and relative intelligence of the contracting parties; (3) the **amount of consideration received**; (4) **the likelihood of inadequate knowledge concerning future consequences of present injury** to the human body and brain; and (5) the haste, or lack thereof, with which release was obtained.”<sup>101</sup>

Further, the HE admits this novel theory was not argued by the County. Any resolution of a dispute over whether a “Settlement Agreement” was actually reached” is to be determined in a manner similar

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<sup>100</sup> *Finch v. Carlton*, 84 Wn.2d 140, 144-45, 524 P.2d 898 (1974).

<sup>101</sup> *Stottlemire v Reed*, *Supra* at 146, *quoting Finch V. Carlton*, 10 Wn. App. 32, 39, 516 P.2d 212 (1973) *Emphasis provided*.

to Summary Judgement, with the burden on the moving party.<sup>102</sup> Here, the County is apparently the moving party. Appellant would be the non-moving party – but both parties were faced with *burdens they did know existed*.<sup>103</sup> Here the HE application of contract law is wholly inappropriate. And, if applied, the County failed to reach its burden.

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<sup>102</sup> *In Re The Marriage of Ferree*, 71 Wn. App. 35 (1983), at para 3-5: “The burden is on the moving party to prove there is no genuine dispute regarding the existence and material terms of a settlement agreement. See *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985) (in summary judgment proceedings, burden is on moving party to show no genuine dispute). This is but a specific application of the general rule that one who would recover on a contract must prove its existence and terms. *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 944, 640 P.2d 1051 (1982) (proponent of contract must prove its existence); *Western Wash. Laborers-Employers Health & Sec. Trust Fund v. Merlino*, 29 Wn. App. 251, 255, 627 P.2d 1346 (1981) (proponent of contract must prove its terms); *Peoples Mortgage Co. v. Vista View Builders*, 6 Wn. App. 744, 747, 496 P.2d 354 (1972) (proponent of contract has burden of proving promise, consideration, breach and damages)”.

<sup>103</sup> *In Re The Marriage of Ferree*, 71 Wn. App. 35 (1983): “Summary judgment procedures involve several steps which, in combination, ferret out the presence or absence of a genuine dispute of fact. The moving party must initially produce affidavits, declarations or other cognizable materials that show the absence of a genuine dispute of fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302, 616 P.2d 1223 (1980); *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).

If and only if the moving party does this, the nonmoving party must produce affidavits, declarations or other cognizable materials that show, internally or by comparison, the presence of a genuine dispute of fact. *Young*, 112 Wn.2d at 225; *Graves*, 94 Wn.2d at 302. The nonmoving party cannot rely on the oral assertions of counsel that are not made under penalty of perjury, *Wilkerson v. Wegner*, 58 Wn. App. 404, 408 n.3, 793 P.2d 983 (1990), or that have no basis in personal knowledge or the record. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 880, 431 P.2d 216 (1967) (attorney's verification of pleading insufficient when based on hearsay, or on information and belief); see *W.G. Platts, Inc. v. Platts*, 73 Wn.2d 434, 443, 438 P.2d 867, 31 A.L.R.3d 1413 (1968) (insufficient to make "mere assertion that an issue exists without any showing of evidence") (citing *Reed v. Streib*, 65 Wn.2d 700, 706, 399 P.2d 338 (1965)). The court must read the parties' submissions in the light most favorable to the nonmoving party, *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d at 226; *Jacobsen*, 89 Wn.2d at 108-09, and determine whether reasonable minds could reach but one conclusion. If so, summary judgment is appropriate. *Hartley*, 103 Wn.2d at 775. Otherwise, it is not.

#### IV. CONCLUSION

This Court should grant this appeal. This enforcement action is based entirely upon wholly improper materials: (1) the original false “complaint,” (2) material expressly prohibited by County Code, (3) unconstitutional intrusions, lacking knowing or any consent, and (4) stale, irrelevant and or unconstitutional evidence. Even with its ill obtained materials, the County also still failed to meet its burden to establish that an actual F&W Area or related violation exists. For the above reasons, this appeal should be granted. The Court should dismiss the alleged violation outright, or overturn and remand with direction to exclude all of the unconstitutionally derived materials, and those prohibited by County Code. Appellant also requests reasonable attorney fees and costs and any other relief the Court deems just and reasonable under the circumstances.

RESPECTFULLY SUBMITTED this 8<sup>TH</sup> day of January 2018.

GOODSTEIN LAW GROUP PLLC

By: s/Carolyn A. Lake

Carolyn A. Lake, WSBA #13980

Attorneys for Appellant Dotson

**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

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DATED this 8th day of January 2018, at Tacoma, Washington.

s/Carolyn A. Lake  
Carolyn A. Lake

# GOODSTEIN LAW GROUP PLLC

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**Appellate Court Case Title:** Kimberlyn Dotson, Appellant v. Pierce County, Respondent  
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