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

KIMBERLYN DOTSON, Appellant

v.

PIERCE COUNTY, ET AL. , Respondents

BRIEF OF RESPONDENT PIERCE COUNTY

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A. INTRODUCTION

This is a land use appeal filed under the Land Use Petition Act ("LUPA") RCW Chapter 36.70C. Appellant Kimberlyn Dotson is appealing a decision of the Pierce County Hearing Examiner (Examiner) who upheld an administrative decision issued by Pierce County Planning & Land Services (PALS). The Examiner found that Ms. Dotson constructed a paddock, a shelter, and introduced a horse into a fish and wildlife habitat area on her property without first obtaining permits or approvals from Pierce County.

Pursuant to LUPA, this Court acts in its appellate capacity and reviews the record made before the Examiner. The appellant has the burden of proving that the Examiner's decision was not based upon substantial evidence, is an erroneous interpretation or application of the law, or is otherwise in error.

B. ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR.

1. Was there substantial evidence in the record to support the Examiner's finding that a critical area violation occurred on Ms. Dotson's property despite the evidentiary weaknesses in the County's case?

2. Was the Examiner required to apply the exclusionary rule in a civil land use appeal?
3. Was there substantial evidence to support the Hearing Examiner's finding that a critical area violation occurred on the Dotson property if the PALS Biologist's observations from a private road are excluded from consideration?
4. Was there substantial evidence in the record showing that a fish and wildlife habitat area was verified and delineated on Ms. Dotson's property prior to the issuance of the Notice and Order to Correct on July 8, 2016?
5. Is a King County case regarding the delineation of flood hazard area pursuant to the requirements of the King County Code applicable to this appeal?
6. Did the Examiner err by considering the results of a 2007 fish and wildlife habitat assessment on an adjoining upstream parcel?
7. Are local governments required to investigate a citizen prior to investigating a citizen's complaint of a possible code violation?
8. Did Pierce County staff violate PCC 18.140.040.B.5 when using aerial photos, orthophotos, and planimetrics in this case?

9. Did the appellant abandon her constitutional arguments regarding aerial photos when she failed to brief the issue?
10. Is there substantial evidence of a binding settlement agreement between Ms. Dotson and Pierce County?
11. Is the County or the Appellant entitled to costs and reasonable attorneys fees?

C. STATEMENT OF THE CASE

On September 28, 2015, the Washington State Department of Ecology received a citizen complaint alleging a code violation on Ms. Dotson's property in unincorporated Pierce County. CP 144. The complainant wrote: "They have built a fence and corral and feeder for animals. They have shoveled dirt into creek so it's land now = not a creek anymore." CP 144. The complaint was referred to Pierce County Responds, the complaint portal for Pierce County code enforcement.¹ CP 72, 146.

PALS Environmental Biologist Mary Van Haren conducted site visits and observed that the stream was flowing naturally and therefore,

¹ On Pierce County's complaint intake form (CP 72), the complainant is listed as the "Department of Ecology" and the complaint was listed as "Built a paddock over a stream. They shoveled dirt into the creek so it's not a creek anymore." At the evidentiary hearing before the Pierce County Hearing Examiner on October 26, 2016, Ms. Dotson submitted into evidence CP 144-147 which shows the true origin of the complaint.

the allegation that the creek was filled in with dirt was not accurate and was unsubstantiated. CP 73. However, Ms. Van Haren observed a paddock, a horse, and a horse shelter constructed within 165 feet from a fish and wildlife habitat indicator (the stream). CP 73.

At first, the case appeared to be heading towards a mutually agreeable resolution. On November 25, 2015, Ms. Van Haren sent a compliance letter to Ms. Dotson explaining that the introduction of the horse and construction of the paddock and shelter in a potential fish and wildlife habitat area without approval from Pierce County was a violation of Title 18E of the Pierce County Code.² CP 73, 74. The letter stated:

From adjacent roads, I observed a fenced area, horse, and structure (stall) within 165 feet for a fish and wildlife habitat indicator (ie: drainage/stream)... Initiation of these activities violates Pierce County Code (Title 18E, Development Regulations-Critical Areas, more specifically 18E.10.050).

CP 73. The letter outlined the permitting steps that must be taken to resolve the violation and also included instructions on how to submit an appeal. CP 73-74. Ms. Dotson did not appeal this letter.

On March 17, 2016, Ms. Dotson submitted the land use applications listed in the compliance letter, specifically, a water type

² Fish and Wildlife Habitat areas are considered a Critical Area in Title 18E of the Pierce County Code. Fish and wildlife habitat areas and potential fish and wildlife habitat areas are regulated pursuant to Chapters 18E.10 and 18E.40 of the Pierce County Code.

verification and a farm management plan. CP 75-95, RP 72, line 9 to RP 73, line 1. Ms. Dotson submitted an aerial photo with her application showing the proposed new location of the paddock and horse shelter which would be outside the stream buffer areas. CP 81. Ms. Dotson and the Pierce County Conservation District (PCCD) entered into a written agreement whereby PCCD agreed to coordinate a grant between the Department of Ecology and Ms. Dotson to cover the costs of the relocation project. CP 86, RP 80.

On May 4, 2016, PALS issued a water type verification and fish and wildlife habitat conservation approval to Ms. Dotson. CP 96-101. The approval letters stated that the stream was classified as an F1 stream type with a 100 foot wide buffer area.³ CP 98, 99. The cover letter explained that in order to finalize the approval process, Ms. Dotson needed to sign and notarize the approval documents and send them back to PALS. CP 96, 97. Ms. Dotson did not sign and return the approval documents or relocate the horse, paddock, or shelter away from the stream. CP 46, 49.

On July 8, 2016, Biologist Van Haren issued a Notice and Order to Correct (NOTC). CP 103-105. The NOTC summarized the procedural history of the case and required that Ms. Dotson complete the approval

³ An F1 stream type refers to water courses, lakes and ponds that provide habitat for critical fish species. See PCC Table 18E.40.060.

process by signing and returning the approval documents. CP 103, 104.

On July 22, 2016, Ms. Dotson submitted a timely request for administrative review of the NOTC. CP 106,107. On August 9, 2016, PALS Manager Kathleen Larrabee issued a written decision denying the request to rescind the NOTC. CP 119-121. On August 23, 2016, Ms. Dotson submitted a timely appeal to the Pierce County Hearing Examiner (“Examiner”). CP 54-70.

An evidentiary hearing took place before the Examiner on October 26, 2016. CP 27. On January 19, 2017, Examiner Stephen Causseaux issued his decision finding that the County met its burden of proving, by a preponderance of evidence, that the fish and wildlife habitat area violations occurred on the Dotson property. CP 26-40.

On February 3, 2017, a LUPA petition was filed in Thurston County Superior Court under case no. 17-2-00374-34. CP 3-7. Oral argument took place on August 25, 2017. On September 7, 2017, Thurston County Superior Court Judge Chris Lanese issued an order stating that Ms. Dotson failed to meet her burden of proof under RCW 36.70C.130 and that the Examiner’s decision was affirmed. CP 372 ,373. This timely appeal followed.

D. ARGUMENT

1. Standard of review in LUPA cases.

Under LUPA, the party seeking relief of an administrative decision bears the burden of proving error. RCW 36.70C.130(1), *N. Pac Union Conference Ass'n of Seventh Day Adventists v. Clark County*, 118 Wn. App. 22, 28, 74 P.3d 140 (2003). On appeal of an administrative decision, courts review the record made before the Hearing Examiner, including the Examiner's findings of fact and conclusions of law. *Id.*

This court may grant relief to the appellant only if the appellant carries the burden of establishing that one of the standards contained in RCW 36.70C.130 has been met. Those standards are:

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

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1). Interpretations of law are reviewed de novo. *Milestone Homes Inc., v. City of Bonney Lake*, 145 Wn. App. 118, 126, 186 P.3d 357 (2008). Factual determinations are reviewed under the substantial evidence standard. *Cingular Wireless, LLC v. Thurston Co.*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). Substantial evidence is evidence of a sufficient quantity to persuade a fair-minded person of the truth the statement asserted. *Id.* Courts view the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority. *Id.* Findings involving the application of law to facts are reviewed under the clearly erroneous standard. *Id.* Under that test, the decision may be reversed only if the court is left with a definite and firm conviction that a mistake has been committed. *Id.*

2. There was substantial evidence to support the Examiner's finding that a fish and wildlife habitat violation occurred despite evidentiary weaknesses in the County's case.

Ms. Dotson has correctly identified several evidentiary weaknesses in the County's case regarding the fish and wildlife habitat assessment. It is uncontested that the habitat assessment was done using 2007 data from a neighboring upstream parcel, overlay maps, and visual observations from

the roadways and did not include a close up examination of the stream on the Dotson property. It is also uncontroverted that the assessment did not conform to the detailed requirements for habitat assessments as set forth in PCC 18E.40.030.B.

In spite of these deficiencies, the Examiner upheld the allegations in the written administrative decision and the Notice and Order to Correct based upon the totality of evidence, including Ms. Van Haren's observations from the roadways. CP 39 (Conclusion no.7). During the October 15, 2016, site visit, Ms. Van Haren observed a low topographical area near the culvert on 296th, a public roadway. RP 68, lines 18-24. Ms. Van Haren then drove down 55th Ave East, a private road, and from that vantage point could see a stream bed in the paddock area. RP 84, lines 12-24. During a subsequent site visit, Ms. Van Haren was able to see water flowing through the stream bed. RP 57, lines 11-14.

The Examiner also relied on testimony and documents that referenced a 2007 Habitat assessment for an adjacent upstream property. CP 37 (See finding no.4). The 2007 habitat assessment concluded that the drainage course on the adjacent upstream property was an F1 stream. CP 99. The Examiner found:

Ms. Van Haren's reliance on the 2007 habitat assessment performed by Habitat Technologies for an adjacent upstream property is appropriate for

consideration in typing the stream on the appellant's parcel. Especially when considered with observations of the stream flowing freely within culverts where it enters and leaves appellant's parcel.

CP 38 (finding no.4).

Furthermore, the Examiner correctly observed that when Ms. Dotson submitted her application materials to PALS, she agreed that there was an actual fish and wildlife habitat area within the paddock as evidenced by the following:

- a) In her master application form, Ms. Dotson handwrote that she was submitting the water typing survey application and farm management plan to "resolve violation of a horse in a fish and wildlife habitat." CP 78.
- b) The farm resource management plan, which was prepared for and submitted by Ms. Dotson, contained several statements verifying that a water course existed in the paddock area including a finding that "an unnamed seasonal tributary to S. Fork Muck Creek flows south through the west side of the property." CP 35 (Paragraph C), CP 83-85.
- c) In the written agreement with Pierce Conservation District signed by Ms. Dotson, the introductory paragraph states: "This agreement is for the construction of a heavy use area (corral fending and

footing material) to contain the landowner's horse in order to move it off the F1 seasonal stream located on the property". CP 86.

The Examiner did not commit any error by relying on these statements. The Examiner appropriately weighed the strengths and weaknesses of the County's case before concluding that the County met its burden of showing that Ms. Dotson introduced a horse and constructed a shelter and paddock in a fish and wildlife habitat area without first obtaining a permit or approval from Pierce County.

In this appeal, the burden is no longer upon the County. Rather, the burden is upon Ms. Dotson to show how the Examiner's key findings are NOT supported by substantial evidence. When the evidence is viewed in the light most favorable to the County, there is sufficient evidence to persuade a fair minded person that the horse, paddock, and shelter were placed within an actual fish and wildlife habitat area. Therefore, Ms. Dotson has not met her burden.

3. The Examiner did not commit error by refusing to exclude evidence at the hearing based upon Ms. Dotson's constitutional objections.

Ms. Dotson argues that the Examiner should have excluded any evidence obtained after Ms. Van Haren entered onto 55th Ave E on October 15, 2015. The Hearing Examiner correctly noted in Conclusion no. 2 that he had no authority to resolve the State and Federal

constitutional issues that Ms. Dotson was raising. CP 36. The Hearing Examiner's authority under the Pierce County Code is limited and does not include authority to rule on State and Federal constitutional issues. PCC 1.22.080.B, *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 637-638, 689 P.2d 1084 (1984).

The cases relied upon by Ms. Dotson are criminal cases. She did not cite to any case where the exclusionary rule was extended to civil land use appeals before a local hearing examiner. Ms. Dotson argues that the Examiner committed error by refusing to apply the exclusionary rule, but fails to support her argument with relevant legal authority or analysis in her brief.

4. There is substantial evidence in the record to support the Examiner's key findings even if Ms. Van Haren's observations from 55th Ave E are excluded from consideration.

It is uncontested that on October 15, 2015, Ms. Van Haren walked down 55th Avenue, a private road, without permission from Ms. Dotson, the underlying property owner. It was from 55th Avenue that Ms. Van Haren observed the stream in the paddock area. RP 84, lines 12-16. However, even if the observations from 55th Avenue are excluded from consideration, there would still be substantial evidence to support the Examiner's key findings that Ms. Dotson constructed a paddock, a horse

shelter, and introduced a horse into a fish and wildlife habitat area without first obtaining a permit or approval from Pierce County.

On October 15, 2015, Ms. Van Haren was able to observe indicators of potential fish and wildlife habitat area from her vantage point on 296th, a public roadway. RP 103, 3-7. Ms. Van Haren testified:

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 were probably the key ones.

RP 103; lines 3-7

What Ms. Dotson does not acknowledge is that there was a significant event that took place after the October 15, 2015 site visit. On November 25, 2015, Ms. Van Haren wrote a letter to Ms. Dotson explaining that she observed a critical area violation on the Dotson property. CP 73,74. The letter listed the permitting steps that Ms. Dotson needed to take to resolve the violation and informed Ms. Dotson that she had the opportunity to appeal the determination. CP 74. Ms. Dotson could have submitted an appeal at that time, but chose not to. Instead, on March 17, 2016, Ms. Dotson came to the County and submitted a permit application for a water typing survey and a fish and wildlife habitat

assessment and paid \$670.00 in application fees. CP 75-81. Ms. Dotson also submitted her proposed farm plan for review and approval. CP 82-85.

As set forth in the Examiner's finding no. 11, Ms. Dotson's application materials contained several statements where she agreed that there was a F1 stream on her property and her farm plan proposed relocating her horse outside of the habitat area. CP 34, 35. As the Examiner pointed out, Ms. Dotson entered into a written agreement with the PCCD to secure grant funding from the Department of Ecology to pay for the relocation expenses. That agreement stated:

This agreement is entered into between the Pierce Conservation District and Kim Dotson, 5523 296th St E., Graham WA 98338. This agreement is for the construction of a heavy use area (corral fencing and footing materials) to contain the landowner's horse in order to move it off the F1 seasonal stream located on the property. In addition, there will be the installation of native plants and grass seed along the creek.

CP 36, 86. PALS staff reviewed the application materials, considered the 2007 habitat assessment on the adjoining upstream parcel, and confirmed that an F1 stream existed on the Dotson property and approved the relocation project. CP 96-101. Even if Ms. Van Haren's observations from 55th Avenue are excluded, there is substantial evidence to support the Examiner's key findings that Ms. Dotson constructed a paddock, a horse

shelter, and introduced a horse into a fish and wildlife habitat area without first obtaining a permit or approval from Pierce County.

5. The fish and wildlife habitat area was verified and delineated prior to the issuance of the Notice and Order to Correct.

Ms. Dotson argues that a potential fish and wildlife habitat area must be “delineated” before enforcement action is taken. In fact, a water type verification and fish and wildlife habitat assessment was completed by PALS Biologist Mary Van Haren before the NOTC was issued on July 8, 2016. CP 96-102. The verification and assessment documents, which classified the drainage course as a F1 stream type, was mailed on May 4, 2016, two months before the NOTC was issued. CP 96-102. The May 4, 2016, habitat assessment contained the following finding:

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 0417066004. This Type F1 stream is regulated under Chapter 18E.40-Regulated Fish and Wildlife Species and Habitat Conservation Areas

CP 99. An **F1 stream type** is defined in PCC Table 18E.40.060 as:

All segments of natural water within the bankfull widths of defined channels or within lakes, ponds, or impoundments which provide habitat for or support any portion of the lifecycle of a critical fish species (3). Waters that are diverted for use by federal, state, tribal, or private fish hatcheries shall be considered to be Type F1 waters upstream from the point of diversion for 1,500 feet and tributaries if highly significant for protection of downstream water quality.

All natural waters are included in the definition of Habitats of Local Importance which is a type of fish and wildlife habitat area under PCC 18E.40.020. Therefore the presence of an actual fish and wildlife habitat area was already confirmed by PALS prior to the issuance of the NOTC on July 8, 2016.

Moreover, the fish and wildlife habitat was delineated before the NOTC was mailed on July 8, 2016, with the assistance of Ms. Dotson. In the May 4, 2016, verification and assessment documents, Ms. Van Haren explained that the Pierce County Code requires a 150 foot undisturbed buffer adjacent to the stream.⁴ CP 99. However, new agricultural activities, including the keeping of livestock, are allowed in the buffer area as long as the activities are in compliance with a farm resource management plan which must be submitted to the County for approval per PCC 18E.40.040.B.14. In Ms. Dotson's master permit application dated March 17, 2016, she included a copy of her farm resource management plan which reduced the stream buffer to 100 feet and required the relocation of her horse, shelter, and paddock outside of reduced buffer

⁴ PCC Table 18E.40.060 requires a 150 feet buffer landward from the Ordinary High Water Mark (OHWM) from F1 streams.

area.⁵ CP 83, 84. Ms. Dotson's farm management plan was reviewed and approved by PALS. In the May 4, 2016, verification and assessment documents, Ms. Van Haren wrote:

An undisturbed buffer of 150 feet is required for Type F1 waters, plus an additional 15 foot building setback. However, 18E.40.040.B.14 permits new agriculture provided compliance with a farm management plan. According to the plan, the horse, shelter, and paddock will be moved to provide a 100 foot buffer.

CP 99. The habitat assessment also included a diagram of the F1 stream along with the required 100 foot buffer area. CP 101. Contrary to Ms. Dotson's assertions, the record shows that the presence of an actual fish and wildlife habitat area was verified and the buffer areas were delineated prior to the mailing of the NOTC on July 8, 2016.

6. The *Shear* case is not applicable.

In *Shear*, the Court of Appeals examined unique aspects of the King County Code (KCC).⁶ The Court of Appeals found that the King

⁵ Per her farm management plan, Ms. Dotson was required to remove the horse and its existing shelter away from the stream corridor by March 1, 2016 and relocate the paddock away from the stream. See CP 83, 84 "Horse Housing." The buffer reduction associated with the relocation project is mentioned on CP 83 in the section entitled "Water Resources and Sensitive Areas."

⁶ Although the case is commonly referred to as "*Shear*" or "*Shear v. King County*", the correct citation is: *King County Dept. of Development and Environmental Services v. King County*, 167 Wn. App. 561, 273 P.3d 490 (Div 1 2012). The Court of Appeals decision was reversed on other grounds by the State Supreme Court in *King County Dept. of Development and Environmental Services v. King County*, 177 Wn. 2d 636, 305 P.3d 240 (2013). Ron Shear was one of the original parties in the case.

County Department of Development and Environmental Services (DDES) failed to comply with the critical area designation requirements in the King County Code. 167 Wn. App. at 571-574. KCC 21A.24.230 required King County to “examine a wide variety of sources of information on flooding, weigh the data, and after that, designate specific flood hazard areas.” 167 Wn. App. at 574. King County failed to complete this process. 167 Wn. App. at 571-574. Because King County failed to comply with its own mapping requirements, there was no “easily ascertainable adopted county flood hazard area standard applicable to the Spencer property”. 167 Wn. App. at 571. Unlike the King County Code, the Pierce County Code does not impose upon PALS a detailed designation procedure that must take place prior to enforcement. Rather, PCC Title 18E refers to maps of “potential” critical areas as shown in the department’s maps. PCC 18E.10.050.H states:

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.

PCC 18E.10.050.H. The *Shear* case does not apply to this case because the Court of Appeals was interpreting unique aspects of the King County

Code related to the mandatory study of flood hazard areas that must take place prior to enforcement. The King County Code requirements regarding designation of flood hazard areas are significantly different from the fish and wildlife habitat area regulations found in the Pierce County Code which do not contain the same requirement.

In *Young v. Pierce County*, the Court of Appeals, Division II reviewed Pierce County's wetland regulations, found in Title 18E of the Pierce County Code. *Young v. Pierce County*, 120 Wn. App. 175, 84 P.3d 927 (2004). Ms. Dotson's argument mirrors that made by the Youngs. The Youngs argued that because the wetlands on their property are "unverified", their land is not a critical area and Title 18E does not apply. 120 Wn. App. at 184. Pierce County argued that although the County did not know the extent of the wetlands and their buffers on the Young property, the northwest area of the property is identified as a potential wetland on the County Wetland Atlas and this made it a designated critical area subject to regulation under Title 18E. 120 Wn. App. at 185. The majority of the court agreed with the County and held that the northwest area of the Youngs' property fell within a recognized critical area designation and that the wetland regulations contained in PCC Title 18E

applied to their property.⁷ *Id.*

In the end, neither *Shear* nor *Young* are directly on point because PALS Staff had already determined that the horse paddock and shelter were in an actual fish and wildlife habitat area before the NOTC was issued. CP 98-101. In accordance with the compliance letter dated November 25, 2015, Dotson submitted the required critical area applications and her farm management plan to PALS in March of 2016. CP 75-96. Ms. Dotson's application materials were reviewed and approved by PALS staff and the approval documents were issued on May 4, 2016. CP 96-101. The NOTC was mailed over two months later on July 8, 2016, after Dotson failed to sign and return the approval documents. CP 103-105.

The Examiner also found that Ms. Dotson's development activities occurred within an actual fish and wildlife habitat area:

For the reasons set forth hereinafter PALS has shown by a preponderance of evidence that a Fish and Wildlife Critical Area and Buffer exists on the Appellant's parcel; that appellant conducted unpermitted, regulated activities within the said critical area and buffer; and that the Regulated Fish and Wildlife Species and Habitat Conservation Area Habitat Assessment Review prepared by Ms. Van Haren is appropriate and necessary to resolve the critical area on the parcel. Therefore, the NOTC was properly issued and Ms. Dotson's appeal is

⁷ On page 22 of her opening brief, Ms. Dotson quotes extensively from the dissent in the *Young* case without identifying the quotes as coming from the dissenting opinion.

denied.

CP 32 (finding no.4). Neither *Shear* nor *Young* apply to cases where the County has already made a determination that a fish and wildlife habitat area actually exists on the property and where the buffer areas were already delineated in Ms. Dotson's farm management plan. This Court should decline Ms. Dotson's invitation to rule on the legal validity of Pierce County's critical area regulations based upon an inapplicable King County case.

At some points in her opening brief, Ms. Dotson appears to challenge the earlier compliance letter dated November 15, 2015, which was issued by Ms. Van Haren before the habitat area was verified and delineated. Any argument regarding the November 15, 2015 letter is untimely. The November 15, 2015, letter advised Ms. Dotson that she could appeal the letter within 14 days of the date of the letter and provided instructions on how to submit an appeal.⁸ CP 74. Instead of submitting an appeal, Ms. Dotson chose to comply and submitted her application for a water typing verification along with her farm management plan. CP 75-95. Throughout her application materials, Ms. Dotson acknowledged that the stream was an F1 stream type and her farm management plan proposed a

⁸ Per PCC 1.22.090, an aggrieved person must submit an appeal within 14 days of the decision.

100 foot buffer extending out from the stream. PALS reviewed and approved the application. CP 96-100. When Ms. Dotson failed to sign the approval documents, a NOTC was issued on July 8, 2016. CP 103-105. An appeal was not submitted until after the NOTC was issued. CP 106. By that time, the habitat area had already been verified and delineated.

7. The Examiner did not err by considering the results of a 2007 habitat assessment on the adjoining upstream property.

- a. WAC 222-16-030 does not prohibit the Examiner from taking the 2007 habitat assessment into consideration.

Ms. Dotson asserts that the Examiner committed error by relying upon a 2007 habitat assessment on the adjoining upstream property. The Examiner correctly summarized and responded to this argument in his finding no. 4:

...Appellant asserts that the County should not have used a previous Habitat Assessment on an adjacent property conducted nine years ago because Section of 222-16-030 of the Washington Administrative Code (WAC) requires fish habitat water type maps to be updated every five years, and that Ms. Van Haren used a 2007 study that was nine years old. However, the relevant portion of WAC 222-16-030 reads as follows:

...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 map[ped] water types...(emphasis added)

The only evidence of observed, in-field conditions in the area are the 2007 Habitat Assessment for the adjacent parcel and the appellant's assessment prepared by Ms. Van Haren that shows the stream flowing unobstructed across her parcel. No evidence shows that the State of Washington Department of Natural Resources (DNR) has found it "necessary to update" its map for the affected stream....

CP 38 (finding no. 4). The Examiner was correct. There was no evidence that DNR found it necessary to update the water type map for the area. Additionally, there was no "adjustment" of the stream type. The stream on the upstream adjacent property was classified as a F1 stream in 2007, and the stream on the Dotson property was classified as an F1 stream type in 2016. CP 99. Hence, there was no "adjusting" of the stream type on the Dotson property or the upland property.

Ms. Dotson's objections go to the weight and not the admissibility of the evidence. Ms. Dotson correctly points out that the habitat assessment on the upland adjoining property was done approximately nine years earlier and that the assessment did not include the Dotson property. The County did not introduce a copy of the 2007 habitat assessment into the administrative record. These facts are undisputed. However, WAC 222-16-030 did not prohibit the Examiner from considering Ms. Van Haren's testimony regarding the results from the 2007 habitat assessment on the adjoining upland property.

b. Consideration of the 2007 habitat assessment did not violate Ms. Dotson's constitutional rights.

Ms. Dotson argues that consideration of the 2007 habitat assessment conclusions violated Ms. Dotson's due process rights because the assessment was performed without notice to Ms. Dotson and an opportunity to appeal the findings. Ms. Dotson relies heavily upon *Post v City of Tacoma*, 167 Wn.2d 300, 217 P.3d 1179 (2009). In *Post*, the City of Tacoma adopted an enforcement scheme in which civil penalties began to automatically issue on a daily basis with no right to appeal. 167 Wn. 2d at 313.

In this case, Ms. Dotson had the right to appeal the NOTC dated July 8, 2016 (CP103-105) and the written decision on administrative review dated August 9, 2016, (CP 119-121) and she did so. Throughout this appeal, Ms. Dotson has been able to challenge the NOTC, the water typing verification (CP 98), and the fish and wildlife habitat assessment on the Dotson property (CP 99-101). The habitat assessment provided notice to Ms. Dotson that the County was basing its stream type finding, in part, on the assessment on the adjoining upstream parcel and included the PALS application number for that assessment. CP 99. The habitat assessment stated:

Based upon 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 0417066004. This Type F1 stream is regulated under Chapter 18E.10-Regulated Fish and Wildlife Species and Habitat Conservation Areas.

CP 99. Likewise, the staff report that was mailed to Ms. Dotson and her attorney on October 11, 2016, also included references to the 2007 Habitat Assessment.⁹ On page 7 of the staff report, Ms. Van Haren wrote:

Data showing an F1 stream type flowing across a neighboring property was used during PALS review of application number 832074 during the stream type verification process. Neither the review nor approval document issued by PALS for application no. 832074 was appealed.

CP 50. Additionally, during the evidentiary hearing on October 26, 2016, Ms. Dotson's attorney questioned Ms. Van Haren about the 2007 assessment and did not stop her questioning to ask for a copy of the assessment or to request a continuance of the hearing.¹⁰ RP 35- 37, RP 89. Despite not having a copy of the 2007 assessment on the adjoining parcel, Ms. Dotson has contested the admissibility, the validity, and the evidentiary weight of the 2007 habitat assessment throughout the proceedings and in this appeal, yet somehow argues that she is being deprived of the opportunity to appeal the 2007 assessment.

⁹ The Staff report was mailed to Appellant Kimberlyn Dotson and her attorney Carolyn Lake on October 11, 2016. See CP 45 and CP 126.

¹⁰ Ms. Dotson asserts that she submitted a public request seeking a copy of the 2007 assessment, but that request and any responses thereto are not part of the record.

What Dotson appears to argue is that when one property owner submits an application for a fish and wildlife habitat assessment, the County must provide all surrounding property owners with a copy of the final assessment and notice of their right to appeal. Ms. Dotson fails to cite any legal authority supporting such a burdensome mandate upon the County.

8. Local governments are not required to investigate a citizen before investigating his or her complaint of a possible code violation.

Ms. Dotson argues on page 47 of her opening brief that the County was under an obligation to prove there was no trespassing committed by Pierce County Conservation District (PCCD) staff or Department of Ecology staff before a complaint was submitted to Pierce County code enforcement.

First, the Examiner found that the complaint originated from a citizen, not the Department of Ecology or PCCD. In finding no. 5, The Examiner stated:

The State of Washington Department of Ecology (ECY) received a citizen complaint on September 29, 2015, alleging unpermitted, regulated activities within critical areas on a parcel located at 5523- 296th Street East, Graham, in unincorporated Pierce County. PALS staff determined that Kimberlyn Dotson, appellant, owned said parcel. ECY forwarded the complaint to PALS for further investigation.

CP 32 (finding 5). There was substantial evidence in the record to support this finding. Ms. Dotson's Exhibit A (CP 144, 145) shows that a male citizen submitted a complaint to the Department of Ecology alleging: "They have built a fence and corral and feeder for animals. They have shoveled dirt into creek so it's land now = not a creek anymore." CP 144. That complaint was then referred to three different agencies, including Pierce County Responds, the complaint portal for Pierce County code enforcement. CP 144-146. There is no indication that the citizen trespassed onto the Dotson property prior to calling in his complaint to the Department of Ecology.

Second, there is no briefing or legal authority to support the assertion that Pierce County is under a legal obligation to investigate citizens when they call in a complaint to the Department of Ecology. Per PCC 18.140.025, it is the responsibility of Pierce County enforcement staff to conduct an investigation following a complaint in order to confirm that a violation has occurred.¹¹

Third, there is no evidence that the Examiner relied upon the evidence gathered by the citizen. In fact, both Ms. Van Haren and the Examiner agreed that part of the citizen's complaint was false. In Finding

¹¹ PCC 18.140.025 states: 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.

no. 7, the Examiner wrote: “She [Ms. Van Haren] noted on a subsequent visit that the creek continued to flow naturally, and therefore the complaint of shoveling dirt into the creek does not appear to have occurred or impacted the flow.” CP 33, RP 57.

Ms. Dotson has no evidence that the citizen complaint was based upon an illegal entry or that the Examiner relied upon the complaint instead of Ms. Van Haren’s own investigation and Ms. Dotson’s own statements.

9. PALS staff did not violate the Pierce County Code when using aerial photography and planimetrics in this case.

In Conclusion No. 3, the Examiner found that Ms. Van Haren’s use of aerial photography, orthophotos, and planimetrics did not violate the Pierce County Code. CP 37 (Conclusion 3). PCC 18.140.040.B.5 prohibits PALS and Pierce County Public Works staff from using aerial photography, orthophotos or planimetrics as a proactive enforcement tool to initiate a complaint. PCC 18.140.040.B.5 states:

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.¹²

¹² The term “planimetrics” is not defined in the Pierce County Code. PALS staff generally refer to overlay data that is superimposed over aerial photos as planimetrics.

As Ms. Van Haren testified during the hearing, neither PALS nor Pierce County Public Works initiated the complaint. RP 9; RP 47 at lines 11-16; CP 72. The complaint came from a citizen to the Department of Ecology which then referred it to Pierce County Responds. CP 144-146.

As Ms. Van Haren explained in her testimony, PALS staff used the aerial photo at CP 203 to research the complaint and to confirm the violation. RP 49, 50. Other aerial photos contained in the email exchanges between Ms. Van Haren and the Department of Ecology and the Pierce County Conservation District were used to determine relocation options for the paddock and shelter and to arrange grant funding to cover the costs of relocation. RP 53, line 15 to RP 56, line 19. The Pierce County Code does not prohibit the use of aerial photography or planimetrics for these purposes. The aerial photos were not used as a proactive enforcement tool to initiate an enforcement action by PALS or the Public Works department in violation of the Pierce County Code. Therefore, the Examiner correctly found that PALS staff did not violate PCC 18.140.040.B.5.

10. Ms. Dotson's constitutional arguments regarding the admissibility of aerial photos have been abandoned.

Throughout Ms. Dotson's opening brief, she asserts that photos taken or used by Ms. Van Haren were unconstitutionally obtained. Ms. Dotson's original 66 page over length brief included a section discussing

the law with respect to aerial photos. After the over length brief was rejected by the Court, Ms. Dotson submitted another 52 page over length brief and the analysis of aerial photos was deleted. What is left are bare assertions that aerial photos are unconstitutional without corresponding briefing to support her constitutional claims against Ms. Van Haren. A party abandons an issue on appeal by failing to brief the issue. *Holder v. City of Vancouver*, 136 Wn. App. 104,107, 147 P.3d 641,642 (2006). Ms. Dotson has clearly abandoned her constitutional arguments regarding aerial photos.

The County does however wish to correct a misrepresentation in Ms. Dotson's opening brief. On October 15, 2015, Ms. Van Haren took a photo from 296th, a public roadway.¹³ Contrary to Ms. Dotson's assertion, there is no evidence that any zoom magnification was used by Ms. Van Haren. In fact, Ms. Van Haren testified that she did not use any visual enhancement.

Q. Um, if you could turn to Exhibit 5A to the staff report, and look at the photo contained in that exhibit.

A: Okay.

Q: Can you tell us when this photo was taken and where it was taken from?

¹³ The photo at CP 131 is labeled as Administrative Record no. 106 in the bottom right hand corner and Exhibit 5A in the upper right hand corner.

A: The photo is dated October 15, 2015. And it was taken from 296th Street East.

RP 11 line 22 to RP 12 line3.

Q: Okay. And what degree of magnification was used?

A: None.

Q: You're indicating that this was the—there's no magnification in this picture?

A: Correct.

RP 41, lines 16 to 20.

Ms. Dotson's allegation that visual enhancement technology was used during the taking of this photo is false and any allegations regarding the County's use of aerial photography have been abandoned.

11. There is insufficient evidence of a settlement agreement between Pierce County and Ms. Dotson.

On page 48 of her opening brief, Ms. Dotson argues that the Examiner committed error in Conclusion no. 8 by applying contract principles of law to a code enforcement case. Pierce County acknowledges there is insufficient evidence in the record to support the Examiner's finding that a binding settlement agreement was finalized as discussed in the Examiner's Conclusion No. 8. CP 39. Conclusion no. 8 is not supported by substantial evidence in the record.

At the beginning of the case, the parties were working towards a

mutually agreeable resolution, and there was a verbal agreement that Ms. Dotson would relocate the paddock and shelter to the northeast portion of the site. CP 73. This agreement was discussed in Ms. Van Haren's letter dated November 25, 2015. CP 73. However, there was never any settlement agreement put in writing and signed by Ms. Dotson or Pierce County.

It is not clear why Conclusion 8 was added to the Examiner's decision because he already found that the County met its burden in the preceding paragraph. In conclusion no.7, the Examiner wrote:

Pierce County has shown by a preponderance of evidence that the Notice and Order to Correct issued to appellant Kimberlyn Dotson on July 9, 2016, describing violations of Title 18E PCC and requiring [her to] sign the Fish and Wildlife approval and recording it on the title to her property is appropriate and satisfies all criteria set forth in the PCC. Pierce County has shown by a preponderance of evidence that violation of Title 18E as set forth in the NOTC have occurred on appellant's parcel...

CP 39 (Conclusion no. 7).¹⁴ The Examiner already found that the County met its evidentiary burden and therefore Conclusion 8 was unnecessary dicta.

¹⁴ The words "her to" was missing from the original quote and have been added. CP 39-conclusion 7.

12. The County is entitled to costs and reasonable attorney's fees, but the Appellant is not.

If the Hearing Examiner's decision is upheld, the County is entitled to costs and reasonable attorney fees pursuant to RCW 4.84.370. Under applicable law, the County, as the prevailing party, is entitled to an award of reasonable attorneys' fees and costs associated with defending this appeal. *Bellevue Farm Owners Association v. State of Washington Shorelines Hearing Board*, 100 Wn. App. 341, 365-366, 997 P.2d 380 (2000).

On page 52 of her opening brief, Ms. Dotson requests reasonable attorney fees and costs if she prevails in this appeal. No authority is cited in support of her request. Per RCW 4.84.370(1), reasonable attorney fees and costs shall be awarded to the prevailing party on appeal only if that party also prevailed in all prior proceedings. 100 Wn App. 365-366. Ms. Dotson did not prevail before the Pierce County Hearing Examiner or in Thurston County Superior Court and is therefore not eligible for an award of costs and attorney fees under RCW 4.84.370.

On the other hand, Pierce County was the prevailing party before the Hearing Examiner and in Thurston County Superior Court and is therefore entitled to reasonable attorney fees and costs per RCW 4.84.370(2).

E. CONCLUSION

Ms. Dotson has not met her burden of showing that the Examiner's decision was not based upon substantial evidence or was an erroneous interpretation or application of the law. The fish and wildlife habitat area was verified and delineated prior to the issuance of the Notice and Order to Correct. There was substantial evidence to support the Examiner's finding that the County had met its burden of proving a critical area violation occurred on the Dotson property. Ms. Dotson's constitutional allegations against Ms. Van Haren are either not supported by the facts in this case or not supported by relevant legal authority and analysis. Ms. Dotson has not met her burden. The Examiner's decision should be upheld and the County is entitled to an award of costs and reasonable attorney's fees.

DATED this 7th day of February, 2018.

MARK LINDQUIST
Prosecuting Attorney

By: 
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Deputy Prosecuting Attorney
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Attorneys for Pierce County

CERTIFICATE OF SERVICE

I, DAYNA WILLINGHAM, declare that I am over the age of 18 years, not a party to this action, and competent to be a witness herein. As a legal assistant in the Office of the Pierce County Prosecuting Attorney, I sent a true and correct copy of the Brief of Respondent Pierce County today by delivering the same to ABC Legal Messengers, Inc., with appropriate instruction to forward the same to the attorney for Plaintiff as follows:

**CAROLYN LAKE
GOODSTEIN LAW GROUP, PLLC
501 SOUTH G STREET
TACOMA, WA 98405**

I certify under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED at Tacoma, Washington, this 7th day of February, 2018.


DAYNA WILLINGHAM
Legal Assistant

PIERCE COUNTY PROSECUTING ATTORNEY CIVIL DIVISION

February 07, 2018 - 11:07 AM

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